Proposte di emendamenti proposte dal Consiglio Nazionale degli Ingegneri (CNI)

COM(2000)275 def	COM(2000)275 def	
Considerando 30 (30) Al fine di garantire il rispetto del principio della parità di trattamento in sede di aggiudicazione degli appalti è opportuno assicurare e rafforzare la trasparenza necessaria per quanto concerne i criteri prescelti per individuare l'offerta economicamente più vantaggiosa. Le amministrazioni aggiudicatrici devono quindi indicare fin dall'inizio della procedura la ponderazione relativa attribuita a ciascuno di tali criteri. Ad ogni modo, essa non può consistere unicamente nell'indicazione di un semplice ordine decrescente di importanza dei criteri. Se, a titolo eccezionale e in taluni casi debitamente giustificati dall'amministrazione aggiudicatrice, la fissazione della ponderazione relativa non è possibile fin dall'inizio della procedura, è opportuno consentirne la definizione in una fase successiva.	**Considerando 30** (30) Al fine di garantire il rispetto del principio della parità di trattamento in sede di aggiudicazione degli appalti è opportuno assicurare e rafforzare la trasparenza necessaria per quanto concerne i criteri prescelti per individuare l'offerta economicamente più vantaggiosa. Le amministrazioni aggiudicatrici devono quindi indicare fin dall'inizio della procedura la ponderazione relativa attribuita a ciascuno di tali criteri. Ad ogni modo, essa non può consistere unicamente nell'indicazione di un semplice ordine decrescente di importanza dei criteri. Se, a titolo eccezionale e in taluni casi debitamente giustificati dall'amministrazione aggiudicatrice, la fissazione della ponderazione relativa non è possibile fin dall'inizio della procedura, è opportuno consentirne la definizione in una fase successiva. Per gli Appalti di servizi intellettuali, in particolare nei casi di servizi rientranti nella categoria 1 dell'allegato 1C, l'Amministrazione aggiudicatrice prevede che il valore dei criteri quali la qualità, il pregio tecnico, le caratteristiche estetiche e funzionali, le soluzioni tecniche ingegneristiche, le caratteristiche ambientali, precisati in diretta connessione con l'oggetto dell'Appalto pubblico deve assumere valore preminente rispetto a quello complessivamente attribuito agli altri criteri scelti per determinare l'offerta economicamente più vantaggiosa	***Motivazione dell'emendamento*** *L'integrazione al Considerando, intende fornire una garanzia d'inserimento dei giovani professionisti nel mondo del lavoro, premiandosi, nelle gare, i parametri relativi all'aspetto qualitativo e al pregio tecnico della prestazione, rispetto a quelli economici.*
.....	.....	
Articolo 1	**Articolo 1**	otivazione degli emendamento

1.1. Definizioni 1. Ai fini della presente direttiva valgono le definizioni di cui ai paragrafi da 2 a 14. 2. Gli “appalti pubblici di forniture” sono i contratti a titolo oneroso, stipulati per iscritto fra uno o più fornitori e un’amministrazione aggiudicatrice, aventi per oggetto l'acquisto, la locazione finanziaria, la locazione, l'acquisto a riscatto, con o senza opzione per l'acquisto, di prodotti; Gli “appalti pubblici di servizi” sono i contratti a titolo oneroso, stipulati per iscritto tra uno o più prestatori di servizi e un’amministrazione aggiudicatrice, aventi per oggetto esclusivamente o principalmente la prestazione dei servizi di cui all’allegato I; Gli “appalti pubblici di lavori” sono i contratti a titolo oneroso, stipulati per iscritto tra uno o più imprenditori e un’amministrazione aggiudicatrice, aventi per oggetto l'esecuzione o, congiuntamente, l'esecuzione e la progettazione di lavori relativi a una delle attività di cui all'allegato II o di un'opera, oppure l'esecuzione, con qualsiasi mezzo, di un'opera rispondente alle esigenze specificate dall'amministrazione aggiudicatrice. Per “opera” si intende il risultato di un insieme di lavori edili o di genio civile avente una funzione economica o tecnica autonoma.	**1.2.** Definizioni Ai fini della presente direttiva valgono le definizioni di cui ai paragrafi da 2 a 14. Gli “appalti pubblici di forniture” sono i contratti a titolo oneroso, stipulati per iscritto fra uno o più fornitori e un’amministrazione aggiudicatrice, aventi per oggetto l'acquisto, la locazione finanziaria, la locazione, l'acquisto a riscatto, con o senza opzione per l'acquisto, di prodotti; Gli “appalti pubblici di servizi” sono i contratti a titolo oneroso, stipulati per iscritto tra uno o più prestatori di servizi e un’amministrazione aggiudicatrice. ~~aventi per oggetto esclusivamente o principalmente la prestazione dei servizi di cui all’allegato I.~~ <u>In particolare sono Appalti Pubblici di servizi esecutivi i contratti aventi per oggetto esclusivamente o principalmente la prestazione dei servizi di cui agli allegati IA e IB, mentre sono Appalti Pubblici di servizi intellettuali i contratti aventi per oggetto esclusivamente o principalmente la prestazione dei servizi di cui all’allegato IC”</u> Gli “appalti pubblici di lavori” sono i contratti a titolo oneroso, stipulati per iscritto tra uno o più imprenditori e un’amministrazione aggiudicatrice, aventi per oggetto l'esecuzione ~~o, congiuntamente, l'esecuzione e la progettazione~~ di lavori relativi a una delle attività di cui all'allegato II o di un'opera, oppure l'esecuzione, con qualsiasi mezzo, di un'opera rispondente alle esigenze specificate dall'amministrazione aggiudicatrice. Per “opera” si intende il risultato di un insieme di lavori edili o di genio civile avente una funzione economica o tecnica autonoma.	CNI considera indispensabile ·mantenere impregiudicata la valenza qualitativa, culturale e tecnica dei servizi di natura intellettuale, distinguendo gli atti professionali di progettazione e di assistenza nel settore dell’Ingegneria e dell’Architettura, da quelli esecutivi, quali la realizzazione delle opere. ò risponde all’esigenza, espressa dal Parlamento Europeo, di conseguire nel settore delle costruzioni, la garanzia della qualità e di attuare nel contempo un controllo dei costi nell’interesse del committente e del consumatore. Recenti studi effettuati da alcune Corti dei Conti nazionali hanno stabilito che per l’edilizia pubblica, il rapporto qualità-prezzo è migliore quando le attività di progettazione dell’opera sono disgiunte da quelle relative alla sua esecuzione. i conseguenza un appalto pubblico di lavori non può comprendere congiuntamente l’esecuzione e la progettazione dell’opera

.....	.....	
9. I “concorsi di progettazione” sono le procedure nazionali intese a fornire all'amministrazione aggiudicatrice, soprattutto nel settore della pianificazione territoriale, dell'urbanistica, dell'architettura e dell'ingegneria, nonché in quello dell'elaborazione dei dati, un piano o un progetto, selezionati da una commissione giudicatrice in base ad una gara, con o senza assegnazione di premi.	9. I “concorsi di progettazione” sono le procedure nazionali intese a fornire all'amministrazione aggiudicatrice, soprattutto nel settore della pianificazione territoriale, dell'urbanistica, dell'architettura e dell'ingegneria, nonché in quello dell'elaborazione dei dati, un piano o un progetto, selezionati da una commissione giudicatrice in base ad una gara, con ~~o senza~~ assegnazione di premi.	*Il CNI ritiene che gli incentivi economici siano necessari per stimolare la partecipazione dei giovani professionisti per i quali i costi di partecipazione non sono facilmente affrontabili dal punto di vista economico.*
.....	.....	
Articolo 3 Raggruppamenti di operatori economici 1. I raggruppamenti di operatori economici sono autorizzati a presentare offerte. A tali raggruppamenti non può essere richiesto di assumere una forma giuridica specifica ai fini della presentazione dell'offerta; ciò può tuttavia essere imposto al raggruppamento selezionato una volta che gli sia stato aggiudicato l'appalto, qualora la trasformazione sia necessaria per la buona esecuzione dell'appalto.	**Articolo 3** Raggruppamenti di operatori economici 1. I raggruppamenti di operatori economici sono autorizzati a presentare offerte e i soggetti ad essa partecipanti possono soddisfare cumulativamente i requisiti di selezione individuati dalle amministrazioni aggiudicatrici. A tali raggruppamenti non può essere richiesto di assumere una forma giuridica specifica ai fini della presentazione dell'offerta; ciò può tuttavia essere imposto al raggruppamento selezionato una volta che gli sia stato aggiudicato l'appalto, qualora la trasformazione sia necessaria per la buona esecuzione dell'appalto.	***Motivazione dell’emendamento*** *Il CNI ritiene che per stimolare la collaborazione tra professionisti anche di Stati diversi,la Direttiva dovrebbe consentire, in caso di partecipazione in forma raggruppata alle singole gare di appalto, i requisiti di selezione individuati dalle amministrazioni aggiudicatici,possano essere raggiunti mediante il cumulo dei requisiti personali dei singoli partecipanti al raggruppamento.*
.....	.....	

Articolo 26 **Subappalto** Nel capitolato d'oneri l'amministrazione aggiudicatrice può chiedere all'offerente di indicare, nella sua offerta, le parti dell'appalto che egli eventualmente intenda subappaltare a terzi, nonché i subappaltatori designati. Tale comunicazione lascia impregiudicata la questione della responsabilità dell'operatore economico principale.	**Articolo 26** **Subappalto** Nel capitolato d'oneri l'amministrazione aggiudicatrice può chiedere all'offerente di indicare, nella sua offerta, le parti dell'appalto che egli eventualmente intenda subappaltare a terzi, nonché i subappaltatori designati. Tale comunicazione lascia impregiudicata la questione della responsabilità dell'operatore economico principale.	***Motivazione dell'emendamento*** *Il CNI ritiene che il divieto di subappalto dei servizi di natura intellettuale, con particolare riguardo a quelli di Ingegneria e di Architettura, costituirebbe un vero fattore di concorrenza, concedendo uguali opportunità d'accesso agli appalti ai professionisti singoli, agli studi associati di professionisti,ai professionisti associati, alle*
	Le prestazioni intellettuali elencate nella prima categoria dell'allegato 1C non sono subappaltabili.	*società di progettazione ed ai servizi di progettazione delle grandi imprese e delle amministrazioni pubbliche (ove ciò è consentito).*
Articolo 29 **Aggiudicazione mediante procedura negoziata con pubblicazione di un bando di gara** Le amministrazioni aggiudicatrici possono aggiudicare appalti pubblici mediante procedura negoziata, previa pubblicazione di un bando di gara, nelle fattispecie seguenti:**……** 3) per gli appalti pubblici di servizi, qualora la natura dei servizi da fornire, in particolare nel caso di prestazioni di natura intellettuale e di servizi rientranti nella categoria 6 dell'allegato I A, renda impossibile stabilire specifiche d'appalto con sufficiente precisione perché l'appalto possa essere aggiudicato selezionando l'offerta migliore secondo le norme sulla procedura aperta o sulla procedura ristretta;	**Articolo 29** **Aggiudicazione mediante procedura negoziata con pubblicazione di un bando di gara** Le amministrazioni aggiudicatrici possono aggiudicare appalti pubblici mediante procedura negoziata, previa pubblicazione di un bando di gara, nelle fattispecie seguenti: **……..** 3) per gli appalti pubblici di servizi, qualora la natura dei servizi da fornire, in particolare nel caso di prestazioni di natura intellettuale e di servizi rientranti ~~nella categoria 6 dell'allegato I A,~~ nell'allegato C1, renda impossibile stabilire specifiche d'appalto con sufficiente precisione perché l'appalto possa essere aggiudicato selezionando l'offerta migliore secondo le norme sulla procedura aperta o sulla procedura ristretta;	***Motivazione dell'emendamento*** *Il ricorso alla procedura negoziata, specie per quanto attiene le prestazioni intellettuali, deve avere carattere di eccezionalità riservandola all'aggiudicazione di appalti per i quali non è possibile altra procedura.* *L'abuso della procedura minerebbe gravemente la concorrenza e soprattutto la trasparenza degli appalti che costituisce uno dei principali obiettivi della Commissione.*

Articolo 30 **Disposizioni specifiche sugli appalti pubblici particolarmente complessi** 9. Le amministrazioni aggiudicatrici possono prevedere l'attribuzione ai partecipanti di premi e importi in denaro. Siffatti premi e pagamenti in denaro sono presi in considerazione ai fini dell'applicazione dell'articolo 8.	**Articolo 30** **Disposizioni specifiche sugli appalti pubblici particolarmente complessi** 9. Le amministrazioni aggiudicatrici ~~possono~~ devono prevedere l'attribuzione ai partecipanti di premi e importi in denaro. Tale attribuzione deve riguardare tutti i candidati le cui proposte in toto o in parte sono state usate come base per redigere il bando di gara. Siffatti premi e pagamenti in denaro sono presi in considerazione ai fini dell'applicazione dell'articolo 8.	***Motivazione dell'emendamento*** L'emendamento è volto a garantire che le procedure da applicare ai servizi intellettuali non inficino i diritti connessi alla proprietà intellettuale e al contratto d'opera intellettuale, soprattutto se vengono utilizzati documenti, idee e concetti altrui per preparare da parte delle Amministrazioni la procedura e il suo negozio. *Ogni professionista che abbia contribuito in toto od anche in parte all'identificazione della soluzione tecnica prescelta, dovrebbe essere ricompensato.*
……..	……..	
Articolo 32 1.1.1.1. Accordi quadro **……..**	**Articolo 32** **Accordi quadro** **……** 4. Ai servizi intellettuali di cui alla categoria 1 dell'allegato 1C non si applicano gli accordi previsti al presente articolo**.**	**Motivazione dell'emendamento** *Per le prestazioni intellettuali di cui alla categoria 1 dell'allegato IC, la procedura dell'appalto quadro è totalmente inadatta.*

Articolo 33 **Appalti pubblici di lavori: disposizioni specifiche sull'edilizia sociale** Nel caso di appalti riguardanti la progettazione e la costruzione di un complesso residenziale di edilizia sociale il cui piano, a causa dell'entità, della complessità e della durata presumibile dei relativi lavori, deve essere stabilito sin dall'inizio sulla base di una stretta collaborazione in seno a un gruppo che comprende i delegati delle amministrazioni aggiudicatrici, dei periti e l'imprenditore che avrà l'incarico di eseguire l'opera, è possibile applicare una speciale procedura di aggiudicazione, volta a scegliere l'imprenditore più idoneo a essere integrato nel gruppo.	**Articolo 33** **Appalti pubblici di lavori: disposizioni specifiche sull'edilizia sociale** Nel caso di appalti riguardanti la progettazione e la costruzione di un complesso residenziale di edilizia sociale il cui piano, a causa dell'entità, della complessità e della durata presumibile dei relativi lavori, deve essere stabilito sin dall'inizio sulla base di una stretta collaborazione in seno a un gruppo che comprende i delegati delle amministrazioni aggiudicatrici, dei periti e l'imprenditore che avrà l'incarico di eseguire l'opera, è possibile applicare una speciale procedura di aggiudicazione, volta a scegliere l'imprenditore più idoneo a essere integrato nel gruppo. Pur tuttavia le amministrazioni aggiudicatrici anche quando ricorrono ad una siffatta procedura, tengono separate le attività di progettazione da quelle di esecuzione delle opere.	***Motivazione dell'emendamento*** *Questo articolo unisce la progettazione e l'esecuzione dell'opera in un unico processo affidabile al medesimo soggetto, Il CNI ha già espresso negli emendamenti all'articolo 1 l'inammissibilità che un'opera possa essere "congiuntamente" progettata ed eseguita dal medesimo imprenditore.* *Tuttavia, dato il carattere particolare degli appalti per edilizia popolare, si può accettare una deroga purché le attività di progettazione siano mantenuti distinti da quelle di esecuzione delle opere.*
.....	.....	
Articolo 49 **Capacità tecniche e professionali** **……** 3. Nelle procedure di aggiudicazione degli appalti pubblici di servizi…….. La capacità tecnica dei prestatori di servizi può esser provata in uno o più dei seguenti modi, a seconda della natura, della quantità e della destinazione dei servizi da	**Articolo 49** **Capacità tecniche e professionali** **……** 3. Nelle procedure di aggiudicazione degli appalti pubblici di servizi…….. La capacità tecnica dei prestatori di servizi può esser provata in uno o più dei seguenti modi, a seconda della natura, della quantità e della destinazione dei servizi da prestare:	***Motivazione dell'emendamento*** *Precisazione necessaria per coerenza con l'emendamento proposto all'articolo 26 che esclude il ricorso al subappalto per i servizi intellettuali di cui all'articolo 1C*

prestare: **…….** h) indicazione della quota dell'appalto che il prestatore di servizi intende eventualmente subappaltare.	**…….** h) indicazione della quota dell'appalto che il prestatore di servizi, compresi negli allegati IA e IB, intende eventualmente subappaltare.	
.....	.....	
Articolo 53 **Criteri di aggiudicazione dell'appalto** **……**	**Articolo 53** **Criteri di aggiudicazione dell'appalto** [1] **……..…….** 3. Nel caso previsto al paragrafo 1, lettera b), per gli Appalti dei servizi intellettuali, in particolare nel caso di servizi rientranti nella categoria 1 dell'allegato 1C, l'Amministrazione aggiudicatrice prevede che il valore dei criteri quali la qualità, il pregio tecnico, le caratteristiche estetiche e funzionali, le soluzioni tecniche ingegneristiche, le caratteristiche ambientali, precisati in diretta connessione con l'oggetto dell'appalto pubblico, deve situarsi tra un minimo del sessanta ed un massimo dell'ottanta per cento di quello complessivamente attribuito agli altri criteri scelti per determinare l'offerta economicamente più vantaggiosa.	***Motivazione dell'emendamento*** *Per aiutare i Giovani e il loro inserimento nel mondo del lavoro, occorre premiare i parametri relativi all'aspetto qualitativo e al pregio tecnico della prestazione, rispetto a quelli economici.* *Pertanto nella fase della determinazione e ponderazione dei criteri di valutazione che le Amministrazioni aggiudicatici sono chiamate ad effettuare, deve essere previsto un preciso criterio in tal senso.*

Emendamento dell'allegato I

ALLEGATO I

SERVIZI DI CUI ALL'ARTICOLO 1, PARAGRAFO 2, SECONDO COMMA

[1] Emendamento proposto congiuntamente o in alternativa con l'emendamento proposto al considerando 30

ALLEGATO I A

Categorie	Denominazione	Numero di riferimento CPC	Numero di riferimento CPV
1	Servizi di manutenzione e riparazione	6112, 6122, 633, 886	omissis
2	Servizi di trasporto terrestre, inclusi i servizi con furgoni blindati, e servizi di corriere ad esclusione del trasporto di posta	(eccetto 71235), 7512, 87304	omissis
3	Servizi di trasporto aereo di passeggeri e merci, escluso il trasporto di posta	(eccetto 7321)	omissis
4	Trasporto di posta per via terrestree aerea	71235, 7321	omissis
5	Servizi di telecomunicazione	752	omissis
6	Servizi finanziari: a) servizi assicurativi b) servizi bancari e finanziari	ex 81, 812, 814	omissis
7	~~Servizi informatici ed affini~~	~~84~~	~~50310000, 50311000, 50311400, 50312000, 50312100, 50312110, 50312120, 50312200, 50312210, 50312220, 50312300, 50312310, 50312320, 50312400, 50312410, 50312420, 50312500, 50312510, 50312520, 50312600, 50312610, 50312620, 50313000, 50313100, 50313200, 50316000, 50317000, 50320000, 50321000, 50322000, 50323000, 50323100, 50323200, 50324000, 50324100, 50324200, 72000000, 72100000, 72110000, 72120000, 72130000, 72140000,~~

			~~72150000, 72200000, 72210000, 72211000, 72212000, 72220000, 72221000, 72222000, 72222100, 72222200, 72222300, 72223000, 72224000, 72224100, 72224200, 72225000, 72226000, 72227000, 72228000, 72230000, 72231000, 72232000, 72240000, 72241000, 72243000, 72245000, 72246000, 72250000, 72251000, 72252000, 72253000, 72253100, 72253200, 72254000, 72254100, 72260000, 72261000, 72262000, 72263000, 72264000, 72265000, 72266000, 72267000, 72268000, 72300000, 72310000, 72311000, 72311100, 72311200, 72311300, 72312000, 72312100, 72312200, 72313000, 72314000, 72315100, 72316000, 72317000, 72319000, 72320000, 72321000, 72510000, 72511000, 72511110, 72512000, 72514000, 72514100, 72514200, 72514300, 72520000, 72521000, 72521100, 72540000, 72541000, 72541100, 72550000, 72560000, 72570000, 72580000, 72590000, 72591000~~
~~8~~	~~Servizi di ricerca e sviluppo~~	~~85~~	~~63368000, 73000000, 73100000, 73110000, 73111000, 73112000~~
~~9~~	~~Servizi di contabilità, revisione dei conti e tenuta dei libri contabili~~	~~862~~	~~74121000, 74121100, 74121110, 74121112, 74121113, 74121120, 74121200, 74121210, 74121220, 74121230, 74121240, 74121250, 74541000~~
10	Servizi di ricerca di mercato e di sondaggio dell'opinione pubblica	864	omissis
11	Servizi di consulenza gestionale e affini	865, 866	omissis
~~12~~	~~Servizi attinenti all'architettura e all'ingegneria, anche integrata; servizi attinenti all'urbanistica e alla paesaggistica; servizi affini di consulenza scientifica e tecnica; servizi di sperimentazione tecnica e analisi~~	~~867~~	~~72242000, 72244000, 74142300, 74142310, 74220000, 74221000, 74222000, 74223000, 74224000, 74225000, 74225100, 74230000, 74231100, 74231110, 74231120, 74231130, 74231200, 74231300, 74231310, 74231320, 74231400, 74231500, 74231510, 74231520, 74231521, 74231530, 74231540, 74231600, 74231700, 74231710, 74231720, 74231721, 74231800, 74231900, 74232000, 74232100, 74232110, 74232120, 74232200, 74232210, 74232220, 74232230, 74232240, 74232300, 74232310, 74232320, 74232400, 74232500, 74232600, 74233000, 74233100, 74233200, 74233300, 74233400, 74233500, 74233600, 74233700, 74240000, 74250000, 74251000, 74252000, 74252100, 74260000, 74261000, 74262000, 74262100, 74263000, 74270000, 74271000, 74271100,~~

			~~74271200, 74271210, 74271220, 74271300, 74271400, 74271500, 74271700, 74271710, 74271720, 74271800, 74272000, 74272100, 74272110, 74272111, 74272112, 74272113, 74272300, 74273000, 74273100, 74273200, 74274000, 74274100, 74274200, 74274300, 74274400, 74274500, 74275000, 74275100, 74275200, 74276000, 74276100, 74276200, 74276300, 74276400, 74300000, 74310000, 74311000, 74312000, 74312100, 74313000, 74313100, 74313110, 74313120, 74313130, 74313140, 74313141, 74313142, 74313143, 74313144, 74313145, 74313146, 74313147, 74313200, 74313210, 74313220, 74874000~~
13	Servizi pubblicitari	871	omissis
14	Servizi di pulizia degli edifici e di gestione delle proprietà immobiliari	874, 82201-82206	omissis
15	Servizi di editoria e di stampa in base a tariffa o a contratto	88442	omissis
16	Eliminazione di scarichi di fogna e di rifiuti; disinfestazione e servizi analoghi	94	omissis

ALLEGATO I B

Categorie	Denominazione	Numero di riferimento CPC	Numero di riferimento CPV
17	Servizi alberghieri e di ristorazione	64	omissis
18	Servizi di trasporto per ferrovia	711	omissis
19	Servizi di trasporto per via d'acqua	72	omissis
20	Servizi di supporto e sussidiari per il settore dei trasporti	74	omissis
~~21~~	~~Servizi legali~~	~~861~~	~~74110000, 74111000, 74111100, 74111200, 74112000, 74112100, 74112110, 74113000, 74113100, 74113200, 74113210, 74114000~~
22	Servizi di collocamento e reperimento di personale	872	omissis
23	Servizi di investigazione e di sicurezza, eccettuati i servizi con furgoni blindati	873 (eccetto 87304)	omissis
~~24~~	~~Servizi relativi all'istruzione, anche professionale~~	~~92~~	~~80000000, 80100000, 80110000, 80200000, 80210000, 80211000, 80212000, 80220000, 80300000, 80310000, 80320000, 80330000, 80340000, 80400000, 80411000, 80411100, 80411200, 80412000, 80421000, 80422000, 80422100, 80423000, 80423100, 80423110, 80423120, 80423200, 80423300, 80423320, 80424000, 80425000, 80426000, 80426100, 80426200, 80427000, 80428000, 80430000, 92312212, 92312213~~
~~25~~	~~Servizi sanitari e sociali~~	~~93~~	~~60113300, 74511000, 85000000, 85100000, 85110000, 85111000, 85111100, 85111200, 85111300, 85111320, 85111400, 85111500, 85111600, 85111700, 85111800, 85112000, 85112100, 85120000, 85121000, 85121100, 85121200,~~

			~~85121300, 85130000, 85131000, 85131100, 85131110, 85140000, 85141000, 85141100, 85141200, 85141210, 85141211, 85141212, 85141220, 85142000, 85142100, 85142200, 85142300, 85142400, 85143000, 85144000, 85144100, 85145000, 85146000, 85146100, 85146200, 85147000, 85148000, 85149000, 85200000, 85300000, 85310000, 85311000, 85311100, 85311200, 85311300, 85312000, 85312100, 85312200, 85312300, 85312310, 85312320, 85312330, 85312400, 85320000, 85323000~~
26	Servizi ricreativi, culturali e sportivi	96	omissis
27	Altri servizi	Eccetto servizi linguistici	omissis

Allegato 1C

1.1.1.2.	Denominazione dei servizi	Numero di riferimento CPC	Numero di riferimento CPV

1	Servizi attinenti all'architettura e all'ingegneria, anche integrata; servizi attinenti all'urbanistica e alla paesaggistica; servizi affini di consulenza scientifica e tecnica; servizi di sperimentazione tecnica e analisi	867	72242000, 72244000, 74142300, 74142310, 74220000, 74221000, 74222000, 74223000, 74224000, 74225000, 74225100, 74230000, 74231100, 74231110, 74231120, 74231130, 74231200, 74231300, 74231310, 74231320, 74231400, 74231500, 74231510, 74231520, 74231521, 74231530, 74231540, 74231600, 74231700, 74231710, 74231720, 74231721, 74231800, 74231900, 74232000, 74232100, 74232110, 74232120, 74232200, 74232210, 74232220, 74232230, 74232240, 74232300, 74232310, 74232320, 74232400, 74232500, 74232600, 74233000, 74233100, 74233200, 74233300, 74233400, 74233500, 74233600, 74233700, 74240000, 74250000, 74251000, 74252000, 74252100, 74260000, 74261000, 74262000, 74262100, 74263000, 74270000, 74271000, 74271100, 74271200, 74271210, 74271220, 74271300, 74271400, 74271500, 74271700, 74271710, 74271720, 74271800, 74272000, 74272100, 74272110, 74272111, 74272112, 74272113, 74272300, 74273000, 74273100, 74273200, 74274000, 74274100, 74274200, 74274300, 74274400, 74274500, 74275000, 74275100, 74275200, 74276000, 74276100, 74276200, 74276300, 74276400, 74300000, 74310000, 74311000, 74312000, 74312100, 74313000, 74313100, 74313110, 74313120, 74313130, 74313140, 74313141, 74313142, 74313143, 74313144, 74313145, 74313146, 74313147, 74313200, 74313210, 74313220, 74874000
2	Servizi legali	861	74110000, 74111000, 74111100, 74111200, 74112000, 74112100, 74112110, 74113000, 74113100, 74113200, 74113210, 74114000
3	Servizi relativi all'istruzione, anche professionale	92	80000000, 80100000, 80110000, 80200000, 80210000, 80211000, 80212000, 80220000, 80300000, 80310000, 80320000, 80330000, 80340000, 80400000, 80411000, 80411100, 80411200, 80412000, 80421000, 80422000, 80422100, 80423000, 80423100, 80423110, 80423120, 80423200, 80423300, 80423320, 80424000, 80425000, 80426000, 80426100, 80426200, 80427000, 80428000, 80430000, 92312212, 92312213

4	Servizi informatici ed affini	84	50310000, 50311000, 50311400, 50312000, 50312100, 50312110, 50312120, 50312200, 50312210, 50312220, 50312300, 50312310, 50312320, 50312400, 50312410, 50312420, 50312500, 50312510, 50312520, 50312600, 50312610, 50312620, 50313000, 50313100, 50313200, 50316000, 50317000, 50320000, 50321000, 50322000, 50323000, 50323100, 50323200, 50324000, 50324100, 50324200, 72000000, 72100000, 72110000, 72120000, 72130000, 72140000, 72150000, 72200000, 72210000, 72211000, 72212000, 72220000, 72221000, 72222000, 72222100, 72222200, 72222300, 72223000, 72224000, 72224100, 72224200, 72225000, 72226000, 72227000, 72228000, 72230000, 72231000, 72232000, 72240000, 72241000, 72243000, 72245000, 72246000, 72250000, 72251000, 72252000, 72253000, 72253100, 72253200, 72254000, 72254100, 72260000, 72261000, 72262000, 72263000, 72264000, 72265000, 72266000, 72267000, 72268000, 72300000, 72310000, 72311000, 72311100, 72311200, 72311300, 72312000, 72312100, 72312200, 72313000, 72314000, 72315100, 72316000, 72317000, 72319000, 72320000, 72321000, 72510000, 72511000, 72511110, 72512000, 72514000, 72514100, 72514200, 72514300, 72520000, 72521000, 72521100, 72540000, 72541000, 72541100, 72550000, 72560000, 72570000, 72580000, 72590000, 72591000
5	Servizi di contabilità, revisione dei conti e tenuta dei libri contabili	862	74121000, 74121100, 74121110, 74121112, 74121113, 74121120, 74121200, 74121210, 74121220, 74121230, 74121240, 74121250, 74541000
6	Servizi di ricerca e sviluppo	85	63368000, 73000000, 73100000, 73110000, 73111000, 73112000

7	Servizi sanitari e sociali	93	60113300, 74511000, 85000000, 85100000, 85110000, 85111000, 85111100, 85111200, 85111300, 85111320, 85111400, 85111500, 85111600, 85111700, 85111800, 85112000, 85112100, 85120000, 85121000, 85121100, 85121200, 85121300, 85130000, 85131000, 85131100, 85131110, 85140000, 85141000, 85141100, 85141200, 85141210, 85141211, 85141212, 85141220, 85142000, 85142100, 85142200, 85142300, 85142400, 85143000, 85144000, 85144100, 85145000, 85146000, 85146100, 85146200, 85147000, 85148000, 85149000, 85200000, 85300000, 85310000, 85311000, 85311100, 85311200, 85311300, 85312000, 85312100, 85312200, 85312300, 85312310, 85312320, 85312330, 85312400, 85320000, 85323000
8	Servizi di traduzione linguistica		

Amendments Proposed by the Consiglio Nazionale degli Ingegneri (CNI)

COM(2000)275 final	**COM(2000)275 final**	
Whereas 30 (30) In order to ensure compliance with the principle of equality of treatment in the awarding of contracts, the necessary transparency should be ensured and enhanced with regard to the criteria chosen to determine the most economically advantageous tender. The contracting authorities should therefore indicate at the start of the procedure the relative weighting given to each of these criteria. It should be more than a simple indication of the descending order of importance attaching to the criteria. For exceptional cases fully justified by the contracting authority where it is not possible to fix the relative weighting at the start of the procedure, it should be possible to allow its indication to be given at a later stage.	**Whereas 30** **(**30) In order to ensure compliance with the principle of equality of treatment in the awarding of contracts, the necessary transparency should be ensured and enhanced with regard to the criteria chosen to determine the most economically advantageous tender. The contracting authorities should therefore indicate at the start of the procedure the relative weighting given to each of these criteria. It should be more than a simple indication of the descending order of importance attaching to the criteria. For exceptional cases fully justified by the contracting authority where it is not possible to fix the relative weighting at the start of the procedure, it should be possible to allow its indication to be given at a later stage. As concerns contracts of intellectual services, in particular those listed in category 1 of the annex 1C, the contracting authorities provide that the weighting of criteria such as quality, technical value, aesthetic and functional characteristics, Engineering technological solutions, environmental characteristics, strictly defined with reference to the object of the public contract, shall have prominent value in respect of the weighting altogether given to other criteria chosen to determine the most economically advantageous tender	***Motivation for the amendment*** *Objective of this supplement is to give young professionals the possibility to enter the working environment by rewarding the parameters relevant to quality and technical value rather than the economic ones in tenders.*

.....	.....	
Article 1 1.1.1.1.5. Definitions For the purpose of this Directive, the definitions set out in paragraphs 2 to 14 shall apply. "Public supply contracts" means contracts for pecuniary interest concluded in writing between one or more suppliers and a contracting authority and involving the purchase, lease, rental or hire purchase, with or without option to buy, of products. Public service contracts" means contracts for pecuniary interest concluded in writing between one or more service providers and a contracting authority relating exclusively or mainly to the provision of services mentioned in Annex I. Public works contracts" means contracts for pecuniary interest concluded in writing between one or more contractors and a contracting authority which have as their object either the execution, or both the execution and design, of works related to one of the activities referred to in Annex II or of a work, or the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority. A "work" means the outcome of building or civil engineering works taken as a whole that is sufficient of itself to fulfil an economic or	**Article 1** 1.1.1.1.6. Definitions 1 **For the purpose of this Directive, the definitions set out in paragraphs 2 to 14 shall apply.** 2 "Public supply contracts" means contracts for pecuniary interest concluded in writing between one or more suppliers and a contracting authority and involving the purchase, lease, rental or hire purchase, with or without option to buy, of products. Public service contracts" means contracts for pecuniary interest concluded in writing between one or more service providers and a contracting authority ~~relating exclusively or mainly to the provision of services mentioned in Annex I.~~ In particular, public service contracts are to be considered those, exclusively or mainly, relating to the provision of services referred to in annexes 1A and 1B, while public contracts of intellectual services are those relating , exclusively or mainly, to the provision of services mentioned in Annex 1C" Public works contracts" means contracts for pecuniary interest concluded in writing between one or more contractors and a contracting authority which have as their object ~~either~~ the execution, ~~or both the execution and design~~, of works related to one of the activities referred to in Annex II or of a work, or the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority. A "work" means the outcome of building or civil engineering works taken as a whole that is sufficient of itself to fulfil an	*3* **Motivation of the amendment** *The CNI deems as absolutely necessary to safeguard the qualitative, cultural and technical values of the intellectual services by distinguishing the professional activity of design supporting the Engineering and Architecture sector, from the executive ones, such as the implementation of the works.* *This meets the need, expressed by the European Parliament, to achieve quality and, at the same time, to control costs for the benefit of clients and users. Recent studies carried out by some national Courts of Auditors have shown that the quality/costs ratio is higher when the design activities are distinguished from the construction of works.* *Thus, a public procurement cannot combine the execution and the design of the works.*

technical function.	economic or technical function.	
……..	……..	
9. "Design contests" means those national procedures which enable the contracting authority to acquire, mainly in the fields of area planning, town planning, architecture and engineering or data processing, a plan or design selected by a jury after being put out to competition with or without the award of prizes.	9. "Design contests" means those national procedures which enable the contracting authority to acquire, mainly in the fields of area planning, town planning, architecture and engineering or data processing, a plan or design selected by a jury after being put out to competition with ~~or without~~ the award of prizes.	*The CNI deems that economic incentives are necessary to spur the participation of young professionals who cannot easily face high participation costs.*
……..	……..	
1.1.1.1.7. Article 3 1.1.1.1.8. Groups of economic operators 1.1.1.1.9. 1. Tenders may be submitted by groups of economic operators. These groups may not be required to assume a specific legal form in order to submit the tender; however, the group selected may be required to do so when it has been awarded the contract, to the extent that this change is necessary for the satisfactory performance of the contract.	**Article 3** 1.1.1.1.10.Groups of economic operators 1. Tenders may be submitted by groups of economic operators and the individuals participating can meet the requirements criteria defined by the contracting authorities cumulatively. These groups may not be required to assume a specific legal form in order to submit the tender; however, the group selected may be required to do so when it has been awarded the contract, to the extent that this change is necessary for the satisfactory performance of the contract.	***Motivation of the amendment*** *CNI deems that, to spur the co-operation among professionals even in different States, the Directive should provide that the selection requirements fixed by the contracting authorities could be met, when participating in groupings to single bids, through the plurality of personal capabilities of the single participants to the grouping.*
……..	……..	

Article 26 **Subcontracting** In the contract documents, the contracting authority may ask the tenderer to indicate in his tender any share of the contract he may intend to subcontract to third parties and any designated sub-contractors. This indication shall be without prejudice to the question of the principal economic operator's liability.	**Article 26** **Subcontracting** In the contract documents, the contracting authority may ask the tenderer to indicate in his tender any share of the contract he may intend to subcontract to third parties and any designated sub-contractors. This indication shall be without prejudice to the question of the principal economic operator's liability. Intellectual services listed within category 1 of Annex IC cannot be subcontracted.	***Motivation of the amendment*** *In CNI's opinion, no subcontracting of the intellectual services, in particular those relevant to Engineering and Architecture, would constitute an actual element of competition, allowing the same opportunities to individual professionals, professionals' societies, to individual professionals' groupings, to design companies and to the design services of large enterprises and of public administrations (where this is allowed) to enter bids.*
.....	.....	
Article 29 **Cases justifying use of the negotiated procedure with publication of a contract notice** Contracting authorities may award their public contracts by negotiated procedure, after publication of a contract notice, in the following cases:……. (3) In respect of public service contracts, when the nature of the services to be procured, in particular in the case of intellectual services and services falling within category 6 of Annex I A, is such that contract specifications cannot be established with sufficient precision to permit the award of the contract by selecting the best tender according to the rules governing open or restricted procedures.	**Article 29** **Cases justifying use of the negotiated procedure with publication of a contract notice** Contracting authorities may award their public contracts by negotiated procedure, after publication of a contract notice, in the following cases:……. (3) In respect of public service contracts, when the nature of the services to be procured, in particular in the case of intellectual services and services falling ~~within category 6 of Annex I A~~ within Annex IC, is such that contract specifications cannot be established with sufficient precision to permit the award of the contract by selecting the best tender according to the rules governing open or restricted procedures.	***Motivation of the amendment*** *Resorting to the negotiated procedure, in particular as concerns intellectual services, shall occur in exceptional cases, and shall be reserved to contracts awards where other procedures are not applicable.* *The abuse of this procedure would severely jeopardize competition and, above all, transparency which is one of the main objective of the Commission in this field.*

Article 30 **Specific rules on particularly complex public contracts** 9. The contracting authorities may specify prices and payments to the participants. Such prices and payments shall be taken into consideration for the application of Article 8.	**Article 30** **Specific rules on particularly complex public contracts** 9. The contracting authorities ~~may~~ shall specify prices and payments to the participants. Such specification shall be related to all candidates whose proposals in toto or partly were used to draft the bid. Such prices and payments shall be taken into consideration for the application of Article 8.	***Motivation of the amendment*** *This amendment intends to assure that the procedures to be applied to intellectual services do not invalidate rights relevant to intellectual property and to contracts of intellectual works, above all when documents, ideas, and concepts of others are used by the Administration to prepare procedures and negotiations.* *Each single professional, contributing in toto or partly to the technical solution chosen by the contracting authorities, should be rewarded adequately.*
……..	……..	
Article 32 1.1.1.3. Framework agreements **…….**	**Article 32** **Framework Agreements** **……** 4. The provisions under this article are not to be applied to services within category 1 of Annex IC**.**	***Motivation of the amendment*** *The procedure under this article is absolutely unsuited for the intellectual services within category 1 of Annex 1C.*

Article 33 **Public works contracts: particular rules on subsidised housing schemes** In the case of contracts relating to the design and construction of a subsidised housing scheme whose size and complexity, and the estimated duration of the work involved, require that planning be based from the outset on close collaboration within a team comprising representatives of the contracting authorities, experts and the contractor to be responsible for carrying out the works, a special award procedure may be adopted for selecting the contractor most suitable for integration into the team.	**Article 33** **Public works contracts: particular rules on subsidised housing schemes** In the case of contracts relating to the design and construction of a subsidised housing scheme whose size and complexity, and the estimated duration of the work involved, require that planning be based from the outset on close collaboration within a team comprising representatives of the contracting authorities, experts and the contractor to be responsible for carrying out the works, a special award procedure may be adopted for selecting the contractor most suitable for integration into the team. Contracting authorities keep the design activities distinguished from the execution ones, even resorting to such a procedure.	***Motivation of the amendment*** *As already expressed for the amendments of article 1, CNI deems it as inadmissible that works can be "jointly" designed and built by the same operator.* *However, because of the particular feature of public procurements for subsidised housing, CNI can accept an exception provided that the contracting authorities keep distinguished the design activities from the execution ones.*
……..	……..	
Article 49 **Technical and/or professional capability** **……** 3. In the procedures for awarding public service contracts, the ability of service providers to perform services …….. Evidence of the service provider's technical capability may be furnished by one or more of the following means according to the nature, quantity and purpose of the services to be provided **…….** (h) an indication of the proportion of the contract which the service provider may intend to sub-contract..	**Article 49** **Technical and/or professional capability** **……** 3. In the procedures for awarding public service contracts, the ability of service providers to perform services …….. Evidence of the service provider's technical capability may be furnished by one or more of the following means according to the nature, quantity and purpose of the services to be provided **…….** (h) an indication of the proportion of the contract which the service provider may intend, to sub-contract, within Annexes IA and IB.	***Motivation of the amendment*** *This specification is necessary to be coherent with the amendment proposed for article 26 which does not allow the resort to subcontracting for the intellectual services within category 1 of Annex 1C.*

…….	…….	
Article 53 **Contract award criteria** ……	**Article 53** **Contract award criteria** [1] …….……. 3. In the case referred to in paragraph 1, letter b), relevant to the contracts of intellectual services, in particular in the services listed in category 1 of annex 1C, the contracting authorities provide that the weighting of criteria such as quality, technical value, aesthethic and functional characteristics, Engineering technological solutions, environmental characteristics, strictly defined with reference to the object of the public contract, shall be fixed within a minimum of sixty per cent and a maximum of eighty per cent of the weighting altogether given to other criteria chosen to determine the most economically advantageous tender.	***Motivation of the amendment*** *In order to facilitate young professionals and their entrance in the working environment, the parameters relevant to quality and technical value of the service shall be praised in respect to the economical aspect.* *Therefore, at the stage of definition and weighting of the evaluation criteria the contracting authorities have to fix, a clear criterium shall be provided in this respect.*

[1] Amendment proposed jointly or alternatively to the amendment of the whereas clause 30.

Amendment Annex I

ANNEX I

SERVICES REFERRED TO IN ARTICLE 1(2), SECOND SUBPARAGRAPH

ANNEX 1 A

Category No	Subject	CPC Reference No	CPV Reference No
1	Maintenance and repair services	6112, 6122, 633, 886	omissis
2	Land transport services, including armoured car services, and courier services, except transport of mail	(except 71235), 7512, 87304	omissis
3	Air transport services of passengers and freight, except transport of mail	(except 7321)	omissis
4	Transport of mail by land and by air	71235, 7321	omissis
5	Telecommunications services	752	omissis
6	Financial services: (a) Insurance services (b) Banking and investment services	ex 81, 812, 814	omissis

7	~~Computer and related services~~	~~84~~	~~50310000, 50311000, 50311400, 50312000, 50312100, 50312110, 50312120, 50312200, 50312210, 50312220, 50312300, 50312310, 50312320, 50312400, 50312410, 50312420, 50312500, 50312510, 50312520, 50312600, 50312610, 50312620, 50313000, 50313100, 50313200, 50316000, 50317000, 50320000, 50321000, 50322000, 50323000, 50323100, 50323200, 50324000, 50324100, 50324200, 72000000, 72100000, 72110000, 72120000, 72130000, 72140000, 72150000, 72200000, 72210000, 72211000, 72212000, 72220000, 72221000, 72222000, 72222100, 72222200, 72222300, 72223000, 72224000, 72224100, 72224200, 72225000, 72226000, 72227000, 72228000, 72230000, 72231000, 72232000, 72240000, 72241000, 72243000, 72245000, 72246000, 72250000, 72251000, 72252000, 72253000, 72253100, 72253200, 72254000, 72254100, 72260000, 72261000, 72262000, 72263000, 72264000, 72265000, 72266000, 72267000, 72268000, 72300000, 72310000, 72311000, 72311100, 72311200, 72311300, 72312000, 72312100, 72312200, 72313000, 72314000, 72315100, 72316000, 72317000, 72319000, 72320000, 72321000, 72510000, 72511000, 72511110, 72512000, 72514000, 72514100, 72514200, 72514300, 72520000, 72521000, 72521100, 72540000, 72541000, 72541100, 72550000, 72560000, 72570000, 72580000, 72590000, 72591000~~
~~8~~	~~Research and development services~~	~~85~~	~~63368000, 73000000, 73100000, 73110000, 73111000, 73112000~~
~~9~~	~~Accounting, auditing and bookkeeping services~~	~~862~~	~~74121000, 74121100, 74121110, 74121112, 74121113, 74121120, 74121200, 74121210, 74121220, 74121230, 74121240, 74121250, 74541000~~
10	Market research and public opinion polling services	864	omissis
11	Management consulting services and related services	865, 866	omissis
~~12~~	~~Architectural services; engineering services and integrated engineering services;~~	~~867~~	~~72242000, 72244000, 74142300, 74142310, 74220000, 74221000, 74222000, 74223000, 74224000, 74225000, 74225100, 74230000, 74231100, 74231110, 74231120, 74231130, 74231200, 74231300, 74231310, 74231320, 74231400,~~

	~~urban planning and landscape engineering services; related scientific and technical consulting services; technical testing and analysis services~~		~~74231500, 74231510, 74231520, 74231521, 74231530, 74231540, 74231600, 74231700, 74231710, 74231720, 74231721, 74231800, 74231900, 74232000, 74232100, 74232110, 74232120, 74232200, 74232210, 74232220, 74232230, 74232240, 74232300, 74232310, 74232320, 74232400, 74232500, 74232600, 74233000, 74233100, 74233200, 74233300, 74233400, 74233500, 74233600, 74233700, 74240000, 74250000, 74251000, 74252000, 74252100, 74260000, 74261000, 74262000, 74262100, 74263000, 74270000, 74271000, 74271100, 74271200, 74271210, 74271220, 74271300, 74271400, 74271500, 74271700, 74271710, 74271720, 74271800, 74272000, 74272100, 74272110, 74272111, 74272112, 74272113, 74272300, 74273000, 74273100, 74273200, 74274000, 74274100, 74274200, 74274300, 74274400, 74274500, 74275000, 74275100, 74275200, 74276000, 74276100, 74276200, 74276300, 74276400, 74300000, 74310000, 74311000, 74312000, 74312100, 74313000, 74313100, 74313110, 74313120, 74313130, 74313140, 74313141, 74313142, 74313143, 74313144, 74313145, 74313146, 74313147, 74313200, 74313210, 74313220, 74874000~~
13	Advertising services	871	omissis
14	Building-cleaning services and property management services	874, 82201-82206	omissis
15	Publishing and printing services on a fee or contract basis	88442	omissis
16	Sewage and refuse disposal services; sanitation and similar services	94	omissis

ANNEX I B

Category No	Subject	CPC Reference No	CPV Reference No
17	Hotel and restaurant services	64	omissis
18	Rail transport services	711	omissis
19	Water transport services	72	omissis
20	Supporting and auxiliary transport services	74	omissis
~~21~~	~~Legal services~~	~~861~~	~~74110000, 74111000, 74111100, 74111200, 74112000, 74112100, 74112110, 74113000, 74113100, 74113200, 74113210, 74114000~~
22	Personnel placement and supply services	872	omissis
23	Investigation and security services, except armoured car services	873 (eccetto 87304)	omissis
~~24~~	~~Education and vocational education services~~	~~92~~	~~80000000, 80100000, 80110000, 80200000, 80210000, 80211000, 80212000, 80220000, 80300000, 80310000, 80320000, 80330000, 80340000, 80400000, 80411000, 80411100, 80411200, 80412000, 80421000, 80422000, 80422100, 80423000, 80423100, 80423110, 80423120, 80423200, 80423300, 80423320, 80424000, 80425000, 80426000, 80426100, 80426200, 80427000, 80428000, 80430000, 92312212, 92312213~~
~~25~~	~~Health and social services~~	~~93~~	~~60113300, 74511000, 85000000, 85100000, 85110000, 85111000, 85111100, 85111200, 85111300, 85111320, 85111400, 85111500, 85111600, 85111700, 85111800, 85112000, 85112100, 85120000, 85121000, 85121100, 85121200, 85121300, 85130000, 85131000, 85131100, 85131110, 85140000, 85141000, 85141100, 85141200, 85141210, 85141211, 85141212, 85141220, 85142000, 85142100, 85142200, 85142300, 85142400, 85143000, 85144000, 85144100, 85145000, 85146000, 85146100, 85146200, 85147000, 85148000, 85149000,~~

			~~85200000, 85300000, 85310000, 85311000, 85311100, 85311200, 85311300, 85312000, 85312100, 85312200, 85312300, 85312310, 85312320, 85312330, 85312400, 85320000, 85323000~~
26	Recreational, cultural and sporting services	96	omissis
27	Other services	<u>Except translation services</u>	omissis

Annex 1C

Category No	Subject	CPC Reference No	CPV Reference No
1	Architectural services; engineering services and integrated engineering services; urban planning and landscape engineering services; related scientific and technical consulting services; technical testing and analysis services	867	72242000, 72244000, 74142300, 74142310, 74220000, 74221000, 74222000, 74223000, 74224000, 74225000, 74225100, 74230000, 74231100, 74231110, 74231120, 74231130, 74231200, 74231300, 74231310, 74231320, 74231400, 74231500, 74231510, 74231520, 74231521, 74231530, 74231540, 74231600, 74231700, 74231710, 74231720, 74231721, 74231800, 74231900, 74232000, 74232100, 74232110, 74232120, 74232200, 74232210, 74232220, 74232230, 74232240, 74232300, 74232310, 74232320, 74232400, 74232500, 74232600, 74233000, 74233100, 74233200, 74233300, 74233400, 74233500, 74233600, 74233700, 74240000, 74250000, 74251000, 74252000, 74252100, 74260000, 74261000, 74262000, 74262100, 74263000, 74270000, 74271000, 74271100, 74271200, 74271210, 74271220, 74271300, 74271400, 74271500, 74271700, 74271710, 74271720, 74271800, 74272000, 74272100, 74272110, 74272111, 74272112, 74272113, 74272300, 74273000, 74273100, 74273200, 74274000, 74274100, 74274200, 74274300, 74274400, 74274500, 74275000, 74275100, 74275200, 74276000, 74276100, 74276200, 74276300, 74276400, 74300000, 74310000, 74311000, 74312000, 74312100, 74313000, 74313100, 74313110, 74313120, 74313130, 74313140, 74313141, 74313142, 74313143, 74313144, 74313145, 74313146, 74313147, 74313200, 74313210, 74313220, 74874000
2	Legal services	861	74110000, 74111000, 74111100, 74111200, 74112000, 74112100, 74112110, 74113000, 74113100, 74113200, 74113210, 74114000

3	Education and vocational education services	92	80000000, 80100000, 80110000, 80200000, 80210000, 80211000, 80212000, 80220000, 80300000, 80310000, 80320000, 80330000, 80340000, 80400000, 80411000, 80411100, 80411200, 80412000, 80421000, 80422000, 80422100, 80423000, 80423100, 80423110, 80423120, 80423200, 80423300, 80423320, 80424000, 80425000, 80426000, 80426100, 80426200, 80427000, 80428000, 80430000, 92312212, 92312213
4	Computer and related services	84	50310000, 50311000, 50311400, 50312000, 50312100, 50312110, 50312120, 50312200, 50312210, 50312220, 50312300, 50312310, 50312320, 50312400, 50312410, 50312420, 50312500, 50312510, 50312520, 50312600, 50312610, 50312620, 50313000, 50313100, 50313200, 50316000, 50317000, 50320000, 50321000, 50322000, 50323000, 50323100, 50323200, 50324000, 50324100, 50324200, 72000000, 72100000, 72110000, 72120000, 72130000, 72140000, 72150000, 72200000, 72210000, 72211000, 72212000, 72220000, 72221000, 72222000, 72222100, 72222200, 72222300, 72223000, 72224000, 72224100, 72224200, 72225000, 72226000, 72227000, 72228000, 72230000, 72231000, 72232000, 72240000, 72241000, 72243000, 72245000, 72246000, 72250000, 72251000, 72252000, 72253000, 72253100, 72253200, 72254000, 72254100, 72260000, 72261000, 72262000, 72263000, 72264000, 72265000, 72266000, 72267000, 72268000, 72300000, 72310000, 72311000, 72311100, 72311200, 72311300, 72312000, 72312100, 72312200, 72313000, 72314000, 72315100, 72316000, 72317000, 72319000, 72320000, 72321000, 72510000, 72511000, 72511110, 72512000, 72514000, 72514100, 72514200, 72514300, 72520000, 72521000, 72521100, 72540000, 72541000, 72541100, 72550000, 72560000, 72570000, 72580000, 72590000, 72591000
5	Accounting, auditing and bookkeeping services	862	74121000, 74121100, 74121110, 74121112, 74121113, 74121120, 74121200, 74121210, 74121220, 74121230, 74121240, 74121250, 74541000
6	~~Research and development services~~	85	63368000, 73000000, 73100000, 73110000, 73111000, 73112000

7	~~Health and social services~~	93	60113300, 74511000, 85000000, 85100000, 85110000, 85111000, 85111100, 85111200, 85111300, 85111320, 85111400, 85111500, 85111600, 85111700, 85111800, 85112000, 85112100, 85120000, 85121000, 85121100, 85121200, 85121300, 85130000, 85131000, 85131100, 85131110, 85140000, 85141000, 85141100, 85141200, 85141210, 85141211, 85141212, 85141220, 85142000, 85142100, 85142200, 85142300, 85142400, 85143000, 85144000, 85144100, 85145000, 85146000, 85146100, 85146200, 85147000, 85148000, 85149000, 85200000, 85300000, 85310000, 85311000, 85311100, 85311200, 85311300, 85312000, 85312100, 85312200, 85312300, 85312310, 85312320, 85312330, 85312400, 85320000, 85323000
8	Translation services		

Propositions d'amendements exprimés par le Consiglio Nazionale degli Ingegneri (CNI)

COM(2000)275 fin	COM(2000)275 fin	
Considérant 30 (30) En vue de garantir le respect du principe d'égalité de traitement lors de l'attribution des marchés, il convient d'assurer et de renforcer la transparence nécessaire en ce qui concerne les critères choisis pour identifier l'offre économiquement la plus avantageuse. Il doit dès lors incomber aux pouvoirs adjudicateurs d'indiquer dès le début de la procédure la pondération relative donnée à chacun de ces critères. Celle-ci ne doit pas pouvoir se limiter à l'indication d'un simple ordre décroissant d'importance des critères. Si, à titre exceptionnel et dans des cas dûment justifiés par le pouvoir adjudicateur, la fixation de la pondération relative n'est pas possible dès le début de la procédure, il convient d'en permettre l'indication dans une phase ultérieure.	**Considérant 30** (30) En vue de garantir le respect du principe d'égalité de traitement lors de l'attribution des marchés, il convient d'assurer et de renforcer la transparence nécessaire en ce qui concerne les critères choisis pour identifier l'offre économiquement la plus avantageuse. Il doit dès lors incomber aux pouvoirs adjudicateurs d'indiquer dès le début de la procédure la pondération relative donnée à chacun de ces critères. Celle-ci ne doit pas pouvoir se limiter à l'indication d'un simple ordre décroissant d'importance des critères. Si, à titre exceptionnel et dans des cas dûment justifiés par le pouvoir adjudicateur, la fixation de la pondération relative n'est pas possible dès le début de la procédure, il convient d'en permettre l'indication dans une phase ultérieure. Pour les Marchés de prestations intellectuelles, s'agissant en particulier des services qui rentrent dans la catégorie 1 de l'annexe 1C, le pouvoir adjudicateur prévoit que la pondération de critères tels que la qualité, la valeur technique, le caractère esthétique et fonctionnel, les solutions techniques d'ingénierie, les caractéristiques environnementales, strictement liés à l'objet du marché public doit assumer la valeur prééminente par rapport à la pondération totale attribuée aux autres critères que le pouvoir adjudicateur a retenu pour déterminer l'offre économiquement la plus	***Justification de la proposition d'amendement*** *L'intégration au Considérant, poursuit le but de permettre aux jeunes professionnels de s'insérer dans le monde du travail, en primant surtout les paramètres liés à l'aspect qualitatif et à la qualité technique de la prestation plutôt que les paramètres économiques.*

	avantageuse	
.....	.....	
Article 1 .1.1.11. Définition	**Article 1** **1.1.12.** Définition	***Justification de la proposition d'amendement*** *Le CNI juge indispensable distinguer nettement entre les actes professionnels et les actes d'exécution tels que la construction des œuvres, pour sauvegarder la valeur qualitative, culturelle et technique des prestations intellectuelles notamment dans le domaine de l'Ingénierie et de l'Architecture.* *Ceci répond au besoin exprimé par le Parlement européen de garantir la qualité et d'assurer un contrôle des coûts dans l'intérêt du consommateur et du maître d'ouvrage. Certaines études réalisées par des Courts de comptes au niveau national ont établi que le rapport coûts-qualité pour les bâtiments publics, est plus avantageux en cas de séparation des fonctions de conception et d'exécution.* *Par conséquent, un marché public de travaux ne peut pas prévoir "conjointement" l'exécution et la conception de travaux.*
1. Aux fins de la présente directive, les définitions figurant aux paragraphes 2 à 14 s'appliquent. 2. Les «marchés publics de fournitures» sont des contrats à titre onéreux conclus par écrit entre un ou plusieurs fournisseurs et un pouvoir adjudicateur et ayant pour objet l'achat, le crédit-bail, la location ou la location-vente, avec ou sans option d'achat, de produits. Les «marchés publics de services» sont des contrats à titre onéreux, conclus par écrit entre un ou plusieurs prestataires de services et un pouvoir adjudicateur et portant à titre exclusif ou principal sur la prestation de services mentionnés à l'annexe I. Les «marchés publics de travaux» sont des contrats à titre onéreux, conclus par écrit entre un ou plusieurs entrepreneurs et un pouvoir adjudicateur et ayant pour objet soit l'exécution, soit conjointement l'exécution et la conception de travaux relatifs à une des activités mentionnées à l'annexe II ou d'un ouvrage, soit la réalisation, par quelque moyen que ce soit, d'un ouvrage répondant aux besoins précisés par le pouvoir adjudicateur. Un «ouvrage» est le résultat d'un ensemble de travaux de bâtiment	1. Aux fins de la présente directive, les définitions figurant aux paragraphes 2 à 14 s'appliquent. 2. Les «marchés publics de fournitures» sont des contrats à titre onéreux conclus par écrit entre un ou plusieurs fournisseurs et un pouvoir adjudicateur et ayant pour objet l'achat, le crédit-bail, la location ou la location-vente, avec ou sans option d'achat, de produits. Les «marchés publics de services» sont des contrats à titre onéreux, conclus par écrit entre un ou plusieurs prestataires de services et un pouvoir adjudicateur ~~et portant à titre exclusif ou principal sur la prestation de services mentionnés à l'annexe I~~. <u>En particulier, les marchés publics de services d'exécution sont des contrats portant à titre exclusif ou principal sur la prestation de services mentionnés aux annexes 1A et 1B, tandis que les marchés publics de services intellectuels sont des contrats portant à titre exclusif ou principal sur la prestation de services mentionnés à l'annexe 1C</u> Les «marchés publics de travaux» sont des contrats à titre onéreux, conclus par écrit entre un ou plusieurs entrepreneurs et un pouvoir adjudicateur et ayant pour objet ~~soit~~ l'exécution, ~~soit conjointement l'exécution et la conception~~ de travaux relatifs à une des activités mentionnées à l'annexe II ou d'un ouvrage, soit la réalisation, par quelque moyen que ce soit, d'un ouvrage répondant aux besoins précisés par le pouvoir adjudicateur. Un «ouvrage» est le résultat d'un ensemble de	

ou de génie civil destiné à remplir par lui-même une fonction économique ou technique.	adjudicateur. Un «ouvrage» est le résultat d'un ensemble de travaux de bâtiment ou de génie civil destiné à remplir par lui-même une fonction économique ou technique.	
.....	.....	
9. Les «concours» sont les procédures nationales qui permettent au pouvoir adjudicateur d'acquérir principalement dans le domaine de l'aménagement du territoire, de l'urbanisme, de l'architecture et de l'ingénierie ou des traitements de données, un plan ou un projet qui est choisi par un jury après mise en concurrence avec ou sans attribution de primes.	9. Les «concours» sont les procédures nationales qui permettent au pouvoir adjudicateur d'acquérir principalement dans le domaine de l'aménagement du territoire, de l'urbanisme, de l'architecture et de l'ingénierie ou des traitements de données, un plan ou un projet qui est choisi par un jury après mise en concurrence avec ~~ou sans~~ attribution de primes.	*Le CNI estime que les primes sont nécessaires pour stimuler la participation des jeunes professionnels aux concours. Des budgets jeunes ne peuvent pas toujours soutenir des coûts de participation importants.*
.....	.....	
Article 3 **Les groupements d'opérateurs économiques** 1. Les groupements d'opérateurs économiques sont autorisés à soumissionner. La transformation de tels groupements dans une forme juridique déterminée ne peut être exigée pour la présentation de l'offre, mais le groupement retenu peut être contraint d'assurer cette transformation lorsque le marché lui a été attribué, dans la mesure où cette transformation est nécessaire pour la bonne exécution du marché.	**Article 3** **Les groupements d'opérateurs économiques** 1. Les groupements d'opérateurs économiques sont autorisés à soumissionner <u>et les sujets qui participent aux dits groupements peuvent satisfaire cumulativement aux critères de sélection fixés par les pouvoirs adjudicateurs</u>. La transformation de tels groupements dans une forme juridique déterminée ne peut être exigée pour la présentation de l'offre, mais le groupement retenu peut être contraint d'assurer cette transformation lorsque le marché lui a été attribué, dans la mesure où cette transformation est nécessaire pour la bonne exécution du marché.	***Justification de la proposition d'amendement*** *Le CNI estime que dans le but de faciliter la collaboration entre professionnels, même de différents pays, la directive devrait consentir aux participants à un groupement d'atteindre, par le cumul des qualités personnelles de chacun, les critères de sélection établis par le pouvoir adjudicateur. ·*
.....	.....	

Article 26 **La sous-traitance** Dans le cahier des charges, le pouvoir adjudicateur peut demander au soumissionnaire d'indiquer, dans son offre, la part du marché qu'il a l'intention de sous-traiter à des tiers ainsi que les sous-traitants désignés. Cette communication ne préjuge pas la question de la responsabilité de l'opérateur économique principal.	**Article 26** **La sous-traitance** Dans le cahier des charges, le pouvoir adjudicateur peut demander au soumissionnaire d'indiquer, dans son offre, la part du marché qu'il a l'intention de sous-traiter à des tiers ainsi que les sous-traitants désignés. Cette communication ne préjuge pas la question de la responsabilité de l'opérateur économique principal. Les marchés publics de services intellectuels ayant pour objet la prestation des services dont à la catégorie 1 de l'annexe 1C, ne peuvent pas etre sous-traités.	***Justification de la proposition d'amendement*** *Le CNI estime que l'interdiction de recourir à la sous-traitance dans le cas de services intellectuels, notamment d'Ingénierie et d'Architecture, constituerait un facteur de concurrence véritable car les mêmes opportunités seraient ainsi offertes à tout genre de concurrent : professionnels exerçant en libéral, bureaux d'études associés, groupes de professionnels associés, sociétés d'ingénierie/ architecture, services techniques des grandes entreprises et de l'Administration publique (dans les pays où cette pratique est admise)*
.....	.....	
Article 29 **Cas justifiant le recours à la procédure négociée avec publication d'un avis de marché** Les pouvoirs adjudicateurs peuvent passer leurs marchés publics en recourant à une procédure négociée après avoir publié un avis de marché dans les cas suivants:…… 3) pour les marchés publics de services, lorsque, notamment dans le domaine des prestations intellectuelles et des services au sens de la catégorie 6 de l'annexe I A, la nature du service à fournir est telle que les spécifications du marché ne peuvent être établies avec une précision suffisante pour permettre l'attribution du marché par la sélection de la meilleure offre, conformément aux règles régissant la procédure ouverte ou la procédure restreinte;	**Article 29** **Cas justifiant le recours à la procédure négociée avec publication d'un avis de marché** Les pouvoirs adjudicateurs peuvent passer leurs marchés publics en recourant à une procédure négociée après avoir publié un avis de marché dans les cas suivants: …….. 3) pour les marchés publics de services, lorsque, notamment dans le domaine des prestations intellectuelles et des services ~~au sens de la catégorie 6 de l'annexe I A~~ qui figurent dans l'annexe 1C, la nature du service à fournir est telle que les spécifications du marché ne peuvent être établies avec une précision suffisante pour permettre l'attribution du marché par la sélection de la meilleure offre, conformément aux règles régissant la procédure ouverte ou la procédure restreinte;	***Justification de la proposition d'amendement*** *Le recours à la procédure négociée, notamment pour les prestations intellectuelles, doit avoir un caractère tout à fait exceptionnel, et être choisie lorsqu'il n'est pas possible recourir aux procédures normales.* *L'abus de la procédure négociée préjugerait considérablement la concurrence et surtout la transparence des marchés qui est un objectif fondamental de la Commission.*

Article 30 **Règles spécifiques applicables aux marchés publics particulièrement complexes** 9. Les pouvoirs adjudicateurs peuvent prévoir des prix et des paiements aux participants. De tels prix et paiements sont pris en compte pour l'application de l'article 8.	**Article 30** **Règles spécifiques applicables aux marchés publics particulièrement complexes** 9. Les pouvoirs adjudicateurs ~~peuvent~~ doivent prévoir des prix et des paiements aux participants. Ces prix et paiements doivent concerner tous les candidats les solutions desquels ont été totalement ou en partie, utilisées pour définir la base du marché. De tels prix et paiements sont pris en compte pour l'application de l'article 8	***Justification de la proposition d'amendement*** *Cet amendement se propose d'assurer que les procédures applicables aux services intellectuels respectent les droits liés à la propriété intellectuelle et au contrat d'œuvre intellectuelle, surtout au cas où le pouvoir adjudicateur utiliserait les documents, les idées et les concepts d'autrui pour préparer le marché.* *Tout concepteur qui par ses idées ait contribué en partie ou en totalité à l'identification de la solution technique choisie par l'administration, devrait avoir une compensation adéquate.*
.....	.....	
Article 32 **1.1.1.4.** Les accords-cadres **…….**	**Article 32** **1.1.1.5.** Les accords-cadres **…….** 4. Les accords-cadres ne s'appliquent pas aux services intellectuels dont à la catégorie 1 de l'annexe 1C.	***Justification de la proposition d'amendement*** *Pour les prestations intellectuelles dont à la catégorie 1 de l'annexe IC, les accords-cadres sont absolument inadaptés.*

Article 33 **Marchés publics de travaux : règles particulières concernant la réalisation de logements sociaux** Dans le cas de marchés portant sur la conception et la construction d'un ensemble de logements sociaux dont, en raison de l'importance, de la complexité et de la durée présumée des travaux s'y rapportant, le plan doit être établi dès le début sur la base d'une stricte collaboration au sein d'une équipe comprenant les délégués des pouvoirs adjudicateurs, des experts et l'entrepreneur qui aura la charge d'exécuter les travaux, il peut être recouru à une procédure spéciale d'attribution visant à choisir l'entrepreneur le plus apte à être intégré dans l'équipe.	**Article 33** **Marchés publics de travaux : règles particulières concernant la réalisation de logements sociaux** Dans le cas de marchés portant sur la conception et la construction d'un ensemble de logements sociaux dont, en raison de l'importance, de la complexité et de la durée présumée des travaux s'y rapportant, le plan doit être établi dès le début sur la base d'une stricte collaboration au sein d'une équipe comprenant les délégués des pouvoirs adjudicateurs, des experts et l'entrepreneur qui aura la charge d'exécuter les travaux, il peut être recouru à une procédure spéciale d'attribution visant à choisir l'entrepreneur le plus apte à être intégré dans l'équipe. <u>Même s'ils font recours à une telle procédure, les pouvoirs adjudicateurs doivent maintenir séparées les activités de conception de celles d'exécution des oeuvres.</u>	***Justification de la proposition d'amendement*** *Le CNI a déjà exprimé dans sa proposition d'amendement à l'article 1, l'inadmissibilité que le même sujet puisse être chargé conjointement de la conception et de la réalisation d'une oeuvre.* *Toutefois, étant donné le caractère particulier de la construction de logements sociaux, le CNI peut accepter une dérogation pourvu que les activités de conceptions soient distinguées des activités d'exécution des œuvres.*
.....		
Article 49 **Capacités techniques et/ou professionnelles** ..... 3. Dans les procédures de passation des marchés publics de services, ……. La capacité technique du prestataire de services peut être justifiée d'une ou de plusieurs des façons suivantes, selon la nature, la quantité et l 'utilisation des services à fournir:	**Article 49** **Capacités techniques et/ou professionnelles** ..... 3. Dans les procédures de passation des marchés publics de services, La capacité technique du prestataire de services peut être justifiée d'une ou de plusieurs des façons suivantes, selon la nature, la quantité et l 'utilisation des services à fournir:	***Justification de la proposition d'amendement*** *Il s'agit d'une intégration cohérente avec la proposition d'amendement à l'article 26, qui exclut le recours à la sous-traitance pour les prestations intellectuelles d'ingénierie et d'architecture.*

……. h) l'indication de la part du marché que le prestataire de services a éventuellement l'intention de sous-traiter.	……. h) l'indication de la part du marché que le prestataire de services compris dans les annexes 1A et 1B a éventuellement l'intention de sous-traiter.	
……..	……..	
Article 53 1.1.1.6. Critères d'attribution des marchés ……	**Article 53** **Critères d'attribution des marchés** [1] …….…… Dans les cas prévus au paragraphe 1, lettre b), pour les marchés de services intellectuels notamment dans le cas des services figurant dans la catégorie 1 de l'annexe 1C, le pouvoir adjudicateur prévoit que la pondération de critères tels que la qualité, la valeur technique, le caractère esthétique et fonctionnel, les solutions techniques d'ingénierie, les caractéristiques environnementales, strictement liés à l'objet du marché public doit se situer entre un minimum de 60% et un maximum de 80% de la pondération totale attribuée aux autres critères que le pouvoir adjudicateur a retenu pour déterminer l'offre économiquement la plus avantageuse.	***Justification de la proposition d'amendement*** *Pour aider les jeunes à s'insérer dans le monde du travail, il faut primer les critères liés à l'aspect qualitatif et à la valeur technique de la prestation, par rapport aux critères économiques.* *De ce fait, les pouvoirs adjudicateurs doivent prévoir un critère de pondération en ce sens dans la phase de détermination et pondération des critères de sélection.*

[1] Amendement proposé conjointement ou alternativement à l'amendement proposé au Considérant 30

Amendement proposés à l'annexe I

ANNEXE I
SERVICES VISÉS À L'ARTICLE 1er, PARAGRAPHE 2, DEUXIEME ALINEA

ANNEXE I A

Catégories	Désignation des services	Numéros de référence CPC	Numéros de référence CPV
1	Services d'entretien et de réparation	6112, 6122, 633, 886	omissis
2	Services de transports terrestres , y compris les services de véhicules blindés et les services de courrier, à l'exclusion des transports de courrier	712 (sauf 71235), 7512, 87304	omissis
3	Services de transports aériens: transports de voyageurs et de marchandises, à l'exclusion des transports de courrier	73 (sauf 7321)	omissis
4	Transports de courrier par transport terrestre et par air	71235, 7321	omissis
5	Services de télécommunications	752	omissis
6	Services financiers: a) services d'assurances b) services bancaires et d'investissement	ex 81, 812, 814	omissis
7	~~Services informatiques et services connexes~~	~~84~~	~~50310000, 50311000, 50311400, 50312000, 50312100, 50312110, 50312120, 50312200, 50312210, 50312220, 50312300, 50312310, 50312320, 50312400, 50312410, 50312420, 50312500, 50312510, 50312520, 50312600, 50312610, 50312620, 50313000, 50313100, 50313200, 50316000, 50317000, 50320000, 50321000, 50322000, 50323000, 50323100, 50323200, 50324000, 50324100,~~

			~~50324200, 72000000, 72100000, 72110000, 72120000, 72130000, 72140000, 72150000, 72200000, 72210000, 72211000, 72212000, 72220000, 72221000, 72222000, 72222100, 72222200, 72222300, 72223000, 72224000, 72224100, 72224200, 72225000, 72226000, 72227000, 72228000, 72230000, 72231000, 72232000, 72240000, 72241000, 72243000, 72245000, 72246000, 72250000, 72251000, 72252000, 72253000, 72253100, 72253200, 72254000, 72254100, 72260000, 72261000, 72262000, 72263000, 72264000, 72265000, 72266000, 72267000, 72268000, 72300000, 72310000, 72311000, 72311100, 72311200, 72311300, 72312000, 72312100, 72312200, 72313000, 72314000, 72315100, 72316000, 72317000, 72319000, 72320000, 72321000, 72510000, 72511000, 72511110, 72512000, 72514000, 72514100, 72514200, 72514300, 72520000, 72521000, 72521100, 72540000, 72541000, 72541100, 72550000, 72560000, 72570000, 72580000, 72590000, 72591000~~
~~8~~	~~Services de recherche et de développement~~	~~85~~	~~63368000, 73000000, 73100000, 73110000, 73111000, 73112000~~
~~9~~	~~Services comptables, d'audit et de tenue de livres~~	~~862~~	~~74121000, 74121100, 74121110, 74121112, 74121113, 74121120, 74121200, 74121210, 74121220, 74121230, 74121240, 74121250, 74541000~~
10	Services d'études de marché et de sondages	864	omissis
11	Services de conseil en gestion et services connexes	865, 866	omissis
~~12~~	~~Services d'architecture; services d'ingénierie et services intégrés d'ingénierie; services d'aménagement urbain et d'architecture paysagère; services connexes de consultations scientifiques et techniques; services d'essais et d'analyses techniques~~	~~867~~	~~72242000, 72244000, 74142300, 74142310, 74220000, 74221000, 74222000, 74223000, 74224000, 74225000, 74225100, 74230000, 74231100, 74231110, 74231120, 74231130, 74231200, 74231300, 74231310, 74231320, 74231400, 74231500, 74231510, 74231520, 74231521, 74231530, 74231540, 74231600, 74231700, 74231710, 74231720, 74231721, 74231800, 74231900, 74232000, 74232100, 74232110, 74232120, 74232200, 74232210, 74232220, 74232230, 74232240, 74232300, 74232310, 74232320, 74232400, 74232500, 74232600, 74233000, 74233100, 74233200, 74233300, 74233400, 74233500, 74233600, 74233700, 74240000, 74250000, 74251000, 74252000, 74252100, 74260000, 74261000, 74262000, 74262100, 74263000, 74270000, 74271000, 74271100, 74271200, 74271210, 74271220, 74271300, 74271400, 74271500, 74271700, 74271710, 74271720, 74271800, 74272000, 74272100, 74272110, 74272111, 74272112, 74272113, 74272300, 74273000, 74273100, 74273200, 74274000, 74274100, 74274200, 74274300, 74274400, 74274500, 74275000, 74275100,~~

			~~74275200, 74276000, 74276100, 74276200, 74276300, 74276400, 74300000, 74310000, 74311000, 74312000, 74312100, 74313000, 74313100, 74313110, 74313120, 74313130, 74313140, 74313141, 74313142, 74313143, 74313144, 74313145, 74313146, 74313147, 74313200, 74313210, 74313220, 74874000~~
13	Services de publicité	871	omissis
14	Services de nettoyage de bâtiments et services de gestion de propriétés	874, 82201-82206	omissis
15	Services de publication et d'impression sur la base d'une redevance ou sur une base contractuelle	88442	omissis
16	Services de voirie et d'enlèvement des ordures: services d'assainissement et services analogues	94	omissis

ANNEXE I B

Catégories	Désignation des services	Numéros de référence CPC	Numéros de référence CPV
17	Services d'hôtellerie et de restauration	64	omissis
18	Services de transports ferroviaires	711	omissis
19	Services de transport par eau	72	omissis
20	Services annexes et auxiliaires des transports	74	omissis
~~21~~	~~Services juridiques~~	~~861~~	~~74110000, 74111000, 74111100, 74111200, 74112000, 74112100, 74112110, 74113000, 74113100, 74113200, 74113210, 74114000~~
22	Services de placement et de fourniture de personnel	872	omissis
23	Services d'enquête et de sécurité, à l'exclusion des services des véhicules blindés	873 (sauf 87304)	omissis
~~24~~	~~Services d'éducation et de formation professionnelle~~	~~92~~	~~80000000, 80100000, 80110000, 80200000, 80210000, 80211000, 80212000, 80220000, 80300000, 80310000, 80320000, 80330000, 80340000, 80400000, 80411000, 80411100, 80411200, 80412000, 80421000, 80422000, 80422100, 80423000, 80423100, 80423110, 80423120, 80423200, 80423300, 80423320, 80424000, 80425000, 80426000, 80426100, 80426200, 80427000, 80428000, 80430000, 92312212, 92312213~~
~~25~~	~~Services sociaux et sanitaires~~	~~93~~	~~60113300, 74511000, 85000000, 85100000, 85110000, 85111000, 85111100, 85111200, 85111300, 85111320, 85111400, 85111500, 85111600, 85111700, 85111800, 85112000, 85112100, 85120000, 85121000, 85121100, 85121200, 85121300, 85130000, 85131000, 85131100, 85131110, 85140000, 85141000, 85141100, 85141200, 85141210, 85141211, 85141212, 85141220, 85142000, 85142100, 85142200, 85142300, 85142400, 85143000, 85144000, 85144100, 85145000, 85146000, 85146100, 85146200, 85147000, 85148000, 85149000, 85200000, 85300000, 85310000, 85311000, 85311100, 85311200, 85311300,~~

			~~85312000, 85312100, 85312200, 85312300, 85312310, 85312320, 85312330, 85312400, 85320000, 85323000~~
26	Services récréatifs, culturels et sportifs	96	omissis
27	Autres services	Sauf services de traduction	omissis

ANNEXE 1C

Catégories	Désignation des services	Numéros de référence CPC	Numéros de référence CPV
1	Services d'architecture; services d'ingénierie et services intégrés d'ingénierie; services d'aménagement urbain et d'architecture paysagère; services connexes de consultations scientifiques et techniques; services d'essais et d'analyses techniques	867	72242000, 72244000, 74142300, 74142310, 74220000, 74221000, 74222000, 74223000, 74224000, 74225000, 74225100, 74230000, 74231100, 74231110, 74231120, 74231130, 74231200, 74231300, 74231310, 74231320, 74231400, 74231500, 74231510, 74231520, 74231521, 74231530, 74231540, 74231600, 74231700, 74231710, 74231720, 74231721, 74231800, 74231900, 74232000, 74232100, 74232110, 74232120, 74232200, 74232210, 74232220, 74232230, 74232240, 74232300, 74232310, 74232320, 74232400, 74232500, 74232600, 74233000, 74233100, 74233200, 74233300, 74233400, 74233500, 74233600, 74233700, 74240000, 74250000, 74251000, 74252000, 74252100, 74260000, 74261000, 74262000, 74262100, 74263000, 74270000, 74271000, 74271100, 74271200, 74271210, 74271220, 74271300, 74271400, 74271500, 74271700, 74271710, 74271720, 74271800, 74272000, 74272100, 74272110, 74272111, 74272112, 74272113, 74272300, 74273000, 74273100, 74273200, 74274000, 74274100, 74274200, 74274300, 74274400, 74274500, 74275000, 74275100, 74275200, 74276000, 74276100, 74276200, 74276300, 74276400, 74300000, 74310000, 74311000, 74312000, 74312100, 74313000, 74313100, 74313110, 74313120, 74313130, 74313140, 74313141, 74313142, 74313143, 74313144, 74313145, 74313146, 74313147, 74313200, 74313210, 74313220, 74874000
2	Services juridiques	861	74110000, 74111000, 74111100, 74111200, 74112000, 74112100, 74112110, 74113000, 74113100, 74113200, 74113210, 74114000

3	Services d'éducation et de formation professionnelle	92	80000000, 80100000, 80110000, 80200000, 80210000, 80211000, 80212000, 80220000, 80300000, 80310000, 80320000, 80330000, 80340000, 80400000, 80411000, 80411100, 80411200, 80412000, 80421000, 80422000, 80422100, 80423000, 80423100, 80423110, 80423120, 80423200, 80423300, 80423320, 80424000, 80425000, 80426000, 80426100, 80426200, 80427000, 80428000, 80430000, 92312212, 92312213
4	Services informatiques et services connexes	84	50310000, 50311000, 50311400, 50312000, 50312100, 50312110, 50312120, 50312200, 50312210, 50312220, 50312300, 50312310, 50312320, 50312400, 50312410, 50312420, 50312500, 50312510, 50312520, 50312600, 50312610, 50312620, 50313000, 50313100, 50313200, 50316000, 50317000, 50320000, 50321000, 50322000, 50323000, 50323100, 50323200, 50324000, 50324100, 50324200, 72000000, 72100000, 72110000, 72120000, 72130000, 72140000, 72150000, 72200000, 72210000, 72211000, 72212000, 72220000, 72221000, 72222000, 72222100, 72222200, 72222300, 72223000, 72224000, 72224100, 72224200, 72225000, 72226000, 72227000, 72228000, 72230000, 72231000, 72232000, 72240000, 72241000, 72243000, 72245000, 72246000, 72250000, 72251000, 72252000, 72253000, 72253100, 72253200, 72254000, 72254100, 72260000, 72261000, 72262000, 72263000, 72264000, 72265000, 72266000, 72267000, 72268000, 72300000, 72310000, 72311000, 72311100, 72311200, 72311300, 72312000, 72312100, 72312200, 72313000, 72314000, 72315100, 72316000, 72317000, 72319000, 72320000, 72321000, 72510000, 72511000, 72511110, 72512000, 72514000, 72514100, 72514200, 72514300, 72520000, 72521000, 72521100, 72540000, 72541000, 72541100, 72550000, 72560000, 72570000, 72580000, 72590000, 72591000
5	Services comptables, d'audit et de tenue de livres	862	74121000, 74121100, 74121110, 74121112, 74121113, 74121120, 74121200, 74121210, 74121220, 74121230, 74121240, 74121250, 74541000
6	Services de recherche et de développement	85	63368000, 73000000, 73100000, 73110000, 73111000, 73112000

7	Services sociaux et sanitaires	93	60113300, 74511000, 85000000, 85100000, 85110000, 85111000, 85111100, 85111200, 85111300, 85111320, 85111400, 85111500, 85111600, 85111700, 85111800, 85112000, 85112100, 85120000, 85121000, 85121100, 85121200, 85121300, 85130000, 85131000, 85131100, 85131110, 85140000, 85141000, 85141100, 85141200, 85141210, 85141211, 85141212, 85141220, 85142000, 85142100, 85142200, 85142300, 85142400, 85143000, 85144000, 85144100, 85145000, 85146000, 85146100, 85146200, 85147000, 85148000, 85149000, 85200000, 85300000, 85310000, 85311000, 85311100, 85311200, 85311300, 85312000, 85312100, 85312200, 85312300, 85312310, 85312320, 85312330, 85312400, 85320000, 85323000
8	Services de traductions		

II. f) Other specific sectors

Associazione Bancaria Italiana (ABI)

domanda:

NOTE

Observations on the proposals for directives of the European Parliament and Council on the coordination of public procurement procedures – COM (2000) 275, COM (2000) 276

1 – Examination of the foregoing proposals shows that they help to meet a series of needs for the simplification and rationalization of the rules governing public procurement contracting, needs that are felt in Italy as well, with specific regard to the procedures for awarding financial service contracts.

The following provisions in particular are significant:

1. simplification of value thresholds for procurement contracts relevant to application of the rules;
2. extension of possible cases permitting the negotiated procedure with the publication of calls for tenders ;
3. introduction of the "framework agreements" for the award of contracts without applying the entire set of obligations under Directive to each individual award.

These provisions are thus in line with the needs that have emerged in recent years, which are transforming the type demand for banking and financial services on the part of public institutions and consequently the role that the banks have to play vis-à-vis government in Italy.

This transformation originates in the multitude of rules that have affected institutional finances and accounting (especially local governments, hence municipalities, provinces and mountain communes), extending their ability to turn to outside resources for funding, increasing their possibilities for independent initiative, and spurring the search for more effective and less costly financial services. This change in the rules has laid the basis for significant extension in the quantity and improvement in the quality of relations between banks and public institutions. In particular, it highlights the financial consulting role of banks in devising better strategies for their institutional clients and consequently in influencing the choice or design of the most suitable product to meet their specific needs.

Clearly the evolution of banks' relations with public institutions and the achievement of a better balance between supply and demand for financial services in the government sector will benefit from Community reform for more streamlined and flexible contracting procedures.

2 – Thus our overall evaluation of the directive proposals is positive. However, we should like to emphasize that the proposals could also provide the opportunity to solve the difficulties in the award of contracts for treasury services for local governments.

In this area the directive proposals do not change the objective sphere of application to services, as reference is expressly to "financial services" and the annexes specify that this comprises "banking and financial services".

This generic wording is still today the source of substantial interpretative doubts and operational difficulties. Specifically, in setting a minimum threshold value for contracts, the rules lay down that this value is to be calculated with regard to "fees, commissions, interest or other types of remuneration", elements which at least in the abstract refer to a very broad range of transactions. Moreover, the reference (which the proposals confirm) to the UN common product classification system, which together with the detailed identification of some types of banking operations (large deposit services, other bank deposit services, mortgage loan services, credit cards) also has a residual category of "other credit services" embracing a broad range of services.

The uncertainties and problems of application for banking and financial services remained virtually unchanged in Italy following the issue of Legislative Decrees 157 and 158 of 17 March 1995 (partly amended by Legislative Decree 65 of 25 February 2000) transposing into Italian law the Community directives on public contracts for services (Directives 92/50 of 18 June 1992 and 93/38 of 14 June 1993).

As regards the activities subject to Community legislation, these measures repeat the generic criteria adopted in the directives, requiring a relatively difficult interpretation of the law, whereby the notion of banking and financial services is given a very broad reading such as to comprise indistinctly all services proper and all activities of lending and fund-raising.

In this situation it was impossible to find any grounds for arguing that treasury and cashier services for government bodies could be excluded from the scope of application of the directives; yet these are operations whose particular characteristics make the application of the Community law improper and in any event arduous.

In particular, it should be underscored that treasury and cashier services are of a public accounting nature; the bank does not perform a banking or financial service but an activity that is properly a function of the public administration. Furthermore, the performance of this activity presumes the existence of a permanent establishment in the territory where the public institution carries out its functions, such that the bank can adequately play the role of accounting agent assigned to collect revenues and make payments on the institution's behalf.

Even without considering the questions of principle set forth above, essentially in connection with the specificity of the relationship between the public institution and its treasurer, it has been hard to determine the conditions for the practical application of the rules. In particular, it was complicated to quantity the "onerousness" of the contracts considered by the Community law. In practice, local governments in Italy have linked this onerousness to the cost of any current account overdrafts, but such funds are not suitable for the purpose, in that they are merely accessory charges that arise only in the event of a momentary imbalance between the inflow and outflow of funds. To obey to the letter a set of rules that are difficult to apply to this kind of service, therefore, the local institutions had to make complicated calculations of the costs connected with hypothetical future advances, which in many cases were not actually disbursed during the period in which the treasury service was performed.

In short, it stands confirmed that the application of the Community contract rules to treasury and cashier services raises delicate problems on scope of application, forcing the institutions covered by the directives to strike a difficult balance in awarding such service contracts between the need for realistic conduct appropriate to the nature of the services and the need to comply with Community law.

3 – To achieve the necessary certainty and uniformity of operations at European level, in the interest of the public institutions awarding the contracts and of the banks engaged in providing such services and funding, the advisability of including certain, unequivocal indications of the services covered by the Community rules is reaffirmed, in order to definitively overcome the anomalies of application observed.

The new directive proposals offer an opportunity in this regard.

In particular, we are of the opinion that the new Community provisions now being drafted should extend the list of cases excluded from the scope of the directives — now consisting solely of financial services relating to the issue, purchase, sale and transfer of securities and other financial instruments and the services supplied by central banks — by introducing the principle that the directives are also not applicable in cases in which the services provided to governmental institutions by banks give rise, under the national law of the Member States, to activities that do not form part of the ordinary, institutionally defined activities of the intermediaries but are intended for the pursuit of an important public interest, inseparably connected with specific obligatioins and responsibilities that are not involved in those taken on in the performance of any other typical banking or financial service.

We recommend amending Article 18 of directive proposal COM(2000) 275 and Article 24 of COM(2000) 276 to extend the list of cases set forth therein, specifying that both directives do not apply to the award of public service contracts for the performance of treasury and cashier services, governed by national law.

4 – For lending services, and specifically bank loans, it is worth noting the virtually total absence in the *OJEC* of calls for bids except those of Italian local governments. This demonstrates that in this case too the objective scope of the rules has not been interpreted in uniform fashion at the European level.

On this point, in order to bring about a comparison at European level and avoid procedural disparities and the resulting discrimination against economic agents in Member States that are impeded or hindered in approaching the market, we think it should be expressly specified (even as as point of interpretation, hence in the recitals) whether local authorities' choice of lending banks is or is not subject to the Community rules.

5 – Further on the matter of bank loans, note that Article 53 of proposal COM(2000) 275 and Article 54 of COM(2000) 276 confirm that government institutions may use a method based on the "lowest price" or the "most economically advantageous" offer.

Practice evidences that in most cases the first of these two criteria has been adopted. However, it is worth considering that the "most economically advantageous" standard is better suited to recognizing the quality of services, facilitating government

bodies in obtaining the instrument best suited to their needs in a context of enhanced financial and management autonomy.

For this reason we believe an amendment to encourage this latter method is desirable. The directives could introduce the notion of a preference for the method by an indication of the scope of the articles cited above or with a special recital. This would help to raise the quality of the contents of individual contract procedures, supplementing the beneficial effects of the introduction, already provided for in the directive proposals, of framing//master agreements and the extension of the cases in which private negotiations with a call for bids is allowable.

II. f) Other specific sectors

Union of the Electricity Industrie EURELECTRIC

Union of the Electricity Industry-*EURELECTRIC* Position Paper on the Commission's proposal for a Directive amending the scope of the "Utilities Directive" - Directive 93/38/EEC (COM (2000) 276 final)

October 2000

Union of the Electricity Industry-*EURELECTRIC* Position Paper on the Commission's proposal for a Directive amending the scope of the "Utilities Directive" - Directive 93/38/EEC (COM (2000) 276 final)

This paper has been drafted by the EURELECTRIC Working Group "EU Procurement Regulation". It was approved by the EURELECTRIC Board of Directors on 10 October 2000.

Members of the Working Group " EU Procurement Regulation" :

Ann GOOSSENS (Chairwoman, BE), Günter ALLESCH (AT), Hans ARENDS (NL), Pedro BARROS MOURA (PT), Luigi BOSCHI (IT), Iñaki EGANA DIAZ-PARDO (ES), Gorm K. ELIKOFER (DK), David HIGGON (GB), Hans LUNDIN (SE), Gerry MULLIGAN (IE), Fernand MUSIQUE (BE), Teresa OLIVIE' (ES), Arto PIELA (FI), Jean-Pierre RIU (FR), Paola SANSONATO (IT), Hubert SELLMEIER (DE), Wilma VAN OORSPRONK (NL), Jeff WOODHAMS (GB), Ana AGUADO, Lars Peter SVANE (EURELECTRIC).

Executive Summary

1. The Commission proposes to modify all the procurement directives. EURELECTRIC is concerned that all efforts in the debate will concentrate on the public sector's directives and not sufficiently on the key areas of major concern for the sectors covered by the Utilities Directive.

2. The proposal modifying the Utilities directive raises a number of issues, as it **does not take into account the radical changes in the electricity sector resulting from the Internal Electricity Directive.** With the implementation of the Internal Electricity Market Directive in all 15 EU countries **and more than 65 % of the EU electricity market open to competition**, the electricity companies should be allowed to operate under the same conditions as all other companies in open markets ie they should therefore be exempted from the procurement rules. This is the more true given the development of new purchasing techniques such as the internet platforms.

3. *EURELECTRIC* welcomes the possibility for exemption from the Utilities Directive for those activities faced with competition**. However, this benefit could remain simply dead letter if the burdensome procedure currently envisaged is implemented.** Therefore, *EURELECTRIC* stresses that it would be more appropriate to formulate the exemption ground in such a way as **to allow immediate exemption of individual projects for which contracting entities are in competition with companies which are not themselves obliged to apply the procurement rules and to adapt the annexes in order to reflect those activities which are already today in competition**.

4. *EURELECTRIC* **is surprised that the proposal deletes the energy purchase exemption and is afraid that the Commission has not sufficiently assessed the impracticalities of this change.** Energy companies and other contracting entities need the flexibility of being able to buy energy at short notice in order to carry out their business, including guaranteeing the security of supply. Further, primary energy is purchased on highly competitive international energy markets. *EURELECTRIC* would welcome the opportunity to explain its concerns in more detail and to provide technical advice regarding the problems which would arise if the final Directive imposed the procurement rules to the purchase of fuel and energy by electricity undertakings.

5. The current rule for exemption of **joint ventures and associated companies** from EU procurement requires that at least 80% of an associated company's turnover be part of the group turnover for it to obtain exemption and is limited to services. **This rule is, in EURELECTRIC's view, outdated since modern companies tend to separate particular parts of their businesses into distinct subsidiaries.**

Introduction

1. The Commission has recognised that electricity undertakings are operating in a very different economic environment from that in which they operated when the rules enshrined in the Utilities Directive were imposed in 1990 by Directive 90/531/EEC. The implementation of the Internal Electricity Market Directive (96/92/EC) is already having a significant impact on the structure and operation of the electricity market in the EU. As a result, the need for the Utilities Directive to apply to electricity undertakings is becoming increasingly questionable.

2. In May the European Commission adopted a new Directive proposal amending the scope of the existing Utilities Directive 93/38/EEC, with the aim of removing the constraints imposed by the current Directive in cases where a sector becomes liberalised. The amendments proposed would have a significant effect on certain contracting utilities, especially to the newly-liberalised electricity sector, and in some cases they would increase the legal uncertainties with regard to the interpretation of the procurement rules.

3. EURELECTRIC welcomes the Commission's initiative to modify the existing Utilities Directive but considers that in doing so the Commission has not taken due account of the new environment in which the electricity sector is operating, following implementation of the Electricity Directive 96/92/EC. Moreover, we are concerned that all efforts in the debate will tend to focus on the public sector directives and not sufficiently on the key areas of major concern for the sectors covered by the Utilities Directive. This position paper, therefore, mainly focuses on those proposed amendments which, in EURELECTRIC's view, are likely to negatively affect the competitiveness of the electricity sector and create an unlevel playing field.

4. Although the new Directive proposal from the Commission provides a mechanism for electricity companies acting in the competitive market to be exempted from mandatory procurement procedures, there will be a transitory period of at least 5 years before the new Directive is implemented in the Member States, during which time these electricity companies will still be subject to procurement rules while other competitors in the market will not.

5. Moreover, even in five years' time, when the activities which are today subject to competition are finally exempted, the new provisions will still remain burdensome for those activities still covered by the Directive.

6. For the reasons stated above, the following articles in the new Utilities Directive proposal raise major concern among EURELECTRIC members.

Content of the proposed Directive

Article 2.3 – Definition of the activities and entities concerned

7. The new Utilities Directive should take account of the new market conditions, in which private-sector and state-owned companies operate with identical objectives. However, the Commission's proposal introduces discrimination between these two types of companies. This discrimination arises from the fact that ownership of public undertakings is currently the basis for the application of the Utilities Directive. In EURELECTRIC's view, where companies are operating under comparable market conditions they should be able to conduct their business on an equivalent basis. Any and all limitations or restrictions which apply solely on the basis of the ownership of the enterprise should be removed. Therefore, in order to ensure equality of treatment between state-owned and private-sector companies - which is a basic principle of the utilities procurement rules – **this article should be amended accordingly.**

Article 26 – Service contracts awarded to an affiliated undertaking or to a contracting entity forming part of a joint venture

8. Article 26 of the draft proposal maintains the rule according to which contracts awarded to affiliated companies or by a joint venture to an associated contracting entity are subject to the EU procurement rules, except where these are service contracts and the service supplier achieves 80 % of its turnover within the group.

<u>The obligation limits the possibility to use modern purchase management techniques</u>

9. EURELECTRIC regrets that the Commission has not seized the opportunity to clarify the non-application of procurement rules to particular arrangements such as joint ventures and other technology transfer-related partnerships. Contracting entities of the electricity sector should be allowed to follow the usual professional procurement practices as applied in other industries so as to take advantage of long-term supply-chain management collaboration, which tends to improve cost efficiency, thereby improving services and reducing prices for consumers. Such modern purchase management techniques should be made available to the electricity sector too.

<u>Disincentive to restructure efficiently utility companies in several service subsidiaries</u>

10. Moreover, the liberalisation of the electricity sector has led utilities to move from a vertically integrated structure to a holding structure with different subsidiaries for reasons of independence imposed by law or of commercial flexibility according to the activity concerned. In addition, utilities are engaging in new activities such as providing IT or telecommunication services, for which they establish a separate subsidiary offering its services to the whole group (e.g. a call-centre simultaneously serving the supplier company for "eligible" customers and the supplier company for "tariff" customers, plus any other subsidiary requiring such a service). This is also the case for engineering or other technical services. These activities form part of a company's basic know-how, providing the technical expertise for activities which are part of its core business and which as such are of great strategic importance.

11. In order to remain 'best-in-class', stay competitive, or exploit economies of scale in the interests of the group as a whole and the intra-group 'customers', the subsidiary may wish to offer its products, works or services to customers outside the group. Unbundling is imposed by national governments, even for distribution activities, to increase economic efficiency. However, the restrictions on intra-group transactions as provided in the Utilities Directive will hinder companies from harvesting the full benefits through economic efficiency which coordinated intra-group services can achieve. From the moment when the separate subsidiary wishes to offer its services outside the group, it faces the possibility that it will no longer be providing 80% of its services within the group, and thus runs the risk that the contracting entities within the group will lose their entitlement to apply the exception rule of Article 26.

Obstacle to the achievement of synergy in case of mergers

12. The rule would equally hinder the pursuit of synergies when companies merge. Especially in the case of diversification into multi-utilities, it surely cannot be the intention of this article to oblige one subsidiary in the newly constituted group to look for contractors outside the group when the basic rationale of the merger was precisely to improve services to end-customers through co-operation with the other partners in the group.

13. The same can be said in cases where several distribution network operators wishing to set up a joint subsidiary to carry out maintenance works or network development services on all the networks operated by these distribution network operators, or customer services, billing, etc.., would be confronted with the application of Article 26, without any real justification.

The 'economic entity' is legally exempted from competition rules

14. Legally the Article 26 provision also seems contrary to the 'economic entity' notion which is well established in the European competition rules. Indeed the European Court of Justice has recently confirmed that competition rules do not apply to agreements between affiliated companies within a group. The public procurement rules are part of EU internal market and competition rules, and should therefore not provide for different treatment when it comes to intra-group relations. Within this context the strategic organisational choices-and thereby the signing of agreements-for groups which possess the necessary internal means, should no longer be subject to the conditions of this Directive.

15. To conclude, there seems to be no logical reason to limit the exception to services contracts. EURELECTRIC therefore proposes to extend the exception provided in Article 26 to all contracts awarded between affiliated companies and within joint-venture structures. The amended article could be formulated in the following way in order to reflect the economic reality in all sectors covered by the Utilities Directive:

' **This directive shall not apply to contracts which:**
1. a contracting entity awards to an affiliated undertaking or to a joint-venture in which it is associated ;

2. are awarded by a joint-venture formed by a number of contracting entities for the purpose of carrying out a relevant activity within the meaning of Articles 3, 4, 5 or 6, to one of those contracting entities or to an undertaking which is affiliated with one of these contracting entities.'

Article 27 – Contracts awarded by certain contracting entities for the purchase of water

16. Article 9 of the current Utilities Directive provides that the requirements of that Directive do not apply when undertakings operating in the energy sector award contracts for the purchase of energy or fuels for the production of energy. Removing this exemption for electricity undertakings would mean that they would now have to apply the provisions of the Utilities Directive when awarding contracts for the purchase of energy or of fuels for the production of energy.

<u>The change obliges entities in competition to set up a procedure until formally exempted.</u>

17.If the proposals regarding the scope of the Utilities Directive are implemented, EURELECTRIC members could be excluded from its scope completely or in respect of those of their activities which are exposed to competition. However, for the transitory period needed for the adoption and implementation of this proposed Directive, and during the waiting period until the "de facto" exemption is authorised by the Commission, those activities subject to competition will also be faced with commercial restrictions in respect of their energy and fuels purchases. Consequently, unless immediate exemption from procurement rules for those activities is provided, they will have to set up a new procurement procedure simply for that transitional period.

<u>The conditions justifying the initial exemption have not changed</u>

18. EURELECTRIC finds it therefore unacceptable to impose procurement procedures for the purchase of fuels and energy since we do not see how this will lead to more open and transparent markets. The current exception only applies to water and primary energy purchases. The circumstances with regard to primary energy purchases have not changed, therefore the initial considerations justifying the exceptions are still valid. Absence of competition in the primary energy markets was not the reason primary energy purchases were exempted from the procurement procedures. If this had been the case, the contracting of transport and telecommunication services should equally have been exempted from the procedure. The energy exemption was therefore clearly based on other grounds: indeed it was considered that the purchase of primary energy on the basis of procurement procedures would be too burdensome for the intended use of the products. A clear-cut example was and still is to be found in dual firing plants, where the change from one fuel to another has to be undertaken at very short notice, in order to allow the arbitrage between the prices of the two fuels to produce its effects. It goes without saying that most fuels are traded on a global level and that the liberalisation of electricity and gas markets will tend to increase the need for flexibility, also outside exchanges and pool systems.

Cases to illustrate the need for flexibility

19. To illustrate the difficulty, EURELECTRIC would point to one specific example: the purchase of fuel for CHP (cogeneration) production. If the draft proposal amending the existing exemption were to be accepted, CHP producers would need to purchase the fuel for their electricity production in compliance with the procurement legislation if more than 30% of the total energy produced was exported to the public network. However, the fuel to be used may be dictated by the requirements of the heat user on or adjacent to the generating station site. Moreover, one condition of the grant of the land for the station may be a requirement to use fuel provided by the heat user (eg. an oil refinery). This may still offer best value to the utility's consumers for the 30-50% exported energy and so the project is valid and in line with Community energy policy (since good-quality CHP is more efficient than electricity generation alone), but then the purchase of the fuel would comply with the Directive's requirements.

20. Electricity cannot be stored and there must therefore be a continuous balancing of the demand and supply of electricity. This requires that the market for electricity be extremely flexible and capable of short-term adjustments. Balancing markets are being set up in which the counterparty to trade is the system operator. It is therefore unrealistic to require transmission companies to fulfil the requirements of public procurement rules when, for example, contracting for ancillary services and balancing power. Transmission operators will certainly seek to conclude with the relevant generators framework agreements, to be used at very short notice without any need to go through burdensome procurement procedures (this is the situation in countries with the most experience of a liberalised electricity sectors). **For these reasons, a clear withdrawal from the procurement obligations when regulatory incentives are already in place (by the Electricity Directive or national regulators in the Member States) should be ensured.**

21. There will also be a particular problem in applying procurement procedures for any supply undertaking where distribution and supply activities are carried on within the same corporate structure - even though there is internal unbundling. If supply and distribution activities are not treated as distinct in a given Member State, the supply undertaking will have to comply with the Utilities Directive when purchasing energy. This would place the supply undertaking at an economic disadvantage to those of its competitors who do not have to comply with such a restriction. It is also unclear how Article 26 relating to intergroup activities would apply in this situation.

Risk of conflict with Member States‘ sovereign powers regarding security of supply

22. The implications of the above-mentioned proposal on the sovereign powers of the EU and Member States should not be neglected when it comes to ensuring security of supply, maintenance of minimum stocks and the stockpiling of reserves of fuel, and also with regard to powers to order reductions in consumption on the grounds of national security or in the event of difficulties with the supply of stocks.

23. For all the reasons mentioned above, EURELECTRIC does not see what benefits would accrue to either suppliers or electricity undertakings as a result of the

imposition of procurement rules on the current purchasing arrangements for fuels and energy.

We therefore consider that the existing exemption should not be removed and that the wording in the current Article 9 should be maintained.

Article 29 – General mechanism for the exclusion of activities directly exposed to competition

24. The Electricity Directive 96/92/EC has already been implemented in 15 Member States.The majority of the implementing laws go much further than what was provided in the liberalising Directive. Apart from the actual legal framework, the economic reality has also developed faster than expected and competition is now a rule in the majority of the EU member states. The Commission stated in its latest Communication on "recent progress with building the internal electricity market" that the electricity liberalisation is a genuine success, and announced its intention to come up with new proposals by the end of the year to further accelerate the opening up of the electricity markets in those countries not yet fully opened to competition.

25. The Electricity Industry welcomes this proposal for accelerating market-opening and increasing competition. However, it is essential to the electricity sector that the conditions on the market be made equal for all parties - ie that there should be a level playing field.

Today there is great legal uncertainty with regard to the applicability of procurement rules to certain companies such as equipment suppliers and independent power producers. A time-lag between the implementation of a liberalised market and the moment when the existing companies on the market are exempted from the restrictions of the procurement Directive would offer new companies which might not be applying the procurement rules a substantial competitive advantage. This puts existing companies at a severe disadvantage compared to new market-entrants and may lead to losses and eventual deficits in these existing companies. This is corroborated by the fact that the procurement rules often have to be applied for contracts for which very few suppliers exist in the market.

26. If the mechanism as proposed in Article 29 to exempt activities which are exposed to competition were to be adopted, it is estimated that utilities could benefit from this exemption at the earliest from 2005 onwards. The estimated time required to adopt a Directive under the EU co-decision procedure is two or three years. In addition to that, Member States in general require two years to implement a Directive. Finally the Commission will have 6 months in which to take the formal decision exempting an activity.

27. It goes without saying that this situation is unacceptable when we take into account that today electricity companies are in competition with companies which may not be subject to the procurement rules. A clear example can be found in the building and operating of co-generation installations on the site of the client,

which constitutes a very important business for utilities since it is a preferred manner to enter the market. In this business a client requests offers for the installation and operation of co-generation units from different suppliers, amongst whom there will be utilities subject to the procurement rules and other companies which supply, and possibly operate, such installations without also supplying energy to public networks. Within the time-limit imposed it is impossible for the utility to follow a tender procedure for price-offers from the equipment suppliers, so the utility is obliged to submit a price to the client without knowing the extent of the costs it will finally incur itself. In these cases it is quite evident that real competition does exist and that there is no adequate reason for submitting the utility to procurement rules with regard to these activities.

28. Even monopoly businesses such as transmission and distribution network operation operate in market environments and are thus required to manage their businesses in an efficient manner, hence applying efficient procurement systems for works, supply and services even without having to comply formally with the procurement rules. Moreover, these activities are already regulated through the energy or electricity national regulatory authorities.

29. **EURELECTRIC therefore proposes to formulate the exemption grounds in the draft proposal (both in Article 29 and Article 2) in such a way as to allow immediate exemption of individual projects for which contracting entities are in competition with companies which may not themselves bound to apply the procurement rules.**

30. **EURELECTRIC also proposes that the Commission should already today begin analysing which activities in the energy sector are directly exposed to competition, in order to allow the Council and the European Parliament to adopt, together with the final Directive, a list of activities for which utilities are no longer required to follow the procurement procedure,** and which may be exempted from the moment the Directive enters into force.

Article 34 – Technical specifications

31. The formulation of paragraph 5 of this article seems to imply that the contracting entity will not have the power to take the final decision to reject a tender but that if a technical dossier of the manufacturer or a test from a third party body confirms compliance of the performance with the standard, the purchaser would be obliged to accept.

32. EURELECTRIC fully supports the need to introduce flexible means to allow technological developments enter the market, but at the same time it should be clearly stated in the Directive that the final buying decision is in the hands of the purchasing entity which, at the end of the day, is responsible for the safety of the final product.

33. **EURELECTRIC therefore proposes to add in paragraph 5 the following: « … … the tenderer can show in his offer to the satisfaction of the contracting authority… … ».**

Article 54 – Contract award criteria

34. The Commission intends in this Article to specify the relative weighting of award criteria at a certain stage of the procedure depending on the type of procedure concerned.

35. EURELECTRIC understands this is an obligation to give an indicative percentage of importance attached to a criterion, not as a complex mathematical formula to be applied.

36. However, the distinction in different cases to determine at which stage the criteria should be specified renders this measure very complex and uncertain. The distinction made between open procedures and restricted or negotiated procedures also seems rather illogical since it is more difficult in the latter type of procedures to establish the weighting of the award criteria at the very beginning of the call for tenders. The latter procedures are indeed preferred for complex purchases extending over a period of time and where contracting entities should be able to take into account innovative aspects arising during the course of the tender process.

37. **For the sake of simplification EURELECTRIC therefore proposes to formulate paragraph 2 of this article in the following way and to delete paragraphs 3,4 and 5.**

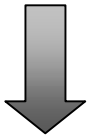
‘In the case referred to in point (a) of paragraph 1, the contracting entity shall specify the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender. **This specification of the weighting shall take place in the notice or in the contract documents.**

This weighting may be expressed as a range within which the value of each criterion is stated'.

Eurelectric position on the Commission's proposal for the amendment of the Directive 93/38/EEC (COM (2000) 276 final)

Luigi Boschi (Enel SpA - Italy)

Art. 2.3 Definition of the activities and entities



Discrimination between state-owned and private

Add a paragraph: this Directive shall not apply to public undertakings if other contracting entities can carry out the same activities, in the same territory, without any restrictions.

Art. 26: Service contracts awarded to an affiliated undertaking or to a contracting entity forming part of a joint venture

Most companies separate particular sectors of their business into independent companies. With the existing rules, companies within the holding company cannot in fact award contracts directly to their own subsidiaries, but they must go through competitive tenders.

This Directive shall not apply to supply, works, service contracts which a contracting entity awards to an affiliated undertaking or to a joint-venture in which it is associated.

Art. 27: Contracts awarded by certain contracting entities for the purchase of water.

The proposed change obliges contract entities to set up too burdensome regulations for the purchase of energy or fuels for energy production.

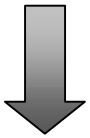
Eurelectric finds unacceptable and highly impractical to delete the energy and fuels purchase exemption from the existing Directive, since Eurelectric do not see how this would lead to more open and transparent markets. The circumstances with regard to primary energy purchases have not changed, so the initial considerations justifying the exceptions still apply. Energy companies need the flexibility of being able to buy energy at short notice to carry out their business, including guaranteeing the security of supply. Further, fuel and primary energy is purchased on highly competitive international energy markets, and there is therefore no reason why these purchases will not be made in the most economical way.

Art. 29: General mechanism for the exclusion of activities directly exposed to competition

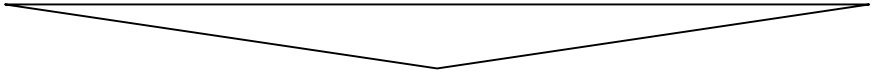
The gap between the time where the electricity market is liberalized and the time where the existing companies on the market are excluded from the restrictions of the procurement Directive (it could take 5 years), puts existing companies at a severe disadvantage compared to new entrants.

Eurelectric proposes an immediate exemption of individual projects for which contracting entities are in competition with companies which may not themselves be bound to apply the procurement rules.

Art. 34: Technical specifications

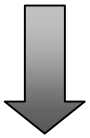


It should be clearly stated in the directive that the final decision, about an equivalent technical solution, must be in the hands of the purchasing entity which in the end is in charge of the safety of the final product

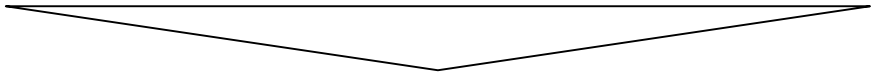


Add in the par. 5 ….. *the tenderer can show in his offer an equivalent technical solution to the contracting authority's satisfaction …..*

Art. 39: use of open, restricted and negotiated



The wording of the Directive should specifically provide that the acquisition of fuel and power would fall outside the scope of the Utilities Directive



It must be clear that contracting entities may use a procedure without prior call for competition also for supply of energy quoted and purchased on a commodity market.

Art. 54: Contract Award Criteria

The distinction to determine at which stage the criteria should be specified renders this measure very complex and uncertain. The distinction between open procedures and restricted and negotiated procedures does not seem logical also because it is more difficult in the negotiated procedures to establish the weighing of the award criteria in the very beginning of the call for tender.

Contracting authorities shall specify the relative weighing they assign to all of the award criteria they intend to apply. This specification of the weighing shall take place in the notice or directly in the contract documents: contracting entities should be able to take into account innovative aspects arising during the course of the tender process.

II. f) Other specific sectors

EUROGAS

EUROGAS VIEWS ON PROPOSED DIRECTIVE CO-ORDINATING THE PROCUREMENT PROCEDURES OF ENTITIES OPERATING IN THE WATER, ENERGY AND TRANSPORT SECTORS (COM(2000)276)

1. Eurogas has studied the proposed new Directive co-ordinating procurement procedures by the Utilities (COM(2000)276). By and large, Eurogas considers that aspects of the proposal offer potentially an improved approach for the utilities and welcomes the indications that the Commission is taking a fresh look at the approach to procurement policy and seeking to develop a more flexible and simpler approach, called for by Eurogas and other industry associations. Nonetheless Eurogas considers that there is scope for improvement; certain Articles require modification.

2. The views of Eurogas set out in its position paper on the Commission's Communication "Public Procurement in the European Union" (S/EUR/00/1210 sent to the Commission 17.04.00) are the starting point for the assessment by Eurogas of this new proposal. In summary :

- a mechanism should be introduced to permit the exemption of contracting entities other than the telecommunications sector operating in a liberalised market;
- a changed approach is needed with regard to the artificial requirements posed by Article 13 of Directive 93/38 (80 percent rule);
- there should be no weakening of the fundamental distinction between utilities and the public sector proper;
- market means should be promoted to facilitate qualification of suppliers possibly by way of a shared approach on pre-qualification, eg a vendors' register, and involving mutual recognition of standards;
- electronic procurement should be promoted, but a clear distinction needs to be made between off the shelf items and high-value, specialist purchasing (the bulk of gas sector procurement) for which solutions are now emerging;
- as long as the Directive still applies, the systems of negotiated procedures and framework contracts with regard to utilities should be maintained;
- the system of award criteria, requiring the publication of relative weighting, is not applicable for high-value complex procurement;
- in the absence of appropriate European standards, utilities should not be required to prejudice the safety of equipment or operations by any amendments to the provision on purchase specifications;
- procurement legislation is not an appropriate vehicle for enforcing consideration of environmental aspects in purchasing of works, suppliers and services, but EU policy in this area should promote complementary approaches.

ARTICLE 2 : CONTRACTING ENTITIES

3. Eurogas can endorse a redefinition of the concept of "special or exclusive rights" which is understood to be derived from EU case law. Eurogas long argued that the network-based concept of special or exclusive rights was inappropriate and the modification proposed represents an improvement.

ARTICLE 26 : SERVICE CONTRACTS AWARDED TO AN AFFILIATED UNDERTAKING OR TO A CONTRACTING ENTITY FORMING PART OF A JOINT VENTURE

4. If any utilities are to remain covered by the Directive, it is important to rethink the approach of Article 13. The requirements of Article 26 stem from assumptions on simple structures which are not realistic. When Article 13 of 93/38 was first devised, it already represented a blunt approach to a complex situation. In view of the evolving regulatory regimes and the consequences they will have on the company activities, Article 26 is even less appropriate now, as it has implications for corporate governance and company structures, which are not intended to be in the province of procurement legislation.

5. Eurogas has elaborated on the problems caused by this Article (see attached), which is a problem common to other utilities.

ARTICLE 27 : DELETION OF ARTICLE 9.1B

6. Following the proposed deletion of Article 9/1b of 93/38/EEC, the Directive no longer contains an exemption for energy purchases. The Advisory Committee on Public Procurement studied the issue of whether or not this exemption should be deleted, but recommended it should stay in a revised text. Despite this, the Commission proposes its deletion, on the argument of the ongoing energy market liberalisation.

7. In the view of Eurogas this is an inappropriate change in the provisions, which introduces an unacceptable and legal uncertainty into the operation of the liberalised internal market, and is not coherent with the principles of the Gas Directive.

   Previously it was never considered appropriate for the Procurement Directives to regulate in the field of energy policy. It is arguably even less appropriate now, when the market is undergoing significant changes, following the liberalisation measures.

8. Eurogas is concerned that the approach in the proposed Article 27 has not been adequately analysed in relation to the different approaches to liberalisation allowed for in the Gas Directive, and the developments in the different parts of the gas supply chain. As a result, far from complementing the Gas Directive, either the provision seeks to go further than it or, in different circumstances, the provision is incompatible with the Gas Directive.

ARTICLE 29 : GENERAL MECHANISM FOR THE EXEMPTION OF ACTIVITIES DIRECTLY EXPOSED TO COMPETITION

9. Eurogas fully supports the development of an approach which will permit the exemption of liberalised entities from the Directive. Any mechanism to be applied to allow activities exemption if they operate in a competitive market should be transparent and efficient and speedy to avoid that there is a long period between the opening-up of the sector and the granted exemption. A transparent system involving a minimum administrative burden within a well defined time frame should deliver a quick decision in the interests of companies' business plans.

10. Furthermore, there should be a clear understanding that the Remedies Directives should not apply to exempted entities.

11. Eurogas would prefer that the same legal framework, including the possibilities of exemption can apply to all players in a national gas sector, and indeed operate on an EU basis.

ARTICLE 34 : TECHNICAL SPECIFICATIONS

12. Eurogas opposes the proposed amendment to the technical specifications provision because the wording could lead to companies being obliged to recognise standards which would not meet the technical requirements of the purchase.

13. Eurogas wholly supports the use of EU standards when available. In, however, the absence of such standards, Eurogas would be concerned about the safety and liability implications, if a company had to recognise national standards of European countries and international standards without being confident of their suitability, compatibility and performance. This is especially important in cases of modifications or maintenance of existing infrastructure, which requires materials or components equal to or comparable with the existing ones.

    Eurogas suggests the wording of 93/38 Article 18 be retained.

ARTICLE 54 : AWARD CRITERIA

14. Eurogas considers that the current version of Article 34 in EC/93/38 is appropriate. It is sufficient to require the contracting entities to state all the criteria which they intend to apply to the award, where possible in descending order of importance.

15. The proposal to specify relative weighting to each criterion would be too formulistic and calculating. In complex procurement, such an analysis is impracticable, time consuming and would not lead to the most efficient outcome. Management discretion in awarding contracts remains indispensable for the contracting entities.

16. The proposed change in timing of publication of the weighting criterion is impracticable. The time between Call for Competition and issuing of the final RFQ documents can be a year or longer for complex contracts. For these types of contracts all aspects of the purchase are not always known at the Call for Competition stage because of external factors or because views change. If

weighting factors have to make known at this early stage this will lead to more emphasis on price and lead times than on technical (innovative) aspects[1], which are not developed in full at that time. This might be negative for both parties.

ARTICLE 62 : ELECTRONIC PROCUREMENT

17. Eurogas is concerned that the policy on promoting electronic procurement fails to distinguish between the needs of complex, high-value-specialist procurement, and lower-value, off-the shelf type items. Eurogas agrees that over-time e-commerce holds potential cost benefits, but its use is more evident with regard to simpler purchases. For the complex, high-cost purchasing, e-commerce will evolve more slowly. Eurogas is ready to inform officials of its ideas on gas industry co-operation in this area including on the outcome of any pilot schemes to facilitate evaluation of future e-commerce activities.

18. Eurogas also notes that it will probably be some time before technical solutions to verify electronic signatures and meet other security requirements will be available.

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COMMENT ON ARTICLE 26 OF PROPOSED NEW PROCUREMENT DIRECTIVE

(FORMER ARTICLE 13)

INTRODUCTION

1. In the several position papers over the last years, Eurogas has called attention to the inappropriateness of the provision in the Utilities Directive on intra-group trading (EC/93/38 Art. 13; now revised as Art. 26). Eurogas has repeatedly called for a more practical and flexible approach in the case of intra-group trading; which would recognise the dynamics of procurement in an evolving business environment.

2. Eurogas therefore is disappointed that the issues raised by Article 13 have not been addressed by the Commission in this direction. The new proposal in other respects seeks to recognise the significant changes now taking place in the gas sector and Eurogas will comment on those separately. The approach, however, in new Article 26 remains rigid and impractical. In this short paper, Eurogas emphasises its concerns about Article 26, and illustrates the problem with some typical examples.

LACK OF CLARITY OF ART. 13/26

3. The text of the Article has from the outset given rise to problems of interpretation. It is not clear whether the 80% rule applies to the same type of services covered by the relevant contract or <u>all</u> services provided by the affiliate. This had led to different applications of the Directive in national legislation, and the new text does not clarify this point.

[1] This is contrary to § 1.2 of the Substantive Amendments (page 5) where it is assumed that the rewording of the article about the Technical Specifications will lead to more innovative business.

Implications of Art. 13/26 in an Evolving Gas Sector

4. A more fundamental concern about Art. 13/26, however, is that it is an anachronism in the changes which are taking place in Europe's gas markets. It can be understood that in the early 90s, the Commission's purpose in seeking to limit intra-group trading and curtail what it saw as anti-competitive practices of its abuse, was against the background of vertically integrated, monopolistic, utilities. A decade later, however, this picture has changed, Companies have reorganised themselves, in order to be able to respond in a flexible manner to individual business and commercial needs generally; also in some cases, to meet national decisions to unbundle gas transport facilities from other activities of the gas business.

5. The provision that if more than 20% of the service turnover of the company or subsidiary concerned is provided outside the Group, then it would be illegal for it to provide intra-group services without competitively tendering for them, is impractical with regard to current business dynamics.

6. It is common practice in today's business world that all types of enterprise transfer some of their activities to independent subsidiaries, which will carry out services for their parent companies as well as for other companies.

7. The rigid provisions of Art. 13/26, however, cause unjustified disadvantages for all those entities operating in a sector covered by the Utilities Directive. Their ability to determine the company's structure is restricted, and they cannot establish a subsidiary for specific services without establishing the obligation to make a call for tender when these services are needed.

8. In Italy, for example, Snamprogetti is a separate engineering company within the ENI group, but in view of its top-level know-how and expertise in the oil and gas sector its services are increasingly sought after. A major contract in any one year can distort the apparent relationship with SNAM or indeed any other ENI group company, with the effect of depriving SNAM of a corporate asset.

9. Another example comes from The Netherlands. Within Gasunie, the unit "Transport, Services and Consultancy" a task force is operating in the area of gas pipeline repair and special expertise and experience in (hot)tapping and welding on pressurised gas pipelines. Highly qualified staff are trained to do their job in all conditions. To maintain this highly qualified standard on-the-job-training is essential. Therefore this task force is also used for "normal" construction activities, if no special tasks are in hand. It is obvious that the best training for these men is this pipeline repair and (hot)tapping work. It has been decided to approach pipeline-owners all over the world to promote this task force and its activities, which enable operators to repair or extend their pipeline-grid without the need to stop the product-flow. Because of the Directive's requirements, Gasunie will be running a risk, if the unit is established as an affiliate company, that it would have to tender for the services offered, which will lead to uncertainties in relation to the responsibilities Gasunie manages in its business at large. Gasunie is concerned that this might also be in conflict with art 10 of the “Gas Wet” which emphasises the duty of Gasunie to develop and maintain the

grid in a way that safety, efficiency and reliability are secured (this article is the Dutch implementation of art. 7.1 of directive 98/30/EC).

10. The impact which the Gas Directive will have on companies' organisational structures also needs to be considered, as it can be expected that there will be unbundling of operational and commercial activities to various degrees.

11. A last general argument against Art. 13/26 is that it does not appreciate that for reasons of efficiency companies will outsource more and more for particular activities. This will not change fundamental relationships with intra-group companies, but in a particular year can already affect the 20% criterion.

12. The provisions of Art. 13/26 are quite arbitrary and do not take account of legitimate company structures in a changing business and commercial environment. Eurogas would like to see it replaced with a provision which would exempt from the scope of the Directive as many of the contracts awarded to associated companies as possible. As the provision stands it will discourage restructuring which is justified in the interests of commercial flexibility and efficiency, or to comply with regulatory requirements. It may also act as a disincentive to mergers undertaken to improve and enlarge the services to customers.

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UTILITIES DIRECTIVE

WHY THE CLAUSE EXEMPTING ENERGY PURCHASES FROM TENDER REQUIREMENTS SHOULD NOT BE DELETED

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1. The 1993 Utilities Directive was designed to give all undertakings in the water, energy, transport and telecommunications sectors within the Community equal access to public contracts and to promote cost-effective conduct on the part public authorities and public undertakings in those sectors. Energy purchases were exempted from tender requirements (Art. 9 (1)(b) of the Utilities Directive).

2. With its amendment proposal of 10 May 2000 (COM (200) 276 final), the Commission intends, inter alia, to take action in the light of the extensive competition now existing in the aforementioned sectors.

   Due to liberalisation, some undertakings will have the possibility to go through the procedure for exemption envisaged in the amendment proposal (cf. Arts. 29 and 20). However, a largish number of undertakings will continue to be covered by the Directive. If Art. 9 (1)(b) is deleted, they must in future invite tenders for energy purchases despite liberalisation. This is even less justifiable today than in 1993, considering all the progress made in liberalisation.

3. Tender requirements would have considerable negative implications for the gas supply companies concerned. Like all other companies in the gas industry, they are now subject to fierce competition. The picture is characterised by gas-to-gas and interfuel competition. Tender requirements constitute an additional burden for those companies and cause distortion of competition (additional costs, loss of

flexibility and efficiency). Competitors not exposed to this burden which include not only private gas suppliers but also the suppliers of oil as the main rival on the heat market, would be placed at an advantage.

4. Transparency and the prevention of discrimination are already ensured via the Gas Directive and competition. Tenders are not the adequate approach - neither in 1993 nor today.

5. For good reasons the Advisory Committee of Member States has decided in favour of retaining the exemption of energy supply contracts.

   Eurogas welcomes the draft of the Advisory Committee (text attached)

Article 27

Contracts awarded by certain contracting entities for the purchase of water or for the supply of energy or of fuels for the production of energy

This directive shall not apply to :
(a) contracts which the contracting entities exercising the activity referred in Annex I award for the purchase of water;
(b) contracts which the contracting entities exercising one of the activity referred in Annexes II to V award for the supply of energy or of fuels for the production of energy,

The Council shall re-examine the provisions of paragraph 1 when it has before it a report from the Commission together with appropriate proposals."

LEGAL ARGUMENTS AGAINST THE DELETION FROM THE PROPOSED NEW UTILITIES DIRECTIVE OF THE PROVISION EXEMPTING CONTRACTING ENTITIES FROM APPLYING THE PROCUREMENT REGIME TO ENERGY PURCHASES

1. The Commission's proposed Directive on procurement by the utilities (COM(2000)276 final) no longer contains an exemption for energy purchases (Article 9(1)b of 93/38/EEC). The Advisory Committee on Public Procurement studied the issue of whether or not this exemption should be deleted, but recommended it stayed in a revised text. Despite this, the Commission proposes its deletion.

2. In the view of Eurogas this is an inappropriate change in the provisions, which introduces an unacceptable and harmful legal confusion into the operation of the liberalised internal market, and is not coherent with the principles of the Gas Directive.

3. The Commission's explanations state that now that the energy market is liberalised, there is no need for an exemption clause, but Eurogas is concerned that the approach has not been adequately analysed in relation to the different approaches to liberalisation allowed for in the Gas Directive, and the developments in the different parts of the gas supply chain with the result that far from complementing it either the provision seeks to go further than the Gas Directive, and it is inappropriate that the

Procurement Directive is a vehicle for regulating the energy market or, in different circumstances, the provision is incompatible with the Gas Directive.

4. Eurogas assumes that most large supply companies will be exempt under Art. 29. There is a risk, however, that this may not happen immediately and any delay would give rise to unacceptable results in the absence of an exemption. The gas supply activities are subject to a range of new obligations under the liberalisation process. To legislate, without taking these into consideration, that they should also be obliged to put out to tender for new supplies observing the criteria of the Procurement Directive, is not foreseen in the Gas Directive or Member States' developing regulations, and it is inappropriate for procurement legislation to seek this

5. Perhaps the proposal assumed that such purchases of gas would continue to be exempt under Article 20, which provides for the exemption of contracts awarded for purpose of resale. This would seem to apply to gas purchased for selling, in a liberalised market. The limitative clauses, however, providing that the entity enjoys no special or exclusive right to sell the commodity, and other entities are free to sell it on the same conditions introduces significant difficulties. Since the Gas Directive allows for progressive liberalisation it could well be that part of the volume of a gas purchase contract was destined for the competitive market and part for the captive-market. The consequence of this would be that an entity may feel obliged to split contracts. This surely was not intended by the proposed legislation.

6. The legal contradictions for the distribution sector are even more severe. The Gas Directive leaves the option to Member States whether or not distribution companies are eligible customers. In some Member States they may not be and therefore could be supplied only by incumbent suppliers. To oblige non eligible distribution companies to invite tenders would contradict the principles and system of the Gas Directive.

7. The suppression of old Article 9(1)b of 93/38 was evidently not thought through; it should be re-inserted. Liberalisation of the internal energy market is properly the domain of energy policies and legislation.

II. f) Other specific sectors

Common amendments suggested by

EURELECTRIC
EUROGAS
CEEP
EUREAU
CCFE

EURELECTRIC, EUROGAS, CEEP, EUREAU and CCFE common amendments on the Commission's 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)

This position paper has been elaborated jointly by EURELECTRIC (Union of the Electricity Industry), CEEP (European Centre of Public Enterprises and of Enterprises of General Economic Interest), CCFE (Community of European Railways), EUROGAS (European Union of the Natural Gas Industry) and EUREAU (European Union of National Associations of Water services and Waste Water services).

The industries these associations represent welcome the Commission's efforts to take into account the introduction of competition when modifying the Utilities Directive 93.38/ECC. However, we are all concerned that the proposed general mechanism for the exclusion of activities directly exposed to competition (article 29) will not allow to take into account the changing environments in due time.

Moreover, we also understand the initiative to introduce flexible means to allow technical developments enter the market (article 34 on technical specifications), but at the same time it should be clearly stated in the Directive that the final buying decision is in the hands of the purchasing entity which, at the end of the day, is responsible for the safety of the final product.

The associations would also like to propose the following amendments to the Commission's proposal:

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 (Deleted words are underlined)	**Associations Proposal on the Commission's proposal for a Directive amending the scope of Directive 93/38/EEC (COM (2000) 276 final)** (New words are **bold underlined)**
Article 26 - Service contracts awarded to an affiliated undertaking or to a contracting entity forming part of a joint venture	**Article 26 -** Contracts awarded to an affiliated undertaking or to a contracting entity forming part of a joint venture
1. This directive shall not apply to service contracts which:	**1.This directive shall not apply to contracts which:**
(a) a contracting entity awards to an affiliated undertaking;	a) a contracting entity awards to an affiliated undertaking **or to a joint-venture in which it is associated;**
(b) are awarded by a joint venture formed by	b) are awarded by a joint-venture formed by a

a number of contracting entities for the purpose of carrying on activities within the meaning of *Articles 3,4,5 or 6* to one of those contracting entities or to an undertaking which is affiliated with one of these contracting entities,	number of contracting entities for the purpose of carrying on activities within the meaning of Articles 3, 4, 5 or 6, to one of those contracting entities or to an undertaking which is affiliated with one of these contracting entities.
provided that at least 80% of the average turnover of that undertaking with respect to services arising within the Community for the preceding three years derives from the provision of such services to undertakings with which it is affiliated. Where more than one undertaking affiliated with the contracting entity provides the same service or similar services, the total turnover in the Community deriving from the provision of services by those undertakings shall be taken into account.	
2. For the purposes of this Article, "affiliated undertaking" means any undertaking the annual accounts of which are consolidated with those of the contracting entity in accordance with the requirements of the Seventh Council Directive 83/349/EEC, or, in the case of entities not subject to that Directive, any undertaking over which the contracting entity may exercise, directly or indirectly, a dominant influence within the meaning of point (b) of Article 2(1) or which may exercise a dominant influence over the contracting entity or which, in common with the contracting entity, is subject to the dominant influence of another undertaking by virtue of ownership, financial participation, or the rules which govern it.	2. For the purposes of this Article, "affiliated undertaking" means any undertaking the annual accounts of which are consolidated with those of the contracting entity in accordance with the requirements of the Seventh Council Directive 83/349/EEC, or, in the case of entities not subject to that Directive, any undertaking over which the contracting entity may exercise, directly or indirectly, a dominant influence within the meaning of point (b) of Article 2(1) or which may exercise a dominant influence over the contracting entity or which, in common with the contracting entity, is subject to the dominant influence of another undertaking by virtue of ownership, financial participation, or the rules which govern it.
3. The contracting entities shall notify to the Commission, at its request, the following information regarding the application of the provisions of paragraph 1: (a) the names of the undertakings concerned,	3. The contracting entities shall notify to the Commission, at its request, the following information: (a) the names of the undertakings concerned, (b) the nature and value of the contracts involved,

(b) the nature and value of the service contracts involved, (c) such proof as may be deemed necessary by the Commission that the relationship between the undertaking to which the contracts are awarded and the contracting entity complies with the requirements of this Article.	(c) such proof as may be deemed necessary by the Commission that the relationship between the undertaking to which the contracts are awarded and the contracting entity complies with the requirements of this Article.
	This amendment proposal on article 27 is only relevant to the EURELECTRIC and EUROGAS activities.
Article 27 - Contracts awarded by certain contracting entities for the purchase of water	**Article 27 -** Contracts awarded by certain contracting entities for the purchase of water **or for the supply of energy or fuels for the production of energy**
1. This Directive shall not apply to contracts which contracting entities *engaged in the activity referred to* in Annex I award for the purchase of water.	1. This Directive shall not apply to : **(a) contracts which the contracting entities exercising the activity referred to in Annex I award for the purchase of water.** **(b) Contracts which the contracting entities exercising one of the activity referred to in Annexes II to V award for the supply of energy or of fuels for the production of energy.**
2. The Council shall reexamine the provisions of paragraph 1 when it has before it a report from the Commission together with appropriate proposals.	2. The Council shall reexamine the provisions of paragraph 1 when it has before it a report from the Commission together with appropriate proposals.

II. g) Information technologies and public procurement

Protender AB

(www.protender.com)

Electronic public procurement - the use of the Internet for improved efficiency

Pernilla Bjurman, CLO
ProTender AB

ProTender.com is an Internet based tool facilitating and quality assuring the complicated administrative and legal process for European public procurement.

The vision of ProTender is to contribute to the realisation of the European objectives by creating an open and competitive market for European procurement without internal boarders.

ProTender has extensive experience of public procurement and has thus identified a number of difficulties and problems for procuring entities and for suppliers. A few examples are significant:

- The administrative and legal public procurement process is complicated, lengthy and thus costly,
- Most tenders are national and from known tenderers,
- Tendering is costly and small errors can have fatal consequences,
- There are obvious language barriers and translations are costly,
- The objects of a procurement are often too large for SMEs to tender.

These, and other difficulties are addressed in and can be overcome by the use of ProTender.com.

ProTender.com is a tool supporting the complete procurement process for the procuring entities as well as the suppliers tendering. Standard documents and templates for procurements and tenders, and a market place advertising tender notices can increase efficiency of the procurement process with up to 80 per cent for each side, procuring entity and supplier tendering.

Further, we believe that prices can be reduced with on average 25 per cent as a result of increased competition - an increased number of tenders in each procurement. ProTender.com will open up the European market and facilitate cross-border tenders by containing a translation tool and by containing standard documents and templates adjusted for each national market, e.g contract laws differ. Thus, a procuring entity in the UK can prepare the tender documents in ProTender.com in English, a potential tenderer can pick them up in Italian or any other EU-or EEA-language, prepare the tender in ProTender.com in that language, send the tender via ProTender.com and the procuring entity can pick the tender up in English. Thus, ProTender.com will remove the language barriers within the European Union and the EEA.

The Internet provides the means and the possibilities to create a tool as ProTender.com, that can radically change public procurement and tendering, not the least by increased efficiency and increased competition.

It is often mentioned in the debate concerning electronic public procurement, that there is a risk that Small and Medium sized Enterprises could be closed out from tendering if the requirements for technical means, such as installation of systems are too burdensome for these companies. However, this is no longer the case. With a tool as ProTender.com, the user simply needs a computer with an Internet connection.

That is all. There is not any need for investments or training. The tool contains a navigation that is self-instructive. In fact, a European Internet based tool will open new business opportunities for SMEs.
There are, of course, legal implications to consider in connection with electronic public procurement. First should be mentioned, the possibility to safeguard the legality through the electronic tool. This function has considerable effect for procuring entities, by increased certainty and decreased risk exposure for appeals, and for the supplier by the tender's increased conformity with the tender documents.

The acceptance of electronic signatures will have positive effect on the electronic public procurement process. The former requirements for personal signature of tenders and contracts had the consequence that these steps in the procedure had to be manual. When the use of electronic signatures is mentally and practically accepted in the public sector, an Internet based tool, such as ProTender.com can be used through the full public procurements process and thus optimal efficiency can be obtained.

The use of framework agreements is supported in ProTender.com. We believe that the proposal is an improvement in the respect of legal certainty concerning the use of framework agreements. As the former Head business lawyer of the Region of Stockholm, I have positive experience of the use of framework agreements. In my opinion, the clue is, as is stated in the proposed Directive, that the framework agreement itself is procured in accordance with the public procurement rules.

Lastly, the point on a common vocabulary is of outmost importance to electronic procurement. It is important with a product and services standard such as the CPV and we welcome an improved structure of the CPV. However, the need goes beyond this. For the functioning of electronic public procurement, a common standard for documents is needed. Today, such a standard does to a limited extent exist for public procurement notices. But an advanced standard is needed for tender documents, appendixes, notices, tenders, contracts and any other document that could be relevant in a procurement. Concerning common vocabulary and document standards we consider the proposed Directive too limited.

It can be concluded that the Internet and the Internet technology make it possible to create the means to improve public procurement by increased efficiency and legality in the process, improved access to procurements and information for potential tenderers, increased competition by improved possibilities for cross-border tendering and increased possibilities for SMEs to tender. In short, the objectives of the public procurement legislation can be obtained by the use of e-procurement.

II. g) Information technologies and public procurement

Millstream Associates Ltd.

European Parliament

Committee on Legal Affairs and the Internal Market

Hearing on the Revision of the Public Procurement Directives, 9th January 2001

Tim Williams, Managing Director – Millstream Associates Limited

I have two major points to make on the new legislative package, the first point concerns the overall level of compliance with the procurement directives and the second relates to how accessible public procurement opportunities are to small and medium sized enterprises (SME's).

Before I begin, I thought it would be useful to provide some background on the activities of my company, to explain the perspective from which we view the procurement legislation. Since 1993 we have provided a tender information service by the name of 'Tenders Direct' which matches tender notices, published in Supplement S of the Official Journal, with the products and services provided by our subscribing companies. We provide information to approximately 15,000 companies through trade magazines, our internet sites (www.tendersdirect.co.uk and www.tendersdirekt.de) and the subscription service which is the core of our business.

We consider ourselves to be in a strong position to comment on the practical implementation of the procurement directives as we review all of the tender notices published in the Official Journal, discuss requirements with contracting authorities as well as observing and analysing the responses of our customers to the tender notices.

Compliance with European Procurement Directives

The Community has repeatedly affirmed, most recently at the Lisbon summit, that public procurement policy is a key tool in the establishment of the Single Market. Yet by the Commission's own estimates the Official Journal currently contains less than 30% of the tender notices that should be advertised under the requirements of the existing legislation, that is, over 70% of procurement is not being conducted in an openly competitive and transparent market. This is detrimental to the Community as a whole, but is particularly disadvantageous to SME's who lack alternative resources to identify these opportunities.

After the award of a contract governed by the Directives a contracting authority is required to publish a contract award notice. However, only 25-30% of the tenders published in the Official Journal subsequently result in the publication of a contract award notice. Given that only 30% of the required tender notices are being advertised in the Official Journal in the first place, this suggests that 90% of eligible contract awards by the public sector are not being published.

Given the importance of procurement policy to the Community, why is it that compliance with the Directives is so low? Publicly the Commission's view is that the complexity of the existing Directive's means that contracting authorities do not understand the obligations placed upon them. The new legislative package, which we are discussing today, is designed to address this issue, although this initiative is to be

welcomed, in our view the degree of simplification that has been introduced is unlikely to have any significant effect on the level of compliance.

In our opinion the one measure that is holding back the development of an open and transparent market is the lack of an effective monitoring system together with effective penalties for organisations that continue to ignore their obligations. The two new Directives carry forward exactly the same requirements as the existing legislation, which requires the member states to provide statistical reports to the European Commission. These reports should include the number and value of contracts classified by product type, service classification or works classification. In principle this should provide an effective mechanism for monitoring the level of compliance, however, in practice they suffer a number of fatal drawbacks, as follows:

- The Commission does not know how many entities carry out procurement activities that are covered by the Directives, let alone the identity of these entities. Without this fundamental information they cannot check that they have even received the correct number of reports. The Commission estimates that there are 400,000 entities governed by the Directives, yet less than 14,000 have ever published a tender notice in the Official Journal.
- The data in the statistical reports that are provided is frequently incomplete and inaccurate, but the Commission does not have the authority to audit the contracting authority to verify the report.
- The Commission does not currently have the resources to analyse the statistical reports. I am happy to be corrected on this point, but I believe that there is only one member of staff assigned to review these reports.

The Directives are intended to be self-policing in that an aggrieved supplier can take action in the Civil Courts to have the tender process set aside or obtain damages. However, the reality is that in all but the most flagrant breaches no action is taken. The most common reasons for this are as follows:

- It is extremely difficult for an external party to obtain sufficient information to determine whether an infringement has occurred.
- The supplier is ignorant of the contracting authority's obligations and/or the arbitration and legal remedies available to them.
- Suppliers are reluctant to take legal action against a potential customer
- Uncertainty of successful outcome versus high cost and protracted timescale of legal action.

In addition, the remedies are only available to an aggrieved contractor i.e. an entity that can claim it should have been considered for the contract and that would have stood a reasonable chance of being successful. Interested third parties, such as my company, are not able to raise a legal action against an offending awarding authority.

There is no penalty for failure to publish a contract award notice.

I'll conclude my talk by listing our proposals for tackling these deficiencies. But before I finish I would briefly like to cover the accessibility of public procurement opportunities to SME's.

Access for SME's

I would like to quote a short extract from the Presidency Conclusions of the Lisbon European Council held in March last year (2000).

'The European Council …. asks the Commission, the Council and the Member States, each in accordance with their respective powers … to conclude work in good time on the forthcoming proposals to update public procurement rules, ***in particular to make them accessible to SMEs****…..'*

The financial thresholds in the Directives (i.e. a minimum of € 139,000) put the contracts out of reach of many smaller companies. This is aggravated by the rapidly growing trend for purchasing to be carried out by large consortia which aggregate the requirements of a number of awarding authorities into a single large contract. Only the very largest companies are able to meet the requirements of these contracts.

In our opinion the proposed new Directives do absolutely nothing to improve access to public procurement opportunities for SME's.

Conclusions

1. The procurement regime established by the 'classic directives' (92/50, 93/36, 93/37 and 93/38) essentially makes good business sense and if applied properly would be beneficial to the individual contracting authority, the tax payers of the member states and the Community as a whole through the effective development of the Single Market.

2. At present, compliance is very poor, although it is slowly improving. Less than 30% of eligible contracts are being advertised in the Official Journal and of these only 25% result in the publication of a contract award notice.

3. The proposed new Directives are a welcome initiative to simplify the legislation, but in isolation this will not produce a significant improvement in compliance.

4. Both the existing Directives and the new proposals specify a statistical reporting format that should provide an adequate monitoring framework. However, the European Commission has allocated insufficient resources to the monitoring and analysis of these reports, to the extent that they have become largely worthless.

5. There is no mechanism to audit the procurement activities of contracting authorities in order to verify the accuracy of the statistical reports.

6. It is extremely difficult for an external party to obtain sufficient information to determine whether an infringement of the Directives has occurred.

7. The legal remedies available under Directives 89/665 and 92/13 are inappropriate in the majority of cases due to the uncertain outcome, the extended timescale involved and the potentially ruinous costs of legal action.

8. The financial thresholds place the majority of contracts outside the reach of smaller companies. This is aggravated by the increasing number of consortia contracts that aggregate the requirements of many contracting authorities.

Proposals

1. Require Member States to forward an annual report to the Commission identifying by name all the contracting authorities or entities governed by the Directives.

2. Require the European Commission to ensure that it has received a statistical report from all of the contracting authorities or entities identified by the Member States.

3. Require the European Commission to carry out sufficient analysis of the statistical reports to identify areas of non-compliance and/or publish the statistical reports so that the information is available to interested parties.

4. Require the Member States to audit a percentage of contracting authorities each year to verify the accuracy of their statistical reports. The selection of contracting authorities for audit to be carried out by a mixture of random selection and identified non-compliance.

5. Impose a fixed penalty (circa € 250) for each failure to submit a statistical report, publish a tender notice or publish a contract award notice.

In addition if the Parliament, Council and the Commission are serious about improving access to opportunities for SME's, there are two measures that would have a direct effect:

i Restrict the growth of purchasing consortia which aggregate the requirements of multiple contracting authorities.

ii Lower the financial thresholds

Member State	Public Procurement (€ Billion)	GDP (€ Billion)	Value Published in OJ (€ Billion)	Procurement as % of GDP	Tenders Published as % of GDP	% Procurement Published in OJ	1.1.2. No. of entities Publishing in OJ
Greece	14.31	108.58	6.39	13.2%	5.9%	44.7%	396
Belgium	17.82	223.14	4.43	8.0%	2.0%	24.9%	419
Ireland	7.95	75.85	1.5	10.5%	2.0%	18.9%	130
France	125.41	1297.40	23.54	9.7%	1.8%	18.8%	3186
Luxembourg	1.94	16.39	0.35	11.8%	2.1%	18.0%	40
Portugal	13.91	97.64	2.16	14.2%	2.2%	15.5%	236
Sweden	34.47	212.00	5.26	16.3%	2.5%	15.3%	606
Denmark	23.31	155.79	3.52	15.0%	2.3%	15.1%	527
Spain	56.39	520.20	7.85	10.8%	1.5%	13.9%	715
United Kingdom	276.55	1252.78	38.27	22.1%	3.1%	13.8%	1694
Italy	114.12	1058.70	13.92	10.8%	1.3%	12.2%	1276
Finland	14.93	114.79	1.69	13.0%	1.5%	11.3%	270
Netherlands	36.94	349.68	3.69	10.6%	1.1%	10.0%	573
Austria	33.06	188.45	2.77	17.5%	1.5%	8.4%	413
Germany	282.53	1921.76	21.54	14.7%	1.1%	7.6%	3114
Total	**1053.64**	**7593.14**	**136.88**	**13.2%**	**1.8%**	**13.0%**	**13595**

Sources: Eurostat Yearbook 2000
Single Market News No. 20, March 2000

Amendments suggested be Tim Williams

On the coordination of procedures for the award of public supply contracts, public service contracts and public works contracts

Article 74
Statistical Duties

1. In order to permit assessment of the results of applying this Directive, Member States shall forward to the Commission a statistical report, prepared in accordance with Article 75, separately addressing public supply, services and works contracts awarded by contracting authorities during the preceding year, not later than 31 October each year.	1. In order to permit assessment of the results of applying this Directive, Member States shall forward to the Commission a report listing all bodies that, during the preceding year, were defined as 'contracting authorities' by Article 1 (5), not later than 30 April each year. This report shall be published by the Commission in the *Official Journal of the European Communities* at the beginning of the month of June following receipt.
	2. For each contracting authority listed in the report referred to above at 1. the Member States shall forward to the Commission a statistical report, prepared in accordance with Article 75, separately addressing public supply, services and works contracts awarded by the contracting authorities during the preceding year, not later than 31 October each year.
	3. The Commission shall review and analyse the statistical reports to determine whether all the 'contracting authorities' have fulfilled their obligations with regard to the publication of notices in the Official Journal.
	4. The Member States shall audit 5% of contracting authorities each year to verify the accuracy of their statistical reports. The selection of contracting authorities for audit to be carried out by a mixture of random selection and identified non-compliance.

Justification

1. There is currently no defined list of 'contracting authorities' in each Member State. In order to assess the results of this Directive, the European Commission needs a definitive list in order to determine whether it has received all the statistical reports that should have been submitted. The current situation is that the statistical reports are currently incomplete, submitted late or not submitted at all.

2. Paragraph 2 re-phrases the original paragraph 1 to take account of the requirements of the new Paragraph 1.

3. Based on estimates published by DG Internal Market of the European Commission the number of tender notices published by the 'contracting authorities' is between 25%-30% of the number that should be published. The Commission currently allocates insufficient resources to adequately monitor and enforce the obligations of the contracting authorities with regard to the publication of notices.

4. The current statistical reports submitted by the contracting authorities are frequently inaccurate and incomplete. A programme of random and selective audit will quantify the degree of inaccuracy in the reports and will encourage the contracting authorities to exercise a greater degree of care in the submission of their reports.

Article 1

5. "Contracting authorities" means the State, regional or local authorities, bodies governed by public law***, associations formed by one or several of such authorities or one or several of such bodies governed by public law.***	5. "Contracting authorities" means the State, regional or local authorities ***and*** bodies governed by public law.

Article 34

	4. Notices published by an association formed by one or several of such authorities or one or several of such bodies governed by public law shall not relieve a "Contracting Authority" of its individual obligations under this article.

Justification

1. The Lisbon European Council held in March last year (2000) concluded with the following request.

The European Council …. asks the Commission, the Council and the Member States, each in accordance with their respective powers … to conclude work in good time on the forthcoming proposals to update public procurement rules, ***in particular to make them accessible to SMEs****…..'*

2. Associations of individual "Contracting Authorities" are increasingly being formed specifically in order to aggregate the procurement requirements of several such authorities.

3. The aggregation of procurement requirements usually increases the value of the contract to such an extent that SME suppliers are unable to tender for the contract by virtue of their lack of production capacity or financial resources. As such these associations directly exclude SME's from public procurement opportunities.

4. The amendments proposed above are intended to remove the status of "Contracting Authority" from such "Associations" so that where they are acting in a procurement role they are treated as "Economic Operators" i.e. as simply another supplier, service provider, or contractor. Such an amendment will provide opportunities for SME's in the public procurement market but importantly will also allow "Contracting Authorities" the flexibility to aggregate their requirements with other "Authorities" if this demonstrably provides 'best value.'

Committee of the Regions

COM-6/023

OPINION
of the
Committee of the Regions
of 13 December 2000
on the
Proposal for a Directive of the European Parliament and of the Council on the coordination of procedures for the award of public supply contracts, public service contracts and public works contracts
and 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) 275 final - 2000/0115 (COD)and COM(2000) 276 final - 2000/0117 (COD))

The Committee of the Regions

HAVING REGARD TO Proposal for a Directive of the European Parliament and of the Council on the coordination of procedures for the award of public supply contracts, public service contracts and public works contracts and 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) 275 final - 2000/0115 (COD) and COM (2000) 276 final - 2000/0117 (COD));

HAVING REGARD TO the decision of the Council on 8 September 2000, under the first paragraph of Article 265 of the Treaty establishing the European Community, to consult it on this matter;

HAVING REGARD TO the decision taken by its Bureau on 2 June 1999, to draw up an opinion on this matter and to instruct Commission 6 for Employment, Economic Policy, Single Market, Industry and SMEs to undertake the preparatory work;

HAVING REGARD TO the Commission's Communication on Public Procurement in the European Union, COM(98) 143 final;

HAVING REGARD TO its opinion on the Commission's Communication on Public Procurement in the European Union, CdR 108/1998 fin[1];

HAVING REGARD TO the Commission's Green Paper on Public Procurement in the European Union: Exploring the Way Forward, COM(96) 583 final;

HAVING REGARD TO its opinion on the Green Paper on public procurement in the European Union: Exploring the way forward, CdR 81/1997 fin[2];

HAVING REGARD TO the decision of its President of 26 October 2000 to appoint Ms Segersten-Larsson as rapporteur general to draw up an opinion on this subject, in accordance with Rule 40.2 of the Rules of Procedure of the Committee of the Regions;

HAVING REGARD TO a number of relevant European Court of Justice rulings, such as the judgment of the Court of Justice of 26 September 2000 in case C-225/98, the Commission versus France, for failure to fulfil its obligations under Council Directive 71/305/EEC of 26 July 1971, as amended by Council Directive 89/440/EEC of 18 July 1989 and Council Directive 93/37/EEC of 14 June 1993, concerning various procedures for the award of public works contracts for the construction and maintenance of school buildings;

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1 OJ C 373 of 2.12.1998, p. 13

2 OJ C 244 of 11.8.1997, p. 28

HAVING REGARD TO the draft opinion CdR 312/2000 rev. 1, drawn up by the general rapporteur **Ms Segersten-Larsson,** S - EPP;

adopted the following opinion at its 36th plenary session, held on 13-14 December 2000 (meeting of 13 December):

2. **Views of the Committee of the Regions**

2.1. The Committee of the Regions (COR) welcomes the fact that the Commission has taken on board the criticism of the unnecessarily bureaucratic nature and application of the procurement rules, and the Commission's intentions to emphasise increased flexibility, modernisation and simplification.

2.2. The COR endorses the idea of merging the three standard directives into a single directive. The readability of the Directive has been simplified considerably by introducing contents pages and intermediate headings in the texts. This is a positive development.

2.3. It is also positive that the proposal would increase opportunities for electronic trade, and this is entirely in line with what the COR has proposed in the past.

2.4. It quite rightly includes measures to discourage organised crime in public procurement.

2.5. The COR also welcomes the fact that the telecommunications sector is exempted from the Utilities Directive.

2.6. However, the COR feels that the Commission has sometimes lost its way in its proposals and that, as presented, they lack certain elements. Unfortunately, the COR also thinks that some of the proposals would be counter-productive.

2.7. The COR considers that the Commission's plans to address a number of important topics including environmental and social considerations in procurement in non-binding interpretative documents are not appropriate and wishes to see these important topics properly addressed in the directives.

1.8 The COR considers that the proposed Directive must state explicitly that it is possible for contracting bodies to use social or environmental considerations as award criteria, and that these must be mentioned expressly in the invitation to tender. Purely economic criteria should not be the only ones to determine the best and most advantageous tender.

3. **The Committee of the Regions' recommendations on the proposed directive**

3.1. **Electronic procurement**

3.1.1. While the COR generally welcomes the new provisions on electronic procurement and the reduction in time limits there are areas in which the COR wishes to see the directive go further. The Committee feels that it is particularly important to address all aspects of electronic procurement as this is a fast changing

field and the situation in 2002 when the directive is implemented will be very different to today.

3.1.2. Specifically, the COR urges the Commission to include provisions explaining how the placing of orders through electronic catalogues (online “marketplaces” or “shopping malls”) should be treated under the directive. This should be closely linked to the provisions on framework agreements, which should be revised in accordance with the COR’s suggestions below.

3.2. **New rules on particularly complex procurement contracts**

3.2.1. The COR earlier warmly welcomed the Commission's proposal to introduce more flexible forms of procurement, particularly procurement of complicated equipment and similar contracts. In its Opinion on the Green Paper (point 2.2.13) the COR said that "provisions on negotiated procedures similar to those of those of the Utilities Directive should be incorporated into other directives".

3.2.2. The COR understands that the new procedure meets the specific requirements of some Member States whose contracting authorities are engaged in public-private partnerships (PPP) projects on a large scale. However the COR takes the view that the Commission’s proposals are not sufficiently far reaching because the procedure is neither sufficiently flexible nor generally accessible. Procurement of services is a field which generally requires much contact between buyers and sellers throughout the procurement process. This is not an exceptional requirement, and the present rules are far too rigid in this area.

3.2.3. The term “objectively” in the grounds for using the procedure needs to be explained, and an additional ground needs to be added to reflect the reality of PPPs, namely:

" Cannot effectively allocate risks and rewards under the contract without negotiation with economic operators."

3.2.4. The COR is particularly concerned about the provision concerning “outline solutions”. Economic operators will consider that they have intellectual property rights in any such outline solutions and may demand payment for such solutions whether or not they are used. As local authorities will have no budget to pay for outline solutions this will effectively prevent them using the new procedure. As an alternative the COR proposes that the term “outline solution” is substituted. This would not represent a technical solution but describe the economic operators' approach to carrying out the contract and would help the contracting authority to better define its requirements in the specifications which form the basis of the subsequent negotiations.

3.2.5. In its Opinion on the Green Paper, the COR said that "it cannot be considered necessary to suspend the procurement procedure because the price offered is higher than the contracting entity can afford, when negotiation could have produced a lower price acceptable to both purchaser and seller". This problem is not solved by the current proposals.

3.2.6. The COR urges the Commission to amend the directive so that the contracting entity has the possibility to use a negotiated procedure characterised by great flexibility, and to make it possible to hold a wide-ranging dialogue with suppliers before, during and after the procurement process. The Commission ought here to take the provisions of the Utilities Directive as a model.

3.3. **Framework agreements**

3.3.1. In its earlier opinion, the COR expressed the view that framework agreements ought to be expressly permitted in all the directives, and it is to be welcomed that the Commission proposes the regulation of framework agreements. However, the COR takes the view that the proposed regulations are unsatisfactory and do not provide the necessary flexibility.

3.3.2. In its explanatory statement, the Commission distinguishes between framework contracts and framework agreements. Framework agreements are not regarded as contracts within the meaning of the directive, since they do not include all the necessary elements for them to be used as the basis for a delivery.

3.3.3.

3.3.4. However, framework contracts are covered by the directive's definition of public contracts. The explanatory statement gives a contract with an order form as an example of such a contract. In some Member States "framework contracts" of this kind are considered non-binding and hence referred to as "framework arrangements" or "framework agreements" in those Member States. By using the term "framework agreement" in the directive to describe what is essentially a new procedure, the Commission is adding to the confusion rather than bringing clarity.

3.3.5. The Commission's proposals cover only framework agreements in the special sense accorded to this term in the directive, but in the COR's view this is not stated with sufficient clarity. The definition must be clearer. In particular, it should be clear to those Member States who regularly award non-binding framework contracts (which they call framework arrangements or agreements) that these are to be treated in the same way as any other public contracts and not as framework agreements in the special sense of the draft directive.

3.3.6. The COR sets great store by this, so that doubts will not arise later as to whether agreements now regarded as framework contracts are covered by the new rules or not. For example, this covers the customer choice models used in a number of member countries, where a contracting authority enters into a contract with a number of suppliers, and the individual citizen later chooses the supplier, along with the municipal or regional contracting authority's contract.

3.3.7. Nor is the procedure which would apply to a framework agreement sufficiently flexible. This particularly applies to the fact that competition has to be reopened every time the agreement is used, which generates more work for the contracting entity and defeats the purpose of a framework agreement. It also applies to the requirement for at least three suppliers and the time-limit on the duration of the agreement. This procedure may have a use but it is so different from the normal way in which framework agreements are used in some Member States that it really should be called by another name.

3.3.8. The Commission seems to have assumed above all that the provisions of the framework agreements will be used mainly for procurement of computer equipment and similar procurement contracts. However, procurement under the framework agreements is also used for other types of procurement in order to satisfy an individual requirement, for example facilities for the handicapped: in that respect the proposed method is not realistic.

3.3.9. If the Commission is intent on expressly covering framework agreements in the classical directive, the COR takes the view that the text proposed for the Utilities Directive describes much better the wide range of different techniques which Member States regard as framework agreements and provides the necessary flexibility.

3.4. **Modifications to threshold values**

3.4.1. The Commission proposes that the number of threshold values be reduced and that they be given in euro. It is good in itself for the number of threshold values to be reduced, but expressing them in euro must not mean in practice that any value is reduced from its present level. However, the proposal does in practice mean a reduction in most cases - something which the COR cannot accept.

3.4.2. The COR has stated in earlier opinions that the threshold values are set far too low and ought to be raised. The COR holds to this view and calls upon the Commission to take steps to renegotiate the Government Procurement Agreement (GPA) on this point.

3.4.3. The low threshold values are particularly problematic in the procurement of services, since transaction costs are often relatively high in relation to the value of the contract, as the COR has already pointed out at an earlier stage. Part of the problem with the low threshold values could therefore be solved if a provision were included in the directive to the effect that negotiated procurement with prior announcement would always be permitted for minor service procurement contracts, e.g. for contracts below a value of EUR 400,000. This should enhance flexibility.

3.5. **Criteria for quality selection**

3.5.1. The COR welcomes the fact that the Commission proposes some tightening up with regard to breaches of law by suppliers. It is the COR's view that dishonest suppliers should not be allowed to take part in public procurement.

3.5.2. However, the COR takes the view that the Commission must clarify which situations are covered by Article 46 (1) which states that an economic operator shall be excluded from a procurement contract if he has been convicted of corruption in the previous five years. In countries where a legal person cannot be convicted of corruption, would the provision apply to all the supplier's employees? In the affirmative, are penalties to be imposed - and if so, which penalties - if the economic operator has, for example, introduced appropriate preventive measures in his enterprise or has dismissed without notice the manager who committed the criminal offences without the knowledge of the economic operator? What would then happen if such an employee were to move to another employer or start a new firm? What happens in a case where only a supplier who has been convicted of corruption can deliver certain goods, or where it would be very costly to change supplier? The COR thinks that these questions must be discussed further. It should also be borne in mind here that the penalties would be imposed in accordance with national practice since there is, as yet, no European criminal law.

3.5.3. The proposed wording would most definitely cause problems for the contracting entities and for citizens in the area of pharmaceutical procurement, in cases involving a unique, life-sustaining drug which cannot be obtained from any other supplier. The Commission must consider a different wording for this very special and unusual case.

3.5.4. The COR regards it as most important that the contracting entities should be able to require suppliers to comply with national social sector regulations in the Member State concerned. A contracting entity should not have to accept suppliers which, for instance, violate rules on job protection, the working environment, minimum pay or child labour. Such requirements should be clearly stated in the invitation to tender, and not be discriminatory. These key aspects are dealt with by the European Court of Justice in the "Beentjes" case (31/87) and, most recently, in case C-225/98. The COR feels that it is essential for the principles established in case law to be spelt out clearly in the directive.

3.5.5. The COR feels strongly that contracting authorities should be able to ask for additional categories of information at the qualitative selection stage. Specifically, authorities should be permitted to seek information, e.g. on economic operators' policy regarding environmental management.

3.5.6. Contract award criteria

3.5.7. The Commission proposes that the criteria for awarding contracts, where it is not just a matter of the lowest price, should be directly linked with the nature of the contract: this is a new departure. The consequence of this is that environmental requirements cannot be imposed on production processes. The COR, in its Opinion on the Communication on public procurement (point 3.1.2), stated: "The COR considers it crucial in public procurement to be able, in addition to laying down certain conditions with regard to a product's properties (e.g. the PVC content of plastic), to impose objective requirements concerning the overall environmental impact of a product and of a company, including the production process". The COR reaffirms that view.

3.5.8.

3.5.9. However, the COR welcomes the fact that the environment is mentioned among the criteria to be taken into account in awarding contracts. Although this is not a substantive change - since the adjustment is only by way of example - it is an important signal and a reminder to contracting entities that it is right to consider environmental impact in public procurement. However, the COR takes the view that the word "environmental impact" should be used in the text of the directive instead of "environmental characteristics", since the latter wording reduces the scope to impose environmental requirements than exist at present.

3.5.10.

3.5.11. The Commission also proposes that the contracting authority should specify the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender.

3.5.12.

3.5.13. The Commission's intention is to ensure greater openness in procurement procedures and equal treatment for suppliers. The COR does not think that the rule is likely to have this effect. The rule is based on an unrealistic idea that the value of each of the criteria can be determined when the procurement procedure begins. However, this presupposes that the contracting authorities have complete information at their disposal in advance; this would probably only apply in exceptional cases.

3.5.14.

3.5.15. The Commission proposal implies that the scheme would be set up when various parameters have been established and that, with the help of the weighting, it could later be established with mathematical exactitude which tender is economically most advantageous. In practice this is an almost impossible task and, if it also involves "soft" parameters such as aesthetic profile, it becomes meaningless.

3.5.16.

3.5.17. It would be completely impossible to weight the criteria in procurement contracts where a large number of different articles are bought in one and the same contract, e.g. foodstuffs, medical equipment or medicines. In procurement of medicines for hospital use, a county council in Sweden normally buys all the various medicines it needs in one procurement contract. If the criteria were to be weighted, a different weighting would be needed for each group of products. The criteria of "taste" naturally carries more weight when the medicines are for small children than when they are for adults. This means that the procurement contracts would have to be divided up so that the same weighting applied within each group; this would lead to a situation where a large procurement contract exceeding the threshold value would have to be divided up into many small procurement contracts, many of which would certainly fall below the threshold value.

3.5.18.

3.5.19. Professional buyers who have seen the proposal do not think it will work in practice. The COR does not think that impracticable rules should be included in the directive. There is also a high risk that the rule might lead to a large number of unnecessary court cases relating to the weighting.

3.5.20.

3.5.21. 2.6.8 The contracting authorities should be able to include objective social criteria which are not discriminatory and which guarantee equality of treatment and free competition.

3.5.22.

3.5.23. Special contract provisions

3.5.24.

3.5.25. The Commission proposes a new rule on the possibility of imposing special requirements on the execution of the contract, the aim of which is to codify existing law on the subject. However, the wording is restrictive in relation to the case law which it is intended to codify, since it introduces a requirement for the condition to be related to the performance of the contract.

3.5.26.

3.5.27. The COR thinks it important that the wording which provides the possibility of imposing special conditions on performance of the contract should not prejudice the contracting authorities' right to decide themselves on what shall be procured; for example, this applies to the possibility of imposing environmental requirements on production processes, and to social requirements which must of course be non-discriminatory so that the requirement can be met by suppliers of all Member States.

3.5.28.

3.5.29. The common procurement vocabulary (CPV)

3.5.30.

3.5.31. The COR thinks there is a clear advantage in employing only one system. The problem is that the existing CPV nomenclature gives rise to many problems because of its heterogeneous structure and its ambiguity in many areas.

3.5.32.

3.5.33. The practitioners in this field point out that it is difficult to find one's way in the CPV (for example, parking meters are listed with medical apparatus and

pharmaceutical products), that it is difficult to know which number is relevant in an individual case (e.g. is a given implant surgical or orthopaedic?); in addition, certain headings are missing in some groups (in the health and nursing services group, urban cleansing services are listed while child health care is missing). The deficiencies in the nomenclature also cause problems for suppliers. They say that it is difficult to find relevant notices and that they lack basic data on procurement contracts because the nomenclature has misled them to think that the contract concerned a certain product or service, whereas in reality something quite different is involved. These problems also constitute an obstacle to the extension of electronic commerce.

3.5.34.

3.5.35. The COR therefore urges the Commission to improve the CPV nomenclature as soon as possible so as to make it an effective instrument for the future.

3.5.36.

3.5.37. An improved CPV could also be a tool enabling the Commission to obtain correct procurement statistics directly from the Tenders Electronic Daily (TED), thereby reducing the administrative burden on contracting entities.

3.5.38.

3.5.39. Exclusive rights

3.5.40.

3.5.41. The proposal on exclusive rights granted to a body other than a contracting authority (in Article 55) is unclear. The wording is far too broad, as it could perhaps be interpreted as covering all the contracting authority's contracts with private suppliers: from a strictly logical viewpoint, any contract can be said to contain an element of exclusive right. It ought to be made clear, too, that the provision concerns only contracts related to the exclusive right itself.

3.5.42.

3.5.43. Deadlines in negotiated procurement

3.5.44.

3.5.45. The Commission proposes a tightening of the rules on deadlines in negotiated procurement: a time-limit of 40 days for receipt of a tender is proposed, whereas in the existing directive no deadline is laid down for this.

3.5.46.

3.5.47. The COR thinks that the proposal would mean less flexibility, and that the proposed change should not be introduced.

3.5.48.

3.5.49. The Committee of the Regions' recommendations on questions not covered in the draft directives

3.5.50.

3.5.51. Procurement compatible with the environment

3.5.52.

3.5.53. In its earlier opinions, the COR devoted special attention to the possibility of imposing environmental requirements on procurement contracts. The current proposals for directives are unsatisfactory on this point, since some of the proposals apparently tighten the rules. The COR takes the view that it is essential for regional and local authorities to have the right to decide for themselves what is to be procured. The procurement directive should simply ensure openness and equal treatment in the procurement process. For example, a contracting entity which wishes to buy organic vegetables, or hormone-free meat, should have the right to do so and to refer to relevant environmental markings and certification systems. These requirements are to be set out in the specifications.

3.5.54.

3.5.55. Since the Commission, in its draft explanatory communication on environment-friendly procurement, and by tightening up the draft directives, appears to some extent to question this right to buy what one wishes, the COR feels it important for the Commission to include in the directive provisions making it possible to impose requirements for environmental marking and certification on production processes and delivery of services.

3.5.56.

3.5.57. Inter-municipal cooperation

3.5.58.

3.5.59. In its opinions on the Green Paper and on the Communication on public procurement, the COR referred to the problems which the procurement directive raises for inter-municipal cooperation.

3.5.60.

3.5.61. In the opinion on the Green Paper (point 2.4.3), the COR stated that "it must be established that procurement by regional and local authorities from their own independent legal entities does not fall within the scope of the directives and must be regarded as production carried out under their own management." The Commission was also urged to clarify that the transfer of tasks from e.g. a

municipality to an inter-municipal cooperative enterprise (e.g. a waste disposal consortium) will not be covered by the directive.

3.5.62.

3.5.63. These problems have also been dealt with by the Court of Justice in the Teckal case (Case C-107/98) and in the Arnhem case (Case C-360/96) and by national courts.

3.5.64.

3.5.65. The COR calls upon the Commission to clarify these questions in the procurement directive.

3.5.66.

3.5.67. Privatisation

3.5.68.

3.5.69. The COR has also drawn the Commission's attention in the past to the problems which can arise with the privatisation of public enterprises and in cases where employees are given the opportunity to set up their own business which, under contract, takes over tasks from local and regional authorities.

3.5.70.

3.5.71. The COR takes the view that the rules on service procurement should not hinder these processes. On the contrary, it should be possible, as a transitional solution and for a limited period, to purchase without a procurement procedure; this means that the competition would increase in the long run.

3.5.72.

3.5.73. Definition of service contract and the division into 'A' and 'B' services

3.5.74.

3.5.75. The Commission should consider moving certain services from the 'A' to the 'B' category. Certain financial services, for example, are not suitable for procurement under the very formal rules in category 'A', since, among other things, the provisions on time-limits make it difficult to act in a businesslike manner.

3.5.76.

3.5.77. Public service contracts are defined in the proposal as mutually binding agreements between one or more service providers and a contracting authority, which exclusively or principally should cover the services listed in Annex 1. There

has been some confusion as to the meaning of "exclusively or principally", and the phrase ought to be replaced.

3.5.78.

3.5.79. Qualification systems

3.5.80.

3.5.81. The COR urges the Commission to include provisions concerning “qualification systems” in the classic directive which parallel those in the new Utilities Directive. Such arrangements are used in several Member States and their use is now severely constrained by the procurement directives. The Committee does not see why the use of systems by the utilities concerned is considered to be consistent with Community law while other contracting authorities are prevented from using them.

3.5.82.

3.5.83. Representation of local and regional authorities

3.5.84.

3.5.85. The COR wishes to draw the Commission's attention once again to the fact that, despite the central role played by local and regional authorities in the application of procurement rules, they are represented only to a very limited extent in the bodies which the Commission regularly consults.

3.5.86.

3.5.87. The COR therefore urges the Commission to ensure that the local and regional levels are represented in these bodies; this would enable the Commission to make better use of the experience accumulated by the local and regional contracting authorities.

3.5.88.

Brussels, 13 December 2000

The President of the Committee of the Regions	The Secretary-General of the Committee of the Regions
Jos Chabert	**Vincenzo Falcone**

IV. Statements by Experts

Council of European Municipatilies and Regions (CEMR)

POSITION PAPER
COUNCIL OF EUROPEAN MUNICIPALITIES & REGIONS
ON THE PROPOSED LEGISLATIVE PACKAGE ON PUBLIC PROCUREMENT

Final Draft

Introduction

This paper sets out the position of the Council of European Municipalities and Regions (CEMR) regarding the proposed legislative package on public procurement.

The focus of the paper is on the proposed changes to the rules which apply to public authorities (which we refer to as the draft Public Sector Directive for short), as the changes to the Utilities Directive are comparatively minor.

Generally, the paper follows the structure of the explanatory memorandum which accompanies the public sector proposal. However, additional comments are included on environmental and social considerations in procurement, small and medium sized enterprises, qualification systems, inter-municipal co-operation and privatisation.

It may be noted that the CEMR wishes to see the position with regard to environmental and social considerations and small and medium-sized enterprises set out clearly in the new directive. The Commission proposes to address these topics in (non-binding) interpretative communications but the CEMR considers that this is insufficient on its own. There must be a sound legal foundation in the directive for action in these fields.

Simplification

The proposed introduction of a single directive covering works, supplies and services (the new Public Sector Directive) is welcomed as is the elimination of inconsistencies between the rules applicable to contracts for works, goods and services.

The new layout, which more closely follows the logical sequence of a procurement, will also make it easier for authorities to understand the rules and so comply with them.

Electronic Procurement

The proposed amendment of the rules to expressly permit electronic procurement is supported as are the incentives for its adoption (the reduced time limits). However, the CEMR would also like to see a reduction in time limits where electronic procurement is used for particularly complex contracts.

The CEMR believes that the stretching European targets set for the introduction of electronic procurement are unlikely to be met if no significant action is taken until the directive is implemented (July 2002 or later). The CEMR therefore encourages local authorities to move to full electronic procurement as soon as practicable and we recommend that the European institutions take parallel steps.

The CEMR would like to see the directive expressly address the issues of collective procurement by means of electronic “shopping malls” or “marketplaces” and the use of “reverse

auctions" in public procurement. Both are already in use in US government procurement and are likely to be introduced in Europe in the near future. It would be a missed opportunity not to clarify the applicable procurement rules in the current legislative package.

For example, it should be made clear that framework agreements awarded under the European rules can be used to compile electronic catalogues for online "marketplaces" (but see the discussion below on the proper meaning of "framework agreements").

The directive should also make it clear that "lowest price" as a contract award criterion can mean the lowest price obtained after controlled rounds of electronic bidding (a "reverse auction") as well as the lowest price initially received. Reverse auctions will not be appropriate for all types of procurement but contracting authorities should have the opportunity to use this approach where it makes sense.

Particularly Complex Contracts

The CEMR welcomes the proposal to introduce a new negotiated procedure for the award of particularly complex contracts as this will be of benefit to local authorities in those Member States which have large-scale public-private partnership (PPP) programmes. However, we are concerned that the proposal appears to be a variant on the restricted procedure rather than the negotiated procedure, and specifically that it does not permit negotiation over the final offers that are submitted.

We are also disappointed that the Commission has not introduced more flexibility into the other procedures (open, restricted and negotiated procedures) which are used more often, as smaller local authorities in particular find these costly and complicated.

Because the thresholds are so low, comparatively small contracts must be awarded under the European rules. The CEMR believes that the requirements relating to smaller contracts (e.g. below Euro 400,000) should be relaxed. For example, authorities should be free to award these smaller contracts by a negotiated procedure.

To address the central requirement of PPP projects, the CEMR would like to see the following added to the definition of a particularly complex contract in Article 29(1)(b) –

- cannot effectively allocate risks and rewards under the contract without negotiating with economic operators.

What should authorities understand by the term "objectively" as used in the proposed definition? This must be explained.

Article 37(7)(a) increases the time limit for submission of requests to participate by 10 days where an outline solution is required. The CEMR feels that this is excessive.

The CEMR has concerns about the concept of "outline solutions". If these are thought of as technical solutions, economic operators will claim that they have intellectual property rights in those solutions (whether or not the law would protect such rights) and might demand payment for outline solutions whether or not they are used by the contracting authority. This means that local authorities would have to set aside a budget simply to pay for outline solutions. Few local

authorities are in a position to do this, so effectively they would be prevented from using the new negotiated procedure for particularly complex contracts.

The CEMR believes that "outline proposal" is a better term. This would be defined as meaning a description of the economic operator's' proposed approach to carrying out the contract and their comments on the contracting authority' draft specifications or concept for the contract. Contracting authorities would be able to revise their specifications or concept in the light of economic operators' comments and could reissue them as the basis for subsequent rounds of negotiation. Contracting authorities would thus benefit from economic operators' knowledge of the market and the range of potential technical solutions without infringing confidentiality, intellectual property rights or moral rights. All economic operators would then be in a position to enter negotiations on equal terms, preserving the principle of equal treatment.

In Article 30(1), the passage "They shall then draw up the contract documents" should be replaced with "They shall then finalise the contract documents". This is because the contract documents may be issued in draft form at the inception of the negotiated procedure (see above on outline solutions).

Framework Agreements

The CEMR is extremely unhappy with the proposed text on framework agreements (Articles 1(7) and 32). The Commission's proposals have not clarified or simplified the position on framework agreements they have added to the confusion.

The procedure described in the draft directive is a new one introduced for the first time by the legislative package. It is not a procedure that is widely used in Member States at the present time and it would not be recognised as a "framework agreement" in most Member States.

Local authorities - and central purchasing organisations acting on their behalf - generally treat framework agreements in the same way as other public contracts, advertising them in OJEC and awarding them in competition under the European rules.

Orders for specific quantities of goods are subsequently placed with economic operators in the framework on terms (which include price and delivery) agreed at the time the framework agreement was set up, and without a second round of competition. This is an efficient arrangement. It is most often used for supply contracts but sometimes also for services.

Should local authorities reading the new directive conclude that there is now only one type of framework agreement and that it is the procedure described in the directive involving two successive rounds of competition? The so-called "re-opening of competition" defeats the purpose of framework agreements as generally understood.

The CEMR would like the directives to bring clarity on the subject of framework agreements. Apart from anything else, this will be important as public authorities move towards electronic procurement and put electronic catalogues on the internet (these are based on framework agreements).

To resolve the uncertainty once and for all, the CEMR would like the text on framework agreements which has been included in the new Utilities Directive to be inserted in the Public

Sector Directive. It is much more flexible and would encompass all the varieties of framework agreement currently in use across Europe.

The CEMR accepts that there may be instances where the new two-stage procedure currently referred to in the draft directive as a "framework agreement" is appropriate (e.g. in the ICT field) but if the procedure remains it should be separately identified to prevent confusion with framework agreements as generally understood.

Technical Specifications

The proposed clarifications, which make it clear that there is no obligation to specify European Standards when a new or different standard of performance is required, are supported.

Selection and Award Criteria

The CEMR takes the view that there should be no obligation to specify the relative weighting of contract award criteria if it is not the practice of contracting authorities to apply weightings and none will be applied to the contract in question.

The changes to the criteria for qualitative selection are supported, we discuss below new categories of information which we believe contracting authorities should be able to seek in order to satisfy themselves that economic operators comply with minimum standards in the environmental and social fields.

It should be mentioned that an alternative approach would address our concerns equally well: the list of information which can be sought from economic operators could be made non-exhaustive. If this approach is taken there would clearly need to be a general requirement to avoid discrimination on nationality grounds and to give equal treatment.

Thresholds

The CEMR concurs with the proposal to simplify the system of thresholds. However, it is noted that the euro thresholds for non-central government are lowered slightly as a consequence. We believe that this should be avoided.

Indeed, the CEMR continues to hold the view that the thresholds in general are too low and urges the Commission to press for higher thresholds as part of the review of the WTO Government Procurement Agreement.

Common Procurement Vocabulary

The introduction of a single classification (nomenclature) for all matters relating procurement under the European regime is supported, provided that there is no alteration to the scope of the directives. However, the CEMR favours an internationally accepted classification (e.g. UN) which is suitable for global (electronic) procurement.

Telecommunications Sector Exclusion

The logic of excluding public authorities in the telecommunications sector from the Public Sector Directive as well from the Utilities Directive is accepted.

Environmental and Social Considerations in Procurement

The CEMR welcomes the inclusion of "environmental characteristics" in the illustrative list of contract award criteria (economically most advantageous tender) making it clear that such considerations can be taken into account at this stage.

The CEMR wishes to see the inclusion of an additional provision in Article 49 which makes it clear that an economic operator's policy and arrangements in respect of environmental management may be required as evidence of technical/professional capability (works, supplies and services contracts) at the qualitative selection stage.

Similarly, Article 50 (quality assurance standards) should be extended to cover environmental management standards (ISO 14000 and EMAS).

Article 24 (technical specifications) should be amended to make it clear that specifications can refer to EU "eco-labels".

Further, it is the CEMR's position that the revision of the procurement regime presents an opportunity to strengthen the directive's provisions on social matters as well as on the environment.

In this respect new Article 23 (incorporating the Beentjes principle that conditions relating to social matters can be incorporated into contracts provided that these are consistent with the Treaty) is welcomed. However, the CEMR's view is that the wording is more restrictive than the case law, as it requires the condition to be related to the performance of the contract. This should be amended.

However, we wish to see Article 49 amended so that an economic operator's policy and arrangements in respect of -

- occupational health and safety, and
- equal opportunities

can also be taken into consideration as evidence of technical/professional capability.

As both are the subject of minimum standards laid down in Community law (including directives on health and safety and equal opportunities, including the new Race Directive) we see no obstacle to the consideration of these matters.

We also wish to see express reference to obligations relating to occupational health and safety and equal opportunities included in Article 27 (obligations relating to employment protection provisions and working conditions).

Small and Medium Sized Enterprises

The explanatory memorandum highlights the relevance of the provisions on sub-contracting to small and medium sized enterprises (SMEs). However, the proposal contains no specific measures designed to assist SMEs or micro enterprises (MEs).

Based on the approach of the Federal Government in the United States and the new South African government, the CEMR proposes that contracting authorities be permitted to set aside up to 10% of their total annual requirement for goods, works and services for SMEs/MEs generally, and a further 5% for socio-economically disadvantaged SMEs/MEs.

Authorities would be able to meet set aside targets by reserving main or sub-contracts to SMEs/MEs.

This set aside policy would be operated in a way which is consistent with the Treaty (i.e. no national discrimination) and the WTO Government Procurement Agreement (to which the US is also subject).

Qualification systems

The CEMR wishes to see the article on "qualification systems" proposed for the Utilities Directive incorporated into the new Public Sector Directive. We see no reason why the use of qualification systems by utilities is considered to be consistent with Community law while the use of such systems is denied to public authorities.

Inter-municipal co-operation

The CEMR calls upon the Commission to amend its proposed to make it clear that procurement by contracting authorities from inter-municipal associations (e.g. a consortium established for waste disposal) is expressly excluded from the scope of the new directive.

Privatisation

The CEMR also wishes to see procurement from companies established by a contracting authority, by a number of contracting authorities acting together, by a contracting authority in conjunction with a private sector partner (a joint venture company), or by former managers or employees of a contracting authority (e.g. management or employee buy-outs) expressly excluded from the scope of the new directive.

There is much uncertainty at the moment about the rules which apply to "privatisation" in this sense.

Representation of local and regional bodies

The CEMR, in common with the Committee of the Regions, is concerned that despite the central role played by local and regional authorities in the application of the procurement rules, they are underrepresented on the bodies which the Commission regularly consults.

Greater representation would make for better decision-making and we urge the Commission to take appropriate steps to ensure that the knowledge and experience of local and regional authorities is taken into account.

Guidance

The Commission recently published a series of guidance notes on the application of the four directives. The CEMR urges the Commission to align this guidance with the new regime and to reissue at the first opportunity. We would welcome it if the new guidance contained more practical examples of how the Community rules should be applied.

December 2000

IV. Statements by Experts

María Antonia AGUDO RIAZA

PONENCIA SOBRE LA NECESIDAD DE INCLUIR CRITERIOS SOCIALES EN LA NUEVA DIRECTIVA EN MATERIA DE CONTRATACIÓN PÚBLICA.

1. **Objetivos que se persiguen introduciendo las cláusulas sociales en la contratación pública.**

   La aprobación de una nueva Directiva sobre coordinación de los procedimientos de adjudicación de los contratos públicos de suministro, de servicios y de obras que refunda en un único texto las actuales Directivas del Consejo 92/50/CEE, 93/36/CEE, 93/37/CEE y 97/52/CE incrementando la flexibilidad, la modernización y la simplificación de las mismas, es el momento adecuado para defender la inclusión de criterios sociales en los procesos de licitación pública.

   La introducción de estos criterios sociales pretende potenciar todas las políticas que contribuyan de forma eficaz a la generación de empleo. En concreto pueden materializarse en dos vertientes: una, la relativa a la integración en el mercado laboral de las personas discapacitadas, y, otra, la lucha contra el desempleo en la búsqueda de más empleo y de mejor calidad.

   La ponencia analizará cómo la incorporación de estos criterios en la contratación pública responde, por una parte, al nuevo peso que tiene la política social y de empleo en nuestro entorno, y, por otra parte, el reconocimiento de que la contratación administrativa es un instrumento para ejercer políticas públicas y, en concreto, puede ser un medio de fomento de políticas de empleo.

   Asimismo, la ponencia entrará en el análisis de las Directivas vigentes en la materia y en las distintas Sentencias del Tribunal de Justicia que deben ser tenidas en cuenta a la hora de elaborar la nueva Directiva.

2. **La nueva consideración de la política social y de empleo en Europa.**

   El momento actual es muy diferente del período en el que se elaboraron las Directivas relativas a la contratación pública.

   La política social de la Unión Europea contribuye a velar por un elevado nivel de empleo y de protección social (art. 2 del Tratado CE), la libre circulación de trabajadores, la igualdad de oportunidades entre hombres y mujeres, el refuerzo de la cohesión económica y social, la mejora de las condiciones de vida y de trabajo, un nivel elevado de protección de la salud, el fomento de una educación y una formación de calidad y la inserción social de personas con minusvalías y otras categorías desfavorecidas.

   Por otro lado, destacaremos el art. 136 del Tratado Constitutivo de la Comunidad Europea, versión consolidada, que dispone: "...La Comunidad y los Estados miembros, teniendo presentes derechos sociales fundamentales... tendrán como objetivo el fomento del empleo, la mejora de las condiciones de vida y de trabajo, a fin de conseguir su equiparación por la vía de progreso, una protección social adecuada, el diálogo social, el desarrollo de los recursos humanos para conseguir un nivel de empleo adecuado y duradero y la lucha con las exclusiones. A tal fin la Comunidad y los Estados Miembros emprenderán acciones en las que se tenga en cuenta la diversidad de las prácticas nacionales, en particular en el ámbito de las relaciones contractuales, así como la necesidad de mantener la competitividad de la economía de la Comunidad.

Por otra parte, también se puede señalar que las Conclusiones del Consejo Europeo de Viena (11 y 12 de diciembre de 1998) confirman que el empleo es la prioridad principal de la Unión.

3. La inclusión de cláusulas sociales en la contratación pública.

Las políticas de empleo van sufriendo una lenta evolución buscando nuevos instrumentos adecuados para afrontar los problemas estructurales del desempleo.

Las políticas de fomento directo del empleo no son suficientes. Son necesarias "acciones positivas". En esta línea esta la utilización de otros instrumentos que de forma indirecta sirvan al objetivo pretendido, como son la inclusión de criterios sociales en los procesos de licitación pública.

El proceso de elaboración de la nueva Directiva en materia de contratación pública ha dado lugar a un proceso de reflexión y a un debate que incide en lo señalado anteriormente.

Así, en el Libro Verde de la Comisión sobre la contratación pública en la Unión Europea: Reflexiones para el futuro, de 27 de noviembre de 1996, se recoge que: "Una política eficaz en materia de contratos públicos es vital para el éxito del mercado interior en todos sus aspectos... Con la implantación del marco jurídico comunitario de contratación pública, es importante iniciar un proceso de reflexión sobre la mejor forma de aprovechar todas sus posibilidades..."

En el apartado 5.V se aborda el tema de los aspectos sociales en la contratación pública. Se reconoce que "los poderes y entidades adjudicatarias pueden verse obligados a aplicar los diferentes aspectos de la política social en el momento de adjudicación de sus contratos, ya que las adquisiciones públicas pueden constituir un importante medio de orientar la actuación de los operadores económicos",citando a modo de ejemplo la protección del empleo entre las "acciones positivas".

En este proceso de reflexión merece destacarse también, el Informe de 9 de octubre de 1997, acerca del Libro Verde, del Parlamento Europeo, al que se anexa la opinión de la Comisión de Asuntos Jurídicos y Derechos de los Ciudadanos y de la Comisión de Empleo y Asuntos Sociales.

El Parlamento Europeo, después de considerar que "El marco jurídico actual en materia de contratación pública carece de flexibilidad y es excesivamente burocrático; que por lo tanto no puede aprovecharse por completo el potencial de mercado de contratación" (letra J).La recomendación 13 "Reconoce que el punto de vista de la Comisión es que las directivas sobre contratación no constituyen el marco adecuado para llevar a cabo políticas ambientales o sociales, pero señala que no deberían ser un obstáculo para fomentar mejores prácticas y el mantenimiento de normas locales (rigurosas), si ese es el deseo de la entidad adjudicadora".

La Comisión de Empleo y Asuntos Sociales, en el citado Informe, pide a la Comisión de Asuntos Económicos y Monetarios, entre otras cuestiones las siguientes:

"Que incluya, en futuras directivas relativas a la contratación pública o en la revisión de las directivas actuales, disposiciones relativas a la admisibilidad de cláusulas contractuales relativas a objetivos sociales;" (punto 3) "Considera que los Estados miembros tienen la obligación de combatir el desempleo y la exclusión social; indica que las contrataciones

públicas financiadas, en definitiva, a través de los fondos públicos, pueden contribuir al logro de estos objetivos en condiciones que garanticen la transparencia en las licitaciones y los procedimientos de adjudicación;" (punto 7)

Por otra parte, la propia Comisión en su "Comunicación sobre la contratación pública en la Unión Europea", de 11 de marzo de 1998, apartado 4.4, resalta "La Comisión también subraya que los contratos públicos pueden ser un medio para orientar la acción de los operadores económicos, siempre que se respeten los límites establecidos por el Derecho comunitario. En este contexto, la Comisión anima a los Estados miembros a que utilicen su influencia en cuanto compradores públicos para perseguir los objetivos sociales anteriormente mencionados. Por su parte, la Comisión tiene la intención de actuar de manera análoga en sus procedimientos de contratación".

En definitiva, a corto plazo, la inclusión de cláusulas sociales en los procesos de licitación pública será práctica común en los Estados miembros de la Unión Europea.

En concordancia con lo anterior se han ido produciendo diversos desarrollos normativos en las legislaciones nacionales y regionales que pretenden conseguir, a través de diversas fórmulas, los objetivos anteriores.

Apuntaremos algunos ejemplos españoles que afectan al ámbito de la contratación pública, que están siendo discutidos por la Comisión:

a) En la legislación estatal, la Ley de Contratos de las Administraciones Públicas, aprobada por Real Decreto Legislativo 2/2000, de 16 de junio, recoge en su disposición adicional octava que: "Los órganos de contratación podrán señalar en los pliegos de cláusulas administrativas particulares la preferencia en la adjudicación de los contratos para las proposiciones presentadas por aquellas empresas públicas o privadas que, en el momento de acreditar su solvencia técnica, tengan en su plantilla un número de trabajadores minusválidos no inferior al 2%, siempre que dichas proposiciones igualen en sus términos a las más ventajosas desde el punto de vista de los criterios objetivos que sirvan de base para la adjudicación".

   Asimismo, recoge como uno de los medios de acreditar la solvencia técnica o profesional tanto en obras, como en suministros y en los restantes contratos, el grado de estabilidad en el empleo de los empresarios.

b) En la legislación de la Comunidad Autónoma de Madrid, el Decreto 213/1998, de 17 de diciembre, aplica a los contratos administrativos celebrados por la Administración de la Comunidad de Madrid, criterios objetivos de adjudicación en relación con el empleo que favorecen la contratación con empresas que tengan mayor estabilidad en sus plantillas o que se comprometan a realizar nuevas contrataciones vinculadas a la ejecución del objeto del contrato, así como medidas de preferencia de contratación con empresas que tengan trabajadores minusválidos.

Los ejemplos señalados anteriormente están dentro del objetivo de la Unión Europea de fomentar el empleo y no se pueden considerar discriminatorios al garantizar la igualdad de las empresas con independencia de su nacionalidad en el acceso a los contratos públicos al ser valorados a todas las empresas que los acrediten, garantizando su publicidad y transparencia por establecerse en los Pliegos de Cláusulas Administrativas Particulares y ser

publicados en los correspondientes Diarios Oficiales, de forma tal que el posible licitador conozca previamente esos criterios y pondere si le interesa presentar su oferta.

4. Las Directivas actuales sobre contratación pública y su interpretación por las sentencias del Tribunal de Justicia.

Las Directivas comunitarias sobre coordinación de los procedimientos de adjudicación de los contratos públicos de servicios (Directiva 92/50/CEE), de suministros (Directiva 93/36/CEE) y de obras (Directiva 93/37/CEE) establecen en sus artículos 36, 26 y 30, respectivamente, cuales deben ser los criterios en que se basarán las entidades adjudicadoraspara la adjudicación de los contratos. Así el artículo 30 de la Directiva 93/37/CEE dice que son:

"a) O bien, únicamente el precio más bajo.

b) O bien en caso de que la adjudicación se efectúe a la oferta económicamente más ventajosa, distintos criterios que variarán en función del contrato, y el precio, el plazo de ejecución, el coste de utilización, la rentabilidad, el valor técnico."

Señalan las Directivas que cuando el contrato deba adjudicarse a la oferta económicamente más ventajosa las entidades adjudicatarias mencionarán en el Pliego de condiciones o en el anuncio de licitación, los criterios de adjudicación que vayan a aplicar, cuando resulte posible en orden decreciente de importancia atribuida.

En términos similares se pronuncian los artículos 26 y 36 de las otras Directivas citadas.

Como puede apreciarse, atendiendo al tenor literal de los mencionados artículos, solo en el caso de utilizar la forma de adjudicación subasta, el criterio precio es "numerus clausus", en tanto que para el concurso los criterios enumerados lo son a título de ejemplo, es decir "numerus apertus".

Por otro lado, señalar que algunos de los criterios de adjudicación citados en las Directivas pueden llevar implícitas circunstancias socioeconómicas, puesto que la calidad del empleo ofrecido, la cualificación de los recursos humanos de la empresa a través de su formación permanente, adiestramiento, y coordinación en equipo, dan mayores garantía a la Administración y conducen a la elección de una oferta de mayor calidad y en definitiva de superior valor técnico y rentabilidad.

En línea con la interpretación de las Directivas citadas anteriormente podemos comentar tres relevantes sentencias del Tribunal de Justicia:

– **Sentencia Beentjes de 20 de septiembre de 1988, recaída en el asunto Gebroeders Beentjes BV contra los Países Bajos (AS. 31/87).**

Esta sentencia declara que, en principio, "La elección de los criterios de adjudicación del contrato... sólo puede recaer sobre criterios dirigidos a identificar la oferta más ventajosa económicamente". Añade que".. Se debe aún recordar que la Directiva no establece una normativa comunitaria uniforme y exhaustiva, sino que, en el marco de las normas comunes que contiene, los Estados miembros conservan su libertad para mantener o dictar normas materiales y de procedimiento en materia de contratos públicos, a condición de que se respeten todas las disposiciones aplicables del Derecho comunitario y especialmente las

prohibiciones que se derivan de los principios consagrados por el Tratado en materia de derecho de establecimiento y de libre prestación de servicios". La conclusión de la sentencia declara que "...la condición de emplear trabajadores en paro prolongado es compatible con la Directiva si no incide de forma directa o indirectamente por lo que respecta a los licitadores de otros Estados miembros de la Comunidad. Tal condición específica adicional debe obligatoriamente ser mencionada en el anuncio del contrato".

- **Sentencia de 26 de septiembre de 2000, Asunto C-225/98, Comisión contra la República Francesa, en relación a diversos procedimientos de adjudicación de contratos de obras de construcción y mantenimiento de edificios escolares.**

  El razonamiento del Tribunal, (puntos 46 a 54 y 73) en referencia a la posibilidad de incluir criterios sociales en las adjudicaciones de los contratos, es favorable al análisis que venimos desarrollando:

- El art. 30, apartado 1 de la Directiva 93/37, al señalar los criterios en que ha de basarse el órgano de contratación para la adjudicación de los contratos, no excluye la posibilidad de que los órganos de contratación utilicen como criterio una condición relacionada con la lucha contra el desempleo.

- Esta condición debe respetar todos los principios fundamentales del Derecho comunitario, citando en particular el principio de no discriminación en materia de derecho de establecimiento y libre prestación de servicios.

- La aplicación de tal criterio de adjudicación del contrato debe respetar las normas de procedimiento de la Directiva, especialmente el de publicidad, debiendo mencionarse expresamente en el anuncio de licitación para permitir que los contratistas conozcan la existencia de tal condición.

- Aludiendo a la sentencia Beentjes, entiende que se deriva claramente del apartado 14 de la misma, que la condición de contratar parados de larga duración (que había servido para la exclusión de un licitador en dicho asunto) no se refería a una condición de ejecución del contrato, sino a un criterio de adjudicación del mismo.

- La exigencia de publicidad, conforme también a la sentencia Beentjes, obliga a los órganos de contratación, cuando no utilicen el precio más bajo como único criterio para la adjudicación del contrato y se basen en diversos criterios con el fin de adjudicar el contrato a la oferta económicamente más ventajosa, a mencionar estos criterios, bien en el anuncio de licitación, bien en el pliego de cláusulas administrativa particulares, sin que baste una remisión global a una disposición de la legislación nacional.

  El razonamiento anterior viene a confirmar que el Tribunal de Justicia admite como criterio adicional de adjudicación de los contratos públicos condiciones relacionadas con la lucha contra el desempleo (sociales), siempre que no incida de forma discriminatoria directa o indirectamente en los licitadores de otros Estados miembros y se mencione obligatoriamente en el anuncio del contrato. Además, aclara que la sentencia Beentjes, frente a la interpretación de la Comisión, consideró la condición relativa al empleo como criterio de adjudicación de los contratos, no como criterio de ejecución.

- **Sentencia Cambridge de 3 de octubre de 2000, Asuntos C-380/98.**

El Tribunal de Justicia incide en que el objetivo de las Directivas sobre coordinación de procedimientos de adjudicación de los contratos públicos de servicios, suministro y obras (Directiva 92/50, 93/36 y 93/37 del Consejo, respectivamente), "es suprimir las trabas a la libre circulación de servicios y de mercancías y, por tanto, proteger los intereses de los operadores económicos establecidos en un Estado miembro que deseen ofrecer bienes o servicios a las entidades adjudicadoras establecidas en otros Estado miembro" (...) excluyendo "tanto el riesgo de que se dé preferencia a los licitadores o candidatos nacionales en cualquier adjudicación de contratos efectuada por las entidades adjudicadoras, como la posibilidad de que un organismo financiado o controlado por el Estado, los entes territoriales u otros organismos de Derecho público se guíe por consideraciones que no tengan carácter económico". De ello se deriva que aquellos criterios objetivos de adjudicación (de nuevo los contemplados en las Directivas a título de ejemplo y otros similares como el criterio basado en la lucha contra el desempleo) que se apliquen por igual, cualquiera que sea la nacionalidad del licitador del Estado miembro, que permita valorar la oferta económicamente más ventajosa para el poder público adjudicador ante ofertas similares de cualquier operador económico que previamente conozca dichos criterios de adjudicación y su ponderación, es absolutamente conforme a los principios informadores del Tratado sobre libre prestación de servicios y derecho de establecimiento entre los Estados miembros de la Unión Europea.

5. Propuesta de inclusión de los criterios sociales como criterios de adjudicación en la nueva Directiva sobre coordinación de los procedimientos de adjudicación de los contratos públicos de suministro, de servicios y de obras:

La Comunidad de Madrid con objeto de recoger en la nueva normativa los objetivos y principios defendidos y desarrollados a lo largo de esta ponencia ha presentado diversas enmiendas que pretenden fomentar la consecución de objetivos sociales de creación y estabilidad de empleo e integración laboral de grupos discriminados. Se persigue, de esta forma, orientar a los operadores económicos hacia acciones positivas de carácter social, si bien, haciendo una ponderación accesoria de estos criterios que en ningún caso determine la adjudicación y siempre respetando los principios de la contratación pública.

6. Conclusiones:

- La política de empleo es, hoy, una prioridad europea. Un eficaz sistema de contratación pública es básico para que se genere un crecimiento sostenido y se cree empleo.

- La inclusión de cláusulas sociales en los procesos de licitación pública se esta impulsando en el seno de la Unión europea como instrumento de promoción de políticas sociales.

- El Tribunal de Justicia, a través de sus sentencias, es un motor para la modificación de la normativa comunitaria.

- La inclusión de criterios sociales objetivos en la contratación pública es absolutamente conforme con los principios del tratado de la Unión sobre libre prestación de servicios y establecimiento entre los Estados miembros.

- También es conforme con los principios básicos inspiradores de la contratación pública como son los de publicidad, libre concurrencia, no discriminación, transparencia y objetividad.

- La consideración de oferta más ventajosa para la Administración puede venir determinada atendiendo, entre otros criterios objetivos de adjudicación, a la estabilidad y calidad de los contratos que la empresa mantiene con sus empleados, así como a la creación de empleo directamente vinculado a la ejecución contractual.

- La ponderación de estos criterios será adicional y no determinante, permitiendo valorar mejor la oferta económicamente más ventajosa, siendo conforme con los principios comunitarios.

IV. Statements by Experts

Lee DIGINGS

EUROPEAN PARLIAMENT HEARING ON PUBLIC PROCUREMENT
BRUSSELS, 9 JANUARY 2000

STATEMENT BY LEE DIGINGS

INTRODUCTION

1. I am delighted to have the opportunity to present a statement to the European Parliament Hearing on Public Procurement. (The **Annex** contains a brief account of my experience in this field).

2. I believe that this is an important moment in the history of the European public procurement regime. Through the co-decision procedure Parliament has the opportunity to shape the procurement regime for the better and I encourage you to seize that opportunity.

3. This paper focuses on the Commission's proposal in regard to the "classic" directives. However, many of the observations apply equally to the proposal on utilities procurement.

4. Generally, the modernisation and simplification of the Community procurement rules, as proposed by the Commission, will be of great benefit to contracting authorities and economic operators throughout Europe and must be welcomed.

5. However, there are certain aspects of the Commission's proposal (as drafted) which would cause significant problems for contracting authorities and economic operators and, as I will go on to explain, the proposal misses the opportunity to create legal certainty on a number of important topics.

6. Specifically, the Commission's proposal omits to address all aspects of electronic commerce and neglects to provide sufficient flexibility in the conclusion of framework agreements and particularly complex contracts. Furthermore, the Commission only intends to address environmental and social considerations and the position of SMEs in interpretative communications. Such communications represent the Commission's interpretation of the current state of development of Community law but they are not binding and as such cannot be relied upon by contracting authorities or economic operators.

ELECTRONIC COMMERCE

7. The Commission's proposal will expressly permit electronic procurement and indeed will provide an incentive to this in the form of reduced time limits. This is to be welcomed.

8. A reduction in time-limits is not permitted where the new procedure for particularly complex contracts is employed (see below). The rationale for this is not clear as electronic means will also expedite communications regardless of the procedure in use.

9. The Commission's proposal does not make express provision for procurement by means of -

- online ordering of goods and services from electronic catalogues (exchanges, shopping malls, market places). These electronic catalogues are compiled on the basis of framework agreements (see below) or contracts awarded under the procurement rules.

- so-called "reverse auctions", where a contract is awarded to the tenderer who submits the lowest tender following several rounds of electronic tendering.

10. These techniques are already in use in US government procurement and they are being introduced into the European public sector. It is therefore essential that contracting authorities and economic operators in Europe are clear on how such arrangements should be treated under the Community public procurement regime.

11. The public sector in Europe represents a huge market. If the use of new internet-based techniques is prohibited the development of e-commerce in Europe will be held back to the detriment of both economic operators and contracting authorities.

12. The present legislative package is unlikely to come into force before 2002. There is simply no time to wait for another major review of the public procurement directives before introducing the necessary provisions on e-commerce. Appropriate rules on electronic catalogues and reverse auctions must be introduced into the legislative package now.

PARTICULARLY COMPLEX CONTRACTS

13. The Commission's proposal introduces a new procedure designed to facilitate the award of particularly complex contracts. This is also to be welcomed.

14. The first point to note here is that the definition of a particularly complex contract makes no mention of the need for contracting authorities and economic operators to negotiate over the allocation of *risk and reward*. This is probably the single most important reason why negotiation becomes objectively necessary. I would urge that this is incorporated into the definition in the Directive.

15. The explanatory memorandum suggests that the new procedure is a negotiated procedure. In reality it is a type of *restricted procedure*. It culminates in the submission of tenders over which no negotiation is possible. Negotiation takes place at an earlier stage and concerns not the tenders but "outline solutions" furnished by economic operators.

16. There are two major difficulties with this.

(a) *Outline solutions*. Economic operators may consider that they are being asked to assign intellectual property rights without remuneration (whether or not the law would protect those rights) and might demand remuneration or decline to participate. As the CEMR has pointed out, small contracting authorities (e.g.

local authorities) would be unable to set aside a budget to pay for outline solutions, most of which would not be used. Either way, the purpose of the new procedure would be defeated.

(b) *Tendering in place of negotiation*. In normal commercial practice, negotiation takes place at the end of the contract award procedure before the contract is awarded and not at the earlier qualitative selection stage. Further, negotiation is not limited to technical solutions (as the Commission's proposal assumes), but may also concern financing arrangements and business models (especially in Information Society projects). With complex contracts it is seldom possible to finalise financing arrangements before the final stage of a contract award procedure.

17. I would recommend that the proposal is amended to make it clear that the procedure for particularly complex contracts is a negotiated procedure whose final stage is an *invitation to negotiate*. By definition there will be negotiation at that stage.

18. The purpose of the "outline solution" (by any name) should be to provide contracting authorities with sufficient information to enable them to frame specifications and contracts in a way that does not *exclude* any solutions that economic operators in the market might offer. The purpose should not be to *acquire* a solution. There should be no negotiation over outline solutions.

FRAMEWORK AGREEMENTS

19. There are many different kinds of "framework agreement" in use in the Member States. The Commission's proposal only describes one type of framework agreement - one which involves competition at *two* stages.

20. This will lead to confusion as it will not be clear to contracting authorities how other types of framework agreement should be treated.

21. Other framework agreements (particularly those used for the supply of goods) provide for competition at *one* stage only (i.e. when the framework agreement is first concluded). The normal practice is to award such agreements under the Community procurement rules in the same way as any public contract.

22. To avoid confusion, I would urge that the Directive expressly permits both types of framework agreement and that appropriate rules are laid down.

23. I would recommend a general prohibition of anti-competitive behaviour. But otherwise I would say that there should be no restrictions on the number of economic operators included in the agreement or on its duration. There are no restrictions of that kind on other contractual arrangements. If the rules are too prescriptive there is a danger of stifling the development of the framework agreement approach for new purposes.

CONTRACTS WITHIN THE ADMINISTRATION

24. Contracting authorities may choose a variety forms to deliver public services including inter-authority associations (public law), undertakings and joint ventures (private law), in addition to direct delivery of services.

25. A contract may arise because the association or undertaking has a separate legal personality, but all of these arrangements are alternative forms of organisation *within the public administration*. Consequently, there should be no requirement to award any contract that arises under the Community procurement rules.

26. Recent cases before the Court of Justice (particularly *Arnhem* and *Teckal*) have caused confusion on this point. I would therefore recommend that the proposal is amended to make it clear that contracts within the administration (as described above) are *excluded* from the scope of the Directive. (Contracts *awarded by* such entities to third parties will, of course, continue to be covered).

QUALIFICATION SYSTEMS

27. The Utilities Directive permits contracting entities to establish a "qualification system" (a list of qualified economic operators who may be invited to tender for public contracts) and lays down rules concerning advertising and the operation of the system.

28. Most public authorities would like the opportunity to operate a qualification system but this opportunity is denied to them in the "classic" directives. The Commission has not proposed to remedy this anomalous situation in its proposal.

29. My recommendation is that the Commission's proposal is amended to incorporate rules on qualification systems which parallel those in the Utilities Directive.

ENVIRONMENTAL AND SOCIAL CONSIDERATIONS

30. Article 6 of the Treaty (post-Amsterdam) states that there is an *obligation* to integrate environmental protection requirements into other Community policies and activities.

31. A high level of protection and improvement of the quality of the environment, and sustainable development, are also mentioned in Article 2 of the Treaty as being goals of the European Union. The realisation of the internal market is among the means set out in Article 3 to be employed to achieve those goals.

32. Therefore it is essential that the priority which the Treaty gives to the protection of the environment and sustainable development is reflected in the Directive. The publication of an interpretative communication will not be sufficient.

33. There is also a substantial body of Community law concerning the social dimension (including a series of directives on matters ranging from occupational health and safety to equal opportunities) which needs to be recognised in the Directive. Again, an interpretative communication on its own will not create legal certainty on the treatment of social considerations.

34. I would recommend that environmental and social considerations are integrated into the Directive in the following ways –

- Reference to EU eco-labels in technical specifications is permitted
- Candidates can be rejected for not fulfilling Community or national obligations relating to the environment, occupational health and safety or equal opportunities
- Candidates' technical capacity is assessed, inter alia, on the basis of measures taken to protect the environment and health and safety
- Conformance to environmental management standards can be taken into account in the same way as conformance to quality standards
- Contract award criteria (most economically advantageous tender) include environmental *impact.*

35. The incorporation of the Beentjes principles into the Directive (Article 23(3)) is to be welcomed. However the new provision does not reproduce the Court's decision faithfully. Specifically, the Commission's proposal requires that any "particular conditions" incorporated into contracts (e.g. regarding social considerations) must concern the performance of the contract. The Court, on the other hand, would permit the inclusion of any special conditions compatible with the Treaty. The proposal should be amended on this point so as not to be unnecessarily restrictive.

SMALL AND MEDIUM-SIZED ENTERPRISES

36. The explanatory memorandum highlights the relevance of provisions on sub-contracting to small and medium sized enterprises. However, the proposal contains no specific measures designed to assist SMEs or micro enterprises (MEs). These issues are to be addressed in a further interpretative communication.

37. Given the importance of SMEs to the European economy and the important role that SMEs and MEs can play in combatting social exclusion, I would argue that specific measures should be included in the Directive.

38. I support the CEMR's suggestion that the EU should adopt an approach modelled on the policies in force in the United States and South Africa. Contracting authorities should be permitted to set aside for SMEs/MEs up to 15% of their total annual requirement for goods, works and services. Contracting authorities would be able to meet set-aside targets by reserving main or sub-contracts to SMEs/MEs.

39. This set-aside policy would be operated in a way which is consistent with the Treaty (i.e. transparency and avoidance of national discrimination) and contracts would be awarded in accordance with the rules laid down in the Directive.

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ANNEX

Together with John Bennett of the law firm Eversheds, Lee Digings is author of the UK's standard reference work on public procurement (*EC Public Procurement: Law and Practice*, published by Sweet & Maxwell). This is a loose-leaf encyclopaedia (updated twice a year) which covers both the legal and practical aspects of compliance with the Community public procurement regime.

Lee Digings has 15 years experience as a procurement manager in the UK public sector. He is currently employed as a senior procurement consultant with the Improvement and Development Agency (IDeA). This is a specialist agency of the Local Government Association (England and Wales). At IDeA Lee Digings is responsible for procurement policy (including European and international relations) and best practice guidance (advisory services to local authorities).

IV. Statements by Experts

Professor Mario CHITI

OSSERVAZIONI SULLE PROPOSTE DI NUOVE DIRETTIVE PER LA DISCIPLINA DEGLI APPALTI PUBBLICI

1. La disciplina comunitaria degli appalti pubblici è una delle più complesse dell'intero diritto comunitario. La vastità del tema, la rilevanza economica degli appalti pubblici, i diversi oggetti degli appalti (lavori, forniture e servizi), le esigenze particolari degli appalti in alcuni settori (una volta detti "settori esclusi", ed ora più correttamente "settori speciali"), il rapido mutare dello scenario economico ed istituzionale (privatizzazioni e liberalizzazioni; istituzione dell'Organizzazione Mondiale del Commercio; ecc.) hanno determinato il formarsi di un vasto e poco coordinato corpo di regole comunitarie. Malgrado la "consolidazione" nel 1993 di alcune direttive precedenti, sono ancora in vigore molte direttive per la disciplina dell'aggiudicazione degli appalti pubblici e per i ricorsi a tutela degli interessati. La complessità della disciplina comunitaria si è negli ultimi anni accentuata, per una serie di nuove discipline particolari che si sono inserite in modo disordinato nel corpo normativo precedente.

Era dunque particolarmente sentita l'esigenza di una sistemazione completa delle direttive comunitarie sugli appalti pubblici, tramite testi unici per raccogliere e coordinare tutta la normativa in materia, con contestuale abrogazione delle direttive precedenti. In tal modo pervenendo ad una maggiore certezza del diritto, con positivi effetti sia per le autorità nazionali interessate sia per tutti gli operatori privati del settore. L'occasione della sistemazione della attuale disciplina in testi unici avrebbe potuto consentire talune parziali innovazioni per tener conto di nuove esigenze (ad esempio, le procedure elettroniche) e di alcuni problemi in rapida evoluzione (come le politiche di privatizzazione e di liberalizzazione).

Le proposte di direttive, ora all'esame del Parlamento europeo, sono il frutto di un'accurata istruttoria della Commissione, iniziata nel 1996 con il Libro verde su "Gli appalti pubblici nell'Unione europea" e proseguita con la comunicazione del 1998 dallo stesso titolo e con altre comunicazioni collegate (rimarchevole, tra le altre, la comunicazione interpretativa 2000/C 121/02 sulle concessioni nel diritto comunitario). Malgrado che le risposte ed i commenti ottenuti dalla Commissione avessero avuto considerazione anche di altri problemi (specialmente i rimedi, le concessioni, i servizi pubblici), le due proposte di direttive presentate dalla Commissione hanno per oggetto – la prima - le procedure di aggiudicazione degli appalti pubblici di forniture, di servizi e di lavori; la seconda, le procedure di appalto degli enti erogatori di acqua, di energia e degli enti che forniscono servizi di trasporto. Sono state dunque rinviate altre riforme ed innovazioni per i restanti settori del diritto comunitario degli appalti e per problematiche strettamente connesse, in parte ancora non disciplinate.

L'esame che segue è condotto nella prima parte sulla direttiva relativa agli appalti nei "settori ordinari", poi sulla direttiva "settori speciali".

2. Iniziando dalla proposta di direttiva relativa al coordinamento delle procedure di aggiudicazione degli appalti di forniture, di servizi e di lavori nei settori ordinari, risulta che l'intento della Commissione è duplice: semplificare e chiarire il quadro normativo, attraverso principalmente l'eliminazione delle incoerenze e la ristrutturazione dei testi esistenti; introdurre modifiche al quadro giuridico attuale per rispondere ai problemi posti dalla società dell'informazione, dall'abbandono progressivo da parte dello Stato di talune attività economiche e dall'esigenze per un maggior rigore di bilancio.

Per quanto riguarda la semplificazione, è evidente che la sola circostanza di riunire in un solo testo molte disposizioni contenute in diverse direttive è un notevole risultato. Altrettanto può dirsi per la nuova "architettura" della materia, che assicura una maggiore leggibilità della normativa. Semplificare la disciplina non è mai un semplice fenomeno di migliore tecnica legislativa (drafting), perché, quando effettivamente riuscita, si traduce in maggiore certezza del

diritto, capacità di influenzare il diritto nazionale attraverso una sua adeguata interpretazione, responsabilità degli Stati membri e dei soggetti tenuti ad applicare il diritto comunitario.

La direttiva in esame raggiunge in gran parte l'obbiettivo della semplificazione, dato che la sua struttura è più coerente di quella dei precedenti testi; molte disposizioni che erano divenute obsolete sono state eliminate; altre disposizioni sono state coordinate, ad esempio superando non spiegabili differenze di formulazione delle precedenti direttive.

Peraltro, la Commissione avrebbe potuto fare di più, specie per le parti derivate dalle precedenti direttive. Al riguardo la Commissione non doveva limitarsi ad assemblare disposizioni, se non quando già adeguatamente chiare (circostanza rara); ma riscriverle alla luce della vasta esperienza acquisita nella loro applicazione e della giurisprudenza in materia. Inoltre, le varie modifiche introdotte – su cui tra breve torneremo – sono oggettivamente assai complesse e formulate nel tradizionale gergo "mandarino", di difficile interpretazione anche per gli esperti del settore (cfr. ad esempio il nuovo art. 29). Ciò determina che in un testo complessivamente semplificato si abbiano delle parti, di assai rilevante importanza, che non sono armoniche con il resto. Considerato che, per i motivi che si diranno, le innovazioni proposte dalla Commissione appaiono positive, appare opportuno che gli articoli "nuovi" siano riscritti con la stessa tecnica di semplificazione adottata con successo dalla proposta.

Una seconda osservazione riguarda le abrogazioni conseguenti alla nuova disciplina. All'art. 80 si prevede solo l'abrogazione delle direttive di consolidazione del 1993, ma la nuova disciplina ora proposta sembra coprire varie altre disposizioni, anche successive. Se è vera questa interpretazione, avremmo una abrogazione implicita per disciplina nuova della medesima materia; che non appare conforme alla esigenza di semplificazione e chiarificazione della vigente normativa. Se invece l'oggetto di talune disposizioni contenute in altre direttive, specie le più recenti, non fossero riviste dalla proposta in esame, si evidenzierebbero delle lacune e la direttiva potrebbe apparire non un vero testo unico della materia, ma solo una più organica consolidazione. Da un esame compiuto sulla disciplina comunitaria recente ho potuto appurare che non tutte le disposizioni ivi contenute sono integrate nelle direttive del 1993, seguendone la sorte; e dunque pare confermarsi la necessità di meglio precisare la portata abrogativa della direttiva in esame.

Per quanto poi riguarda le innovazioni introdotte, esse risultano molte e di notevole importanza. Ciò conferma che la proposta di nuova direttiva non è un semplice testo unico "compilativo", sintesi di discipline precedenti, ma "additivo" perché caratterizzato da qualificanti innovazioni.

Tutte le novità proposte mi paiono convincenti, dall'introduzione di procedure informatiche, alla nuova procedura di "dialogo" tra amministrazioni aggiudicatici e candidati, all'utilizzazione degli accordi quadro, al rafforzamento delle disposizioni relative ai criteri di aggiudicazione ed alla selezione. Si tratta di innovazioni da tempo auspicate dalle amministrazioni, dagli imprenditori e dalle loro associazioni, nonché dagli studiosi della materia, sia per colmare alcune lacune della vigente normativa, sia per rispondere ad alcuni difetti evidenziati dalla esperienza attuativa.

In particolare, appare rilevante la previsione che consente un dialogo tra amministrazioni aggiudicatrici e partecipanti selezionati, che rappresenta una nuova modalità di procedura negoziata. Si è infatti di fronte al superamento della eccezionalità della procedura negoziata, che sarà ora possibile, con le fasi procedurali disciplinate all'art. 29 e seguenti, in casi "particolarmente complessi", non meglio specificati. L'innovazione risponde ad una diffusa esigenza per un maggior uso della procedura negoziata, che in molte circostanze appare più adatta a garantire l'interesse pubblico rispetto alle procedure più rigide e formalizzate quali le "aperte" e le "ristrette". Ovviamente, alla condizione che la procedura negoziata rispetti alcuni principi generali quali la trasparenza e la parità di trattamento.

Fermo il positivo giudizio di merito sulla procedura di “dialogo”, le relative disposizioni della proposta di direttiva sono redatte in modo complesso e secondo uno schema che, risentendo della elaborazione per testi successivi tra loro differenti, lascia alcune questioni senza una chiara disciplina. In particolare non è chiaro come questa nuova procedura si amalgama con l’attuale procedura negoziata, nelle sue diverse forme; ovvero se rappresenta una modalità della stessa o una vera e propria nuova procedura, malgrado il diverso intento della Commissione. In sostanza, la nuova disposizione merita un approfondimento al fine di assicurare un testo finale chiaro ed esaustivo, capace davvero di rispondere alla domanda da tempo posta dalle amministrazioni aggiudicatici e dagli imprenditori.

Ad una esigenza non molto diversa dalla precedente risponde anche l’innovazione relativa a tecniche di committenza più flessibili mediante il ricorso ad accordi quadro. Si tratta di un istituto, già conosciuto in alcuni ordinamenti nazionali ed in atti comunitari, per scegliere taluni operatori economici in grado di soddisfare a tempo debito i bisogni dei committenti; a valere sul lungo periodo e per oggetti a forte evoluzione produttiva, tecnologica e di valore. I settori più interessati saranno intuitivamente le forniture ed i servizi. La relativa disposizione (art. 32) chiarisce i principali punti di questa nuova tecnica, ma merita anch’essa una formulazione ancora più precisa, specie alla luce della relazione illustrativa della proposta ove si dice (pag. 8), un po’ sbrigativamente, che “gli accordi quadro non sono appalti pubblici ai sensi delle direttive”.

Le altre novità, in tema di specifiche tecniche, di rafforzamento delle disposizioni relative ai criteri di aggiudicazione ed alla selezione, le nuove soglie semplificate, appaiono del tutto condivisibili e ben formulate. Da segnalare in particolare il nuovo regime delle soglie, che adegua l’unità di riferimento al prossimo sistema in euro e riduce drasticamente il numero delle attuali categorie. Non si è peraltro tenuto conto della esperienza degli appalti nei settori delle forniture e dei servizi, ove ha poco senso - nella prospettiva comunitaria - mantenere una soglia di applicazione così bassa come l’attuale.

3. La seconda proposta di direttiva si riferisce ai settori speciali, già noti come “settori esclusi”, ovvero agli appalti degli enti erogatori di acqua, di energia e degli enti che forniscono trasporto, che ancora hanno uno speciale rilievo economico nel quadro complessivo degli appalti.

Si tratta di un settore composito, con problemi assai diversi a seconda del campo di applicazione, che inizialmente comprendeva anche le telecomunicazioni. Per la disciplina di questi appalti, la Comunità era intervenuta più tardi che per i settori “ordinari”, a causa delle particolarità e differenze delle discipline nazionali, la frequente posizione di monopolio per operatori pubblici, la non chiara linea di confine tra gli appalti e l’affidamento di servizi pubblici. Quando nel 1990 era stata approvata la direttiva 531, la disciplina ivi prevista era risultata di particolare difficoltà per il recepimento in molti Stati, a causa della sua originalità rispetto a molte tradizioni giuridiche nazionali e della quantità di nuovi istituti previsti.

In modo simile all’altra proposta di direttiva, anche quella in esame si caratterizza per due obbiettivi: la semplificazione e la ristrutturazione della vigente normativa degli appalti nei settori speciali; l’ammodernamento della normativa tramite una serie di innovazioni connesse, ad esempio, alla società dell’informazione. Profilo particolare di questa direttiva è invece l’esclusione esplicita del settore delle telecomunicazioni dal suo campo di applicazione.

L’obbiettivo della semplificazione è coerentemente perseguito attraverso una più chiara partizione della materia, l’inserimento di articoli “introduttivi” e la raccolta in un solo testo di varie norme (peraltro minori per numero e peculiarità che nei settori ordinati). I risultati sono soddisfacenti, anche se la complessità dei testi originari è in gran parte rimasta. Ove ve ne fosse la possibilità, sarebbe quanto mai auspicabile una nuova, più chiara, formulazione delle medesime disposizioni.

Più difficile era il compito di rendere più attuale una disciplina che risente di molte diverse influenze, a cominciare da fenomeni di riassetto tra sfera pubblica e sfera privata, come il progressivo disimpegno dello Stato da talune attività economiche. Lo stesso può dirsi per l'obbiettivo connesso di ridurre una regolamentazione a volte troppo dettagliata e complessa, ed in specie di allentare l'eccessiva rigidità di procedure (peraltro meno rigide di quelle nei settori ordinari) che così non rispondono alle esigenze degli acquirenti pubblici.

Al riguardo le innovazioni previste sono classificabili in due gruppi: da un lato, le novità di carattere particolare, quali l'introduzione dei meccanismi di acquisito elettronico, la definizione dei diritti speciali od esclusivi, ed i chiarimenti delle norme sulle specifiche tecniche; novità apprezzabili nel merito e ben formulate normativamente. Dall'altro, la previsione di maggiore rilievo sul regime delle telecomunicazioni, che formalizza il distacco di questo settore dal quadro normativo degli appalti nel settori speciali, principalmente a seguito delle liberalizzazioni già avvenute e della progressiva realizzazione della concorrenza effettiva. Le telecomunicazioni saranno così disciplinate dalle specifiche direttive di settore o dal diritto comune. Tale sarà lo sviluppo anche per altri settori in via di liberalizzazione, come il settore dell'energia.

4. Accanto ai molti profili positivi, le due proposte mostrano però alcune lacune e non sono accompagnate, per il momento, da altre pur necessarie riforme del settore e da discipline di settori prossimi alla problematica degli appalti pubblici..

Un tipico esempio di lacuna è la mancata chiarificazione della nozione di "organismo di diritto pubblico", presente in tutte le attuali direttive con formulazioni leggermente diverse da un testo all'altro, ma di assai difficile definizione; tanto che si è avuto un ampio contenzioso sull'interpretazione della nozione, su cui anche la Corte di giustizia si è mostrata reticente. Le numerose sentenze della Corte che si susseguono negli ultimi anni sembrano infatti più interessate alla soluzione del caso controverso che, come di consueto, a stabilire criteri generali di interpretazione. A fronte di questa situazione, la questione avrebbe dovuto essere risolta in via normativa stante anche la grande importanza che la definizione di organismo pubblico assume tanto per le amministrazioni aggiudicatici che per le imprese coinvolte. Le due proposte di direttiva si limitano invece ad unificare la nozione nei rispettivi campi, superando le piccole diversità precedenti senza una definizione esplicita; mancando dunque all'obbiettivo sollecitato dagli interessati e dalla dottrina.

Lacunosi, o meglio poco appropriati, paiono anche i "considerando" delle due direttive. Si tratta infatti di due lunghe motivazioni dal taglio convenzionale, che non danno adeguato risalto al nuovo quadro istituzionale ed economici di riferimento. Stante l'importanza della motivazione negli atti comunitari ed il valore giuridico che i "considerando" hanno ai fini della interpretazione del diritto nazionale, se ne consiglia un formulazione più incisiva.

Per quanto infine riguarda la mancanza di un completo quadro di proposte riformatrici, le due proposte in esame – di riforma del diritto sostanziale degli appalti pubblici – non sono accompagnate, almeno per ora, da analoghe proposte per il campo dei "rimedi", ovvero per la riforma delle garanzie degli interessati, giurisdizionali e quasi giurisdizionali.

In verità, una volta affermato (con decisione di altissimo significato giuridico e politico) che alla realizzazione di una disciplina sostanziale uniforme deve accompagnarsi anche l'uniformazione dei rimedi (ad iniziare dalla direttiva 89/665), sembra coerente che alla modifica della normativa sostanziale comunitaria ed alla sua raccolta in nuovi testi unici faccia seguito anche una revisione delle "direttive ricorsi". Al momento non si conoscono iniziative in tal senso, almeno in avanzata elaborazione; e dunque il disegno riformatore appare monco di una parte di grande rilievo.

Riassumendo, le due proposte di direttive concludono un processo di elaborazione assai lungo e complesso, apportando soluzioni che – per lo più - si segnalano per novità e chiarezza. Esse vanno dunque approvate al più presto, anche se auspicabilmente con le modifiche ed i miglioramenti suggeriti. Rimane peraltro ancora non poco da fare per completare il disegno riformatore, sia con il superamento di alcune attuali lacune della disciplina degli appalti, sia con ulteriori innovazioni in settori strettamente connessi.

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