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The New Public Procurement Regime

Introduction

The European Union has finally adopted a new set of rules which govern the award of public contracts in the supplies, works and services sectors, as well as in the public utilities\(^1\) after a considerable amount of debate and consultation.\(^2\) The new Directives reflect on the 1996 Commission’s Green Paper on Public Procurement\(^3\) and subsequently the 1998 Commission’s Communication. The Directives have been seen as an integral part of the Commission’s 2000 Work Programme, which pledges to modernise the relevant legislation for the completion of the internal market and at the same time implement the Lisbon European Council’s call for economic reform within the internal market. The new Public Procurement regime will become operational by January 31, 2006, when Member States are expected to transpose the Directives into national law.\(^4\) Currently the previous regime is still applicable.\(^5\)

The Directives have been based upon two basic premises: simplification and modernisation. Drawing on the wealth of experience from three previous generations of legal instruments, and the Court’s jurisprudential inferences to public procurement regulation, the new Directives are set to achieve what is perhaps the most challenging objective of the internal market: fully integrate its public sector and abolish any remaining non-tariff barriers. The new regime maps also a clear-cut dichotomy between the public and the utilities sectors respectively. Although the same fundamental principles underlie the liberalisation of procurement in government and public utilities, their separate regulation reveals a diametrically opposed nature of the contracting authorities/entities under these sectors. Over the past two decades, public
utilities in the EU Member States have been undergoing a process of
transformation. Their change in ownership from public to private has
stimulated commercialism and competitiveness and provided for the
justification of a more relaxed regime and the acceptance that utilities,
in some form or another represent a *sui generis* contracting authorities
not in need of a rigorous and detailed regulation of their procurement.
The above dichotomy reflects an insight of current market conditions
and political priorities across the European Union, as well as an indica-
tion that the main emphasis should be placed on attempts to open up
the public sector.

The intellectual paternity of the reasons behind past and current
efforts to “...co-coordinate the procedures for the award of public con-
tracts....”\(^6\) could be traced in a neo-classical economic approach to
market integration.\(^7\) Public procurement has been identified as a
serious non-tariff barrier and a hindering factor for the functioning of
a genuinely competitive common market. Its regulation, apart from
seeking an endorsement of the *acquis communautaire* by Member States
of the fundamental principles of the common market, aims, primarily,
at introducing radical changes in the industrial base of the European
Union. Integration of public markets will bring substantial savings to
the public sector, rationalise an over-capacity ridden industry, and
allocate more efficiently resources (human and capital) and increase
productivity and competitiveness of European firms to provide them a
fair chance in the global arena.

**Part 1 The new concepts in public procurement regulation**

**The Codified Public Supplies, Works and Services Directive**

The Green Paper on Public Procurement prompted a modest moderni-
sation of the existing Directives and as a consequence of industry pres-
sure, minor amendments were made to the Public Services Directive,\(^8\)
the Public Supplies Directive\(^9\) and the Public Works Directive.\(^10\) Pre-
vius regimes on the public sector procurement (public supplies, works
and services for central and local governments and bodies governed by
public law) were segmented for two main reasons: first, the applicabil-
ity thresholds for the relevant public contracts were, and still are, dif-
ferent; this feature gave apparently a false perception that the thrust of
the rules would be applied better if procurement of works, supplies and
services is regulated through different regimes. It should be maintained
that apart from the differential applicability thresholds, every other
aspect of the previous regime (advertisement and publicity, selection