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In the area of ICT (Information and Communications Technologies) EURIM is a link between Commerce and Industry, Parliamentarians, Whitehall and Brussels

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# Public Sector Procurement

## Introduction

EURIM commented on the Public Sector Procurement situation in Briefing No 7 published in 1995. A Green Paper: *Public Procurement in the European Union: Exploring the Way Forward* was published by the Commission in November 1996 and this paper is EURIM's response to that consultation exercise. It focuses primarily on the broader issues raised by the Green Paper and the approach to procurement manifest therein.

EURIM welcomes a number of statements in the Green Paper, especially the continued commitment to ethical procurement, but it also finds significant areas where a different approach is required to achieve an appropriate way forward which will benefit both social provision and the competitiveness of the European Information and Communications Technologies (ICT) industries.

Increasingly, Governments throughout the Union are looking to private investment in public projects, the Public Private Partnership (PPP) approach as embodied in the Commission's Trans-European Networks (TENs) programme. A similar approach is necessary for the provision of ICT if the Union is to remain competitive as Europe moves towards the Information Society, an area in which it can and should be a world leader.

## Key Recommendations

EURIM believes that for the Union to overcome mutual discrimination and enable Member States to obtain best value for taxpayers' money, take advantage of private investment in ICT projects, and retain a competitive ICT industry, then the Directives need to be modified in a number of key areas. In particular:

- They should be simplified in line with Council Resolution 96/C224/03, 8 July 1996
- They should be focused on principles, with procedures implemented in accordance with the varying legal processes of Member States.
- They should be responsive to innovative financing initiatives, such as public/private partnerships and joint venture companies.
- They should be clear as to which organisations fall within their scope.
- They must recognise that ICT systems require a special procurement approach, that accommodates frequent and significant technological change.

In the overall context of these recommendations, EURIM makes the following detailed comments:

1. EURIM welcomes the intention to make public procurement the subject of wide-ranging consultation and debate and is pleased to note that some of the recommendations in its earlier Briefing are incorporated in the Green Paper. In particular "value for money" is now given proper emphasis as a stated objective of the Union's public procurement policy and there is recognition that, where it is allowed, the negotiated procedure is efficient.
2. The comments made about accelerated procedures are timely and we agree that they should be exceptional. Although, ICT procurement often requires lengthy negotiation and may not be particularly disadvantaged by a protracted process, abuse of the accelerated procedure is widespread in some sectors.
3. EURIM welcomes the commitment to extend facilities for electronic dissemination and submission and supports the development of a fully electronic tendering system. It will, however, be important to ensure that this does not create yet another barrier for SMEs.
4. The high cost of bidding is cited by suppliers, large and small, as a more serious problem than any residual national discrimination. Encouraging greater competition by reducing the cost of bidding should be a priority in the review process.
5. The Green Paper rightly stresses the importance of SMEs but EURIM has reservations about the proposed solutions. We detect a lack of understanding of the role SMEs actually play in public sector tendering. Whilst they frequently lack the resources to respond as potential prime contractors, they are, however, very involved both as suppliers in their own right and as sub-contractors.
6. EURIM is also concerned that the Commission attempts to measure the effectiveness of the Directives by assessing the level of imports. We believe that this is not a sufficient index. When the Directives were first introduced it was relatively easy to identify national and non-national purchases, but this is no longer the case. ICT industries are now global on both the demand and supply side. Suppliers locate wherever a presence is beneficial, regardless of where their products and services are produced.
7. To some extent the situation in ICT procurement merely highlights wider problems, but there are also features unique to this sector. The products and services of the information technology and communications industries are at the leading edge. They enable change; they are the tools for directing change; and they must react to change. The life cycle of many of today's ICT products is less than the time needed to conduct a major procurement exercise and far too short for formal standards to be established. The public sector cannot perform effectively if procurement rules and procedures take no account of this.
8. Many traditional market sector boundaries are breaking down so that a single

large procurement exercise, such as for an emergency services command and control system, may be affected by several Directives, each with different, and sometimes conflicting, requirements.

9. Public/private partnerships are widely seen as an opportunity to introduce more innovation in the provision of systems. They will not succeed if private sector partners are forced to adhere to costly, time consuming and confusing procedures that may deny them the means to achieve the very innovation that is the purpose of the venture.
10. EURIM believes there is a strong case for simplifying the Directives. Note should be taken also of the Council resolution 96/C224/03 of 8 July 1996 on the simplification of legislation and its recommendations implemented in this context. Part of this simplification should be an increased emphasis on principles rather than procedures. Where it is absolutely necessary to spell out procedures, these should take account of the requirements for handling change, especially those changes arising in the course of the procurement process.
11. In some types of procurement, such as for building roads or buying office furniture, the tendering process can be broken down into distinct phases with the specification and quantities of the goods and services required at each stage measurable in advance. But in much ICT procurement, the buyer cannot specify what he needs pre-tender; he knows only what the final outcome should be and needs to be able to choose between different ways of reaching that goal. There should not be barriers to the establishment of strategic partnerships between purchaser and supplier where these will result in better information management, improved quality of service and better value for taxpayers' money. Such barriers could deny the public sector the benefits of a coherent long-term ICT strategy.
12. EURIM is concerned that over-prescriptive rules result in attempts at circumvention by those who find them a barrier to timely and cost-effective action. This risks encouraging the less scrupulous to ignore them, placing the honest purchaser at a disadvantage. The Green Paper proposes to tighten up and make processes more specific; EURIM believes that they should be made more flexible. The TENs approach goes some way to achieving this and it should be applicable to the whole range of ICT procurement.
13. EURIM considers that individual states should control compliance. The legal and organisational structure of quasi-public sector bodies varies from country to country and pan-European legislation in this area cannot be even handed. There is an underlying assumption in the Green Paper that non-compliance is a deliberate action rather than arising from genuine confusion. There are real difficulties in defining the extent of the "Public Sector". As an example, most universities receive both public funding and private endowments as well as engaging in commercially profitable activities (eg as research centres).
14. There is also uncertainty amongst the de-nationalised industries as to whether and when the rules apply. In the de-regulated communications market in the UK, there are some 200 players, very few of which are ex-public sector suppliers. Since the original purpose of the procurement Directives was to overcome

deficiencies due to the lack of competitive pressure in government controlled industries, it is inconsistent that players in liberalised and highly competitive industries are still deemed to be subject to these rules and treated as if they were still part of the public sector.

15. Differences in the way in which Directives are interpreted in each country cannot easily be addressed. Much of the thinking, especially in the earlier Directives, is geared to administrative law countries and does not lend itself readily to legal systems where Courts, not Government, decide whether proposals meet their stated objectives. This problem is irreconcilable while the present Directives remain in force. EURIM believes that Public Procurement across Europe would be fairer and more effective if the Directives focused on principles and permitted detailed procedures consistent with them to be formulated within the individual jurisdiction. This would enable full account to be taken of the legal and administrative system of that State and comply with the declared objectives on subsidiarity.
- 16 Actual examples of some of the difficulties cited in the above comments are being collected as part of the follow through to this paper.

## **The Way Ahead**

The Commission asks for a period of stability during which no major changes are to be made and we accept that this is needed while those Member States which have yet to implement current Directives do so. However, the timescale for change is such that there must be a fundamental review now if we are to see action before the start of the next millenium. Confusion and mistrust of other countries will remain until the enabling legislation takes proper account of different legal systems and interpretations. Europe needs an approach that is sufficiently flexible to cope with the long term requirements for the procurement of today's and tomorrow's information and communications technologies - the fastest growing sector of the economy and one that increasingly underpins all other sectors.

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