

EURIM Briefing No 7

In the area of I&T (Informatics and Telematics)
EURIM is a link between Commerce and Industry,
Parliamentarians, Whitehall and Brussels.

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PUBLIC SECTOR PROCUREMENT

Introduction and background

The EU has issued seven Public Procurement Directives, the first over 20 years ago. Early Directives were closely based on French legislation for non-commercial business and gave rules and procedures aimed at ensuring probity in Government procurement.

Recent Directives have moved some way toward more appropriate objectives in terms of efficiency and ensuring long-term security of supply but none of the directives have ever been amended to reflect changing market needs. There is a common perception that the Directives, when applied to Informatics and Telematics (I&T), are not achieving their intended effect of ensuring transparent, cross border, trade. They do not keep pace with innovation nor do they address value for money. This is a major failing.

The Directives are due for review in 1996/7 and, despite its acknowledgement of failures in their application and the efforts of interested parties to acquire such information, the Commission has not indicated its objectives or method for the review.

Conclusions and Recommendations

EURIM believes:

- The Directives are failing to ensure an open market.
- They do not meet the needs of I&T procurement.
- They are not evenly applied or enforced across the Union.
- They do not address value for money.
- There is no provision for adjustment to them as market needs change.

The Directives should be updated to focus on the need for efficiency and effectiveness of procurement, the best economic benefit to users and both security and competitiveness of supply.

The target should be to achieve Directives which are:

- Value focussed (as in the UK Government White Paper "Setting New Standards").
- Open, transparent and focussed on principles and goals rather than rules and procedures.
- Less prescriptive but more evenly applied across the Union.
- More relevant to rapidly changing markets and technologies.
- Responsive to the impact of the GATT Government Procurement Agreement (GPA).
- Clear in their definition of "Public Sector".

EURIM seeks to influence the Commission's review through its own efforts and will be working with other bodies to ensure the development of these refocussed Directives.

EURIM identified the following problem areas:

1) Special Aspects of I&T

There are significant factors in the use of I&T which complicate the overall procurement process and which cause it to fit uncomfortably within the model that underlies the Directives. Few I&T procurements are "stand alone":- I&T is a worldwide market and access to the latest technologies is essential for competitiveness: the I&T market is being increasingly liberalised and deregulated. The complications imposed by the Directive make public sector procurement complex and costly for both supplier and customer and often lead to delay in initiatives. They fail to allow access to the most relevant and up-to-date technologies and standards. This puts EU buyers at risk compared with buyers who buy on an international basis with full access to leading edge technologies.

It was once believed that most of these problems could be solved through EU and International Standards. In practice the rate of technological change and the dynamics of the global I&T market means that this has not been the case, nor is it likely in the future. Insistence upon compliance with obsolescent standards is a significant barrier to the cost effective exploitation of IT in the Public Sector and full compliance can preclude the public sector from access to emerging technologies and resultant market driven standards.

The increasing complexity of IT Infrastructures has resulted in the growth of partnership and outsourcing arrangements in order to ensure continuity and increase value added. The Directives are not suited to this type of contract nor to those projects procured as part of the UK Private Finance Initiative.

Many procurement rules are proving nonsensical. As an example, Novell currently accounts for some 80% of the network products used in the European Public Sector. This is despite procurement rules which prevent them bidding except under "special exemptions".

2) Implementation and Effectiveness

There is a common perception that the Directives fail to ensure an open market. Evidence can be found in the DTI Public Procurement Review published in the summer of 1994 although this was based on a comparatively small sample. UK databases do not indicate any significant increase in suppliers from other Member States since the early 90s.

EU Procurement Directives, which predate UK entry, are orientated to the markets of the 70s and 80s. They are not appropriate to the market of the 90s and beyond. The thrust is toward central direction rather than focussing on value and effectiveness in service. This very regulated approach, whilst justifiable for "one-off" purchases, is inappropriate where the procurement is of a service or in cases of rapid change. In these cases procurement itself is effectively a continuing process which follows market opportunities.

A good example of the conflict that this is now causing is to be found in the May 1995 UK Government White Paper "Setting New Standards" which identifies value for money as a primary Public Sector procurement objective.

EURIM believes that many problems with the implementation of the Directives stem from mismatches between the needs of purchasers and suppliers and the legal frameworks imposed by the Directives.

3) Differences between Directives

The Directives were developed over a number of years; it is the earlier ones which give most problems with the newest, the Utilities Directive, giving the least. This is largely due to lobbying, by the Utilities themselves, during development. However, the Commission is currently modifying the Directive in order to implement GATT/GPA and there are signs that it is attempting to "claw back" some of the provisions won by the Utilities.

4) Differences in Interpretation across the EU

Directives are not commonly interpreted across the Union. The Commission believes that only 60% of the Directives have been duly applied, that in 19% of cases there is evidence of uneven forms of implementation. (European Report No. 2019 23/2/95) and the Directives fail, in practice, to ensure an open market with only Luxembourg and The Netherlands fully compliant.

The UK has taken exception to the Commission statement that UK is failing to implement Directives properly. None of the alleged problem cases have been tested in the courts or by the Public Accounts Committee. Consequently much evidence is not attributable. Major differences between UK law and that of other Continental States makes common implementation, or transposition, very difficult. (Transposition is the mechanism by which national regulations seek to give direct effect to European legislation.)

There are several factors which affect the way in which Directives are interpreted. Although Directives are published in all Union languages they are translations of an original in one language. They suffer, therefore, from the problem of all such productions, the difference between literal translation and actual meaning.

Countries in the Union rely heavily on interpretation of the Directives in relation to local law and this raises the question of final authority for such interpretation particularly given the differences in legal bases throughout the Union. In most of Europe the decision would lie with an official, in the UK it would be a matter for eventual testing in the courts.

Massive differences between UK and Continental law make common implementation very difficult. Continental law enables objectives to be listed in Statutes and allows Government to decide whether specific proposals meet such objectives. There is no equivalent in UK law and legal draftsmen must attempt to produce law which, when tested in court, can be shown to be in line with the Commission's objectives.

There is a view that Directives are followed by the Public Sector in the UK in a more prescriptive way than by their equivalents in other countries in the Union. This is certainly the view expressed by the DTI, which also identified systematic abuses of the system in some Member States. One explanation is that the UK correctly implements legislation but this can lead to over prescription. This is indeed observed in practice.

5) Over prescription in the UK

The problem of over prescription arises from interpretation and is compounded by the basic ethos of the Civil Service which is politically independent and concentrates on generalists advising upon and implementing policies rather than setting objectives. This, coupled with a strongly risk-averse culture is an excellent recipe for an objective and uncorrupted service. The down side is an over-dependence on the rules as written rather than on the achievement of objectives. Training in procurement is available through The Civil Service College although EURIM is unsure whether a two-day course is sufficient in this very complex area. Civil servants are aware of the danger and much effort is devoted to interpretation of the over prescriptive Directives, to the extent that one Government department offers consultancy in this esoteric area.

6) Extent of application

A major area of concern is that the identification of those organisations falling within the domain of the Directives is unclear and subject to changing interpretation. Between the obviously Public Sector procurer such as MOD/PE and the obvious private purchaser such as Marks and Spencer lies a range of organisations which may, or may not be, subject to the Directives. A particular case is that of Utilities in the UK which although privatised are subject to a Public Procurement Directive. The situation of other recently privatised bodies is less clear. This is a rich area for confusion and one which must be addressed if competitiveness is to be maintained. It is clearly a matter where interpretation is paramount and the complexity of the rules makes this difficult.