1. In the light of a number of enquiries from developing country delegations, the secretariat has endeavoured in the following paragraphs to provide background information, additional to that circulated in document MTN/NTM/W/16, on certain aspects of government procurement operations which may be of interest in a number of developed countries. This is being done in the context of technical assistance being made available to developing countries participating in the multilateral trade negotiations. The material is based on an OECD publication - "Government Purchasing, Regulations and Procedures, in Europe, North America and Japan" dated 1966 and other published sources. As the OECD secretariat expects to issue an updated version of its booklet in the course of 1976, the information which follows may need to be revised at a later date in the light of recorded developments over the last decade. Because no systematic collection of information on the size or the product coverage of procurement operations has apparently been undertaken, such details are unavailable at the present time. Comprehensive information on government procurement activities in developing countries is also generally unavailable.  

2. It will be recalled that when the Group "Non-Tariff Measures", at its last meeting in December 1975, examined the possibility of establishing a second list of non-tariff measures for consideration in the trade negotiations, "there was a broad consensus that government procurement practices should be taken up in the negotiations at an appropriate time" (MTN/NTM/11, paragraph 6). The Group also agreed that at its next meeting scheduled for 27-30 April, it would endeavour to establish additional categories of non-tariff measures to be dealt with multilaterally.

3. The procurement procedures and practices outlined in relation to the countries covered in the succeeding paragraphs may be broadly categorised on the basis of (a) the method of opening tenders i.e. by public tender, selective tender and single tender and (b) the criteria available to the authorities concerned in the awarding

---

1It might be noted that in the section of the Manila Declaration (UNCTAD document TD/195) concerning the multilateral trade negotiations, reference is made in paragraph 6(i) to government procurement.
of contracts such as **automatic tender** which is generally based on a "lowest bid" procedure, **discretionary tender** which may be based on several criteria some of which are predetermined and others permitting the awarding authorities a certain freedom of choice, and **negotiated tender** whereby the conditions of contract are freely negotiated by the awarding authority. Automatic or discretionary tenders may be public or selective.

4. There appears to be considerable flexibility in the practices adopted by the countries covered in the succeeding paragraphs in relation to the publicising of tenders and the time period or limit allowed between the opening and closing dates for bids. Broadly, the generally chosen media for the publicising of tenders appear to be the local newspapers, the countries' official journals, bulletins or gazettes and certain trade journals. The time period allowed for the presentation of bids appears to range from that of 2-3 weeks to 2-3 months depending essentially on whether the tender calls for the supply of standard or complex goods.

**Canada**

**Legal and regulatory framework**

5. The procedures governing the calling of tenders for all departments other than Defence Production and Defence Construction (1951) Limited, are those described in the Government Contracts Regulations made pursuant to the Financial Administration Act by Order in Council (P.C. 1964-1967) of 23 September 1964.

6. The Department of Defence Production procures materials, equipment and supplies (including services) and the Defence Construction (1951) Limited undertakes construction, on behalf of the Department of National Defence. Both these agencies are governed by the Defence Production Act 1951. The Government Contracts Regulations govern the contracts entered into by these agencies on behalf of civil departments.

7. The legislation and regulations mentioned above are applicable to departments, boards, commissions and departmental corporations which are to a large extent dependent upon parliamentary appropriations. They do not apply to autonomous bodies, that is bodies not dependent on parliamentary appropriations such as agencies and proprietary corporations.
Procurement procedures and practices

8. The regulations provide for three procurement procedures - public discretionary tender, selective discretionary tender and private contract. The application of these procurement procedures generally leads to the concluding of basically three types of contracts, each with different tendering requirements. These types of contracts could be categorized as Construction Contracts, Purchase Contracts and Service Contracts.

9. The Act and Regulations do not prescribe tendering requirements in relation to the Department of Defence Production and Defence Construction (1951) Limited. The Department of Defence Production does not rely on public advertisement for tenders to the same extent as other departments do, but on invitations from lists of suppliers. Defence Construction (1951) Limited adopts tendering procedures similar to other departments except for classified works where tenders are invited from a representative list of suppliers.

10. Departments generally have the authority to enter into contracts up to and within a stipulated value or range of values, and under certain specified conditions and prescribed situations. Treasury Board (i.e. a Ministerial Committee of the Privy Council) approval is required under most other circumstances.

11. There are no restrictions in relation to registration, residence or similar requirements laid down for foreign suppliers. The main factors governing the choice of tender appear to be price, financial responsibility of the contractor, competence, adequacy of plant and equipment. Normally the tender is awarded to the lowest bidder taking into account the considerations mentioned above.

12. No existing Act or Regulations impose restrictions on Federal Government procurement from foreign sources. However, it is stated that it is customary to grant a small preference to goods of Canadian origin. Normally, the premium paid is to be less than 10 per cent and is based on the difference in the price of the foreign content of the goods the subject of tenders, rather than on the difference in price of the tenders. Preferences of 10 per cent or more may be granted under special circumstances. Tenders are invited from national suppliers for certain types of goods produced by industries whose maintenance is considered essential from a national defence point of view. The Treasury Board takes into account not only such factors as price, the quality of goods or services offered, the reputation of the bidder and the possibility of satisfactory follow-up services, but also the budget situation, the state of the economy and Canada's foreign trade position. Import duties and other charges are taken into account when foreign bids are being considered.
France

Legal and regulatory framework

13. The rules governing procurement and the awarding of contracts are codified in the Decree of 17 July 1964, which also became binding on local authorities in the course of 1966.

Procurement procedures and practices

14. Competition for tenders on as wide a basis as possible is regarded as the underlying principle of the Code. The procedures used are - automatic tender either public or selective, discretionary tender and private contracts.

15. In principle, equal treatment is accorded domestic and foreign firms except that where bids are equal, those of domestic firms are generally accepted. One apparent exception however is the electronics industry, where the French Government has undertaken to make a certain part of its purchases from domestic sources.\(^1\) The practice of using procurement as a tool contributing to the implementation of development plans is not confined to the electronics industry.\(^2\) In the public works field, for example, administrative regulations specify (where applicable and subject to international agreements), the use of domestic materials, machines, tools and appliances. The appropriate Ministry may, however, deviate from these regulations, under certain circumstances. The nationality requirement applies to all industrial contracts.

16. France gives special preferences to certain social groups. Bids from producer co-operatives and agricultural producer societies are favoured over other domestic and foreign bids, provided the tenders are equal. One quarter of any contract may be assigned to these societies, as well as to workers and artistic co-operatives at the mean price fixed for the other shares\(^3\) (Article 63). It has been stated that, in practice, however, these provisions rarely apply.

_________
\(^1\) EEC, Entwurf des Zwanten Programms für die Mittelstrittige Wirtschaftspolitik (EEC 1968) pages A.11-17.
\(^3\) This applies to cases where the service is divisible into shares.
Federal Republic of Germany

Legal and regulatory framework

17. While the general law is applicable, the regulations covering government procurement in the Federal Republic of Germany are: Reich Public Budget Regulations of 1938, the Ordinance concerning Public Contracts, Ordinance concerning Prices for Public Contract (1953) and statutory rules by the Federal Government granting special treatment to certain categories of bidders.

Procurement procedures and practices

18. The Ordinance for Public Contracts specifies three methods of procurement - public discretionary tender, selective discretionary tender and private contract.

19. Contracts are generally awarded on the basis of tenders regarded as most economical. Factors which usually tend to influence authorities when deciding on the most economical bid are not merely price, but also quality, date of delivery, after sales services, and spare parts availability.

20. Under a Decree of 29 April 1960, foreign bids and products are treated on the same footing as domestic bids. The participation of foreign bidders in selective tenders depends on the nature and value of the services required and on whether the foreign products are better suited to the purpose envisaged than domestic products, and whether they are cheaper.

21. When deciding the award (on the basis of the "most economical bid"), customs and other duties leviable are added to the price of the foreign bid, unless they have already been included in the price submitted.

22. As an exception to the general principle of competition, tenders from the following categories are given special consideration with respect to the award of public contracts - expelled people and refugees from the Soviet Zone, individuals and firms in areas classified as "distressed areas", victims of nationalist socialist persecution, victims of war and evacuees.

23. The Ministry of Defence is enabled to place approximately 20 per cent of its contracts with "suitably qualified" medium-sized firms. The price preference granted these firms and the various groups of disadvantaged persons is stated to be 0.5 per cent. A particular feature of the procurement policy of the Federal Republic of Germany is its recognition of reciprocity in its military purchases. 1

Japan

Legal and regulatory framework


Procurement procedures and practices

25. The use of the public automatic tender procedure has legal sanction. However, unless specified otherwise, the selective tender and private contract procedures are the most frequently used methods of government procurement.

26. The selective automatic tender procedure is applied when there is a paucity of bidders and the public automatic tender procedure is considered to be disadvantageous. It may also be applied if the contract involved does not exceed a value provided for in the Budget, or in respect of an exceptional measure introduced by Cabinet Order. Private contract procedure is applied in situations of urgency and expediency, and may also be applied if the contract does not exceed a specified value.

27. There is no legislation providing for preferences to domestic products and producers in Japan. However, a Cabinet decision of 20 September 1963 urges the national government and its agencies to make a due evaluation of domestic products in government procurement activities. It also calls for voluntary co-operation from local governments as well as private firms in these efforts.

28. It may be noted that Cabinet Order No. 336 of 25 September 1963 permits heads of ministries in consultation with the Minister of Finance to accept the lowest offer from a selected list of bidders on a specified list of manufactures with the Japanese bidder preferred if its bid is equal to that of a foreign firm. The list of products includes automobiles, office machines, computers, construction, printing, and agricultural machinery, aircraft, machine tools, and measuring instruments.

29. In respect of products other than those categories specified in paragraph 28, when there are two or more offers at the same price the successful bidder is chosen by the drawing of lots, under both public and selective automatic tender procedures.
Norway

Legal and regulatory framework

30. The regulations concerning tenders are contained in Government Regulations of 4 July 1927. It is stated in the OECD publication that these regulations were due for revision in the light of Norway's present international commitments.

31. Norwegian procurement regulations are not applicable to publicly-owned enterprises which produce and sell their goods in competition with privately-owned enterprises. However, autonomous and semi-autonomous agencies which do not fall under such a category are subject to the regulations, e.g. railways, telecommunications, etc.

Procurement procedures and practices

32. The regulations provide that bids can be sought by public discretionary tender, selective discretionary tender and private contract, under varying specified conditions and situations, e.g. public interest and security, favourable market conditions, paucity of suppliers, urgency, non-availability of any acceptable bids, artistic skill or specialized technical qualifications required, etc.

33. No special conditions are required of bidders. Foreign firms are not treated differently from domestic firms, but the purchasing agency may request that they nominate a Norwegian citizen as their agent.

34. Paragraph 24 of the Regulations states that the bid considered most advantageous to the State is to be preferred. The factors taken into consideration are price, transport costs, quality, time of delivery, service and standardization.

35. When domestic and foreign tenders are in competition, preference is given to domestic tenders provided they are advantageous to the State. The same principle is applied when deciding between competitive Norwegian products which incorporate, in varying degrees, foreign raw materials or semi-finished products. The preference which may be accorded to a Norwegian supplier is calculated according to a formula laid down in the Royal Decree of 11 March 1927.
Sweden

Legal and regulatory framework

36. The methods of procuring goods and services by the Central Government and its Agencies have been laid down in a Government Memorandum of 6 June 1952 (Royal Purchasing Proclamation). These regulations are binding on government authorities organized as administrative boards. They do not apply to nationalized industries, or autonomous or semi-autonomous government agencies. Local authorities, although not bound by the rules of the Proclamation, tend to follow them in practice.

Procurement procedures and practices

37. Procurement is carried out through the procedures of public discretionary tender, selective discretionary tender and private contract. While public works are prosecuted and services acquired, generally through public tender, the purchase of goods is most often effected by means of selective tender and private contract.

38. The basic criteria when assessing bids and awarding contracts appears to be one of the most "advantageous to the State". The choice is made on commercial considerations after price, quality and the terms of delivery have been considered.

39. Government departments are authorized to seek bids from foreign suppliers. No preferences are granted to national products and Swedish and foreign goods are evaluated on an equal basis. In case of competition between domestic and foreign products, only commercial considerations should influence the decision (circular letter from Permanent Under Secretary of the Ministry of Finance dated 8 July 1960). Customs duties and other charges are included in the price when foreign goods are considered.

Switzerland

Legal and regulatory framework

40. The Federal Regulations relating to government procurement apply only to buying services of the Confederation which includes e.g. Federal factories, munition factories and armaments works etc. They also apply to a limited extent to the Federal Railways and to the PTT. The main regulations in force are the Order of 4 March 1924, the Order of Federal Administrative Buying of 22 May 1962; and the law on the Federal Railway of 23 June 1944.
Procurement procedures and practices

41. The usual method for inviting bids is that of selective discretionary tender. Private contract and public discretionary tender account for only a small proportion in the total value of purchases.

42. No special conditions are attached to foreign firms. Like national firms, only proof of their ability to carry out the order satisfactorily is required. There is no formal obligation for a foreign supplier to have a Swiss agent, although in practice this often proves to be the case as it is commercially advantageous.

43. Swiss Government departments are empowered to purchase foreign products. Similar criteria is applied to all tenders whether local or foreign. Domestic products do not enjoy any preferential price margins over foreign products, except that in a situation of fairly equivalent offers - the Order of 4 March 1924 states that preference should be given to the Swiss product. Other considerations that could influence the authorities in their choice of supplier are security of supplies and the geographical location of the supplying country.

United Kingdom

Legal and regulatory framework

44. Apart from the relevance of some general Treasury regulations, purchasing departments have full discretion to follow the practices best suited to their needs and the nature of the purchase, in their procurement activities.

Procurement procedures and practices

45. The procurement procedures applied are open public tender (public automatic tender), selective tender (selective discretionary tender), and single tender (private contract).

46. There are no residential or registration requirements for firms desiring to bid for government contracts. With open public tender and selective tender procedures, contracts are normally awarded to the lowest bidder who is able to satisfy the relevant authorities regarding servicing, spare parts facilities and special delivery dates, if any. Private or single tender contracts are concluded by negotiations.
47. There is no statutory requirement, nor any guidance of a formal or informal character, which stipulates that preference should be given to domestic firms, except in the case of computers and under "special circumstances" - e.g. the Treasury must give formal consent for purchases involving very large orders from abroad, and reserves the right to refuse consent for balance-of-payments reasons. Certain preferences are given to firms in development areas where high and persistent unemployment exists or is expected. If tenders equivalent in all respects are received from firms in development areas and other firms, the contract is normally offered to the former. Moreover 25 per cent of an available contract may be offered to firms in development areas, even when their tenders are not among the lowest submitted, but only so long as it does not increase the total cost of a contract to the Government above the lowest tender.

48. In accordance with the practice reaffirmed by the Commonwealth Trade and Economic Conference in Montreal in 1958, purchasing departments intending to place orders abroad are expected to determine whether the goods concerned can be obtained on competitive terms within the Commonwealth.

49. The nationalized sector is possibly the most important area of preference for local suppliers. Certain nationalized industries purchase abroad only if substantially better quality and lower prices are offered than for similar UK products. These industries also place contracts in areas of high unemployment whenever possible.

United States

Legal and regulatory framework

50. The key statutory bases for the conduct of procurement operations by the United States Federal Government are the Federal Property and Administrative Services Act of 1949 (PLUSC, 251 et seq) and the former Armed Services Procurement Act of 1947 (now Chapter 137 of Title 10 of the United States Code - USC). The former governs the procurement of the General Services Administration (the Central Supply Agency) and is adhered to by most other civilian agencies. Other statutory requirements relating to procurement are found in Titles 10 and 41 of the United States Code. The Buy American Act of 1933, Executive Order 10582

1When the Government purchases computers, preference is to be given to those of UK manufacture, provided that there is no undue price difference as compared with overseas suppliers, and that the domestic model is technically suitable and no undue delay would be involved.
of 1954 as well as other laws and regulations relate to preferences granted to American products.

Procurement procedures and practices

51. Two basic procurement procedures are given statutory recognition—procurement by public advertising (which is analogous to automatic public tender) and negotiated procurement (which embraces all methods outside "formal advertising" and exhibits features generally associated with discretionary tender, selective discretionary tender, and private contract).

52. Government purchases for use in the United States are covered by the Buy American Act of 1933 (41 USC 10a to 10d). This Act obliges the Federal Government to restrict purchases for use within the United States to products "mined, produced or manufactured in the United States", provided that in the opinion of "the head of Department or Agency concerned" it is not "inconsistent with public interest", the cost is not "unreasonable" and the supplies concerned are available in satisfactory quantity and quality.

53. An Executive Order 10582 issued in 1954, established specific guidelines for implementing the Buy American Act. It provides (a) that materials shall be considered of foreign origin if foreign products account for 50 per cent or more of the cost of all products used in materials, and (b) that a domestic price shall be considered unreasonable only if it exceeds the delivered cost of the foreign material including the duty by more than 6 per cent. The Executive Order provides for special preferences for small business concerns and concerns in labour surplus areas. This is accomplished by according such bidders a 12 per cent price preference rather than the usual 6 per cent, over foreign firms. It also allows Department heads to circumvent the 6 per cent rule for reasons of national interest. Proposed procurements of over US$100,000 from foreign sources must be approved by the secretary or deputy secretary of defense.

54. Furthermore, Section 5, of the Executive Order specifically exempts from its provisions any case where the Head of an Executive Agency proposing to purchase domestic materials determines:

(i) that a greater differential than that provided in the Order between the cost of such materials of domestic origin and materials of foreign origin was not unreasonable; or

---

1In 1962 the Defence Department took such action in order to reduce defense expenditures affecting a balance-of-payments deficit, and granted a 50 per cent preference to domestically produced materials. The preference was, however, measured exclusive of duty on foreign inputs.
(ii) that the purchase of materials of foreign origin was not inconsistent with the public interest.

55. Procurement in Panama and Canada by certain federal agencies is excluded from Buy American requirements under special bilateral arrangements. Certain military items produced in Canada are exempt from both the price differential and the content requirement. In addition to the restrictions under the Buy American Act, the Defense Appropriation Act includes a prohibition (the Berry Amendment) on the use of appropriated funds for the procurement of any article of food, clothing, cotton, wool, or spun silk yarn for cartridge cloth which has not been grown or produced in the United States (the exceptions are items not available from United States sources and perishables).

56. Several other specific laws and regulations require the use of goods and components of American origin for various purposes, particularly when public financing is involved, e.g. in the field of shipbuilding, ship equipment, and low rent housing. These requirements at times affect the purchasing of private firms, and local governments as well as Federal departments and agencies.

57. More than twenty States and many local governments also differentiate in their purchasing policies against foreign products and foreign suppliers.¹

EFTA provisions in relation to government procurement

58. Article 14 of the Stockholm Convention which relates to government procurement and State trading, states that:

(i) Member States shall ensure the progressive elimination, during the period from 1 July 1960 to 31 December 1969, in the practices of public undertakings; of

(a) measures the effect of which is to afford protection to domestic production which would be inconsistent with this Convention if achieved by means of a duty, a charge with equivalent effect, quantitative restrictions or government aid; or

(b) trade discrimination on grounds of nationality in so far as it frustrates the benefits expected from the removal or absence of duties and quantitative restrictions on trade between member States.

(ii) In so far as the provisions of Article 15 are relevant to the activities of public undertakings, that Article shall apply to them in the same way as it applies to other enterprises.

(iii) Member States shall ensure that new practices of the kind described in paragraph 1 of this Article are not introduced.

(iv) Where member States do not have the necessary legal powers to control the activities of regional or local government authorities or enterprises under their control in these matters, they shall nevertheless endeavour to ensure that those authorities or enterprises comply with the provisions of this Article.

(v) The Council shall keep the provisions of this Article under review and may decide to amend them.

(vi) For the purposes of this Article "public undertakings" means central, regional or local government authorities, public enterprises, any other organizations by means of which a member State by law or in practice, controls or appreciably influences imports from, or exports to, the territory of a member State.

---

1Article 15 of the Stockholm Convention on restrictive business practices declares incompatible with the Convention certain practices and actions. These are "in so far as they frustrate the benefits expected from the removal or absence of duties and quantitative restrictions on trade between member States".

(a) Agreements between enterprises, decisions by associations of enterprises and concerted practices between enterprises which have as their object or result the prevention, restriction, or distortion of competition within the Area of the Association;

(b) Action by which one or more enterprises take unfair advantage of a dominant position within the Area of the Association or of a substantial part of it.
The essence of Article 14, is that EFTA public undertakings should not discriminate in favour of domestic producers or protect them. Furthermore, public tenders are to be adequately publicised, with sufficient time allowed for tendering. Selective tenders are to be on such a basis that there are equal opportunities for domestic and other interested EFTA suppliers to compete and single tenders permitted only when competitive tenders are clearly impracticable or unreasonable. Member States agreed to exchange lists of public undertakings responsible for major procurement programmes, the lists containing such information as the type of goods normally purchased. It was also agreed that the operation of Article 14 would be kept under review by the EFTA Committee of Trade Experts. The provisions of the Article came into full force on 31 December 1966.

At the meeting of EFTA Ministers in Lisbon in October 1966, agreement was reached between the seven member States of EFTA and Finland on the interpretation to be given to the provisions of Article 14.

An explanation of the Lisbon Ministerial Agreement is provided in the Annex.
ANNEX

Public Undertakings

The Lisbon Ministerial Agreement Explained

Last October, Ministers of the seven Member States of EFTA and Finland agreed an authoritative interpretation of the article in the Stockholm Convention ensuring that public undertakings do not act in such a way that the benefits of the removal of trade barriers would be nullified or impaired. The interpretation is explained below.

The public undertakings in question assume a variety of forms. They may be contractors or distributors or manufacturing enterprises. They may be large purchasing agencies under direct control of central governments. To some degree or other they are offered products which are of EFTA origin; and if they were free to procure supplies or to trade on such non-commercial considerations as national origin they could circumvent the effects of the abolition of tariffs and quotas. In order to prevent this from happening, the Member Governments are to make widely known to all the relevant national authorities and agencies the contents of the agreement.

The removal of potential discrimination has a number of implications. Public tenders are to be adequately publicised, with enough time allowed for tendering. Selective tenders are to be on such a basis that there are equal opportunities for domestic and other interested EFTA suppliers to compete. And single tender is to be allowed only when competitive tenders are clearly impracticable or unreasonable. Public concerns with an import or domestic sale monopoly are to take a liberal attitude towards including other EFTA products on their stock lists. The article gives further information on such questions.

To get full advantage of this freeing of trade, the manufacturer needs to know what the potential market is. The Member States are therefore to exchange lists of public undertakings responsible for major procurement programmes, and the lists are to contain such information as the types of goods normally bought.

Article 14 of the Stockholm Convention sets out the principles that are to guide EFTA public undertakings. Its essence is that public undertakings are not to discriminate in favour of domestic producers nor to protect them. The provisions of the Article came into full force on 31st December 1966.*

At the meeting of EFTA Ministers in Lisbon in October 1966, agreement was reached between the seven Member States of EFTA and Finland on the interpretation to be given to the provisions of Article 14. Since the buying and trading practices of public undertakings are based on many different statutory provisions in the countries of the Association, the agreement on interpretation will ensure that all governments implement the obligations in Article 14 in the same way. In some Member States the practices are governed by law, in others by administrative regulations. In many cases these have to be changed in order to fulfil the obligation of reciprocal non-discrimination which is common to all EFTA countries irrespective of the form of the national regulations which govern their practices. The purpose of the present article is to explain the interpretation in some detail. Like the decision of the Ministers, it is based on the conclusions and recommendations of a sub-committee of the Committee of Trade Experts that studied the implications of Article 14 at a series of meetings in 1964-1966.

Article 14 deals with two related but distinct problems: public procurement of goods and the trading practices of enterprises where the State controls or appreciably influences imports or exports of goods of EFTA origin. An example may help to distinguish these two aspects, and to show the coverage of Article 14. When an alcohol monopoly in a Member country buys stationery, this is public procurement. But its dealings in spirits are trading practices. Both aspects fall under Article 14 and its interpretation.

In principle the Free Trade Area Agreement is concerned only with rules for trade in goods of area origin. Although services, per se, are thus not covered, certain obligations under Article 14 are imposed on a public authority responsible for a service contract, for instance a public works contract which includes provisions as to the purchase of goods.

These obligations have been defined both by the report of the sub-committee and by the statement issued by Ministers. The sub-committee found “that conditions imposed by public undertakings on the purchase of goods by contractors under public works or service contracts are subject to Article 14 as they would be if the purchases were made by the public undertakings themselves”. And Ministers agreed that:

“Public undertakings shall not in making public works or service contracts impose any conditions on the purchase of goods by the contractors which would be incompatible with Article 14 and the findings of the report.”

The remainder of this article explains, in turn, the general interpretation of the obligations of the obligations of Article 14, the application

---

* The Stockholm Convention originally provided that the progressive elimination of the practices mentioned in Article 14 should be completed by the first of January 1970. The earlier date was substituted as part of the general acceleration of the EFTA timetable agreed by Ministers in May 1963.
of this interpretation in the separate fields of public procurement and of the trading activities of public undertakings, and the agreement reached by the EFTA Ministers on future co-operation and follow-up action to ensure the satisfactory working of Article 14.

General questions

Ministers agreed the following text:

"Article 14 contains an obligation for Member States to ensure that public undertakings in their procurement and trading practices do not afford protection to domestic production nor discriminate against suppliers or purchasers in other Member States. This obligation means that public undertakings as defined in paragraph 6 of the Article shall give equivalent treatment to domestic goods and other goods of EFTA origin and shall award contracts on the basis of commercial considerations.

The practices to which the obligations of Article 14 apply are those by which public undertakings conduct their procurement and trading activities whether they are based on formal rules and regulations, administrative instructions, etc. or initiated by the public undertakings themselves.

Public undertakings shall not in the exercise of their public powers engage in practices which would be tantamount to a circumvention of Articles 3-13 of the Convention, nor shall they in their economic activities make any agreements or arrangements with other enterprises, or make use of a dominant position, in a way which would be incompatible with Article 15.*

Monopolies as defined in Article 12(d) of the Convention shall be operated in accordance with Article 14.

In order to ensure that they are in a position to carry out their obligations under the Convention, Member Governments will review their laws, regulations and practices with a view to making such amendments as may be necessary to ensure the effective implementation of Article 14 and in particular to comply with the conclusions and recommendations contained in the various chapters of the report and the agreements set out in the foregoing and following paragraphs."

Public procurement—the authorities concerned

Which are the authorities in Member States that must now take the Article and the interpretation of it into account? The definition in paragraph 6 of the Article is so wide that it could cover any public procurement:

"For the purposes of this Article, 'public undertakings' means central, regional, or local government authorities, public enterprises and any other organization by means of which a Member State, by law or in practice, controls or appreciably influences imports from, or exports to, the territory of a Member State."

(a) Central government authorities

Central government authorities are all covered by the Article and the interpretation.

(b) Regional and local government authorities

The position of regional or local government authorities is defined in paragraph 4 of Article 14:

"Where Member States do not have the necessary legal powers to control the activities of regional or local government authorities or enterprises under their control in these matters, they shall nevertheless endeavour to ensure that those authorities or enterprises comply with the provisions of this Article."

The sub-committee studied the implications of the limitation in paragraph 4 of Article 14. They based themselves on the knowledge that the constitutional position varies considerably between Member States and that public procurement in one country might therefore fall under the EFTA obligations to a larger extent than public procurement in another country. This was dealt with as follows:

"Activities which in some Member countries are performed by central government or State-owned or State-controlled organizations and enterprises are in other Member countries the responsibility of regional or local authorities. The information available showed, however, that there were many similarities in the field of activities covered by regional and local authorities. They take part in varying degrees, depending on the country, in such public services as gas, water, electricity, public health and education, etc. In most Member countries, the regional and local authorities enjoy an autonomous status and the central government authorities do not as a rule have legal powers to exercise direct influence on their procurement activities."

The sub-committee discussed the application of Article 14 to regional and local authorities and recalled that paragraph 4 of Article 14 takes account of the different constitutional structures of Member States. Where the central government authorities have no legal...
power to control regional and local authorities, the Article nevertheless calls on them to endeavour to ensure that it is observed also by the authorities which they do not have the legal power to control."

The Ministers said on this point: "Member States are required to make use of any legal powers at their disposal to control or influence the procurement activities of regional or local authorities in order to ensure that the obligations contained in Article 14 are duly implemented by them. Member Governments will bring the obligations of Article 14 and the relevant findings of the report to the attention of these authorities.

Member Governments having no legal powers at their disposal to control or influence the procurement activities of regional and local authorities will make the endeavour required of them in paragraph 4 of Article 14. In doing so they will bring the obligations of the Article and the relevant findings of the report to the attention of their regional and local authorities and recommend them to take all possible steps to ensure that their procurement activities comply with those obligations and findings." Regional and local authorities are thus covered by Article 14 to the extent that central government authorities exercise direct influence on their procurement activities. Ministers furthermore decided that "grants to regional or local authorities shall never be made conditional on supplies being bought from national sources".

(c) State-owned or State-controlled organizations or enterprises

To an extent varying from country to country public undertakings concerned with procurement exist which are neither organized as central government authorities, nor as regional or local authorities. The examination of these undertakings by the sub-committee showed that both their legal status and their functions vary considerably. With regard to their legal status, the investigation covered both undertakings controlled by statutory public boards and companies on which the State otherwise exercises influence by means of public law (e.g. conditions attached to concessions, licences, privileges, etc.) and privately-operated companies on which State influence may be exercised on the basis of private law through shareholding, board membership, etc. As regards their economic function, these enterprises preponderantly fall in the public utility or manufacturing sectors, the former being responsible for a very substantial part of public procurement.

A representative list of the undertakings falling in this category was given by the sub-committee, comprising services dealing mainly with transport and communications and enterprises concerned with a wide range of production, e.g. energy, iron and steel, tobacco and alcohol. Fuller information can be obtained from the competent authorities in Member States, usually the Ministry of Trade.

The sub-committee found that Article 14 applies to these undertakings "to the extent to which the State by law or in practice controls or appreciably influences imports from other Member States" and Ministers decided that the interpretations and agreements concerning procurement by central authorities also apply to these undertakings to the extent that their practices are equivalent.

"Any influence exerted by Member States, whether as shareholders, through board membership or in any other way on the procurement activities of the State-owned or State-controlled organizations or enterprises is subject to the provisions of Article 14 and the findings of the report."

Ministers finally decided: "Conditions imposed by the State on privately-operated enterprises or industries shall, even where no direct State interest exists, comply with the obligations of Article 14."
The field of application having thus been identified the rest of the text concerning the general agreement on public procurement is given below:

Public procurement — general rules

"Member States are free to have any procurement system they wish provided that it has no discriminatory or protective effects. Legal stipulations involving obligatory preferences to national suppliers or which might lead to such preferences (even if not necessarily practised in a discriminatory way) shall not be maintained in relation to EFTA suppliers. None of the tendering methods used in Member countries seem to be inherently inconsistent with Article 14. However, any such method could be used in a discriminatory way. The following points shall therefore be borne in mind together with the objectives of Article 14:

(a) Public tender shall be adequately publicized and sufficient time for tendering shall be allowed.

(b) Selective tender shall allow equal opportunities for domestic and other EFTA suppliers to compete.

(c) Single tender shall be used only when competitive tender (public or selective) would be clearly impracticable or unreasonable.
Time-limits or special requirements which make it more difficult for an EFTA supplier than for a domestic supplier to compete for a contract shall not be imposed.

Article 14 does not contain any obligation to divulge the results of tenders. Although disclosure of tenders and awards may be an effective guarantee to secure impartial treatment, it may on the other hand decrease rather than promote competition. It may be misleading and is in fact often contrary to the wishes of the tenderers themselves. Other means to safeguard impartiality will be investigated in the light of the experience gained from the co-operation between Member States in this field.

The consideration of the bids and the awarding of contracts is in all Member States normally based on commercial considerations (price, quality, delivery terms, etc.), which are fully compatible with the principles laid down in Article 14. Non-commercial criteria are, however, applied in some cases. The application of such criteria will only be compatible with Article 14 if they do not in practice lead to protection or discrimination. The findings can be summarized as follows:

(a) Public undertakings shall be entirely free to seek supplies from other EFTA countries. When comparing domestic and foreign bids, duties, when levied, shall be included in the prices of the foreign bidders and tax revenues shall not be deducted from the prices of domestic bidders. Rules on possible rejection of unfair or unreasonably low bids shall apply to foreign and domestic bidders in exactly the same way.

(b) Prior control by the Treasury or any other government body of public purchases abroad is only compatible with Article 14 if it has no other purpose or effect than ordinary budget or audit control and places no additional burden on the purchasing authority which wants to buy abroad.

(c) Long-term agreements shall not be made in such a way as to exclude suppliers in other EFTA countries from competing.

(d) National security and public health considerations are compatible with Article 14 only to the extent that they can be justified under the provisions of Articles 12 and 18 * in each specific case that may arise.

(e) Member States shall not disregard the possibilities of inviting suppliers in other Member countries to compete for development contracts or for the production element of them, at least after a reasonable period of time.

(f) Article 14 makes no provision for the use of discriminatory or protective procurement practices for the benefit of regional development areas, nor as a means against deflationary tendencies in the economy (including adverse trends in the employment situation) or against balance of payments difficulties.

The texts agreed by Ministers are largely self-explanatory. It should, however, be noted that references to the report by the sub-committee are made in each paragraph to indicate that the authorities applying them should use the report for authoritative guidance.

---

Public procurement—specific recommendations

The sub-committee looked at a number of specific practices in different Member States and made recommendations on them. Ministers agreed with these recommendations, which will be taken into account in the review and follow-up procedure referred to at the end of this article.

---

Trading activities of public undertakings—general rules

The public undertakings covered by the interpretation given by Ministers have been identified above. The text concerning their trading activities is as follows:

"Article 14 does not prevent Member States from having any State-trading organizations they wish provided the practices of these undertakings do not lead to protection or discrimination in the sense of the Article. The practices of State-trading organizations enumerated in paragraph 102 (a) to (e) of the report are incompatible with Article 14 if they result in protection to domestic production or in trade discrimination frustrating the benefits expected from the removal or absence of duties and quantitative restrictions on trade between Member States."

State-trading organizations having the sole right to import and in certain cases also to sell in the domestic market shall be guided by the liberal and non-discriminatory attitude set out in paragraphs 108 and 109 of the report with regard to their import and distribution of EFTA products and the price fixing and taxation systems applied by them."

* Articles on security and other exceptions.
Here again the sub-committee looked at some special practices in some Member States and made recommendations that were accepted. The follow-up procedures will apply also to these practices.

**Tendering procedures**

Ministers agreed as follows:

"Apart from the abolition of rules and practices which are inconsistent with the obligations of Article 14, there is a need to take certain practical steps with a view to facilitating the expansion of EFTA trade in the public sector through closer co-operation between Member States in the field of public procurement.

In order to ensure that interested suppliers in other EFTA countries are given adequate access to tendering competitions, not least when selective tender is used, the following measures will be undertaken as an immediate step:

(a) Lists will be exchanged through the Secretariat of public agencies and enterprises responsible for major public procurements.

(b) These lists shall, in addition to the name and address of each agency and enterprise, contain such information as would be of particular interest to potential suppliers in other EFTA countries. inter alia: a general description of the types of goods normally bought (specified in detail as far as practical); to the extent possible, an estimated value of yearly purchases for appropriate groups of goods and, where public tender is used, information about where the tender invitations are advertised.

(c) Information on major changes affecting the lists will also be exchanged.

(d) Furthermore, such guidance will be given to agencies and enterprises responsible for public procurement as is considered necessary in order that adequate opportunities to take part in tendering competitions are in fact given to interested suppliers in other EFTA countries and that their tenders are judged objectively.

Member Governments will discuss at short notice, on a bilateral basis, individual cases involving difficulties in connection with the participation of foreign EFTA bidders in competition for tenders, whether these are public, selective or single."

In order to facilitate commercial contacts between public agencies and enterprises responsible for public procurement and interested suppliers in other EFTA countries, Member Governments will consider certain suggestions by the sub-committee.

**Other measures agreed**

"To ensure that the obligations laid down in Article 14 are implemented Member Governments will make the provisions of the Article and the findings of the report widely known to all national authorities and agencies responsible for procurement or for trading activities. It will be emphasized that bids from domestic and other EFTA suppliers will be considered in accordance with the conclusions and recommendations contained in the various chapters of the report and the agreements set out in the foregoing paragraphs. The contents of the report and the agreements reached can be made known to interested trade organizations.

Any substantial changes in legislation, in other statutory regulations or practices with regard to public procurement or State-trading activities will be reported to the Association.

The Committee of Trade Experts is instructed to keep the operation of Article 14 under current review. In particular it shall, from time to time, call for reports on the measures taken by Member States to fulfil their obligations under the Article as interpreted in the report and in the foregoing paragraphs and on internal administrative experience of the operation of these measures. Information shall also be exchanged on the effectiveness of the agreement concerning co-operation on tendering procedures set out in paragraphs 37 to 40 above. The Committee of Trade Experts shall, whenever appropriate, recommend additional measures in order to ensure that the objectives of Article 14 are fully attained. The first review of the practical operation of the Article shall be initiated during the first half of 1968. The Committee of Trade Experts shall also from time to time inform the Council of the activities of other international organizations in the fields covered by Article 14 and evaluate their possible effects on EFTA trade."

From the account of the decision taken by EFTA Ministers to implement Article 14 it can be seen that while the approach is pragmatic, the agreement on Article 14 nevertheless constitutes a serious decision by Member States to increase competition by removing protection.

In view of the fact that this decision provides for no exceptions and that it shows the firm intention to implement Article 14 and to proceed further on the basis of experience, it constitutes a major step towards the strengthening of the Free Trade Area.