

## COMMUNICATION FROM THE COMMISSION Participation of European Economic Interest Groupings (EEIGs) in public contracts and programmes financed by public funds (97/C 285/10)

### INTRODUCTION

In its communication of 10 July 1996 on the integrated programme for small and medium-sized enterprises (SMEs) and the craft sector (1), the Commission decided to issue a communication on measures designed to ensure that the European Economic Interest Grouping (EEIG) can tender on an equal footing for public contracts and can participate fully in programmes financed by public funds. In this way, better use can be made of the EEIG as a means of enabling SMEs to combine their resources.

The European Economic Interest Grouping was established by Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (referred to below as 'the Regulation') (2).

The creation at Community level of a legal instrument for facilitating transnational cooperation between firms is an important element in the completion of the internal market. The EEIG is currently the only legal vehicle for cooperation that is directly connected with the Community system, and it thus constitutes a key element in European cooperation, particularly for SMEs wishing to participate in European-scale projects. More than 800 groupings are currently developing economic activities in a wide range of sectors. This is an encouraging figure given that the first EEIGs could only be set up from 1 July 1989, the date on which the Regulation came into force.

However, a recent conference organized by the Commission (3) showed that optimum use is not yet being made of the EEIG by firms wishing to cooperate at transnational level, particularly where they hope to participate in public contracts and programmes financed by public funds.

This communication describes the EEIG and clarifies some of its characteristics and the way in which it operates so as to ensure that it can tender for public contracts and participate in programmes financed by public funds on an equal footing with other firms. This clarification should ultimately lead to better use of the EEIG by firms, particularly SMEs. The Commission has pointed out on a number of occasions that the access of SMEs to public contracts, the rules governing which are frequently applied in programmes financed by public funds, is a means of speeding up completion of the internal market and regional economic development (4).

From a wider viewpoint, the Commission intends to encourage EEIG participation in such contracts and programmes; the EEIG represents considerable progress for all Community firms in that it enables them to organize their cooperation within a transnational structure that guarantees its members' freedom to pursue their own activities.

### I. Definition of the EEIG

The EEIG is a flexible and light structure which enables its members to interlink some of their economic activities while retaining their economic and legal independence.

The formation of an EEIG gives rise to an independent legal entity with legal capacity whose purpose is to facilitate or develop its members' economic activities and to improve or increase the results of those activities.

This definition shows that the objective pursued by those who conceived this instrument is to promote transnational cooperation between firms at European level through the development of a common activity that is ancillary to their own activities.

The EEIG is similar to a partnership (or 'société en nom collectif', 'offene

Handelsgesellschaft') in that, for example, its members have unlimited joint and several liability for its debts (see point II.5). However, the EEIG has features which are peculiar to more structured forms of companies: for example, it has the capacity to act in its own name through managers who can be appointed independently of their status as members (5) on the basis of a rule which applies generally to limited companies (see point II.2).

## II. Characteristics of the EEIG

### 1. Community nature of the EEIG

EEIGs are connected with the Community legal system. Their formation and legal existence can therefore come about only on the terms, in the manner and with the effects laid down by Community law, even if that law refers back to national laws in certain respects.

The EEIG's legal neutrality places its members on an equal footing, which is very important for overcoming members' fears that one of them may be more favourably placed because it is operating in a more familiar legal environment.

### 2. The EEIG's legal capacity and its members' autonomy

The EEIG has full and independent legal capacity which differentiates it from purely contractual forms of cooperation. In particular, the fact that it has its own organs gives it a much greater power to negotiate and represent its members than each of those members could exercise individually. The EEIG has the capacity to act in its own name through managers who can be appointed independently of their status as grouping members and whose representative powers are directly based on the rules applicable to limited companies. This feature is important for the EEIG's participation in public contracts and programmes financed by public funds because it enables its members to present a united front when negotiating contracts and seeking loans or financial guarantees directly linked to public contracts (6).

### 3. The ancillary nature of an EEIG's activity

An EEIG differs from a company principally in its aim, which is to facilitate or develop the economic activities of its members in order to enable them to increase their own profits. A company, by contrast, generally aims to make profits for itself.

Owing to its ancillary nature, the grouping's activity must be connected with its members' economic activities and not replace them.

However, the formation of an EEIG should establish a legal framework which facilitates the adaptation of its members' activities to the economic conditions of the market (7).

The ancillary nature of the EEIG's activity should not therefore be regarded as an operational limitation which confines the grouping to a subsidiary or minor role.

Notwithstanding the ancillary nature of its activities, a grouping can be regarded as being capable of carrying out any of the functions which may fall to any other form of grouping participating in a public contract or in a programme financed by public funds.

In this context, the EEIG can have different functions: it can be used simply as a framework for coordinating and organizing its members' activities or it can conclude in its own name and execute contracts awarded by the public authorities or under programmes financed by public funds.

In particular, the Regulation does not prohibit the EEIG from completely but temporarily taking over some of its members' activities. This matter was clarified by the Commission in 1991 when it stated: 'there is nothing to prevent an EEIG carrying on some of the activities of its members for a limited period, for the purposes of performing site work, for example' (8).

### 4. Structural aspects of the EEIG: stability and flexibility

The Regulation guarantees a grouping's ability to adapt to economic conditions through the considerable freedom its members have in their contractual relations and the internal organization of the grouping (9).

This flexibility is reflected both in the formation and duration of the EEIG and in the

arrangements governing its financing or operation.

The formalities involved in the formation of an EEIG are very simple, being limited to the conclusion of a written contract (the notarial procedure is not required) and the filing of the contract at the registry in the Member State in which the official address is situated.

Furthermore, the EEIG can be formed for an indefinite or a limited period. This flexibility of formation makes the grouping a particularly suitable instrument for projects with a limited life, such as feasibility studies or the carrying out of work.

The very wide access to the EEIG form enables it to respond effectively, where necessary, to any change in the conditions of cooperation. This openness is made unequivocally clear in the sixth recital of the Regulation, which states that 'access to grouping form must be made as widely available as possible to natural persons, companies, firms and other legal bodies, in keeping with the aims of the Regulation' (10).

The flexibility which an EEIG's members enjoy regarding its financing is also very attractive to firms. Capital is not required when it is formed. This flexibility is very important and distinguishes the formation of an EEIG from that of a company, where large sums of money may be tied up for a given period. In the case of a grouping, by contrast, intermediate stages are possible which permit optimum use to be made of the funds which will subsequently be released.

It is important to point out that all types of contribution are possible: contributions in cash, in kind or even in industrial property (technological knowledge, patents, commercial or trade relationships, etc.).

The EEIG may even function in some cases through the payment of regular contributions or through funds being made available on current account.

Furthermore, although the Regulation prohibits an EEIG from inviting investment by the public, it is permitted to borrow from a bank (11).

The flexibility of operation of an EEIG is further reflected in its ability to transfer its official address from one Member State to another while retaining its legal personality or capacity. Such an operation cannot therefore be regarded as the winding-up of the grouping or be taxed as such.

The Regulation broadly leaves it to an EEIG's members to organize relations between themselves. However, it also includes certain peremptory and non-peremptory arrangements in the interests of third parties but also in those of the members themselves, enabling the latter to gauge the extent of their personal commitment (12).

Certain major decisions affecting the operation and composition of the grouping must be adopted unanimously. These include modification of the grouping's aims, changes in the number of votes allotted to each member, alteration of the conditions under which decisions are taken, amendment of the members' or some members' contributions to the grouping's financing, transfer of the grouping's official address where that transfer involves a change in the law applicable to the grouping, and authorization for a member to assign all or part of its rights.

The winding-up of a grouping requires a unanimous decision, unless the contract for the formation of the grouping provides otherwise.

It should be added that, if the contract for the formation of the grouping contains no provision governing the collective decision-taking, the unanimity rule applies in all cases (13).

The Regulation also imposes fairly strict conditions on the admission and withdrawal of members of the grouping. These rules confirm the very marked *intuitu personae* nature of the relationships between members. The admission of new members thus requires a unanimous decision of the grouping's members. A member's withdrawal from the grouping is possible under the conditions laid down in the contract for the formation of the grouping or, in the absence of such conditions, with the unanimous agreement of the other members (14).

The Regulation subjects assignment of participations in the grouping to the unanimous

authorization of the other members. In the absence of any clause in the contract for the formation of the grouping concerning the provision of guarantees in respect of a member's participation, such an operation can be carried out only with the unanimous agreement of the other members (15).

The Regulation therefore reduces the risk of structural change within a grouping by imposing effective controls on the admission and withdrawal of members.

Such control is important as a means of reassuring an EEIG's potential co-contracting parties, in particular banks and insurance companies from which credit or guarantees may be sought in connection with a grouping's participation in public contracts, or the authorities from whom funding is requested in connection with programmes.

#### 5. Unlimited joint and several liability of members

Independently of the credit and guarantees which may be granted to the EEIG depending on its members' financial position, maximum effective protection is provided for third parties entering into a business relationship with the grouping.

The Regulation establishes the principle that the members of a grouping have unlimited joint and several liability for its debts (16).

The EEIG may enter into commitments in its own name that have financial implications. It will of course be required to meet the cost from its own assets. Where payment has not been made within an appropriate period by the grouping itself, its members have unlimited joint and several liability for debts of any kind it may have. This personal commitment of the members is the natural counterweight to the contractual freedom underlying the EEIG and to the lack of a capital requirement.

In addition, former members of an EEIG remain answerable for five years following their withdrawal for the debts and other liabilities arising out of the grouping's activities during the period they were members (17). The unlimited joint and several liability of the grouping's members constitutes a fundamental guarantee that makes it easier for third parties to enter into a business relationship with the EEIG, to insure it or lend to it in the light of the financial position of one or more of its members.

This rule demonstrates, particularly in the case of an EEIG formed without capital, that the combined financial standing of its members and the guarantees they may provide should be taken into account where a grouping tenders for a contract or applies for funding or credit.

### III. EEIG participation in public procurement

#### (a) General considerations

The Community Directives on public procurement require compliance, throughout the European Union, with certain minimum conditions of information and procedures for the award of public supply contracts by, on the one hand, public authorities ('traditional sectors' Directives) and, on the other hand, by the entities operating in the water, energy, transport and telecommunications sectors (the 'special sectors' Directives). This legal framework is supplemented by certain rules on the legal remedies available when it is necessary to settle disputes between firms and contracting bodies. These rules together constitute what are commonly referred to as the Procurement Directives (18).

Although they differ on a number of points, the two groups of Directives ban discrimination, provide for transparent candidate selection and contract award procedures, based on objective criteria which must be known in advance and compliance with the rules applicable in the technical field.

As regards the participation of EEIGs in public procurement, it is important to note that the Community Directives in this area do not contain any provisions which could impede such participation. On the contrary, all the Procurement Directives provide for the possibility of groupings participating in contracts without requiring them to have a specific legal form when

they have been awarded a contract by the contracting authorities or contracting body (19). The ancillary nature of the activity of an EEIG should not be an obstacle to its participation in public procurement. In this connection, the Court of Justice recently stated that 'not only a natural or legal person who will himself carry out the works but also a person who will have the contract carried out through agencies or branches or will have recourse to technicians or outside technical divisions, or even a group of undertakings, whatever its legal form, may seek to be awarded public works contracts' (20). An EEIG may therefore participate in and perform a public works contract.

(b) Consolidated assessment of public procurement contract participation criteria

In the abovementioned judgment, the Court establishes the principle of a consolidated assessment of the resources and capacities of all the members of a group of enterprises when one of the firms in the group participates in a public procurement contract, provided that the latter actually has available to it the resources and capacities of the other members of the group which are necessary for carrying out the contract.

In applying the reasoning of the Court to an EEIG, a contracting body should, when selecting tenderers or candidates for a public procurement contract, apply the assessment criteria laid down by the Directives taking account not only of the capacities of the EEIG itself but also of those of its members.

On the basis of the Procurement Directives, any contractor wishing to take part in a public procurement contract may be requested to prove his identity or his economic and financial standing or his technical capacity (21) (qualitative selection criteria). If the EEIG does not itself, as an independent legal entity, satisfy these selection criteria, the principle of consolidated assessment requires account to be taken of the capacities of its members. This means that:

- where all the members of the EEIG are firms satisfying the selection criteria, an EEIG may not be required to satisfy these conditions as well,
- on the other hand, if the members of an EEIG do not all satisfy the selection criteria, the members that will in practice perform the contract must satisfy the conditions imposed by the contracting authority,
- lastly, if none of the members of an EEIG satisfy the conditions imposed by the contracting authority, the EEIG may not be used as a means of avoiding the conditions,
- national law governing the registration and authorization of contractors as a condition of their participation in public contracts should not impede the participation of EEIGs in such contracts. Where national law makes EEIGs' participation conditional on their registration or authorization, it should either permit EEIGs to be registered or authorized as such or provide for an exception to enable them to participate in public contracts without being registered or authorized.

#### IV. EEIG participation in programmes financed by public funds

The particular features of an EEIG should enable it to take part fully in programmes financed by public funds. These features are analysed below.

##### 1. Transnational character of the EEIG

A number of Community support programmes require projects to be submitted by several partners belonging to different Member States. An example is provided by Article 2 (b), second tiret, of Council Decision 94/763/EC of 21 November 1994 concerning the rules for the participation of undertakings, research centres and universities in research, technological development and demonstration activities of the European Community (22).

Within the meaning of that Article, Community contributions may benefit only activities carried out 'by at least two legal entities. Such entities must not be affiliated and must be established in different Member States, or in at least one Member State and one State

associated with the programme`.

Cross-border cooperation is also an objective of operational Community initiative programmes financed by the Structural Funds. This is true of Interreg II (23), one of whose objectives is to promote regional cross-border cooperation, Leader II, which also subsidizes (part C) transnational rural development cooperation projects (24), or Regis II, which encourages transnational cooperation between the most remote regions of the Community (25).

As an EEIG must necessarily comprise at least two partners from two different Member States (26), it is inherently transnational, and the EEIG can therefore be considered as a 'consortium`. This is why EEIGs are always entitled to apply to participate in Community programmes, including those which require the participation of legal entities in several Member States.

Members of an EEIG cannot therefore be required to submit tenders in parallel with that submitted by the grouping itself.

With this in mind, the Commission intends to add to its official lists of approved contractors and to the forms to be completed as part of the tender procedure, in addition to the 15 existing categories for classifying national participants, a new purely European category, called 'EUR`. EEIGs will be classified automatically in this category because of their transnational character.

## 2. The presence of several independent operators

The members of an EEIG retain full legal and economic independence in the running of their affairs. EEIGs should therefore be able to participate fully in programmes which require at least two separate legal entities to submit a joint project. One example is the Council Decision of 23 November 1994 adopting a specific programme for research and technological development, including demonstration in the field of non-nuclear energy (1994 to 1998) (27). The Decision groups together most of the activities of the Thermie programme relating to the technical demonstration of projects. Its Annex III provides that Community funding for cooperative research projects, involving normally at least four non-affiliated SMEs from at least two different Member States, will cover 50 % of the cost of research.

This means that EEIGs should participate in the programmes on an equal footing with the other eligible firms, as the grouping must comprise at least two members from two different Member States who remain economically and legally independent throughout their cooperation (28).

An EEIG must therefore be able to participate on its own in programmes, even in those which explicitly require several independent partners. In that case, members of an EEIG should not be required to submit individual proposals in parallel with that made by the grouping itself.

## 3. Creating synergy

In certain cases, the selection of proposals takes account of the effective capacity of the proposed action to create synergy between various categories of participants (29). Such programmes call for the participation of newly formed cooperative structures. In this context, ad hoc consortia should not be preferred to recently formed EEIGs without a detailed investigation of their characteristics and capacities.

## V. Access of EEIGs to credit

Access to credit is essential to most economic operators. However, it is not always easy for firms to obtain external financing, especially in the case of SMEs which could be regarded as high-risk borrowers.

That is why the grouping together of firms within an EEIG can be a major advantage in discussions with credit institutions.

The Commission wishes to clarify and specify certain questions concerning EEIGs' access to

credit in order to avoid any risk of discriminating between EEIGs and other forms of national enterprises better known to economic operators.

#### 1. Guarantees

Despite the considerable degree of freedom and operational autonomy retained by members of an EEIG, their unlimited joint and several liability can make it much easier to obtain credit and strengthen the negotiating powers of its members.

The creditors of an EEIG, in particular banks and other financial institutions, can make a claim on the personal assets of members in respect of debts incurred by the grouping and not settled by it in good time.

A requirement that each member of an EEIG should provide a personal guarantee would add considerably to the cost of a loan and so should not be imposed in practice, as members are already liable to pay the debts of the grouping from their personal assets.

An EEIG thus provides a means of increasing the borrowing potential of its members while generally reducing the cost of a loan.

#### 2. Managerial competences

The legal autonomy of an EEIG also enables it to act as a single interlocutor with financial institutions, as the manager or managers represent the grouping in negotiations.

Direct negotiation with each member of the grouping and its financial partners is therefore not necessary.

#### 3. Evidence of financial soundness

An EEIG, like any other loan applicant, must be able to prove its creditworthiness.

Like the procedures described in Chapter III on public procurement, credit institutions should be able to carry out an overall assessment of the solvency of groupings on the basis of the financial status of their members.

Consolidation of the assets of an EEIG and of its members would facilitate the necessary assessments by the financial institutions.

The drawing-up by an EEIG of a balance sheet and a consolidated profit-and-loss account could considerably facilitate the assessment.

In addition, an EEIG which has equity capital, which is not compulsory within the meaning of Regulation (EEC) No 2137/85, offers security to all creditors dealing with a grouping.

An EEIG with its own equity thus has a significant competitive edge and could be included as one of the elements of assessment referred to above.

Without equity capital, the financial viability of the member or members established in the State where the credit institution is located will clearly be a decisive factor in obtaining a loan or guarantee.

Creditors of an EEIG can avoid time-consuming procedures for the recovery of sums due from abroad, the principle of members' unlimited joint and several liability allowing them to select the member they will have recourse against in the event of default of the grouping itself.

## VI. Conclusion

The EEIG is currently the only vehicle offering firms a framework for cooperation directly attached to the Community legal order. For that reason, and in order to facilitate its use, the Commission will continue to monitor application of Regulation (EEC) No 2137/85 closely. In a constantly changing market, the EEIG offers businesses in the Community, especially SMEs, the opportunity to develop their potential in projects with a Community dimension. SMEs are now recognized as firms which play a crucial part in achieving the objectives of growth, competitiveness and employment which are part of the priorities of the European Union (30). The Regie project thus represents a good means of promoting the use of the EEIG among SMEs.

The Commission considers it essential that all the actors concerned by the use of EEIGs, firms or bodies concluding contracts with a grouping, should be fully aware of its characteristics and potential.

This Communication is intended to provide the clarifications which should remove all uncertainty still preventing maximum use of the EEIG in public procurement, access to credit with which it is directly linked, and programmes financed by public funds.

(1) COM(96) 329 final.

(2) OJ L 199, 31. 7. 1985, p. 1.

(3) The 1996 'Regie' conference held on 25 and 26 March 1996 to review six years of experience of the EEIG.

(4) See Commission 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 (OJ C 22, 28. 1. 1989, p. 3).

See also the following Commission communications: 'Promoting SME participation in public procurement in the Community', COM(90) 166 of 7 May 1990; 'SME participation in public procurement in the Community', SEC(92) 722 final of 1 June 1992.

(5) Article 19 of the Regulation.

(6) Article 1 (2) of the Regulation.

(7) First recital of the Regulation.

(8) Answer given by Mr Bangemann on behalf of the Commission to Written Question No 1587/91 (OJ C 323, 13. 12. 1991, pp. 32 and 33).

(9) Fourth recital of the Regulation.

(10) See also Article 4 of the Regulation.

(11) Article 23 of the Regulation.

(12) Article 17 of the Regulation.

(13) Article 17 (3) of the Regulation.

(14) Articles 26 (1) and 27 (1) of the Regulation.

A member may withdraw at any time on just and proper grounds without having to obtain the unanimous agreement of the other members (second paragraph of Article 27 (1)).

(15) Article 22 of the Regulation.

(16) Article 24 of the Regulation.

(17) Articles 34 and 37 (1) of the Regulation.

(18) Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ L 199, 9. 8. 1993); Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ L 199, 9. 8. 1993); Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ L 209, 24. 7. 1992); Council Directive 89/665/EEC 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 (OJ L 395, 30. 12. 1989); Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ L 199, 9. 8. 1993); Council Directive 92/13/EEC of 25 February 1992 on the coordination of the laws, regulations and administrative provisions relating to the application of the Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ L 76, 23. 3. 1992).

(19) Article 18 of Directive 93/36/EEC, Article 21 of Directive 93/37/EEC, Article 26 of Directive 92/50/EEC and Article 33 of Directive 93/38/EEC.

(20) Judgment in Case C-389/92, *Ballast Nedam Groep NV v. Belgische staat* [1994] ECR I-1306, point 13. This judgment is currently the subject of a reference for a preliminary ruling

(Case C-5/97).

(21) Articles 21 to 25 of Directive 93/36/EEC, Articles 25 to 29 of Directive 93/37/EEC, Articles 30 to 35 of Directive 92/50/EEC. See also Articles 30 to 32 of Directive 93/38/EC.

(22) OJ L 306, 30. 11. 1994, p. 8.

(23) See Commission notice to the Member States laying down guidelines for operational programmes which Member States are invited to establish in the framework of a Community initiative concerning border developments, cross-border cooperation and selected energy networks (Interreg II) (OJ C 180, 1. 7. 1994, p. 60).

(24) See notice to the Member States laying down guidelines for global grants or integrated operational programmes for which Member States are invited to submit applications for assistance in the framework of a Community initiative for rural development, Leader II (OJ C 180, 1. 7. 1994, p. 48).

(25) See notice to the Member States laying down guidelines for operational programmes which Member States are invited to establish in the framework of a Community initiative concerning the most remote regions, Regis II (OJ C 180, 1. 7. 1994, p. 44).

(26) See Article 4 (2) of Regulation (EEC) No 2137/85.

(27) OJ L 334, 22. 12. 1994, p. 87.

(28) See Articles 3 and 4 of Regulation (EEC) No 2137/85.

(29) See Article 4 of Decision 94/763/EC.

(30) See the Commission communication on an integrated programme for small and medium-sized enterprises and the craft sector, COM(96) 329 final of 10 July 1996.

See also: 'Maximum enhancement of the employment, growth and competitive potential of European SMEs', Council Decision 97/15/EC of 9 December 1996 on a third multiannual programme for SMEs in the European Union (1997 to 2000), OJ L 6, 10. 1. 1997, p. 25.