ANNEX 3

Utilities which procure in accordance with the provisions of this Agreement

Supplies
Thresholds: SDR 400,000

Services
Specified in Annex 5
Thresholds: SDR 400,000

Works
Specified in Annex 6
Thresholds: SDR 5,000,000

All contracting entities whose procurement is covered by the EU utilities directive which are contracting authorities (e.g. those covered under Annex 1 and Annex 2) or public undertakings[1] and which have as one of their activities any of those referred to below or any combination thereof:

(a) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of drinking water or the supply of drinking water to such networks;

(b) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of electricity or the supply of electricity to such networks;

(c) the provision of airport or other terminal facilities to carriers by air;

(d) the provision of maritime or inland port or other terminal facilities to carriers by sea or inland waterway;

(e) the provision or operation of networks[2] providing a service to the public in the field of transport by urban railway, automated systems, tramway, trolley bus, bus or cable.

(f) the provision or operation of networks providing a service to the public in the field of transport by railways.[3]

[1] According to the EU utilities directive, a public undertaking is any undertaking over which the contracting authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it.

A dominant influence on the part of the contracting authorities shall be presumed when these authorities, directly or indirectly, in relation to an undertaking:

- hold the majority of the undertaking's subscribed capital, or
- control the majority of the votes attaching to shares issued by the undertaking, or
- can appoint more than half of the undertaking's administrative, management or supervisory body.

[2] As regards transport services, a network shall be considered to exist where the service is provided under operating conditions laid down by a competent authority of an EU Member State, such as conditions on the routes to be served, the capacity to be made available or the frequency of the service.

[3] E.g. the provision or operation of networks (within the meaning of footnote 4) providing a service to the public in the field of transport by high-speed or conventional trains.

Indicative lists of contracting authorities and public undertakings fulfilling the criteria set out above are attached.

Notes to Annex 3

1. Procurement for the pursuit of an activity listed above when exposed to competitive forces in the market concerned are not covered by this Agreement.

2. This Agreement does not cover procurement by procuring entities included in this Annex:

- for the purchase of water and for the supply of energy or of fuels for the production of energy;

- for purposes other than the pursuit of their activities as listed in this Annex or for the pursuit of such activities in a non-EEA country;

- for purposes of re-sale or hire to third parties, provided that the procuring entity enjoys no special or exclusive right to sell or hire the subject of such contracts and other entities are free to sell or hire it under the same conditions as the procuring entity.

3. The supply of drinking water or electricity to networks which provide a service to the public by a procuring entity other than a contracting authority shall not be considered as an activity within the meaning of paragraphs (a) or (b) of this Annex where:

- the production of drinking water or electricity by the entity concerned takes place because its consumption is necessary for carrying out an activity other than that referred to in paragraphs (a) to (f) of this Annex; and

- supply to the public network depends only on the entity's own consumption and has not exceeded 30 per cent of the entity's total production of drinking water or energy, having regard to the average for the preceding three years, including the current year.

4. I. Provided that the conditions in paragraph II are met, this Agreement does not cover procurement:

(i) by a procuring entity to an affiliated undertaking[4], or

(ii) by a joint venture, formed exclusively by a number of procuring entities for the purpose of carrying out activities within the meaning of paragraphs (a) to (f) of this Annex, to an undertaking which is affiliated with one of these procuring entities.

II. Paragraph I shall apply to services or supplies contracts provided that at least 80 per cent of the average turnover of the affiliated undertaking with respect to

[4] "affiliated undertaking" means any undertaking the annual accounts of which are consolidated with those of the procuring entity in accordance with the requirements of Council Directive 83/349/EEC on consolidated accounts, or in case of entities not subject to that Directive, any undertaking over which the procuring entity may exercise, directly or indirectly, a dominant influence, or which may exercise a dominant influence over the procuring entity, or which, in common with the procuring entity, is subject to the dominant influence of another undertaking by virtue of ownership, financial participation, or the rules which govern it.