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The Utilities Directive—A Giant Step Down the Long and Winding Road Toward Opening Public Procurement Markets in the EC

INTRODUCTION

Public procurement pertains to contracts involving "a manufacturer or supplier of goods or machinery or services under the terms of which a sale or service is made to the government." These government contracts involve a specific bidding, or "tendering" procedure which also is governed by standardized government regulations. Public procurement always has been a common governmental practice. Today, liberalization of the public procurement market is an important link to achieving the ultimate goal of a unified European market. Despite the importance of public procurement, the Treaty Establishing the European Economic Community (EEC Treaty) does not discuss public procurement specifically. Article 3 of the EEC Treaty, however, explains that the overall objective is to create a free market in goods and services within European Community (EC) borders. Other articles in the EEC Treaty establish guidelines for EC competition in the public procurement realm. The public procurement market is significant and opening it up is crucial for the achievement of a complete integration of a single

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2 Id.
5 Sohrab, supra note 3, at 522.
6 Id.; EEC TREATY, art. 3.
European market. The Department of Trade and Industry (DTI) estimates that public procurement contributes to 15 percent of the EC's gross domestic product. Moreover, roughly 7 percent of this amount stems from the telecommunications, water, energy, and transport sectors. Public purchasing throughout the Community is estimated to amount to ECU 550 billion.

Discriminatory practices of each individual nation, favoring domestic producers, appear to benefit national economies, particularly in the short run. In the long run, however, nationalistic pursuits result in poorer quality goods, trade distortions, and increased prices. Nonetheless, the Commission argues that over 75 percent of procurement authorities openly use discriminatory practices, giving preference to "national champions." The result is that discriminatory practices ignore quality and cost-effectiveness.

This Comment considers the Council of Minister's decision to open up the public procurement markets in the four utility sectors historically excluded from public procurement Directives. Part I provides the relevant background of the public procurement Directives, their amendments and their shortcomings. Part II introduces the new Utilities Directive aimed at opening up public procurement in energy, transport, water, and telecommunications. Specifically, Part II examines the different requirements of the Directive and the various problems the EC has faced thus far in achieving unified compliance by all Member States. Part III examines the Remedies Directive subsequently passed with the intention of enhancing the enforcement of the Utilities Directive. Part IV analyzes the anticipated effects and likelihood of enforcement of the Utilities and Remedies Directives. This Comment concludes that the EC faces a
long and difficult road to unification and solidarity in this area, and its biggest obstacle is each Member State’s own national interests.

I. HISTORY OF THE EUROPEAN COMMUNITY PUBLIC PROCUREMENT DIRECTIVES

In 1971, the EC passed the first in a series of Directives designed to open procurement markets. On July 26, 1971, the Council adopted Directive 71/305 concerning the coordination of procedures for the award of public works contracts (Works Directive). Additionally, on December 21, 1976, the EC enacted a similar instrument on government supplies contracts, Directive 77/62 (Supplies Directive). These Directives sought to eliminate trade distortions caused by inefficiencies in awarding bids only to national favorites. Thus, the primary aim was to improve market information in order to assure that contracts would be awarded to suppliers and contractors most beneficial to the market and to the parties involved.

The Directives do not establish a uniform set of rules for tendering procedures to be adopted by each Member State. Rather, Member States are free to exercise their tendering procedures at will as long as the standards used comply with relevant EC law. A report presented to the Council on the operation and application of these Directives determined that many countries failed to implement the Directives into national law properly. Further, those countries which did convert the Directives into national law failed to ensure compliance. As a result, these Directives had little impact on the public procurement market.

Aside from poor implementation and enforcement, the Works and the Supplies Directives had other flaws which a second wave of legislation tried to correct. Council Directive 88/295 amended the
Supplies Directive on March 22, 1988. Similarly, Council Directive 89/440 amended the Works Directive on July 18, 1989. These Directives improved the tendering rules by making them more definitive as well as more difficult to ignore. In addition, in order to ensure greater compliance with these Directives, the Council adopted Directive 89/665 on December 21, 1989. The Council adopted this Directive in an effort to establish adequate mechanisms that provide individual firms in all Member States with legal remedies when needed, thus establishing a uniform procedure for each Member State to observe when reviewing the tendering process exercised by contracting authorities.

Misapplication of these Directives continues, however, and as a result, markets have remained essentially national preserves. At least 75 percent of all national tenders continue to go to national firms. According to one estimate, the inefficient effect of closed public procurement markets is costing the EC approximately ECU twenty billion per year.

II. THE EXCLUDED SECTORS

The Supplies and Works Directives exclude from their scope procurement contracts awarded by the government authorities offering transport services or telecommunication services. The Directives also do not include services involving the production, distribution, transmission, or transportation of drinking water and energy.
These four sectors are treated separately because the Member States could not agree on common rules of coverage for these industries. More specifically, the energy, water, transport, and telecommunications sectors were excluded primarily because the entities offering these services are governed by public law in some cases but by private law in other cases. In 1988, the Commission proposed to look beyond the public/private distinction because of the need to achieve a true liberalization of the market and a fair balance in the application of the procurement procedures.

A. The New Utilities Directive

On September 17, 1990, the EC Council of Ministers adopted Directive 90/531 (Utilities Directive) on the procurement procedures of entities operating in water, transport, energy, and telecommunication sectors. This Utilities Directive was the result of lengthy negotiations amongst Member States regarding the fair treatment of such services. Like the Supplies and Works Directives, the Utilities Directive aims to eliminate nationalistic buying by utility companies. A second objective of the Directive is to make tendering procedures more public. The Utilities Directive does not overturn or reduce the scope of the Works or Supplies Directives.

The Utilities Directive became effective January 1, 1993, for most Member States. Implementation of Directives, however, is often slow and varied. For example, although January 1, 1993, is the implementation date set for most Member States, only four Member

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36 Winter, supra note 17, at 763; Weiss, supra note 8, at 324.
38 Id.
39 Winter, supra note 17, at 763.
41 See id. at 3.
42 Id.
44 EC Council of Ministers, supra note 35.
States actually executed the Directive into national law by May of that year. While Belgium, Denmark, France, and the United Kingdom complied with the January 1, 1993, deadline, Germany, Italy, The Netherlands, Ireland, and Luxembourg have not respected the terms of the Directive.

The Utilities Directive applies to those buyers who: provide fixed “networks” offering specified services to the public in connection with drinking water, electricity, gas, or heat; who exploit geographical areas for specified purposes; who operate transport networks servicing the Member States; and who provide public telecommunication networks or services. In addition, the Directive creates exemptions for listed buyers in particular circumstances because of the activities performed. For example, the Directive does not cover: (1) contracts awarded for purposes other than the pursuit of article 2(2) activities; (2) contracts awarded for purposes of performing article 2(2) activities outside the EC even though procurement is sourced within the EC; (3) procurements made by buyers exploiting geographical areas for the purpose of exploring or extracting natural resources defined under article 2(2) if the buyer’s Member State has obtained a Commission exemption under article 3; (4) procurement of services which are covered by the Works and Supplies Directives; (5) contracts awarded for purpose of resale or hire to third parties; (6) procurement contracts deemed secret by the Member States; and (7) procurement contracts governed by the procedures of an international body.

Furthermore, the Directive only applies to those contracts that meet the respective ceiling or threshold values imposed by the terms of the Utilities Directive. For example, in the case of public supplies

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46 Id.
48 Id. art. 6(1).
49 Id.
50 Id. art. 3. Article 3(1) states in pertinent part: “Member States may request the Commission to provide that exploitation of geographical areas for the purpose of exploring for, or extracting, oil, gas, coal or other solid fuels shall not be considered to be an activity defined in Article 2(2)(b)(i).” Id.
52 Id. art. 7(1).
53 Id. art. 10.
54 Id. art. 11(3).
contracts awarded under article 2(2)(a), (b), and (c), the contract's estimated value may not be less than ECU 400,000. For contracts providing telecommunications networks or services, however, the estimated value must be at least ECU 600,000. Third, public works contracts must be estimated at ECU five million or higher.

B. The Nuts and Bolts of the Utilities Directive

Contracting authorities in most circumstances must make a "call for competition" by placing a notice in the **Official Journal of the European Communities.** Three forms of notice are permitted. The buyer may use either a traditional notice advertising the particular procurement at hand, a "periodic indicative notice" which estimates the authority's procurement intentions, or a "notice on the existence of a qualification system." Any contracting authority that proposes to conduct article 2(2) activities must place a periodic indicative notice in the **Official Journal** at least once a year to publicize prospective supplies and works contracts estimated to exceed the threshold values.

Contracting authorities ultimately decide which award procedure will be appropriate for the various projects. There are three basic tendering procedures which contracting authorities may choose between freely: open, negotiated, or restricted. Open procedures must allow all interested suppliers or contractors to submit tenders. Restricted procedures only apply to those candidates who are invited by the contracting authority. In negotiated procedures, the contracting authority consults specifically chosen suppliers or contractors to negotiate the terms of the contract. The most economically advantageous tender or the lowest price bid is the standard to guide

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55 Id. art. 12(1)(a).
57 Id. art. 12(1)(c).
58 Id. art. 15(1).
59 Id. arts. 16(4), 19(2).
61 Id. arts. 16(1)(b), 16(2).
62 Id. arts. 16(1)(c), 16(3).
63 Id. arts. 17(1)(a), 17(1)(b)(2).
65 Id. art. 1(6)(a).
66 Id. art. 1(6)(b).
67 Id. art. 1(6)(c).
contracting authorities’ final decisions regardless of the tendering procedure chosen.\(^68\)

C. Article 29—The Focus of International Attention

In order to ensure equal access to third-country markets for EC suppliers and contractors, the Directive allows EC preferencing in certain circumstances. Article 29 proves to be the Community’s bargaining chip in international negotiations.\(^69\) This article applies to tenders involving “products originating in third countries with which the Community has not achieved multilaterally or bilaterally, an agreement ensuring comparable and effective access for Community undertakings in the markets of those third countries.”\(^70\) According to article 29, any supplies procurement may be rejected if the proportion of products originating outside the European Community exceeds 50 percent of the value of the products associated with the bid.\(^71\) Furthermore, when tenders are equivalent, preferences shall be given to the EC bid.\(^72\) Equivalent bids are defined by this provision if the price difference does not exceed 3 percent.\(^73\)

Article 29 has been the root of great debate and hostility between the United States and the EC during the past year.\(^74\) The EC Commission continuously emphasized its willingness to negotiate either bilaterally or multilaterally for the elimination of this controversial reciprocity clause in article 29.\(^75\) After a year of hostility, the United States and the EC at least partially resolved the dispute over access to transatlantic public procurement contracts during a meeting in

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\(^68\) Id. art. 27.


\(^70\) Council Directive 90/531, supra note 33, art. 29(1).

\(^71\) Id. art. 29(2).

\(^72\) Id. art. 29(3).

\(^73\) Id.

\(^74\) EC Criticizes U.S. Procurement Practices, supra note 69.

\(^75\) Id. The United States responded to article 29 by threatening trade sanctions. In response to U.S. retaliatory threats, the Commission stated: “[I]t is hard to understand why the country which operates the Buy American Act, whose sole aim is to discriminate systematically in government purchases, should consider that it has any grounds whatever for complaining of discrimination by others in the field of public procurement.” Id. Under the Buy American Act, the purchasing authority must choose the U.S. bid if it costs as much as 25 percent more than the non-U.S. bid. Id. Thus, the EC asserts that if the U.S. administration wants progress toward opening public procurement markets, it should match its behavior to its rhetoric and dispense with discriminatory measures on public contracts. Id.
May 1993. Specifically, the agreement between the United States and the EC only eliminates discrimination against U.S.-based companies allowed under article 29 involving public contracts for heavy electrical equipment. Until a similar agreement is achieved in the remaining sectors, namely telecommunications, energy, and transport, EC Member States may continue to discriminate against the United States in these sectors pursuant to the terms of article 29.

The United States reacted to EC discrimination in the telecommunications sector by imposing trade sanctions. The United States, however, excluded Germany from U.S. sanctions because Germany never adopted article 29 discriminatory practices against U.S. companies. The United States and Germany entered into a bilateral agreement allowing mutual access to each other’s public tenders. According to the European Community Commission, this is a breach of Community trade law. As a result, in order to preserve its international credibility, the EC Commission may be forced to take legal action against Germany by bringing charges before the European Court of Justice. In addition, the EC perceives Germany’s actions as a challenge and a threat to the Commission’s credibility and responsibility for international trade negotiations and agreements because it proves that the Commission is not the

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76 EC Ministers Approve Partial Solution with U.S. in Public Procurement Dispute, Daily Rep. for Executives (BNA), May 11, 1993, available in LEXIS, Nexis Library, Current File. Declaring article 29 discriminatory and a violation of GATT, the United States demanded that the EC waive article 29 or risk retaliation. Id. The agreement ultimately reached between the United States and the EC represents the result of months of negotiations between EC Trade Commissioner, Leon Brittan and U.S. Trade Representative, Mickey Kantor. Id.

77 EC Responds to U.S. Sanctions on Procurement, PR Newswire, May 27, 1993, available in LEXIS, Nexis Library, Current File. Thirty-three states have agreed to consider removing “Buy American” restrictions, but no firm commitments have been made. Id. Similarly, the U.S. administration must request that the remaining 17 states also consider such action. Id. The U.S. administration is also seeking promises from the largest U.S. municipalities to do the same. Id. The ultimate result may be the elimination of “Buy American,” a principal that has pervaded the United States for over 60 years. Id.

78 Id.


80 Id.


82 Id.

83 Id.
sole source with which a third party must negotiate. Moreover, Germany's agreement with the United States completely ignores its obligations as a Member State to comply with policy decisions enacted by the Council of Ministers, such as the imposition of counter-sanctions against the United States in the public procurement dispute.

III. THE REMEDIES DIRECTIVE

Recognizing that Council Directive 90/531 establishes rules for procurement procedures, but does not contain any specific provisions ensuring effective application for interested bidders, the Council adopted Directive 92/13, the Remedies Directive, in February 1992. The Remedies Directive ensures appropriate review procedures for suppliers or contractors who are the victims of a violation of EC law or national rules implementing EC law with regard to public procurement in the four sectors. The EC learned from its experience with the ineffective implementation of the Supplies and Works Directives that inadequate remedies distort and negatively affect the entire tendering process. Thus, Member States must provide a meaningful enforcement regime to ensure that the transparency and non-discrimination guarantees of the Utilities Directive are upheld. Moreover, because the Remedies Directive complements and enhances the effectiveness of the Utilities Directive, both Directives must be implemented simultaneously.

The Remedies Directive requires Member States to follow procedures necessary to ensure that effectively contracting authorities' decisions are reviewable upon request. Under the Remedies Directive, Member States must make review procedures available to all persons with an interest in obtaining a particular contract and who have been or risk being affected negatively by an alleged infringement. The authorities responsible for the review procedures are

85 Id.
87 Id.
88 See id.
89 Id.
90 Id.
92 Id. art. 1(1).
93 Id. art. 1(3).
not judicial in nature. Therefore, written reasons must always accompany decisions. In addition, Member States must ensure that a court, independent of both the contracting party and the review board, is available to review the initial decision. Member States also must ensure that decisions by the review bodies can be enforced successfully with a legally binding effect.

The Member States must empower reviewing bodies to correct an alleged infringement or prevent further injury. Member States may establish their own specific authority for reviewing tendering procedures. Review bodies may be empowered to take the necessary action to either correct the alleged violation or prevent further injury to the interested party. In addition, review bodies may set aside decisions made unlawfully. In cases where an infringement has been identified already, review bodies may order violators to pay a fine. In all cases, and regardless of which power the review board exercises, damages must be awarded to persons injured by infringements.

The Remedies Directive provides an alternative to the remedial powers granted the review boards, as well as an added check on the application of the Utilities Directive. This Directive establishes an "attestation" system which allows contracting authorities to subject their contracting procedures to periodic audits by outside independent auditors. The "attestation" system is designed to ensure that public sector contracting authorities and private sector contracting authorities receive equal benefits. Upon a determination that a "clear and manifest infringement" of EC law in the public procurement market occurred during a contract award, the Commission may invoke corrective procedures. The purpose of the "corrective mechanism" is to grant the Commission the power to intervene immediately at the national level before a contract award procedure is completed. In order to

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94 Id. art. 2(9).
95 Id. art 2(8).
97 Id. art 2(8).
98 Id. art. 2.
99 Id.
100 Id. art. 2(1)(c).
102 Id.
103 Id. arts. 3, 4, and 6.
104 Weiss, supra note 8, at 333.
106 Id.; see also Weiss, supra note 8, at 334.
exercise its corrective powers, the Commission must notify the Member States and the contracting authority of the basis of the Commission’s opinion that a Member State or contracting authority committed an infringement in the procurement procedures. 107 Within thirty days of receipt of the Commission’s notice, Member States either must confirm that the contracting authority corrected the infringement, 108 explain why the contracting authority failed to make a correction, 109 or notify the Commission that the contracting authority suspended the contract award procedure. 110

IV. SIGNIFICANCE OF THE NEWLY ADOPTED UTILITIES AND REMEDIES DIRECTIVES

The Utilities Directive represents a realization within the EC that efforts must be made to open the procurement markets in the excluded sectors. Additionally, the Remedies Directive manifests an understanding that an open market will not succeed without definitive enforcement guarantees. The success of this effort is difficult to predict because much depends on how the Member States will choose to implement the Council’s Directive. If past experience in this market is any indication, Member States may be able to exercise enough latitude and discretion when implementing the Directives into national law so that the desired impact will be lost. 111 Without Member State compliance, however, a unified European market for procurement contracts will never be formed. 112

The Utilities Directive clearly defines the tendering procedures expected, and explicitly calls for publicized practices. These procedures include strict publication requirements, specific time limits between publication and the awarding of a bid, and publication of the name of the company ultimately awarded the contract. 113 The publishing criteria provided in the Directive should force contracting authorities to stop protectionist practices. Additionally, the

108 Id. art. 8(3)(a).
109 Id. art. 8(3)(b).
110 Id. art. 8(3)(c). When the contracting authority suspends an award procedure, notice also must be given to the Commission when the suspension is lifted or a new procedure concerning the same issue is commenced. Id. art. 8(5).
111 See supra notes 18-22 and accompanying text.
112 See Weiss, supra note 8, at 311.
Remedies Directive provides an added guarantee that nationalistic preferencing in the EC will end. By implementing the Remedies and Utilities Directives simultaneously, the strength of each Directive is enhanced greatly.

The Remedies Directive requires Member States to establish effective appeals procedures for each phase of the public procurement process so that challenges may be made as soon as unfair practices occur. Problems may arise, however, when bidders try to prove an actual infringement. The applicant also must be able to identify the amount of loss caused by the alleged infringement. The Remedies Directive fails to tie specific infringements to a set value of compensation. Thus, the ultimate burden of proof for damages rests upon the injured party.

While the Utilities and Remedies Directives demonstrate that the EC recognizes the need to promote a unified, open economy, Germany’s actions call the effectiveness of these Directives into question. Germany's decision to ignore the Directive and cooperate with the United States proves that Member States may not be entirely ready to act as a unified force. At the very least, Germany’s actions demonstrate that Member States still can find ways to work around the provisions of each Directive to benefit their own national interests.

As the EC moves closer to attaining its goal of integration, Member States must learn to stop putting their national interests first. The actions of Germany, one of the most “pro-integrationist” countries, raise a doubt as to whether the EC is capable of achieving complete integration. The episode with Germany clearly demonstrates how failure to look beyond a short-term gain, and refusal to act for the common good rather than with an eye for national interests will disrupt Community progress and weaken the Community’s position as a player in the international market.

Germany's decision to negotiate independently with the United States reflects a nationalistic choice to protect its own interests.

114 Id.
116 Id.
117 Id.
118 Lessons From U.S.-German Deal, supra note 81.
119 Id.; see also EC Pressing Challenge of Germany, supra note 84.
already established in U.S. markets.\textsuperscript{120} Germany is not willing to risk losing its substantial niche in U.S. telecommunications markets.\textsuperscript{121} Thus, Germany independently refused to abide by the terms of the Utilities Directive and deny U.S. firms preference in bids for government telecommunications contracts.\textsuperscript{122}

The key to attaining integration is for the Member States to put the mutually shared single market interests before any self-serving national interests.\textsuperscript{123} Without adopting such a policy, all Member States may follow the non-Community-minded example set by Germany. The result may be the dissolution of the EC as a unified force as each Member State pursues its own national interests whenever such action is more advantageous.\textsuperscript{124}

\textbf{CONCLUSION}

The EC has been working for over two decades on a strategy aimed at opening the Community’s public procurement markets to cross-border competition. The Supplies and Works Directives proved to be ineffective because of the ability of Member States to manipulate the provisions and implement them as they desired. Thus, contract awards continued to go to the national champion. Having learned from the initial mistakes of the Works and Supplies Directives, the Council tightened the loopholes in the Utilities Directive. In addition, unlike the Works and Supplies Directive, the EC implemented the Utilities Directive at the same time as the Remedies Directive. The underlying intent was to encourage contract authorities to provide more transparency and less discrimination in their tendering procedures. For those authorities which fail to do so, effective remedies are available. Thus, the basic framework for effectively opening the public procurement market has been established.

Full compliance, however, depends on each Member State realizing that the long-term benefits of an open market far outweigh the short-term gains from protectionist practices. The episode with Germany represents a setback in EC progress. In addition, it demon-


\textsuperscript{121} See \textit{id}.

\textsuperscript{122} \textit{Id}.

\textsuperscript{123} See \textit{id}.

\textsuperscript{124} EC Pressing Challenge of Germany, \textit{supra} note 84.
strates the number of potential weak links in the chain toward total integration. As a result, questions remain as to whether the European Community truly will be able to integrate and act as a unified force rather than individual threads of a patchwork quilt. Until all Member States prove to take integration seriously, liberalization of the public procurement market cannot be achieved effectively.

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