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ARTICLES

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I. INTRODUCTION

The current push to establish uniform, nondiscriminatory public procurement laws within the European Community (EC) by 1992 follows more than twenty years of relatively unsuccessful attempts to achieve the same goal. Nationalism, entrenched bureaucratic habits, and simple lethargy have all played a role in frustrating the efforts of the Commission of European Communities (EC Commission) to extend the benefits of the open internal market to government purchases and construction contracts. However, the promulgators of the new procurement directives have the force of legal precedent behind them, both at the Community and international levels. How helpful that precedent will be in actually enforcing the directives remains to be seen.

This article analyzes the developments in EC procurement law under the 1992 program. Following a brief overview of the principal sources of EC procurement law, including the Treaty

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of Rome, the early procurement directives issued in the seventies, and the Government Agreement on Tariffs and Trade (GATT) Procurement Code, the article describes the changes to EC procurement discipline prompted by the 1992 integration program. As this article explains, these changes developed through the White Paper promulgated by the EC, which launched the 1992 program, through the Single European Act, which amended the Treaty of Rome to accommodate the integration program, and, most particularly, through the issuance of a series of directives stipulating rules against discrimination in the award of public procurement contracts. Following an in-depth discussion of each of these directives, the article closes with an analysis of the implications of the EC 1992 procurement regime for U.S. businesses.

II. Sources of EC Procurement Law Discipline

A. *Origins of Community Procurement Law*

1. *The Treaty of Rome*

The EC Commission was established under the Treaty of Rome to ensure "the proper functioning and development of the common market."[1] The Commission's authority to promulgate Community-wide public procurement rules derives fundamentally from this Treaty. Although the Treaty contains no explicit public procurement provision, it does establish several basic principles from which the Commission has derived the obligation to eliminate intra-EC discrimination in public procurement.[2] The European Court of Justice has construed articles 30

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1. Treaty Establishing the European Economic Community, *signed* Mar. 25, 1957, art. 155, 298 U.N.T.S. 11 (effective Jan. 1, 1958) [hereinafter Treaty of Rome]. An English translation is located at 1 Common Mkt. Rep. (CCH) ¶ 151 (1971). There are four principal institutions in the EC that carry out its operations. The EC Commission proposes internal market measures and enforces EC law. The European Parliament reviews and comments on the proposed measures. The Council of Ministers approves and issues the measures. Finally, the European Court of Justice adjudicates matters involving the EC treaties and EC law. U.S. Int'l Trade Comm'n, U.S.ITC Pub. No. 2204. The Effects of Greater Economic Integration Within the European Community on the United States vi (1989) [hereinafter 1989 ITC Report].

2. *See generally* Weiss, *The Law of Public Procurement in EFTA and the EEC: The Legal Framework and Its Implementation*, 7 Y.B. Eur. L. 59, 85-87; Reid, *1992 and the U.S. Manufacturing Industry: The Opening Up of the Public Procurement Markets in the EEC, reprinted in* Practicing Law Institute, 1992: The Changing Legal Landscape for Doing Business in Europe 79, 87-88 (1989).

through 36 of the Treaty,[3] which prohibit quantitative restrictions on imports or measures having an equivalent effect, as mandating the elimination of "all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade."[4]

Article 7 of the Treaty states that, except in specified circumstances, "any discrimination on grounds of nationality shall be hereby prohibited."[5] Other articles apply the principle of nondiscrimination specifically to goods, persons, services, and capital.[6] Finally, Articles 52 and 53 require the abolition of restrictions on the right of nationals to take up residence or employment and to set up businesses in any Member State.[7]

Most importantly, article 33 of the Treaty of Rome directs the Commission to issue directives establishing procedures and timetables to implement the ban on quantitative restrictions on imports.[8] In 1966, the Commission promulgated a directive calling for the elimination of legislative and administrative measures that prevented in whole or in part the use of products imported from an EC Member State for any purpose. This initial directive, however, explicitly exempted measures relating to public supply contracts, stating that they would be dealt with separately.[9]

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3. *See* Treaty of Rome, *supra* note 1, at arts. 30-36.

4. Public Prosecutor v. Benoit, 1974 E. Comm. Ct. J. Rep. 8, [1975 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8276 (1974).

5. Treaty of Rome, *supra* note 1, at art. 7. The European Court of Justice has interpreted article 7 to prohibit discrimination whether direct, indirect, or covert, and whether it consists of different treatment of similar situations or similar treatment of different situations. *See, e.g.*, Government of Italy v. Comm'n, 9 Recueil 335, [1961-1966 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8014 (1963). *See generally* H. SMIT & P. HERZOG, 1 THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY: COMMENTARY ON THE EEC TREATY 1-52 to 1-64 (1988).

6. *See* Treaty of Rome, *supra* note 1, at arts. 31, 48, 59, 67.

7. For the purposes of these articles, nationals include corporations. Treaty of Rome, *supra* note 1, at art. 58.

8. *See* Treaty of Rome, *supra* note 1, at art. 33, para. 7.

9. *Directive de la Commission du 7 Novembre 1966 Portant Elimination de Toute Difference de Traitement Entre les Produits Nationaux et les Produits Qui, en Vertu des Articles 9 et 10 du Traite, Doivent Etre Admis a la Libre Circulation, en Ce Qui Concerne les Dispositions Legislatives, Reglementaires et Administratives qui Interdisent l'Utilisation Desdits Produits Importes et Qui Imposent l'Utilisation de Produits Nationaux ou Qui Subordonnent un Benefice a Cette Utilisation (66/683/CEE)*, 9 J.O. COMM. EUR. 3748 (1966).

2. *Early public procurement directives*

It was not until 1971 that the Commission introduced its first directive dealing explicitly with public procurement. Surprisingly, the Commission chose first to tackle public works and procurement contracts rather than public purchases of supplies.[10] The 1971 public works directive requires public entities to follow certain procedures in awarding contracts for the construction of public works worth one million European Economic Units (ECU) or more. First, the directive forbids contracting authorities to use discriminatory technical specifications in tenders, such as specifications that call for the use of products of a particular trademark, patent, or type.[11] Second, the directive requires notice and bidding procedures. Notice of all covered public works contracts must be advertised in the *Official Journal of the European Communities* (*Official Journal*) for a set time period before the contract can be awarded, and no local advertisement may contain more information than is published in the *Official Journal*.[12] Contracts must generally be awarded through

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10. *Council Directive of 26 July 1971 Concerning the Co-ordination of Procedures for the Award of Public Works Contracts (71/305/EEC)*, 14 J.O. COMM. EUR. (No. L 185) 5 (1971) [hereinafter *Directive 71/305*]. Actually, the 1971 directive was a revised version of Directive 70/32. *See Directive de la Commission du 17 Decembre 1969 Concernant les Fournitures de Produits a l'Etat, a Ses Collectivites Territoriales et aux Personnes Morales de Droit Public (70/32/CEE)*, 13 J.O. COMM. EUR. (No. L 13) 1 (1970).

11. *Directive 71/305*, *supra* note 10, at art. 10(2). "However, if such indication is accompanied by the words 'or equivalent,' it shall be authorized in cases where the authorities awarding contracts are unable to give a description of the subject of the contract using specifications which are sufficiently precise and intelligible to all parties concerned." *Id.*

12. *Id.* at arts. 12-18. *See generally* OFFICE FOR OFFICIAL PUBLICATIONS OF THE EUROPEAN COMMUNITIES, PUBLIC PROCUREMENT AND CONSTRUCTION—TOWARDS AN INTEGRATED MARKET 43-47 (1988) [hereinafter EC Doc. 1988].

There is a prescribed layout for tender notices to ensure that all such notices give the same amount of information. In general, all notices must include the date on which the notice was sent for publication to the *Official Journal*; the tendering procedure; the site, nature, and extent of the work; any time limit for its completion; particulars of the principal; the closing date for receipt of bids or applications to bid (selective tendering); the main financing and payment terms; the evidence and formalities required of contractors; and the criteria on which the contract is to be awarded. *Directive 71/305*, *supra* note 10, at arts. 16-18.

Tender notices advertised in national publications may not contain any additional information and may not appear before the tender notice is sent to the *Official Journal*. *Id.* at art. 12. The closing date for receipt of bids must be at least 36 days from dispatch of the notice to the *Official Journal*. *Id.* at art. 13. Where restricted tendering is to be used, the closing date for receipt of applications to bid must not be less than 21 days from dispatch of the notice and 21 days from the dispatch of the written invitations to tender. All such invitations must be sent simultaneously. *Id.* at art. 14.

open bidding procedures, although single tendering is permitted under limited circumstances.[13] Third, the directive states that contracts must be awarded on one of only two permissible bases: the lowest price or the most economically advantageous tender.[14] Finally, the directive includes safeguards to ensure that contractors from other EC countries are not arbitrarily eliminated from consideration.[15]

Next, in 1977, the Commission introduced a supplies direc-

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13. *Directive 71/305*, *supra* note 10, at art. 9. When open tendering procedures are used, all interested suppliers can present an offer. In certain specified circumstances, the rule that contracts be put out to open tender is waived and the single tender procedure, in which the purchaser negotiates directly with a supplier or suppliers of its choice without prior advertisement, may be used. Single tendering is allowed only (1) when no suitable contractor was found in a previous open or restricted tender, and the terms of the contract have not been substantially altered; (2) when, for technical or artistic reasons or because of exclusive rights, only one contractor in the Community can carry out the work; (3) when the work is for purposes of research, experiment, study, or development; (4) in cases of urgency resulting from unforeseen circumstances that are not the fault of the contracting authority; (5) when the works are secret on the grounds of national security; (6) when the work is an unforeseeable continuation of an earlier contract project; (7) when the contract is for the repetition of work that was previously the subject of an open or restricted tender; or, (8) in exceptional circumstances, when the nature of the work or the risks attaching to it make it impossible to estimate its total cost.

Authorities making single tenders must still act in conformity with article 10, concerning nondiscriminatory technical specifications, but otherwise are not bound by the provisions of the directive. *Id.* The European Court of Justice has ruled that these exceptions must be construed strictly and that the burden is on the contracting authority invoking them to prove that invocation of an exception is warranted. *See, e.g.*, Commission v. Italian Republic, 1987 E. Comm. Ct. J. Rep. 199, [1987-1988 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,428 (1987) (rejecting Italian claims that single tendering was justified for a contract to build a solid waste recycling plant either because the technology was the best in Europe or because an accident at the existing incinerator made the new plant an urgent need).

14. *Directive 71/305*, *supra* note 10, at art. 29(1). The directive lists examples of features of bids that can be taken into consideration in determining which is economically the most advantageous. These include price, period for completion, running costs, profitability, and technical merit. Other factors may be considered if they are objective. All criteria to be considered must be listed in descending order of importance in the published notice. *Id.* at art. 29(2). Abnormally low tenders may be rejected after further examination. *Id.* at art. 29(5).

15. *Directive 71/305*, *supra* note 10, at arts. 23-27. A contractor can be disqualified from making a construction tender only if it (1) is bankrupt, or in an analogous situation; (2) is the subject of proceedings for bankruptcy or of a similar nature; (3) has been convicted of an offense concerning professional conduct; (4) is shown by the contracting authority to have been guilty of grave professional misconduct; (5) has not fulfilled obligations relating to the payment of social security contributions under the law of its country of residence or the country of the authority awarding the contract; (6) owes taxes in its country of residence or the country of the authority awarding the contract, or (7) is guilty of serious misrepresentation in supplying the information required under the Chapter. *Id.* at art. 23.

tive, requiring national, regional, and local government entities and all other legal persons governed by public law to employ transparent, nondiscriminatory procedures for procurement of goods worth 200,000 ECU or more, whether by purchase, lease, or rental.[16] The substantive requirements of the 1977 supplies directive parallel those of the 1971 public works directive. The supplies directive was supposed to be implemented through incorporation into national law within eighteen months.[17]

Both the supplies and the public works directives include certain important limitations. First, both directives exclude key sectors and certain types of contracts. Contracts for the supply of services do not fall within the scope of either directive. Further, the directives do not apply to public water and energy utilities, nor to public transportation administrations.[18] In addition, the supplies directive contains an exclusion for telecommunications services equipment.[19] These sectors were excluded because of the complications engendered by their varying legal statuses in Member States.[20] Yet at the time the directives were issued, these exempted sectors rivaled in size the markets covered by the directives.[21]

The directives also exempt certain international contracts.[22]

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16. *Council Directive of 21 December 1976 Coordinating Procedures for the Award of Public Supply Contracts (77/62/EEC)*, 20 O.J. EUR. COMM. (No. L 13) 1 (1977) [hereinafter *Directive 77/62*]. Although the directive did not clearly state that it applied to purchase, lease, and rental arrangements, the Commission intended that all three procurement forms would be covered by the directive. *See* 1989 ITC Report, *supra* note 1, at 4-9. The revised supplies directive, adopted in 1989, clarifies this point. *See infra* note 105 and accompanying text.

17. *Directive 77/62*, *supra* note 16, at art. 30.

18. *Directive 71/305*, *supra* note 10, at arts. 3(4)-(5); *Directive 77/62*, *supra* note 16, at art. 2(2). These exceptions are strictly construed. In the area of water services, only bodies that manage drinking water are exempt. River management, sewage, irrigation, and drainage services are subject to the directives. If the agency engages in some covered and some exempt activities, only contracts relating to the exempt activities are excluded. Similarly, in the energy sector, the exception is limited to utilities in the business of providing energy. Thus, for example, a hospital's purchase of an electrical generator is not exempt from the supplies directive. In the transportation sector, the exemption applies to organizations engaged in the carriage of passengers and goods (common carriers), but not to those operating facilities. Therefore entities operating airports and ports are not exempt. EC Doc. 1988, *supra* note 12, at 23.

19. *Directive 77/62*, *supra* note 16, at art. 2(2)(b).

20. *Directive 71/305*, *supra* note 10, at recitals 4-6. *See also infra* text accompanying notes 184-86.

21. Weiss, *supra* note 2, at 88.

22. Three types of international contracts are excluded from the works and supplies directives: (1) contracts awarded by a Member State, under an international agreement with a non-Member State, which agreement includes stipulations for the award of con-

In the construction area, the works directive exempts concession contracts—i.e., contracts in which the consideration consists in whole or in part of a franchise to operate the completed works.[23] Procurement of products for specifically military purposes, such as arms and war material, is also exempted.[24]

Most importantly, the directives do not extend their benefits to suppliers of goods and services outside the Community.[25] In fact, because of a loophole in the Treaty of Rome, the Commission could be obligated to exclude third country products from a Member State's supplies contracts in certain circumstances. Article 115 of the Treaty, the safeguards clause, provides that when, in the course of implementing the common commercial policy, a particular Member State suffers disparate economic difficulties, "the Commission shall authorize the Member State to take the necessary protective measures of which it shall determine the conditions and particulars." These protective measures could include a fixed period of exclusion of the relevant product.[26]

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tracts; (2) contracts awarded to firms in a non-EC country under an international agreement that excludes EC firms from eligibility; and (3) contracts awarded under the procedure of an international organization. *Directive 71/305*, *supra* note 10, at art. 4; *Directive 77/62*, *supra* note 16, at art. 3.

23. *Directive 71/305*, *supra* note 10, at art. 3(1). Member State governments have agreed to a voluntary code of conduct for such contracts, adopted at the same time as the works directive in 1971. *Declaration des Representants des Gouvernements des états Membres, Reunis au Sein du Conseil, sur les Procedures a Suivre en Matiere de Concessions de Travaux*, 14 J.O. COMM. EUR. (No. C 82) 13 (1971). The procedural rules are similar to those in the works directive but are not as detailed. They apply to all contracts for works worth at least 1 million ECU. The declaration also governs the subcontracting of work. (A declaration is an undertaking of the governments of EC Member States, not an act of the European Community). EC Doc. 1988, *supra* note 12, at 52-53.

24. *Directive 77/62*, *supra* note 16, at art. 6(g) & recital 5. Defense purchases of items listed in an appendix to the GATT Government Procurement Code are subject to that Code's rules. *See infra* note 37.

25. These early directives only benefit EC suppliers because they were adopted pursuant to article 30 of the Treaty of Rome, which only prohibits intra-community quantitative restrictions on imports. The Treaty states that "[q]uantitative restrictions on importation and all measures with equivalent effect shall, without prejudice to the following provisions, hereby be prohibited between Member States." Treaty of Rome, *supra* note 1, at art. 30. *See also Directive 77/62*, *supra* note 16, at recital 5 (stating that the directive is derived from article 30).

26. Weiss, *supra* note 2, at 90-91. *See also* Criel v. Procureur de la Republique, 1976-1979 E. Comm. Ct. J. Rep. 1921, [1977 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8398 (1976). In this case the European Court of Justice made the following statement.

> Article 115 allows difficulties of this kind to be avoided by giving the Commission the power to authorize Member States to take protective measures, particularly in the form of derogations from the principle of free circulation within

Recognizing these limitations, the EC Council adopted a Resolution in 1976 highlighting the need to determine conditions under which public supply contracts of EC Member States might be opened to third country products. The resolution also suggested that the Community secure reciprocal treatment through negotiations within the GATT or the OECD.[27] The GATT Government Procurement Code, which was signed in 1979, provided such reciprocal treatment.

B. The GATT Government Procurement Code

The opportunity to achieve reciprocal liberalization of nonmember procurement regimes came in the Tokyo round of multilateral trade negotiations held from 1973 to 1979 under the auspices of the GATT. In the course of the round, negotiators concluded an Agreement on Government Procurement ("Government Procurement Code").[28] The code was designed to ensure that contractors from signatory countries could participate on equal terms in the tendering process in any other signatory country and have equal access to means of redress available to local contractors.[29] The Code applies to all contracts for the

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the Community for products which originated in third countries and which were put into free circulation in one of the Member States.

Id. The Commission has also issued a statement supporting the exclusionary period.

In accordance with the provisions of article 115 of the Treaty the Commission intends to authorize, for fixed periods which might extend until the conclusion of the international negotiations, those Member States concerned which have so applied to provide for the exclusion from their public contracts of certain goods or categories of goods originating in third countries which are in free circulation in another Member State, in all cases where similar arrangements are made as regards directly imported products originating in third countries.

Commission Statement concerning Article 115 of the Treaty, 20 O.J. EUR. COMM. (No. C 11) 2 (1977).

27. *Council Resolution of 21 December 1976 Concerning Access to Community Public Supply Contracts for Products Originating in Nonmember Countries*, 20 O.J. EUR. COMM. (No. C 11) 1 (1977).

28. Agreement on Government Procurement, April 12, 1979, T.I.A.S. No. 10403, *reprinted in* 26 G.A.T.T. BASIC INSTRUMENTS OF SELECTED DOCS. (1980) [hereinafter Government Procurement Code]. The Government Procurement Code entered into force on January 1, 1981. *Id.* Current signatories include the United States, the European Economic Community (on behalf of all Member States), Austria, Canada, Finland, Hong Kong, Israel, Japan, Norway, Singapore, Sweden, Switzerland, and the United Kingdom (on behalf of most territories for which it has international responsibility). U.S. DEPARTMENT OF STATE, TREATIES IN FORCE: A LIST OF TREATIES OR OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 1990, at 390 (1990).

29. Government Procurement Code, *supra* note 28, at 33 ("recognizing that laws, regulations, procedures and practices regarding government procurement should not be prepared, adopted or applied to foreign or domestic products and to foreign or domestic

purchase of supplies worth at least 150,000 Special Drawing Rights (SDRs) and to purchases of incidental services, so long as their value does not exceed the cost of the relevant supplies.[30]

In most respects, the Code imposes the same obligations on EC procuring entities as the 1977 supplies directive.[31] For example, the Code:

- provides that technical specifications cannot be used to discriminate between tenderers and must be based whenever possible on international standards;[32]
- sets out minimum time periods during which an announced bid must remain open;[33]
- limits the criteria by which a winning bid may be selected;[34]
- instructs signatories to publish their pertinent laws and regulations conspicuously;[35] and
- requires government agencies to inform suppliers of the reason the suppliers are rejected, either as unqualified tenderers or as unsuccessful bidders.[36]

Nevertheless, the Government Procurement Code does not extend to public works and other services. In some ways its

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suppliers so as to afford protection to domestic products or suppliers and should not discriminate among foreign products or suppliers"). *See also* Thys & Henry, *Government Procurement Regulations of the European Economic Community*, 20 GEO. WASH. J. INT'L L. & ECON. 445, 453 (1987).

30. Thys & Henry, *supra* note 29, at 453. At the time the Government Procurement Code was signed, 150,000 SDRs were worth approximately 140,000 ECU. *Id.* at 453 n.61. The value threshold in the 1977 EC supplies directive was adjusted downward accordingly for all contracts subject to the Code. *Council Directive of 22 July 1980 Adapting and Supplementing in Respect of Certain Contracting Authorities Directive 77/62/EEC Coordinating Procedures for the Award of Public Supply Contracts (80/767/EEC)*, 23 O.J. EUR. COMM. (No. L 215) 1, 2 (1980) [hereinafter *Directive 80/767*]. The value threshold was further reduced to bring the directive into compliance with amendments to the Government Procurement Code, which entered into force in 1988. *See infra* note 42 and accompanying text.

31. *See supra* notes 10-16 and accompanying text.

32. Government Procurement Code, *supra* note 28, at art. IV(1)-IV(2)(b).

33. *Id.* at art. V(10).

34. *Id.* at art. V(14)(f). This article provides that

> unless in the public interest an entity decides not to issue the contract, the entity shall make the award to the tenderer who has been determined to be fully capable of undertaking the contract and whose tender, whether for domestic or foreign products, is either the lowest tender or the tender which in terms of the specific evaluation criteria set forth in the notices or tender documentation is determined to be the most advantageous.

Id.

35. *Id.* at art. VI(1).

36. *Id.* at art. VI(2)-(6).

scope in the area of supplies is even more circumscribed than that of the EC supplies directive. First, it does not apply to lease and rental contracts. Second, most local and regional procuring authorities are not bound to follow Code rules. In addition, the Code does not apply to defense purchases, with the exception of a few basic commodities listed in an annex.[37] Lastly, the Government Procurement Code does not cover the so-called "excluded sectors" of energy, water, transportation, and telecommunications.[38]

Accession to the Government Procurement Code imposed an obligation on the EC to modify the supplies directive because the directive applied only to EC Member States,[39] whereas the Code extends protection against discriminatory procurement practices to signatory foreign countries.[40] The European Council of Ministers (EC Council)[41] fulfilled this obligation in July 1980 by amending the supplies directive.[42] At least in theory, there-

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37. 1989 ITC REPORT, *supra* note 1, at 4-9 & n.8.

38. These sectors were excluded from the coverage of the Government Procurement Code in part because the EC Commission had not been delegated the authority to bargain in that area by the Member States. *See* U.S. GENERAL ACCOUNTING OFFICE, PUB. No. GAO/NSIAD-90-60, EUROPEAN SINGLE MARKET: ISSUES OF CONCERN TO U.S. EXPORTERS, 40 (1990) [hereinafter GAO, SINGLE EUROPEAN MARKET).

39. *See supra* note 25 and accompanying text.

40. *See* Government Procurement Code, *supra* note 28, at art. II (1). The Code also extends protection to certain developing countries. *Id.*

41. The EC Council is responsible for most EC decisionmaking and for relations with international organizations and third countries. Treaty of Rome *supra* note 1, at arts. 145, 203, 209. The Council is composed of cabinet-level representatives from each of the EC's member states. 1989 ITC Report, *supra* note 1, at 1-12 to 1-13. *See also supra* note 1.

42. *Directive 80/767*, *supra* note 30. Article 7 of the directive states that "[m]ember States shall apply in their relations conditions as favorable as those which they grant to third countries in implementation of the Agreement." *Id.*

Accession to the Code also required some minor modifications to the supplies directive. For example, the notice period for publication of requests for bids had to be extended, as mandated in article V(10) of the Code, and the contract value threshold had to be lowered. *See Directive 80/767*, *supra* note 30, at arts. 6 & 3.

Additional modifications were made to the supplies directive in 1986 to take account of the conclusion of a GATT Panel Report, made pursuant to a complaint by the United States, finding that the EC practice of excluding the value added tax (VAT) from the price of contracts had the effect of evading the threshold set by article I(1)(b) of the Code. Weiss, *supra* note 2, at 92; *GATT Panel on Value-Added Tax and Threshold, Report of the Panel adopted by the Committee on Government Procurement on 16 May 1984 (GPR/21)*, 31 G.A.T.T. BASIC INSTRUMENTS OF SELECTED DOCS. 247 (1985). Finally, in 1988, the range of covered contracts was extended and the value threshold further reduced (to the ECU equivalent of 130,000 SDR) to bring the directive into compliance with amendments to the Code which entered into force in 1988. GENERAL AGREEMENT ON TARIFFS AND TRADE, GATT ACTIVITIES 1988 119 (1989). *See infra* notes 101-25 and ac-

fore, the EC's accession to the Code opened up a significant subsection of its procurement market to competitive bidding by third-country companies.

C. *The 1984 Commission Reports on the Operation and Effectiveness of the Works and Supplies Directives*

The 1977 supplies directive instructed the EC Commission to submit to the Council within three years a report on progress made toward implementation of the directive.[43] In that report, which was not released until 1984, the Commission concluded that the incorporation of the supplies directive and the 1980 amendments into national laws had not succeeded in homogenizing the Member States' procurement regimes.[44] While the number of invitations to bid published in the *Official Journal* was increasing, the directive was not being fully implemented in other respects.[45] Similarly, the Commission's *1984 Report on the Award of Building and Public Works Contracts* found that in many cases the public works directive either was incorporated ineffectively into national law or coexisted with inconsistent national regulations.[46]

The Commission concluded that the directives had had at best a marginal affect on procurement behavior.[47] The directives were handicapped from the outset by the complete exclusion of major sectors. In fact, the Commission found that many central government departments made no purchases at all under the directives.[48] Most local and regional authorities also failed to

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companying text.

43. *Council Resolution of 21 December 1976 Concerning the Review of Directive 77/62/EEC Coordinating Procedures for the Award of Public Supply Contracts*, 20 O.J. EUR. COMM. (No. C 11) 3 (1977).

44. PUBLIC SUPPLY CONTRACTS, CONCLUSIONS AND PERSPECTIVES, 1984 EUR. COMM. DOC. (COM No. 717) (1984) [hereinafter 1984 REPORT ON SUPPLIES]. *See also The Commission Makes Representations to the Member States' Governments*, 10 BULL. E.C. 23-24, para. 2.1.14 (1978) (noting that complaints of national restrictions on the free flow of goods and services increased markedly between 1975 and 1978).

45. *See, e.g.*, Commission v. Italian Republic, 1981 E. Comm. Ct. J. Rep. 133, [1979-1981 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8741 (1982) (concluding that Italy had failed to enact the supplies directive into its national law in violation of article 169 of the Treaty of Rome).

46. Thys & Henry, *supra* note 29, at 455-56 & n.81.

47. 1984 REPORT ON SUPPLIES, *supra* note 44, at 11.

48. More than two-thirds of the entities covered by the supplies directive made no purchases above the threshold value. *Id.* at 13.

purchase under the directives.[49] As a result, while total purchasing controlled by the public sector amounted to as much as 15 % of the Community's gross domestic product, only 0.14 % of the GDP was awarded to companies from other EC countries.[50] This lingering economic nationalism was costing the Community an estimated eight to nineteen billion ECU per year due to the maintenance of inefficient surplus production capacity and artificially inflated prices.[51]

The reports attributed this failure to four causes: (1) widespread ignorance at the local and regional level of the directives' existence and contents, (2) deliberate division of projects into several smaller contracts in order to come in under the value threshold, (3) abuse of the exception allowing for single tendering in limited circumstances, and (4) pretense of following the open tendering rules while in fact flouting them.[52] "The stark fact," wrote one commentator, "is that the Community legislator [sic] has up to now proved no match for national and local purchasing bureaucracies."[53]

In some EC Member States, current laws mandate discrimination at the national or subnational level. Many Member States have laws according preferential treatment to specific regions within the country.[54] These preferences are intended to encourage business and production in less populous or poorer regions or to assist firms that would not otherwise receive contracts "because they lack know-how, infrastructure, access to capital, sophisticated marketing and product development methods, or opportunities for specialization."[55] Germany, for example, favors the eastern frontier zone, while Greece favors all of the country outside Attica. Similar zones exist in the United Kingdom and Italy. Preferences given to those zones include

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49. *Id.*

50. P. CECCHINI, THE EUROPEAN CHALLENGE 16 (1988)(containing figures from 1986).

51. W. S. Atkins Management Consultants, *The "Cost of Non-Europe" in Public Sector Procurement*, 1 RESEARCH ON THE "COST OF NON-EUROPE" §§ 2.2-2.3 (1987) [hereinafter RESEARCH ON THE COST OF NON-EUROPE].

52. 1984 REPORT ON SUPPLIES, *supra* note 44, at 8, 13-14.

53. P. CECCHINI, *supra* note 50, at 18.

54. *Public Procurement: Commission Proposes an Alternative to Regional Preferences*, 4 Common Mkt. Rep. (CCH) ¶ 95,239 (1989) [hereinafter *CCH Report on Regional Preferences*].

55. U.S. INT'L TRADE COMM'N, USITC PUB. No. 2268, 1992: THE EFFECTS OF GREATER ECONOMIC INTEGRATION WITHIN THE EUROPEAN COMMUNITY ON THE UNITED STATES: FIRST FOLLOW-UP REPORT 4-5 (1990) [hereinafter 1990 ITC REPORT].

price margins, the reservation of particular contracts, and the right to submit a revised tender.[56]

To some extent, the failure of Member States to implement the EC's procurement directives is due to structural impediments. The sheer number of government agencies to which the procurement rules apply makes their uniform and effective implementation difficult at best. For example, there are approximately 700 purchasing entities in the United Kingdom and over 20,000 such agencies in West Germany.[57] Likewise, the procedures for seeking remedies in the various Member States vary widely. In Germany, Denmark, Ireland, the Netherlands, and the United Kingdom, a supplier seeking redress is referred to an administrative proceeding before the purchasing authority.[58]

In the latter three countries, an appeal of last resort to the competent minister is possible. Belgium, Luxembourg, and Greece provide for both administrative and judicial proceedings, depending on the circumstances of the case. Italy allows review either by the local purchasing authority or by a regional administrative tribunal. France provides for three successive levels of administrative review.[59] In addition, national design standards vary considerably, such that railway and power generation equipment made in one country are incompatible with the railway or power generation needs of another.[60]

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56. *CCH Report on Regional Preferences*, *supra* note 54.

57. Reid, *supra* note 2, at 84.

58. Thys & Henry, *supra* note 29, at 457-58.

59. *Id. See also* Goldman, *An Introduction to the French Law of Government Contracts*, 20 GEO. WASH. J. INT'L L. & ECON. 461 (1987).

60. RESEARCH ON THE COST OF NON-EUROPE, *supra* note 51, § 2.2. A wronged supplier may also seek redress under article 169 of the Treaty of Rome. Under article 169, a firm can complain to the Commission by means of a simple letter giving details of the complaint and the evidence to support the claim. If the Commission determines that the complaint is justified, the Commission may commence an infringement proceeding against the Member State responsible for the relevant contracting authority. The Commission then writes a letter to the Member State asking it to answer the charges by a certain date. If the Member State refutes the charges or fails to take remedial action by that date, the Commission serves a "reasoned opinion" on the Member State ordering it to take certain remedial actions by a specified date. Should the Member State fail to comply, the Commission can then take the case before the European Court of Justice, which in turn is empowered in certain circumstances to issue an injunction suspending the award of the contract pending its decision on the merits. EC Doc. 1988, *supra* note 12, at 57-59.

In the case of a contract awarded by a contracting authority in a non-Member State that is a signatory of the GATT Government Procurement Code, the Commission can refer the complaint to the GATT Committee on Government Procurement. Thys & Henry, *supra* note 29, at 457. A contractor is free to follow both avenues of redress at the

In the *1984 Report on Supplies*, the Commission concluded, however, that the structural and legal impediments alone could not account for the widespread failure of national procuring authorities to buy from other Member States. The truth, they surmised, was that "the desire for competition is not universally shared; that old prejudices and preferences die hard; and that a majority of suppliers are either not informed of the existence of the market offered by public procurement or discouraged by past experience, or reluctant to make the necessary efforts to win contracts over frontiers."[61]

To rectify the situation, the Commission proposed three lines of action. First, the application of existing directives would have to be improved. Second, the directives should be modified to deter abuse and circumvention. Finally, the directives should be extended to apply to the excluded sectors of water, energy, transport, and telecommunications.[62]

III. Changes to EC Procurement Discipline Prompted By the 1992 Integration Program

A. *The White Paper and the Single European Act*

The decline in Europe's economy in the eighties prompted Europeans to appreciate more fully that the Member States share common economic problems and would benefit from a joint effort to address these difficulties.[63] Thus, in 1985, the Member States asked the Commission to develop concrete proposals to achieve a fully unified internal market by 1992.[64] In response, the Commission issued two documents: the White Pa-

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same time. Action through national courts under EC law may be faster and, unlike a complaint brought by the Commission, can be directed specifically at the purchasing authority. EC Doc. 1988, *supra* note 12, at 58. *See, e.g.*, S.A. Transoroute et Travaux v. Minister of Pub. Works, 1982 E. Comm. Ct. J. Rep. 76, [1981-1983 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8812 (1984) (in answer to question posed by the Luxembourg court to which a Belgian contractor brought an action for infringement of the works directive, the court held that the Minister of Public Works violated the directive and article 30 of the Treaty of Rome when he rejected a contractor listed on the register of qualified contractors in the contractor's state of residence for failure to have an establishment permit issued by the government of Luxembourg).

61. Weiss, *supra* note 2, at 94-95.

62. 1984 Report on Supplies, *supra* note 44, at 17.

63. Office for Official Publications of the European Communities, Europe Without Frontiers—Completing the Internal Market 19 (1989) [hereinafter EC Doc. 1989].

64. *Id.*

per, setting forth an economic framework for achieving unification as well as a timetable for action, and the Single European Act, which modified the Treaty of Rome to facilitate complete integration. These two documents served as the impetus for more detailed and comprehensive procurement legislation.

1. The White Paper

In June 1985, the Commission issued its White Paper, "Completing the Internal Market" (White Paper),[65] which launched the drive toward the economic integration of the twelve EC Member States. The White Paper delineated the step-by-step program for eliminating major internal barriers to commercial activity by the year 1992.[66]

The goal of the White Paper is the gradual achievement of economic integration through the implementation of approximately 279 measures[67] which address three broad goals: (1) the eradication of internal physical barriers, such as those arising from customs border procedures; (2) the eradication of technical barriers, including those relating to government procurement procedures; and (3) the eradication of fiscal barriers, principally by narrowing the broad range of VAT and excise tax rates.

In the White Paper, the Commission reported the "minimal" application of the earlier directives on public procurement by the Member States and reaffirmed its commitment to open up government procurement and large public-sector construction projects.[68] The Commission set forth an ambitious agenda to strengthen existing Member State commitments on public procurement.[69] The Commission promised to submit legislative

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65. COMPLETING THE INTERNAL MARKET: WHITE PAPER FROM THE COMMISSION TO THE EUROPEAN COUNCIL, 1985 EUR. COMM. DOC. (COM No. 310) [hereinafter WHITE PAPER].

66. The White Paper has no binding legal effect because the Council need not adopt the EC Commission's proposals. *See* 1989 ITC REPORT, *supra* note 1, at 1-17.

67. The original White Paper contained 300 proposals. Subsequently, several proposals were eliminated or consolidated and new proposals were added. The proposals now number 279. *See* COMPLETING THE INTERNAL MARKET: AN AREA WITHOUT INTERNAL FRONTIERS, 1988 EUR. COMM. DOC. (COM No. 650) 4.

68. WHITE PAPER, *supra* note 65, at paras. 81-87. The Commission stated that less than one ECU in four of public expenditure in the areas covered by previously issued procurement directives (*e.g.*, the public supply and public works directives) is the subject of procurement notices published in the *Official Journal* and thus, ostensibly, open to Community-wide competition. *Id.* at para. 83.

69. *See* 1989 ITC REPORT, *supra* note 1, at 4-10.

proposals by the end of 1987 and envisaged Member State implementation of all directives by 1992.[70]

The 1992 proposals contemplated by the Commission would accomplish the following:

- close loopholes in existing directives governing central and local government purchases of goods and public works construction;[71]
- extend the scope of the directives to cover service contracts and the so-called "excluded sectors"—telecommunications, water, energy, and transport;[72]
- require Member States to provide effective administrative and judicial remedies for wronged suppliers;[73]
- strengthen EC oversight of Member State procurement practices;[74]
- increase the transparency of procedures for the award of contracts;[75]
- improve the Member States' implementation of existing directives;[76] and
- improve the quality and speed of publication of notices to tender.[77]

2. *The Single European Act*

The second document that serves as a key component to the 1992 program is the Single European Act (Act).[78] This Act contains the first major amendments to the Treaty of Rome since its adoption in 1957 and modifies the functions of EC institutions in order to facilitate implementation of the integration program discussed in the White Paper.[79]

The Act has made several key alterations to EC institutional procedure. First, the Act authorizes certain decisions involving the establishment and functioning of the internal market

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70. WHITE PAPER, *supra* note 65, at para. 86.
71. 1990 ITC REPORT, *supra* note 55, at 4-3.
72. WHITE PAPER, *supra* note 65, at paras. 86-87.
73. 1990 ITC REPORT, *supra* note 55, at 4-3.
74. WHITE PAPER, *supra* note 65, at para. 152.
75. *Id.* at para. 85.
76. *Id.* at para. 84.
77. *Id.*
78. Single European Act, BULL. E.C., Supp., Feb., 1986, *reprinted in* 3 Common Mkt. Rep. (CCH) ¶¶ 21,000-21,540 (1989) [hereinafter SEA].
79. For a description of the four principal EC institutions, see *supra* note 1.

to be taken by a weighted majority rather than by unanimity.[80] In the past, the unanimity requirement made decision-making a complex and lengthy process and meant that progress was often slowed by a single Member State.[81]

Perhaps the most important provision of the Act to the integration of the EC is the new cooperation procedure, which changes the voting procedure for issuing directives and broadens the European Parliament's role in the legislative process, particularly in the context of completing the internal market.[82] The procedure requires that the Commission and the Council maintain closer contact with the European Parliament[83] and governs certain designated provisions in the Treaty of Rome that are important to the 1992 integration program.[84]

In the chapter on research and technological development, the Act emphasizes the importance of public procurement:

> [T]o strengthen the scientific and technological basis of European industry . . ., [the Community will] support [efforts of firms] . . . to co-operate with one another, aiming, notably, at enabling undertakings to exploit the Community's internal market potential to the full, in particular through the opening up of national public contracts, the definition of common standards and the removal of legal and fiscal barriers to that co-operation.[85]

Further, in hopes that defense procurement will be liberalized, the new provisions on foreign policy cooperation reflect a com-

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80. SEA, *supra* note 78, at arts. 7 & 16, *reprinted in* 3 Common Mkt. Rep. ¶¶ 21,060 & 21,150 (1989). Article 16 introduces qualified majority voting in the following areas: the common customs tariff, freedom for non-EC nationals established in a member state to provide cross-frontier services, free movement of capital, and the liberalization of sea and air transport. Article 7 requires qualified majority voting in connection with the new cooperation procedure. *See infra* notes 82-84 and accompanying text. *See Decision Making in the Council of Ministers*, 3 Common Mkt. Rep. (CCH) ¶ 20,020 (1989).

81. *See* EC Doc. 1989, *supra* note 63, at 23.

82. SEA, *supra* note 78, at art. 7 (replacing article 149 of the Treaty of Rome), *reprinted in* 3 Common Mkt. Rep. ¶ 21,060 (1989). *See also* E.C. Doc. 1989, *supra* note 63, at 23.

83. *See* EC Doc. 1989, *supra* note 63, at 23.

84. 1989 ITC REPORT, *supra* note 1, at 1-17. The EC reports that the new majority voting rules in the Council and the timetables established for the operation of the cooperation procedure have prompted speedier decision-making. Nevertheless, the cooperation procedure does not ensure adoption of legislation; the political resolve of the EC institutions continues to determine whether legislation is passed. *See* EC Doc. 1989, *supra* note 63, at 23.

85. SEA, *supra* note 78, at art. 24.

mitment by the Member States to coordinate their positions more closely on the political and economic aspects of security.[86]

B. The EC's 1986 Communication

In 1986, the Commission sent a report on public procurement to the Council.[87] As in its 1984 communication, the Commission again found the Member States' procurement policies to be unsatisfactory and found little change since the publication of its earlier report.[88] The communication set forth an action program to implement the Commission's procurement directives and the objectives set forth in the White Paper.

As part of its action program, the Commission called upon the Member States to implement the directives in national laws, emphasized the need for a more uniform and complete interpretation and application of the directives, and stressed the need to use the sanctions procedure established by Article 169 of the Treaty of Rome whenever Member States fail to fulfill their obligations under the directives.[89] The Commission recommended an information campaign to increase public awareness of the public procurement rules and the remedies that may be adopted.[90]

The 1986 paper also addressed ways to improve the directives. The Commission advocated increased control by Member States and the Commission through adoption of certain measures. The Commission's recommendations included the following:

- establishment of a system of pre-information to suppliers;

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86. *Id.* at art. 30. *See* EC Doc. 1988, *supra* note 12, at 19.

87. This report was contemplated in the White Paper. *See The Completion of the Internal Market by 1992*, 19 BULL. E.C., 14 Sep., 1986; 18 BULL. E.C., point 1.3.1 *et seq.* Aug., 1985.

88. PUBLIC PROCUREMENT IN THE COMMUNITY, 1986 EUR. COMM. DOC. (COM No. 375) 4 [hereinafter 1986 COMMUNICATION]. *See also* Weiss, *supra* note 2, at 101. Member States had failed to implement the EC's directives or incorporated only portions of the directives into national law. *See* Diamond, *Europe 1992: Initiatives in the Public Procurement Sector*, 5 INT'L PROCUREMENT COMM. REPORT pt. 2, at 3 (1989).

Unlike EC regulations, which are directly applicable law in the member states, directives must be implemented by national governments to take effect. *Id.*

89. 1986 COMMUNICATION, *supra* note 88, at 5. *See* Weiss, *supra* note 2, at 101. Article 169 of the Treaty of Rome describes the steps the Commission must follow to take action against a Member State. It requires the Commission to issue a reasoned opinion on the issue and provides that the matter can be brought before the Court of Justice in the event of noncompliance. Thys & Henry, *supra* note 29, at 458 n.85.

90. 1986 COMMUNICATION, *supra* note 88, at 6. *See* Weiss, *supra* note 2, at 102.

- limited use of the restricted or single tender procedure;
- mandated use of European technical standards;
- rationalized publication procedures and lengthened time limits.[91]

The Commission contemplated that supervision by a newly established public procurement unit would supplement these measures.[92] Such a unit would (1) provide enterprises and awarding authorities with information;[93] (2) monitor published tenders in order to detect cases of improper application of the directives;[94] (3) intervene to prevent or punish cases of breaches of EC discipline;[95] (4) establish a system of rapid redress permitting intervention during award procedures;[96] and (5) study the possibility of imposing sanctions in the case of non-application of the directives.[97] Finally, the Commission reiterated the importance of open competition in the excluded sectors and outlined recommendations to accomplish this goal.[98]

C. Public Supplies and Public Works Directives Issued Since the White Paper

In March 1987, the EC Commission issued a reform package to improve the transparency of the procurement process, to introduce competitive bidding in public sector markets—the previously "excluded sectors"—and to tighten up enforcement.[99] The directives issued by the Commission as part of this package substantially change public procurement rules for supplies, public works, remedies, telecommunications, energy, transport, and water.

By the end of 1989, the EC had adopted three procurement measures: a directive on the procedures to govern the award of

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91. 1986 COMMUNICATION, *supra* note 88, at 6-7. *See* Weiss, *supra* note 2, at 102.

92. The EC Economic and Social Committee first proposed this procurement unit in its opinion of April 23, 1986. *Opinion on the Communication from the Commission to the Council—Public Supply Contracts—Conclusions and Perspectives*, 29 O.J. EUR. COMM. (No. C 189) 16, 18 (1986).

93. 1986 COMMUNICATION, *supra* note 88, at 7. *See* Weiss, *supra* note 2, at 102.

94. 1986 COMMUNICATION, *supra* note 88, at 7.

95. *Id.*

96. *Id.*

97. *Id.*

98. 1986 COMMUNICATION, *supra* note 88, at 8-9. *See* Weiss, *supra* note 2, at 103-04. The Commission also noted that liberalization of public procurement in services was essential. *See* 1986 COMMUNICATION, *supra* note 88, at 10; Weiss, *supra* note 2, at 103.

99. GAO, SINGLE EUROPEAN MARKET, *supra* note 38, at 41. The reform package was designed to "open up procurement of services to a greater extent." *Id.*

public supply contracts, one on public works contracts, and another on remedies against discrimination in the award of public contracts. In February 1990, the Council reached agreement on the proposal for a directive that extends procurement rules to the "excluded sectors" of water, energy, transport, and telecommunications.[100] These directives are discussed in detail below.

1. The public supplies directive

The new supplies directive[101] represents a significant overhaul of the previous directives in this area.[102] The modifications reflect the Commission's effort to alter procurement procedures where discrimination is most likely to occur. Further, the amending directive implements the commitments made by the

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100. FIFTH PROGRESS REPORT OF THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT CONCERNING THE IMPLEMENTATION OF THE WHITE PAPER ON THE COMPLETION OF THE INTERNAL MARKET, 1990 EUR. COMM. DOC. (COM No. 90) 20 [hereinafter FIFTH PROGRESS REPORT].

101. *Council Directive of 22 March 1988 Amending Directive 77/62/EEC Relating to the Coordination of Procedures on the Award of Public Supply Contracts and Repealing Certain Provisions of Directive 80/767/EEC (88/295)*, 31 O.J. EUR. COMM. (No. L 127) 1-14 (1988) [hereinafter *Directive 88/295*]. These proposed amendments, which strengthen the *1977 Directive on Public Supply Contracts*, were adopted on March 22, 1988, and entered into force on January 1, 1989. Greece, Spain, and Portugal must comply with the directive by March 1, 1992. 1990 ITC REPORT, *supra* note 55, at 4-4. *See also* FOURTH PROGRESS REPORT OF THE COMMISSION TO THE COUNCIL AND EUROPEAN PARLIAMENT CONCERNING THE IMPLEMENTATION OF THE COMMISSION'S WHITE PAPER ON THE INTERNAL MARKET, 1989 EUR. COMM. DOC. (COM No. 311) 18. Of the Member States that were subject to the January 1, 1989, effective date, all have incorporated the directive into national legislation except for Italy and the Netherlands. FIFTH PROGRESS REPORT, *supra* note 100, at 20.

In addition to the directives mentioned above, in July 1989, the EC Commission adopted a policy on regional preferences in response to Member State concerns that liberalized public procurement rules conflict with the objective of strengthening economic and social cohesion within the EC. PUBLIC PROCUREMENT: REGIONAL AND SOCIAL ASPECTS, 1989 EUR. COMM. DOC. (COM No. 400) [hereinafter REGIONAL PREFERENCE POLICY]. For a discussion of regional preferences, see *supra* notes 54-56 and accompanying text. The EC Commission has concluded, however, that these preference schemes have not contributed significantly to the economic development of the regions concerned. REGIONAL PREFERENCE POLICY, *supra* at 9. "In order to ensure that regional preferences do not interfere with the single market goal of nondiscriminatory access to public contracts, the EC Commission is offering these four Member States (Greece, Italy, the United Kingdom, and West Germany) two options to be implemented by December 31, 1992: the progressive elimination of preferences or the modification of existing preference systems." 1990 ITC REPORT, *supra* note 55, at 4-5. The public supply directive excludes from its coverage, until the end of 1992, the award of contracts under existing national regional preference programs. *See Directive 88/295*, *supra* note 101, at art. 16.

102. *See supra* notes 16-27 & 30 and accompanying text.

EC during the 1986 renegotiation of the GATT Government Procurement Code.[103]

As a general matter, the new provisions endeavor to:[104]

- increase the transparency of the procedures for awarding public supply contracts by requiring covered entities to publish information concerning their procurement programs and the outcome of procurement decisions;
- limit noncompetitive tendering to a few specifically delineated circumstances;
- lengthen the minimum time limits for submission of bids or applications to bid;
- require entities to refer to EC-wide standards, where they exist, unless the use of such standards would result in disproportionate costs or technical difficulties; and
- more narrowly define terms and exemptions described in the previous directive, which had served as loopholes for Member States.[105]

The principal provisions of the new directive are discussed in detail below.

a. Covered contracts. The new directive clarifies that the procurement rules apply to leases, rentals, or hire purchases, as well as outright purchases.[106] The rules apply to contracts for goods valued at more than 200,000 ECU or, where contracts are governed by the Government Procurement Code, 130,000 ECU.[107] In an effort to restrict splitting contracts or undervaluing them in order to evade the directive's rules, the new amendments describe a method for valuing lease, rental, and hire

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103. 1989 ITC REPORT, *supra* note 1, at 4-11 & n.14. For example, the new supplies directive lowers the threshold for central-government procurements to 130,000 ECU. Thus, EC Commission rules apply to procurement contracts worth 200,000 ECU for regional and local procurement and 130,000 ECU for central-government procurement. (Central-government procurement in the EC is generally covered by the GATT Government Procurement Code.) *Id.*; 1 INTERNATIONAL TRADE ADMINISTRATION, U.S. DEP'T OF COMMERCE, EC 1992: A COMMERCE DEPARTMENT ANALYSIS OF EUROPEAN COMMUNITY DIRECTIVES 46 (1989) [hereinafter DOC ANALYSIS]. *See also supra* note 30 and accompanying text.

104. 1989 ITC REPORT, *supra* note 1, at 4-11 to 4-12.

105. For example, the new supplies directive clarifies the method for calculating the value of contracts for purposes of applying the thresholds and more narrowly defines "the excluded sectors" and national security exemptions. 1989 ITC REPORT, *supra* note 1, at 4-11. *See infra* notes 106-13 and accompanying text.

106. *Directive 88/295*, *supra* note 101, at art. 2.

107. The currency equivalents of the ECU thresholds are calculated at a fixed exchange rate that is adjusted every two years. *See id.* at art. 6.

purchase contracts and regularly renewed contracts.[108] Further, the new directive "expand[s] the scope of the previous public procurement directive to include purchases of equipment by the armed forces, excluding those products intended specifically for military purposes or those directly affecting national security."[109]

In order to stem abusive use of the provisions on organizations exempt from the rules, the amendments specify that only the following types of procurement by public utilities are excluded:

- contracts awarded by land, air, sea, or inland waterway carriers;
- contracts concerning the production, transport, and distribution of drinking water;
- contracts awarded by public authorities whose principal activity is the production and distribution of energy or the provision of public telecommunications services.[110]

Other exemptions under the new directive include (1) procurement of supplies or equipment that are classified as secret or the delivery of which requires special security measures;[111] (2) contracts awarded under certain international agreements or pursuant to procedures of an international organization;[112] and (3) until the end of 1992, the award of contracts under existing national provisions that have the objective of promoting job creation in disadvantaged and declining industrial regions, provided the national provisions are compatible with the Treaty of Rome.[113]

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108. *Id. See also* EC Doc. 1988, *supra* note 12, at 33.

109. Diamond, *supra* note 88, at 2. *See also Directive 88/295*, *supra* note 101, at art. 4.

110. *See Directive 88/295*, *supra* note 101, at art. 3; Weiss, *supra* note 2, at 104; EC Doc. 1988, *supra* note 12, at 33-34.

The water, energy, transport, and telecommunications sectors were excluded from the original directive because they involved a varied mix of public and private ownership and control among member countries, which made it difficult to draft rules that would ensure uniform application among member states, and because they were excluded from the GATT Government Procurement Code. *See* GAO, SINGLE EUROPEAN MARKET, *supra* note 38, at 40; Diamond, *supra* note 88, n.19. *See also infra* notes 184-86 & 189 and accompanying text.

111. *Directive 88/295*, *supra* note 101, at art. 3. *See also* EC Doc. 1988, *supra* note 12, at 34.

112. *Directive 88/295*, *supra* note 101, at art. 16.

113. *Id. See also Directive 77/62*, *supra* note 16, at art. 3. This latter provision is consistent with the EC's policy on regional preference programs. *See supra* notes 54-56 and accompanying text.

b. Bid solicitation procedures. There are three types of tender procedures discussed in the 1988 directive:[114]

- open procedure—all interested suppliers can submit an offer;
- restricted procedure—suppliers apply to be invited to submit a tender; and
- negotiated procedure—the public entity selects suppliers of its choice and negotiates the terms of the contract with one or several of them.

The open procedure, which offers potential suppliers the best opportunities to bid, is the norm under the new directive. There are several acceptable reasons for using the two other procedures, however. For example, the restricted procedure is permissible where the purchaser requires a very specific product or where the procedural costs of an open tender are not justified in light of the contract's value.[115] Although negotiated tenders will be permissible in a smaller number of cases than before,[116] they may occur where, for example, irregular tenders were received under the open or restricted procedure.[117] The Commission will be able to monitor the use of restricted and negotiated procedures because procuring entities must prepare written justification for the use of these procedures which must be sent to the Commission on request.[118]

The 1988 directive extends the earliest deadline purchasers can set for the receipt of bids and applications to bid to make it easier for suppliers in other countries to bid.[119] Further, entities are required to refer to EC-wide standards for technical specifications for products.[120] In some cases, purchasers may deviate from this requirement, but must justify doing so in the tender

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114. *See generally Directive 88/295, supra* note 101, at art. 7.

115. EC Doc. 1988, *supra* note 12, at 35. *See Directive 88/295, supra* note 101, at art. 7.

116. EC Doc. 1988, *supra* note 12, at 35-36.

117. *Directive 88/295, supra* note 101, at art. 7.

118. *Id.* at art. 7(6). *See* Reid, *supra* note 2, at 92.

119. *Directive 88/295, supra* note 101, at arts. 10-12. *See* EC Doc. 1988, *supra* note 12, at 35.

120. The directive requires entities to record the reasons for using non-EC standards and includes a hierarchy of preferences: (1) international standards, as implemented in member states; (2) other EC national standards; and (3) other standards. *Directive 88/295, supra* note 101, at art. 8(3)-(4). *See* 1989 ITC REPORT, *supra* note 1, at 4-12 & n.22.

notice and in their internal documentation, which must be available to the Commission and Member States on request.[121]

The directive stipulates advertising rules for covered procurements to ensure that all suppliers are given the opportunity to pursue procurement contracts. Contracting authorities must publish in the *Official Journal* a notice of their intention to award a public supply contract, including information on what procedure will be used.[122] Once an award has been made, entities must also publish a notice giving details of the outcome of the procurement decision, including the identity of the successful bidder and the general contract terms. Additionally, entities are required to publish a notice at the beginning of each budgetary year which discloses total planned procurement in any product area in which their procurement will equal or exceed 750,000 ECU.[123]

c. Award of contracts. The contracting entities must be able to justify their final award decision on objective grounds. Contracts may be awarded based either upon the lowest price or, when the award is made to the most economically advantageous tender, upon various criteria according to the contract in question, e.g., price, delivery date, cost-effectiveness, quality. When the public authority relies upon the "most economically advantageous" criterion, the contract documents or contract notice must contain all the criteria they intend to apply.[124] Covered entities must also send a statistical report to the EC Commission by October 31 of each year detailing contracts awarded in the previous year.[125]

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121. *Directive 88/295*, *supra* note 101, at art. 8. *See* EC Doc. 1988, *supra* note 12, at 37. For example, EC-wide specifications need not be applied if they would require the purchaser to accept products incompatible with equipment already in use or would entail disproportionate costs or technical difficulties. *Directive 88/295*, *supra* note 101, at art. 8.

122. *Directive 88/295*, *supra* note 101, at art. 9(1)-(2). The advertisement must follow a certain format as set out in annex III to the 1988 directive. *See generally supra* note 12 regarding advertising requirements set forth in the 1971 public works directive.

123. *Directive 88/295*, *supra* note 101, at art. 9. Initially, this advertising requirement will apply exclusively to government agencies subject to the Government Procurement Code. EC Doc. 1988, *supra* note 12, at 34.

124. *Directive 77/62*, *supra* note 16, at art. 25(1)(b)-(2). *See also* Reid, *supra* note 2, at 94.

125. *Directive 88/295*, *supra* note 101, at art. 17. *See* 1989 ITC REPORT, *supra* note 1, at 4-11; DOC ANALYSIS, *supra* note 103, at 46.

2. The public works directive

On July 18, 1989, the EC Council adopted the new public works directive, which sets forth procedures for the award of public works contracts.[126] Although the original public works directive has been in place for almost two decades, public works contracts in the EC remain principally in the hands of national contractors.[127] The new works directive substantially revises the original legislation in an attempt to promote greater competition in the EC market and to ensure transparency.[128]

The principal amendments to the 1971 public works directive would:[129]

- define more broadly the entities that are subject to the directive;
- limit the ability of Member States to employ non-competitive bidding procedures;
- provide for advanced notice of public construction projects and lengthen the time for submission of bids;
- require entities to refer to EC standards when such standards exist; and
- require bid decision-makers to document their decisions.

The key provisions of the public works directive are described below.

a. Covered contracts. The new directive expands the scope

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126. *Council Directive of 18 July 1989 Amending Directive 71/305/EEC Concerning Coordination of Procedures for the Award of Public Works Contracts (89/440/EEC)*, 32 O.J. EUR. COMM. (No. L 210) 1-22 (1989) [hereinafter *Directive 89/440*]. The new works directive was first proposed on January 12, 1987, and modified on June 20, 1988, after the European Parliament issued its opinion on the proposal. *See Proposal for a Council Directive Coordinating the Laws, Regulations and Administrative Provisions Relating to the Application of Community Rules on Procedures for the Award of Public Supply and Public Works Contracts*, 30 O.J. EUR. COMM. (No. C 230) 6-7 (1987). During its second reading in February 1989, the European Parliament proposed two amendments that would require bidders to consider youth unemployment and the chronically unemployed and to be informed of the social legislation in countries where the works would be performed. The Council accepted only the second of these amendments. 1990 ITC REPORT, *supra* note 55, at 4-4.

The directive became effective on July 19, 1990, for all Member States except Greece, Spain, and Portugal, which have until March 1, 1992, to comply. COMMISSION'S FIFTH REPORT, *supra* note 100, annex I, at 27. The legislation permits Member States to retain regional preferences until December 31, 1992, however. *Directive 89/440*, *supra*, at art. 1, para. 21.

For a discussion of previous EC legislation on public works, see *supra* notes 10-15 and accompanying text.

127. 1989 ITC REPORT, *supra* note 1, at 4-12.

128. *See id.*

129. *See id.*

of the 1971 directive by more broadly defining the entities that are subject to its procedures. The directive raises the threshold for defining contracts that are subject to its rules from one million ECU to five million ECU.[130] The directive explains how to compute the value of contracts and prohibits splitting up contracts to bring them below the threshold.[131]

The new legislation covers not only construction contracts but also contractual forms that have developed over the past decade such as design, financing, management of works, and other services related to public works—promotion contracts, management contracts, and concession contracts, for example.[132] Contracts awarded by entities that receive more than half of their financing from public funds are also within the directive's scope.[133] Finally, the new works directive adopts a more limited definition of the exclusion of entities in the water, energy, and transport sectors. This is in line with the more restrictive provision of the revised public supply directive and with the general principle of reducing the number of exemptions from the directive.[134]

b. Bid solicitation procedures. The 1971 directive has been amended to restrict the award of contracts that have not been open to competitive bidding. A new procedure, called the "negotiated procedure with a prior call for competition," has been introduced and may in certain cases replace the single (or re-

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130. *Directive 89/440*, *supra* note 126, at art. 1, para. 6. The EC Commission determined that a higher threshold was necessary because costs associated with construction works had increased since the original directive was issued and contractors, except those close to the border, are only interested in work in other Member States if the contract is big enough to make the logistics of the operation economic. *Commission of the European Communities, Guide to the Community Rules on Open Government Procurement*, 30 O.J. EUR. COMM. (No. C 358) 43 (1987) [hereinafter *Commission Guide to Procurement Rules*].

131. *See* EC Doc. 1988, *supra* note 12, at 42; *Directive 89/440*, *supra* note 126, at art. 1, para. 6. The value of the contract must include the value of the work contracted for and the cost of the supplies needed to carry out the work, even if these are provided to the contractor by the principal. *Id.*; E.C. Doc. 1988, *supra* note 12, at 42.

132. PROPOSAL FOR A COUNCIL DIRECTIVE AMENDING DIRECTIVE 71/305/EEC CONCERNING THE COORDINATION OF PROCEDURES FOR THE AWARD OF PUBLIC WORKS CONTRACTS, 1986 EUR. COMM. DOC. (COM No. 679) 2 (Explanatory Memorandum) [hereinafter EXPLANATORY MEMORANDUM TO PROPOSAL AMENDING DIRECTIVE 71/305). *See also* 1989 ITC REPORT, *supra* note 1, at 4-12 & n.27.

133. *Directive 89/440*, *supra* note 126, at art. 1, para. 2.

134. *Id.* at art. 1, para. 4. *See also* 1989 ITC REPORT, *supra* note 37, at 4-12; EXPLANATORY MEMORANDUM TO PROPOSAL AMENDING DIRECTIVE 71/305, *supra* note 132, at 6. For a discussion of the new definition of exempted public utilities in the supply directive, see *supra* note 110 and accompanying text.

stricted) tender procedure.[135] For example, the negotiated procedure may be used when irregular tenders have been received in response to an open or restricted procedure or when the works involved are carried out for the purpose of research, experiment, or development.[136] In order for the negotiated procedure to be used, however, entities must publish a tender notice in advance and must objectively pre-select the candidates.[137] In instances where contracting authorities use noncompetitive procedures (i.e., restricted or negotiated procedures), written justifications for the approach selected must be provided to the Commission.[138]

The new directive lengthens the minimum time limits authorities are allowed for bids and applications to bid[139] and sets forth extensive advertising requirements. For example, contracting authorities must publish advance notice of construction projects to be put out to tender, which must include the tender procedure to be followed (open, restricted, or negotiated).[140] In addition, results of the contract award must be published within forty-eight days of the contract award.[141]

Finally, there are rules on the types of technical specifications entities may give in tender notices and tender documentation. Under the works directive, authorities must provide technical specifications for the work and descriptions of the testing, inspection, acceptance, and calculation methods that will be used.[142] The works directive prohibits specifications that would

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135. *Directive 89/440*, *supra* note 126, at art. 1, para. 7. The original works directive set forth essentially two tender procedures: (1) open tendering, where all interested contractors submit bids for the contract, and (2) restricted or single tendering, where the public authorities select from the contractors who reply to the tender notice and only the selected contractors are invited to bid. *Directive 71/305*, *supra* note 10, at art. 5.

136. *See Directive 89/440*, *supra* note 126, at art. 1, para. 7.

137. *Id.* The contracting authorities may award contracts by negotiated procedure without prior publication of a tender notice in limited situations. For example, the requirement for such notice is waived when, for technical or artistic reasons or for reasons connected with the protection of exclusive rights, the works may only be carried out by a particular contractor. *Id.*

138. *Id.* at art. 1, para. 8. *See also* 1989 ITC REPORT, *supra* note 1, at 4-12.

139. *Directive 89/440*, *supra* note 126, at art. 1, para. 12. *See also* 1989 ITC REPORT, *supra* note 1, at 4-12.

140. *Directive 89/440*, *supra* note 126, at art. 1, para. 12. *See also* 1989 ITC REPORT, *supra* note 1, at 4-12.

141. *Directive 89/440*, *supra* note 126, at art. 1, para. 12. Model notices are provided in annexes to the 1989 directive and must be followed. *Id.* at annexes IV, V, & VI. *See generally supra* note 12 (regarding advertising requirements set forth in the 1971 public works directive).

142. EC Doc. 1988, *supra* note 12, at 44. *See also Directive 89/440*, *supra* note 126,

discriminate against contractors in other EC Member States.[143] Accordingly, specifications may not include reference to "products of a specific make or source or refer to specific patents, unless the subject of the contract cannot be adequately described in any other way."[144] These rules are particularly important because contracting authorities often present specifications that are difficult for foreign contractors to satisfy in order to reserve contracts for local firms.[145]

c. Documentation requirements. The 1989 directive increases the transparency of tendering and award procedures by requiring contract authorities to document their decisions and actions.[146] For example, entities must inform firms that they have been turned down, and if asked to do so, must explain to the contractor why the bid or application was rejected. Additionally, the contracting authority must prepare a written report on each award decision identifying both the successful and the rejected bidders, and the grounds for the selection. The report must be submitted to the Commission upon request.[147] Finally, contracting authorities must publish a notice regarding the outcome of each award decision[148] and must periodically supply the Commission with information on procurement levels and award procedures.[149]

d. Contractor disqualification. The original public works directive included provisions governing contractor disqualification which were intended to protect against the arbitrary elimination of foreign contractors.[150] The new directive essentially keeps intact these provisions. Under these provisions, only specified criteria may serve as the basis for disqualifying bidders or applicants. For example, a contractor may be excluded from participation in the contract if he is bankrupt, has been convicted of an offense concerning his professional conduct, has been guilty of grave professional misconduct, or has not paid taxes in the contracting authority's country.[151] Further, entities

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at art. 1, para. 10.

143. EC Doc. 1988, *supra* note 12, at 44.

144. *Id.* at 44. *See also Directive 89/440*, *supra* note 126, at art. 1, para. 10.

145. E.C. Doc. 1988, *supra* note 12, at 44.

146. *See* 1989 ITC REPORT, *supra* note 1, at 4-12.

147. *Directive 89/440*, *supra* note 126, at art. 1, para. 8.

148. *Id.* at art. 1, para. 12.

149. *Id.* at art. 1, para. 22.

150. *See supra* note 15 and accompanying text.

151. *Directive 71/305*, *supra* note 10, at art. 23.

may require contractors to demonstrate their commercial standing and fitness by listing on an official register and to provide evidence of their financial standing and technical competence.[152]

e. Award of contracts. The criteria that authorities may use for awarding contracts may be either the lowest price or, when the award is made to the most economically advantageous tender, various criteria such as price, completion time, profitability, and technical merit.[153] There is an exception to this rule where legislation in force at the time of the adoption of the directive gives preference to certain bidders as a means of providing aid.[154] The contracting authority must state in the tender notice or tender documents all the criteria that will be considered in awarding the contract.[155]

3. *Remedies*

The original public works and public supplies directives were largely ineffective because the EC does not have in place a system to enforce its directives. Not only does the Commission have inadequate resources to oversee the actions of public contracting authorities,[156] it also lacks a speedy mechanism to mediate disputes over procurement practices.[157] Further, structured

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152. *Id.* at arts. 24-26 (as amended by *Directive 89/440, supra* note 126). *See* EC Doc. 1988, *supra* note 12, at 49.

153. *Directive 71/305, supra* note 10, at art. 29 (as amended by *Directive 89/440, supra* note 126). If a bid appears to be abnormally low considering the contract specifications, the contracting authority must request details of the costing of the tender and verify them before rejecting the bid. *Id.*

154. *Directive 89/440, supra* note 126, at art. 1, para. 20. *See also* EC Doc. 1988, *supra* note 12, at 51. This legislation must be compatible with the Treaty of Rome. *Directive 89/440, supra* note 126, at art. 1, para. 20.

155. *Directive 71/305, supra* note 10, at art. 29(2). *See also* EC Doc. 1988, *supra* note 12, at 51.

156. *See* 1989 ITC REPORT, *supra* note 1, at 4-13. The Commission often relies on infrequent spot checks and complaints from suppliers who believe that contracting entities are not adhering to the directives. *See* Reid, *supra* note 2, at 106. Although the supply and works directives require statistical reporting, which is intended to provide the Commission with data to assist in monitoring compliance with the directives, the Member States have not followed the reporting requirements. 1989 ITC REPORT, *supra* note 1, at 4-13.

157. The Commission has intervened on an informal basis in a few purchasing activities when it was informed of a violation of a directive. Although these interventions were successful, few suppliers use this process because they are unaware it exists. Thys & Henry, *supra* note 29, at 458. Additionally, some disputes have been successfully resolved before the EC Court of Justice under article 169 of the Treaty of Rome. This process, however, is cumbersome, slow, and unpredictable. 1989 ITC REPORT, *supra* note 1, at 4-13. The Commission admits that

systems for administrative or judicial appeals are not available in all Member States.[158] Even where formal redress procedures are in place, there is no assurance that a remedy will be timely. Most Member States do not stop the contract process while a dispute is under review. They rarely grant suspension of an award decision and generally do not award monetary damages to wronged suppliers.[159]

a. The remedies directive. The lack of adequate enforcement procedures has led to continued discriminatory practices in public procurement among the Member States.[160] Recognizing that new procurement rules would be effective only if enforcement procedures were available, the Commission proposed a separate directive on remedies.[161] The remedies directive, which

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> [t]he current means at its disposal are unsuited to the specific nature of the infringements in the public contracts field. The procedure relating to the failure by a Member State to fulfill an obligation (Article 169 EEC) is cumbersome and slow (on average, judgement is given two years after the Commission starts proceedings), nor does it lend itself easily to the correction of procedural irregularities as encountered in the public contracts sphere. Proceedings usually reach their conclusion when it is no longer possible to remedy the consequences of the infringement. Further, Article 169 proceedings are addressed to Member States only and generally do not provide a basis for the Commission to intervene directly with regard to an individual decision by an awarding body.

AMENDED PROPOSAL FOR A COUNCIL DIRECTIVE ON THE COORDINATION OF THE LAWS, REGULATIONS AND ADMINISTRATIVE PROVISIONS RELATING TO THE APPLICATION OF COMMUNITY RULES ON PROCEDURES FOR THE AWARD OF PUBLIC SUPPLY AND PUBLIC WORKS CONTRACTS,1989 EUR. COMM. DOC. (COM No. 733) 10-11 (Explanatory Memorandum) [hereinafter EXPLANATORY MEMORANDUM TO AMENDED REMEDIES PROPOSAL].

The EC has also attempted to enforce its procurement directives by withholding EC funding. *See infra* notes 177-83 and accompanying text.

158. PROPOSAL FOR A COUNCIL DIRECTIVE COORDINATING THE LAWS, REGULATIONS AND ADMINISTRATIVE PROVISIONS RELATING TO THE APPLICATION OF COMMUNITY RULES ON PROCEDURES FOR THE AWARD OF PUBLIC SUPPLY AND PUBLIC WORKS CONTRACTS (87/C230/05), 1987 EUR. COMM. DOC. (COM No. 134) 2 (Explanatory Memorandum) [hereinafter EXPLANATORY MEMORANDUM TO PROPOSED DIRECTIVE 87/C230/05]. France, Greece, Italy, Portugal, and Spain do have relatively structured procedures for administrative appeals. *See* 1989 ITC REPORT, *supra* note 1, at 4-13 & n.32. *See also* Thys & Henry, *supra* note 29, at 457-58; *supra* notes 58-59 and accompanying text.

159. 1989 ITC REPORT, *supra* note 1, at 4-13.

160. *Id.* The most serious and frequent infringements of procurement procedures include

- "failure to publish invitations to tender in the Official Journal. . .;
- failure to specify standard technical specifications in the tender notice;
- "the unlawful exclusion of tenderers or candidates from Member States other than that of the contracting authority. . .;"
- "discrimination in the award of contracts."

EXPLANATORY MEMORANDUM TO PROPOSED DIRECTIVE 87/C230/05, *supra* note 158, at 1-2.

161. PROPOSAL FOR A COUNCIL DIRECTIVE COORDINATING THE LAWS, REGULATIONS AND

facilitates appeals against discrimination in the award of public contracts covered by the supplies and works directives, was adopted on December 21, 1989.[162] Prior to formal adoption, however, the draft remedies proposal was amended and substantially weakened by the EC Council.[163] The final directive, as amended by the Council, is discussed below.

The two principal objectives of the remedies directive are (1) to establish effective national remedies procedures; and (2) to better prevent violations of EC procurement law before they occur.[164] Accordingly, the directive requires each Member State to ensure effective redress of grievances for suppliers who believe they have been discriminated against. It also provides for greater Commission oversight of Member States' implementation of procurement procedures.[165] These two areas are discussed further below.

b. Member State legislation. The remedies directive, as amended, describes specific procedures which Member States

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ADMINISTRATIVE PROVISIONS RELATING TO THE APPLICATION OF COMMUNITY RULES ON PROCEDURES FOR THE AWARD OF PUBLIC SUPPLY AND PUBLIC WORKS CONTRACTS, 1987 EUR. COMM. DOC. (COM No. 134) (Explanatory Memorandum); PROPOSAL FOR A COUNCIL DIRECTIVE COORDINATING THE LAWS, REGULATIONS AND ADMINISTRATIVE PROVISIONS RELATING TO THE APPLICATION OF COMMUNITY RULES ON PROCEDURES FOR THE AWARD OF PUBLIC SUPPLY AND PUBLIC WORKS CONTRACTS, 30 O.J. EUR. COMM. (No. C 230) 7 (1987) [hereinafter *Proposed Directive 87/C230/05*]. *See* 1989 ITC REPORT, *supra* note 1, at 4-13.

The Commission drew the European Council's attention to the need for action to ensure compliance with EC procurement rules in its White Paper on completing the internal market. *See supra* notes 65-77 and accompanying text. And, in its communication to the Council in 1986, the Commission stated its intention of establishing redress procedures as part of its public procurement action program. *See* EXPLANATORY MEMORANDUM TO PROPOSED DIRECTIVE 87/C230/05, *supra* note 158, at 1.

162. *Council Directive of 21 December 1989 on the Coordination of the Laws, Regulations and Administrative Provisions Relating to the Application of Review Procedures to the Award of Public Supply and Public Works Contracts (89/665/EEC)*, 32 O.J. EUR. COMM. (No. L 395) 33-35 (1989) [hereinafter *Directive 89/665*]. Member States must implement the directive by December 21, 1991. COMMISSION'S FIFTH REPORT, *supra* note 100, annex I, at 27.

163. *See* 1989 ITC REPORT, *supra* note 1, at 4-13 to 4-14; 1990 ITC REPORT, *supra* note 55, at 4-4. After the Council adopted a common position in July, the proposal went to the European Parliament. The Parliament did not approve any amendments to the common position during its second reading in November, and the directive was adopted by the Council without debate. 1990 ITC REPORT, *supra* note 55, at 4-4.

164. EXPLANATORY MEMORANDUM TO PROPOSED DIRECTIVE 87/C230/05, *supra* note 158, at 1-2. *See also* 1989 ITC REPORT, *supra* note 1, at 4-13.

Speedy remedies against discriminatory award decisions are essential because violations of procurement rules generally occur before contracts are awarded. *See* EXPLANATORY MEMORANDUM TO PROPOSED DIRECTIVE 87/C230/05, *supra* note 158, at 1-2; Weiss, *supra* note 2, at 107-08.

165. *See* 1989 ITC REPORT, *supra* note 1, at 4-13 to 4-14.

must incorporate into national legislation to redress infringement of Community or national procurement rules. EC suppliers must be assured access to either administrative or judicial complaint procedures, and judicial or quasi-judicial appeals mechanisms.[166] Member States must grant to competent administrative or judicial fora the power to (1) suspend contract award procedures and provide other interim measures; (2) order the removal of discriminatory technical, economic, or financial specifications in the invitation to tender, the contract documents, or similar documents; and (3) set aside decisions made unlawfully and award damages to the injured supplier.[167] The Council did not approve a proposal to give the Commission the right to intervene in such procedures as amicus curiae.[168]

c. Commission oversight. The remedies directive calls for the creation of a mechanism whereby the Commission notifies Member States and awarding entities of imminent infringements of EC law and requires remedial action.[169] Within twenty-one days of receiving notification, the Member State must respond to the Commission.[170] In this response, the Member State must (1) confirm that the infringement has been corrected or (2) provide a "reasoned submission as to why no correction has been made" or (3) provide notice that the contract award procedure has been suspended either by the contracting authority or by the Member State.[171] Following review of the Member State's response, the EC Commission may initiate infringement procedures under article 169 of the Treaty of Rome[172] or may apply to

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166. *Directive 89/665*, *supra* note 162, at arts. 1 & 2.

167. *Id.* at art. 2. *See also* 1989 ITC REPORT, *supra* note 1, at 4-13 to 4-14.

168. 1989 ITC REPORT, *supra* note 1, at 4-14. Five or six Member States objected to the provision. *Id.*

169. *Directive 89/665*, *supra* note 162, at art. 3. *See also* 1989 ITC REPORT, *supra* note 1, at 4-14.

170. *Directive 89/665*, *supra* note 162, at art. 3, para. 3.

171. *Id.*

> Where notice has been given that a contract award procedure has been suspended . . ., the Member State shall notify the Commission when the suspension is lifted or another contract procedure relating in whole or in part to the same subject matter is begun. That notification shall confirm that the alleged infringement has been corrected or include a reasoned submission as to why no correction has been made.

Id. at art. 3, para. 5.

172. *See* EXPLANATORY MEMORANDUM TO AMENDED REMEDIES PROPOSAL, *supra* note 157, at 10; 1989 ITC REPORT, *supra* note 1, at 4-14.

the Court of Justice for interim measures to suspend the award procedure.[173]

The Council approved this procedure, as proposed, in lieu of a controversial provision permitting the Commission to suspend a tendering procedure for up to three months in cases of infringement while the Commission and the procuring entity attempt to work out changes consistent with EC law.[174] This amendment significantly weakened the Commission's original proposal because the article 169 procedure is cumbersome and slow.[175] Nevertheless, the adoption of the remedies directive is a major step toward ensuring suppliers the right to nondiscriminatory treatment in public procurement of supplies and works.[176]

d. Withholding EC funding. In addition to the remedies directive, the Commission has endeavored to enforce its directives by withholding grants and loans from entities that violate procurement rules.[177] During 1989, the EC Commission introduced a system for monitoring compliance with public procurement rules for projects supported by EC funds.[178] Both the EC Com-

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173. *See* EXPLANATORY MEMORANDUM TO AMENDED REMEDIES PROPOSAL, *supra* note 157, at 10; 1989 ITC REPORT, *supra* note 1, at 4-14.

174. 1990 ITC REPORT, *supra* note 55, at 4-4. *See also* 1989 ITC REPORT, *supra* note 37, at 4-14.

175. *See generally supra* notes 60 & 157. *See also* EXPLANATORY MEMORANDUM TO AMENDED REMEDIES PROPOSAL, *supra* note 157, at 10.

176. 1989 ITC REPORT, *supra* note 1, at 4-14. The Commission reports that it "is very actively monitoring both what happens in the member states and the publication of tender notices, and has referred four cases to the court." FIFTH PROGRESS REPORT, *supra* note 100, at 20. Indeed, during the summer of 1989, the Commission brought proceedings in the European Court of Justice against Denmark for violating EC government procurement rules. Prior to seeking judicial action, the EC Commission issued a "reasoned opinion" claiming that the Danish government had not observed transparent bidding procedures and had inserted discriminatory clauses in a bridge construction contract by specifying the use of Danish labor and supplies. Although the Danish government deleted the offending clauses from the contract, it refused to acknowledge the right of the EC Commission to suspend the contract award on its own authority and went forward with the award. In response, the EC Commission sought an injunction from the Court of Justice suspending the contract and reopening the tender procedures. During last-minute negotiations, the EC Commission agreed to withdraw its summary complaint for an injunction in exchange for the Danish government's acknowledgement of error, payment of monetary damages to reimburse all unsuccessful bidders for their expenses, and the opportunity for unsuccessful bidders to claim damages and interest in the appropriate Danish courts. Although its summary complaint was withdrawn, the EC Commission is pressing forward with its formal complaint of discrimination against foreign bidders on the merits. The Court's judgment is not expected for at least one to two years.

177. *See* Reid, *supra* note 2, at 107.

178. NOTICE C(88) 2510 TO THE MEMBER STATES ON MONITORING COMPLIANCE WITH PUBLIC PROCUREMENT RULES IN THE CASE OF PROJECTS AND PROGRAMMES FINANCED BY THE STRUCTURAL FUNDS AND FINANCIAL INSTRUMENTS (89/C22/03), 32 O.J. EUR. COMM.

mission and national governments are responsible for monitoring compliance with the rules.[179] The monitoring system includes measures to advise recipients of the obligations they assume in receiving EC funds. For example, the Commission plans to disseminate information on its interpretation of the procurement directives and on the monitoring methods the Commission uses.[180] The monitoring mechanisms in use by the Commission include (1) spot checks; (2) public procurement questionnaires, which must be completed by applicants before recieving EC funds; and (3) payment request forms, which must include either a reference to the public procurement notices in the *Official Journal* or a statement that unpublished contracts have been awarded in accordance with the procurement directives.[181] If the Commission determines that contracting entities have not complied with the government public procurement directives, it may suspend payments, order past payments returned, or institute proceedings under article 169 of the Treaty of Rome.[182] Pending adoption of the directives involving the excluded sectors, the Commission plans to give funding priority to applicants who either open up contracts in these sectors to EC competition or who publish tender notices in the *Official Journal* and apply non-discriminatory criteria in the award process.[183]

D. The "Excluded Sectors": Water, Energy, Transport, and Telecommunications

As stated above, the public works and supply directives do not cover four important sectors of the EC procurement market: water, energy, transport, and telecommunications.[184] These sectors were ostensibly excluded from the works and supply directives because the wide variety of ownership and control among Member States within these sectors—ranging from public to

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(No. C 22) 3 (1989) [hereinafter NOTICE C (88) 2510]. Such an approach could have a broad impact because the Commission plans to increase social and regional funds from 9.3 billion ECU to 14.4 billion ECU by 1993. Reid, *supra* note 2, at 107.

179. NOTICE C (88) 2510, *supra* note 178, at para. 3(b).

180. *Id.* at paras. 4, 5.

181. *Id.* at paras. 6, 7, 10.

182. *Id.* at para. 9.

183. *Id.* at para. 12.

184. *See supra* notes 110 & 134 and accompanying text. These sectors account for almost one-fourth of public procurement in the EC. 1989 ITC REPORT, *supra* note 1, at 4-14.

quasi-public to private—made it difficult to ensure a similar level of coverage and obligation among the Member States.[185] As a result, the Commission drafted the works and supply directives to apply only to public entities, and excluded the four sectors pending development of an approach that could accommodate their special circumstances.[186]

Not incidentally, these same four sectors are traditional bastions of national procurement bias.[187] Considered by most Member States as vital to economic growth, employment stability, and technological development, the water, energy, transportation, and telecommunications markets are dominated by "national champion" firms.[188] Thus, given the absence of any international obligation to do so,[189] the EC's unwillingness to open these sectors to competition in its initial attempts to regulate public procurement is not surprising. However, the failure of the works and supply directives to significantly increase public sector imports has prompted the EC to address this difficult issue.[190]

In addition, other factors contribute to the distinct nature of public procurement in these sectors. The goods and works involved are often technically complex, expensive, and part of a larger infrastructure or "technical network."[191] As a result, the costs of preparing and evaluating bids are substantial. Contracting entities rely heavily on limited pools of "qualified" suppliers, and often work closely with one or two such suppliers in developing procurement strategies.[192] Due to the specialized nature of the technical networks operated in these sectors, and to the importance of the public services provided, these four sectors are subject to heavy government regulation. For these same reasons, quality, reliability, specifications compliance, and after-sales service are competitive prerequisites.[193]

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185. *See* PROPOSAL FOR A COUNCIL DIRECTIVE ON THE PROCUREMENT PROCEDURES OF ENTITIES PROVIDING WATER, ENERGY, AND TRANSPORT SERVICES, 1988 EUR. COMM. DOC. (COM No. 377) 3-4, paras. 4, 7 (Explanatory Memorandum) [hereinafter EXPLANATORY MEMORANDUM TO THE WET PROPOSAL].

186. *Id.* at 3, para. 4.

187. *See* 1989 ITC REPORT, *supra* note 1, at 4-14.

188. *Id.*

189. The water, energy, transport, and telecommunications sectors are not covered by the current GATT Government Procedure Code. *See id.* at 4-18 & n.69.

190. *Id.* at 4-9 to 4-10.

191. *Id.* at 4-15.

192. *Id.* at 4-14 to 5-15.

193. *Id.* at 4-15.

Nevertheless, on March 29, 1990, the EC Council of Ministers reached an agreement in principle on a distinct regulatory regime for procurement in the excluded sectors.[194] This "common position" adopted the provisions of the excluded sectors proposal issued by the Commission a few months earlier, with several important changes—most notably the effective withdrawal of most oil, gas and coal exploration and extraction activities from the scope of the directive and an increase in the contract value thresholds that trigger the application of its provisions. The proposal, as adopted in the Council's "common position," is discussed below.

1. Development of the excluded sectors proposal

The excluded sectors proposal regulates the procurement of goods, works, and software services contracts[195] in the water, energy, transport, and telecommunications sectors.[196] Originally, the Commission proposed one directive for the water, energy, and transport sectors and a separate directive for the telecommunications sector.[197] Although both proposed directives embodied a similar approach to procurement regulation,[198] the Commission originally felt several distinct features of the tele-

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194. *See* RE-EXAMINED PROPOSAL FOR A COUNCIL DIRECTIVE ON THE PROCUREMENT PROCEDURES OF ENTITIES OPERATING IN THE WATER, ENERGY, TRANSPORT AND TELECOMMUNICATIONS SECTORS, 1990 EUR. COMM. DOC. (COM No. 301) (containing the Commission's proposal for a regulation on procurement in the excluded sectors as modified by the Council in its "common position" of March 29, 1990 and the proposed amendments to that common position as adopted by the Parliament on June 13, 1990) [hereinafter EXCLUDED SECTORS PROPOSAL]. On September 17, 1990, the Council formally approved the excluded sectors proposal. Member States are required to adopt measures implementing the directive by July 1, 1992 (January 1, 1996, for Spain and January 1, 1998, for Greece and Portugal), although deferral of implementation until January 1, 1993, will be permitted. *Id.* at art. 37.

195. A "software services contract" is defined as the procurement of software for use in connection with public telecommunications networks or services. *See id.* at art. 1, para. 3(a).

196. *Id.* at art. 2, para. 2.

197. *See* EXPLANATORY MEMORANDUM TO THE WET PROPOSAL, *supra* note 185, at 8, para. 28; PROPOSAL FOR A COUNCIL DIRECTIVE ON THE PROCUREMENT PROCEDURES OF ENTITIES OPERATING IN THE TELECOMMUNICATIONS SECTOR, 1988 EUR. COMM. DOC. (COM No. 378) [hereinafter TELECOMMUNICATIONS PROPOSAL].

198. Indeed, the proposal on the telecommunications sector cross-referenced the analogous provisions of the WET Proposal. *See, e.g.*, TELECOMMUNICATIONS PROPOSAL, *supra* note 197, at art. 3, para. 1 ("For the purposes of this Directive, the provisions of TITLE I of Council Directive . . . EEC concerning procurement procedures in the water, energy and transport sectors shall apply, except Articles 2, 3 and 5.") (footnote omitted).

communications market required separate regulation.[199] However, on the recommendation of the Parliament, the Commission consolidated the two proposals.[200]

The excluded sectors proposal differs from the existing public works and supply directives in three fundamental ways. First, the proposal avoids the mixed ownership problem by covering both state-owned companies and private sector firms[201] (although the proposal defines its scope with reference to the underlying market conditions that are likely to result in preferential procurement practices: market insulation and exposure to state influence).[202] Second, the proposal accommodates the diverse structure of the excluded sectors by providing entities greater flexibility in conforming their procurement practices to the goals of transparency and non-discrimination.[203] Finally, in a provision that could have a significant impact upon the ability of U.S. companies to compete in the EC water, energy, transportation, and telecommunications markets, the proposal mandates a procurement preference for EC works and supplies over those of third countries if certain pricing conditions exist.[204]

2. *Covered contracts*

The excluded sectors proposal includes both value thresholds and coverage limitations. Entities must employ open procurement procedures only on those public supply contracts worth 400,000 ECU or more—600,000 ECU in the telecommunications sector—and on public works contracts valued at 5 mil-

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199. *See* EXPLANATORY MEMORANDUM TO THE TELECOMMUNICATIONS PROPOSAL, 1988 EUR. COMM. DOC. (COM No. 378) 5, para. 9 (citing as the primary reasons for a separate directive the progressive application of procurement rules to the telecommunications market, the role of the Advisory Committee on Telecommunications Procurement in implementing these rules, and the unique telecommunications standardization efforts).

200. *See* EXPLANATORY MEMORANDUM TO THE AMENDED PROPOSAL FOR A COUNCIL DIRECTIVE ON THE PROCUREMENT PROCEDURES OF ENTITIES OPERATING IN THE WATER, ENERGY, TRANSPORT AND TELECOMMUNICATIONS SECTORS, 1989 EUR. COMM. DOC. (COM No. 380) 2, 4 [hereinafter EXPLANATORY MEMORANDUM TO THE ORIGINAL EXCLUDED SECTORS PROPOSAL].

201. *See* 1989 ITC REPORT, *supra* note 1, at 4-15.

202. *See* EXPLANATORY MEMORANDUM TO THE WET PROPOSAL, *supra* note 185, at 4-5, paras. 7-15.

203. *Id.* at 6, paras. 16-18.

204. *See* EXCLUDED SECTORS PROPOSAL, *supra* note 194, at art. 29.

lion ECU or more.[205] The proposal prohibits splitting contracts as a means of avoiding the value thresholds.[206]

In addition to these value thresholds, the proposal is limited to certain subsectors. The scope of the proposal is defined both generally, by a functional definition of the market conditions likely to foster preferential procurement, and specifically, by nine annexes that provide a non-exhaustive list of covered entities generic by category or by name.[207] In addition, the proposal exempts certain subsectors and procurement contracts which, although arguably included within the functional definition, are nonetheless excluded from regulation.[208]

Two basic conditions are assumed to give rise to preferential procurement policies: market insulation and exposure to state influence.[209] The proposed directive specifically applies to certain types of entities involved in the subsectors deemed insulated from competitive pressures.[210] The covered entities are (1)

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205. *Id.* at art. 12, para. 1. The supplies thresholds agreed to by the Council in its "common position" greatly exceed those of the original excluded sectors proposal, drafted by the Commission in 1988, which covered supply contracts of 200,000 ECU or more in all four sectors. *See* AMENDED PROPOSAL FOR A COUNCIL DIRECTIVE ON THE PROCUREMENT PROCEDURES OF ENTITIES OPERATING IN THE WATER, ENERGY, TRANSPORT AND TELECOMMUNICATIONS SECTORS, 1989 EUR. COMM. DOC. (COM No. 380) at art. 11, para. 1 [hereinafter ORIGINAL EXCLUDED SECTORS PROPOSAL]. Thus, as a result of a compromise agreement reached by the Council in its "common position" of March 29, 1990, the thresholds adopted in the Excluded Sectors Proposal reserve a significant portion of the public works and supply markets of each Member State for domestic firms. *See EC Council of Ministers Reaches Accord on Procurement in Excluded Sectors*, 7 Int'l Trade Rep. (BNA) 312 (Feb. 28, 1990).

206. *See* EXCLUDED SECTORS PROPOSAL, *supra* note 194, at art. 12, para. 9.

207. *Id.* at art. 2.

208. *Id.* at arts. 2-3, 8-11.

209. *See* EXPLANATORY MEMORANDUM TO THE WET PROPOSAL, *supra* note 185, at 5, para. 14. "Market insulation," or the absence of competitive pressures sufficient to ensure systematic preference of the most economically advantageous offer, results from barriers to entry into the market, either technical, legal, or economic. *Id.* at 4-5, paras. 10-11. "Exposure to State influence"—basically government regulation that leaves entities especially beholden to state interests—results from a variety of relationships ranging from overt state control of an entity's management to periodic state authorization of the right to engage in a vital activity. *Id.* at 5, paras. 12-13. Particularly in those markets where a large technical network is necessary to provide a good or service, such as electricity or rail transport, the tendency toward monopoly or oligopoly is often reinforced by state allocation of "special or exclusive rights" to operate in the markets. *Id.*

210. The following are the subsectors that are deemed to be insulated from competition: the provision or operation of public telecommunications networks or services; the production, transport, and distribution of drinking water, electricity, gas, and heat; the exploration for and extraction of oil, gas, coal, and other solid fuels; the operation of networks providing rail, bus, and other mechanized public transport (except some public bus services); and the provision of port and airport facilities. *See* EXCLUDED SECTORS

"public authorities," which are essentially state-owned or controlled entities;[211] (2) "public undertakings", which are those entities in which the state exerts a dominant influence through indirect financial or managerial control;[212] and (3) entities that operate on the basis of special or exclusive rights granted by the state.[213]

The excluded sectors proposal applies only to certain subsectors and activities within the water, energy, transportation, and telecommunications sectors, including

- the supply or management of public services in connection with the production, transport, or distribution of drinking water,[214] electricity, or gas or heat;
- exploration for oil, gas, coal, or other solid fuels;
- the provision of airport, maritime or inland port, or other terminal facilities;
- the management of public services in the field of transport by railway, tramway, trolley bus, or bus; and
- the operation of public telecommunications networks.[215]

This definition excludes several important water, energy, transport, and telecommunications subsectors. For example, air-

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PROPOSAL, *supra* note 194, at art. 2, para. 2. *See also infra* notes 215-23 and accompanying text. To ease the task of identifying the covered entities within the water, energy, transportation, and telecommunications sectors, the proposal contains annexes I-X which list, by sector for each member state, the categories and names of entities considered to fall within the functional definition set out in article 2. These lists are not exclusive and are subject to amendment. *See* EXCLUDED SECTORS PROPOSAL, *supra* note 194, at art. 2, para. 6. *See also id.* at art. 32 (describing procedures for amendment of annexes).

211. *See* EXCLUDED SECTORS PROPOSAL, *supra* note 194, at art. 2, para. 1(a). *See also id.* at art. 1, para. 1 (defining "public authority").

212. *Id.* at art 2, para. 1(a). *See also id.* at art. 1, para. 2 (defining "public undertaking").

213. *Id.* at art. 2, para. 1(b). An entity operates on the basis of special or exclusive rights when (1) it must obtain prior authorization from a state authority to engage in one of the listed activities; (2) for the purpose of constructing facilities for such an activity, it can avail itself of state procedures for the expropriation or use of property or place related equipment on, over, or under a public highway; or (3) it supplies gas, heat, electricity, or drinking water through a technical network that is subject to state authorization. *See id.* at art. 2, para. 3.

Note that the proposal covers only those entities operating on the basis of a special or exclusive right where one of its principal activities is among those listed. *Id.* at art. 2, para. 2.

214. Article 6 of the EXCLUDED SECTORS PROPOSAL specifically extends the scope of article 2 which lists the distribution of drinking water as an included activity to include water contracts related to irrigation, hydraulic engineering projects, land drainage, and the disposal and treatment of sewage. *See* EXCLUDED SECTORS PROPOSAL, *supra* note 194, at art. 6, para. 2.

215. *Id.* at art. 2, para. 2.

line services, some public bus services, private coach and road haulage services, sea and waterway transport, shipbuilding and repairs, and maritime shipping are not covered.[216]

Several other subsectors are explicitly excluded from the Commission's proposed directive. Most notable among those exclusions are water, energy, and fuel supply purchases.[217] In addition, under certain conditions, Member States may withdraw from regulation under the directive activities related to the exploration and extraction of oil, gas, coal, and other solid fuels.[218] This provision significantly narrows the scope of the directive and is apparently the product of a compromise agreement reached by the Council.[219]

Although both the operation of public telecommunications networks and the provision of public telecommunications services are within the scope of the proposal,[220] the proposed directive does not regulate contracts purchased solely in connection

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216. *See* EXPLANATORY MEMORANDUM TO THE ORIGINAL EXCLUDED SECTORS PROPOSAL, *supra* note 200, at 22 (coverage of air transport services market currently inappropriate because of other directives and regulations specifically designed to enhance competition); EXCLUDED SECTORS PROPOSAL, *supra* note 194, at art. 2, para. 4 (excluding public bus transport where market is competitive); EXPLANATORY MEMORANDUM TO THE WET PROPOSAL, *supra* note 185, at 10, para. 37 (discussing exclusion of road haulage and private coach services); *id.* at 12, paras. 44-47 (discussing exclusion of sea and waterway transport, maritime shipping, and shipbuilding and repairs).

217. *See* EXCLUDED SECTORS PROPOSAL, *supra* note 194, at art. 9(a) (excluding water purchases); *id.* at art. 9(b) (excluding purchases of energy and fuel supplies). The recital to the ORIGINAL EXCLUDED SECTORS PROPOSAL indicates that water purchases were excluded due to the need to procure water from sources near the area where it will be used, and energy and fuel purchases were excluded pending more comprehensive efforts to realize an internal energy market within the EC. *See* ORIGINAL EXCLUDED SECTORS PROPOSAL, *supra* note 205, at 22.

218. Member States can withdraw these activities from regulation if they ensure that (1) all entities are permitted to seek operating authorizations under the same conditions; (2) operating authorizations are granted pursuant to objective, published criteria; (3) authorization requirements are applied in a non-discriminatory manner; and (4) contracting entities in these subsectors observe the principles of non-discrimination and competitive procurement in their awards of works and supply contracts. *See* EXCLUDED SECTORS PROPOSAL, *supra* note 194, at art. 3.

219. Press accounts suggest that the UK, concerned about the impact of cumbersome reporting procedures on its North Sea oil and gas industry, won the latter exclusion by promising to support the "Buy-European" preference provision it initially opposed. *See, e.g., Some Progress on EC Procurement Proposal*, Power Eur., March 15, 1990, at 11-12 (a newsletter published by the Financial Times, Ltd.); *The EC Opens Market on Public Works Tenders*, The Independent, Feb. 23, 1990, at 26. This compromise agreement excludes a rather significant energy market; European oil and gas industry spending amounted to over $10 billion in 1989, and approximately seventy percent of that amount was spent in the UK. *See Offshore Clouds*, OIL & GAS J., Sept. 11, 1989, at 23.

220. *See* EXCLUDED SECTORS PROPOSAL, *supra* note 194, at art. 2, para. 2(d).

with telecommunications services provided in competitive markets[221] (i.e., where "other entities are free to offer the same [telecommunications] services in the same geographical area and under substantially the same conditions").[222] While it is not entirely clear who will determine the contracts that fall within this exception, the Telecommunications Proposal suggests that the determination may be based on the existence of legal provisions minimizing market barriers to entry.[223]

The excluded sectors proposal also does not regulate (1) contracts awarded by entities exclusively for purposes unrelated to the listed "relevant" activities,[224] (2) contracts for the supply of products purchased for resale or hire to third parties,[225] (3) certain contracts related to national security,[226] and (4) certain contracts entered into pursuant to an international agreement.[227]

The success of the proposed directive in liberalizing procurement in the excluded sectors will depend in part on the stringency with which the exceptions to the directive's "coverage" are interpreted and enforced. Most important in this regard is the willingness and ability of the enforcement tribunals to prevent entities from splitting contracts in order to fall beneath the contract value thresholds. The loose language of the national security and telecommunications competitive market exceptions also provides potentially significant opportunities to avoid procurement regulation. Thus, the interpretations given the "scope" provisions, and the speed with which the EC can create an internal common market for major excluded markets, such as energy supplies and airline services, will strongly influence the extent to which procurement in the excluded sectors becomes competitive.

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221. *Id.* at art. 8, para. 1.

222. *Id.*

223. EXPLANATORY MEMORANDUM TO THE TELECOMMUNICATIONS PROPOSAL, *supra* note 199, at 13, para. 33.

224. *See* EXCLUDED SECTORS PROPOSAL, *supra* note 194, at art. 6, para. 1.

225. *Id.* at art. 7, para. 1.

226. EXCLUDED SECTORS PROPOSAL, *supra* note 194, at art. 10. The following is the language of article 10:

> This Directive shall not apply to contracts when they are declared to be secret by the Member States, when their execution must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in the Member State concerned or when the protection of the basic security interests of that State so requires.

Id.

227. *Id.* at art. 11.

3. Bid solicitation procedures

The excluded sectors proposal allows entities to choose between three forms of bid solicitation procedures: open, restricted, and negotiated.[228] In providing this choice of procedures, the proposal differs substantially from the public works and supply directives, which limit the use of restricted and negotiated procedures.[229] This flexible approach is designed to permit entities to develop and maintain close, cooperative relationships with suppliers and contractors—relationships which are considered crucial to ensuring the quality, reliability, and efficiency necessary in these technically sophisticated markets.[230]

The excluded sectors proposal sets mandatory time limits for each of the three procedures. For example, in an open procedure, bids must be accepted for at least thirty-six days from the date the tender notice is published.[231] The proposal also mandates that, in a restricted or negotiated procedure, entities must notify selected candidates simultaneously, must provide all candidates equal time to prepare and submit tenders, and must supply additional contract information upon request.[232] Finally, entities are required to publish the results of all procedures in the *Official Journal*.[233]

As in the supplies and works directives, the excluded sectors proposal sets forth advertising rules. Subject to a few excep-

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228. *Id.* at art. 16, para. 1. These three procedures are also available in certain circumstances under the public supplies and the public works directives. *See supra* notes 114-18 & 135-38 and accompanying text. For a definition of these three procedures, see *supra* discussion under section III.C.1.b. of this article and the EXCLUDED SECTORS PROPOSAL, *supra* note 194, at art. 1 para. 6.

229. *See* EXPLANATORY MEMORANDUM TO THE WET PROPOSAL, *supra* note 185, at 21, para. 82. *See also supra* notes 115-118 & 135-138 and accompanying text.

230. *See* EXPLANATORY MEMORANDUM TO THE WET PROPOSAL, *supra* note 185, at 20-21, para. 79.

231. *See* EXCLUDED SECTORS PROPOSAL, *supra* note 194, at art. 20, para. 1. These time provisions, which are designed to ensure that all suppliers and contractors have an adequate opportunity to submit their bids, are crucial to the success of the directive. As the Commission points out in the *WET Proposal*, "too short time-limits are the most evident and one of the most efficient means of excluding notably foreign suppliers who have to overcome certain handicaps which do not exist for domestic suppliers, such as language problems." EXPLANATORY MEMORANDUM TO THE WET PROPOSAL, *supra* note 185, at 25, para. 96.

232. EXCLUDED SECTORS PROPOSAL, *supra* note 194, at art. 20, para. 2 (time limits for restricted and negotiated procedures); *id.* at art. 22 (on candidate invitations and information access).

233. *Id.* at art. 18.

tions,[234] the contracting entity must issue a "call for competition," which generally involves publication in the *Official Journal* of a notice of intent to award a contract.[235] Open procedures require publication of a tender notice which must include such information as the nature and quantity of the supply or work sought, required specifications, delivery or completion date, where to request additional contract documents, and the final date for submitting tenders.[236] For restricted and negotiated procedures, three notice options are available: (1) publishing a tender notice containing information similar to that of an open procedure notice, (2) inviting selected candidates who qualify under an open qualification system, and (3) using a "periodic" notice.[237]

Under the second option, entities can solicit bids from a limited number of candidates provided they are selected through an open, non-discriminatory qualification system, and provided notice of the process is published in the *Official Journal*.[238] In addition, suppliers or contractors seeking qualification cannot be excluded for reasons other than published selection criteria, and

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234. The exceptions are very similar to those of the existing supplies and works directives, and generally cover situations where there is either no prospect for competition or the existing competitors are already known. *See* EXPLANATORY MEMORANDUM TO THE WET PROPOSAL, *supra* note 185, at 22-23, paras. 85, 92. The exceptions include situations where (1) all tenders are unsuitable; (2) for technical or artistic reasons, only one supplier or contractor can perform the contract; (3) the contract is for replacement or supplementary supplies, where substituting suppliers would result in incompatibility or inordinate technical difficulties; (4) the contract is for works either supplementing or copying an existing project, under certain circumstances; (5) products are purchased on a commodity market; (6) supplies can be bought at prices considerably below the market price in a limited time "bargain" offer; and (7) goods are available on particularly attractive terms due to supplier bankruptcy. *See* EXCLUDED SECTORS PROPOSAL, *supra* note 194, at art. 15, para. 2.

235. *See* EXCLUDED SECTORS PROPOSAL, *supra* note 194, at art. 15, para. 1.

236. *Id.* at art. 16, paras. 1, 4 (requiring entities soliciting bids by open procedure to publish a tender notice); *id.* at annex XII(A) (listing the information to be included in all such tender notices).

237. *Id.* at art. 16 (describing authorized methods of bid solicitation); *id.* at annex XII(B) and (C) (listing the information to be included in all restricted and negotiated tender notices).

238. *See id.* at art. 16, paras. 2(b), 3 (setting out qualification option); *id.* at arts. 24, 25 (describing the nature of authorized qualification systems); *id.* at annex XIII (listing the information to be included in a qualification notice). Although entities are free to choose their selection criteria, the criteria must be objective, non-discriminatory, and available upon demand. *Id.* at art. 25, para. 1. In particular, entities cannot impose administrative, technical, or financial obligations on some suppliers or contractors and not others, and cannot require tests or proof duplicative of available evidence. *Id.* at art. 24, para. 5.

all applicants refused qualification must be informed of the reasons for their exclusion.[239]

A "periodic notice" may also be used in a restricted or negotiated procedure. Under this option, entities can solicit bids from a limited number of suppliers or contractors if they (1) publish a general notice indicating total projected procurement by product area or works contract for the coming year, (2) indicate in the notice that contracts will be awarded by restricted or negotiated procedure, and (3) provide all candidates expressing written interest in participating in the procurement process with an opportunity to confirm their interest in bidding on specific contracts.[240]

Regardless of whether the periodic notice option is used, all contracting entities must publish in the *Official Journal* their projected annual procurement.[241] This periodic notice must list the total projected annual procurement of supply and software service contracts for each product area estimated in value at 750,000 ECU or more, and the essential characteristics of all works contracts estimated at five million ECU or more.[242] Although the information contained in these periodic notices will normally be rather general, suppliers and contractors should be able to stay informed of all contracting opportunities in their markets by monitoring the notices and responding with written expressions of interest.[243]

4. *Technical specifications*

The specification requirements of the excluded sectors proposal are similar to those embodied in the supplies directive. Both seek to eliminate the use of contract specifications as nontariff barriers to foreign suppliers.[244] To that end, the excluded sectors proposal obligates contracting authorities to use EC-wide standards in describing technical specifications.[245] In limited cir-

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239. *Id.* at art. 24, para. 6. The need to limit the number of candidates to a manageable pool is a valid reason for exclusion. *See id.* at art. 25, para. 3.

240. *Id.* at art. 16, para, 2. *See also id.* at art. 17, para. 3 & art. 20, para. 2 (setting out time limits on the use of a periodic notice as a call to competition).

241. *Id.* at art. 17, para. 2.

242. *Id.* at para. 1.

243. *See* EXPLANATORY MEMORANDUM TO THE WET PROPOSAL, *supra* note 185, at 22, para. 89.

244. *Id.* at 18, para. 70.

245. EXCLUDED SECTORS PROPOSAL, *supra* note 194, at art. 13, paras. 1, 2, 3. The term "technical specifications" is defined very broadly to include quality, performance,

cumstances, entities need not use these standards; but if these standards are not used, entities must explain in the published notice why alternative standards are being employed.[246]

The proposal also contains a provision similar to that in the supplies directive prohibiting specification of trademarks, patents, origin, or production methods.[247] Unlike the supplies directive, however, the proposal prohibits only specifications which favor or eliminate suppliers and contractors; discrimination for or against certain products is permitted.[248] Also, the excluded sectors proposal creates an explicit preference for the use of performance criteria over design standards, an effort intended to increase supplier and contractor discretion.[249]

To promote transparency, the proposal contains information access provisions (similar to those of the supply directive) requiring that entities make technical specifications on regularly procured goods or works available to all interested suppliers and contractors.[250] The proposal deviates from the supplies directive, however, by requiring entities to respond to specification inquiries on all substantial *prospective* procurements as well.[251]

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safety, materials, testing, packaging, and costing criteria. *See id.* at art. 1, para. 7.

Contracting entities must use one of the following three standards: (1) European standards, which are standards approved by one of three EC standardization bodies, *see id.* at art. 1, para. 9; (2) "common technical standards," which are published specifications drawn up in accordance with a recognized EC procedure, *see id.* at art. 1, para. 10; or (3) "European technical approvals," which are assessments of product fitness for certain uses provided by designated bodies, *see id.* at art. 1, para. 11.

246. *Id.* at art. 13, paras. 2, 3. The exceptions include situations where (1) it is technically impossible to establish the conformity of the product with the European specification; (2) the project is of a genuinely innovative nature for which use of European standards would not be appropriate; (3) use of European standards conflicts with certain telecommunications legislation; and (4) use of European standards would result in incompatibility or disproportionate cost or difficulty in adapting contract goods to existing materials, but only as part of a clearly defined and recorded strategy for assimilating specified standards. *See id.* at art. 13, para. 6.

247. *See* EXCLUDED SECTORS PROPOSAL, *supra* note 194, at art. 13, para. 5.

248. *See* EXPLANATORY MEMORANDUM TO THE WET PROPOSAL, *supra* note 185, at 20, para. 77.

249. *See* EXCLUDED SECTORS PROPOSAL, *supra* note 194, at art. 13, para. 4; EXPLANATORY MEMORANDUM TO THE WET PROPOSAL, *supra* note 185, at 19, 20, para. 77.

250. *See* EXCLUDED SECTORS PROPOSAL, *supra* note 194, at art. 14, para. 1.

251. *See id.* at arts. 14, paras. 1 & 17, para. 1 (entities must make available specifications on all supply and software service contracts they intend to procure exceeding an 750,000 ECU annual value, and all public works contracts exceeding 5 million ECU in value).

5. Award of contracts

Article 27 of the excluded sectors proposal provides that entities must award contracts to either (1) the lowest price bid or (2) the most economically advantageous bid.[252] The non-exhaustive list of factors that may be considered in determining the most economically advantageous tender includes delivery date, period for completion, running costs, cost-effectiveness, quality, aesthetic and functional characteristics, technical merit, after-sales service and technical assistance, commitments regarding spare parts, security of supplies, and price.[253] Pursuant to article 27, entities may choose the criteria they will use in awarding contracts, subject to two limitations: (1) they cannot take into account macro-economic, social, regional, or other criteria not relevant to the object of the contract,[254] and (2) they must state in advance the criteria to be used.[255]

In evaluating the proposed directive's potential for success in liberalizing procurement in the "excluded sectors," it is important to recognize that the directive dictates processes, not results. Thus, even if all the provisions requiring transparent and non-discriminatory procurement processes were effectively enforced, entities could still manipulate subjective assessments such as quality, technical merit, and after-sales service to favor national firms. But by providing foreign suppliers and contractors with the opportunity to submit competitive bids, and by requiring entities to review those bids with enough attention to plausibly justify their rejection, the proposed directive, at the very least, will force entities to recognize the costs of such national procurement bias.

6. EC preference provisions

Article 29 of the excluded sectors proposal creates a preference for EC goods and services. Specifically, it permits discrimination against non-EC goods and services under certain circumstances, mandates such discrimination in others, and provides a

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252. *See id.* at art. 27, para. 1.

253. *Id.*

254. EXPLANATORY MEMORANDUM TO THE WET PROPOSAL, *supra* note 185, at 27, para. 103.

255. EXPLANATORY MEMORANDUM TO THE ORIGINAL EXCLUDED SECTORS PROPOSAL, *supra* note 200, at 15, para. 26. Wherever possible, the entity is to identify the criteria chosen in descending order of priority. *Id.*

mechanism for waiving all EC preference provisions pursuant to bilateral or multilateral agreement. According to a special provision in the proposed directive, these preference rules will be revised if progress is made in the current round of GATT negotiations.[256]

Pursuant to article 29, any offer *may* be rejected when more than half of the total value of the products offered "originates" in a third country, as defined by Council Regulation (EEC) No. 802168 (June 27, 1968).[257] Thus, entities are under no obligation to consider non-EC bids. However, article 29 also imposes on entities an affirmative duty to accept EC offers where the goods or services tendered are equivalent to those of a non-EC bid, and where the price of the EC offer does not exceed that of the competing bid by more than three percent.[258] The provision "makes it clear that the contracting entities *must* choose a community offer if offers are equivalent."[259] The mandatory preference requirement is qualified, however, in that an EC offer shall not be preferred where its acceptance would oblige the contracting entity to purchase materials the use of which would result in "incompatibility or technical difficulties in operation and maintenance, or disproportionate costs."[260]

These EC preference provisions were clearly crafted with the current Uruguay Round of the GATT negotiations in mind.[261] In the recital to the excluded sectors proposal, the Council states that "this Directive should not prejudice the position of the Community in any current or future international ne-

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256. EXCLUDED SECTORS PROPOSAL, *supra* note 194, at art 29, para. 6.

> The Commission shall submit an annual report to the Council (for the first time in the second half of 1991) on progress made in multilateral or bilateral negotiations regarding access for Community undertakings to the markets of third countries in the fields covered by this Directive. . . . The Council, acting by a qualified majority on a proposal from the Commission, may amend the provisions of this Article in the light of such developments.

Id. See also EC Faces Challenge to Directives and to Speed of Liberalization, FinTech 1 TELECOM MKTS., Feb. 22, 1990, at 1-2 (a newsletter published by The Financial Times, Ltd.) [hereinafter *EC Faces Challenges to Directives*].

257. *See* EXCLUDED SECTORS PROPOSAL, *supra* note 194, at art. 29, para. 2 (emphasis added).

258. *Id.* at art. 29, para. 3.

259. EXPLANATORY MEMORANDUM TO THE WET PROPOSAL, *supra* note 185, at 30, para. 111 (emphasis added). This mandatory preference provision first appeared in the WET Proposal.

260. *See* EXCLUDED SECTORS PROPOSAL, *supra* note 194, at art. 29, para. 4.

261. *See infra* notes 311-37 and accompanying text.

gotiations."[262] The Commission commentary to the water, energy, and transport proposal is more direct: "[P]rovisions are needed to defend the Community's commercial interests and preserve its negotiating position by making no unilateral concession but on the contrary creating a positive incentive for third countries to give guarantees of equal access to similar markets."[263]

Support for the EC preference provisions appears to vary considerably among the Member States. According to press accounts, France sought a much stronger "Buy-European" clause,[264] while West Germany, with almost fifty percent of its foreign trade outside the EC, opposed the preference altogether.[265] Other Member States apparently feared that the French proposal would send too strong a protectionist signal to the world during a crucial phase of the GATT negotiations.[266] Yet, the Council agreed to the excluded sectors proposal preference provisions in its March 29, 1990 "common position." However, the Council's "common position" provided that such provisions would be subject to revision, should the current negotiations result in progress on the issue of multilateral procurement access.[267]

To accommodate bilateral or multilateral agreements removing EC procurement preferences, the proposal contains a provision allowing the Council to extend the benefits of the directive to non-EC offers.[268] It appears that the Council will not necessarily require sector-specific reciprocity as the price for such an extension.[269]

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262. *See* EXCLUDED SECTORS PROPOSAL, *supra* note 194, at art. 29, para. 8.

263. EXPLANATORY MEMORANDUM TO THE WET PROPOSAL, *supra* note 185, at 29, para. 107.

264. *See EC Council of Ministers Reaches Accord on Procurement in Excluded Sectors*, *supra* note 205, at 312.

265. *See West German Minister Outlines Reforms to Partially Deregulate Telecommunications*, 6 Int'l Trade Rep. (BNA) 631 (May 17, 1990) (quoting German Minister of Posts and Telecommunications Christian Schwarz-Schilling).

266. *See EC Faces Challenge to Directives*, *supra* note 256, at 1-2.

267. *See* EXCLUDED SECTORS PROPOSAL, *supra* note 194, at art. 29, para. 6. *See also EC Faces Challenge to Directives*, *supra* note 256, at 1-2.

268. *See* EXCLUDED SECTORS PROPOSAL, *supra* note 194, at art. 29, para. 1.

269. *See* 1989 ITC REPORT, *supra* note 1, at 4-18 (quoting an unidentified EC Commission official as stating, "The Council may act, not necessarily only if reciprocity is present and not necessarily only if agreement is reached in the GATT Government Procurement Code.").

7. *Remedies*

The remedies directive adopted by the Council in 1989 does not apply to the excluded sectors.[270] Recognizing how important effective enforcement is to the successful implementation of the procurement procedures in the water, energy, transport, and telecommunications markets, the Commission has drafted a proposed remedies directive governing the excluded sectors.[271] Although the excluded sectors remedies proposal contains a few unique features, most of its provisions are similar to those of the existing remedies directive.

Like the existing public works and supply remedies directive,[272] the excluded sectors remedies proposal mandates the establishment of a legal structure for the independent review of alleged violations of procurement rules.[273] This structure must include competent administrative or judicial fora with the power to hear complaints, grant interlocutory relief, and award damages.[274] The excluded sectors remedies proposal also contains provisions for the enforcement of EC procurement laws by the Commission which are virtually identical to those of the public works and supply remedies directive.[275]

The two major features that distinguish the excluded sectors remedies proposal from the public works and supply remedies directive are the provisions on attestation and conciliation.[276] Anticipating that the application of certain interlocutory

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270. *See generally Directive 89/665*, *supra* note 162, at 33-35.

271. *See* PROPOSAL FOR A COUNCIL DIRECTIVE COORDINATING THE LAWS, REGULATIONS AND ADMINISTRATIVE PROVISIONS RELATING TO THE APPLICATION OF COMMUNITY RULES ON THE PROCUREMENT PROCEDURES OF ENTITIES OPERATING IN THE WATER, ENERGY, TRANSPORT AND TELECOMMUNICATIONS SECTORS, 1990 EUR. COMM. DOC. (COM No. 297) (1990) [hereinafter EXCLUDED SECTORS REMEDIES PROPOSAL] (the Proposal includes an explanatory memorandum).

The EXCLUDED SECTORS REMEDIES PROPOSAL, if enacted, is to be implemented by the member states by July 1, 1992. *Id.* at art. 17, para. 1.

272. *See supra* note 167 and accompanying text (describing the provisions of the existing public works and supply remedies directive).

273. *See* EXCLUDED SECTORS REMEDIES PROPOSAL, *supra* note 271, at art. 1 (requiring establishment of means for reviewing procurement decisions); *id.* at art. 2 (requiring the grant of authority to provide interlocutory relief and award damages). *See also id.* at art. 2, para. 9 (administrative review decisions must be subject to judicial appeal).

274. *Id.* at art. 2.

275. *See supra* notes 169-76 (discussing the public works and supply remedies directive provision on Commission enforcement of EC law infringements); EXCLUDED SECTORS REMEDIES PROPOSAL, *supra* note 271, at art. 12 (containing virtually identical provisions).

276. *See* EXCLUDED SECTORS REMEDIES PROPOSAL, *supra* note 271, at arts. 3-11 (attestation) & 13-15 (conciliation).

remedies to entities governed by private law would face constitutional obstacles in some states,[277] the proposal offers such entities "a flexible means of demonstrating compliance with Community law which does not involve mandatory interference with their freedom of commercial action."[278] Under this attestation option, contracting entities would submit to regular, periodic audits of their procurement processes.[279]

Member States can thus decline to suspend discriminatory contracting procedures or to set aside contract awards subject to two conditions: (1) the entities concerned must submit to regular attestation by an independent, qualified person regarding the general conformity of their procurement systems with Community law, and (2) effective interlocutory remedies must still be available, although they may leave the entity concerned with the final responsibility for deciding whether to correct an infringement or to pay a financial penalty.[280]

The conciliation provisions of the excluded sectors remedies proposal establish a mechanism at the Community level for the resolution of procurement procedure disputes through settlement.[281] The conciliation process may be invoked by any potential contractor who has been harmed or risks being harmed, without prejudice to the rights of the parties under applicable Community or national laws.[282] The conciliation working group is to consist of several members of the Community's Advisory Committee for Public Contracts, or, for telecommunications disputes, the Advisory Committee on Telecommunications Procurement. Its recommendations are not legally binding.[283]

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277. In addition to the potential constitutional problems raised by applying solely a "classical" remedies system, such as that embodied in the public works and supplies directive, to both public and private entities, the attestation option reflects the concern that

> given the industrial character of some organisations concerned, and also their need to satisfy imperative requirements of continuous service to the public, the view is strongly held in some quarters that classical remedies which directly affect the decision-making of the bodies concerned would not be appropriate. Suspension of contract award procedures and setting aside of award decisions are accordingly said to be unacceptable.

Id. at art. 6, para. 9 (Explanatory Memorandum).

278. *Id.* at 6, para. 11.

279. *See* EXCLUDED SECTORS REMEDIES PROPOSAL, *supra* note 271, at arts. 3, 4.

280. *Id.* at 7, para. 14 (Explanatory Memorandum); *id.* at arts. 3-11.

281. *Id.* at 19, para. 48 (Explanatory Memorandum).

282. *Id.* at arts. 13, 15.

283. *Id.* at arts. 14, 15.

D. Competition for Government Contracts for Services

Government contracts for the performance of services represent approximately one-quarter of the value of the total EC public procurement market.[284] But the services area is perhaps the most protected procurement market in the EC. Only about one percent of public contracts for services are awarded to firms from outside the contracting states.[285] Such contracts are not routinely advertised, and non-EC firms rarely have the opportunity to secure a contract.[286]

In yet another step to augment the EC's procurement regime, the EC Council recently proposed a draft directive on the award of public service contracts in connection with supplies and public works.[287] The proposal principally covers larger contracts, valued at 200,000 ECU or more,[288] which is the same value threshold as in the supplies directive.[289] For services provided in connection with public works, the threshold for the public works directive—five million ECU—applies.[290]

The proposal adopts a two-tier approach to application of its services rules. Priority services, which include contracts for such services as repairs and maintenance, goods and passenger transport, accounting, data processing, publishing, advertising, and refuse disposal, are subject to a complete procurement regime similar to that in the directives already adopted for public works and supplies.[291] The residual group of other services,

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284. Government contracts for the performance of services account for a total value of over 145 billion ECU. In 1987, the total EC public procurement market was valued at 595 billion ECU. *Community-wide competition for government contracts for services*, (Information Memo, published by European Commission) (Sept. 19, 1990).

285. *Id.*

286. *Id.*

287. *See* PROPOSAL FOR A COUNCIL DIRECTIVE RELATING TO THE COORDINATION OF PROCEDURES ON THE AWARD OF PUBLIC SERVICE CONTRACTS (Draft April 1990) [hereinafter SERVICES PROPOSAL]. The proposal covers all contracting authorities covered by either the supplies or the public works directives. *See* PROPOSAL FOR A COUNCIL DIRECTIVE RELATING TO THE COORDINATION OF PROCEDURES ON THE AWARD OF PUBLIC SERVICE CONTRACTS 5 (Draft April 1990) (Explanatory Memorandum) [hereinafter EXPLANATORY MEMORANDUM TO THE SERVICES PROPOSAL]. If adopted by the Parliament, this directive will be effective March 1, 1992, for most EC states. *Id.* at 38.

The Commission intends to submit a proposal on service contracts awarded to firms in the water, energy, transport, and telecommunications sectors by the end of 1990. *Id.* at 37.

288. *See* SERVICES PROPOSAL, *supra* note 287, at art. 8.

289. *See supra* note 107 and accompanying text.

290. *See* SERVICES PROPOSAL, *supra* note 287, at art. 8.

291. EXPLANATORY MEMORANDUM TO THE SERVICES PROPOSAL, *supra* note 287, at 3.

which include contracts for such services as hotel and restaurant, rail and water transport, legal, education and vocational training, health and social, recreational, cultural and sporting, are subject only to a basic transparency regime designed to give suppliers of services the minimum information necessary to explore the market.[292] The Council anticipates that the information collected for this residual group of services will provide a solid base for future decisions on wider application of the full procurement regime.[293]

A unique feature of the services proposal is a provision to take account of the fast pace of developments in the services field. A report on the operation of the directive is to be drawn up after the directive has been in force for three years. At that time, changes can be made if necessary, for example, to alter the scope of the directive or the rules on technical standards.[294]

As for enforcement, article 41 of the services proposal would amend the remedies directive for public works and supplies to include services within its scope.[295]

IV. Implications for the United States

Overall, the major concerns of U.S. industry with the EC-1992 procurement regime include the following:

- the extent to which the EC's developing public procurement policies will open Member States' procurement markets by 1992;
- whether non-EC suppliers will be required to establish EC subsidiaries in order to benefit from the new procedural rights and remedies and to avoid continued discrimination;
- whether market-opening measures will adequately cover the previously excluded "big ticket" sectors of water, energy, transport, and telecommunications; and
- the extent to which the United States can bring leverage

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292. *Id. See also Community-wide competition for government contracts for services*, *supra* note 284.

293. *See* Explanatory Memorandum to the Services Proposal, *supra* note 287, at 3.

294. *Id.* at 32.

295. *See generally supra* notes 160-76 and accompanying text. (outlining the general provisions of the remedies directive for public works and supplies).

to bear against the EC to eliminate strict reciprocity requirements from the procurement directives.[296]

The level of interest among U.S. industry in the EC-1992 process has been growing rapidly over the last few years. As it becomes increasingly clear that European integration will have a profound effect on the business environment worldwide, U.S. industries are anxious to develop positions and find fora in which to express their concerns while EC policies are still in the formative stages. A number of U.S. industry associations have been actively publishing their views on the policy implications of the EC procurement directives through congressional testimony, the publication of studies and position papers, and consultation with government agencies.[297] They have also lobbied for access to the European standards setting process, tried to build coalitions with European trade associations, and directly petitioned EC authorities and Member State governments.[298] Thus, with 1992 less than a year away and the current stalemate in the Uruguay Round, the political pressures on the procurement process are reaching a crescendo.

A. Anticipated Impact on U.S. Industries

1. Export and investment prospects

a. Expectations of U.S. firms. The expectations of U.S. industries concerning the changing business environment in the EC public market vary widely, depending to a large extent on each firms' involvement in the EC market. Industries that are

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296. U.S. CHAMBER OF COMMERCE, EUROPE 1992: A PRACTICAL GUIDE FOR AMERICAN BUSINESS 85 (1989) [hereinafter PRACTICAL GUIDE].

297. *See generally* S. COONEY, EC-92 AND U.S. INDUSTRY (1989) (Report of the Nat'l Ass'n of Mnfrs., Feb. 1989); PRACTICAL GUIDE, *supra* note 296; *Europe 1992: Economic Integration Plan, Hearings Before the Subcomm. on Europe and the Middle East and on International Economic Policy and Trade of the House Comm. on Foreign Affairs*, 101st Cong., 2nd Sess. iii-iv (1989) [hereinafter *House Hearings*]; *The Effects of Greater Economic Integration Within The European Community on The United States: Hearings Before the United States International Trade Commission*, April 11, 1989 (Docket No. 332-267) [hereinafter *ITC Hearings*]; HOUSE SUBCOMM. ON INTERNATIONAL ECONOMIC POLICY AND TRADE OF THE HOUSE COMMITTEE ON FOREIGN AFFAIRS, EUROPEAN COMMUNITY'S 1992 ECONOMIC INTEGRATION PLAN, 101st Cong., 1st Sess. (Comm. Print 1989) [hereinafter HOUSE REPORT ON EC INTEGRATION].

298. *See generally* ATLANTIC COUNCIL OF THE UNITED STATES, THE U.S. TELECOMMUNICATIONS SERVICES AND EQUIPMENT SECTOR AND THE EUROPEAN COMMUNITY UNIFIED MARKET—1992, at 33-34 (1990) [hereinafter ATLANTIC COUNCIL REPORT]; PRACTICAL GUIDE, *supra* note 296, at 118; *Leading U.S. Business Groups Warn Community Against Adopting Local-Content Legislation*, 7 Int'l Trade Rep. (BNA) 368 (March 14, 1990).

already competitive in the EC public procurement market or in the EC market as a whole expect to gain from any liberalization of procurement rules, even with local content restrictions. For example, in certain public sector markets, advanced technology or specialized product expertise has allowed American companies to penetrate the procurement processes in some EC Member States.[299] Companies that have name recognition and a track record are less likely to find their bids discarded under the new local content guidelines than firms that try to break into sectors that have traditionally been closed to U.S. exports. For these firms, any increased transparency and uniformity in EC procurement practices should be trade liberalizing. Additionally, industries that already have substantial direct investments in the EC expect to benefit from the changes, mainly because of easier access to markets in Member States in which they have not invested and because of the resulting ability to consolidate EC operations.[300]

In contrast, smaller companies that do business in the EC mainly by means of exports rather than investment do not expect the new procurement rules, as currently conceived, will liberlize trade for them. In fact, some expect to lose sales either to EC firms or to larger U.S. firms with direct investments.[301] In particular, those U.S. firms that have had a small volume of ex-

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299. U.S. industries already competitive in the public procurement markets of some EC Member States include construction and mining equipment, architecture, engineering and construction services, medical equipment, environmental technology and services, waste management, computers and data processing equipment, optical fiber, and telecommunications equipment. *See* 1989 ITC REPORT, *supra* note 1, at 4-20 to 4-21; DOC ANALYSIS, *supra* note 103, at 47, 58, 61-62; PRACTICAL GUIDE, *supra* note 296, at 88-89. U.S. medical instruments manufacturers already supply about 25 % of the EC market. 1989 ITC REPORT, *supra* note 1, at 4-24.

300. *See* 1989 ITC REPORT, *supra* note 1, at 4-24 to 4-25, 4-35; GAO, SINGLE EUROPEAN MARKET, *supra* note 38, at 22.

301. 1989 ITC REPORT, *supra* note 1, at 4-21. *See, e.g.*, *House Hearings*, *supra* note 297, at 219-20 (Bernard H. Falk, President, National Electrical Manufacturers Association). Mr. Falk stated,

> Now this code, which is the subject for our discussion this morning, if anything makes the situation tougher for U.S. exporters of electrical equipment to compete not only in Europe but internationally. I think that what you have to bear in mind, and there has been no mention made of this, is that [in] the heavy electrical industry you have now perhaps 6, 8, or 10 suppliers in Europe, and they are rationalizing that they will end up with basically three or four major suppliers who now have a bigger home insulated market to work from than they have had before. It is not just the German market that a leading German company will have, but now it will have all of Europe to work from.

Id.

port sales to the EC do not expect to gain from the procurement directives.[302]

b. Investment opportunities. Much attention has been given to the rush of American companies establishing or expanding their presence in the EC before 1992. Investment in the EC is indeed increasing, and it is taking every conceivable form: establishment of wholly-owned manufacturing subsidiaries, joint ventures with EC firms, mergers with or acquisitions of EC businesses, technology licensing agreements, and the establishment of distributorships or representative offices.[303]

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302. In sectors such as motor vehicles and motor vehicle parts, locomotives and rolling stock, heavy electrical equipment, boilers, water measuring and control equipment, and water pipes, tubes and flanges, U.S. export sales to the EC public sector have generally been negligible. In some sectors, such as heavy electrical equipment, there is substantial overcapacity both in the U.S. and in the EC. In others, such as office machines, U.S. companies have been excluded from the public sector despite capturing significant shares of EC private market sales. 1989 ITC REPORT, *supra* note 1, at 4-25, 4-28 to 4-32, 4-34 to 4-35, 4-38.

303. *Id.* at 4-22. At the ITC hearings on the effect of European integration on the U.S., Stephen Cooney (International Investment and Finance Director, National Association of Manufacturers) stated, "I think the best way to ask the question is are any of your members not considering [pursuing a European presence] right now." *ITC Hearings*, *supra* note 297, at 91-92.

Direct investment has been the predominant means of entry into the EC market. Substantial direct investment has occurred in the medical equipment, computer and data processing equipment, construction and mining equipment, motor vehicles and parts, water measuring and control instruments, and water treatment chemicals industries. 1989 ITC REPORT, *supra* note 1, at 4-24, 4-26, 4-28 to 4-29, 4-35 to 4-36. At least three U.S. producers of water measuring and control instruments have EC production facilities, one in seven different countries. They confirm that they will have no difficulty meeting the utilities directive's fifty percent local content requirement. *Id.* at 4-35. In addition, IBM, Unisys, and Apple have already invested over $14 billion for the production of computers and data processing equipment in the EC, where they already dominate the private sector market for office machines. *Id.* at 4-26. U.S. accounting services providers, operating in the EC through local partnerships employing largely EC nationals, already dominate both the public and private EC markets for such services. *Id.* at 4-27. Production facilities are not the only parts of U.S. businesses that may be moving to Europe. The EC has indicated that the calculation of local content contained in products in the excluded sectors will include the cost of all goods and services in the contract, including research and development. GAO, SINGLE EUROPEAN MARKET, *supra* note 38, at 42; *House Hearings*, *supra* note 297, at 349 (statement of Eugene J. McAllister, Assistant Secretary of State for Economic and Business Affairs). As a result, some U.S. businesses have indicated that there is pressure to increase EC-based research and development activity. GAO, SINGLE EUROPEAN MARKET, *supra* note 38, at 42; ATLANTIC COUNCIL REPORT, *supra* note 298, at 20; *House Hearings*, *supra* note 297, at 37-38 (exchange between Representative Gejdenson and Kyle Pitsor, Manager of International Affairs, National Electrical Manufacturers Association).

Additionally, several firms have entered joint ventures. Sectors experiencing or likely to experience joint venture activity include architecture, engineering and construction services, heavy electrical equipment, commercial radio and television communica-

Many industry representatives believe that the EC procurement directives will be interpreted and implemented by local procuring authorities as "Buy EC" rules.[304] They also are concerned that the EC directives allow for indefinite transition periods during which procuring entities can entirely exclude bids incompatible with existing standards even if they contain over fifty percent EC content.[305] As a result, industry representatives characterize the decision to invest directly in the EC at least in part as a defensive necessity.[306]

Others view the investment decision more positively as a means to capture new markets throughout the EC without having to invest in each individual country. As one industry representative commented, "[T]he prospects of EC 92 are leading European companies not just to seek alliances with other European companies—that's the Commission model. But it's just as logical

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tions equipment, optical fiber, and telecommunications equipment. 1989 ITC REPORT, *supra* note 1, at 4-23, 4-33, 4-41 to 4-44. For example, one U.S. producer of heavy electrical equipment, no sales of which have been reported to any EC public purchaser since 1960, recently entered a joint venture with two EC companies in the hope that getting a foot in the door would create further investment opportunities despite overcapacity in the industry. *Id.* at 4-33. And two firms (Corning Glassworks and AT&T Network Systems) have joint ventures or licensees producing optical fiber and related equipment in the United Kingdom, Germany, France, Italy, the Netherlands, Spain, and Denmark. *Id.* at 4-42.

304. *See House Hearings, supra* note 297, at 192. At the House hearings on 1992, Bernard Falk (President, National Electrical Manufacturers Association) stated, "[T]he European utilities have used 'buy national' practices and policies to effectively close their home market. The European utilities are not obliged to accept bids from American firms. The proposed EC directive on procurement provides no new right of access for suppliers of non-EC products". *Id.*

305. 1990 ITC REPORT, *supra* note 55, at 4-7.

306. *ITC Hearings, supra* note 297, at 101 (testimony of Stephen Cooney, International Investment and Finance Director, National Association of Manufacturers); Letter from the U.S. Chamber of Commerce, the National Association of Manufacturers, and the U.S. Council for International Business to EC External Affairs Commissioner Frans Andriessen (Mar. 12, 1990) (stating that "we foresee a serious negative impact on U.S.-EC relations" if proposed local content provisions become law, and that "[w]e believe that the message needs to be stronger that 'forced investment' is not the goal of [the EC's program to create a single market by 1992] in general, or of specific EC policies"), *quoted in Leading U.S. Business Groups Warn Community Against Adopting Local-Content Legislation, supra* note 298. In an interview, Secretary of Commerce Robert Mosbacher stated,

> So the people who are really concerned are those who build and produce here and export to Europe. Local content requirements pose problems. The result of restrictions is that there is a rush among U.S. firms to build and operate plants in Europe. And that's not bad. But it should be voluntary; it should not be under duress.

Mosbacher Seeks an Open Europe, Christian Science Monitor 9 (Feb. 5, 1990).

for them to seek alliances with non EC companies."[307] This trend is particularly evident in the telecommunications sector where several proposed and completed mergers between EC national champion firms and large U.S. companies have been making headlines.[308]

In either case, the investment decision is seldom driven by the public procurement market alone. A few industries have suggested that the prospect of increased access to public contracts alone is prompting their decisions to open or expand EC facilities.[309] In most cases, however, the private market for goods and services traditionally sold to governments is larger than the public one, and increased access to procurement contracts is as much a byproduct of the decision to invest as an incentive for it.[310]

2. *Trade diversion to the U.S.*

In addition to concern with U.S. export and investment prospects in the EC, the EC-1992 program has raised the possibility that trade will be diverted to the United States. U.S. industries fear that third country producers, particularly the Japanese, could lose sales in the EC because of the buy-European impact of the government procurement and other initiatives and divert those products to the U.S. market. According to an investigation performed by the International Trade Commission, the risk of trade diversion is slight in most procurement-oriented sectors because Japanese penetration of EC markets has been as

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307. *ITC Hearings*, *supra* note 297, at 102-03 (testimony of Stephen Cooney, International Investment and Finance Director, National Association of Manufacturers).

308. These deals include AT&T and Italtel (Italy), AT&T and Telefonica (Spain), GE and GEC Plessey (Britain), and ITT and Alcatel, which is a joint venture formed in 1986 between ITT (US) and Compagnie Generale d'Electricite (France). *Id.* (testimony of Stephen Cooney).

309. For example, U.S. manufacturers of water measuring and water control instruments and systems are expected to expand their already substantial EC presence as the public procurement market, in which their sales have to date been minimal, is liberalized. 1989 ITC REPORT, *supra* note 1, at 4-35 to 4-36.

310. For example, the U.S. construction equipment industry supplies about twenty-eight percent of the EC private market and has already invested over $1 billion in plant and capital there. Manufacturers predict that if open procurement procedures are enforced, they could capture fifteen percent or more of the EC public market over the next ten years. Nevertheless, they consider EC public procurement of construction machinery to be a "low-volume, low-margin business" and are not basing their investment decisions on these predictions. *Id.* at 4-26.

minimal as that of American companies.[311] However, in three sectors—optical fiber, telecommunications equipment, and medical equipment—U.S. companies have invested more heavily in the EC than their Japanese competitors. To the extent that Japanese producers in these sectors are hit harder by the fifty percent local content rule, exports to the United States could increase, raising the specter of some economic dislocation in the U.S. domestic market. Nevertheless, analysts do not foresee significant harm to U.S. interests.[312]

B. Pressures on the Procurement Process

U.S. government efforts in the area of EC government procurement policy have been focused on keeping the issue on the bargaining table. This emphasis reflects the fear that, left to its own devices, the EC will not give adequate consideration to the external consequences of its attempts to create a single internal procurement market.[313] The United States has pressed in several ways to contribute its input in the process. Most importantly, the United States has, during the Uruguay Round of trade negotiations, pressed for extension of the Government Procurement Code to services and to the excluded sectors. At the same time, the U.S. Administration, often prodded by Congress, has taken several steps to exploit bilateral leverage created by the 1988 Trade Act in order to influence the course of EC-1992 developments.

1. The Uruguay round

The Uruguay Round of multilateral trade negotiations, the eighth round of negotiations carried on under the auspices of the GATT, was launched in 1986 with a Ministerial Declaration calling for the progressive liberalization of trade both by bringing new aspects of trade under GATT discipline and by expanding the scope of existing GATT agreements.[314] In the area of govern-

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311. *Id.* at 4-21 to 4-22.

312. *Id.*

313. *See, e.g., House Hearings, supra* note 297, at 24. At the House hearings on EC 1992, Richard Cooper, Professor, Harvard University stated, "The risk is not that they are going to call time out to do something to hurt us with the purpose of hurting us. The risk is that they will hurt us inadvertently in the process of the internal dealmaking. . . . There is a tremendous preoccupation now with Europe within Europe." *Id.*

314. *See Ministerial Declaration of 20 September 1986* (*Punta del Este* Declaration), Part I (A), *reprinted in* GENERAL AGREEMENT ON TARIFFS AND TRADE, GATT AC-

ment procurement, talks have addressed both of these goals.[315] In particular, negotiators are working to expand the coverage of the Government Procurement Code to the excluded sectors of water, energy, transport, and telecommunications and to contracts for services.[316]

The results of these renegotiations will likely determine the future course of U.S.-EC relations in the area of public procurement. GATT Government Procurement Code signatories will automatically qualify for the broadened coverage of the EC supplies directive.[317] In areas not already covered by the Code, however, the EC has taken the position that it should not unilaterally extend the benefits of its liberalized internal procurement market to third countries.[318] Thus, while the EC has been unwilling to eliminate the fifty percent EC content rule from the utilities directive, EC officials indicate a willingness to change the rule to a fifty percent Code signatory content standard if EC countries receive equivalent concessions from other signatories.[319] On its side, the U.S. administration has been eager to negotiate access to EC public markets for all Code signatories,

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TIVITIES 1986, 15 (1987) [hereinafter GATT ACTIVITIES 1986].

315. Although not formally part of the Uruguay Round, renegotiation of the Government Procurement Code under the terms of the Code itself has been timed to coincide with the Uruguay Round and has been effectively incorporated into its structure. *See* Government Procurement Code, *supra* note 28, at art. IX(6)(b) (calling for further negotiations to begin within three years of the agreement's entry into force in order to expand its coverage and, in particular, to "explore the possibilities of expanding the coverage of this Agreement to include service contracts"); 1989 ITC REPORT, *supra* note 1, at 15-10.

316. 1989 ITC REPORT, *supra* note 1, at 15-10; GATT ACTIVITIES 1986, *supra* note 314, at 35. During the initial negotiation of the Government Procurement Code, the EC had not been delegated the authority by its Member States to negotiate an agreement applicable to the excluded sectors. *See supra* note 38 and accompanying text.

317. 1989 ITC REPORT, *supra* note 1, at 4-20 n.83.

318. *See* EXPLANATORY MEMORANDUM TO THE WET PROPOSAL, *supra* note 185, at 29-30, paras. 107, 110; 1989 ITC REPORT, *supra* note 1, at 4-17 to 4-18.

319. *See* Montagnon, *GATT Prepares to See Fair Play in Trade as 1992 Approaches*, Fin. Times, Jan. 8, 1990, sec. I, at 2.

> Commission officials say liberalized European public procurement rules after 1992 will almost certainly be more generous than those of most other major industrial countries, including Canada, the US and Switzerland where regional governments can be as restrictive as they like. The EC would thus be naked in GATT if it did not retain something to give away in return for liberalization by others—for example, agreement by the US to drop its 'Buy America' procurement policy. The Commission has thus been seeking to write stipulations into the new rules on European content and preference. . . . [T]he issue is now inextricably linked to the Uruguay Round.

Id.

but less willing to put its own procurement policies on the table.[320]

In mid-1990, the EC presented to the Uruguay Round Working Group (the committee that discusses revisions to the Code) a detailed offer to open its public procurement markets to Code signatories.[321] The EC proposal would open national markets in telecommunications, transport, power and water supply, and would apply to large-scale purchases of services as well as goods and equipment. The proposal suggested negotiating a similar agreement on purchases of commercial services by other public bodies. The EC also proposed extending the Code's rules on open tendering and non-discrimination to state, regional, and local government bodies, which are not currently covered, and to certain private utilities that enjoy government-sponsored privileges. Finally, the EC suggested instituting a bid challenge system under which unsuccessful bidders could appeal the award of contracts and obtain effective redress. The United States greeted the EC proposal enthusiastically, with the exception of its inclusion of private utilities in the regulatory scheme, which the United States continues to oppose.[322]

In September 1990, the United States offered a counter-proposal, which included a mechanism for excluding many privately-owned utilities.[323] The U.S. offer establishes two subcategories of government-regulated utilities — companies under government control and those under "government influence."[324] The criteria for the two subcategories would essentially bring EC telecommunications and heavy electrical entities under the more disciplined "control" category.[325] However, most U.S. telecommunications and heavy electrical entities would fall into the less disciplined "influence" category.[326] Further, although the EC offer proposed the inclusion of urban transport, the U.S. proposal

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320. *See* EUROPE 1992: REPORT OF THE ADVISORY COMMITTEE FOR TRADE POLICY AND NEGOTIATIONS 22 (Nov. 1989). The report recommends that USTR "negotiate the exchange of 'EC origin' in the current proposed directives for 'signatory origin' under the GATT Code." *Id.*

321. *See European Community Proposes Wider Access for Foreign Bidders in Public Procurement*, 7 Int'l Trade Rep. (BNA) 1227-28 (Aug. 8, 1990).

322. *Id.*

323. *EC, U.S. Remain Deadlocked Over Coverage of New Public Procurement Code*, Inside U.S. Trade, Special Rep. 1 (Nov. 2, 1990).

324. *Id.*

325. *Id.*

326. *Id.*

fails to mention it.[327] The EC does not believe the U.S. offer is workable because it does not provide a "symmetry of benefits."[328] The extent to which the Code should cover privately-owned, government-regulated entities has remained a contentious issue in the negotiations.

Both the United States and the EC have devoted considerable time and energy to identifying aspects of each other's procurement regimes that discriminate against foreign participants. The EC's 1990 *Report on United States Trade Barriers and Unfair Practices* devotes over twenty pages of discussion to U.S. federal and state level practices that discriminate against European suppliers.[329] The Europeans are quick to point out that their local content provisions are based on the U.S. government's "Buy American" laws.[330] These laws require the U.S. government to purchase U.S. manufactured goods and to grant products of fifty percent U.S. origin (by value) a six to twelve percent price preference in awarding contracts.[331] The EC also

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327. *Id.*

328. *Id.*

329. COMMISSION OF THE EUROPEAN COMMUNITIES, EC REPORT ON UNITED STATES TRADE BARRIERS AND UNFAIR PRACTICES 20-40 (1990) [hereinafter REPORT ON U.S. TRADE BARRIERS].

330. Any analogy to U.S. Buy American laws is misplaced. Under the Buy American Act, procuring entities apply a six or twelve percent price preference in favor of bids that contain at least fifty percent U.S. domestic content for the purchase of covered equipment. A foreign supplier who is otherwise qualified and beats the U.S. price preference cannot be excluded on the grounds that his goods are of foreign origin. Under the proposed EC procurement regime, however, not only would a mandatory three percent price preference be applied in favor of goods that contain at least fifty percent EC origin, but procuring entities would retain discretion to reject foreign origin goods, even when they are competitive in terms of price. DOC ANALYSIS, *supra* note 103, vol. 3, at 112-13; *ITC Hearings*, *supra* note 297, at 101 (testimony of Stephen Cooney, International Investment and Finance Director, National Association of Manufacturers).

331. *See* 41 U.S.C. § 10a-d (1988) (the Buy American Act of 1933, as amended by title VII of the Omnibus Trade and Competitiveness Act of 1988). The Commission also lists as discriminatory procurement laws the National Security Act of 1947, the Defense Production Act of 1950, the Defense Balance of Payments Program, the Trade Agreements Act of 1979, the Competition in Contracting Act of 1984, and the Omnibus Trade and Competitiveness Act of 1988. REPORT ON U.S. TRADE BARRIERS, *supra* note 329, at 23.

The Community has emphasized that most states have product-specific Buy-American laws, ranging from total bans on foreign goods to small preferences for domestic goods. REPORT ON U.S. TRADE BARRIERS, *supra* note 329, at 28-31. State and local government procurement represents 70 % of total U.S. public procurement spending, yet only the limited amount of that spending that is funded by the federal government is subject to the disciplines of the GATT Government Procurement Code. *Id.* at 31. *See also* EUROPE 1992: REPORT OF THE ADVISORY COMMITTEE FOR TRADE POLICY AND NEGOTIATIONS, *supra* note 320, at 17-18.

contends that indiscriminate U.S. invocation of the national security exemption "has led in practice to a substantial reduction of the Department of Defense (DOD) supplies covered by the GATT Code."[332] In addition, the EC wants AT&T and the Regional Bell Operating Companies to be obligated to follow transparent and nondiscriminatory procurement policies because, though not government-owned, they enjoy exclusive rights sanctioned by the government.[333]

Meanwhile, the U.S. 1990 *National Trade Estimate Report on Foreign Trade Barriers* devotes similarly extensive coverage to discriminatory procurement measures proposed by the EC and practiced by its Member States.[334] Although some private sector advisors have encouraged the U.S. government to make concessions in some of the EC's areas of concern,[335] others have indicated that the United States should keep intact current restrictions on foreign participation in procurement rather than trade them away in the Uruguay Round for access to Europe.[336]

Should the Uruguay Round fail to yield some accommodation between the United States and the EC in the area of public procurement, a search for bilateral solutions is bound to ensue. Administration officials have made it clear that they intend to have their concerns addressed by the EC. Deputy U.S. Trade Representative James Murphy, Jr. said in congressional hearings on EC 1992:

> To the extent that they [U.S. procurement concerns] get solved in the Uruguay Round, that is fine. We are happy to meet our objectives there. But to the extent that they may fall off the table for some reason in the Uruguay Round, then they are back on the table bilaterally. So there is no escaping the objective. . . . If it happens in Geneva, fine. If not, it happens in Brussels.[337]

2. *Bilateral action*

a. The 1988 Trade Act. The primary tool for exerting bilateral pressure on the European Community is the Omnibus

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332. REPORT ON U.S. TRADE BARRIERS, *supra* note 329, at 38.

333. *Id.* at 36.

334. *See generally* OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, 1990 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS (1990).

335. *See, e.g.*, ATLANTIC COUNCIL REPORT, *supra* note 298, at 42-45.

336. 1989 ITC REPORT, *supra* note 1, at 4-20 to 4-21.

337. *House Hearings*, *supra* note 297, at 381-82.

Trade and Competitiveness Act of 1988 (1988 Trade Act).[338] The 1988 Trade Act includes three separate provisions that could be used first to force a foreign government practicing discriminatory procurement policies to the bargaining table and then to impose sanctions if no agreement is reached. To date, only one of the three provisions has been invoked against the EC; but, as the Uruguay Round comes to an end, pressure on the Bush Administration to exert the full leverage potential of the Act is growing.

The first of the three procurement provisions in the 1988 Trade Act requires the U.S. Trade Representative to investigate and to identify priority countries for negotiations aimed at opening markets to exports of U.S. telecommunications equipment.[339] If no progress is made through negotiations within one year, the president may either retaliate against the targeted country under the strengthened section 301[340] or opt to extend the negotiations period for up to two years.[341] Industry groups have pressured Congress and the executive to use this provision to bring the EC to the negotiating table.[342]

In February, 1989, U.S. Trade Representative Carla Hills

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338. Pub. L. No. 100-418, 102 Stat. 1107 (1988).

339. Pub. L. No. 100-418, § 1374, 102 Stat. 1107, 1217 (1988). Although Congress expressed its desire that the government procurement aspects of telecommunications trade be treated in the context of the GATT Government Procurement Code, the 1988 Trade Act also authorized bilateral procurement agreements. *See* Pub. L. No. 100-418, § 1375(d)(3) & (11), 102 Stat. 1107, 1219 (1988). The 1988 Trade Act also provides that any agreements concluded under its authority and any necessary implementing legislation will be considered by Congress under its "fast-track" procedures, which place time limits on congressional consideration and assure that Congress will accept or reject any such agreement in its entirety. ATLANTIC COUNCIL REPORT, *supra* note 298, at 24.

340. Section 301 of the Trade Act of 1974 authorizes presidential action to enforce U.S. rights under international trade agreements and to respond to discriminatory or unreasonable practices of foreign governments that burden or restrict U.S. commerce. 19 U.S.C. §§ 2411-2483 (1988). The 1988 Trade Act amended section 301 in several significant respects including restricting presidential discretion to deny relief and imposing tighter deadlines.

341. Pub. L. No. 100-418, § 1376, 102 Stat. 1107, 1216, 1220-22 (1988).

342. *House Hearings*, *supra* note 297, at 140 (Joseph Greenwald, Consultant, Unisys, Inc., and Chairman of the Working Group on the GATT Negotiating Round, National Association of Manufacturers, stated, "We believe that the USTR has acted wisely in citing the entire E.C. as a 'priority country' under the terms of the telecommunications provisions of the Trade Act. . . . We support U.S.-E.C. negotiations aimed at opening the E.C. telecommunications equipment and services markets to U.S. producers"). *See also* ATLANTIC COUNCIL REPORT, *supra* note 298, at 43 ("The U.S. Government should consider the negotiations of a bilateral agreement on telecommunications with the EC for matters not likely to be dealt with in adequate detail in the GATT agreements or not covered at all.").

transmitted to Congress a report identifying the European Community as a priority country for liberalization of telecommunications trade under the 1988 Trade Act. The EC agreed to participate in "talks" about telecommunications issues—which took place in June and December of 1989—but has consistently refused to engage in formal bilateral "negotiations" until after the conclusion of the Uruguay Round.[343] Although no agreement is under consideration, in March, 1990, President Bush informed Congress that he had decided to extend the negotiating period for another year, citing progress in opening the EC telecommunications market, including the government sector, to competition.[344] According to administration officials, President Bush will most likely extend the negotiating period through 1991 as well.

In addition to its special provisions for the telecommunications sector, the 1988 Trade Act includes provisions aimed at pressuring foreign governments that practice discriminatory procurement policies. The Buy American Act of 1988 (Title VII of the 1988 Trade Act) provides that no federal agency shall award any contract for the procurement of goods or services from "a foreign country whose government maintains, in government procurement, a significant and persistent pattern or practice of discrimination against United States products or services which results in identifiable harm to United States businesses. . . ."[345] The Trade Act requires the U.S. Trade Representative to identify by April 30, 1990, and each year thereafter through 1996, those governments that discriminate against U.S. exporters when purchasing goods and services, and to seek immediate negotiations with the identified countries.[346] If progress is not made within sixty days, the Trade Act authorizes the president to bar U.S. government agencies from buying products and services from those countries.[347] If no satisfactory settlement is reached within one year, the president is then required to revoke

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343. *Certain Sectors to Remain Closed to Foreign Firms Under EC 1992 Plan*, 52 Banking Rep. (BNA) 144 (Jan. 16, 1989) (quoting Riccardo Perissich, Deputy Director-General for Internal Markets at the EC Commission).

344. *President Formally Announces Delay in Retaliatory Telecommunications Decision*, 50 Daily Rep. for Executives (BNA) A-23 (Mar. 14, 1990).

345. Pub. L. No. 100-418, § 7002, 102 Stat. 1107, 1545 (1988) (codified as amendment at 41 U.S.C. § 10a-d (the Buy American Act of 1933)).

346. Pub. L. No. 100-418, § 7003, 102 Stat. 1107, adding a new subsection (d) to § 305 of the Trade Agreements Act of 1979, 19 U.S.C. § 2515.

347. *Id.* § 7003(e) and (f), 102 Stat. 1107, 1549.

the waiver of discriminatory purchasing requirements granted to the country under the GATT Government Procurement Code.[348]

Despite pressure from Congress and some business groups, the U.S. Trade Representative did not identify the EC (or any other country) under the procurement provisions of the 1988 Act in her 1990 report to Congress. Asked why she chose not to name the EC, Representative Hills stated that she did not view the EC's public procurement policies as exhibiting the "persistent pattern" of discrimination described in Title VII and that each Member State appeared to be making progress to open its market. Moreover, she stressed the need not to jeopardize "good faith negotiations" underway in the context of the Uruguay Round, adding that failure to reach a satisfactory multilateral agreement would be taken into account in the next year's Title VII review.[349]

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348. *Id.* § 7003(f)(3), 102 Stat. 1107, 1550. The 1988 Trade Act states that the offending country "shall be considered as a signatory not in good standing of the [GATT] Agreement." *Id.* at § 7003(f)(3)(A). In all cases, however, the president is permitted to withhold, modify, or terminate sanctions should he determine that a procurement ban "would harm the public interest of the United States." *Id.* § 7003(f)(4). Subsection (h) provides that the President shall not impose sanctions if he determines that such action "would limit the procurement or class of procurements to, or would establish a preference for, the products or services of a single manufacturer or supplier" or "would, with respect to any procurement or class of procurements, result in an insufficient number of potential or actual bidders to assure procurement of services, articles, materials, or supplies of requisite quality at competitive prices." *Id.* § 7003(h).

349. *U.S. Faces Criticism from Congress over Policy on Government Procurement*, 7 Int'l Trade Rep. (BNA) 617, 618 (May 2, 1990). Several Congressmen denounced USTR's decision as "sending precisely the wrong signal at exactly the worst time to our trading partners who engage in unfair trade practices." *Id.* at 617 (quoting Representative Conyers). The House sponsors of title VII argue that Hills flouted the law by ignoring the specific criteria to be considered in deciding which trading partners should be identified for retaliatory measures and relying on a loophole provision allowing for consideration of "other additional criteria." *Lawmakers Press USTR to be Tougher on Closed Procurement Markets*, 8 Inside U.S. Trade (No. 18) 1, 2 (May 4, 1990).

In 1990, a proposal amending title VII to eliminate this loophole was introduced in the House of Representatives. *See* H.R. 5439, 101st Cong., 2d Sess. (1990). The proposed amendment would have eliminated the provision allowing the President to take into consideration "any other additional criteria deemed appropriate" when naming countries that have discriminatory procurement regimes. *See* 136 CONG. REC. E2612 (Aug. 3, 1990). In part, Representative Conners said,

> [O]ur bill will remove a massive loophole in the Buy American Act which was utilized by the administration to avoid identifying countries as having engaged in government procurement discrimination against U.S. firms. This section of our bill would delete section 7003(C) of title VII—Buy American Act of 1988—from the Trade and Competitiveness Act of 1988—Public Law 100-418.

Id. Although hearings were held on the bill, it was never reported out of committee before the end of the congressional session. Congressional staffers are currently revising the legislation and expect it will be re-introduced in 1991.

Finally, U.S. industry groups have called for the U.S. Trade Representative to designate EC government procurement practices as a liberalization priority under the so-called "super 301" provisions of the 1988 Trade Act.[350] The 1990 priority watch list, released in late April, 1990, did not name the EC or any sector of its market as a liberalization priority.[351] Although "super 301" expired at the end of 1990, legislation is currently pending to extend the provision.[352] If the provision is extended, it is likely that the EC's procurement regime will remain a potential target, particularly if progress in opening EC procurement markets is not achieved in the Uruguay Round.

b. Defense procurement. Notwithstanding the 1988 Trade Act's procurement provisions, most proponents of bilateral bargaining with the EC consider the most effective U.S. bargaining chip to be access to the U.S. defense procurement market. Under the Trade Agreements Act of 1979, the Department of Defense is authorized to grant greater foreign access to its own contracting process than other federal agencies. The Buy American Act of 1933 generally requires agencies of the federal government to procure products and services manufactured in the United States and containing at least fifty percent U.S. content.[353] The Department of Defense, however, may waive these requirements with respect to products of any country that enters into a reciprocal procurement agreement with the United States.[354] Through a series of memoranda of understanding, the U.S. Department of Defense has agreed with defense procure-

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350. *See, e.g.*, SUBMISSION OF THE NATIONAL ELECTRONIC MANUFACTURERS ASSOCIATION TO THE SECTION 301 COMMITTEE OF THE OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE (Mar. 23, 1989), *reprinted in* HOUSE REPORT ON EC INTEGRATION, *supra* note 297, at 201 (requesting that the government procurement practices of EC member states covering purchases of heavy electrical equipment be identified as a trade liberalization priority).

Section 301 requires the U.S. Trade Representative to submit to the Senate Finance and House Ways and Means Committees a report in 1989 and 1990 with lists of priority foreign countries and priority practices of those countries, the elimination of which are likely to have the most significant potential to increase U.S. exports. Within twenty-one days of the U.S. Trade Representative's report to Congress, the Trade Representative is required to initiate a section 301 investigation against all priority unfair trade practices and priority foreign countries. Pub. L. No. 100-418, § 1302, 102 Stat. 1107, 1176 (1988).

351. *U.S. Faces Criticism from Congress Over Policy on Government Procurement*, *supra* note 349, at 617-18.

352. Section 301, 102d Cong., 1st Sess. (1991); H.R. 787, 102d Cong., 1st Sess. (1991).

353. 41 U.S.C. § 10a-b (1988).

354. 19 U.S.C. § 2512(b)(3) (1988).

ment authorities in most European nations that Buy American and Buy European laws do not apply to defense purchases.[355] Under these agreements, goods and services originating in the signatory state are entitled to be treated the same in Defense Department purchasing decisions as goods of U.S. origin.[356]

As these memoranda of understanding began coming up for renegotiation in 1989, the U.S. government came under increasing pressure to use access to the large U.S. defense procurement market as a bargaining chip to open up non-defense European procurement markets.[357] Industry groups argue that while the

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355. The U.S. has concluded such agreements with the United Kingdom, France, West Germany, Italy, the Netherlands, Portugal, Belgium, Denmark, Luxembourg, and Spain. *See* Memorandum of Understanding Concerning the Principles Governing Mutual Cooperation in the Research, Development, Production, Procurement and Logistic Support of Defense Equipment, Dec. 12, 1979, United States-Belgium; Memorandum of Understanding Concerning the Principles Governing Mutual Cooperation in the Research, Development, Production, Procurement and Logistic Support of Defense Equipment, Jan. 2 & 30, 1980, United States-Denmark, 33 U.S.T. 3128; Memorandum of Understanding Between the Government of the French Republic and the Government of the United States of America Concerning the Principles Governing Reciprocal Purchases of Defense Equipment, May 22, 1978, United States-France; Memorandum of Understanding Concerning the Principles Governing Mutual Cooperation in the Research and Development, Production, Procurement and Logistic Support of Defense Equipment, Oct. 17, 1978, United States-Federal Republic of Germany; Memorandum of Understanding Concerning the Principles Governing Mutual Cooperation in the Research, Development, Production and Procurement of Defense Equipment, Sept. 11, 1978, United States-Italy; Memorandum of Understanding on Reciprocal Defense Procurement, with annex, Dec. 2, 1982, United States-Luxembourg; Memorandum of Understanding Concerning Principles Governing Mutual Cooperation in Research and Development, Production and Procurement of Conventional Defense Equipment, July 25 and Aug. 24, 1978, United States-Netherlands, 33 U.S.T. 3105; Memorandum of Understanding Concerning the Principles Governing Mutual Cooperation in the Research, Development, Production, Procurement and Logistic Support of Defense Equipment, Dec. 18, 1978, and Mar. 28, 1979, United States-Portugal, 30 U.S.T. 3892; Memorandum of Understanding Concerning Mutual Logistic Support Between the U.S. European Command and the Spanish Armed Forces, Nov. 5, 1984, United States-Spain; Memorandum of Understanding Relating to the Principles Governing Cooperation in Research and Development, Production and Procurement of Defense Equipment, with annex, Dec. 18 & 30, 1985, United States-United Kingdom. These Memoranda are all reprinted in 48 C.F.R. ch. 2, app. T (1989).

356. *See, e.g.*, Memorandum of Understanding, July 25 and Aug. 24, 1978, United States-Netherlands, 33 U.S.T. 3105, 3107. The Memorandum provides that

> a. Offers or proposals will be evaluated without applying price differentials under buy national laws and regulations and without applying the costs of import duties; [and]
>
> b. Full consideration will be given to all qualified industrial and/or governmental resources in each other's country . . . .

Id. at art. I, para. 9.

357. Industry groups have come out in favor of linking their renewal to assurances against discriminatory treatment of U.S. companies in non-defense EC procurement. HOUSE REPORT ON EC INTEGRATION, *supra* note 297, at 15.

United States spends about 6.5 % of its gross domestic product (GDP) on defense, Europe spends only 3.3 % of its GDP. Thus, according to a House Report, "while EC companies get the opportunity to bid on 80% of total U.S. government contracts without discrimination, U.S. companies only receive the opportunity to bid on 25% of European government contracts without discrimination."[358]

Congress has also taken steps to link defense and non-defense procurement. In early 1990, legislation was introduced in Congress to amend the Buy American Act to forbid the Secretary of Defense from negotiating future agreements that waive the Act's requirements without the consent of the U.S. Trade Representative.[359] The bill essentially granted the U.S. Trade Representative a veto over any Defense Department decision to provide reciprocal nondiscriminatory procurement treatment to another country.[360] Although the proposal was not enacted before the end of the congressional session, there are plans to reintroduce similar legislation in 1991.[361]

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358. *Id.* at 43-44.

359. H.R. 4132, 101st Cong., 2d Sess., 136 CONG. REC. E435 (Feb. 28, 1990) ("Reciprocity in International Government Procurement Act of 1990"). According to the bill's sponsor, Representative Conyers, "[t]he Congress has attempted several times in the past to persuade, cajole, and otherwise nag the Department of Defense into looking at the broader trade and competitiveness implications in its defense trade agreements without much success." *Id.* at E436. The bill was intended to coordinate conflicting policy goals within the executive branch and was expected to "certainly put us in a better position to deal with the economic challenges as well as exploit the opportunities presented by economic integration of the European Community in 1992." 126 CONG. REC. E436 (Feb. 28, 1990) (remarks of Representative Conyers).

On August 2, 1990, Representative Conyers introduced H.R. 5439, 101st Cong., 2nd Sess. (1990). *See* 136 CONG. REC. E2612 (Aug. 3, 1990). This bill incorporated H.R. 4132 and added two new sections. One is discussed in note 339 of this article. The other instituted a reporting requirement: by April 30 of each year, the Director of the Office of Federal Procurement Policy must submit a report to the House Committee on Government Operations and the Senate Committee on Governmental Affairs detailing U.S. purchases during the year and the terms on which they were made. Following hearings on H.R. 5439, the bill died in committee.

360. 136 CONG. REC. E436 (Feb. 28, 1990).

361. Additionally, a 1989 Report of the House Subcommittee on International Economic Policy and Trade recommended that the Department of Defense

> actively work with the Department of Commerce and the U.S. Trade Representative to renegotiate the memoranda of understanding which govern defense procurement when they come up for re-negotiation. . . . Non-discriminatory access for EC firms to the lucrative U.S. defense procurement market should be tied to non-discriminatory access for U.S. firms to the EC telecommunications, health care and electrical markets.

HOUSE REPORT ON EC INTEGRATION, *supra* note 297, at 65-66.

V. Conclusion

Prior to the issuance of the 1992 procurement directives, the government procurement regime in the EC was restrictive and discriminatory. Under the new directives—in particular, the public works and public supplies directives—these deficiencies, assuming effective enforcement, have been corrected at least in part. The procurement environment in the excluded sectors also looks promising, although the directive in this area is in a somewhat more formative stage than the other procurement directives. Whether the EC has truly opened its procurement market, however, can only be evaluated over time, as the procurement regime evolves under these new measures.