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**A7-0034/2013**

7.2.2013

**\*\*\*I**  
**REPORT**

on the proposal for a directive of the European Parliament and of the Council  
on procurement by entities operating in the water, energy, transport and postal  
services sectors  
(COM(2011)0895 – C7-0007/2012– 2011/0439(COD))

Committee on the Internal Market and Consumer Protection

Rapporteur: Marc Tarabella

### ***Symbols for procedures***

- \* Consultation procedure
- \*\*\* Consent procedure
- \*\*\*I Ordinary legislative procedure (first reading)
- \*\*\*II Ordinary legislative procedure (second reading)
- \*\*\*III Ordinary legislative procedure (third reading)

(The type of procedure depends on the legal basis proposed by the draft act.)

### ***Amendments to a draft act***

In amendments by Parliament, amendments to draft acts are highlighted in ***bold italics***. Highlighting in *normal italics* is an indication for the relevant departments showing parts of the draft act which may require correction when the final text is prepared – for instance, obvious errors or omissions in a language version. Suggested corrections of this kind are subject to the agreement of the departments concerned.

The heading for any amendment to an existing act that the draft act seeks to amend includes a third line identifying the existing act and a fourth line identifying the provision in that act that Parliament wishes to amend. Passages in an existing act that Parliament wishes to amend, but that the draft act has left unchanged, are highlighted in **bold**. Any deletions that Parliament wishes to make in such passages are indicated thus: [...].

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## DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

**on the proposal for a directive of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors**

**(COM(2011)0895 – C7-0007/2012– 2011/0439(COD))**

**(Ordinary legislative procedure: first reading)**

*The European Parliament,*

- having regard to the Commission proposal to Parliament and the Council (COM(2011)0895),
  - having regard to Article 294(2) and Article 53(1), Article 62 and Article 114 of the Treaty on the Functioning of the European Union, pursuant to which the Commission submitted the proposal to Parliament (C7-0007/2012),
  - having regard to Article 294(3) of the Treaty on the Functioning of the European Union,
  - having regard to the reasoned opinions submitted, within the framework of Protocol No 2 on the application of the principles of subsidiarity and proportionality, by the Swedish Parliament and by the United Kingdom House of Commons, asserting that the draft legislative act does not comply with the principle of subsidiarity,
  - having regard to the opinion of the European Economic and Social Committee of 26 April 2012<sup>1</sup>,
  - having regard to the opinion of the Committee of the Regions of 9 October 2012<sup>2</sup>,
  - having regard to Rule 55 of its Rules of Procedure,
  - having regard to the report of the Committee on the Internal Market and Consumer Protection and the opinions of the Committee on International Trade, the Committee on Employment and Social Affairs, the Committee on Industry, Research and Energy, the Committee on Transport and Tourism, the Committee on Regional Development, and the Committee on Legal Affairs (A7-0034/2013),
1. Adopts its position at first reading hereinafter set out;
  2. Calls on the Commission to refer the matter to Parliament again if it intends to amend its proposal substantially or replace it with another text;
  3. Instructs its President to forward its position to the Council, the Commission and the national parliaments.

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<sup>1</sup> OJ C 191, 29.6.2012, p. 84.

<sup>2</sup> OJ C 391, 18.12.2012, p. 49.

## Amendment 1

### Proposal for a directive

#### Recital 2

*Text proposed by the Commission*

(2) In order to guarantee the opening up to competition of procurement by entities operating in the water, energy, transport and postal services sectors, provisions should be drawn up coordinating procurement procedures in respect of contracts above a certain value. Such coordination is needed to ensure the effect of the principles of the Treaty on the Functioning of the European Union and in particular the free movement of goods, the freedom of establishment and the freedom to provide services as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. In view of the nature of the sectors affected by such coordination, the latter should, while safeguarding the application of those principles, establish a framework for sound commercial practice and should allow maximum flexibility.

*Amendment*

(2) In order to guarantee the opening up to competition of procurement by entities operating in the water, energy, transport and postal services sectors, provisions should be drawn up coordinating procurement procedures in respect of contracts above a certain value. Such coordination is needed to ensure the effect of the principles of the Treaty on the Functioning of the European Union and in particular the free movement of goods, the freedom of establishment and the freedom to provide services as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. In view of the nature of the sectors affected by such coordination, the latter should, while safeguarding the application of those principles, establish a framework for sound commercial practice and should allow maximum flexibility *at every level of the public procurement procedure, particularly favouring small and medium-sized enterprises. Public procurement rules have to respect the distribution of competences as enshrined in Article 14 TFEU and in Protocol (No 26) on Services of General Interest. The application of those rules should not interfere with the freedom of public authorities to decide how they carry out their public service tasks.*

## Amendment 2

### Proposal for a directive

#### Recital 4

*Text proposed by the Commission*

(4) Public procurement plays a key role in the Europe 2020 strategy as one of the market-based instruments to be used to achieve a smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. For that purpose, the current public procurement rules adopted pursuant to Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts have to be revised and modernised in order to increase the efficiency of public spending, ***facilitating in particular the*** participation of small and medium-sized enterprises in public procurement and ***to*** enable procurers to make better use of public procurement in support of ***common societal goals***. There is also a need to clarify basic notions and concepts to ensure better legal certainty and to incorporate certain aspects of related well-established case-law of the Court of Justice of the European Union.

**Amendment 3**

**Proposal for a directive  
Recital 4 a (new)**

*Text proposed by the Commission*

*Amendment*

(4) Public procurement plays a key role in the Europe 2020 strategy as one of the market-based instruments to be used to achieve a smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. For that purpose, the current public procurement rules adopted pursuant to Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts have to be revised and modernised in order to increase the efficiency of public spending, ***ensure value for money, facilitate equal access and fair*** participation of small and medium-sized enterprises ***and craftsmen*** in public procurement, ***both at local and Union-wide level***, and enable procurers to make better use of public procurement in support of ***sustainable production and consumption***. There is also a need to clarify basic notions and concepts to ensure better legal certainty and to incorporate certain aspects of related well-established case-law of the Court of Justice of the European Union.

*Amendment*

***(4a) The internal market and international markets are increasingly interlinked, therefore Union values, such***

*as transparency, a principled stance against corruption, the principle of reciprocity and the advancement of social and human rights should be appropriately promoted in procurement policies.*

**Amendment 4**  
**Proposal for a directive**  
**Recital 4 b (new)**

*Text proposed by the Commission*

*Amendment*

*(4b) It is also appropriate to recall that this Directive should neither affect the social security legislation of the Member States nor should it deal with the liberalisation of services of general economic interest, reserved to public or private entities, or with the privatisation of public entities providing services. It should equally be recalled that Member States are free to organise the provision of compulsory social services or of other services such as postal services either as services of general economic interest or as non-economic services of general interest or as a mixture thereof. It is appropriate to clarify that non-economic services of general interest should not fall within the scope of this Directive.*

**Amendment 5**

**Proposal for a directive**  
**Recital 5**

*Text proposed by the Commission*

*Amendment*

*(5) Under Article 11 of the Treaty on the Functioning of the European Union, environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development.* This Directive clarifies how the contracting entities may contribute to the protection of

(5) This Directive clarifies how the contracting entities may contribute to the protection of the environment and the promotion of sustainable development, whilst ensuring that they can obtain the best value for money for their contracts.

the environment and the promotion of sustainable development, whilst ensuring that they can obtain the best value for money for their contracts.

### *Justification*

*Social considerations are not enough covered by the Commission proposal*

## **Amendment 6**

### **Proposal for a directive**

#### **Recital 6**

##### *Text proposed by the Commission*

(6) It is appropriate that the notion of procurement or the definition of what constitutes a single procurement are as close as possible to those applied pursuant to Directive [...] of the European Parliament and of the Council of [...] on public procurement, having due regard for the specificities of the sectors covered by this Directive. The concept of single procurement encompasses all supplies, works and services needed to carry out a particular project, for instance a works project or an entirety of works, supplies and/or services. ***Indications for the existence of one single project can for instance consist in overall prior planning and conception by the contracting entity, the fact that the different elements purchased fulfil a single economic and technical function or that they are otherwise logically interlinked and carried out in a narrow time frame.***

##### *Amendment*

(6) It is appropriate that the notion of procurement or the definition of what constitutes a single procurement are as close as possible to those applied pursuant to Directive [...] of the European Parliament and of the Council of [...] on public procurement, having due regard for the specificities of the sectors covered by this Directive. The concept of single procurement encompasses all supplies, works and services needed to carry out a particular project, for instance a works project or an entirety of works, supplies and/or services.

## **Amendment 7**

### **Proposal for a directive**

#### **Recital 12**

*Text proposed by the Commission*

(12) Even if they do not necessarily lead to corrupt conduct, actual, potential or perceived conflicts of interest have a high potential to improperly influence public procurement decisions with the effect of distorting competition and jeopardising equal treatment of tenderers. Effective mechanisms should therefore be set up to prevent, identify and remedy conflicts of interest. Given the differences in the decision-making processes of respectively contracting authorities and undertakings, it is appropriate to limit such provisions to procurement carried out by the former.

*Amendment*

(12) Even if they do not necessarily lead to corrupt conduct, actual, potential or perceived conflicts of interest have a high potential to improperly influence public procurement decisions with the effect of distorting competition and jeopardising equal treatment of tenderers. Effective mechanisms should therefore be set up to prevent, identify and remedy conflicts of interest. ***In addition, in order to guarantee efficient protection of ‘whistleblowers’, Member States should ensure that any staff member who reports undisclosed conflicts in good faith is protected against retaliation, harassment or deleterious actions. In this context, retaliation means any direct or indirect detrimental action recommended, threatened or taken against an individual because of such action.*** Given the differences in the decision-making processes of respectively contracting authorities and undertakings, it is appropriate to limit such provisions to procurement carried out by the former.

## **Amendment 8**

### **Proposal for a directive Recital 16**

*Text proposed by the Commission*

***(16) The results of the Evaluation demonstrated that the exclusion of certain services from the full application of this directive should be reviewed. As a result, the full application of the Directive is extended to a number of services (such as hotel and legal services, which both showed a particularly high percentage of cross-border trade).***

*Amendment*

***deleted***

**Amendment 9**  
**Proposal for a directive**  
**Recital 16 a (new)**

*Text proposed by the Commission*

*Amendment*

***(16a) Service contracts in the fields of civil defence, civil protection, and hazard prevention should be excluded from the scope of this Directive. Those fields include, in particular, emergency rescue work, which should be defined as separate from ambulance services. In order to ensure successful civil protection and emergency response in the interests of the general public, it should be sufficient to apply the principles of the Treaties.***

**Amendment 10**

**Proposal for a directive**  
**Recital 17**

*Text proposed by the Commission*

*Amendment*

(17) ***Other*** categories of services continue by their very nature to have a limited cross-border dimension, ***namely*** what are known as services to the person such as certain social, health and educational services. Those services are provided within a particular context that varies widely amongst Member States, due to different cultural traditions. A specific regime should therefore be established for contracts for those services, with a higher threshold of EUR 1 000 000. In the particular context of procurement in those sectors, services to the person with values below this threshold will typically not be of interest to providers from other Member States unless there are concrete indications to the contrary, such as Union financing for transborder projects. Contracts for services to the person above this threshold should be subject to Union-wide transparency. Given the importance of the cultural

***(17) The results of the Commission Staff Working Paper of 27 June 2011 entitled ‘Evaluation Report - the Impact and Effectiveness of EU Public Procurement Legislation’ demonstrated that the exclusion of certain services from the full application of the Directive should be reviewed. Some*** categories of services continue by their very nature to have a limited cross-border dimension, ***for example*** what are known as services to the person, such as certain social, health and educational services. Those services are provided within a particular context that varies widely amongst Member States, due to different cultural traditions. A specific regime should therefore be established for public contracts for these services, with a higher threshold of EUR 1 000 000. Services to the person with values below this threshold will typically not be of interest to providers from other Member

context and the sensitivity of those services, Member States should be given wide discretion to organise the choice of the service providers in the way they consider most appropriate. The rules of this directive take account of that imperative, imposing only observance of basic principles of transparency and equal treatment and making sure that contracting entities are able to apply specific quality criteria for the choice of service providers, such as the criteria set out in the voluntary European Quality Framework for Social Services of the European Union's Social Protection Committee. Member States and/or contracting entities remain free to provide those services themselves or to organise social services in a way that does not entail the conclusion of public contracts, for example through the mere financing of such services or by granting licences or authorisations to all economic operators meeting the conditions established beforehand by the contracting entity, without any limits or quotas, provided such a system ensures sufficient advertising and complies with the principles of transparency and non-discrimination.

States, unless there are concrete indications to the contrary, such as Union financing for transborder projects. Contracts for services to the person above this threshold should be subject to Union-wide transparency. Given the importance of the cultural context and the sensitivity of those services, Member States should be given wide discretion to organise the choice of the service providers in the way they consider most appropriate. The rules of this directive take account of that imperative, imposing only observance of basic principles of transparency and equal treatment and making sure that contracting entities are able to apply specific quality criteria for the choice of service providers, such as the criteria set out in the voluntary European Quality Framework for Social Services of the European Union's Social Protection Committee. Member States and/or contracting entities remain free to provide those services themselves or to organise social services in a way that does not entail the conclusion of public contracts, for example through the mere financing of such services or by granting licences or authorisations to all economic operators meeting the conditions established beforehand by the contracting entity, without any limits or quotas, provided such a system ensures sufficient advertising and complies with the principles of transparency and non-discrimination. *This Directive should not apply to tried and tested procedures in Member States that are based on the users' free choice of service providers for services of general interest (i.e. voucher system, free choice model, triangular relationship) provided that account is taken of the Treaties' general principles of equal treatment and transparency.*

## **Amendment 11**

### **Proposal for a directive Recital 18**

*Text proposed by the Commission*

(18) Being addressed to Member States, this directive does not apply to procurement carried out by international organisations on their own behalf and for their own account. There is, however, a need to clarify to what extent this directive should be applied to procurement governed by specific international rules.

*Amendment*

(18) Being addressed to Member States, this directive does not apply to procurement carried out by international organisations on their own behalf and for their own account. There is, however, a need to clarify to what extent this directive should be applied to procurement governed by specific international rules. ***The Union institutions should, in particular, take into account the changes provided for in this Directive and adjust their own procurement rules accordingly to reflect those changes.***

**Amendment 12  
Proposal for a directive  
Recital 18 a (new)**

*Text proposed by the Commission*

*Amendment*

***(18a) The awarding of public contracts for certain audiovisual and radio media services by media providers should allow aspects of cultural or social significance to be taken into account which render application of procurement rules inappropriate. For those reasons, an exception should therefore be made for public service contracts, awarded by the media service providers themselves, for the purchase, development, production or co-production of off-the-shelf programmes and other preparatory services, such as those relating to scripts or artistic performances necessary for the production of the programme. It should also be clarified that this exclusion should apply equally to broadcast media services as well as on-demand services (non-linear services). However, this exclusion should not apply to the supply of technical equipment necessary for the production, co-production and broadcasting of such programmes.***

## Amendment 13

### Proposal for a directive

#### Recital 24

##### *Text proposed by the Commission*

(24) The implementation and application of appropriate Union legislation opening a given sector, or a part of it, will be considered to provide sufficient grounds for assuming that there is free access to the market in question. Such appropriate legislation should be identified in an annex which can be updated by the Commission. It is appropriate that this annex should currently refer to Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC *and* Directive 94/22/EC.

##### *Amendment*

(24) The implementation and application of appropriate Union legislation opening a given sector, or a part of it, will be considered to provide sufficient grounds for assuming that there is free access to the market in question. Such appropriate legislation should be identified in an annex which can be updated by the Commission. It is appropriate that this annex should currently refer to Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, Directive 94/22/EC *and Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways*<sup>1</sup>.

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<sup>1</sup> OJ L 237, 24.8.1991, p. 25.

## Amendment 14

### Proposal for a directive

#### Recital 25

##### *Text proposed by the Commission*

(25) Research and innovation, including eco-innovation and social innovation, are among the main drivers of future growth and have been put at the centre of the

##### *Amendment*

(25) Research and innovation, including eco-innovation and social innovation, are among the main drivers of future growth and have been put at the centre of the

Europe 2020 strategy for smart, sustainable and inclusive growth. Contracting entities should make the best strategic use of public procurement to *spur* innovation. Buying innovative goods and services plays a key role in improving the efficiency and quality of public services while addressing major societal challenges. It contributes to achieving best value for money as well as wider economic, environmental and societal benefits in terms of generating new ideas, translating them into innovative products and services and *thus* promoting sustainable economic growth. This *directive* should contribute to facilitating procurement of innovation and help Member States in achieving the Innovation Union targets. A specific procurement procedure should *therefore be provided for which allows* contracting entities to establish *a long-term* innovation partnership for the development and subsequent purchase of *a* new, innovative *product, service* or works provided *it* can be delivered to agreed performance levels and costs. The partnership should be structured in such a way that it can provide the necessary *'market-pull'* incentivising the development of *an* innovative *solution* without foreclosing the market.

Europe 2020 strategy for smart, sustainable and inclusive growth. Contracting entities should make the best strategic use of public procurement to *drive* innovation. Buying innovative goods and services plays a key role in improving the efficiency and quality of public services while addressing major societal challenges. It contributes to achieving best value for *public* money as well as wider economic, environmental and societal benefits in terms of generating new ideas, translating them into innovative products and services and promoting sustainable economic growth. *An innovative procurement model is detailed in the Commission's communication of 14 December 2007 entitled 'Driving innovation to ensure high quality public services in Europe'.* This *model promotes the take-up in the procurement of research and development services which do not fall within the scope of this Directive. That model, which has been incorporated into this Directive, is recognised and will be available for all contracting entities to consider. This Directive should however* contribute to facilitating *the public* procurement of innovation *more generally*, and help Member States in achieving the Innovation Union targets. *Where a need for the development of an innovative product, service or works and the subsequent purchase of the resulting output cannot be met by solutions already available on the market, contracting entities should have access to a specific procurement procedure in respect of contracts falling within the scope of this Directive. This new procedure should allow* contracting *entities* to establish *an* innovation partnership for the development and subsequent purchase of new, innovative *products, services* or works, provided *that these* can be delivered to agreed performance levels and costs. The *procedure should be based on the rules applying to the competitive procedure with negotiations and contracts should be*

*awarded on the sole basis of the most economically advantageous tender, which is the most suited to comparing tenders for innovative solutions. Whether the innovation partnership concerns a very large project or a smaller project, it should be structured in such a way that it can provide the necessary ‘market pull’, incentivising the development of innovative solutions without foreclosing the market. Contracting entities should therefore not misuse innovation partnerships to prevent, restrict or distort competition. In addition, when setting the terms and conditions for procurement, contracting entities should be allowed to establish innovative characteristics, including best available techniques, as a criterion relating to the subject of the contract concerned.*

## **Amendment 15**

### **Proposal for a directive**

#### **Recital 27**

##### *Text proposed by the Commission*

(27) Electronic means of information and communication can greatly simplify the publication of contracts and increase the efficiency and transparency of procurement processes. They should become the standard means of communication and information exchange in procurement procedures. The use of electronic means also leads to time savings. As a result, provision should be made for reducing the minimum periods where electronic means are used, subject, however, to the condition that they are compatible with the specific mode of transmission envisaged at Union level. Moreover, electronic means of information and communication including adequate functionalities can enable contracting authorities to prevent, detect and correct errors that occur during

##### *Amendment*

(27) Electronic means of information and communication can greatly simplify the publication of contracts and increase the efficiency and transparency of procurement processes. They should become the standard means of communication and information exchange in procurement procedures. The use of electronic means also leads to time savings. As a result, provision should be made for reducing the minimum periods where electronic means are used, subject, however, to the condition that they are compatible with the specific mode of transmission envisaged at Union level. Moreover, electronic means of information and communication including adequate functionalities can enable contracting authorities to prevent, detect and correct errors that occur during procurement procedures. *In addition, the*

procurement procedures.

*submission of building information electronic modelling tools for works contracts should be encouraged in order to modernise the procurement process and ensure greater efficiencies are achieved in the public procurement of works covered by this Directive, in particular in relation to taking into account lifecycle costs and sustainability criteria.*

## **Amendment 16**

### **Proposal for a directive Recital 27 a (new)**

*Text proposed by the Commission*

*Amendment*

*(27a) In order to ensure confidentiality during the procedure, contracting entities should not disclose information that has been forwarded to it by economic operators which they have designated as confidential. Non-compliance with this obligation should render the contracting entity liable if harm can be clearly demonstrated by the economic operator.*

## **Amendment 17**

### **Proposal for a directive Recital 28**

*Text proposed by the Commission*

*Amendment*

(28) There is a strong trend emerging across Union public procurement markets towards the aggregation of demand by public purchasers, with a view to obtaining economies of scale, including lower prices and transaction costs, and to improving and professionalising procurement management. This can be achieved by concentrating purchases either by the number of contracting entities involved or by volume and value over time. However, the aggregation and centralisation of

(28) There is a strong trend emerging across Union public procurement markets towards the aggregation of demand by public purchasers, with a view to obtaining economies of scale, including lower prices and transaction costs, and to improving and professionalising procurement management. This can be achieved by concentrating purchases either by the number of contracting entities involved or by volume and value over time. However, the aggregation and centralisation of

purchases should be carefully monitored in order to avoid excessive concentration of purchasing power and collusion, and to preserve transparency and competition, as well as market access opportunities for small and medium-sized enterprises.

purchases should be carefully monitored in order to avoid excessive concentration of purchasing power and collusion, and to preserve transparency and competition, as well as market access opportunities for small and medium-sized enterprises. ***The Commission should provide guidance to Member States and contracting entities on the required monitoring of aggregated and centralised purchases to avoid excessive concentration of purchasing power and collusion.***

## Amendment 18

### Proposal for a directive Recital 29

#### *Text proposed by the Commission*

(29) The instrument of framework agreements can be an efficient procurement technique throughout Europe; however, there is a need to enhance competition by improving transparency of and access to procurement carried out by means of framework agreements. ***It is therefore appropriate to revise the provisions applicable to those agreements, notably by providing for mini-competitions for the award of specific contracts based on the agreement and by limiting the duration of framework agreements.***

#### *Amendment*

(29) The instrument of framework agreements can be an efficient procurement technique throughout Europe; however, there is a need to enhance competition by improving transparency of and access to procurement carried out by means of framework agreements.

## Amendment 19

### Proposal for a directive Recital 31

#### *Text proposed by the Commission*

(31) In addition, new electronic purchasing techniques are constantly being developed, such as electronic catalogues. They help to increase competition and streamline public purchasing, particularly in terms of savings in time and money. Certain rules should however be laid down to ensure that such

#### *Amendment*

(31) In addition, new electronic purchasing techniques are constantly being developed, such as electronic catalogues. They help to increase competition and streamline public purchasing, particularly in terms of savings in time and money. Certain rules should however be laid down to ensure that such

use complies with the rules of this Directive and the principles of equal treatment, non-discrimination and transparency. In particular where competition has been reopened under a framework agreement or where a dynamic purchasing system is being used and where sufficient guarantees are offered in respect of ensuring traceability, equal treatment and predictability, contracting entities should be allowed to generate tenders in relation to specific purchases on the basis of previously transmitted electronic catalogues. In line with the requirements of the rules for electronic means of communication, contracting entities should avoid unjustified obstacles to economic operators' access to procurement procedures in which tenders are to be presented in the form of electronic catalogues and which guarantee compliance with the general principles of non-discrimination and equal treatment.

use complies with the rules of this Directive and the principles of equal treatment, non-discrimination and transparency. ***In addition, the handling of data in this context should be conducted in accordance with national and Union data protection law.*** In particular where competition has been reopened under a framework agreement or where a dynamic purchasing system is being used and where sufficient guarantees are offered in respect of ensuring traceability, equal treatment and predictability, contracting entities should be allowed to generate tenders in relation to specific purchases on the basis of previously transmitted electronic catalogues. In line with the requirements of the rules for electronic means of communication, contracting entities should avoid unjustified obstacles to economic operators' access to procurement procedures in which tenders are to be presented in the form of electronic catalogues and which guarantee compliance with the general principles of non-discrimination and equal treatment.

## Amendment 20

### Proposal for a directive Recital 32

#### *Text proposed by the Commission*

(32) Centralised purchasing techniques are increasingly used in most Member States. Central purchasing bodies are responsible for making acquisitions or awarding contracts/framework agreements for other contracting authorities or for contracting entities. In view of the large volumes purchased, such techniques help increase competition and professionalise public purchasing. Provision should therefore be made for a Union definition of central purchasing bodies dedicated to contracting entities, without preventing the continuation of less institutionalised and

#### *Amendment*

(32) Centralised purchasing techniques are increasingly used in most Member States. Central purchasing bodies are responsible for making acquisitions or awarding contracts/framework agreements for other contracting authorities or for contracting entities. In view of the large volumes purchased, such techniques help increase competition and professionalise public purchasing, ***Specific attention should be paid to the accessibility of any such procedures for small and medium-sized enterprises.*** Provision should therefore be made for a Union definition of central

systematic common purchasing or the established practice of having recourse to service providers that prepare and manage procurement procedures on behalf and for the account of a contracting entity. Rules should also be laid down for allocating responsibility for the observance of the obligations pursuant to this Directive, also in the case of remedies, among the central purchasing body and the contracting entities procuring from or through the central purchasing body. Where the latter has sole responsibility for the conduct of the procurement procedures, it should also be solely and directly responsible for the legality of the procedures. Where a contracting entity conducts certain parts of the procedure, for instance the reopening of competition under a framework agreement or the award of individual contracts based on a dynamic purchasing system, it should continue to be responsible for the stages it conducts.

purchasing bodies dedicated to contracting entities, without preventing the continuation of less institutionalised and systematic common purchasing or the established practice of having recourse to service providers that prepare and manage procurement procedures on behalf and for the account of a contracting entity. Rules should also be laid down for allocating responsibility for the observance of the obligations pursuant to this Directive, also in the case of remedies, among the central purchasing body and the contracting entities procuring from or through the central purchasing body. Where the latter has sole responsibility for the conduct of the procurement procedures, it should also be solely and directly responsible for the legality of the procedures. Where a contracting entity conducts certain parts of the procedure, for instance the reopening of competition under a framework agreement or the award of individual contracts based on a dynamic purchasing system, it should continue to be responsible for the stages it conducts.

## **Amendment 21**

### **Proposal for a directive Recital 33**

#### *Text proposed by the Commission*

(33) Electronic means of communication are particularly well suited to support centralised purchasing practices and tools because of the possibility they offer to re-use and automatically process data and to minimise information and transaction costs. The use of such electronic means of communication should therefore, as a first step, be rendered compulsory for central purchasing bodies, while also facilitating converging practices across the Union. This should be followed by a general obligation to use electronic means of communication in all procurement

#### *Amendment*

(33) Electronic means of communication are particularly well suited to support centralised purchasing practices and tools because of the possibility they offer to re-use and automatically process data and to minimise information and transaction costs. The use of such electronic means of communication should therefore, as a first step, be rendered compulsory for central purchasing bodies, while also facilitating converging practices across the Union. This should be followed by a general obligation to use electronic means of communication in all procurement

procedures after a transition period of two years.

procedures after a transition period of two years. ***So as to ensure continued legal certainty, those provisions should not affect existing arrangements at national level for publishing information on public procurement contracts for amounts below the thresholds set in this Directive.***

## Amendment 22

### Proposal for a directive

#### Recital 34

##### *Text proposed by the Commission*

(34) Joint awarding of contracts by contracting entities from different Member States currently encounters specific legal difficulties, with special reference to conflicts of national laws. Despite the fact that Directive 2004/17/EC implicitly allowed for cross-border joint public procurement, in practice several national legal systems have explicitly or implicitly rendered cross-border joint procurement legally uncertain or impossible. Contracting entities from different Member States may be interested in cooperating and in jointly awarding contracts in order to derive maximum benefit from the potential of the internal market in terms of economies of scale and risk-benefit sharing, not least for innovative projects involving a greater amount of risk than reasonably bearable by a single contracting entity. Therefore new rules on cross-border joint procurement designating the applicable law should be established in order to facilitate cooperation between contracting entities across the Single Market. In addition, contracting entities from different Member States may set up joint legal bodies established under national or Union law. Specific rules should be established for such form of joint procurement.

##### *Amendment*

(34) Joint awarding of contracts by contracting entities from different Member States currently encounters specific legal difficulties, with special reference to conflicts of national laws. Despite the fact that Directive 2004/17/EC implicitly allowed for cross-border joint public procurement, in practice several national legal systems have explicitly or implicitly rendered cross-border joint procurement legally uncertain or impossible. Contracting entities from different Member States may be interested in cooperating and in jointly awarding contracts in order to derive maximum benefit from the potential of the internal market in terms of economies of scale and risk-benefit sharing, not least for innovative projects involving a greater amount of risk than reasonably bearable by a single contracting entity. Therefore new rules on cross-border joint procurement designating the applicable law should be established in order to facilitate cooperation between contracting entities across the Single Market. In addition, contracting entities from different Member States may set up joint legal bodies established under national or Union law. Specific rules should be established for such form of joint procurement. ***Similarly, in the context of cross-border public procurement, it is***

*essential to clarify the aspects relating to intellectual property law.*

**Amendment 23**  
**Proposal for a directive**  
**Recital 35**

*Text proposed by the Commission*

(35) The technical specifications drawn up by purchasers need to allow public procurement to be ***opened up*** to competition. To that end, it must be possible to submit tenders that reflect the diversity of technical solutions ***so as to obtain a sufficient level of competition***. Consequently, technical specifications should be drafted in such a way to avoid artificially narrowing down competition through requirements that favour a specific economic operator by mirroring key characteristics of the supplies, services or works habitually offered by that economic operator. Drawing up the technical specifications in terms of functional and performance requirements generally allows this objective to be achieved in the best way possible and favours innovation. Where reference is made to a European standard or, in the absence thereof, to a national standard, tenders based on other equivalent arrangements which meet the requirements of the contracting entities and are equivalent in terms of safety must be considered by the contracting entities. To demonstrate equivalence, tenderers can be required to provide third-party verified evidence; however, other appropriate means of proof such as a technical dossier of the manufacturer should also be allowed where the economic operator concerned has no access to such certificates or test reports, or no possibility of obtaining them within the relevant time limits.

*Amendment*

(35) The technical specifications drawn up by purchasers need to allow public procurement to be ***open*** to competition ***as well as to achieve objectives of sustainability***. To that end, it must be possible to submit tenders that reflect the diversity of technical solutions, ***standards and technical specifications in the marketplace, including those drawn up on the basis of performance criteria linked to the life cycle and the sustainability of the production process of the works, supplies and services***. Consequently, technical specifications should be drafted in such a way to avoid artificially narrowing down competition through requirements that favour a specific economic operator by mirroring key characteristics of the supplies, services or works habitually offered by that economic operator. Drawing up the technical specifications in terms of functional and performance requirements generally allows this objective to be achieved in the best way possible and favours innovation. Where reference is made to a European standard or, in the absence thereof, to a national standard, tenders based on other equivalent arrangements which meet the requirements of the contracting entities and are equivalent in terms of safety must be considered by the contracting entities. To demonstrate equivalence, tenderers can be required to provide third-party verified evidence; however, other appropriate means of proof such as a technical dossier of the manufacturer should also be allowed where the economic operator concerned has no access to such certificates or test

reports, or no possibility of obtaining them within the relevant time limits. ***In order not to discriminate against tenderers who invest time and money for certificates or test reports, the burden to provide equivalence should be placed on the tenderer claiming equivalence.***

## **Amendment 24**

### **Proposal for a directive Recital 36**

#### *Text proposed by the Commission*

(36) Contracting entities that wish to purchase works, supplies or services with specific environmental, social or other characteristics should be able to refer to particular labels, such as the European Eco-label, (multi-) national eco-labels or any other label provided that the requirements for the label are linked to the subject-matter of the contract, such as the description of the product and its presentation, including packaging requirements. It is furthermore essential that those requirements are drawn up and adopted on the basis of objectively verifiable criteria, using a procedure in which stakeholders, such as government bodies, consumers, manufacturers, distributors ***and*** environmental organisations can participate, and that the label is accessible and available to all interested parties.

#### *Amendment*

(36) Contracting entities that wish to purchase works, supplies or services with specific environmental, social or other characteristics should be able to refer to particular labels ***or certificates***, such as the European Eco-label, (multi-) national eco-labels or any other label ***or certificate*** provided that the requirements for the label are linked to the subject-matter of the contract, such as the description of the product and its presentation, including packaging requirements. It is furthermore essential that those requirements are drawn up and adopted on the basis of objectively verifiable criteria, using a procedure in which stakeholders, such as government bodies, consumers, manufacturers, distributors ***and social partners***, environmental organisations can participate, and that the label is accessible and available to all interested parties.

## **Amendment 25**

### **Proposal for a directive Recital 37 a (new)**

#### *Text proposed by the Commission*

#### *Amendment*

***(37a) For all procurement it is necessary that contracting authorities ensure that the products, services and works subject to the contract meet the requirements of data***

*protection law. In order to ensure and demonstrate the protection of the rights and freedoms of data subjects with regard to the processing of personal data, tenderers should adopt internal policies and implement appropriate technical and organisational measures at the time of the design of the processing of personal data (data protection by design).*

## Amendment 26

### Proposal for a directive

#### Recital 38

*Text proposed by the Commission*

(38) In order to encourage the involvement of *small and medium-sized enterprises* (SMEs) in the procurement market, *it should be provided explicitly that contracts may be divided* into lots, *whether homogenous or heterogeneous*. Where contracts are divided into lots, contracting entities may, for instance in order to preserve competition or to ensure security of supply, limit the number of lots for which an economic operator may tender; they may also limit the number of lots that may be awarded to any one tenderer.

*Amendment*

(38) *Public procurement should be adapted to the needs of small and medium-sized enterprises (SMEs). Contracting entities should make use of the Code of Best Practices set out in the Commission Staff Working Document of 25 June 2008 entitled ‘European Code of Best Practices Facilitating Access by SMEs to Public Procurement Contracts’<sup>1</sup> providing guidance on how they may apply the public procurement framework in a way that facilitates SME participation.* In order to encourage the involvement of SMEs in the procurement market, *and to enhance competition, contracting entities should be encouraged in particular to give consideration to dividing* contracts into lots, *especially for products that require quality for welfare, such as food for passive consumers in hospitals, schools, care for children and older people*. Where contracts are divided into lots, contracting entities may, for instance in order to preserve competition or to ensure security of supply, limit the number of lots for which an economic operator may tender; they may also limit the number of lots that may be awarded to any one tenderer..

**Amendment 27**

**Proposal for a directive  
Recital 39 a (new)**

*Text proposed by the Commission*

*Amendment*

***(39a) Member States should adopt measures to promote the access of SMEs to public procurement, in particular through improved information and guidance on tendering and on the new opportunities offered by the modernised Union legal framework, and to foster the exchange of best practice and the organisation of training and events involving contracting entities and SMEs.***

**Amendment 28**

**Proposal for a directive  
Recital 40**

*Text proposed by the Commission*

*Amendment*

(40) Public contracts should not be awarded to economic operators that have participated in a criminal organisation or have been found guilty of corruption, fraud to the detriment of the Union's financial interests or money laundering. Non-payment of taxes or social security contributions should also be sanctioned by mandatory exclusion at the level of the Union. Given that contracting entities, which are not contracting authorities, might not have access to indisputable proof on the matter, it is appropriate to leave the choice of whether or not to apply the exclusion criteria listed in Directive [2004/18] to such contracting entities. The obligation to apply Article 55(1) and (2) of Directive [2004/18] should therefore be limited to contracting entities that are

(40) Public contracts should not be awarded to economic operators that have participated in a criminal organisation, ***in exploitation of human trafficking and child labour*** or have been found guilty of corruption, fraud to the detriment of the Union's financial interests or money laundering. Non-payment of taxes or social security contributions should also be sanctioned by mandatory exclusion at the level of the Union. Given that contracting entities, which are not contracting authorities, might not have access to indisputable proof on the matter, it is appropriate to leave the choice of whether or not to apply the exclusion criteria listed in Directive [2004/18] to such contracting entities. The obligation to apply Article 55(1) and (2) of Directive [2004/18] should

contracting authorities. Furthermore, contracting entities should be given the possibility to exclude candidates or tenderers for violations of environmental *or* social *obligations, including rules on accessibility for disabled persons or other forms of grave professional misconduct, such as violations of competition rules* or of intellectual property rights.

therefore be limited to contracting entities that are contracting authorities. Furthermore, contracting entities should be given the possibility to exclude candidates or tenderers for violations of environmental, social *or labour law provisions referred to in the general principles of this Directive*.

## Amendment 29

### Proposal for a directive Recital 41

#### *Text proposed by the Commission*

(41) Where contracting entities are obliged or choose to apply the *just mentioned* exclusion criteria, they should apply Directive [2004/18] concerning the possibility that economic operators adopt compliance measures aimed at remedying the consequences of any criminal offences or misconduct and at effectively preventing further occurrences of the misbehaviour.

#### *Amendment*

(41) Where contracting entities are obliged or choose to apply the exclusion criteria *mentioned above*, they should apply Directive [2004/18] concerning the possibility that economic operators adopt compliance measures aimed at remedying the consequences of any criminal offences or misconduct and at effectively preventing further occurrences of the misbehaviour.

## Amendment 30

### Proposal for a directive Recital 43

#### *Text proposed by the Commission*

(43) Contracts should be awarded on the basis of objective criteria that ensure compliance with the principles of transparency, non-discrimination and equal treatment. Those criteria should guarantee that tenders are assessed in conditions of effective competition, also where contracting entities require high-quality works, supplies and services that are optimally suited to their needs. As a result, contracting entities should be allowed to adopt as award criteria *either* 'the most economically advantageous tender' *or* 'the

#### *Amendment*

(43) Contracts should be awarded on the basis of objective criteria that ensure compliance with the principles of transparency, non-discrimination and equal treatment. Those criteria should guarantee that tenders are assessed in conditions of effective competition, also where contracting entities require high-quality works, supplies and services that are optimally suited to their needs. As a result, contracting entities should be allowed to adopt as award criteria 'the most economically advantageous tender', taking

lowest cost', taking into account that *in the latter case they are free to set adequate* quality standards by using technical specifications or contract performance conditions.

into account that *it should refer to* quality *and sustainability* standards by using technical specifications or contract performance conditions.

**Amendment 31**  
**Proposal for a directive**  
**Recital 44**

*Text proposed by the Commission*

(44) *Where* contracting entities *choose to award* a contract *to* the most economically advantageous tender, *they* must determine the award criteria on the basis of which they will assess tenders in order to identify which one offers the best value for money. The determination of *these* criteria depends on the subject-matter of the contract since they must allow the level of performance offered by each tender to be assessed in the light of the subject-matter of the contract, as defined in the technical specifications, and the value for money of each tender to be measured. Furthermore, the chosen award criteria should not confer an unrestricted freedom of choice on the contracting entity and they should ensure the possibility of effective competition and be accompanied by requirements that allow the information provided by the tenderers to be effectively verified.

*Amendment*

(44) Contracting entities *awarding* a contract *on the basis of* the most economically advantageous tender *criterion*, they must determine the award criteria on the basis of which they will assess tenders in order to identify which one offers the best value for money. The determination of *those* criteria, *which may include economic, environmental and social characteristics*, depends on the subject-matter of the contract since they must allow the level of performance offered by each tender to be assessed in the light of the subject-matter of the contract, as defined in the technical specifications, and the value for money of each tender to be measured. Furthermore, the chosen award criteria should not confer an unrestricted freedom of choice on the contracting entity and they should ensure the possibility of effective *and fair* competition and be accompanied by requirements that allow the information provided by the tenderers to be effectively verified.

**Amendment 32**  
**Proposal for a directive**  
**Recital 45**

*Text proposed by the Commission*

(45) *It is of utmost importance to fully* exploit the potential of public procurement

*Amendment*

(45) *Efforts should be made* to exploit the potential of public procurement to achieve

to achieve the objectives of the Europe 2020 Strategy for sustainable growth. In view of the important differences between individual sectors and markets, it would however not be appropriate to set general mandatory requirements for environmental, social and innovation procurement. The Union legislature has already set mandatory procurement requirements for obtaining specific goals in the sectors of road transport vehicles (Directive 2009/33/EC of the European Parliament and the Council of 23 April 2009 on the promotion of clean and energy-efficient road transport vehicles) and office equipment (Regulation (EC) No 106/2008 of the European Parliament and the Council of 15 January 2008 on a Community energy-efficiency labelling programme for office equipment). In addition, the definition of common methodologies for life cycle costing has significantly advanced. It therefore appears appropriate to continue on that path, leaving it to sector-specific legislation to set mandatory objectives and targets in function of the particular policies and conditions prevailing in the relevant sector and to promote the development and use of European approaches to life-cycle costing as a further underpinning for the use of public procurement in support of sustainable growth.

the objectives of the Europe 2020 Strategy for sustainable growth, *without encroaching upon the powers of the contracting entities*. In view of the important differences between individual sectors and markets, it would however not be appropriate to set general mandatory requirements for environmental, social and innovation procurement. The Union legislature has already set mandatory procurement requirements for obtaining specific goals in the sectors of road transport vehicles (Directive 2009/33/EC of the European Parliament and the Council of 23 April 2009 on the promotion of clean and energy-efficient road transport vehicles) and office equipment (Regulation (EC) No 106/2008 of the European Parliament and the Council of 15 January 2008 on a Community energy-efficiency labelling programme for office equipment). In addition, the definition of common methodologies for life cycle costing has significantly advanced. It therefore appears appropriate to continue on that path, leaving it to sector-specific legislation to set mandatory objectives and targets in function of the particular policies and conditions prevailing in the relevant sector and to promote the development and use of European approaches to life-cycle costing as a further underpinning for the use of public procurement in support of sustainable growth.

### **Amendment 33**

#### **Proposal for a directive**

#### **Recital 46**

##### *Text proposed by the Commission*

(46) Those sector-specific measures must be complemented by an adaptation of the public procurement Directives empowering contracting entities to pursue the objectives of the Europe 2020 Strategy in their purchasing strategies. It should hence be

##### *Amendment*

(46) Those sector-specific measures must be complemented by an adaptation of the public procurement Directives empowering contracting entities to pursue the objectives of the Europe 2020 Strategy in their purchasing strategies. It should hence be

made clear that contracting entities can determine the most economically advantageous tender **and the lowest cost** using a life-cycle costing approach, provided that the methodology to be used is established in an objective and non-discriminatory manner and accessible to all interested parties. The notion of life-cycle costing includes all costs over the life-cycle of a works, supplies or services, both their internal costs (such as development, production, use, maintenance and end-of-life disposal costs) and their external costs, provided they can be monetised and monitored. ***Common methodologies should be developed at the level of the Union for the calculation of life-cycle costs for specific categories of supplies or services; whenever such a methodology is developed its use should be made compulsory.***

made clear that contracting entities can determine the most economically advantageous tender using a life-cycle costing approach, provided that the methodology to be used is established in an objective and non-discriminatory manner and accessible to all interested parties. The notion of life-cycle costing includes all costs over the life-cycle of a works, supplies or services, both their internal costs (such as **research**, development, production, **transport** use, maintenance and end-of-life disposal costs) and their external costs, provided they can be monetised and monitored.

#### *Justification*

*Contracting authorities should be encouraged to consider lifecycle costs. However the development of the calculation method is still experiencing problems. An obligation to use the EU method is far too ambitious further more European legislation on public procurement sets minimum requirements, contracting authorities may go further in their requirements as long as they comply with the Treaty principles and the specific requirements for award criteria.*

#### **Amendment 34**

##### **Proposal for a directive**

##### **Recital 47**

###### *Text proposed by the Commission*

(47) Furthermore, in technical specifications **and** in award criteria, contracting entities should be allowed to refer to a specific production process, a specific mode of provision of services, or a specific process for any other stage of the life-cycle of a product or service, provided that they are linked to the subject-matter of the contract. In order to better integrate social considerations in public procurement, procurers may **also be**

###### *Amendment*

(47) Furthermore, in technical specifications, in award criteria **and in contract performance clauses**, contracting entities should be allowed to refer to a specific production process **including for example social and environmental aspects**, a specific mode of provision of services, or a specific process for any other stage of the life-cycle of a product or service, provided that they are linked to the subject-matter of the contract. In order to

*allowed to* include, in the award *criterion of the most economically advantageous tender* characteristics related to the working conditions of the persons directly participating in the process of production or provision in question. Those characteristics may *only* concern the protection of health of the staff involved in the production process or the favouring of social integration of disadvantaged persons or members of vulnerable groups amongst the persons assigned to performing the contract, including accessibility for persons with disabilities. Any award criteria which include those characteristics should in any event remain limited to characteristics that have immediate consequences on staff members in their working environment. They should be applied in accordance with Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services and in a way that does not discriminate directly or indirectly against economic operators from other Member States or from third countries parties to the Agreement or to Free Trade Agreements to which the Union is party.

better integrate social considerations in public procurement, procurers may include, in the award *criteria and in contract performance clauses*, characteristics related to the working, *employment and environmental* conditions *and require the production of certificates or labels drawn up by independent bodies attesting compliance by the economic operator with rules and standards set in those fields, which apply where the works are executed, services provided or goods produced or supplied, as set out in international conventions and in Union and national law as well as in collective agreements concluded in accordance with national law and practices which respect Union law*.. Those characteristics may concern *among others* the protection of health of the staff involved in the production process or the favouring of social integration of disadvantaged persons or members of vulnerable groups amongst the persons assigned to performing the contract, including accessibility for persons with disabilities. Any award criteria which include those characteristics should in any event remain limited to characteristics that have immediate consequences on staff members in their working environment. They should be applied in accordance with Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services and in a way that does not discriminate directly or indirectly against economic operators from other Member States or from third countries parties to the Agreement or to Free Trade Agreements to which the Union is party.

## **Amendment 35**

### **Proposal for a directive Recital 47 a (new)**

***(47a) Taking into account the recent case law of the Court of Justice of the European Union, contracting entities should be permitted to choose an award criterion which refers to the fact that the product concerned is of fair trade origin, including the requirement to pay a minimum price and price premium to producers.***

**Amendment 36**  
**Proposal for a directive**  
**Recital 49**

*Text proposed by the Commission*

*Amendment*

(49) Tenders that appear abnormally low in relation to the works, supplies or services might be based on technically, economically or legally unsound assumptions or practices. In order to prevent possible disadvantages during contract performance, contracting entities should be obliged to ask for an explanation of the price charged where a tender significantly undercuts the prices demanded by other tenderers. Where the tenderer cannot provide a sufficient explanation, the contracting entity should be entitled to reject the tender. Rejection should be mandatory in cases where the contracting entity has established that the abnormally low price results from non-compliance with mandatory Union legislation in the fields of social, labour or environmental law *or international labour law* provisions.

(49) Tenders that appear abnormally low in relation to the works, supplies or services might be based on technically, economically or legally unsound assumptions or practices. In order to prevent possible disadvantages during contract performance, contracting entities should be obliged to ask for an explanation of the price charged where a tender significantly undercuts the prices demanded by other tenderers. Where the tenderer cannot provide a sufficient explanation, the contracting entity should be entitled to reject the tender. Rejection should be mandatory in cases where the contracting entity has established that the abnormally low price results from non-compliance with mandatory Union legislation in the fields of social, labour or environmental law provisions *referred to in the general principles of this Directive*.

**Amendment 37**  
**Proposal for a directive**  
**Recital 50**

*Text proposed by the Commission*

(50) Contract performance conditions are compatible with this Directive provided that they are not directly or indirectly discriminatory, are linked to the subject-matter of the contract and are indicated in the notice used to make the call for competition, or in the procurement documents. They may, in particular, be intended to favour on-site vocational training, the employment of people experiencing particular difficulty in achieving integration, the fight against unemployment, protection of the environment or animal welfare. For example, mention may be made of the requirements applicable during the performance of the contract to recruit long-term job-seekers or to implement training measures for the unemployed or young persons, to comply in substance with fundamental International Labour Organisation (ILO) Conventions, even where such Conventions have not been implemented in national law, and to recruit more disadvantaged persons than are required under national legislation.

*Amendment*

(50) Contract performance conditions are compatible with this Directive provided that they are not directly or indirectly discriminatory, are ***directly*** linked to the subject-matter of the contract ***and to the principle of the procurement related to compliance with environmental, social and labour law provisions*** and are indicated in the notice used to make the call for competition, or in the procurement documents. They may, in particular, be intended to favour on-site vocational ***or professional*** training, the employment of people experiencing particular difficulty in achieving integration, the fight against unemployment, protection of the environment or animal welfare. For example, mention may be made of the requirements applicable during the performance of the contract to recruit long-term job-seekers or to implement training measures for the unemployed or young persons, to comply in substance with fundamental International Labour Organisation (ILO) Conventions, even where such Conventions have not been implemented in national law, and to recruit more disadvantaged persons than are required under national legislation.

**Amendment 38**

**Proposal for a directive**  
**Recital 51**

*Text proposed by the Commission*

***(51) The laws, regulations and collective agreements, at both national and Union level, that are in force in the areas of employment conditions and safety at work apply during the performance of a contract, provided that such rules, and their application, comply with Union law. In cross-border situations where workers***

*Amendment*

***(51) Member State should ensure that economic operators comply with the environmental, social and labour law provisions which apply at the place where the works are executed, services provided or goods produced or supplied, as set out in international conventions listed in Annex XIV and in Union and national***

from one Member State provide services in another Member State for the purpose of performing a contract, Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services lays down the minimum conditions that must be observed by the host country in respect of such posted workers. Where national law contains provisions to this effect, non-compliance with those obligations **may** be considered to be grave misconduct on the part of the economic operator concerned, **liable to** lead to the exclusion of that economic operator from the procedure for the award of a public contract.

**law as well as in collective agreements concluded in accordance with national law and practices which respect Union law.** In cross-border situations where workers from one Member State provide services in another Member State for the purpose of performing a contract, Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services lays down the minimum conditions that must be observed by the host country in respect of such posted workers. Where national law contains provisions to this effect, non-compliance with those obligations **should** be considered to be grave misconduct on the part of the economic operator concerned, **which may** lead to the exclusion of that economic operator from the procedure for the award of a public contract.

#### **Amendment 39**

##### **Proposal for a directive Recital 56 a (new)**

*Text proposed by the Commission*

*Amendment*

***(56a) Contracting entities should respect time-limits for payment as provided for in Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions<sup>1</sup>.***

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***1 OJ. L 48, 23.2.2011, p. 1***

#### **Amendment 40**

##### **Proposal for a directive Recital 57**

*Text proposed by the Commission*

*Amendment*

(57) The evaluation has shown that ***Member States do not consistently and systematically monitor the implementation and the functioning of public procurement rules. This has a negative impact on the correct implementation of provisions stemming from those directives, which is a major source of cost and uncertainty. Several Member States have appointed a national central body dealing with public procurement issues, but the functions that such bodies are empowered with vary considerably across Member States. Clearer, more consistent and authoritative monitoring and control mechanisms would increase knowledge of the functioning of procurement rules, legal certainty for businesses and contracting entities, and contribute to establish a level playing field. Such mechanisms could serve as tools for detection and early resolution of problems, especially with regard to projects cofunded by the Union, and for the identification of structural deficiencies. There is in particular a strong need to coordinate those mechanisms to ensure consistent application, controls and monitoring of public procurement policy, as well as systematic assessment of the outcomes of procurement policy across the Union.***

(57) The evaluation has shown that ***there is still considerable room for improvement in the application of the Union public procurement rules. With a view to ensuring a more efficient and consistent application of the rules, it is on the one hand essential to get a good overview on possible structural problems and general patterns in national procurement policies, in order to address possible problems in a more targeted way. Such an overview should be gained through appropriate monitoring, the results of which should be regularly published, in order to allow for an informed debate on possible improvements of procurement rules and practice. On the other hand, better guidance and assistance to contracting authorities and economic operators could also greatly contribute to enhancing the efficiency of public procurement, through better knowledge, increased legal certainty and professionalisation of procurement practices. Such guidance should be made available to contracting authorities and economic operators wherever it appears necessary, to ensure correct application of the rules. For that purpose, Member States should ensure that competent authorities or structures are in charge of monitoring, implementation and control of public procurement.***

**Amendment 41**

**Proposal for a directive  
Recital 58**

*Text proposed by the Commission*

*Amendment*

***(58) Member States should designate a single national authority in charge of monitoring, implementation and control of public procurement. Such a central***

***deleted***

*body should have first hand and timely information particularly in relation to different problems affecting the implementation of public procurement law. It should be able to provide immediate feedback on the functioning of the policy, the potential weaknesses in national legislation and practice and contribute to the quick identification of solutions. In view of efficiently fighting corruption and fraud, this central body and the general public should also have the possibility to inspect the texts of concluded contracts. High-value contracts should hence be transmitted to the oversight body with a possibility of interested persons to have access to these documents, to the extent that legitimate public or private interests are not jeopardized.*

#### Amendment 42

#### Proposal for a directive

#### Recital 59

##### *Text proposed by the Commission*

(59) Not all contracting entities may have the internal expertise to deal with economically or technically complex contracts. Against this background, appropriate professional support **would be** an effective complement to monitoring and control activities. On the one hand, this objective can be achieved by knowledge sharing tools (knowledge centres) offering technical assistance to contracting entities; on the other hand, business, **not least** SMEs, should benefit from administrative assistance, in particular when participating in procurement procedures on a cross-border basis.

##### *Amendment*

(59) Not all contracting entities, **and particularly local authorities**, may have the internal expertise to deal with economically or technically complex contracts. Against this background, appropriate professional support **constitutes** an effective complement to monitoring and control activities. On the one hand, this objective can be achieved by knowledge sharing tools (knowledge centres) offering technical assistance to contracting entities; on the other hand, business, **and in particular** SMEs, should benefit from administrative assistance, in particular when participating in procurement procedures on a cross-border basis.

## Amendment 43

### Proposal for a directive Recital 59 a (new)

*Text proposed by the Commission*

*Amendment*

***(59a) Citizens, the stakeholders concerned, whether organised or not, and other persons or bodies which do not have access to review procedures pursuant to 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<sup>1</sup> nevertheless have a legitimate interest, as taxpayers, in sound procurement procedures. They should therefore be given the possibility to signal possible violations of this Directive to a competent authority or structure. So as to avoid duplication of existing authorities or structures, Member States should be able to provide for recourse to general monitoring authorities or structures, sectoral oversight bodies, municipal oversight authorities, competition authorities, the ombudsman or national auditing authorities.***

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*1 OJ L 395, 30.12.1989, p. 33.*

## Amendment 44

### Proposal for a directive Recital 60

*Text proposed by the Commission*

*Amendment*

***(60) Monitoring, oversight and support structures or mechanisms exist already at national level and can of course be used to ensure monitoring, implementation and control of public procurement and to provide the required support to***

***(60) Traceability and transparency of decision-making in procurement procedures is essential for ensuring sound procedures, including effectively fighting corruption and fraud. Contracting authorities should keep copies of***

*contracting entities and economic operators.*

*concluded high-value contracts to be able to provide access to those documents to interested parties in accordance with applicable rules on access to documentation. Furthermore, the essential elements and decisions of individual procurement procedures should be documented in a procurement report. To limit administrative burdens, the procurement report should refer to information already contained in the relevant contract award notices. The electronic systems for publication of those notices, managed by the Commission, should also be improved with a view to facilitating data entry while making it easier to extract reports and exchange data between systems.*

#### **Amendment 45**

##### **Proposal for a directive Recital 61**

*Text proposed by the Commission*

*Amendment*

*(61) Effective cooperation is necessary to ensure consistent advice and practice within each Member State and across the Union. Bodies designated for monitoring, implementation, control and technical assistance should be able to share information and cooperate; in the same context, the national authority designated by each Member State should act as the preferred contact point with the Commission services for the purpose of collecting data, exchanging information and monitoring the implementation of Union public procurement law.*

*deleted*

## Amendment 46

### Proposal for a directive Recital 61 a (new)

*Text proposed by the Commission*

*Amendment*

***(61a) The way this Directive is transposed is of utmost importance to the efforts of simplification, as well as to ensure a uniform approach to the interpretation and application of Union rules on public procurement, thus contributing to the necessary legal certainty required by contracting authorities, in particular at sub-central level, and by SMEs. The Commission and the Member States should therefore ensure that this Directive is transposed taking into account the major impact of the public procurement national legislation on the process of accessing Union funds. Therefore it is of utmost importance for the Member States to avoid as far as possible any fragmentation in interpretation and application, while also contributing to the simplification at national level.***

## Amendment 47

### Proposal for a directive Recital 63

*Text proposed by the Commission*

*Amendment*

(63) It is of particular importance that the Commission **carry** out appropriate consultations during its preparatory work, including at expert level. When preparing and drawing up delegated acts, the Commission should ensure simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and the Council.

(63) It is of particular importance that the Commission **carries** out appropriate consultations during its preparatory work, including at expert level. When preparing and drawing up delegated acts, the Commission should ensure simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and the Council. ***The Commission should provide full information and documentation on its meetings with national experts within the framework of the preparation and***

*implementation of delegated acts. In this respect, the Commission should ensure that the European Parliament is duly involved, drawing on best practices from previous experience in other policy areas in order to create the best possible conditions for future scrutiny of delegated acts by the European Parliament.*

## Amendment 48

### Proposal for a directive Recital 64

#### *Text proposed by the Commission*

(64) In order to ensure uniform conditions for the implementation of this Directive, as for the procedure for sending and publishing data referred to in Annex IX and the procedures for drawing up and transmitting notices, the standard forms for the publication of notices as well as of process and messaging standards ***and the common template to be used by the oversight bodies for drawing up the implementation and statistical report***, implementing powers should be conferred on the Commission. Those powers should be exercised in accordance with Regulation (EU) No. 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by the Member States of the Commission's exercise of implementing powers. The advisory procedure should be used for the adoption of those implementing acts, which do not have any impact either from the financial point of views or on the nature and scope of obligations stemming from this Directive. On the contrary, those acts are characterised by a mere administrative purpose and serve to facilitate the application of the rules set by this Directive. Furthermore, decisions to establish whether a given activity is

#### *Amendment*

(64) In order to ensure uniform conditions for the implementation of this Directive, as for the procedure for sending and publishing data referred to in Annex IX and the procedures for drawing up and transmitting notices, the standard forms for the publication of notices as well as of process and messaging standards, implementing powers should be conferred on the Commission. Those powers should be exercised in accordance with Regulation (EU) No. 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by the Member States of the Commission's exercise of implementing powers. The advisory procedure should be used for the adoption of those implementing acts, which do not have any impact either from the financial point of views or on the nature and scope of obligations stemming from this Directive. On the contrary, those acts are characterised by a mere administrative purpose and serve to facilitate the application of the rules set by this Directive. Furthermore, decisions to establish whether a given activity is directly exposed to competition on markets to which access is free should be adopted under conditions ensuring uniform

directly exposed to competition on markets to which access is free should be adopted under conditions ensuring uniform conditions for implementing that provision. Implementing powers should therefore be conferred on the Commission also in respect of the detailed provisions for the implementation of the procedure, provided for under Article 28, for establishing whether Article 27 is applicable as well as the Decisions themselves. Those powers should be exercised in accordance with Regulation (EU) 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by the Member States of the Commission's exercise of implementing powers. The advisory procedure should be used for the adoption of those implementing acts.

conditions for implementing that provision. Implementing powers should therefore be conferred on the Commission also in respect of the detailed provisions for the implementation of the procedure, provided for under Article 28, for establishing whether Article 27 is applicable as well as the Decisions themselves. Those powers should be exercised in accordance with Regulation (EU) 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by the Member States of the Commission's exercise of implementing powers. The advisory procedure should be used for the adoption of those implementing acts.

#### **Amendment 49**

##### **Proposal for a directive Article 1 – paragraph 2 – subparagraph 1**

*Text proposed by the Commission*

2. Procurement within the meaning of this Directive is the ***purchase or other forms of*** acquisition of works, supplies or services by one or more contracting entities from economic operators chosen by those contracting entities, provided that the works, supplies or services are intended for the pursuit of one of the activities referred to in Articles 5 to 11.

*Amendment*

2. Procurement within the meaning of this Directive is the acquisition of works, supplies or services by one or more contracting entities from economic operators chosen by those contracting entities, provided that the works, supplies or services are intended for the pursuit of one of the activities referred to in Articles 5 to 11.

#### **Amendment 50**

##### **Proposal for a directive Article 1 – paragraph 2 – subparagraph 2**

*Text proposed by the Commission*

***An entirety of works, supplies and/or services, even if purchased through***

*Amendment*

***deleted***

*different contracts, constitutes a single procurement within the meaning of this Directive, if the contracts are part of one single project.*

#### **Amendment 51**

##### **Proposal for a directive**

##### **Article 1 – paragraph 2 a (new)**

*Text proposed by the Commission*

*Amendment*

***2a. This Directive is without prejudice to the right of public authorities at all levels to decide whether, how and to what extent they want to perform public functions themselves pursuant to Article 14 TFEU and Protocol (No 26) on Services of General Interest.***

#### **Amendment 52**

##### **Proposal for a directive**

##### **Article 2 – point 4 – point a**

*Text proposed by the Commission*

*Amendment*

(a) they are established for or has the specific ***purpose of meeting needs in the general interest, not having an industrial or commercial character; for that purpose, a body which operates in normal market conditions, aims to make a profit, and bears the losses resulting from the exercise of its activity does not have the*** purpose of meeting needs in the general interest, not having an industrial or commercial character;

(a) they are established for or has the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;

#### **Amendment 53**

##### **Proposal for a directive**

##### **Article 2 – point 8 – point c**

*Text proposed by the Commission*

*Amendment*

(c) the realisation ***by whatever means*** of a

(c) the realisation of a work corresponding

work corresponding to the requirements specified by the contracting entity exercising a decisive influence on the type or design of the work;

to the requirements specified by the contracting entity exercising a decisive influence on the type or design of the work;

## Amendment 54

### Proposal for a directive Article 2 – point 15

#### *Text proposed by the Commission*

(15) ‘procurement documents’ means **all documents** produced or referred to by the contracting entity to describe or determine elements of the procurement or the procedure, including the contract notice, the prior information notice or the notices on the existence of a qualification system where they are used a means of calling for competition, the technical specifications, proposed conditions of contract, formats for the presentation of documents by candidates and tenderers, information on generally applicable obligations and any additional documents;

#### *Amendment*

(15) ‘procurement documents’ means **any document** produced or referred to by the contracting entity to describe or determine elements of the procurement or the procedure, including the contract notice, the prior information notice or the notices on the existence of a qualification system where they are used a means of calling for competition, the technical specifications, proposed conditions of contract, formats for the presentation of documents by candidates and tenderers, information on generally applicable obligations and any additional documents;

## Amendment 55

### Proposal for a directive Article 2 – point 22

#### *Text proposed by the Commission*

(22) ‘life cycle’ means all consecutive **and/or** interlinked stages, including production, transport, use and maintenance, **throughout the existence of a product or a works or the provision of a service**, from raw material acquisition or generation of resources to disposal, clearance and finalisation;

#### *Amendment*

(22) ‘life cycle’ means all consecutive or interlinked stages **throughout the existence of a product or a work or the provision of a service**, including **research, development**, production, transport, use and maintenance, from raw material acquisition or generation of resources to disposal, clearance and finalisation;

## Amendment 56

**Proposal for a directive**  
**Article 2 – point 23 a (new)**

*Text proposed by the Commission*

*Amendment*

***(23a) ‘innovation’ means the implementation of a new or significantly improved good, service or process, a new marketing method, or a new organisational method in business practices, workplace organisation or external relations that helps solve societal challenges or supports the Europe 2020 strategy for smart, sustainable and inclusive growth..***

**Amendment 57**

**Proposal for a directive**  
**Article 4 – paragraph 2 – subparagraph 1**

*Text proposed by the Commission*

*Amendment*

2. Rights which have been granted by means of a procedure in which adequate publicity has been ensured and where the granting of those rights was based on objective criteria shall not constitute "special or exclusive rights" within the meaning of point 6 of Article 2.

2. Rights which have been granted by means of a ***tender*** procedure in which adequate publicity has been ensured and where the granting of those rights was based on objective ***and non-discriminatory award*** criteria shall not constitute "special or exclusive rights" within the meaning of point 6 of Article 2.

**Amendment 58**

**Proposal for a directive**  
**Article 4 – paragraph 3 – point a**

*Text proposed by the Commission*

*Amendment*

(a) which are contracting authorities or public undertakings and which pursue one of the activities referred to in Articles 5 to 11;

(a) which are contracting authorities or public undertakings and which pursue one of the activities referred to in Articles 5 to 11 ***except in cases where the activity is pursued on the basis of rights which have been granted in accordance with paragraph 2 of this Article;***

## Amendment 59

### Proposal for a directive Article 5 – title

*Text proposed by the Commission*

Gas and *heat*

*Amendment*

Gas, *heating* and *cooling*

## Amendment 60

### Proposal for a directive Article 11 – title

*Text proposed by the Commission*

Extraction of oil and gas *and exploration for, or extraction of*, coal or other solid fuels

*Amendment*

Extraction *and exploration* of oil and gas, coal or other solid fuels

## Amendment 61

### Proposal for a directive Article 11 a (new)

*Texte proposé par la Commission*

*Amendement*

#### *Article 11a*

*Exemption from the application of this Directive with a view to protecting a commercial strategy*

*1. Whenever a procurement procedure is likely to reveal a commercial strategy which it would be detrimental to bring to the attention of competitors, the contracting entity may refer the matter to the competent authorities and structures referred to in Article 92 in order to obtain an exemption from the application of this Directive.*

*2. To this end, the contracting entity making the application shall present a duly motivated request to the competent authorities and structures referred to in*

*Article 92.*

*3. If the competent authorities or structures authorise the exemption in accordance with paragraph 1, this Directive shall not apply to the procurement procedure in question.*

**Amendment 62**

**Proposal for a directive**

**Article 14 – paragraph 1 – subparagraph 1**

*Text proposed by the Commission*

Every two years from 30 June 2014, the Commission shall verify that the thresholds set out in points (a) and (b) of Article 12 correspond to the thresholds established in the Government Procurement Agreement, and shall, where necessary, revise them.

*Amendment*

Every two years from 30 June 2014, the Commission shall verify that the thresholds set out in points (a) and (b) of Article 12 correspond to the thresholds established in the Government Procurement Agreement, and shall, where necessary **and after consulting the Member States on the application of the thresholds to certain sectors and types of contracts**, revise them.

**Amendment 63**

**Proposal for a directive**

**Article 15 – paragraph 2**

*Text proposed by the Commission*

2. The contracting entities shall notify the Commission **or the national oversight body at their request** of all the categories of products or activities which they regard as excluded under paragraph 1. The Commission may periodically publish in the Official Journal of the European Union, for information purposes, lists of the categories of products and activities which it considers to be covered by this exclusion. In so doing, the Commission shall respect any sensitive commercial aspects that the contracting entities may point out when forwarding information.

*Amendment*

2. The contracting entities shall notify the Commission of all the categories of products or activities which they regard as excluded under paragraph 1. The Commission may periodically publish in the Official Journal of the European Union, for information purposes, lists of the categories of products and activities which it considers to be covered by this exclusion. In so doing, the Commission shall respect any sensitive commercial aspects that the contracting entities may point out when forwarding information.

## Amendment 64

### Proposal for a directive Article 16 – paragraph 1

*Text proposed by the Commission*

1. This Directive shall not apply to contracts which the contracting entities award for purposes other than the pursuit of their activities as described in Articles 5 to 11 or for the pursuit of such activities in a third country, in conditions not involving the physical use of a network or geographical area within the Union nor shall it apply to design contests organised for such purposes.

*Amendment*

1. This Directive shall not apply to contracts which the contracting entities award for purposes other than the pursuit of their activities as described in Articles 5 to 11 **and are connected with utility activities**, or for the pursuit of such activities in a third country, in conditions not involving the physical use of a network or geographical area within the Union nor shall it apply to design contests organised for such purposes.

## Amendment 65

### Proposal for a directive Article 16 – paragraph 2

*Text proposed by the Commission*

2. The contracting entities shall notify the Commission **or the national oversight body at their request** of any activities which they regard as excluded under paragraph 1. The Commission may periodically publish in the Official Journal of the European Union for information purposes, lists of the categories of activities which it considers to be covered by this exclusion. In so doing, the Commission shall respect any sensitive commercial aspects that the contracting entities may point out when forwarding this information.

*Amendment*

2. The contracting entities shall notify the Commission **if so requested** of any activities which they regard as excluded under paragraph 1. The Commission may periodically publish in the Official Journal of the European Union for information purposes, lists of the categories of activities which it considers to be covered by this exclusion. In so doing, the Commission shall respect any sensitive commercial aspects that the contracting entities may point out when forwarding this information.

## Amendment 66

### Proposal for a directive Article 17 – paragraphs 1 and 2

1. In respect of contracts awarded and design contests organised in the fields of defence and security, this Directive shall not apply to:

(a) contracts *to* which *Directive 2009/81/EC applies*;

(b) contracts to *which Directive 2009/81/EC does not apply pursuant to Articles 8, 12 and 13 thereof*.

2. This Directive shall not apply to contracts and design contests other than those mentioned in the first paragraph to the extent that the protection of the essential security interests of a Member State cannot be guaranteed in an procurement procedure as provided for in Article 39(1).

1. In respect of contracts awarded and design contests organised in the fields of defence and security, this Directive shall not apply to:

(a) contracts *for* which *the application of the rules of this Directive would oblige a Member State to supply information the disclosure of which it considers contrary to the essential interests of its security, or contracts for which the procurement and performance of the contract is accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in a Member State where the Member State has determined that the essential interests concerned cannot be guaranteed by less intrusive measures as for instance those referred to in paragraph 2*;

(b) contracts *awarded in the framework of a cooperative programme referred to in point (c) of Article 13 of Directive 2009/81/EC*;

*(ba) contracts awarded by a government to another government relating to works and services directly linked to military equipment or sensitive equipment, or works and services specifically for military purposes, or sensitive works and sensitive services*;

*(bb) contracts awarded in a third country, carried out when forces are deployed outside the territory of the Union where operational needs require them to be concluded with economic operators located in the area of operations*.

2. This Directive shall not apply to public contracts and design contests other than those referred to in paragraph 1 to the extent that the protection of the essential security interests of a Member State cannot be guaranteed in a procurement procedure as provided for in this Directive *not otherwise exempted under paragraph 1, to the extent that the protection of the*

*essential security interests of a Member State cannot be guaranteed by less intrusive measures, for instance by imposing requirements aimed at protecting the confidential nature of information which the contracting authority makes available in a contract award procedure as provided for in this Directive.*

## **Amendment 67**

### **Proposal for a directive Article 19 – paragraph 1 – point b**

*Text proposed by the Commission*

(b) arbitration and conciliation services;

*Amendment*

(b) arbitration and conciliation services  
*and any of the following legal services:*

*(i) legal representation of a client in judicial or administrative proceedings before courts, tribunals or public authorities by a lawyer within the meaning of Article 1 of Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services<sup>1</sup>;*

*(ii) legal services provided by trustees, appointed guardians or other legal services the providers of which are designated by a court or tribunal in the Member State concerned;*

*(iii) legal services which in the Member State concerned are connected with the exercise of official authority;*

*(iv) certification and authentication of documents by notaries.*

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<sup>1</sup> OJ L 78, 26.3.1977, p. 17.

## **Amendment 68**

### **Proposal for a directive Article 19 – paragraph 1 – point c**

*Text proposed by the Commission*

(c) financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments within the meaning of Directive 2004/39/EC of the European Parliament and of the Council and operations conducted with the European Financial Stability Facility;

*Amendment*

(c) financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments within the meaning of Directive 2004/39/EC of the European Parliament and of the Council, ***or transactions by contracting authorities to raise money or capital, central bank services*** and operations conducted with the European Financial Stability Facility;

**Amendment 69**

**Proposal for a directive  
Article 19 – paragraph 1 – point e a (new)**

*Text proposed by the Commission*

*Amendment*

***(ea) civil defence, civil protection services and danger prevention ;***

**Amendment 70**

**Proposal for a directive  
Article 19 – paragraph 1 – point f**

*Text proposed by the Commission*

*Amendment*

(f) contracts for broadcasting ***time that are awarded to broadcasters.***

(f) contracts for broadcasting ***or distribution and transmission of media services; for the purposes of this Directive, ‘media services’ means all forms of transmission and distribution using any form of electronic network;***

**Amendment 71**

**Proposal for a directive  
Article 19 – paragraph 1 – point f a (new)**

*Text proposed by the Commission*

*Amendment*

*(fa) provision of international assistance, including development aid.*

#### **Amendment 72**

##### **Proposal for a directive Article 19 – paragraph 2**

*Text proposed by the Commission*

*Amendment*

*The broadcasting referred to in point (f) of the first paragraph shall include any transmission and distribution using any form of electronic network.*

*deleted*

#### **Amendment 73**

##### **Proposal for a directive Article 21 – title**

*Text proposed by the Commission*

*Amendment*

*Relations* between public authorities

*Cooperation* between public authorities

#### **Amendment 74**

##### **Proposal for a directive Article 21 – paragraph 1 – subparagraph 1 – point a**

*Text proposed by the Commission*

*Amendment*

(a) the contracting authority exercises over the legal person concerned a control which is similar to that which it exercises over its own departments;

(a) the contracting authority exercises over the legal person concerned a control which is similar to that which it exercises over its own departments, *that is to say it exerts a decisive influence over both strategic objectives and significant decisions of the controlled legal person;*

#### **Amendment 75**

##### **Proposal for a directive Article 21 – paragraph 1 – subparagraph 1 – point b**

*Text proposed by the Commission*

*Amendment*

(b) at least **90** % of the **activities** of that legal person are carried out for the controlling contracting authority or for other legal persons controlled by that contracting authority;

(b) at least **80** % of the **average total turnover** of that legal person are carried out for the controlling contracting authority or for other legal persons controlled by that contracting authority;

**Amendment 76**

**Proposal for a directive**

**Article 21 – paragraph 1 – subparagraph 1 – point c**

*Text proposed by the Commission*

*Amendment*

(c) there is no private participation in the controlled legal person.

(c) there is no private participation in the controlled legal person, **with the exception of non-controlling or legally enforced forms of private participation, in conformity with the Treaties, and which do not exert any influence on the decisions of the controlling contracting authority.**

**Amendment 77**

**Proposal for a directive**

**Article 21 – paragraph 1 – subparagraph 2**

*Text proposed by the Commission*

*Amendment*

***A contracting authority shall be deemed to exercise over a legal person a control similar to that which it exercises over its own departments within the meaning of point (a) of the first subparagraph where it exercises a decisive influence over both strategic objectives and significant decisions of the controlled legal person.***

***deleted***

*Justification*

*Point (a) of subparagraph 1 is clear enough - no repetition needed.*

**Amendment 78**

**Proposal for a directive**  
**Article 21 – paragraph 2**

*Text proposed by the Commission*

2. Paragraph 1 also applies where a controlled entity which is a contracting authority awards a contract to its controlling entity, or to another legal person controlled by the same contracting authority, provided that there is no private participation in the legal person being awarded the public contract.

*Amendment*

2. Paragraph 1 also applies where a controlled entity, **or entities**, which is/**are** (a) contracting authority/**authorities** award(s) a contract to its controlling entity, **or entities**, or to another legal person controlled by the same contracting authority, provided that there is no private participation in the legal person being awarded the public contract, **with the exception of non-controlling or legally enforced forms of private participation, in conformity with the Treaties, and which do not exert any influence on the decisions of the controlling contracting authority.**

**Amendment 79**

**Proposal for a directive**  
**Article 21 – paragraph 3 – subparagraph 1 – introductory part**

*Text proposed by the Commission*

3. A contracting authority, which does not exercise over a legal person control within the meaning of paragraph 1, may nevertheless award a contract **without applying this** Directive to a legal person which it controls jointly with other contracting authorities, where the following conditions are fulfilled:

*Amendment*

3, A contracting authority, which does not exercise over a legal person control within the meaning of **point (a)** paragraph 1 **of this Article**, may nevertheless award a contract **outside the scope of** this Directive to a legal person which it controls jointly with other contracting authorities, where the following conditions are fulfilled:

**Amendment 80**

**Proposal for a directive**  
**Article 21 – paragraph 3 – subparagraph 1 – point b**

*Text proposed by the Commission*

(b) at least **90** % of the **activities** of that legal person are carried out for the controlling contracting authorities or other

*Amendment*

(b) at least **80** % of the **average total turnover** of that legal person are carried out for the controlling contracting

legal persons controlled by the same contracting authorities;

authorities or other legal persons controlled by the same contracting authorities;

## Amendment 81

### Proposal for a directive

#### Article 21 – paragraph 3 – subparagraph 1 – point c

*Text proposed by the Commission*

*Amendment*

(c) there is no private participation in the controlled legal person.

(c) there is no private participation in the controlled legal person, ***with the exception of non-controlling or legally enforced forms of private participation, in conformity with the Treaties, and which do not exert any influence on the decisions of the controlling contracting authorities.***

## Amendment 82

### Proposal for a directive

#### Article 21 – paragraph 3 – subparagraph 2 – point a

*Text proposed by the Commission*

*Amendment*

(a) the decision-making bodies of the controlled legal person are composed of representatives of ***all*** participating contracting authorities;

(a) the decision-making bodies of the controlled legal person are composed of representatives of ***the*** participating contracting authorities, ***while one representative may represent one or many participating contracting authorities.***

## Amendment 83

### Proposal for a directive

#### Article 21 – paragraph 3 – subparagraph 2 – point c

*Text proposed by the Commission*

*Amendment*

(c) the controlled legal person does not pursue any interests which are ***distinct from*** that of the public authorities affiliated to it;

(c) the controlled legal person does not pursue any interests which are ***in conflict with*** that of the public authorities affiliated to it;

## Amendment 84

### Proposal for a directive

#### Article 21 – paragraph 3 – subparagraph 2 – point d

*Text proposed by the Commission*

*Amendment*

*(d) the controlled legal person does not draw any gains other than the reimbursement of actual costs from the public contracts with the contracting authorities.*

*deleted*

Amendment 85  
Proposal for a directive  
Article 21 – paragraph 4

*Text proposed by the Commission*

*Amendment*

4. An agreement concluded between two or more contracting authorities shall ***not be deemed to be a “works, supply or service contract” within the meaning of point 7 of Article 2*** of this Directive, where the following cumulative conditions are met:

4. An agreement concluded between two or more contracting authorities shall ***fall outside the scope*** of this Directive, where the following cumulative conditions are met:

(a) the agreement establishes a genuine co-operation between the participating contracting authorities aimed at carrying out jointly their public service tasks and involving mutual rights and obligations of the parties;

(a) the agreement establishes a genuine cooperation between the participating contracting authorities aimed at carrying out jointly their public service tasks and involving mutual rights and obligations of the parties ***for the purpose of the performance of a shared public service task or the pooling of resources in order to enable them to perform their own tasks;***

(b) the agreement is governed only by considerations relating to the public interest;

(b) the agreement is governed only by considerations relating to the public interest;

***(c) the participating contracting authorities do not perform on the open market more than 10% in terms of turnover of the activities which are relevant in the context of the agreement;***

***(d) the agreement does not involve financial transfers between the participating contracting authorities, other than those corresponding to the reimbursement of actual costs of the***

*works, services or supplies;*

(e) there is no private participation in any of the contracting authorities involved.

(c) there is no private participation in any of the contracting authorities involved ***with the exception of non-controlling or legally enforced forms of private participation in conformity with the Treaties, and which do not exert any influence on the decisions of the controlling contracting authorities.***

## **Amendment 86**

### **Proposal for a directive**

#### **Article 21 – paragraph 4 a (new)**

*Text proposed by the Commission*

*Amendment*

***4a. This Directive shall not apply to agreements, decisions or other legal instruments, concluded between several contracting authorities or groupings of contracting authorities, which make provision, in the context of the internal institutional and administrative organisation of a Member State and pursuant to applicable national law or regulation, for the transfer of powers or for the transfer of a public service task between the parties.***

***There shall be no private participation in any of the contracting authorities or entities involved.***

## **Amendment 87**

### **Proposal for a directive**

#### **Article 21 – paragraph 5 – subparagraph 2**

*Text proposed by the Commission*

*Amendment*

***The exclusions provided for in paragraphs 1 to 4 shall cease to apply from the moment any private participation takes place, with the effect that ongoing contracts need to be opened to competition through regular procurement procedures.***

***deleted***

## Amendment 88

### Proposal for a directive Article 22 – paragraphs 1 and 2

#### *Text proposed by the Commission*

1. For the purposes of this Article, ‘affiliated undertaking’ means any undertaking the annual accounts of which are consolidated with those of the contracting entity in accordance with the requirements of the Seventh Council Directive 83/349/EEC.

**2. In the case of entities not subject to that Directive, ‘affiliated undertaking’ shall mean any undertaking that:**

**(a) may be**, directly or indirectly, subject to a dominant influence by the contracting entity ***within the meaning of point (5) of Article 2 and Article 4(1) of this Directive;***

**(b) may exercise** a dominant influence over the contracting entity;

**(c)** in common with the contracting entity, is subject to the dominant influence of another undertaking by virtue of ownership, financial participation, or the rules which govern it.

#### *Amendment*

1. For the purposes of this Article, ‘affiliated undertaking’ means:

**(a)** any undertaking the annual accounts of which are consolidated with those of the contracting entity in accordance with the requirements of the Seventh Council Directive 83/349/EEC; **or**

**(b) any undertaking finding itself to be in any of the following situations:**

**(i) it is**, directly or indirectly, subject to a dominant influence by the contracting entity;

**(ii) it exercises** a dominant influence over the contracting entity; **or**

**(iii)** in common with the contracting entity, **it** is subject to the dominant influence of another undertaking by virtue of ownership, financial participation, or the rules which govern it.

***For the purposes of this Directive, the notion of ‘dominant influence’ is defined in point 5 of Article 2 and Article 4(1).***

## Amendment 89

### Proposal for a directive Article 22 – paragraph 3

#### *Text proposed by the Commission*

3. Article 21 notwithstanding and provided that the conditions in paragraph 4 are met, this Directive shall not apply to contracts awarded:

#### *Amendment*

3. Article 21 notwithstanding and provided that the conditions ***set out*** in paragraphs ***1 and 4 of this Article*** are met, this Directive shall not apply to contracts awarded:

- (a) by a contracting entity to an affiliated undertaking, or
- (b) by a joint venture, formed exclusively by **a number of** contracting entities for the purpose of carrying out activities within the meaning of Articles 5 to 11, to an undertaking which is affiliated with one of those contracting entities.

- (a) by a contracting entity to an affiliated undertaking, or
- (b) by a joint venture, formed exclusively by **two or more** contracting entities for the purpose of carrying out activities within the meaning of Articles 5 to 11, to an undertaking which is affiliated with one of those contracting entities.

## Amendment 90

### Proposal for a directive Article 22 – paragraph 4 – point a

#### *Text proposed by the Commission*

(a) to service contracts provided that at least 80% of the average total turnover of the affiliated undertaking **with respect to** services **in general for** the preceding three years derives from the provision of services to **undertakings** with which it is affiliated;

#### *Amendment*

(a) to service contracts provided that at least 80% of the average total turnover of the affiliated undertaking, **taking into account all** services **provided by that undertaking, over** the preceding three years derives from the provision of services to **the contracting entity** with which it is affiliated, **or to the contracting entity which is itself subject to the dominant influence of another undertaking with which the contractual partner is affiliated.**

## Amendment 91

### Proposal for a directive Article 22 – paragraph 4 – point b

#### *Text proposed by the Commission*

(b) to supply contracts provided that at least 80% of the average total turnover of the affiliated undertaking **with respect to** supplies **in general for** the preceding three years derives from the provision of supplies to **undertakings** with which it is affiliated;

#### *Amendment*

(b) to supply contracts provided that at least 80% of the average total turnover of the affiliated undertaking, **taking into account all** supplies **provided by that undertaking, over** the preceding three years derives from the provision of **those** supplies to **the contracting entity** with which it is affiliated, **or to the contracting entity which is itself subject to the dominant influence of another**

*undertaking with which the contractual partner is affiliated;*

## Amendment 92

### Proposal for a directive Article 22 – paragraph 4 – point c

*Text proposed by the Commission*

(c) to works contracts provided that at least 80% of the average total turnover of the affiliated undertaking *with respect to* works *in general* for the preceding three years derives from the provision of works to *undertakings* with which it is affiliated.

*Amendment*

(c) to works contracts provided that at least 80% of the average total turnover of the affiliated undertaking, *taking into account all works provided by that undertaking, over* the preceding three years derives from the provision of works to *the contracting entity* with which it is affiliated, *or to the contracting entity which is itself subject to the dominant influence of another undertaking with which the contractual partner is affiliated.*

## Amendment 93

### Proposal for a directive Article 22 – paragraph 5 – subparagraph 1

*Text proposed by the Commission*

5. When, because of the date on which an affiliated undertaking was created or commenced activities, the turnover is not available for the preceding three years, it will be sufficient for that undertaking to show that the turnover referred to in points (a), (b) or (c) of paragraph 4 is credible, particularly by means of business projections.

*Amendment*

5. When, because of the date on which an affiliated undertaking was created or commenced activities, the turnover is not available for the preceding three years, it will be sufficient for that undertaking to show that the *proportion of the average total* turnover referred to in points (a), (b) or (c) of paragraph 4 is credible, particularly by means of business projections.

*Where more than one undertaking affiliated with the contracting entity provides the same or similar services, supplies or works, the above percentages shall be calculated taking into account the total turnover deriving respectively from the provision of services, supplies or*

*works by those affiliated undertakings.*

**Amendment 94**  
**Proposal for a directive**  
**Article 24 – introductory part**

*Text proposed by the Commission*

Contracting entities shall notify to the Commission ***or the national oversight body, at their request***, the following information regarding the application of Article 22, paragraphs 2, 3 and Article 23:

*Amendment*

Contracting entities shall notify to the Commission the following information regarding the application of Article 22, paragraphs 2, 3 and Article 23:

**Amendment 95**  
**Proposal for a directive**  
**Article 27 – paragraph 1**

*Text proposed by the Commission*

1. Contracts intended to enable an activity mentioned in Articles 5 to 11 to be carried out shall not be subject to this Directive if the Member State or the contracting entities having introduced the request pursuant to Article 28 can demonstrate that, in the Member State in which it is performed, the activity is directly exposed to competition on markets to which access is not restricted; nor shall design contests that are organised for the pursuit of such an activity in that geographic area be subject to this Directive. Such competition assessment, which will be made in the light of the information available to the Commission and for the purposes of this Directive, is without prejudice to the application of competition law.

*Amendment*

1. Contracts intended to enable an activity mentioned in Articles 5 to 11 to be carried out shall not be subject to this Directive if the Member State or the contracting entities having introduced the request pursuant to Article 28 can demonstrate that, in the Member State in which it is performed, ***or in the related specific sectors or segments the*** activity is directly exposed to competition on markets to which access is not restricted; nor shall design contests that are organised for the pursuit of such an activity in that geographic area be subject to this Directive. Such competition assessment, which will be made in the light of the information available to the Commission and for the purposes of this Directive, is without prejudice to the application of competition law.

**Amendment 96**  
**Proposal for a directive**  
**Article 27 – paragraph 2 – subparagraph 1**

*Text proposed by the Commission*

2. For the purposes of paragraph 1, the question of whether an activity is directly exposed to competition shall be decided on the basis of criteria that are in conformity with the provisions on competition of the Treaty; those may include the characteristics of the goods or services concerned, the existence of alternative goods or services, the prices and the actual or potential presence of more than one supplier of the goods or provider of the services in question.

*Amendment*

2. For the purposes of paragraph 1 the question of whether an activity is directly exposed to competition ***requires that the relevant product market and the relevant geographic market be defined. The relevant product market*** shall be decided on the basis of criteria that are in conformity with the provisions on competition of the Treaty; those may include the characteristics of the goods or services concerned, the existence of alternative goods or services ***considered to be substitutable on the supply side or demand side***, the prices and the actual or potential presence of more than one supplier of the goods or provider of the services in question. ***The relevant geographic market, on the basis of which exposure to competition is assessed, shall consist of the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because, in particular, conditions of competition are appreciably different in those areas. That assessment shall take account in particular of the nature and characteristics of the products or services concerned, of the existence of entry barriers or of consumer preferences, of appreciable differences of the undertakings' market shares between the area concerned and neighbouring areas and of substantial price differences.***

**Amendment 97**  
**Proposal for a directive**  
**Article 27 – paragraph 3 – subparagraph 1**

*Text proposed by the Commission*

3. For the purposes of paragraph 1, access

*Amendment*

3. For the purposes of paragraph 1, access

to a market shall be deemed not to be restricted if the Member State has implemented and applied the Union legislation listed in Annex III.

to a market shall be deemed not to be restricted if the Member State has implemented and applied the Union legislation listed in Annex III *or, if the Member State has extended to the market concerned the application of principles established by the Union legislation listed in that Annex.*

## **Amendment 98**

### **Proposal for a directive Article 27 – paragraph 3 a (new)**

*Text proposed by the Commission*

*Amendment*

***3a. The protection of the intellectual property of the tenderers shall be ensured.***

## **Amendment 99**

### **Proposal for a directive Article 28 – paragraph 1 – subparagraph 1**

*Text proposed by the Commission*

*Amendment*

1. Where a Member State or, where the legislation of the Member State concerned provides for it, a contracting entity considers that, on the basis of the criteria set out in Article 27(2) and (3), a given activity is directly exposed to competition on markets to which access is not restricted, it may submit a request to establish that this Directive does not apply to the award of contracts or the organisation of design contests for the pursuit of that activity.

1. Where a Member State or, where the legislation of the Member State concerned provides for it, a contracting entity considers that, on the basis of the criteria set out in Article 27(2) and (3), a given activity is ***completely or partially, even with regard to single sectors or segments thereof***, directly exposed to competition on markets to which access is not restricted, it may submit a request to establish that this Directive does not apply to the award of contracts or the organisation of design contests for the pursuit of that activity ***or of a single sector or segment thereof.***

## **Amendment 100**

### **Proposal for a directive Article 28 – paragraph 1 – subparagraph 2**

*Text proposed by the Commission*

Requests shall be accompanied by a reasoned and substantiated position adopted by an independent national authority that is competent in relation to the activity concerned. This position shall thoroughly analyse the conditions for the possible applicability of Article 27(1) to the activity concerned in accordance with its paragraphs 2 and 3.

*Amendment*

Requests shall be accompanied by a reasoned and substantiated position adopted by an independent national authority that is competent in relation to the activity concerned, ***or the individual sector or segment thereof***. This position shall thoroughly analyse the conditions for the possible applicability of Article 27(1) to the activity concerned in accordance with its paragraphs 2 and 3.

**Amendment 101**  
**Proposal for a directive**  
**Article 28 – paragraph 2 – subparagraph 1**

*Text proposed by the Commission*

Upon request submitted in accordance with paragraph 1 of this Article, the Commission may, by way of an implementing decision adopted within the periods set out in paragraph 4 of this Article, establish whether an activity referred to in Articles 5 to 11 is directly exposed to competition on the basis of the criteria set out in Article 27. Those implementing decisions shall be adopted in accordance with the advisory procedure referred to in Article 100(2).

*Amendment*

Upon request submitted in accordance with paragraph 1 of this Article, the Commission may, by way of an implementing decision adopted within the periods set out in paragraph 4 of this Article, establish whether an activity, ***or of a single sector or segment thereof***, referred to in Articles 5 to 11 is directly exposed to competition on the basis of the criteria set out in Article 27. Those implementing decisions shall be adopted in accordance with the advisory procedure referred to in Article 100(2).

**Amendment 102**  
**Proposal for a directive**  
**Article 28 – paragraph 2 – subparagraph 2 – introductory part**

*Text proposed by the Commission*

Contracts intended to enable the activity concerned to be carried out and design contests that are organised for the pursuit of such an activity shall cease to be subject to this Directive in any of the following cases:

*Amendment*

Contracts intended to enable the activity concerned, ***or of a single sector or segment thereof***, to be carried out and design contests that are organised for the pursuit of such an activity, ***or of a single sector or segment thereof***, shall cease to be subject to this Directive in any of the

following cases:

**Amendment 103**  
**Proposal for a directive**  
**Article 28 – paragraph 4**

*Text proposed by the Commission*

4. Where an activity in a given Member State is already the subject of a procedure under paragraphs 1, 2 and 3, further requests concerning the same activity in the same Member State before the expiry of the period opened in respect of the first request shall not be considered as new procedures and shall be treated in the context of the first request.

*Amendment*

4. Where an activity, ***or an individual sector or segment thereof***, in a given Member State is already the subject of a procedure under paragraphs 1, 2 and 3, further requests concerning the same activity, ***or individual sector or segment thereof***, in the same Member State before the expiry of the period opened in respect of the first request shall not be considered as new procedures and shall be treated in the context of the first request.

**Amendment 104**

**Proposal for a directive**  
**Article 29**

*Text proposed by the Commission*

Contracting entities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate way.

The design of the procurement shall not be made with the objective of excluding it from the scope of this Directive or of artificially narrowing competition.

*Amendment*

***1.*** Contracting entities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate way.

The design of the procurement shall not be made with the objective of excluding it from the scope of this Directive or of artificially narrowing competition.

***2. Member States shall ensure that economic operators comply with the environmental, social and labour law provisions which apply at the place where the works are executed, services provided or goods produced or supplied, as set out in international conventions listed in Annex XIV and in Union and national law as well as in collective agreements concluded in accordance with national law and practices which respect Union***

*law.*

## **Amendment 105**

### **Proposal for a directive**

#### **Article 30 – paragraph 1 – subparagraph 2**

*Text proposed by the Commission*

However, in the case of service and works contracts as well as supply contracts covering in addition services or siting and installation operations, legal persons may be required to indicate, in the tender or the request to participate, the *names* and relevant professional *qualifications* of the staff responsible for the performance of the contract in question.

*Amendment*

However, in the case of service and works contracts as well as supply contracts covering in addition services or siting and installation operations, legal persons may be required to indicate, in the tender or the request to participate, the *number* and relevant professional *qualification levels* of the staff responsible for the performance of the contract in question.

## **Amendment 106**

### **Proposal for a directive**

#### **Article 30 – paragraph 2 – subparagraph 1 a (new)**

*Text proposed by the Commission*

*Amendment*

***Contracting entities shall give the possibility to a temporary association of economic operators to fulfil all technical, legal and financial requirements as a single entity, summing up the individual characteristics of the components of the group.***

## **Amendment 107**

### **Proposal for a directive**

#### **Article 32 – paragraph 2 a (new)**

*Text proposed by the Commission*

*Amendment*

***2a. This Article shall not prevent public disclosure of non-confidential parts of concluded contracts, including any subsequent changes.***

**Amendment 108**  
**Proposal for a directive**  
**Article 33 – paragraph 1 – subparagraph 1 – point c**

*Texte proposé par la Commission*

*Amendement*

*(c) telephone in the cases and circumstances referred to in paragraph 6;*

*deleted*

**Amendment 109**

**Proposal for a directive**  
**Article 33 – paragraph 3 – subparagraph 3**

*Text proposed by the Commission*

*Amendment*

To ensure the interoperability of technical formats as well as of process and messaging standards, especially in a cross-border context, the Commission ***shall be empowered to adopt delegated acts in accordance with Article 98 to establish the mandatory*** use of ***certain*** technical standards, at least with regard to the use of e-submission, electronic catalogues and means for electronic authentication.

To ensure the interoperability of technical formats as well as of process and messaging standards, especially in a cross-border context, the Commission ***may recommend the*** use of ***specific*** technical standards, at least with regard to the use of e-submission, electronic catalogues and means for electronic authentication.

*(This amendment applies throughout the text. Adopting it will necessitate corresponding changes throughout.)*

**Amendment 110**  
**Proposal for a directive**  
**Article 33 – paragraph 6 – subparagraph 1 – point a**

*Text proposed by the Commission*

*Amendment*

(a) requests to participate in procedures for the award of contracts may be made in writing ***or by telephone; in the latter case, a written confirmation must be sent before expiry of the time limit set for their receipt;***

(a) requests to participate in procedures for the award of contracts may be made in writing;

**Amendment 111**  
**Proposal for a directive**  
**Article 34 - subparagraph 1 a (new)**

*Text proposed by the Commission*

*Amendment*

***For works contracts above the threshold set out in Article 12, Member States may require the use by both contracting entities and tenderers of building information electronic modelling tools following the general timescales for the implementation of electronic procurement set out in the first subparagraph.***

**Amendment 112**

**Proposal for a directive**  
**Article 36 – paragraph 1 – subparagraph 1**

*Text proposed by the Commission*

*Amendment*

1. Member States shall, in respect of contracting authorities within the meaning of point 1 of Article 2, ***provide for rules*** to effectively prevent, identify and ***immediately*** remedy conflicts of interests arising in the conduct of procurement procedures ***that are subject to this Directive, including the design and preparation of the procedure, the drawing-up of the procurement documents, the selection of candidates and tenderers and the award of the contract,*** so as to avoid any distortion of competition and ensure equal treatment of all ***tenderers***.

1. Member States shall, in respect of contracting authorities within the meaning of point 1 of Article 2, ***put in place mechanisms*** to effectively prevent, identify and remedy conflicts of interests arising in the conduct of procurement procedures so as to avoid any distortion of competition and ensure equal treatment of all ***economic operators***.

**Amendment 113**

**Proposal for a directive**  
**Article 36 – paragraph 1 – subparagraph 2**

*Text proposed by the Commission*

*Amendment*

The ***notion of conflict*** of interests shall at least cover any situation where ***the***

The ***concept of conflicts*** of interests shall at least cover any situation where ***staff or***

*categories of persons referred to in paragraph 2 have, directly or indirectly, a private interest in the outcome of the procurement procedure, which may be perceived to impair the impartial and objective performance of their duties.*

*decision-making members of the contracting authority or of a procurement service provider acting on behalf of the contracting authority who are involved in the conduct of the procurement procedure or may influence the outcome of that procedure have, directly or indirectly, a financial, economic or other personal or common interest which may be perceived to compromise their impartiality and independence in the context of the procurement procedure.*

#### **Amendment 114**

##### **Proposal for a directive Article 36 – paragraph 1 – subparagraph 3**

*Text proposed by the Commission*

*Amendment*

*For the purposes of this Article, 'private interests' means any family, emotional life, economic, political or other shared interests with the candidates or the tenderers, including conflicting professional interests.*

*deleted*

#### **Amendment 115**

##### **Proposal for a directive Article 36 – paragraphs 2, 3 and 4**

*Text proposed by the Commission*

*Amendment*

*2. The rules referred to in paragraph 1 shall apply to conflicts of interests involving at least the following categories of persons:*

*deleted*

*(a) staff members of the contracting authority, procurement service providers or staff members of other service providers who are involved in the conduct of the procurement procedure;*

*(b) the chairperson of the contracting authority and members of decision-making bodies of the contracting*

*authority who, without necessarily being involved in the conduct of the procurement procedure, may nevertheless influence the outcome of that procedure.*

**3. Member States shall ensure in particular:**

*(a) that staff members referred to in paragraph 2(a) are required to disclose any conflict of interests in relation to any of the candidates or tenderers, as soon as they become aware of such conflicts, in order to enable the contracting authority to take remedial action;*

*(b) that candidates and tenderers, are required to submit at the beginning of the procurement procedure a declaration on the existence of any privileged links with the persons referred to in paragraph 2(b), which are likely to place those persons in a situation of conflict of interests; the contracting authority shall indicate in the individual report referred to in Article 85 whether any candidate or tenderer has submitted a declaration.*

*In the event of a conflict of interests, the contracting authority shall take appropriate measures. Those measures may include the recusal of the staff member in question from involvement in the affected procurement procedure or the re-assignment of the staff member's duties and responsibilities. Where a conflict of interests cannot be effectively remedied by other means, the candidate or tenderer concerned shall be excluded from the procedure.*

*Where privileged links are identified, the contracting authority shall immediately inform the oversight body designated in accordance with Article 84 and take appropriate measures to avoid any undue influence on the award process and ensure equal treatment of candidates and tenderers. Where the conflict of interests cannot be effectively remedied by other means, the candidate or tenderer concerned shall be excluded from the*

*procedure.*

**4. All measures taken pursuant to this Article shall be documented in the individual report referred to in Article 94.**

## **Amendment 116**

### **Proposal for a directive Article 38 – paragraph 1**

*Text proposed by the Commission*

1. As far as covered by Annexes III, IV and V and the General Notes to the European Union’s Appendix 1 to the Government Procurement Agreement and by the other international agreements by which the Union is bound, as listed in Annex V to this Directive, contracting entities within the meaning of Article 4(3)(a) shall accord to the works, supplies, services and economic operators of the signatories to those agreements treatment no less favourable than the treatment accorded to the works, supplies, services and economic operators of the Union. By applying this Directive to economic operators of the signatories to those agreements contracting entities shall comply with those agreements.

*Amendment*

1. As far as covered by Annexes III, IV and V and the General Notes to the European Union’s Appendix 1 to the Government Procurement Agreement and by the other international agreements by which the Union is bound — ***including the commitments entered into within the framework of bilateral trade agreements***, as listed in Annex V to this Directive, contracting entities within the meaning of Article 4(3)(a) shall accord to the works, supplies, services and economic operators of the signatories to those agreements treatment no less favourable than the treatment accorded to the works, supplies, services and economic operators of the Union. By applying this Directive to economic operators of the signatories to those agreements contracting entities shall comply with those agreements.

## **Amendment 117**

### **Proposal for a directive Article 39 – paragraph 1 – subparagraph 2**

*Text proposed by the Commission*

Member States shall provide that contracting entities may apply open or restricted procedures or negotiated procedures with prior call for competition as regulated in this Directive.

*Amendment*

Member States shall provide that contracting entities may apply open or restricted procedures or negotiated procedures with prior call for competition ***and innovation partnerships*** as regulated in this Directive.

## Amendment 118

### Proposal for a directive Article 40 – paragraph 3

*Text proposed by the Commission*

3. Where a state of urgency duly substantiated by the contracting entities renders impracticable the time limit laid down in the second subparagraph of paragraph 1, they may fix a time limit which shall be not less than **20 days** from the date on which the contract notice was sent.

*Amendment*

3. Where a state of urgency duly substantiated by the contracting entities renders impracticable the time limit laid down in the second subparagraph of paragraph 1, they may fix a time limit which shall be not less than **25 days** from the date on which the contract notice was sent.

***A state of urgency shall only result in a shorter time limit being set if it has not been brought about by the contracting entities themselves.***

## Amendment 119

### Proposal for a directive Article 42 – paragraph 2 – subparagraph 3 a (new)

*Text proposed by the Commission*

*Amendment*

***Contracting entities may not confine negotiations to the prices quoted in tenders.***

## Amendment 120

### Proposal for a directive Article 43 – paragraph 1

*Text proposed by the Commission*

*Amendment*

1. Member States ***may*** provide that contracting entities may apply innovation partnerships as regulated in this Directive. ***Member States may decide not to transpose into their national law innovation partnerships or to restrict the use of it to certain types of procurement.***

1. Member States ***shall*** provide that contracting entities may apply innovation partnerships as regulated in this Directive.

In innovation partnerships, any economic operator may submit a request to participate in response to a call for competition with a view to establishing a structured partnership for the development of an innovative product, service or works and the subsequent purchase of the resulting supplies, services or works provided that they correspond to the agreed performance levels and costs.

In innovation partnerships, any economic operator may submit a request to participate in response to a call for competition with a view to establishing a structured partnership for the development of an innovative product, service or works and the subsequent purchase of the resulting supplies, services or works provided that they correspond to the agreed performance levels and costs. ***The contract setting up the innovation partnership shall be awarded on the sole basis of the award criterion of the most economically advantageous tender in accordance with Article 76(1)(a).***

**Amendment 121**  
**Proposal for a directive**  
**Article 43 – paragraph 2**

*Text proposed by the Commission*

2. The partnership shall be structured in successive stages following the sequence of steps in the research and innovation process, ***possibly up to*** the manufacturing of the supply or the provision of the services. ***It shall provide for*** intermediate targets to be attained by the partner and provide for ***payment of the*** remuneration in appropriate instalments. Based on those targets, the contracting entity may decide after each stage to terminate the partnership and launch a new procurement procedure for the remaining phases, provided ***that it has acquired the relevant intellectual property rights.***

*Amendment*

2. The partnership shall be structured in successive stages following the sequence of steps in the research and innovation process, ***which may include*** the manufacturing of the supply or the provision of the services ***or the completion of the works.*** ***The partnership shall set*** intermediate targets to be attained by the partner and provide for remuneration in appropriate instalments. Based on those targets, the contracting entity may decide after each stage to terminate the partnership and launch a new procurement procedure for the remaining phases, provided ***the contracting entity has indicated in the procurement documents under which conditions it may make use of this discretion to terminate the partnership.***

**Amendment 122**  
**Proposal for a directive**  
**Article 43 – paragraph 3**

**3. The contract shall be awarded in accordance with the rules for a negotiated procedure with with prior call for competition set out in Article 42.**

**3. In the procurement documents, contracting entities shall describe the minimum requirements to be met and the award criteria. That description shall be sufficiently precise so as to enable economic operators to identify the nature and scope of the procurement and to decide whether to request to participate in the procedure.**

**The minimum time limit for receipt of requests to participate shall be 35 days from the date on which the contract notice, or, where a notice on the existence of a qualification system is used as a means of calling for competition, from the date on which the invitation to confirm interest is sent. The minimum time limit for the receipt of initial tenders shall be 35 days from the date on which the invitation is sent.**

**3a. Contracting entities shall negotiate with tenderers the initial and all subsequent tenders submitted, to improve the content to and ensure that those tenders better fulfil the award criteria specified in the procurement documents.**

**3b. During the negotiations, contracting entities shall ensure the equal treatment of all tenderers. To that end, they shall not provide information in a discriminatory manner which may give some tenderers an advantage over others. They shall inform all tenderers, whose tenders have not been eliminated pursuant to paragraph 3(e), in writing of any changes to procurement documents other than those setting out the minimum requirements. They shall provide such tenderers with sufficient time to allow them to modify and re-submit amended tenders following those changes.**

**3c. In accordance with Article 18, contracting entities shall not reveal to the other participants confidential**

*information communicated by a candidate participating in the negotiations without that candidate's agreement. Such agreement shall not take the form of a general waiver but shall be given with reference to the intended communication of specific information.*

*3d. The minimum requirements and the award criteria shall not be subject to negotiations.*

*Once the deadline for submitting tenders has expired, and prior to their examination, contracting entities may specify a relative weighting attached to the elements composing an award criterion defined in advance to determine the MEAT, in accordance with Article 76(4), provided that:*

*(a) the contract award criteria set out in the contract documents or the contract notice are unaltered;*

*(b) this does not include new elements which would have affected the preparation of the tenders; and*

*(c) this does not give rise to discrimination against any of the tenderers.*

*3e. Innovation partnership procedures may take place in successive stages in order to reduce the number of tenders to be negotiated, by applying the award criteria specified in the contract notice, in the invitation to confirm interest or in the procurement documents. In the contract notice, the invitation to confirm interest or in the procurement documents, the contracting entity shall clearly indicate whether it will use that option.*

*3f. In selecting candidates, contracting authorities shall pay particular attention to criteria concerning the **candidates'** capacity in the field of research and development or of developing innovative solutions. They may limit the number of suitable candidates to be invited to participate in the procedure in accordance*

In selecting candidates, contracting authorities shall pay particular attention to criteria concerning the **tenderers'** capacity **and experience** in the field of research and development or of developing innovative solutions. They may limit the number of suitable candidates to be invited to participate in the procedure in accordance

with Article 72(2).

Only those economic operators invited by the contracting entity following its assessment of the requested information may submit research and innovation projects aimed at meeting the needs identified by the contracting entity that cannot be met by existing solutions. ***The contract shall be awarded on the sole basis of the award criterion of the most economically advantageous tender in accordance with Article 76(1)(a).***

**Amendment 123**  
**Proposal for a directive**  
**Article 43 – paragraph 4**

*Text proposed by the Commission*

4. The structure of the partnership and, in particular, the duration and value of the different phases shall reflect the degree of innovation of the proposed solution and the sequence of the research and innovation activities required for the development of an innovative solution not yet available on the market. The value ***and duration of a contract for the purchase of the resulting supply, service or works shall remain within appropriate limits, taking into account the need to recover the costs, including those incurred in developing an innovative solution, and to achieve an adequate profit.***

***Contracting entities shall not use innovation partnerships in such a way as to prevent, restrict or distort competition.***

**Amendment 124**  
**Proposal for a directive**  
**Article 44 – paragraph 1 – point c**

*Text proposed by the Commission*

(c) where the aim of the procurement is the

with Article 72(2).

Only those economic operators invited by the contracting entity following its assessment of the requested information may submit research and innovation projects aimed at meeting the needs identified by the contracting entity that cannot be met by existing solutions.

*Amendment*

4. The ***contracting entities shall ensure that the*** structure of the partnership and, in particular, the duration and value of the different phases shall reflect the degree of innovation of the proposed solution and the sequence of the research and innovation activities required for the development of an innovative solution not yet available on the market. The ***estimated value of supplies, services or works shall not be disproportionate in relation to the investment required for their development.***

(c) where the aim of the procurement is the creation or obtention of a work of art ***or an***

creation or obtention of a work of art;

*artistic performance*;

## Amendment 125

### Proposal for a directive

#### Article 44 - paragraph 1 -point d – point iii

*Text proposed by the Commission*

(iii) the protection of other exclusive rights.

*Amendment*

(iii) the protection of other exclusive rights,  
*including ownership of a property site.*

## Amendment 126

### Proposal for a directive

#### Article 44 - paragraph 1 -point d – subparagraph 2

*Text proposed by the Commission*

This exception only applies when ***no reasonable alternative or substitute exists*** and the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement;

*Amendment*

This exception only applies when the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement;

## Amendment 127

### Proposal for a directive

#### Article 44 – paragraph 1 – point e

*Text proposed by the Commission*

(e) insofar as is strictly necessary where, for reasons of extreme urgency brought about by ***force majeure***, the time limits laid down for open procedures, restricted procedures and negotiated procedures with prior call for competition cannot be complied with. The circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting entity;

*Amendment*

(e) insofar as is strictly necessary where, for reasons of extreme urgency brought about by ***events unforeseeable by the contracting entity***, the time limits laid down for open procedures, restricted procedures and negotiated procedures with prior call for competition cannot be complied with. The circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting entity;

## Amendment 128

**Proposal for a directive**  
**Article 44 – paragraph 2 – point a**

*Text proposed by the Commission*

(a) it is irregular or unacceptable, **and**

*Amendment*

(a) it is irregular or unacceptable, **or**

**Amendment 129**

**Proposal for a directive**  
**Article 45 – paragraph 1 – subparagraph 3**

*Text proposed by the Commission*

The term of a framework agreement shall not exceed **four** years, *save in exceptional cases duly justified, in particular by the subject of the framework agreement.*

*Amendment*

The term of a framework agreement shall not exceed **five** years, *save in the following cases:*

*(a) the subject of the framework agreement concerns works or services that will take longer than five years to carry out; or*

*(b) economic operators need to make investments for which the amortisation period is longer than five years or which are linked to maintenance, the recruitment of suitable staff to perform the contract or the training of staff to perform the contract.*

*The term of a framework agreement shall be based on the lifecycle of the work, service or supply.*

**Amendment 130**

**Proposal for a directive**  
**Article 45 – paragraph 2 – subparagraph 4 a (new)**

*Text proposed by the Commission*

*Amendment*

*After conclusion of the framework agreement, the number of participating contracting authorities may only be increased where the following conditions are met:*

- (a) the framework agreement has been concluded by a central purchasing body;*
- (b) the possibility of such an increase is expressly provided for in the contract notice;*
- (c) the scope for the increase can be determined on the basis of clear criteria; and*
- (d) all parties to the framework agreement agree to the increase.*

### **Amendment 131**

#### **Proposal for a directive Article 46 – paragraph 1**

*Text proposed by the Commission*

1. For commonly used purchases, the characteristics of which, as generally available on the market, meet the requirements of the contracting entities, contracting entities may use a dynamic purchasing system. The dynamic purchasing system shall be operated as a completely electronic process, open throughout its validity to any economic operator that satisfies the selection criteria.

*Amendment*

1. For commonly used **goods and services** purchases the characteristics of which, as generally available on the market, meet the requirements of the contracting entities, contracting entities may use a dynamic purchasing system. The dynamic purchasing system shall be operated as a completely electronic process, open throughout its validity to any economic operator that satisfies the selection criteria.

### **Amendment 132**

#### **Proposal for a directive Article 46 – paragraph 3 - point a**

*Text proposed by the Commission*

(a) publish a call for competition making it clear that a dynamic purchasing system is involved;

*Amendment*

(a) publish a call for competition making it clear that a dynamic purchasing system is involved **and describe how the procedure operates;**

### **Amendment 133**

#### **Proposal for a directive Article 46 – paragraph 7**

*Text proposed by the Commission*

*Amendment*

7. No charges may be billed to the interested economic operators or to parties to the dynamic purchasing system.

7. No charges may be billed **during the award procedure** to the interested economic operators or to parties to the dynamic purchasing system.

**Amendment 134**

**Proposal for a directive  
Article 47 - paragraph 1**

*Text proposed by the Commission*

*Amendment*

1. Contracting entities may use electronic auctions, in which new prices, revised downwards, and/or new values concerning certain elements of tenders are presented.

1. **For commonly used goods and services**, contracting entities may use electronic auctions, in which new prices, revised downwards, and/or new values concerning certain elements of tenders are presented.

**Amendment 135**

**Proposal for a directive  
Article 47 – paragraph 3 - subparagraph 1**

*Text proposed by the Commission*

*Amendment*

3. The electronic auction shall be based on **one of the the following criteria:**

3. The electronic auction shall be based on **prices and/or on the new values of certain elements of the tenders indicated in the specifications.**

**(a) solely on prices where the contract is awarded to the tender offering the lowest cost;**

**(b) on prices and/or on the new values of the features of the tenders indicated in the specifications where the contract is awarded to the most economically advantageous tender.**

**Amendment 136**

**Proposal for a directive**  
**Article 47 – paragraph 5 - subparagraph 1**

*Text proposed by the Commission*

5. Before proceeding with an electronic auction, contracting entities shall make a full initial evaluation of the tenders in accordance with the award ***criterion or*** criteria and with the weighting fixed for them.

*Amendment*

5. Before proceeding with an electronic auction, contracting entities shall make a full initial evaluation of the tenders in accordance with the award criteria and with the weighting fixed for them.

**Amendment 137**

**Proposal for a directive**  
**Article 47 – paragraph 6 - subparagraph 1**

*Text proposed by the Commission*

6. ***Where the contract is to be awarded on the basis of the most economically advantageous tender,*** the invitation shall be accompanied by the outcome of a full evaluation of the relevant tenderer, carried out in accordance with the weighting provided for in the first subparagraph of Article 76(5).

*Amendment*

6. The invitation shall be accompanied by the outcome of a full evaluation of the relevant tenderer, carried out in accordance with the weighting provided for in the first subparagraph of Article 76(5).

**Amendment 138**

**Proposal for a directive**  
**Article 49 – paragraph 3 – subparagraph 1**

*Text proposed by the Commission*

3. A contracting entity fulfils its obligations pursuant to this Directive when it procures by having recourse to centralised purchasing activities, to the extent that the procurement procedures concerned and their performance are conducted by the central procurement body ***alone*** in all its stages from the publication of the call for competition to the end of the execution of the ensuing contract or

*Amendment*

3. A contracting entity fulfils its obligations pursuant to this Directive when it procures by having recourse to centralised purchasing activities, to the extent that the procurement procedures concerned and their performance are conducted by the central procurement body in all its stages from the publication of the call for competition to the end of the execution of the ensuing contract or

contracts.

contracts

### Amendment 139

#### Proposal for a directive Article 51 – paragraph 1

*Text proposed by the Commission*

1. **One** or more contracting entities may agree to perform certain specific procurements jointly.

*Amendment*

1. **Two** or more contracting entities may agree to perform certain specific procurements jointly.

### Amendment 140

#### Proposal for a directive Article 51 – paragraph 2 – subparagraph 1

*Text proposed by the Commission*

Where **one contracting entity alone conducts** the procurement **procedures concerned** in **all its stages from the publication of the call for competition to the end of the performance of the ensuing contract or contracts**, that contracting entity shall **have sole responsibility** for fulfilling the obligations pursuant to this Directive.

*Amendment*

Where the **conduct of a** procurement **procedure** in its **entirety is carried out jointly by** the contracting **entities concerned**, they shall **be jointly responsible** for fulfilling the obligations pursuant to this Directive. **Contracting entities shall be deemed to conduct an award procedure jointly where one contracting entity manages the procedure on both its own behalf and on that of the other contracting entities concerned.**

### Amendment 141

#### Proposal for a directive Article 52 – paragraph 3 – subparagraph 2

*Text proposed by the Commission*

When determining the applicable national law in accordance with point (a), contracting entities **may** choose the national provisions of any Member State in which at least one of the participating

*Amendment*

When determining the applicable national law in accordance with point (a), contracting entities **shall** choose the national provisions of any Member State in which at least one of the participating

entities is located.

entities is located.

#### **Amendment 142**

##### **Proposal for a directive**

##### **Article 52 – paragraph 5 – point c**

*Text proposed by the Commission*

*Amendment*

*(c) where it is not possible to determine the applicable national law pursuant to points (a) or (b), contracting entities shall apply the national provisions of the Member State of the contracting entity which bears the biggest share of the costs.*

*deleted*

#### **Amendment 143**

##### **Proposal for a directive**

##### **Article 53 – paragraph 1 – subparagraph 2**

*Text proposed by the Commission*

*Amendment*

For this purpose, contracting entities may seek or accept advice from administrative support structures or from third parties or market participants, *provided that such advice does not have the effect of precluding competition and does not result in a violation of the principles of non-discrimination and transparency.*

For this purpose, contracting entities may seek or accept advice from administrative support structures or from third parties or market participants.

#### **Amendment 144**

##### **Proposal for a directive**

##### **Article 53 – paragraph 2 – subparagraph 2 a (new)**

*Text proposed by the Commission*

*Amendment*

*Contracting entities shall:*

*(i) clarify in their invitation to participate in a market consultation what information will be considered relevant and thus may be shared with all potential bidders; and*

*(ii) set out in detail the rights of and procedures available to market consultation participants that allow them to protect confidential information.*

**Amendment 145**  
**Proposal for a directive**  
**Article 54 – paragraph 1 – subparagraph 1**

*Text proposed by the Commission*

The technical specifications as defined in point 1 of Annex VIII shall be set out in the procurement documents. They shall define the characteristics required of a works, service or supply.

*Amendment*

The technical specifications shall be set out in the procurement documents. They shall define the characteristics required of a works, service or supply ***provided that they are linked to the subject-matter of the contract and proportionate to its value and its objectives.***

**Amendment 146**  
**Proposal for a directive**  
**Article 54 – paragraph 1 – subparagraph 4 a (new)**

*Text proposed by the Commission*

*Amendment*

***For all procurements, technical specifications shall be drawn up so as to ensure that the products, services and works subject to the contract meet the requirements of data protection law at the time of the design of the processing of personal data (data protection by design).***

**Amendment 147**  
**Proposal for a directive**  
**Article 54 – paragraph 1 – subparagraph 5**

*Text proposed by the Commission*

Where mandatory accessibility standards are adopted by a legislative act of the Union, technical specifications shall, as far as accessibility criteria are concerned, be defined by reference thereto.

*Amendment*

Where mandatory accessibility, standards are adopted by a legislative act of the Union, technical specifications shall, as far as accessibility criteria ***for persons with disabilities or design for all users*** are concerned, be defined by reference thereto.

**Amendment 148**  
**Proposal for a directive**  
**Article 54 – paragraph 3 – point b**

*Text proposed by the Commission*

(b) by reference to technical specifications and, in order of preference, to national standards transposing European standards, European technical approvals, common technical specifications, international standards, other technical reference systems established by the European standardisation bodies or - when those do not exist - national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the supplies; each reference shall be accompanied by the words ‘or equivalent’;

*Amendment*

(b) by reference to technical specifications and, in order of preference, ***and without discrimination as to development method,*** to national standards transposing European standards, European technical approvals, common technical specifications, international standards, other technical reference systems established by the European standardisation bodies or - when those do not exist - national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the supplies; each reference shall be accompanied by the words ‘or equivalent’;

**Amendment 149**  
**Proposal for a directive**  
**Article 55 – title**

*Text proposed by the Commission*

Labels

*Amendment*

***Certificates and*** labels

**Amendment 150**

**Proposal for a directive**  
**Article 55 – paragraph 1 – subparagraph 1 – introductory part**

*Text proposed by the Commission*

1. Where contracting entities lay down environmental, social or other ***characteristics of a works, service or supply in terms of performance or functional*** requirements ***as referred to in point (a) of Article 54 paragraph 3,*** they may require that ***those*** works, supplies or

*Amendment*

1. Where contracting entities lay down environmental, social or other requirements ***or criteria in the technical specifications, the award criteria or the contract performance clauses,*** they may require ***a specific label or certificate as means of proof*** that ***these*** works, supplies or services

services *bear a specific label*, provided that all of the following conditions are fulfilled:

*correspond to such requirements or criteria* provided that all of the following conditions are fulfilled:

### Amendment 151

#### Proposal for a directive

#### Article 55 – paragraph 1 – subparagraph 1 – point a

*Text proposed by the Commission*

*Amendment*

(a) the requirements *for* the label *only concern characteristics which are linked to the subject-matter of the contract and* are appropriate to define the characteristics of the works, supplies or services that are the subject-matter of the contract;

(a) the requirements *to be met in order to obtain* the label *or the certificate* are appropriate to define the characteristics of the works, supplies or services that are the subject-matter of the contract;

### Amendment 152

#### Proposal for a directive

#### Article 55 – paragraph 1 – subparagraph 1 – point b

*Text proposed by the Commission*

*Amendment*

(b) the requirements *for* the label are drawn up on the basis of scientific information or based on other objectively verifiable and non-discriminatory criteria;

(b) the requirements *to be met in order to obtain* the label *or the certificate* are based on objectively verifiable and non-discriminatory criteria;

### Amendment 153

#### Proposal for a directive

#### Article 55 – paragraph 1 – subparagraph 1 – point c

*Text proposed by the Commission*

*Amendment*

(c) the labels are established in an open and transparent procedure in which all stakeholders, including *government bodies, consumers, manufacturers, distributors and environmental organisations may participate*,

(c) the labels *or certificates* are established in an open and transparent procedure in which all *relevant* stakeholders, including *government bodies and non-governmental organisations, have a substantial role*;

## Amendment 154

### Proposal for a directive

#### Article 55 – paragraph 1 – subparagraph 1 – point d - introductory part

*Text proposed by the Commission*

*Amendment*

(d) the labels are accessible to all interested parties;

(d) the labels **or certificates** are accessible to all interested parties;

## Amendment 155

### Proposal for a directive

#### Article 55 – paragraph 1 – subparagraph 1 – point e

*Text proposed by the Commission*

*Amendment*

(e) the **criteria of** the label are set by a third party which is independent from the economic operator applying for the label.

(e) the **requirements to be met in order to obtain** the label **or certificate** are set by a third party which is independent from the economic operator applying for the label **or certificate. The third party may be a specific national or government body or organisation**

## Amendment 156

### Proposal for a directive

#### Article 55 – paragraph 1 – subparagraph 2

*Text proposed by the Commission*

*Amendment*

Contracting entities requiring a specific label shall accept all equivalent labels that fulfil the requirements of the label indicated by the contracting entities. **For products that do not bear the label,** contracting entities shall also accept a technical dossier of the manufacturer or other appropriate means of proof.

Contracting entities requiring a specific label **or certificate** shall accept all equivalent labels that fulfil the requirements of the **specific** label **or certificate** indicated by the contracting entities. Contracting entities shall also accept **other appropriate means of proof for such requirements which may include** a technical dossier of the manufacturer **where the economic operator concerned has no access to the label, or no possibility of obtaining them within the relevant time limit, provided that the lack of access is not attributable to the economic operator concerned. It shall be the responsibility of the tenderer to prove equivalence with the**

*label requested.*

**Amendment 157**  
**Proposal for a directive**  
**Article 55 – paragraph 2**

*Text proposed by the Commission*

2. Where a label fulfils the conditions of provided in points (b), (c), (d) and (e) of paragraph 1 but also sets out requirements not linked to the subject-matter of the contract, contracting entities may use those of the detailed specifications of that label, or, if necessary, parts thereof, that are linked to the subject-matter of the contract and are appropriate to define characteristics of this subject-matter.

*Amendment*

2. Where a a label ***or certificate*** fulfils the conditions of provided in points (b), (c), (d) and (e) of paragraph 1 but also sets out requirements not linked to the subject-matter of the contract, contracting entities may use the detailed specifications of that label ***or certificate***, or, if necessary, parts thereof, that are linked to the subject-matter of the contract and are appropriate to define characteristics of this subject-matter.

**Amendment 158**

**Proposal for a directive**  
**Article 56 – paragraph 1 – subparagraph 1**

*Text proposed by the Commission*

1. Contracting entities may require that economic operators provide a test report from a recognised body or a certificate issued by such a body as means of proof of conformity with the technical specifications.

*Amendment*

1. Contracting entities may require that economic operators provide a test report from a recognised body or a certificate issued by such a body as means of proof of conformity with ***requirements or criteria set out in*** the technical specifications, ***the award criteria or the contract performance clauses***.

**Amendment 159**

**Proposal for a directive**  
**Article 56 – paragraph 1 – subparagraph 2**

*Text proposed by the Commission*

Where contracting entities require the submission of certificates drawn up by ***recognised bodies attesting*** conformity

*Amendment*

Where contracting entities require the submission of certificates drawn up by a ***specific conformity assessment body***,

*with a particular technical specification,* certificates from equivalent other recognised bodies shall also be accepted by the contracting entities.

certificates from equivalent other recognised bodies shall also be accepted by the contracting entities.

## Amendment 160

### Proposal for a directive Article 56 – paragraph 2

#### *Text proposed by the Commission*

2. Contracting entities shall accept other appropriate means of proof than those referred to in paragraph 1, *such as* a technical dossier of the manufacturer where the economic operator concerned has no access to such certificates or test reports referred to in paragraph 1, or no possibility of obtaining them within the relevant time limits.

#### *Amendment*

2. Contracting entities shall accept other appropriate ***and equivalent*** means of proof than those referred to in paragraph 1, ***which may include*** a technical dossier of the manufacturer where the economic operator concerned has no access to such certificates or test reports referred to in paragraph 1, or no possibility of obtaining them within the relevant time limits, ***provided that the lack of access is not attributable to the economic operator concerned. It shall be the responsibility of the tenderer to prove equivalence with the required test reports or certificates.***

## Amendment 161

### Proposal for a directive Article 56 – paragraph 4

#### *Text proposed by the Commission*

4. Member States shall make available to other Member States, upon request, any information related to the evidence and documents submitted in accordance with Article 54(6), Article 55 and paragraphs 1, 2 and 3 of this Article ***to prove compliance with technical requirements***. The competent authorities of the Member State of establishment shall provide this information in accordance with Article 96.

#### *Amendment*

4. Member States shall make available to other Member States, upon request, any information related to the evidence and documents submitted in accordance with Article 54(6), Article 55 and paragraphs 1, 2 and 3 of this Article. The competent authorities of the Member State of establishment ***of the economic operator*** shall provide this information in accordance with Article 96.

## Amendment 162

### Proposal for a directive Article 57 – paragraph 2

*Text proposed by the Commission*

2. Where the technical specifications are based on documents available by electronic means through **unrestricted and** full direct access free of charge to interested economic operators, the inclusion of a reference to those documents shall be sufficient.

*Amendment*

2. Where the technical specifications are based on documents available by electronic means through full direct access free of charge to interested economic operators, the inclusion of a reference to those documents shall be sufficient.

## Amendment 163

### Proposal for a directive Article 58 – paragraph 1 – subparagraph 1

*Text proposed by the Commission*

Contracting entities **may** take account of variants which are submitted by a tenderer and meet the minimum requirements specified by the contracting entities.

*Amendment*

Contracting entities **shall** take account of variants which are submitted by a tenderer **along with a basic proposal** and meet the minimum requirements specified by the contracting entities **as long as they are linked to the subject matter of the contract**.

## Amendment 164

### Proposal for a directive Article 58 – paragraph 1 – subparagraph 2

*Text proposed by the Commission*

***Contracting entities shall indicate in the specifications whether or not they authorise variants and, if so, the minimum requirements to be met by the variants and any specific requirements for their presentation. Where variants are authorised, they shall also ensure that the chosen award criteria can be usefully applied to variants meeting those minimum requirements as well as to***

*Amendment*

***In duly justified cases, contracting entities may decide not to authorise variants, provided that they indicate the reasons for their decision in the contract notice or, where a periodic indicative notice is used as a means of calling for competition, in the invitation to confirm interest.***

*conforming tenders which are not variants.*

#### **Amendment 165**

##### **Proposal for a directive Article 58 – paragraph 2**

*Text proposed by the Commission*

2. In procedures for awarding supply or service contracts, contracting entities ***that have authorised variants*** shall not reject a variant on the sole ground that it would, where successful, lead either to a service contract rather than a supply contract or to a supply contract rather than a service contract.

*Amendment*

2. In procedures for awarding supply or service contracts, contracting entities shall not reject a variant on the sole ground that it would, where successful, lead either to a service contract rather than a supply contract or to a supply contract rather than a service contract.

#### **Amendment 166**

##### **Proposal for a directive Article 59 – paragraph 1 – subparagraph 1**

*Text proposed by the Commission*

1. Contracts may be subdivided into ***homogenous or heterogeneous*** lots. Article 13(7) applies.

*Amendment*

1. ***To facilitate greater access to public procurement by small and medium-sized enterprises***, contracts may be subdivided into homogenous or heterogeneous lots. Article 13(7) applies.

#### **Amendment 167**

##### **Proposal for a directive Article 59 – paragraph 3**

*Text proposed by the Commission*

3. ***Where more than one lot may be awarded to the same tenderer, contracting entities may provide that they will either award a contract per lot or one or more contracts, covering several or all lots.***

***Contracting entities shall specify in the***

*Amendment*

***deleted***

*procurement documents whether they reserve the right to make such a choice and, if so, which lots may be grouped together under one contract.*

*Contracting entities shall first determine the tenders fulfilling best the award criteria set out pursuant to Article 76 for each individual lot. They may award a contract for more than one lot to a tenderer that is not ranked first in respect of all individual lots covered by this contract, provided that the award criteria set out pursuant to Article 76 are better fulfilled with regard to all the lots covered by that contract. Contracting entities shall specify the methods they intend to use for such comparison in the procurement documents. Such methods shall be transparent, objective and non-discriminatory.*

#### **Amendment 168**

##### **Proposal for a directive Article 64 – paragraph 1 – subparagraph 1**

*Text proposed by the Commission*

1. *Within two months of* the award of a contract or the conclusion of a framework agreement, contracting entities shall send a contract award notice on the results of the procurement procedure.

*Amendment*

1. *Not later than 14 days after* the award of a contract or the conclusion of a framework agreement, contracting entities shall send a contract award notice on the results of the procurement procedure.

#### **Amendment 169**

##### **Proposal for a directive Article 64 – paragraph 1 – subparagraph 2 a (new)**

*Text proposed by the Commission*

*Amendment*

*In case of an incomplete or incoherent contract award notice, the Commission will contact the contracting entity with the aim to receive completion or clarification of the contract award notice.*

## Amendment 170

### Proposal for a directive Article 70 – paragraph 5

*Text proposed by the Commission*

5. Contracting entities **may decide** not to award a contract to the tenderer submitting the best tender where **they have** established that the tender does not comply, **at least in an equivalent manner**, with **obligations established by Union legislation in the field of social and labour law or environmental law or of the international social and environmental law** provisions listed in Annex XIV.

*Amendment*

5. Contracting entities **shall** not award a contract to the tenderer submitting the best tender where **it has been** established, **based on clear and sufficient evidence**, that the tender does not comply with the **environmental**, social and labour law provisions **referred to in Article 29(2)**.

## Amendment 171

### Proposal for a directive Article 74 – paragraph 2

*Text proposed by the Commission*

2. The criteria and rules referred to in paragraph 1 may include the selection criteria set out in Article 56 of Directive 2004/18/EC on the terms and conditions set out therein, notably as regards the limits to requirements concerning yearly turnovers, as provided for under the second subparagraph of paragraph 3 of that Article.

*Amendment*

2. The criteria and rules referred to in paragraph 1 may include the selection criteria set out in Article 56 of Directive 2004/18/EC on the terms and conditions set out therein, notably as regards the limits to requirements concerning yearly turnovers, **the acceptance of self-declarations as well as of the European Procurement Passport**, as provided for under the second subparagraph of paragraph 3 of that Article.

## Amendment 172

### Proposal for a directive Article 74 – paragraph 3

*Text proposed by the Commission*

3. For the purpose of applying paragraphs

*Amendment*

3. For the purpose of applying paragraphs

1 and 2 of this Article, Articles 57 to 60 of Directive 2004/18/EC shall apply.

1 and 2 of this Article, Articles 55 to 60 of Directive 2004/18/EC shall apply.

### Amendment 173

#### Proposal for a directive

#### Article 75 – paragraph 1 – subparagraph 2

##### *Text proposed by the Commission*

Contracting entities shall recognise equivalent certificates from bodies established in other Member States. They shall also accept other evidence of equivalent quality assurance measures from economic operators that have no access to such certificates, or no possibility of obtaining them within the relevant time limits.

##### *Amendment*

Contracting entities shall recognise equivalent certificates from bodies established in other Member States. They shall also accept other evidence of equivalent quality assurance measures from economic operators that have no access to such certificates, or no possibility of obtaining them within the relevant time limits. ***In order not to discriminate against tenderers who invest time and money for certificates, the burden to provide equivalence with a specific label shall be placed on the tenderer claiming equivalence.***

### Amendment 174

#### Proposal for a directive

#### Article 75 – paragraph 2 – subparagraph 2

##### *Text proposed by the Commission*

Contracting entities shall recognise equivalent certificates from bodies established in other Member States. They shall also accept other evidence of equivalent environmental management measures from economic operators that have no access to such certificates, or no possibility of obtaining them within the relevant time limits.

##### *Amendment*

Contracting entities shall recognise equivalent certificates from bodies established in other Member States. They shall also accept other evidence of equivalent environmental management measures from economic operators that have no access to such certificates, or no possibility of obtaining them within the relevant time limits. ***In order not to discriminate against tenderers who invest time and money for certificates, the burden to provide equivalence with a specific label shall be placed on the tenderer claiming equivalence.***

**Amendment 175**  
**Proposal for a directive**  
**Article 76 – paragraph 1 – subparagraph 1**

*Text proposed by the Commission*

1. Without prejudice to national laws, regulations or administrative provisions on the remuneration of certain services, the **criteria** on which contracting entities shall base the award of contracts shall be **one of the following**:

**(a) the most economically advantageous tender;**

**(b) the lowest cost.**

**Amendment 176**  
**Proposal for a directive**  
**Article 76 – paragraph 1 – subparagraph 2**

*Text proposed by the Commission*

**Costs may be assessed, at the choice of the contracting entity, on the basis of the price only or using a cost-effectiveness approach, such as a life-cycle costing approach, under the conditions set out in Article 77.**

**Amendment 177**  
**Proposal for a directive**  
**Article 76 – paragraph 2 – subparagraph 1**

*Text proposed by the Commission*

2. The most economically advantageous tender referred to in **point (a) of** paragraph 1 from the point of view of the contracting entity shall be identified on the basis of criteria linked to the subject-matter of the contract in question.

*Amendment*

1. Without prejudice to national laws, regulations or administrative provisions on the remuneration of certain services, the **criterion** on which contracting entities shall base the award of contracts shall be **the most economically advantageous tender.**

*Amendment*

**deleted**

*Amendment*

2. The most economically advantageous tender referred to in paragraph 1 from the point of view of the contracting entity shall be identified on the basis of criteria linked to the subject-matter of the contract in question.

## Amendment 178

### Proposal for a directive

#### Article 76 – paragraph 2 – subparagraph 2 – introductory part

*Text proposed by the Commission*

Those criteria *shall* include in addition to the price or costs *referred to in point (b) of paragraph 1, other criteria linked to the subject-matter of the contract in question*, such as:

*Amendment*

Those criteria *may* include, in addition to the price or costs *qualitative, environmental and social considerations*, such as:

## Amendment 179

### Proposal for a directive

#### Article 76 – paragraph 2 – subparagraph 2 – point a

*Text proposed by the Commission*

(a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, environmental *characteristics* and innovative *character*;

*Amendment*

(a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, *social* environmental and innovative *characteristics, including cost effectiveness of short-distance procurement where relevant, and the costs over the life-cycle in accordance with Article 67*;

## Amendment 180

### Proposal for a directive

#### Article 76 – paragraph 2 – point b

*Text proposed by the Commission*

(b) *for service contracts and contracts involving the design of works, the organisation*, qualification and experience of the staff assigned to performing the contract in question *may be taken into consideration, with the consequence that, following the award of the contract, such staff may only be replaced with the consent of the contracting entity, which must verify that replacements ensure*

*Amendment*

(b) *wherever relevant for the performance of the contract*, qualification and experience of the staff assigned to performing the contract in question;

*equivalent organisation and quality;*

#### **Amendment 181**

##### **Proposal for a directive**

##### **Article 76 – paragraph 2 – point c**

*Text proposed by the Commission*

(c) after-sales service **and** technical assistance, delivery date and delivery period or period of completion, commitments with regard to parts and security of supply;

*Amendment*

(c) after-sales service and technical assistance, **and delivery conditions such as** delivery date and delivery period or period of completion, commitments with regard to parts and security of supply;

#### **Amendment 182**

##### **Proposal for a directive**

##### **Article 76 – paragraph 3**

*Text proposed by the Commission*

**3. Member States may provide that the award of certain types of contracts shall be based on the most economically advantageous tender referred to in point (a) of paragraph 1 and in paragraph 2.**

*Amendment*

*deleted*

#### **Amendment 183**

##### **Proposal for a directive**

##### **Article 76 – paragraph 5 – subparagraph 1**

*Text proposed by the Commission*

**5. In the case referred to in point (a) of paragraph 1 the** contracting entity shall specify the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender.

*Amendment*

**5. The** contracting entity shall specify the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender.

#### **Amendment 184**

##### **Proposal for a directive**

##### **Article 77 – paragraph 1 – introductory part**

*Text proposed by the Commission*

1. Life-cycle costing shall to the extent relevant cover the following costs over the life cycle of a product, service or works as defined in point 22 of Article 2:

*Amendment*

1. Life-cycle costing shall to the extent relevant cover **parts or all of** the following costs **borne by contracting authorities** over the life cycle of a product, service or works as defined in point 22 of Article 2:

**Amendment 185**

**Proposal for a directive  
Article 77 –paragraph 1 – point b**

*Text proposed by the Commission*

(b) external **environmental** costs directly linked to the life cycle, provided their monetary value can be determined and verified, which may include the cost of emissions of greenhouse gases and of other pollutant emissions and other climate change mitigation costs.

*Amendment*

(b) external costs, **such as social or environmental costs**, directly linked to the life cycle, provided their monetary value can be determined and verified, which may include the cost of emissions of greenhouse gases and of other pollutant emissions and other climate change mitigation costs.

**Amendment 186**

**Proposal for a directive  
Article 77 –paragraph 2**

*Text proposed by the Commission*

2. Where contracting entities assess the costs using a life-cycle costing approach, they shall indicate in the procurement documents the **methodology used for the calculation of** the life-cycle costs. The **methodology** used must fulfil all of the following conditions:

(a) it has been drawn up **on the basis of scientific information or** is based on **other** objectively verifiable and non-discriminatory criteria;

**(b) it has been established for repeated or**

*Amendment*

2. Where contracting entities assess the costs using a life-cycle costing approach, they shall indicate in the procurement documents the **data to be provided by the tenderers and the method which the contracting authority will use to determine the** life-cycle costs. The **method** used must fulfil all of the following conditions:

(a) it has been drawn up **in close consultation with stakeholders and** is based on objectively verifiable and non-discriminatory criteria;

*continuous application;*

(c) it is accessible to all interested parties.

(b) it is accessible to all interested parties.

*(ca) the data required can be provided with reasonable effort by normally diligent economic operators, including operators from third countries.*

*Contracting entities shall allow economic operators, including economic operators from third countries, to apply a different methodology for establishing the life-cycle costs of their offer, provided that they prove that this methodology complies with the requirements set out in points a, b and c and is equivalent to the methodology indicated by the contracting entity.*

#### Amendment 187

##### Proposal for a directive Article 77 – paragraph 3 – subparagraph 1

*Text proposed by the Commission*

3. ***Whenever a*** common methodology for the calculation of life-cycle costs is adopted as part of a legislative act of the Union, including by delegated acts pursuant to sector specific legislation, ***it shall be applied where life-cycle costing is included in the award criteria referred to in Article 76 (1).***

*Amendment*

3. ***Any*** common methodology for the calculation of life-cycle costs is adopted as part of a legislative act of the Union, including by delegated acts pursuant to sector specific legislation ***or as part of a European technical specification shall be deemed to meet the criteria set out in paragraph 2 and may be*** included in the award criteria referred to in Article 76(1).

#### Amendment 188

##### Proposal for a directive Article 79 – paragraph 1

*Text proposed by the Commission*

1. ***The contracting entity shall request economic operators to explain the price or costs charged, where all of the following***

*Amendment*

1. ***Contracting entities shall require economic operators to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to***

*conditions are fulfilled:*

*(a) the price or cost charged is more than 50 % lower than the average price or costs of the remaining tenders;*

*(b) the price or cost charged is more than 20 % lower than the price or costs of the second lowest tender;*

*(c) at least five tenders have been submitted.*

*the works, supplies or services.*

#### **Amendment 189**

##### **Proposal for a directive Article 79 – paragraph 2**

*Text proposed by the Commission*

*Amendment*

*2. Where tenders appear to be abnormally low for other reasons, contracting entities may also request such explanations.*

*deleted*

#### **Amendment 190**

##### **Proposal for a directive Article 79 – paragraph 3 – introductory part**

*Text proposed by the Commission*

*Amendment*

*3. The explanations referred to in paragraphs 1 and 2 may in particular relate to:*

*3. The explanations referred to in paragraph 1 may in particular relate to:*

#### **Amendment 191**

##### **Proposal for a directive Article 79 – paragraph 3 – point d**

*Text proposed by the Commission*

*Amendment*

*(d) compliance, at least in an equivalent manner, with obligations established by Union legislation in the field of social and labour law or environmental law or of the*

*(d) compliance with social, environmental and labour law provisions referred to in Article 29(2);*

*international social and environmental law provisions listed in Annex XIV or, where not applicable, with other provisions ensuring an equivalent level of protection;*

**Amendment 192**  
**Proposal for a directive**  
**Article 79 – paragraph 3 – point d a (new)**

*Text proposed by the Commission*

*Amendment*

*(da) compliance with subcontracting requirements set out in Article 81.*

**Amendment 193**  
**Proposal for a directive**  
**Article 79 – paragraph 4 – subparagraph 3**

*Text proposed by the Commission*

*Amendment*

Contracting entities shall reject the tender, where they have established that the tender is abnormally low because it does not comply with *obligations established by Union legislation in the field of social and labour law or environmental law or by the international social and environmental law provisions listed in Annex XIV.*

Contracting entities shall reject the tender, where they have established that the tender is abnormally low because it does not comply with *social, environmental and labour law provisions referred to in Article 29(2) or with data protection law.*

**Amendment 194**

**Proposal for a directive**  
**Article 79 – paragraph 5**

*Text proposed by the Commission*

*Amendment*

5. Where a contracting entity establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender may be rejected on that ground alone only after consultation with the tenderer where the latter is unable to prove, within a sufficient time limit fixed by the contracting entity, that the aid in question

*5. When submitting a tender, tenderers shall provide a declaration on their honour attesting that to their best knowledge and good faith they have not received for the purposes of their tender State aid which would be incompatible with Article 107 TFEU, or which would be incompatible with that Article if the*

was compatible with the internal market within the meaning of Article 107 of the Treaty. Where the contracting entity rejects a tender in those circumstances, it shall inform the Commission thereof.

***State granting that aid were a Union Member State, and furnish any substantiating documents requested by the contracting entity.***

Where a contracting entity establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender may be rejected on that ground alone only after consultation with the tenderer where the latter is unable to prove, within a sufficient time limit fixed by the contracting entity, that the aid in question was compatible with the internal market within the meaning of Article 107 of the Treaty. Where the contracting entity rejects a tender in these circumstances, it shall inform the Commission of that fact.

***If it is established that the selected tenderer has received unlawful State aid, the call for tender procedure shall be cancelled.***

## **Amendment 195**

### **Proposal for a directive Article 79 a (new)**

*Text proposed by the Commission*

*Amendment*

#### ***Article 79a***

##### ***Tenders comprising products originating in third countries***

- 1. This Article shall apply to tenders covering products originating in third countries with which the Union has not concluded, whether multilaterally or bilaterally, an agreement ensuring comparable and effective access for Union undertakings to the markets of those third countries. It shall be without prejudice to the obligations of the Union or its Member States in respect of third countries.***
- 2. Contracting entities may ask tenderers to provide information on the origin of the***

*products in their tender and their value. Declarations on the tenderer's honour shall be accepted as a preliminary means of proof. A contracting entity may, at any time in the procedure, ask for part or all of the documentation required. Any tender submitted for the award of a supply contract may be rejected where the value of the products originating in third countries, as determined in accordance with Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code<sup>1</sup>, exceeds 50 % of the total value of the products constituting the tender. For the purposes of this Article, software used in telecommunications network equipment shall be regarded as products.*

*3. Subject to the second subparagraph of this paragraph, where two or more tenders are equivalent in the light of the contract award criteria defined in Article 76, preference shall be given to those tenders which may not be rejected pursuant to paragraph 2. The prices of those tenders shall be considered equivalent for the purposes of this Article, if the price difference does not exceed 3 %.*

*A tender shall not be preferred to another pursuant to the first subparagraph where its acceptance would oblige the contracting entity to acquire equipment having technical characteristics different from those of existing equipment, resulting in incompatibility, technical difficulties in operation and maintenance, or disproportionate costs.*

*4. For the purposes of this Article, those third countries to which the benefit of the provisions of this Directive has been extended by a Council Decision in accordance with paragraph 1 shall not be taken into account for determining the proportion, referred to in paragraph 2, of products originating in third countries.*

*5. The Commission shall submit an*

*annual report to the European Parliament and to the Council, commencing in the second half of the first year following the entry into force of this Directive, on progress made in multilateral or bilateral negotiations regarding access for Union undertakings to the markets of third countries in the fields covered by this Directive, on any result which such negotiations may have achieved, and on the implementation in practice of all the agreements which have been concluded.*

*The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may, in the light of such developments, amend the provisions of this Article.*

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<sup>1</sup> OJ L 302, 19.10.1992, p. 1.

## **Amendment 196**

### **Proposal for a directive Article 79 b (new)**

*Text proposed by the Commission*

*Amendment*

#### **Article 79b**

*Relations with third countries as regards works, supplies and service contracts*

*1. Member States shall inform the Commission of any general difficulties, in law or in fact, encountered and reported by their undertakings in securing the award of works, supplies or service contracts in third countries.*

*2. The Commission shall report to the European Parliament and to the Council before 31 December 2014, and periodically thereafter, on the opening up of service contracts in third countries and on progress in negotiations with these countries on this subject, particularly within the framework of the WTO.*

***3. The Commission shall endeavour, by approaching the third country concerned, to remedy any situation whereby it finds, on the basis either of the reports referred to in paragraph 2 or of other information, that, in the context of the award of service contracts, a third country:***

***(a) does not grant undertakings established in the Union effective access comparable to that granted by the Union to undertakings established in that third country;***

***(b) does not grant undertakings established in the Union national treatment or the same competitive opportunities as are available to undertakings established in that third country; or***

***(c) grants undertakings established in other third countries more favourable treatment than undertakings established in the Union.***

***4. Member States shall inform the Commission of any difficulties, in law or in fact, encountered and reported by the undertakings established in their territories and which are due to the non-observance of the international social and environmental law provisions listed in Annex XIV when those undertakings have tried to secure the award of contracts in third countries.***

***5. In the circumstances referred to in paragraphs 3 and 4, the Commission may at any time propose that the Council decide to suspend or restrict, over a period to be laid down in the decision, the award of service contracts to:***

***(a) undertakings governed by the law of the third country in question;***

***(b) undertakings affiliated to the undertakings specified in point (a) and having their registered office in the Union but having no direct and effective link with the economy of a Member State;***

*(c) undertakings submitting tenders which have as their subject-matter services originating in the third country in question.*

*The Council shall act, by qualified majority, as soon as possible.*

*The Commission may propose these measures on its own initiative or at the request of a Member State.*

*6. This Article shall be without prejudice to the commitments of the Union in relation to third countries ensuing from international agreements on public procurement, particularly within the framework of the WTO.*

## Amendment 197

### Proposal for a directive Article 80

#### *Text proposed by the Commission*

Contracting entities may lay down special conditions relating to the performance of a contract, provided that they are indicated in the call for competition or in the specifications. Those conditions may, *in particular, concern social and environmental* considerations. *They may also include the requirement that economic operators foresee compensations for risks of price increases that are the result of price fluctuations (hedging) and that could substantially impact the performance of a contract.*

#### *Amendment*

Contracting entities may lay down special conditions *linked to the subject matter and* relating to the performance of a contract, provided that they are indicated in the call for competition or in the specifications. Those conditions may *include economic, innovation-related, environmental social or employment-related* considerations.

## Amendment 198

### Proposal for a directive Article 81 – paragraph 1

*Text proposed by the Commission*

1. In the procurement documents, the contracting entity ***may ask or may be required by a Member State to*** ask the tenderer to indicate in its tender any share of the contract it may intend to subcontract to third parties ***and any proposed subcontractors***.

**Amendment 199**  
**Proposal for a directive**  
**Article 81 – paragraph 1 a (new)**

*Text proposed by the Commission*

**Amendment 200**  
**Proposal for a directive**  
**Article 81 – paragraphs 3 a and 3 b (new)**

*Text proposed by the Commission*

*Amendment*

1. In the procurement documents, the contracting entity ***shall*** ask the tenderer to indicate in its tender any share of the contract it may intend to subcontract to third parties and any proposed subcontractors.

*Amendment*

***1a. After the tenderer has been selected, it shall indicate to the contracting entities the name, contact details and legal representatives of the subcontractors and any changes related to that information during the course of the contract. The information shall be provided to the tenderer by each subcontractor in the subcontracting chain through the subcontractor's direct contractor. Each subcontractor shall keep the information up to date during the course of the contract.***

*Amendment*

***3a. Member States shall ensure that subcontractors also respect all mandatory legal, regulatory and administrative provisions in force in the Member State of contract performance, which includes the obligations referred to in Article 29(2). To this end, Member States may provide for a system of liability throughout the subcontracting chain so that the direct contractor of a subcontractor is liable in***

*the event that subcontractor fails to comply with one of those provisions or is insolvent. When a direct contractor is insolvent, such system should provide that the next solvent direct contractor up the subcontracting chain, including the main contractor, is liable*

*3b. Member States may provide for more stringent liability rules under national law.*

## **Amendment 201**

### **Proposal for a directive**

#### **Article 82 – paragraph 2 – introductory part and points (-a) and (-aa) (new)**

*Text proposed by the Commission*

*2. A modification of a contract during its term shall be considered substantial within the meaning of paragraph 1, where it renders the contract substantially different from the one initially concluded. In any case, without prejudice to paragraph 3 and 4, a modification shall be considered substantial where one of the following conditions is met:*

*Amendment*

2. Without prejudice to paragraphs 3 and 4, a modification shall be considered substantial where one of the following conditions is met:

*(-a) it alters the nature of the contract;*

*(-aa) it entails replacement of the contractual partner;*

## **Amendment 202**

### **Proposal for a directive**

#### **Article 82 – paragraph 2 – point c**

*Text proposed by the Commission*

(c) the modification extends the *scope* of the contract considerably to encompass supplies, services or works not initially covered.

*Amendment*

(c) the modification extends the *subject* of the contract considerably to encompass supplies, services or works not initially covered.

## **Amendment 203**

**Proposal for a directive**  
**Article 82 – paragraph 3 – subparagraph 1**

*Text proposed by the Commission*

**3. The replacement of the contractual partner shall be considered a substantial modification within the meaning of paragraph 1.**

*Amendment*

*deleted*

**Amendment 204**

**Proposal for a directive**  
**Article 82 – paragraph 3 – subparagraph 2**

*Text proposed by the Commission*

**However, the first subparagraph** shall not apply in the event of universal or partial succession into the position of the initial contractor, following corporate restructuring operations or insolvency, of another economic operator that fulfils the criteria for qualitative selection initially established provided that this does not entail other substantial modifications to the contract and is not aimed at circumventing the application of this Directive.

*Amendment*

**Point (-aa) of paragraph 2** shall not apply in the event of universal or partial succession into the position of the initial contractor, following corporate restructuring operations, **transfer of capital or assets between undertakings or the taking-on of a contractual partner after his** insolvency, **by** another economic operator that fulfils the criteria for qualitative selection initially established provided that this does not entail other substantial modifications to the contract and is not aimed at circumventing the application of this Directive **or in the event of the take-over of the main contractors' signatory status by the contracting entity in accordance with Member States' provisions in line with Article 81.**

**Amendment 205**

**Proposal for a directive**  
**Article 82 – paragraph 4**

*Text proposed by the Commission*

4. Where the value of a modification can be expressed in monetary terms, the modification shall not be considered to be substantial within the meaning of

*Amendment*

4. Where the value of a modification can be expressed in monetary terms, the modification shall not be considered to be substantial within the meaning of

paragraph 1, where its value does not exceed the thresholds set out in Article 12 **and** where it is below 5% of the price of the initial contract, provided that the modification does not alter the overall nature of the contract. Where several successive modifications are made, the value shall be assessed on the basis of the cumulative value of the successive modifications.

paragraph 1, where its value does not exceed the thresholds set out in Article 12 **or** where it is below 10 % of the price of the initial contract, provided that the modification does not alter the overall nature of the contract. Where several successive modifications are made, the value shall be assessed on the basis of the cumulative value of the successive modifications.

## **Amendment 206**

### **Proposal for a directive Article 82 – paragraph 4 a (new)**

*Text proposed by the Commission*

*Amendment*

***4a. A modification shall not be considered to be substantial within the meaning of paragraph 1 where the scope of the contract might evolve pursuant to:***

***(a) significant innovations or technological changes;***

***(b) a technical difficulty in operation or maintenance requiring the intervention of the initial contractor;***

***(c) the necessary implementation of emergency and unforeseeable works, services or supplies which cannot be technically or economically separated from the main contract without causing major disruption to the contracting entity.***

## **Amendment 207**

### **Proposal for a directive Article 82 – paragraph 5**

*Text proposed by the Commission*

*Amendment*

5. Contract modifications shall not be considered substantial within the meaning of paragraph 1 where they have been provided for in the procurement documents

5. Contract modifications shall not be considered substantial within the meaning of paragraph 1 where they have been provided for in the procurement documents

in clear, precise and unequivocal review clauses or options. Such clauses shall state the scope and nature of possible modifications or options as well as the conditions under which they may be used. They shall not provide for modifications or options that would alter the overall nature of the contract.

in clear, precise and unequivocal review clauses or options, ***or in the form of a price revision clause***. Such clauses shall state the scope and nature of possible modifications or options as well as the conditions under which they may be used. They shall not provide for modifications or options that would alter the overall nature of the contract.

## **Amendment 208**

### **Proposal for a directive Article 82 – paragraph 6 a (new)**

*Text proposed by the Commission*

*Amendment*

***6a. For the purpose of the calculation of the price referred to in paragraph 4 of this Article, the updated price shall be the reference value when the contract includes an indexation clause***

## **Amendment 209**

### **Proposal for a directive Article 82 – paragraph 7**

*Text proposed by the Commission*

*Amendment*

7. Contracting entities shall not ***have recourse to*** modifications of the contract ***in the following cases:***

7. Contracting entities shall not ***invoke the provisions of this Article concerning*** modifications of the contract where the modification of the contract would aim at compensating risks of price increases that have been hedged by contractor.

***(a) where the modification would aim at remedying deficiencies in the performance of the contractor or the consequences, which can be remedied through the enforcement of contractual obligations;***

***(b) where the modification would aim at compensating risks of price increases that have been hedged by the contractor.***

## Amendment 210

### Proposal for a directive Article 83 – paragraph 1 – point a

*Text proposed by the Commission*

(a) the exceptions provided for in Article 21 cease to apply following a private participation in the legal person awarded the contract pursuant to Article 21 (4);

*Amendment*

(a) the exceptions provided for in Article 21 cease to apply following a private participation in the legal person awarded the contract pursuant to Article 21(4), ***except for non-controlling or legally enforced forms of private participation;***

*Justification*

*Such provision is not necessary in the EU legislation on public procurement. It can be sufficiently regulated by national legislation.*

## Amendment 211

### Proposal for a directive Article 83 – paragraph 1 a (new)

*Text proposed by the Commission*

*Amendment*

***1a. Member States shall ensure that contracting entities have the possibility, under the conditions determined by the applicable national contract law, to terminate a framework agreement during its term, where the economic operator has shown significant or persistent deficiencies in the performance of any substantive requirement under the agreement.***

## Amendment 212

### Proposal for a directive Article 85 – paragraph 1

*Text proposed by the Commission*

1. Contracting entities intending to award a

*Amendment*

1. Contracting entities intending to award a

contract for the services referred to in Article 84 shall make known their intention by means of a **contract notice**.

public contract for the services referred to in Article 84 shall make known their intention by means of a **periodic indicative notice, which shall be published continuously and contain the information set out in Annex XVIII part A. The periodic indicative notice shall indicate that the contract will be awarded without further publication and invite interested economic operators to express their interest in writing.**

## Amendment 213

### Proposal for a directive Article 85 – paragraph 3

*Text proposed by the Commission*

3. The **notices** referred to in **paragraphs 1 and 2** shall contain the information referred to in Annex XVIII in accordance with the standard model notices. The Commission shall establish the standard forms. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 100.

*Amendment*

3. The **notice** referred to in **paragraph 2** shall contain the information referred to in Annex XVIII **part B**, in accordance with the standard model notices. The Commission shall establish the standard forms. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 100.

## Amendment 214

### Proposal for a directive Article 86 – paragraph 1

*Text proposed by the Commission*

1. Member States shall put in place **appropriate** procedures for the award of contracts subject to this Chapter, ensuring full compliance with the principles of transparency and equal treatment of economic operators and allowing contracting entities to take into account the specificities of the services in question.

*Amendment*

1. Member States shall put in place **simplified** procedures **in accordance with Article 85(1)**, for the award of contracts subject to this Chapter, ensuring full compliance with the principles of transparency and equal treatment of economic operators and allowing contracting entities to take into account the specificities of the services in question.

## Amendment 215

### Proposal for a directive Article 86 – paragraph 2

*Text proposed by the Commission*

2. Member States shall ensure that contracting entities may take into account the need to ensure quality, continuity, accessibility, availability and comprehensiveness of the services, the specific needs of different categories of users, the involvement and empowerment of users and innovation. Member States **may also provide** that the choice of the service provider **shall not be** made solely on the basis of the price for the provision of the service.

*Amendment*

2. Member States shall ensure that contracting entities may take into account the need to ensure **high** quality, continuity, accessibility, **affordability**, availability and comprehensiveness of the services, the specific needs of different categories of users, **including disadvantaged and vulnerable groups**, the involvement and empowerment of users and innovation. Member States **shall ensure** that the choice of the service provider **is not** made solely on the basis of the price for the provision of the service, **but takes into account quality and sustainability criteria for social services**.

## Amendment 216

### Proposal for a directive Article 92 – title

*Text proposed by the Commission*

Enforcement

*Amendment*

**Implementation and enforcement by competent authorities and structures**

## Amendment 217

### Proposal for a directive Article 92 – paragraph 1

*Text proposed by the Commission*

In **conformity with Council Directive 92/13/EEC**, Member States shall **ensure correct application of this Directive by effective, available and transparent mechanisms which complement the system in place for the review of decisions taken by contracting authorities.**

*Amendment*

**1. In order to effectively ensure correct and efficient implementation**, Member States shall **ensure that at least the tasks set out in this Article are performed by one or more authorities or structures. They shall indicate to the Commission all authorities or structures competent for**

*those tasks.*

## **Amendment 218**

### **Proposal for a directive Article 92 – paragraph 1 a (new)**

*Text proposed by the Commission*

*Amendment*

***1a. Member States shall ensure that the application of public procurement rules is monitored, including the implementation of projects co-financed by the Union with a view to detecting threats to the financial interests of the Union. Such monitoring shall be used to prevent, detect and adequately report possible instances of procurement fraud, corruption, conflict of interest and other serious irregularities.***

***Where monitoring authorities or structures identify specific violations or systemic problems, they shall ensure that those problems are referred to national auditing authorities, courts or tribunals or other appropriate authorities or structures, such as the ombudsman, national Parliaments or committees thereof.***

## **Amendment 219**

### **Proposal for a directive Article 92 – paragraph 1 b (new)**

*Text proposed by the Commission*

*Amendment*

***1b. The results of the monitoring activities pursuant to paragraph 2 shall be made available to the public through appropriate means of information. In particular, Member States shall publish, at least every two years, an overview of the most frequent sources of incorrect application or of legal uncertainty, including possible structural or recurring problems in the application of the rules,***

*possible cases of fraud and other illegal behaviours.*

*Member States shall transmit to the Commission every two years, a general overview of their national sustainable procurement policies, describing the relevant national action plans and initiatives and, where known, their practical implementation. They shall also indicate the success rate of SMEs in public procurement; where it is lower than 50 % in terms of values of contracts awarded to SMEs, Member States shall indicate whether any initiatives are in place to increase this success rate.*

*On the basis of the data received, the Commission shall regularly issue a report on the implementation and best practices of such policies in the internal market.*

#### **Amendment 220**

##### **Proposal for a directive Article 92 – paragraph 1 c (new)**

*Text proposed by the Commission*

*Amendment*

*1c. Member States shall ensure that guidance on the interpretation and application of the Union public procurement law is available free of charge to assist contracting entities and economic operators, in particular SMEs, in correctly applying the Union public procurement rules.*

#### **Amendment 221**

##### **Proposal for a directive Article 92 – paragraph 1 d (new)**

*Text proposed by the Commission*

*Amendment*

*1d. Member States shall, without prejudice to the general procedures and working methods established by the*

*Commission for its communications and contacts with Member States, designate a contact point for cooperation with the Commission as regards the application of Union law and the implementation of the budget from the Union on the basis of Article 17 TFEU and Article 317 TFEU.*

## **Amendment 222**

### **Proposal for a directive Article 92 – paragraph 1 e (new)**

*Text proposed by the Commission*

*Amendment*

*1e. Contracting entities shall, at least for the duration of the contract, keep copies of all concluded contracts with a value equal to or greater than:*

*(a) 1 000 000 EUR in the case of supply contracts or service contracts;*

*(b) 10 000 000 EUR in the case of works contracts.*

## **Amendment 223**

### **Proposal for a directive Article 93**

*Text proposed by the Commission*

*Amendment*

#### **Article 93**

*deleted*

*1. Member States shall appoint a single independent body responsible for the oversight and coordination of implementation activities (hereinafter "the oversight body"). Member States shall inform the Commission of their designation.*

*All contracting entities shall be subject to such oversight.*

*2. The competent authorities involved in the implementation activities shall be organised in such a manner that conflicts of interests are avoided. The system of*

*public oversight shall be transparent. For this purpose, all guidance and opinion documents and an annual report illustrating the implementation and application of rules laid down in this Directive shall be published.*

*The annual report shall include the following:*

*(a) an indication of the success rate of small and medium-sized enterprises (SMEs) in procurement; where the percentage is lower than 50 % in terms of values of contracts awarded to SMEs, the report shall provide an analysis of the reasons therefore;*

*(b) a global overview of the implementation of sustainable procurement policies, including on procedures taking into account considerations linked to the protection of the environment, social inclusion including accessibility for persons with disabilities or fostering innovation;*

*(c) centralized data about reported cases of fraud, corruption, conflict of interests and other serious irregularities in the field of public procurement, including those affecting projects cofinanced by the budget of the Union.*

*3. The oversight body shall be responsible for the following tasks:*

*(a) monitoring the application of public procurement rules and the related practice by contracting entities and in particular by central purchasing bodies;*

*(b) providing legal advice to contracting entities on the interpretation of public procurement rules and principles and on the application of public procurement rules in specific cases;*

*(c) issuing own initiative opinions and guidance on questions of general interest pertaining to the interpretation and application of public procurement rules, on recurring questions and on systemic*

*difficulties related to the application of public procurement rules, in the light of the provisions of this Directive and of the relevant case-law of the Court of Justice of the European Union;*

*(d) establishing and applying comprehensive, actionable 'red flag' indicator systems to prevent, detect and adequately report instances of procurement fraud, corruption, conflict of interest and other serious irregularities;*

*(e) drawing the attention of the national competent institutions, including auditing authorities, to specific violations detected and to systemic problems;*

*(f) examining complaints from citizens and businesses on the application of public procurement rules in specific cases and transmitting the analysis to the competent contracting entities, which shall have the obligation to take it into account in their decisions or, where the analysis is not followed, to explain the reasons for disregarding it;*

*(g) monitoring the decisions taken by national courts and authorities following a ruling given by the Court of Justice of the European Union on the basis of Article 267 of the Treaty or findings of the European Court of Auditors establishing violations of Union public procurement rules related to projects cofinanced by the Union; the oversight body shall report to the European Anti-Fraud Office any infringement to Union procurement procedures where these were related to contracts directly or indirectly funded by the European Union.*

*The tasks referred to in point (e) shall be without prejudice to the exercise of rights of appeal under national law or under the system established on the basis of directive 92/13/EEC.*

*Member States shall empower the oversight body to seize the jurisdiction competent according to national law for*

*the review of contracting entities' decisions where it has detected a violation in the course of its monitoring and legal advising activity.*

***4. Without prejudice to the general procedures and working methods established by the Commission for its communications and contacts with Member States, the oversight body shall act as a specific contact point for the Commission when it monitors the application of Union law and the implementation of the budget from the Union on the basis of Article 17 of the Treaty on the European Union and Article 317 of the Treaty on the Functioning of the European Union. It shall report to the Commission any violation of this Directive in procurement procedures for the award of contracts directly or indirectly funded by the Union.***

*The Commission may in particular refer to the oversight body the treatment of individual cases where the contract is not yet concluded or a review procedure can still be carried out. It may also entrust the oversight body with the monitoring activities necessary to ensure the implementation of the measures to which Member States are committed in order to remedy a violation of Union public procurement rules and principles identified by the Commission.*

*The Commission may require the oversight body to analyse alleged breaches to Union public procurement rules affecting projects co-financed by the budget of the Union. The Commission may entrust the oversight body to follow-up certain cases and to ensure that the appropriate consequences of breaches to Union public procurement rules affecting projects co-financed are taken by the competent national authorities which will be obliged to follow its instructions.*

***5. The investigation and enforcement activities carried out by the oversight body***

*to ensure that contracting entities' decisions comply with this Directive and the general principles of the Treaty on the Functioning of the European Union shall not replace or prejudge the institutional role of the Commission as guardian of the Treaty. When the Commission decides to refer the treatment of an individual case, it shall also retain the right to intervene in accordance with the powers conferred to it by the Treaty.*

*6. Contracting authorities shall transmit to the national oversight body the full text of all concluded contracts with a value equal to or greater than*

*(a) 1 000 000 EUR in the case of supply contracts or service contracts;*

*(b) 10 000 000 EUR in the case of works contracts.*

*7. Without prejudice to the national law concerning access to information, and in accordance with national and EU legislation on data protection, the oversight body shall, upon written request, give unrestricted and full direct access, free of charge, to the concluded contracts referred to in paragraph 6. Access to certain parts of the contracts may be refused where their disclosure would impede law enforcement or otherwise be contrary to the public interest, would harm the legitimate commercial interests of economic operators, public or private, or might prejudice fair competition between them.*

*Access to the parts that may be released shall be given within a reasonable delay and no later than 45 days from the date of the request.*

*The applicants filing a request for access to a contract shall not need to show any direct or indirect interest related to that particular contract. The recipient of information should be allowed to make it public.*

**8. A summary of all the activities carried out by the oversight body in accordance with paragraphs 1 to 7 shall be included in the annual report mentioned in paragraph 2.**

#### **Amendment 224**

##### **Proposal for a directive**

##### **Article 94 – paragraph 1 – subparagraph 1 – introductory part**

###### *Text proposed by the Commission*

1. Contracting entities shall keep appropriate information on each contract, framework agreement and each time a dynamic purchasing system is established. This information shall be sufficient to permit them at a later date to justify decisions taken in connection with:

###### *Amendment*

1. Contracting entities shall keep appropriate information on each contract, framework agreement and each time a dynamic purchasing system is established, **for all procurement contracts with a value equal to or greater than the thresholds laid down in Article 12.** This information shall be sufficient to permit them at a later date to justify decisions taken in connection with:

#### **Amendment 225**

##### **Proposal for a directive**

##### **Article 94 – paragraph 1 – subparagraph 2**

###### *Text proposed by the Commission*

Contracting entities shall document the progress of all procurement procedures, whether or not **the procedures** are conducted by electronic means. To that end, they shall **document** all stages **in** the procurement procedure, **including all** communications with economic operators **and internal deliberations**, preparation of the tenders, dialogue or negotiation if any, selection and award of the contract.

###### *Amendment*

Contracting entities shall document the progress of all procurement procedures, whether or not **those** are conducted by electronic means. To that end, they shall **ensure that they keep sufficient documentation to justify decisions taken at all stages of** the procurement procedure, **on** communications with economic operators, preparation of the tenders, dialogue or negotiation if any, selection and award of the contract.

#### **Amendment 226**

**Proposal for a directive  
Article 95 – paragraph 1**

*Text proposed by the Commission*

1. ***The bodies established or appointed in accordance with Article 93*** shall forward to the Commission ***an implementation and statistical report*** on each year, based on a standard form, not later than 31 October of the following year.

*Amendment*

1. ***Member States*** shall forward to the Commission ***a*** statistical report on each year, based on a standard form, not later than 31 October of the following year.

**Amendment 227**

**Proposal for a directive  
Article 95 – paragraph 3**

*Text proposed by the Commission*

3. Member States shall ensure that this report contains at least the number and value of contracts awarded, broken down by categories of activity to which Articles 5 to 11 refer and any other information required to verify the proper application of the Agreement. ***This shall include the number and value of contracts awarded pursuant to a negotiated procedure without a call for competition, broken down according to the circumstances referred to in Article 44 and by categories of activity to which Articles 5 to 11 refer. It shall also specify the Member State or third country of the successful contractor.***

*Amendment*

3. ***For all contracts above the thresholds laid down in Article 12***, Member States shall ensure that this report contains at least the number and value of contracts awarded, broken down by categories of activity to which Articles 5 to 11 refer and any other information required to verify the proper application of the ***WTO Government Procurement*** Agreement.

**Amendment 228**

**Proposal for a directive  
Article 95 – paragraph 5**

*Text proposed by the Commission*

5. The Commission shall establish the standard form for the drawing-up of the annual ***implementation and*** statistical report referred to in paragraph 1. Those implementing acts shall be adopted in

*Amendment*

5. The Commission shall establish the standard form for the annual statistical report referred to in paragraph 1. Those implementing acts shall be adopted in accordance with the advisory procedure

accordance with the advisory procedure referred to in Article 100.

referred to in Article 100.

**Amendment 229**  
**Proposal for a directive**  
**Article 96 – title**

*Text proposed by the Commission*

Assistance to contracting entities **and businesses**

*Amendment*

Assistance to contracting entities

**Amendment 230**

**Proposal for a directive**  
**Article 96 – paragraph 1**

*Text proposed by the Commission*

1. Member States shall make available technical support structures in order to provide legal and economic **advice**, guidance and assistance to contracting entities in preparing and carrying out procurement procedures. Member States shall also ensure that each contracting entity can obtain **competent** assistance and **advice** on individual questions.

*Amendment*

1. Member States shall make available technical support structures in order to provide legal and economic **information**, guidance and assistance to contracting entities in preparing and carrying out procurement procedures. Member States shall also ensure that each contracting entity can obtain **technical** assistance and **information** on individual questions, **in particular in relation to Articles 70, 71, 74 and 81.**

**Amendment 231**  
**Proposal for a directive**  
**Article 96 – paragraph 2**

*Text proposed by the Commission*

**2. With a view to improving access to public procurement for economic operators, in particular SMEs, and in order to facilitate correct understanding of the provisions of this Directive, Member States shall ensure that appropriate assistance can be obtained, including by electronic means or using**

*Amendment*

**deleted**

*existing networks dedicated to business assistance.*

**Amendment 232**

**Proposal for a directive**

**Article 96 – paragraph 3 – subparagraph 1**

*Text proposed by the Commission*

*Amendment*

**3. Specific administrative assistance shall be available to economic operators intending to participate in a procurement procedure in another Member State. Such assistance shall at least cover administrative requirements in the Member State concerned, as well as possible obligations related to electronic procurement.** *deleted*

**Amendment 233**

**Proposal for a directive**

**Article 96 – paragraph 3 – subparagraph 2**

*Text proposed by the Commission*

*Amendment*

**Member States shall ensure that interested economic operators have easy access to appropriate information on the obligations relating to taxes, environmental protection and to social and labour law obligations, which are in force in the Member State, in the region or locality where the works are to be carried out or the services are to be provided and which will be applicable to the works carried out on site or to the services provided during the performance of the contract.** *deleted*

**Amendment 234**

**Proposal for a directive**

**Article 96 – paragraph 4**

*Text proposed by the Commission*

*Amendment*

**4. For the purposes of paragraphs 1, 2 and 3, Member States may appoint a single body or several bodies or administrative structures. Member States shall ensure case due coordination between those bodies and structures.**

**deleted**

#### **Amendment 235**

##### **Proposal for a directive Article 97 – paragraph 1**

*Text proposed by the Commission*

*Amendment*

1. Member States shall provide mutual assistance to each other, and shall put in place measures for effective cooperation with one another, in order to ensure exchange of information on issues referred to in Articles 56, 75 and 79. They shall ensure the confidentiality of the information which they exchange.

1. Member States shall provide mutual assistance to each other, and shall put in place measures for effective cooperation with one another, in order to ensure exchange of information on issues referred to in Articles **71, 72**, 56, 75 and 79. They shall ensure the confidentiality of the information which they exchange.

#### **Amendment 236**

##### **Proposal for a directive Article 97 – paragraph 3**

*Text proposed by the Commission*

*Amendment*

**3. For the purposes of this Article, Member States shall designate one or more liaison points, the contact details of which shall be communicated to the other Member States, the oversight bodies and the Commission. Member States shall publish and regularly update the list of liaison points. The oversight body shall be in charge of the coordination of such liaison points.**

**deleted**

#### **Amendment 237**

**Proposal for a directive**  
**Article 98 – paragraph 2**

*Text proposed by the Commission*

2. The delegation of power referred to in Articles 4, 35, **33**, 38, 25, 65, 70, **77**, **85** **and 95** shall be conferred on the Commission for an indeterminate period of time from the [date of entry into force of this Directive].

*Amendment*

2. The delegation of power referred to in Articles 4, 35, 38, 25, 65, 70 shall be conferred on the Commission for an indeterminate period of time from the [date of entry into force of this Directive].

**Amendment 238**

**Proposal for a directive**  
**Article 98 – paragraph 3**

*Text proposed by the Commission*

3. The delegation of power referred to in Articles 4, 35, **33**, 38, 25, 65, 70, **77**, **85** **and 95** may be revoked at any time by the European Parliament or by the Council. A revocation decision shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the Official Journal of the European Union or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.

*Amendment*

3. The delegation of power referred to in Articles 4, 35, 38, 25, 65, 70 may be revoked at any time by the European Parliament or by the Council. A revocation decision shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the Official Journal of the European Union or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.

**Amendment 239**

**Proposal for a directive**  
**Annex 2 – paragraph 1 – point e a (new)**

*Text proposed by the Commission*

*Amendment*

***(ea) the procedures to allocate railway infrastructure capacity, railway licences or safety certifications in accordance with the Directives 95/18/EC, 2001/14/EC and 2004/49/EC.***

**Amendment 240**

**Proposal for a directive**  
**Annex 3 – point D – paragraph 1**

*Text proposed by the Commission*

*Amendment*

Rail **Freight** transport

Rail transport

**Amendment 241**

**Proposal for a directive**  
**Annex 3 – point D – paragraph 3**

*Text proposed by the Commission*

*Amendment*

**Rail passenger transport**

**deleted**

**None**

**Amendment 242**

**Proposal for a directive**  
**Annex VIII – point 2 – introductory part**

*Text proposed by the Commission*

*Amendment*

(2) "Standard" means a technical specification approved by a recognised standardisation **body** for repeated or continuous **application, compliance** with which is not compulsory and which falls into one of the following categories:

(2) 'Standard' means a technical specification **established by consensus and approved by a recognised standardisation organisation** for repeated or continuous **use** with which **compliance** is not compulsory and which falls into one of the following categories:

**Amendment 243**

**Proposal for a directive**  
**Annex VIII – point 4**

*Text proposed by the Commission*

*Amendment*

(4) "Common technical specifications" means a technical specification laid down in accordance with a procedure recognised by the Member States or in accordance with Articles 9 and 10 of **Parliament and Council Regulation [XXX] on European standardisation [and amending Council Directives 89/686/EEC and 93/15/EEC**

(4) 'Common technical specifications' means a technical specification laid down in accordance with a procedure recognised by the Member States or, **in the field of information and communication technologies**, in accordance with Articles 13 and 14 of Regulation (EU) No 1025/2012 of the European Parliament

*and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/105/EC and 2009/23/EC of the European Parliament and the Council] which has been published in the Official Journal of the European Union;*

*and of the Council of 25 October 2012 on European standardisation<sup>1</sup>;*

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<sup>1</sup> *OJ L 316, 14.11.2012, p. 12.*

## Amendment 244

### Proposal for a directive Annex 17

<i>Text proposed by the Commission</i>		<i>Amendment</i>	
CPV Code	Description	CPV Code	Description
79611000-0; from 85000000-9 to 85323000-9  (except 85321000-5 and 85322000-2);	Health, social services	79611000-0; <b>75200000-8;</b> <b>75231200-6;</b> <b>75231240-8;</b> from 85000000-9 to 85323000-9 (except 85321000-5 and 85322000-2); <b>and</b> <b>98133100-5 and</b> <b>98200000-5</b>	Health, social <b>and</b> <b>related</b> services
75121000-0, 75122000-7, 75124000-1; from 79995000-5 to 79995200-7; from 80100000-5 to 80660000-8 (except 80533000-9, 80533100-0, 80533200-1); from 92000000-1 to 92700000-8 (except 92230000-2, 92231000-9, 92232000-6)	Administrative educational, healthcare and cultural services	75121000-0, 75122000-7, 75124000-1; from 79995000-5 to 79995200-7; from 80100000-5 to 80660000-8 (except 80533000-9, 80533100-0, 80533200-1); from 92000000-1 to 92700000-8 (except 92230000-2, 92231000-9, 92232000-6)	Administrative educational, healthcare and cultural services

75300000-9	Compulsory social security services	75300000-9	Compulsory social security services <sup>1</sup>
75310000-2, 75311000-9, 75312000-6, 75313000-3, 75313100-4, 75314000-0, 75320000-5, 75330000-8, 75340000-1 98000000-3	Benefit services	75310000-2, 75311000-9, 75312000-6, 75313000-3, 75313100-4, 75314000-0, 75320000-5, 75330000-8, 75340000-1 98000000-3; <b>55521100-9</b>	Benefit services
98120000-0	Other community, social and personal services Services furnished by trade unions	98120000-0	Other community, social and personal services Services furnished by trade unions
98131000-0	Religious services	98131000-0 <b>From 80100000-5 to 80660000-8 (except 80533000-9, 80533100-0, 80533200-1) from 79100000-5 to 79140000-7</b>	Religious services <b>Education and vocational education services</b>  <b>Legal services to the extent that they are not excluded under point (b) of the first paragraph of Article 19(b)</b>

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<sup>1</sup> *These services are not covered by this Directive where they are organised as non-economic services of general interest. Member States are free to organise the provision of compulsory social services or of other services as services of general interest or as non-economic services of general interest.*

## Amendment 245

### Proposal for a directive ANNEX XVIII - Part

PART A **Contract** notice

1. Name, identification number (where provided for in national legislation), address including NUTS code, **telephone, fax number**, email and internet address of the contracting entity **and, where different, of the service from which additional information may be obtained.**

2. Main activity exercised.

3. Description of the services or categories thereof and where applicable, incidental works and supplies to be procured, including an indication of the quantities or values involved, nomenclature reference No(s).

**4.** NUTS code for the main place of performance of the services.

**5.** Where appropriate, state whether the contract is reserved for sheltered workshops or whether its performance is reserved in the context of sheltered employment programmes.

**6.** Main conditions to be fulfilled by the economic operators in view of their participation, or, where appropriate, the electronic address where detailed information may be obtained.

**7. Time limit(s) for contacting the contracting entity in view of participation.**

8. Any other relevant information.

PART A **Periodic indicative** notice

1. Name, identification number (where provided for in national legislation), address including NUTS code, email and internet address of the contracting authority.

2. Main activity exercised.

3. **Brief** description of the services or categories thereof and where applicable, incidental works and supplies to be procured, including, **if known**, an indication of the quantities or values involved, nomenclature reference No(s).

**3a. As far as already known:**

**a)** NUTS code for the main place of performance of the services.

**b)** Where appropriate, state whether the contract is reserved for sheltered workshops or whether its performance is reserved in the context of sheltered employment programmes.

**c)** Main conditions to be fulfilled by the economic operators in view of their participation, or, where appropriate, the electronic address where detailed information may be obtained.

8. Any other relevant information.

## EXPLANATORY STATEMENT

The rapporteur believes that the modernisation of the public procurement directives should strike a balance between simplification of the rules, on the one hand, and, on the other, sound, effective procedures related to innovative, sustainable award criteria, while also securing a higher rate of SME participation and making wider use of e-procurement.

The aim should be to exploit the potential of public procurement to the full within the single market in order to foster sustainable growth, employment, and social inclusion. Given that public procurement makes up quite a substantial proportion of the economy (accounting for an estimated 19% of EU GDP), the successful revision and enforcement of public procurement rules would do much to revitalise investment in the real economy and overcome Europe's economic crisis.

The rapporteur welcomes the Commission proposals, which, in his view, put forward some interesting new principles and ideas. They need, however, to be improved in order to achieve the best possible result. The rapporteur's proposals are discussed in more detail in his working document of 23 February 2012 (PE483.690), which he drew up in anticipation of this draft report.

### ▪ **Effective and socially sustainable public procurement**

Especially where social aspects are concerned, the rapporteur does not think that the Commission proposal goes far enough. He therefore wishes to ensure compliance with social standards at every stage of public procurement procedures.

The rapporteur is accordingly enlarging upon the technical specifications set out in the tender documents, which define the requisite features of the works, services, or supplies, in order to enable a contracting authority to attain sustainability objectives if it so wishes. The technical specifications should therefore be allowed to include requirements concerning performance (e.g. environmental performance), the organisation, qualifications, and experience of the workers called upon to carry out the contract, safety, in particular methods for assessing product quality, packaging and instructions for use, life cycle, and features related to the socially sustainable production process.

The **socially sustainable production process**, a concept devised by the rapporteur and mentioned in the award criteria, means a production process linked to the purpose of the contract, be it to provide supplies, works, or services, which is such as to take the health and safety of workers into account and observe social standards. The social criteria underlying it will refer to social standards defined and certified in accordance with national and European law and by collective agreements.

The rapporteur is also tightening up the **grounds for exclusion** by means of a stipulation that an economic operator must be excluded from public procurement contracts if it has breached its obligations under social, labour, and gender equality law as defined by national and European legislation and collective agreements. Similarly, contracting authorities may not award a contract to the tenderer making the best bid if the economic operator in question is unable to provide up-to-date information on the payment of its social security contributions.

As regards the **selection criteria**, the rapporteur believes that contracting authorities should be permitted to lay down conditions of participation linked to compliance with employee health and safety standards and with social and labour legislation as defined by national and European law and by collective agreements.

Finally, regarding the **award criteria** stage of public procurement contracts, the rapporteur considers that the ‘lowest price’ concept should be permanently abandoned and replaced by the concept of the ‘most economically advantageous tender’. Given that this latter approach also allows for price, contracting authorities would be able to make the choices most appropriate to their specific needs and, not least, consider strategic societal aspects, social criteria – including social and labour rights, working conditions, health and safety at the workplace, and access to employment for disadvantaged persons, young persons, women, older workers, and the long-term unemployed – environmental criteria, and, in particular, fair trade. As already mentioned, the concept of a socially sustainable production process is included in the evaluation of the most economically advantageous tender. Furthermore, the definition of the life cycle must include a reference to the place of production. The European Union should be able to give preference to local producers, in particular SMEs, when awarding public procurement contracts in certain specific cases. Besides promoting sustainable development and safeguarding local and regional production, this provision would offer contracting authorities a means of alleviating the local impact of the economic crisis.

However, for reasons of efficiency and legal certainty, none of the award criteria should give total freedom of choice to the contracting authority: the award criteria selected for determining the most economically advantageous tender should always be linked to the subject matter of the contract and afford scope for effective competition.

To ensure that public procurement contracts are implemented effectively, Member States should also have the option of requiring contracting authorities to check the performance of the economic operator to which a contract has been awarded.

- **Sound subcontracting for effective SME participation**

The rapporteur supports subcontracting to the extent that it helps SMEs to develop. However, there have been some alarming cases in which the practice of ‘cascade subcontracting’ has led to the exploitation of workers and hence to lower quality in public procurement contracts. It is in the interest of all parties, companies as well as contracting authorities, to ensure that work carried out in the performance of public procurement contracts is of high quality and complies with labour law. The rapporteur is accordingly proposing that, to restrict cascade subcontracting, the number of consecutive subcontractors should be limited to not more than three. He also proposes that the principle of responsibility be established throughout the subcontracting chain so that all stages in the process would share the responsibility of respecting fundamental rights and complying with employee health and safety regulations and existing labour laws.

In addition, a contracting entity must ask a tenderer to indicate in its tender what proportion of the contract it intends to contract out to third parties and specify the subcontractors proposed.

The provisions on abnormally low bids should also be strengthened to avoid any possibility of subcontracting not in conformity with labour law.

The rapporteur supports the Commission's proposal to make e-procurement the general rule, as this will facilitate and encourage SME participation. However, he believes that the current submission deadlines under Directive 2004/17/EC should continue to apply, since he takes the view that a minimum time-frame is necessary to enable tenderers, particularly SMEs, to draw up an appropriate tender.

▪ **Simplifying public procurement for contracting authorities**

The rapporteur is focusing particular attention on the contracting authorities which will be responsible for applying the provisions of the forthcoming directive on public procurement in the water, energy, transport, and postal services sectors. That is why he is anxious not to make their task any harder, and to enable them to complete public procurement contracts effectively and in the best interests of their local area. In order to safeguard the free movement of goods, freedom of establishment, freedom to provide services, and the principles deriving from those freedoms, for example equal treatment, non-discrimination, mutual recognition, proportionality, and transparency, and taking into account the nature of the sectors concerned and the varying degrees of liberalisation achieved in the Member States, the rapporteur takes the view that this directive cannot be applied when public procurement procedures fail to guarantee fair competition among economic operators.

He therefore considers it essential for all the procedures laid down in the directive to be transposed in the Member States: each contracting authority should be provided with a toolbox enabling it to choose the procedure best suited to its needs. The rapporteur feels that the negotiated procedure should be used more widely in the future.

Moreover, he believes that Member States should provide contracting authorities with the technical and financial resources they need in order to adapt to e-procurement and draw up their calls for tender.

The rapporteur also wishes to improve flexibility in the relations between public authorities along the lines that the Commission is proposing. The Commission is codifying current precedents in quite a restrictive way: local authorities will thus have considerably less room for manoeuvre, and the overall efficiency of public procurement will consequently be undermined. The rapporteur is therefore providing for exceptions to the principle of a total ban on private participation, while insisting on the need to pursue the general interest. Given that the above doctrine would be equally applicable to public authorities operating in the sectors covered by this directive, it should be ensured that the same rules apply both in this directive and in Directive [...]/.../EU[on public procurement].

The rapporteur supports the Commission's proposal to do away with the distinction between priority and non-priority services. He believes that a special scheme should be established for social services, given their specific characteristics and the desirability of making strategic use of public procurement, but wishes to make the scheme less stringent by removing the requirement for ex ante publication, while stressing the need to comply with the principles of transparency and equal treatment.

As regards the national governance authority, the rapporteur considers it important for each Member State to have an authority responsible for the proper operation of public procurement. However, he wishes to avoid any additional administrative burden which might

slow down the work of contracting authorities. He therefore takes the view that, if Member States already have such authorities, these should be given new responsibilities.

21.9.2012

## **OPINION OF THE COMMITTEE ON INTERNATIONAL TRADE**

for the Committee on the Internal Market and Consumer Protection

on the proposal for a Directive of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors (COM(2011)0895 – C7-0007/2012 – 2011/0439(COD))

Rapporteur: Gianluca Susta

### **SHORT JUSTIFICATION**

The Commission recently proposed to update the directives on public procurement (Directive 2004/18/EC) and on the procurement procedures of entities operating in the water, energy, transport and postal services sectors (Directive 2004/17/EC). A proposal was also presented for a new directive aimed at regulating the concessions sector and, only subsequently, a proposal to regulate the access of third-country goods and services to the Union's internal public procurement market and procedures supporting negotiations on access of Union goods and services to third-country public procurement markets.

At international level, public procurement represents an important slice of world trade: the procurement sector is worth on average 15 to 20 % of GDP in developed countries. Despite its importance, the public procurement market remains one of the most closed (the Commission estimates that more than half the global public procurement market is still closed to foreign competition) and least regulated sectors in international trade.

At multilateral level, the key regulation is the Government Procurement Agreement (GPA), which recently underwent a review completed in March 2012. This review aimed to increase the transparency and openness of international public procurement markets and to simplify procedures. In this regard, the rapporteur welcomes this review process and hopes that it is quickly approved by the Union; at the same time, he notes that only 42 Member States of the WTO (of which 27 are Member States of the EU) have currently adhered to this Agreement and strongly hopes that many other countries may join, in particular more developed countries and emerging economies, in order to extend its geographical coverage and thus obtain a system of agreed and universally valid rules in this important sector for international trade.

Specific provisions relating to the public procurement sector are also present in another WTO

agreement, the General Agreement on Trade in Services (GATS).

At bilateral level, the Union is also tied by obligations entered into under some bilateral agreements that it has already made (with Albania, the Former Yugoslav Republic of Macedonia, CARIFORUM, Chile, Croatia, Mexico, Montenegro, South Korea and Switzerland). The procurement sector is an important and often delicate aspect of ongoing negotiations to conclude possible new trade agreements with other international partners.

With regard to this international context, the rapporteur highlights the importance of the international dimension in the public procurement sector. He also notes the need for a gradual opening of international public procurement markets on the basis of a system of agreed rules, marking reciprocity, equity and compliance with international environmental, social and employment standards. The European Union currently guarantees international operators a significant level of openness to its public procurement market, openness which is very often not reciprocated by other important international trade partners. The rapporteur, therefore, hopes for more incisive action by the Union, through legislative initiatives and a coherent negotiating position, in order to re-establish equitable conditions and introduce a real level playing field at international level.

From this viewpoint, he deplores the Commission's decision not to proceed with a unitary standardisation of the 'external dimension' of the public procurement sector: the decision not to re-propose the provisions contained in Directive 2004/17/EC on tenders involving foreign goods and services and the subsequent presentation of a complementary but entirely independent legislative initiative, also in terms of its legislative procedure — although favourably received as regards its proposed contents — risks creating a dangerous legal vacuum, depriving European legislation of provisions aimed at regulating the access of third-country goods, services and companies to the European procurement market.

For this reason, the rapporteur believes it is extremely important to reintroduce specific rules aimed at systematically and extensively regulating the conditions by which to reject any tenders in which there is a prevalence of goods and services that are not contemplated by international agreements: in this regard, the rapporteur intends to adapt the legislative mechanism proposed by the Commission itself in its recent proposal for a regulation.

It also appears important to make the law proposed by the Commission more restrictive with regard to so-called 'abnormally low tenders', by introducing the option to have a mechanism for the automatic exclusion of tenders which are significantly lower than others and the extension of the minimum conditions for requesting additional information from economic operators.

Finally, it is deemed appropriate to introduce some amendments to better highlight the international context in which European directives operate.

## **AMENDMENTS**

The Committee on International Trade calls on the Committee on International Trade, as the committee responsible, to incorporate the following amendments in its report:

## Amendment 1

### Proposal for a directive Recital 4

#### *Text proposed by the Commission*

(4) Public procurement plays a key role in the Europe 2020 strategy as one of the market-based instruments to be used to achieve a smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. For that purpose, the current public procurement rules adopted pursuant to Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts have to be revised and modernised in order to increase the efficiency of public spending, facilitating in particular the participation of small and medium-sized enterprises in public procurement and to enable procurers to make better use of public procurement in support of common societal goals. There is also a need to clarify basic notions and concepts to ensure better legal certainty and to incorporate certain aspects of related well-established case-law of the Court of Justice of the European Union.

#### *Amendment*

(4) Public procurement plays a key role in the Europe 2020 strategy as one of the market-based instruments to be used to achieve a smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. ***Public procurement is a key tool in the process of reframing European industrial policy.*** For that purpose, the current public procurement rules adopted pursuant to Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts have to be revised and modernised in order to increase the efficiency of public spending, facilitating in particular the participation of small and medium-sized enterprises in public procurement and to enable procurers to make better use of public procurement in support of common societal goals. There is also a need to clarify basic notions and concepts to ensure better legal certainty and to incorporate certain aspects of related well-established case-law of the Court of Justice of the European Union.

## Amendment 2

### Proposal for a directive Recital 4 a (new)

***(4a) Internal Market and international markets are increasingly interlinked, therefore EU values, such as transparency, a principled stance against corruption, principle of reciprocity and the advancement of social and human rights should be appropriately promoted in procurement policies.***

### Amendment 3

#### Proposal for a directive Recital 14

Text proposed by the Commission

(14) Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the Agreements reached in the Uruguay Round multilateral negotiations (1986-1994) approved in particular the World Trade Organisation Agreement on Government Procurement, hereinafter referred to as the ‘Agreement’. The aim of the Agreement is to establish a multilateral framework of balanced rights and obligations relating to public contracts with a view to achieving the liberalisation and expansion of world trade. For contracts covered by the Agreement, as well as by other relevant international agreements by which the Union is bound, contracting entities fulfil the obligations under those agreements by applying this Directive to economic operators of third countries that are signatories to the agreements.

Amendment

(14) Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the Agreements reached in the Uruguay Round multilateral negotiations (1986–1994) approved in particular the World Trade Organisation Agreement on Government Procurement, hereinafter referred to as the ‘Agreement’. The aim of the Agreement is to establish a multilateral framework of balanced rights and obligations relating to public contracts with a view to achieving the liberalisation and expansion of world trade. ***This Agreement has been subject to a review which ended in March 2012; the main objectives of the review were to increase the degree of openness of markets in the sector, expand its coverage, eliminate discriminatory measures and increase transparency in procedures.*** For contracts covered by the Agreement, as well as by other relevant international agreements by which the Union is bound, ***including commitments entered into under the framework of bilateral trade agreements,***

contracting entities fulfil the obligations under those agreements by applying this Directive to economic operators of third countries that are signatories to the agreements. *In this regard, it is necessary for the international commitments entered into by the Union with regard to third countries on access to the public procurement market to be transposed into the Union's legal order so as to guarantee their effective and uniform application.*

#### **Amendment 4**

##### **Proposal for a directive Recital 14 a (new)**

*Text proposed by the Commission*

*Amendment*

*(14a) Within the World Trade Organisation and within the framework of its bilateral relations, the Union supports an ambitious international opening up of the international public procurement markets of the Union and of its trade partners, in a spirit of reciprocity and reciprocal advantage.*

#### **Amendment 5**

##### **Proposal for a directive Recital 15**

*Text proposed by the Commission*

*Amendment*

(15) The Agreement applies to contracts above certain thresholds, set in the Agreement and expressed as special drawing rights. The thresholds laid down by this Directive should be aligned to ensure that they correspond to the euro equivalents of the thresholds of the Agreement. Provision should also be made for periodic reviews of the thresholds expressed in euros so as to adjust them, by way of a purely mathematical operation, to possible variations in the value of the euro

(15) The Agreement applies to contracts above certain thresholds, set in the Agreement and expressed as special drawing rights. The thresholds laid down by this Directive should be aligned to ensure that they correspond to the euro equivalents of the thresholds of the Agreement. Provision should also be made for periodic reviews of the thresholds expressed in euros so as to adjust them, by way of a purely mathematical operation, to possible variations in the value of the euro

in relation to the special drawing right. To avoid a multiplication of thresholds it is furthermore appropriate, without prejudice to the international commitments of the Union, to continue to apply the same thresholds to all contracting entities, regardless of the sector in which they operate.

in relation to the special drawing right. To avoid a multiplication of thresholds it is furthermore appropriate, without prejudice to the international commitments of the Union, to continue to apply the same thresholds to all contracting entities, regardless of the sector in which they operate. ***It is also appropriate for this periodic review of the thresholds to be undertaken not least on the basis of a preliminary assessment of the correct implementation of the principle of substantial reciprocity in the opening up of the market between the Union and the other signatories to the Agreement. The assessment of substantial reciprocity is also valid for third countries which do not adhere to the Agreement on public procurement but which enjoy access to the European public procurement market.***

## Amendment 6

### Proposal for a directive Recital 18

#### *Text proposed by the Commission*

(18) Being addressed to Member States, this directive does not apply to procurement carried out by international organisations on their own behalf and for their own account. There is, however, a need to clarify to what extent this directive should be applied to procurement governed by specific international rules.

#### *Amendment*

(18) Being addressed to Member States, this directive does not apply to procurement carried out by international organisations on their own behalf and for their own account. There is, however, a need to clarify to what extent this directive should be applied to procurement governed by specific international rules. ***The European Institutions should, in particular, take into account the changes effected by this Directive and adjust their own procurement rules accordingly to reflect these changes.***

## Amendment 7

### Proposal for a directive Recital 40

#### *Text proposed by the Commission*

(40) Public contracts should not be awarded to economic operators that have participated in a criminal organisation or have been found guilty of corruption, fraud to the detriment of the Union's financial interests or money laundering. Non-payment of taxes or social security contributions should also be sanctioned by mandatory exclusion at the level of the Union. Given that contracting entities, which are not contracting authorities, might not have access to indisputable proof on the matter, it is appropriate to leave the choice of whether or not to apply the exclusion criteria listed in Directive [2004/18] to such contracting entities. The obligation to apply Article 55(1) and (2) of Directive [2004/18] should therefore be limited to contracting entities that are contracting authorities. Furthermore, contracting entities should be given the possibility to exclude candidates or tenderers for violations of environmental or social obligations, including rules on accessibility for disabled persons or other forms of grave professional misconduct, such as violations of competition rules or of intellectual property rights.

## Amendment 8

### Proposal for a directive Recital 40

#### *Text proposed by the Commission*

(40) Public contracts should not be awarded to economic operators that have participated in a criminal organisation or

#### *Amendment*

(40) Public contracts should not be awarded to economic operators that have participated in a criminal organisation or have been found guilty of corruption, fraud to the detriment of the Union's financial interests or money laundering. Non-payment of taxes or social security contributions should also be sanctioned by mandatory exclusion at the level of the Union. Given that contracting entities, which are not contracting authorities, might not have access to indisputable proof on the matter, it is appropriate to leave the choice of whether or not to apply the exclusion criteria listed in Directive [2004/18] to such contracting entities. The obligation to apply Article 55(1) and (2) of Directive [2004/18] should therefore be limited to contracting entities that are contracting authorities. Furthermore, contracting entities should be given the possibility to exclude candidates or tenderers for violations of environmental or social obligations, ***also in compliance with internationally recognised principles and*** including rules on accessibility for disabled persons or other forms of grave professional misconduct, such as violations of competition rules or of intellectual property rights.

have been found guilty of corruption, fraud to the detriment of the Union's financial interests or money laundering. Non-payment of taxes or social security contributions should also be sanctioned by mandatory exclusion at the level of the Union. Given that contracting entities, which are not contracting authorities, might not have access to indisputable proof on the matter, it is appropriate to leave the choice of whether or not to apply the exclusion criteria listed in Directive [2004/18] to such contracting entities. The obligation to apply Article 55(1) and (2) of Directive [2004/18] should therefore be limited to contracting entities that are contracting authorities. Furthermore, contracting entities should be given the possibility to exclude candidates or tenderers for *violations of environmental or social obligations, including rules on accessibility for disabled persons or other* forms of grave professional misconduct, such as violations of competition rules or of intellectual property rights.

have been found guilty of corruption, fraud to the detriment of the Union's financial interests or money laundering. Non-payment of taxes or social security contributions *and violations of environmental or social obligations, including rules on accessibility for disabled persons*, should also be sanctioned by mandatory exclusion at the level of the Union. Given that contracting entities, which are not contracting authorities, might not have access to indisputable proof on the matter, it is appropriate to leave the choice of whether or not to apply the exclusion criteria listed in Directive [2004/18] to such contracting entities. The obligation to apply Article 55(1) and (2) of Directive [2004/18] should therefore be limited to contracting entities that are contracting authorities. Furthermore, contracting entities should be given the possibility to exclude candidates or tenderers for forms of grave professional misconduct, such as violations of competition rules or of intellectual property rights.

## Amendment 9

### Proposal for a directive

#### Recital 43

##### *Text proposed by the Commission*

(43) Contracts should be awarded on the basis of objective criteria that ensure compliance with the principles of transparency, non-discrimination and equal treatment. Those criteria should guarantee that tenders are assessed in conditions of effective competition, also where contracting entities require high-quality works, supplies and services that are optimally suited to their needs. As a result, contracting entities should be allowed to adopt as award *criteria either* "the most economically advantageous tender" *or* "the

##### *Amendment*

(43) Contracts should be awarded on the basis of objective criteria that ensure compliance with the principles of transparency, non-discrimination and equal treatment. Those criteria should guarantee that tenders are assessed in conditions of effective competition, also where contracting entities require high-quality works, supplies and services that are optimally suited to their needs. As a result, contracting entities should be allowed to adopt as *the* award *criterion* "the most economically advantageous tender".

*lowest cost", taking into account that in the latter case they are free to set adequate quality standards by using technical specifications or contract performance conditions.*

## **Amendment 10**

### **Proposal for a directive Recital 44**

*Text proposed by the Commission*

(44) **Where contracting entities choose to award** a contract to the most economically advantageous tender, **they** must determine the award criteria on the basis of which they will assess tenders in order to identify which one offers the best value for money. The determination of those criteria depends on the subject-matter of the contract, since they must allow the level of performance offered by each tender to be assessed in the light of the subject-matter of the contract, as defined in the technical specifications, and the value for money of each tender to be measured. Furthermore, the chosen award criteria should not confer an unrestricted freedom of choice on the contracting entity and they should ensure the possibility of effective competition and be accompanied by requirements that allow the information provided by the tenderers to be effectively verified.

*Amendment*

(44) **With a view to awarding** a contract to the most economically advantageous tender, **contracting entities** must determine the award criteria on the basis of which they will assess tenders in order to identify which one offers the best value for money. The determination of those criteria depends on the subject-matter of the contract, since they must allow the level of performance offered by each tender to be assessed in the light of the subject-matter of the contract, as defined in the technical specifications, and the value for money of each tender to be measured. Furthermore, the chosen award criteria should not confer an unrestricted freedom of choice on the contracting entity and they should ensure the possibility of effective competition and be accompanied by requirements that allow the information provided by the tenderers to be effectively verified.

## **Amendment 11**

### **Proposal for a directive Recital 49**

*Text proposed by the Commission*

(49) Tenders that appear abnormally low in relation to the works, supplies or services might be based on technically,

*Amendment*

(49) Tenders that appear abnormally low in relation to the works, supplies or services might be based on technically,

economically or legally unsound assumptions or practices. In order to prevent possible disadvantages during contract performance, contracting entities should be obliged to ask for an explanation of the price charged where a tender significantly undercuts the prices demanded by other tenderers. Where the tenderer cannot provide a sufficient explanation, the contracting entity should be entitled to reject the tender. Rejection should be mandatory in cases where the contracting entity has established that the abnormally low price results from non-compliance with mandatory Union legislation in the fields of social, labour or environmental law or international labour law provisions.

## **Amendment 12**

### **Proposal for a directive Recital 56 a (new)**

*Text proposed by the Commission*

economically or legally unsound assumptions or practices. In order to prevent possible disadvantages during contract performance, contracting entities should ***have the option of excluding tenders that significantly undercut the prices demanded by other tenderers and should*** be obliged to ask for an explanation of the price charged where a tender significantly undercuts the prices demanded by other tenderers. Where the tenderer cannot provide a sufficient explanation, the contracting entity should be entitled to reject the tender. Rejection should be mandatory in cases where the contracting entity has established that the abnormally low price results from non-compliance with mandatory Union legislation in the fields of social, labour or environmental law or international labour law provisions.

*Amendment*

***(56a) Contracting entities should respect the delay of payment as established in Directive 2011/7/EU.***

## **Amendment 13**

### **Proposal for a directive Recital 63**

*Text proposed by the Commission*

(63) It is of particular importance that the Commission ***carry*** out appropriate consultations during its preparatory work, including at expert level. When preparing and drawing up delegated acts, the Commission should ensure simultaneous, timely and appropriate transmission of relevant documents to the European

*Amendment*

(63) It is of particular importance that the Commission ***carries*** out appropriate consultations during its preparatory work, including at expert level. When preparing and drawing up delegated acts, the Commission should ensure simultaneous, timely and appropriate transmission of relevant documents to the European

Parliament and the Council.

Parliament and the Council. *The Commission should provide full information and documentation on its meetings with national experts within the framework of the preparation and implementation of delegated acts. In this respect, the Commission should ensure that the European Parliament is duly involved, drawing on best practices from previous experience in other policy areas in order to create the best possible conditions for future scrutiny of delegated acts by the European Parliament.*

#### *Justification*

*The directive foresees the use of delegated acts - among other things - to adapt the methodology for the calculation of the threshold levels to any change provided for by the Government Procurement Agreement (Article 6.5 classic, Article 12.4 utilities directive) and to change the list of international social and environmental law provisions in ANNEX XI (Article 54.2 classic directive, Article 70 utilities directive). As these are issue with a clear international trade dimension, the rapporteur feels that the same institutional procedures should apply as with "normal" trade legislation.*

*In line with OMNIBUS I and OMNIBUS II (alignment package in INTA), the rapporteur proposes emphasizing the need for the European Parliament to be duly involved in the preparation and implementation of delegated acts (recital 55). This will facilitate the scrutiny of delegated acts and will ensure an efficient exercise of the delegation of power by avoiding objections from the European Parliament.*

*The rapporteur deems it appropriate to limit in time (article 89.2) the conferral of powers on the Commission. Such limitation brings about more parliamentary control, obliging the Commission to draw up a report in respect of the delegation of power no later than nine months before the end of the established period. On the other hand, tacit extension of the delegation for a period of identical durations prevents overburdening the legislators and facilitates the implementation of the common commercial policy.*

*Considering the dynamics of the Parliamentary work, internal procedures and deadlines, it is important to assure that the legislator is given enough time to duly scrutinize a legislative act (Article 89.5).*

*All changes reflect changes brought about by the two Trade Omnibuses.*

#### **Amendment 14**

##### **Proposal for a directive Article 12 a (new)**

*Text proposed by the Commission*

*Amendment*

**Article 12a**

***When awarding contracts which, on account of their value, are not covered by this Directive, national contracting entities shall be required to comply with the principles of equal treatment, non-discrimination and transparency.***

**Amendment 15**

**Proposal for a directive**

**Article 14 – paragraph 1 – subparagraph 2**

*Text proposed by the Commission*

*Amendment*

In accordance with the calculation method set out in the Government Procurement Agreement, the Commission shall calculate the value of those thresholds on the basis of the average daily value of the euro in terms of the special drawing rights (SDRs), over a period of 24 months terminating on the last day of August preceding the revision with effect from 1 January. The value of the thresholds thus revised shall, where necessary, be rounded down to the nearest thousand euros so as to ensure that the thresholds in force provided for by the Agreement, expressed in SDR, are observed.

In accordance with the calculation method set out in the Government Procurement Agreement, the Commission shall calculate the value of those thresholds on the basis of the average daily value of the euro in terms of the special drawing rights (SDRs), over a period of 24 months terminating on the last day of August preceding the revision with effect from 1 January. The value of the thresholds thus revised shall, where necessary, be rounded down to the nearest thousand euros so as to ensure that the thresholds in force provided for by the Agreement, expressed in SDR, are observed. ***The Commission may also take into consideration the variations in the thresholds made by the other parties to the Agreement.***

**Amendment 16**

**Proposal for a directive**

**Article 15 – paragraph 2**

*Text proposed by the Commission*

*Amendment*

2. The contracting entities shall notify the Commission or the national ***oversight*** body at their request of all the categories of

2. The contracting entities shall notify the Commission or the national ***competent*** body at their request of all the categories of

products or activities which they regard as excluded under paragraph 1. The Commission may periodically publish in the Official Journal of the European Union, for information purposes, lists of the categories of products and activities which it considers to be covered by this exclusion. In so doing, the Commission shall respect any sensitive commercial aspects that the contracting entities may point out when forwarding information.

#### **Amendment 17**

##### **Proposal for a directive**

##### **Article 18 – paragraph 1 – point c**

*Text proposed by the Commission*

(c) a particular procedure of an international organisation;

products or activities which they regard as excluded under paragraph 1. The Commission may periodically publish in the Official Journal of the European Union, for information purposes, lists of the categories of products and activities which it considers to be covered by this exclusion. In so doing, the Commission shall respect any sensitive commercial aspects that the contracting entities may point out when forwarding information.

*Amendment*

(c) a particular procedure of an international organisation, ***which has its affiliation in the Member State***;

#### **Amendment 18**

##### **Proposal for a directive**

##### **Article 21 – paragraph 4 – point c**

*Text proposed by the Commission*

***(c) the participating contracting authorities do not perform on the open market more than 10 % in terms of turnover of the activities which are relevant in the context of the agreement;***

*Amendment*

***deleted***

#### **Amendment 19**

##### **Proposal for a directive**

##### **Article 38 – paragraph 1**

*Text proposed by the Commission*

1. As far as covered by Annexes III, IV and V and the General Notes to the European Union's Appendix 1 to the Government Procurement Agreement and by the other

*Amendment*

1. As far as covered by Annexes III, IV and V and the General Notes to the European Union's Appendix 1 to the Government Procurement Agreement and by the other

international agreements by which the Union is bound, as listed in Annex V to this Directive, contracting entities within the meaning of Article 4(3)(a) shall accord to the works, supplies, services and economic operators of the signatories to those agreements treatment no less favourable than the treatment accorded to the works, supplies, services and economic operators of the Union. By applying this Directive to economic operators of the signatories to those agreements contracting entities shall comply with those agreements.

international agreements by which the Union is bound — ***including the commitments entered into within the framework of bilateral trade agreements***, as listed in Annex V to this Directive, contracting entities within the meaning of Article 4(3)(a) shall accord to the works, supplies, services and economic operators of the signatories to those agreements treatment no less favourable than the treatment accorded to the works, supplies, services and economic operators of the Union. By applying this Directive to economic operators of the signatories to those agreements contracting entities shall comply with those agreements.

## Amendment 20

### Proposal for a directive

#### Article 53 – paragraph 1 – subparagraph 2

##### *Text proposed by the Commission*

For this purpose, contracting entities may seek or accept advice from administrative support structures or from third parties or market participants, provided that such advice does not have the effect of precluding competition and does not result in a violation of the principles of non-discrimination and transparency.

##### *Amendment*

For this purpose, contracting entities may seek or accept advice from administrative support structures or from ***independent*** third parties or market participants, provided that such advice does not have the effect of precluding competition and does not result in a violation of the principles of non-discrimination and transparency.

## Amendment 21

### Proposal for a directive

#### Article 59 – paragraph 1 – subparagraph 1

##### *Text proposed by the Commission*

***Contracts*** may be subdivided into ***homogenous or heterogeneous*** lots. Article 13(7) applies.

##### *Amendment*

***With a view to maximizing competition and access of SMEs to public procurement, contracts*** may be subdivided into lots. Article 13(7) applies.

## Amendment 22

**Proposal for a directive**  
**Article 59 – paragraph 1 – subparagraph 2**

*Text proposed by the Commission*

*Contracting entities shall indicate, in the contract notice, in the invitation to confirm interest, or, where the means of calling for competition is a notice on the existence of a qualification system, in the invitation to tender or to negotiate, **whether tenders are limited to one or more lots only.***

*Amendment*

*Where contracting entity limits the **possibility to tender to one or more lots it shall indicate *it*** in the contract notice, in the invitation to confirm interest, or, where the means of calling for competition is a notice on the existence of a qualification system, in the invitation to tender or to negotiate, or **in the procurement documents.***

**Amendment 23**

**Proposal for a directive**  
**Article 59 – paragraph 3**

*Text proposed by the Commission*

*3. Where more than one lot may be awarded to the same tenderer, contracting entities may provide that they will either award a contract per lot or one or more contracts, covering several or all lots.*

*Contracting entities shall specify in the procurement documents whether they reserve the right to make such a choice and, if so, which lots may be grouped together under one contract.*

*Contracting entities shall first determine the tenders fulfilling best the award criteria set out pursuant to Article 76 for each individual lot. They may award a contract for more than one lot to a tenderer that is not ranked first in respect of all individual lots covered by this contract, provided that the award criteria set out pursuant to Article 76 are better fulfilled with regard to all the lots covered by that contract. Contracting entities shall specify the methods they intend to use for such comparison in the procurement documents. Such methods shall be transparent, objective and non-*

*Amendment*

*deleted*

*discriminatory.*

### *Justification*

*This paragraph could lead to contrary of what is the aim of the proposal, namely to enable better access of SMEs to public contracts, as it may lead to aggregation of procurement, excluding therefore SMEs.*

### **Amendment 24**

#### **Proposal for a directive Article 70 – paragraph 5**

##### *Text proposed by the Commission*

5. Contracting entities **may decide not to** award a contract to the tenderer submitting the best tender where they have established that the tender does not comply, at least in an equivalent manner, with obligations established by Union legislation in the field of social and labour law or environmental law or of the international social and environmental law provisions listed in Annex XIV.

##### *Amendment*

5. Contracting entities **shall** not award a contract to the tenderer submitting the best tender where they have established that the tender does not comply, at least in an equivalent manner, with obligations established by Union legislation in the field of social and labour law or environmental law or of the international social and environmental law provisions listed in Annex XIV.

### **Amendment 25**

#### **Proposal for a directive Article 76 – paragraph 1 – subparagraph 1 – introductory part**

##### *Text proposed by the Commission*

Without prejudice to national laws, regulations or administrative provisions on the remuneration of certain services, the **criteria** on which contracting entities shall base the award of contracts shall be **one of the following**:

##### *Amendment*

Without prejudice to national laws, regulations or administrative provisions on the remuneration of certain services, the **criterion** on which contracting entities shall base the award of contracts shall be **the most economically advantageous tender**.

### **Amendment 26**

#### **Proposal for a directive Article 76 – paragraph 1 – subparagraph 1 – point a**

*Text proposed by the Commission*

*Amendment*

**(a) the most economically advantageous tender;** *deleted*

#### **Amendment 27**

**Proposal for a directive**

**Article 76 – paragraph 1 – subparagraph 1 – point b**

*Text proposed by the Commission*

*Amendment*

**(b) the lowest cost.** *deleted*

#### **Amendment 28**

**Proposal for a directive**

**Article 76 – paragraph 1 – subparagraph 2**

*Text proposed by the Commission*

*Amendment*

**Costs may be assessed, at the choice of the contracting entity, on the basis of the price only or using a cost-effectiveness approach, such as a life-cycle costing approach, under the conditions set out in Article 77.** *deleted*

#### **Amendment 29**

**Proposal for a directive**

**Article 76 – paragraph 2 – subparagraph 1**

*Text proposed by the Commission*

*Amendment*

The most economically advantageous tender ***referred to in point (a) of paragraph 1*** from the point of view of the contracting entity shall be identified on the basis of criteria linked to the subject-matter of the contract in question.

The most economically advantageous tender from the point of view of the contracting authority shall be identified on the basis of criteria linked to the subject-matter of the public contract in question.

#### **Amendment 30**

## Proposal for a directive

### Article 76 – paragraph 2 – subparagraph 2 – introductory part

*Text proposed by the Commission*

Those criteria shall include in addition to the price or costs ***referred to in point (b) of paragraph 1***, other criteria linked to the subject-matter of the contract in question, such as:

*Amendment*

Those criteria shall include in addition to the price or costs – ***assessed, at the choice of the contracting entity, on the basis of price only or using a cost-effectiveness approach, such as a life-cycle costing approach, under the conditions set out in Article 77*** - other criteria linked to the subject-matter of the contract in question, such as:

## Amendment 31

### Proposal for a directive

#### Article 76 – paragraph 3

*Text proposed by the Commission*

***3. Member States may provide that the award of certain types of contracts shall be based on the most economically advantageous tender referred to in point (a) of paragraph 1 and in paragraph 2.***

*Amendment*

***deleted***

## Amendment 32

### Proposal for a directive

#### Article 76 – paragraph 5 – subparagraph 1

*Text proposed by the Commission*

***In the case referred to in point (a) of paragraph 1***, the contracting entity shall specify the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender.

*Amendment*

The contracting entity shall specify the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender.

**Amendment 33 Proposal for a directive  
Article 79**

*Text proposed by the Commission*

*Abnormally low tenders*

**1.** The contracting entity shall request economic operators to explain the price or costs charged, **where all** of the following conditions are fulfilled:

(a) the price or cost charged is more than **50 %** lower than the average price or costs of the remaining tenders;

(b) the price or cost charged is more than **20 %** lower than the price or costs of the second lowest tender;

**(c) at least five tenders have been submitted.**

**2.** Where tenders appear to be abnormally low for other reasons, contracting entities may also request such explanations.

**3.** The explanations referred to in paragraphs **1** and **2** may in particular relate to:

(a) the economics of the manufacturing process, of the services provided and of the construction method;

(b) the technical solutions chosen or any exceptionally favourable conditions available to the tenderer for the supply of the goods or services or for the execution of the work;

(c) the originality of the supplies, services or work proposed by the tenderer;

(d) compliance, at least in an equivalent manner, with obligations established by Union legislation in the field of social and labour law or environmental law or of the

*Amendment*

*Abnormally low tenders*

**1. The contracting entity may exclude tenders where the price or the costs applied is more than 50% lower than the base tender price.**

**2.** The contracting entity shall request economic operators to explain the price or costs charged, **if at least three tenders have been submitted and one** of the following conditions is fulfilled:

(a) the price or cost charged is more than **30 %** lower than the average price or costs of the remaining tenders;

(b) the price or cost charged is more than **20 %** lower than the price or costs of the second lowest tender;

**(c) the price or cost indicated in a tender is more than 40% lower than the price or cost estimated by contracting entity including taxes.**

**3.** Where tenders appear to be abnormally low for other reasons, contracting entities shall also request such explanations.

**4.** The explanations referred to in paragraphs **2** and **3** may in particular relate to:

(a) the economics of the manufacturing process, of the services provided and of the construction method;

(b) the technical solutions chosen or any exceptionally favourable conditions available to the tenderer for the supply of the goods or services or for the execution of the work;

(c) the originality of the supplies, services or work proposed by the tenderer

international social and environmental law provisions listed in Annex XIV or, where not applicable, with other provisions ensuring an equivalent level of protection;

(e) the possibility of the tenderer obtaining State aid.

4. The contracting entity shall verify the information provided by consulting the tenderer.

It *may only* reject the tender where the evidence does not justify the low level of price or costs charged, taking into account the elements referred to in paragraph 3.

Contracting entities shall reject the tender, where they have established that the tender is abnormally low because it does not comply with obligations established by Union legislation in the field of social and labour law or environmental law or by the international social and environmental law provisions listed in Annex XIV.

5. Where a contracting entity establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender may be rejected on that ground alone only after consultation with the tenderer where the latter is unable to prove, within a sufficient time limit fixed by the contracting entity, that the aid in question was compatible with the internal market within the meaning of Article 107 of the Treaty. Where the contracting entity rejects a tender in those circumstances, it shall inform the Commission thereof.

6. Upon request, Member States shall make available to other Member States, in accordance with Article 97, any information relating to the evidence and

(d) compliance, at least in an equivalent manner, with obligations established by Union legislation in the field of social and labour law or environmental law or of the international social and environmental law provisions listed in Annex XIV or, where not applicable, with other provisions ensuring an equivalent level of protection;

(e) the possibility of the tenderer obtaining State aid *both for the financing of the tender itself, and for the financing of the services, supplies and works relating to the tender.*

5. The contracting entity shall verify the information provided by consulting the tenderer.

It *shall* reject the tender where the evidence does not justify the low level of price or costs charged, taking into account the elements referred to in paragraph 3.

Contracting entities shall reject the tender, where they have established that the tender is abnormally low because it does not comply with obligations established by Union legislation in the field of social and labour law or environmental law or by the international social and environmental law provisions listed in Annex XIV.

6. Where a contracting entity establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender may be rejected on that ground alone only

documents produced in relation to details listed in paragraph 3.

after consultation with the tenderer where the latter is unable to prove, within a sufficient time limit fixed by the contracting entity, that the aid in question was compatible with the internal market within the meaning of Article 107 of the Treaty. Where the contracting entity rejects a tender in those circumstances, it shall inform the Commission thereof.

7. Upon request, Member States shall make available to other Member States, in accordance with Article 97, any information relating to the evidence and documents produced in relation to details listed in paragraph 3.

## Amendment 34

### Proposal for a directive Article 79 b (new)

*Text proposed by the Commission*

*Amendment*

#### *Article 79b*

*The current Directive shall be in accordance with Regulation on the access of third-country goods and services to the Union's internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries (COM/2012/0124 - 2012/0060 (COD)) and shall be in accordance with the conditions laid down in Articles 58 and 59 of Directive 2004/17/EC, tenders covering goods originating in third countries with which the European **European** Union has not concluded, whether multilaterally or bilaterally, an agreement ensuring comparable and effective access for Union undertakings to the markets of those third countries, may be rejected.*

## Amendment 35

**Proposal for a directive**  
**Article 92 – paragraph 1 a (new)**

*Text proposed by the Commission*

*Amendment*

***(1a) Member States shall ensure that the application of public procurement rules is monitored including the implementation of projects co-financed by the Union with a view to detecting threats to the financial interests of the Union. This monitoring shall be used to prevent, detect and adequately report possible instances of procurement fraud, corruption, conflict of interest and other serious irregularities.***

***Where monitoring authorities or structures identify specific violations or systemic problems, they shall be empowered to refer those problems to national auditing authorities, courts or tribunals or other appropriate authorities or structures, such as the ombudsman, national Parliaments or committees thereof.***

**Amendment 36**

**Proposal for a directive**  
**Article 92 – paragraph 1 b (new)**

*Text proposed by the Commission*

*Amendment*

***(1b) The results of the monitoring activities pursuant to paragraph 2 shall be made available to the public through appropriate means of information. In particular, Member States shall publish, at least biennially, an overview of the most frequent sources of wrong application or of legal uncertainty, including possible structural or recurring problems in the application of the rules, hereunder possible cases of fraud and other illegal behaviours.***

***Member States shall transmit to the Commission on a biennial basis, a general overview of their national sustainable***

*procurement policies, describing the relevant national action plans and initiatives and, where known, their practical implementation. They shall also indicate the success rate of SMEs in public procurement; where it is lower than 50% in terms of values of contracts awarded to SMEs, Member States shall indicate whether any initiatives are in place to increase this success rate.*

*On the basis of the data received, the Commission shall regularly issue a report on the implementation and best practices of such policies in the Internal Market.*

## Amendment 37

### Proposal for a directive Article 98 – paragraph 2

*Text proposed by the Commission*

2. The delegation of power referred to in Articles 4, 35, 33, 38, 25, 65, 70, 77, 85 and 95 shall be conferred on the Commission for *an indeterminate* period of *time* from *the* [date of entry into force of *this Directive*].

*Amendment*

2. The delegation of power referred to in Articles 4, 35, 33, 38, 25, 65, 70, 77, 85 and 95 shall be conferred on the Commission for *a* period of *five years* from...\*(date of entry into force of *Directive*). *The Commission shall draw up a report in respect of the delegation of power not later than nine months before the end of the five-year period. The delegation shall be tacitly extended for periods of an identical duration, unless the European Parliament or the Council opposes such extension not later than three months before the end of each period.*

### *Justification*

*The directive foresees the use of delegated acts - among other things - to adapt the methodology for the calculation of the threshold levels to any change provided for by the Government Procurement Agreement (Article 6.5 classic, Article 12.4 utilities directive) and to change the list of international social and environmental law provisions in ANNEX XI (Article 54.2 classic directive, Article 70 utilities directive). As these are issue with a clear international trade dimension, the rapporteur feels that the same institutional procedures*

*should apply as with "normal" trade legislation.*

*In line with OMNIBUS I and OMNIBUS II (alignment package in INTA), the rapporteur proposes emphasizing the need for the European Parliament to be duly involved in the preparation and implementation of delegated acts (recital 55). This will facilitate the scrutiny of delegated acts and will ensure an efficient exercise of the delegation of power by avoiding objections from the European Parliament.*

*The rapporteur deems it appropriate to limit in time (article 89.2) the conferral of powers on the Commission. Such limitation brings about more parliamentary control, obliging the Commission to draw up a report in respect of the delegation of power no later than nine months before the end of the established period. On the other hand, tacit extension of the delegation for a period of identical durations prevents overburdening the legislators and facilitates the implementation of the common commercial policy.*

*Considering the dynamics of the Parliamentary work, internal procedures and deadlines, it is important to assure that the legislator is given enough time to duly scrutinize a legislative act (Article 89.5).*

*All changes reflect changes brought about by the two Trade Omnibuses.*

## **Amendment 38**

### **Proposal for a directive Article 98 – paragraph 5**

#### *Text proposed by the Commission*

5. A delegated act adopted pursuant to Article 98 shall enter into force only if no objection has been expressed either by the European Parliament or by the Council within a period of 2 months of notification of the act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by 2 months at the initiative of the European Parliament or the Council.

#### *Amendment*

5. A delegated act adopted pursuant to Article 98 shall enter into force only if no objection has been expressed either by the European Parliament or by the Council within a period of 2 months of notification of the act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by **four** months at the initiative of the European Parliament or the Council.

#### *Justification*

*The directive foresees the use of delegated acts - among other things - to adapt the methodology for the calculation of the threshold levels to any change provided for by the Government Procurement Agreement (Article 6.5 classic, Article 12.4 utilities directive) and to change the list of international social and environmental law provisions in ANNEX XI*

*(Article 54.2 classic directive, Article 70 utilities directive). As these are issue with a clear international trade dimension, the rapporteur feels that the same institutional procedures should apply as with "normal" trade legislation.*

*In line with OMNIBUS I and OMNIBUS II (alignment package in INTA), the rapporteur proposes emphasizing the need for the European Parliament to be duly involved in the preparation and implementation of delegated acts (recital 55). This will facilitate the scrutiny of delegated acts and will ensure an efficient exercise of the delegation of power by avoiding objections from the European Parliament.*

*The rapporteur deems it appropriate to limit in time (article 89.2) the conferral of powers on the Commission. Such limitation brings about more parliamentary control, obliging the Commission to draw up a report in respect of the delegation of power no later than nine months before the end of the established period. On the other hand, tacit extension of the delegation for a period of identical durations prevents overburdening the legislators and facilitates the implementation of the common commercial policy.*

*Considering the dynamics of the Parliamentary work, internal procedures and deadlines, it is important to assure that the legislator is given enough time to duly scrutinize a legislative act (Article 89.5).*

*All changes reflect changes brought about by the two Trade Omnibuses.*

## **Amendment 39**

### **Proposal for a directive Annex XIV – paragraph 12 a (new)**

*Text proposed by the Commission*

*Amendment*

**- Convention No 94 on labour clauses  
(public procurement).**

## PROCEDURE

<b>Title</b>	Procurement by entities operating in the water, energy, transport and postal services sectors	
<b>References</b>	COM(2011)0895 – C7-0007/2012 – 2011/0439(COD)	
<b>Committee responsible</b> Date announced in plenary	IMCO 19.1.2012	
<b>Opinion by</b> Date announced in plenary	INTA 19.1.2012	
<b>Rapporteur</b> Date appointed	Gianluca Susta 25.1.2012	
<b>Discussed in committee</b>	25.4.2012	11.7.2012
<b>Date adopted</b>	18.9.2012	
<b>Result of final vote</b>	+: 21	–: 4
	0: 5	
<b>Members present for the final vote</b>	William (The Earl of) Dartmouth, Laima Liucija Andrikienė, Nora Berra, David Campbell Bannerman, María Auxiliadora Correa Zamora, Christofer Fjellner, Metin Kazak, Franziska Keller, Bernd Lange, David Martin, Vital Moreira, Paul Murphy, Cristiana Muscardini, Franck Proust, Godelieve Quisthoudt-Rowohl, Niccolò Rinaldi, Helmut Scholz, Peter Šťastný, Robert Sturdy, Gianluca Susta, Henri Weber, Jan Zahradil, Paweł Zalewski	
<b>Substitute(s) present for the final vote</b>	Amelia Andersdotter, George Sabin Cutaş, Małgorzata Handzlik, Syed Kamall, Ioannis Kasoulides, Maria Eleni Koppa, Marietje Schaake, Jarosław Leszek Wałęsa, Pablo Zalba Bidegain	
<b>Substitute(s) under Rule 187(2) present for the final vote</b>	Emilio Menéndez del Valle, Raimon Obiols	

4.10.2012

## **OPINION OF THE COMMITTEE ON EMPLOYMENT AND SOCIAL AFFAIRS**

for the Committee on the Internal Market and Consumer Protection

on the proposal for a directive of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors (COM(2011)0895 – C7-0007/2012 – 2011/0439(COD))

Rapporteur: Ramona Nicole Mănescu

### **SHORT JUSTIFICATION**

The Commission proposal for a directive on procurement plays a key role in the ‘Europe 2020’ strategy for smart, sustainable, and inclusive growth (COM(2010)2020). It is one of the market-based instruments to be used to achieve the Europe 2020 objectives by improving the conditions for business to innovate and by encouraging the wider use of green procurement supporting the shift towards a resource efficient and low-carbon economy. At the same time, the Europe 2020 strategy stresses that public procurement policy must ensure the most efficient use of public funds and that procurement markets must be kept open Union-wide (all the more in times of financial crisis).

Public procurement is a key market-based instrument geared to the needs of society which, in addition to meeting other objectives, can play a role in fostering sustainable employment, working conditions, innovation particularly for businesses, above all SMEs, promoting social inclusion, and addressing the employment needs of vulnerable and disadvantaged social groups and can make an important contribution towards meeting the EU 2020 targets. The public procurement can also play an important role in promoting a European social model based on quality jobs, equal opportunities, non-discrimination and social inclusion.

The modernisation of the public procurement directives should strike a balance between simplifications of the rules, on the one hand, and, on the other, sound, effective procedures related to innovative, sustainable award criteria, while also securing a higher rate of SME participation and making wider use of e-procurement.

The aim should be to exploit the potential of public procurement to the full within the single market in order to foster sustainable growth, high employment level, and social inclusion. The successful revision and enforcement of public procurement rules would do much to revitalise investment in the real economy and overcome Europe’s economic crisis.

The rapporteur for opinion welcomes the Commission's proposal, which put forward some

interesting new principles and ideas. The legislative proposal should result in simpler and more flexible procurement procedures for contracting authorities and provide easier access for companies, especially SMEs.

Given that the money involved is public money, it should not be spent on short-term goals, but should, on the contrary, be viewed as a long-term investment in society; to that extent, the onus on the authorities is all the greater.

The public procurement, if used effectively, could be a real driver to promoting quality jobs, equality, developing skills, training, promoting environmental policies and providing incentives for research and innovation. Hence, the costs that companies incur in tendering for a public procurement contract should be minimised, with a view to making companies more competitive and boosting employment.

## AMENDMENTS

The Committee on Employment and Social Affairs calls on the Committee on the Internal Market and Consumer Protection, as the committee responsible, to incorporate the following amendments in its report:

### Amendment 1

#### Proposal for a directive Citation 1

##### *Text proposed by the Commission*

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 53(1) and Article 62 and Article 114 thereof,

##### *Amendment*

Having regard to the Treaty on the Functioning of the European Union, and in particular Article, **14, Article** 53(1) and Article 62 and Article 114 **as well as Protocol 26** thereof,

### Amendment 2

#### Proposal for a directive Recital 2

##### *Text proposed by the Commission*

(2) In order to guarantee the opening up to competition of procurement by entities operating in the water, energy, transport and postal services sectors, provisions should be drawn up coordinating procurement procedures in respect of contracts above a certain value. Such

##### *Amendment*

(2) In order to guarantee the opening up to competition of procurement by entities operating in the water, energy, transport and postal services sectors, provisions should be drawn up coordinating procurement procedures in respect of contracts above a certain value. Such

coordination is needed to ensure the effect of the principles of the Treaty on the Functioning of the European Union and in particular the free movement of goods, the freedom of establishment and the freedom to provide services as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. In view of the nature of the sectors affected by such coordination, the latter should, while safeguarding the application of those principles, establish a framework for sound commercial practice and should allow maximum flexibility.

coordination is needed to ensure the effect of the principles of the Treaty on the Functioning of the European Union and in particular the free movement of goods, the freedom of establishment and the freedom to provide services as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. In view of the nature of the sectors affected by such coordination, the latter should, while safeguarding the application of those principles, establish a framework for sound commercial practice and should allow maximum flexibility.

***Public procurement rules have to respect the distribution of competences as enshrined in Article 14 TFEU and Protocol No 26. The application of those rules should not interfere with the freedom of public authorities to decide how they carry out their public service tasks.***

#### *Justification*

*Adaption to the new provisions of the Lisbon Treaty*

### **Amendment 3**

#### **Proposal for a directive**

##### **Recital 4**

###### *Text proposed by the Commission*

(4) Public procurement plays a key role in the Europe 2020 strategy as one of the market-based instruments to be used to achieve a smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. For that purpose, the current public procurement rules adopted pursuant to Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors and Directive

###### *Amendment*

(4) Public procurement plays a key role in the Europe 2020 strategy as one of the market-based instruments to be used to achieve a smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. For that purpose, the current public procurement rules adopted pursuant to Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors and Directive

2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts have to be revised and modernised in order to *increase* the efficiency of public spending, facilitating in particular the participation of small and medium-sized enterprises in public procurement and to enable procurers to make better use of public procurement in support of common societal goals. There is also a need to clarify basic notions and concepts to ensure better legal certainty and to incorporate certain aspects of related well-established case-law of the Court of Justice of the European Union.

2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts have to be revised and modernised in order to *enable procurers to make better use of public procurement in support of sustainable development and employment and other common societal goals, thereby leading to the creation of new sustainable jobs and increasing* the efficiency of public spending, *while ensuring the best possible outcome in cost-benefit ratio terms and* facilitating in particular the participation of small and medium-sized enterprises in public procurement. There is also a need *to simplify Union public procurement rules, particularly with regard to the method to be used to attain the sustainability objectives, which should be included in public procurement policy, and* to clarify basic notions and concepts to ensure better legal certainty and to incorporate certain aspects of related well-established case-law of the Court of Justice of the European Union.

#### Amendment 4

##### Proposal for a directive

##### Recital 5

###### *Text proposed by the Commission*

(5) Under Article 11 of the Treaty on the Functioning of the European Union, environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development. This Directive clarifies how the contracting entities may contribute to the protection of the environment and the promotion of sustainable development, whilst ensuring *that they can obtain* the best value for

###### *Amendment*

(5) Under Article **9, 10 and** 11 of the Treaty on the Functioning of the European Union, environmental protection requirements *and social considerations* must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development. This Directive clarifies how the contracting entities may contribute to the protection of the environment and the promotion of sustainable development *and how they can use their discretionary power to select*

money for their contracts.

***technical specifications and award criteria with the aim of achieving sustainable public procurement***, whilst ensuring the ***link to the subject matter of the contract and obtaining the best value for money for their contracts.***

*Justification*

*Social considerations are not sufficiently well covered by the Commission proposal.*

**Amendment 5**

**Proposal for a directive  
Recital 5 b (new)**

*Text proposed by the Commission*

*Amendment*

***(5b) This Directive should not prevent Member States from complying with ILO Convention 94 on labour clauses in public contracts, and encourages the inclusion of labour clauses in public procurement.***

**Amendment 6**

**Proposal for a directive  
Recital 7 a (new)**

*Text proposed by the Commission*

*Amendment*

***(7a) Under Article 14 of the TFEU in association with Protocol No 26 thereto, national, regional and local authorities enjoy wide discretion in decisions on procurement in the field of services of general interest.***

*Justification*

*It is important to highlight these stipulations so that state decision makers are not pressured into privatisation solely on grounds of price, especially as competition in the form of under-bidding often results in wages being squeezed.*

**Amendment 7**

**Proposal for a directive**  
**Recital 13 a (new)**

*Text proposed by the Commission*

*Amendment*

***(13a) International labour standards, ILO conventions and recommendations should be duly respected in all phases of the procurement process.***

**Amendment 8**

**Proposal for a directive**  
**Recital 14**

*Text proposed by the Commission*

*Amendment*

(14) Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the Agreements reached in the Uruguay Round multilateral negotiations (1986 to 1994)<sup>25</sup>, approved in particular the World Trade Organisation Agreement on Government Procurement, hereinafter referred to as the 'Agreement'. The aim of the Agreement is to establish **a** multilateral framework of balanced rights and obligations relating to public contracts with a view to **achieving** the **liberalisation and expansion of world trade**. For contracts covered by the Agreement, as well as by other relevant international agreements by which the Union is bound, contracting **entities** fulfil the obligations **under** those agreements by applying this Directive to economic operators of third countries that are signatories to the agreements.

(14) Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the Agreements reached in the Uruguay Round multilateral negotiations (1986 to 1994), approved in particular the World Trade Organisation Agreement on Government Procurement, hereinafter referred to as the "Agreement". The aim of the Agreement is to establish multilateral framework of balanced rights and obligations relating to public contracts **and Member States should endeavour to place Union and third country businesses on an equal footing on the single market** with a view to **facilitating** the **integration of small and medium-sized enterprises (SMEs) and stimulating employment and innovation within the Union**. For contracts covered by the Agreement, as well as by other relevant international agreements by which the Union is bound, contracting **authorities** fulfil the obligations **imposed by** those **various** agreements by applying this Directive to economic operators of third countries that are signatories to the agreements.

## Amendment 9

### Proposal for a directive

#### Recital 17

##### *Text proposed by the Commission*

(17) Other categories of services continue by their very nature to have a limited cross-border dimension, namely what are known as services to the person such as certain social, health and educational services. Those services are provided within a particular context that varies widely amongst Member States, due to different cultural traditions. A specific regime should *therefore* be established **for contracts for those services**, with a higher threshold of EUR 1 000 000. In the particular context of procurement in those sectors, services to the person with values below this threshold will typically not be of interest to providers from other Member States unless there are concrete indications to the contrary, such as Union financing for transborder projects. Contracts for services to the person above this threshold should be subject to Union-wide transparency. Given the importance of the cultural context and the sensitivity of those services, Member States should be given wide discretion to organise the choice of the service providers in the way they consider most appropriate. The rules of this directive take account of that imperative, imposing only observance of basic principles of transparency and equal treatment and making sure that contracting entities *are able to* apply specific quality criteria for the choice of service providers, such as the criteria set out in the voluntary European Quality Framework for Social Services of the European Union's Social Protection Committee. Member States and/or contracting entities remain free to provide those services themselves or to organise social services in a way that does not entail the conclusion of public contracts, for example through the mere

##### *Amendment*

(17) Other categories of services continue by their very nature to have a limited cross-border dimension, namely what are known as services to the person such as certain social, health and educational services. Those services are provided within a particular context that varies widely amongst Member States, due to different cultural traditions. ***For a better quality of those services in contracts***, a specific regime should be established with a higher threshold of EUR 1 000 000. In the particular context of procurement in those sectors, services to the person with values below this threshold will typically not be of interest to providers from other Member States unless there are concrete indications to the contrary, such as Union financing for transborder projects. Contracts for services to the person above this threshold should be subject to Union-wide transparency. Given the importance of the cultural context and the sensitivity of those services, Member States should be given wide discretion to organise the choice of the service providers in the way they consider most appropriate. ***The essential role and wide discretion of national, regional and local authorities in providing, commissioning and organising services of general interest is also in line with Protocol (No 26) on Services of general interest, Article 14 of the Treaty on the Functioning of the European Union and Article 36 of the Charter of Fundamental Rights.*** The rules of this directive take account of that imperative, imposing only observance of basic principles of transparency and equal treatment and making sure that contracting entities apply specific quality criteria for the choice of service providers, such as the

financing of such services or by granting licences or authorisations to all economic operators meeting the conditions established beforehand by the contracting entity, without any limits or quotas, provided such a system ensures sufficient advertising and complies with the principles of transparency and non-discrimination.

criteria set out in the voluntary European Quality Framework for Social Services of the European Union's Social Protection Committee. Member States and/or contracting entities remain free to provide those services themselves or to organise social services in a way that does not entail the conclusion of public contracts, for example through the mere financing of such services or by granting licences or authorisations to all economic operators meeting the conditions established beforehand by the contracting entity, without any limits or quotas, provided such a system ensures sufficient advertising and complies with the principles of transparency and non-discrimination.

## **Amendment 10**

### **Proposal for a directive**

#### **Recital 27**

##### *Text proposed by the Commission*

(27) Electronic means of information and communication can greatly simplify the publication of contracts and increase the efficiency and transparency of procurement processes. **They** should become the standard means of communication and information exchange in procurement procedures. The use of electronic means also leads to time savings. As a result, provision should be made for reducing the minimum periods where electronic means are used, subject, however, to the condition that they are compatible with the specific mode of transmission envisaged at Union level. Moreover, electronic means of information and communication including adequate functionalities can enable contracting authorities to prevent, detect and correct errors that occur during procurement procedures.

##### *Amendment*

(27) Electronic means of information and communication can greatly simplify the publication of contracts and increase the efficiency and transparency of procurement processes. **It is necessary that they** should become the standard means of communication and information exchange in procurement procedures. The use of electronic means also leads to time savings. As a result, provision should be made for reducing the minimum periods where electronic means are used, subject, however, to the condition that they are compatible with the specific mode of transmission envisaged at Union level. Moreover, electronic means of information and communication including adequate functionalities can enable contracting authorities to prevent, detect and correct errors that occur during procurement procedures.

## Amendment 11

### Proposal for a directive

#### Recital 31

##### *Text proposed by the Commission*

(31) In addition, new electronic purchasing techniques are constantly being developed, such as electronic catalogues. They help to increase competition and streamline public purchasing, particularly in terms of savings in time and money. Certain rules should however be laid down to ensure that such use complies with the rules of this Directive and the principles of equal treatment, non-discrimination and transparency. In particular where competition has been reopened under a framework agreement or where a dynamic purchasing system is being used and where sufficient guarantees are offered in respect of ensuring traceability, equal treatment and predictability, contracting entities should be allowed to generate tenders in relation to specific purchases on the basis of previously transmitted electronic catalogues. In line with the requirements of the rules for electronic means of communication, contracting entities should avoid unjustified obstacles to economic operators' access to procurement procedures in which tenders are to be presented in the form of electronic catalogues and which guarantee compliance with the general principles of non-discrimination and equal treatment.

##### *Amendment*

(31) In addition, new electronic purchasing techniques are constantly being developed, such as electronic catalogues. They help to increase competition and streamline public purchasing, particularly in terms of savings in time and money. Certain rules should however be laid down to ensure that such use complies with the rules of this Directive and the principles of equal treatment, non-discrimination and transparency. In particular where competition has been reopened under a framework agreement or where a dynamic purchasing system is being used and where sufficient *social* guarantees are offered in respect of ensuring *accessibility*, traceability, equal treatment and predictability, contracting entities should be allowed to generate tenders in relation to specific purchases on the basis of previously transmitted electronic catalogues. In line with the requirements of the rules for electronic means of communication, contracting entities should avoid unjustified obstacles to economic operators' access to procurement procedures in which tenders are to be presented in the form of electronic catalogues and which guarantee compliance with the general principles of non-discrimination and equal treatment.

## Amendment 12

### Proposal for a directive

#### Recital 35

##### *Text proposed by the Commission*

(35) The technical specifications drawn up by purchasers need to allow public procurement to be opened up to

##### *Amendment*

(35) The technical specifications drawn up by purchasers need to allow public procurement to be opened up to

competition. To that end, it should be possible to submit tenders that reflect the diversity of technical solutions so as to obtain a sufficient level of competition. Consequently, technical specifications should be drafted *in such a way* to avoid artificially narrowing down competition through requirements that favour a specific economic operator by mirroring key characteristics of the supplies, services or works habitually offered by that economic operator. Drawing up the technical specifications in terms of functional and performance requirements generally allows this objective to be achieved in the best way possible and favours innovation. Where reference is made to a European standard or, in the absence thereof, to a national standard, tenders based on other equivalent arrangements which meet the requirements of the contracting entities and are equivalent in terms of safety must be considered by the contracting entities. To demonstrate equivalence, tenderers can be required to provide third-party verified evidence; however, other appropriate means of proof such as a technical dossier of the manufacturer should also be allowed where the economic operator concerned has no access to such certificates or test reports, or no possibility of obtaining them within the relevant time limits.

competition. To that end, it should be possible to submit tenders that reflect the diversity of technical solutions so as to obtain a sufficient level of competition. Consequently, technical specifications should be drafted *and applied in conformity with the principles of transparency, non-discrimination and equality of opportunity* to avoid artificially narrowing down competition through requirements that favour a specific economic operator by mirroring key characteristics of the supplies, services or works habitually offered by that economic operator. Drawing up the technical specifications in terms of functional and performance requirements generally allows this objective to be achieved in the best way possible and favours innovation. Where reference is made to a European standard or, in the absence thereof, to a national standard, tenders based on other equivalent arrangements which meet the requirements of the contracting entities and are equivalent in terms of safety must be considered by the contracting entities. To demonstrate equivalence, tenderers can be required to provide third-party verified evidence; however, other appropriate means of proof such as a technical dossier of the manufacturer should also be allowed where the economic operator concerned has no access to such certificates or test reports, or no possibility of obtaining them within the relevant time limits.

## **Amendment 13**

### **Proposal for a directive Recital 36**

#### *Text proposed by the Commission*

(36) Contracting entities that wish to purchase works, supplies or services with specific environmental, social or other characteristics should be able to refer to particular labels, such as the European

#### *Amendment*

(36) Contracting entities that wish to purchase works, supplies or services with specific environmental, social or other characteristics should be able to refer to particular labels, such as the European

Eco-label, (multi-) national eco-labels or any other label provided that the requirements for the label are linked to the subject-matter of the contract, such as the description of the product and its presentation, including packaging requirements. It is furthermore essential that those requirements are drawn up and adopted on the basis of objectively verifiable criteria, using a procedure in which stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations can participate, and that the label is accessible and available to all interested parties.

Eco-label, (multi-) national eco-labels or any other label provided that the requirements for the label are linked to the subject-matter of the contract, such as the description of the product and its presentation, including packaging requirements. It is furthermore essential that those requirements are drawn up and adopted on the basis of objectively verifiable criteria, using a procedure in which stakeholders, such as government bodies, consumers, manufacturers, distributors, *social organisations* and environmental organisations can participate, and that the label is accessible and available to all interested parties.

#### Amendment 14

##### Proposal for a directive Recital 38

*Text proposed by the Commission*

(38) In order to encourage the involvement of small and medium-sized enterprises (SMEs) in the procurement market, *it should be provided explicitly that contracts may be divided* into lots, whether homogenous or heterogeneous. *Where contracts are divided into lots, contracting entities may, for instance in order to preserve competition or to ensure security of supply, limit the number of lots for which an economic operator may tender; they may also limit the number of lots that may be awarded to any one tenderer.*

*Amendment*

(38) *Public procurement should be adapted to the needs of SMEs. Contracting authorities should make use of the Code of Best Practice providing guidance on how they may apply the public procurement framework in a way that facilitates SME participation.* In order to encourage the involvement of small and medium-sized enterprises (SMEs) in the procurement market, *contracting authorities should in particular give consideration to dividing* contracts into lots, whether homogenous or heterogeneous, *and ensure transparency in access to information on their reasons for doing so or choosing not to do so.*

#### Amendment 15

##### Proposal for a directive Recital 39 a (new)

***(39a) Member States should introduce measures to promote the access of SMEs to public procurement, in particular through improved information and guidance on tendering and on the new opportunities offered by the modernized EU legal framework, and to foster the exchange of best practice and the organisation of training and events involving public procurers and SMEs.***

## **Amendment 16**

### **Proposal for a directive**

#### **Recital 40**

*Text proposed by the Commission*

*Amendment*

(40) Public contracts should not be awarded to economic operators that have participated in a criminal organisation or have been found guilty of corruption, fraud to the detriment of the Union's financial interests or money laundering. Non-payment of taxes or social security contributions should also be sanctioned by mandatory exclusion at the level of the Union. Given that contracting entities, which are not contracting authorities, might not have access to indisputable proof on the matter, it is appropriate to leave the choice of whether or not to apply the exclusion criteria listed in Directive [2004/18] to such contracting entities. The obligation to apply Article 55(1) and (2) of Directive [2004/18] should therefore be limited to contracting entities that are contracting authorities. Furthermore, contracting entities should be given the possibility to exclude candidates or tenderers for violations of environmental or social obligations, including rules on accessibility for disabled persons or other forms of grave professional misconduct,

(40) Public contracts should not be awarded to economic operators that have participated in a criminal organisation or have been found guilty of corruption, fraud to the detriment of the Union's financial interests or money laundering. Non-payment of taxes or social security contributions should also be sanctioned by mandatory exclusion at the level of the Union. Given that contracting entities, which are not contracting authorities, might not have access to indisputable proof on the matter, it is appropriate to leave the choice of whether or not to apply the exclusion criteria listed in Directive [2004/18] to such contracting entities. The obligation to apply Article 55(1) and (2) of Directive [2004/18] should therefore be limited to contracting entities that are contracting authorities. Furthermore, contracting entities should be given the possibility to exclude candidates or tenderers for violations of environmental, ***labour*** or social obligations, including rules on ***working conditions, collective agreements and*** accessibility for disabled

such as violations of competition rules or of intellectual property rights.

persons, **health and safety at work rules** or other forms of grave professional misconduct, such as violations of competition rules or of intellectual property rights.

### *Justification*

*The equal treatment of workers and the compliance with national laws is included in the current directive; there is no reason for deletion. Recital 34 of the current Directive 2004/18/EC: The laws, regulations and collective agreements, at both national and Community level, which are in force in the areas of employment conditions and safety at work apply during performance of a public contract, providing that such rules, and their application, comply with Community law.... If national law contains provisions to this effect, non-compliance with those obligations may be considered to be grave misconduct or an offence concerning the professional conduct of the economic operator concerned, liable to lead to the exclusion of that economic operator from the procedure for the award of a public contract.*

## **Amendment 17**

### **Proposal for a directive Recital 43**

#### *Text proposed by the Commission*

(43) Contracts should be awarded on the basis of objective criteria that ensure compliance with the principles of transparency, non-discrimination and equal treatment. **Those** criteria should guarantee that tenders are assessed in conditions of effective competition, **also where** contracting **entities** require high-quality works, supplies and services that are optimally suited to their needs. As a result, contracting entities should be allowed to adopt as award criteria either ‘the most economically advantageous tender’ or ‘the lowest cost’, taking into account that in the latter case they **are free to set** adequate quality standards by using technical specifications or contract performance conditions.

#### *Amendment*

(43) Contracts should be awarded on the basis of objective criteria that ensure compliance with the principles of transparency, non-discrimination and equal treatment. **These** criteria should guarantee that tenders are assessed in conditions of effective competition, **at the same time ensuring that** contracting **authorities** require high-quality works, supplies and services that are optimally suited to their needs **and which include factors linked to socially sustainable production process criteria and decent jobs**. As a result, contracting entities should be allowed to adopt as award criteria either ‘the most economically advantageous tender’ or ‘the lowest cost’, taking into account that in the latter case they **should refer** to adequate quality standards by using technical specifications or contract performance conditions.

## Amendment 18

### Proposal for a directive Recital 43 a (new)

*Text proposed by the Commission*

*Amendment*

***(43a). It is important to stress that the principles of equal treatment and non-discrimination of economic operators, without bringing prejudice to fair competition, are crucial instruments for the prevention of corruption, notably bribery.***

## Amendment 19

### Proposal for a directive Recital 44

*Text proposed by the Commission*

*Amendment*

(44) Where contracting entities choose to award a contract to the most economically advantageous tender, they must determine the award criteria on the basis of which they will assess tenders in order to identify which one offers the best value for money. The determination of those criteria depends on the subject-matter of the contract, since they must allow the level of performance offered by each tender to be assessed in the light of the subject-matter of the contract, as defined in the technical specifications, and the value for money of each tender to be measured. Furthermore, the chosen award criteria should not confer an unrestricted freedom of choice on the contracting entity and they should ensure the possibility of effective competition and be accompanied by requirements that allow the information provided by the tenderers to be effectively verified.

(44) Where contracting entities choose to award a contract to the most economically advantageous tender, they must determine the award criteria on the basis of which they will assess tenders in order to identify which one offers the best value for money, ***economic and social sustainability***. The determination of those criteria depends on the subject-matter of the contract, since they must allow the level of performance offered by each tender to be assessed in the light of the subject-matter of the contract, as defined in the technical specifications, and the value for money of each tender to be measured. Furthermore, the chosen award criteria should not confer an unrestricted freedom of choice on the contracting entity and they should ensure the possibility of effective competition and be accompanied by requirements that allow the information provided by the tenderers to be effectively verified.

## Amendment 20

### Proposal for a directive

#### Recital 50

##### *Text proposed by the Commission*

(50) Contract performance conditions are compatible with this Directive provided that they are not directly or indirectly discriminatory, are linked to the subject-matter of the contract and are indicated in the notice used to make the call for competition, or in the procurement documents. They may, in particular, be intended to favour on-site vocational training, the employment of people experiencing particular difficulty in achieving integration, the fight against unemployment, protection of the environment or animal welfare. For example, mention may be made of the requirements applicable during the performance of the contract to recruit long-term job-seekers or to implement training measures for the unemployed or for young persons, to comply in substance with fundamental International Labour Organisation (ILO) Conventions, even where such Conventions have not been implemented in national law, and to recruit more disadvantaged persons than are required under national legislation.

##### *Amendment*

(50) Contract performance conditions are compatible with this Directive provided that they are not directly or indirectly discriminatory, are linked to the subject-matter of the contract and are indicated in the notice used to make the call for competition, or in the procurement documents. They may, in particular, be intended to favour on-site vocational training, the employment of people experiencing particular difficulty in achieving integration, the fight against unemployment, protection of the environment or animal welfare. For example, mention may be made of the requirements applicable during the performance of the contract to recruit long-term job-seekers, ***unemployed young persons or persons with disabilities*** or to implement training measures for the unemployed or for young persons, to comply in substance with fundamental International Labour Organisation (ILO) Conventions, even where such Conventions have not been implemented in national law, and to recruit more disadvantaged persons than are required under national legislation.

## Amendment 21

### Proposal for a directive

#### Recital 55

##### *Text proposed by the Commission*

(55) In line with the principles of equal treatment and transparency, the successful tenderer should not be replaced by another economic operator without reopening the contract to competition. However, the

##### *Amendment*

(55) In line with the principles of equal treatment, ***objectivity, traceability*** and transparency, the successful tenderer should not be replaced by another economic operator without reopening the

successful tenderer performing the contract may undergo certain structural changes during the performance of the contract, such as purely internal reorganisations, mergers and acquisitions or insolvency. Such structural changes should not automatically require new procurement procedures for all contracts performed by that undertaking.

contract to competition. However, the successful tenderer performing the contract may undergo certain structural changes during the performance of the contract, such as purely internal reorganisations, mergers and acquisitions or insolvency. Such structural changes should not automatically require new procurement procedures for all contracts performed by that undertaking.

## **Amendment 22**

### **Proposal for a directive Recital 59**

#### *Text proposed by the Commission*

(59) Not all contracting entities may have the internal expertise to deal with economically or technically complex contracts. Against this background, appropriate professional support would be an effective complement to monitoring and control activities. On the one hand, this objective can be achieved by knowledge sharing tools (knowledge centres) offering technical assistance to contracting entities; on the other hand, business, *not least* SMEs, should benefit from administrative assistance, in particular when participating in procurement procedures on a cross-border basis.

#### *Amendment*

(59) Not all contracting entities may have the internal expertise to deal with economically or technically complex contracts. Against this background, appropriate professional support would be an effective complement to monitoring and control activities. On the one hand, this objective can be achieved by knowledge sharing tools (knowledge centres) offering technical assistance to contracting entities; on the other hand, business, *especially* SMEs, should benefit from administrative assistance, in particular when participating in procurement procedures on a cross-border basis.

## **Amendment 23**

### **Proposal for a directive Recital 59 a (new)**

#### *Text proposed by the Commission*

#### *Amendment*

***(59a) Citizens, concerned stakeholders, organised or not, and other persons or bodies which do not have access to review procedures pursuant to Council Directive 89/665/EEC do nevertheless have a legitimate interest as taxpayers in sound procurement procedures. They should***

*therefore be given a possibility to signal possible violations of this Directive to a competent authority or structure. So as not to duplicate existing authorities or structures, Member States should be able to provide for recourse to general monitoring authorities or structures, sectoral oversight bodies, municipal oversight authorities, competition authorities, the ombudsman or national auditing authorities.*

## **Amendment 24**

### **Proposal for a directive Article 2 – point 22**

*Text proposed by the Commission*

(22) ‘life cycle’ means all consecutive and/or interlinked stages, including production, transport, use and maintenance, throughout the existence of a product or a works or the provision of a service, from raw material acquisition or generation of resources to disposal, clearance and finalisation;

*Amendment*

(22) ‘life cycle’ means all consecutive and/or interlinked stages, including production, transport, **installation**, use and maintenance, throughout the existence of a product or a works or the provision of a service, from raw material acquisition or generation of resources to disposal, clearance and finalisation;

## **Amendment 25**

### **Proposal for a directive Article 12 – paragraph 1 a (new)**

*Text proposed by the Commission*

*Amendment*

***1a. When awarding contracts which, on account of their value, are not covered by this Directive, national contracting entities shall be required to comply with the principles of equal treatment, non-discrimination and transparency.***

## **Amendment 26**

### **Proposal for a directive Article 19 a (new)**

*Text proposed by the Commission*

*Amendment*

**Article 19a**

***Service contracts awarded on the basis of exclusive rights***

***This Directive shall not apply to service contracts awarded to an entity which is itself a contracting authority within the meaning of Article 2 (1) or to an association of contracting authorities on the basis of an exclusive right which they enjoy pursuant to a published law, regulation or administrative provision which is compatible with the Treaty.***

*Justification*

*To reintroduce Article 25 from the current Directive 2004/17/EC. This Article is important for operations of services of general economic interest it excludes public service contracts that are based on an exclusive right enshrined in a public law, regulation or administrative provision, compatible with the Treaty. The ECJ has applied this provision in C-360/96.*

**Amendment 27**

**Proposal for a directive  
Article 19 b (new)**

*Text proposed by the Commission*

*Amendment*

**Article 19b**

***Specific Regimes to deliver SGI***

***This directive shall not apply to tried and tested Member State procedures that are based on the user's free choice of service providers (i.e. voucher system, free choice model, triangular relationship) as well as the principle that all providers which are able to comply with the conditions previously laid down by law should, irrespective of their legal form, be permitted to provide services, provided that account is taken of the general principles of equal treatment, transparency and non-discrimination.***

## Amendment 28

### Proposal for a directive

#### Article 21 – paragraph 1 – subparagraph 1 – point b

*Text proposed by the Commission*

(b) at least **90** % of the activities of that legal person are carried out for the controlling contracting authority or for other legal persons controlled by that contracting authority;

*Amendment*

(b) at least **80%** of the activities of that legal person, ***subject to the contract***, are carried out for the controlling contracting authority or for other legal persons controlled by that contracting authority;

## Amendment 29

### Proposal for a directive

#### Article 21 – paragraph 1 – subparagraph 1 – point c

*Text proposed by the Commission*

(c) there is no private participation in the controlled legal person.

*Amendment*

(c) there is no private participation in the controlled legal person, ***with the exception of legally enforced forms of private participation***.

#### *Justification*

*There has to be a clear distinction between public-public cooperation and public-private partnerships. However in some Member States private participation might be an obligation enforced by law.*

## Amendment 30

### Proposal for a directive

#### Article 21 – paragraph 2

*Text proposed by the Commission*

2. Paragraph 1 also applies where a controlled entity which is a contracting authority awards a contract to its controlling entity, or to another legal person controlled by the same contracting authority, provided that there is no private participation in the legal person being awarded the public contract.

*Amendment*

2. Paragraph 1 also applies where a controlled entity which is a contracting authority awards a contract to its controlling entity ***or entities***, or to another legal person controlled by the same contracting authority, provided that there is no private participation in the legal person being awarded the public contract ***with the exception of legally enforced forms of***

*private participation.*

### Amendment 31

#### Proposal for a directive

#### Article 21 – paragraph 3 – subparagraph 1 – introductory part

*Text proposed by the Commission*

A contracting authority, which does not exercise over a legal person control within the meaning of paragraph 1, may nevertheless award a contract ***without applying*** this Directive to a legal person which it controls jointly with other contracting authorities, where the following conditions are fulfilled:

*Amendment*

A contracting authority, which does not exercise over a legal person control within the meaning of paragraph 1, may nevertheless award a contract ***outside the scope of*** this Directive to a legal person which it controls jointly with other contracting authorities, where the following conditions are fulfilled:

### Amendment 32

#### Proposal for a directive

#### Article 21 – paragraph 3 – subparagraph 1 – point b

*Text proposed by the Commission*

(b) at least **90** % of the activities of that legal person are carried out for the controlling contracting authorities or other legal persons controlled by the same contracting authorities;

*Amendment*

(b) at least **80** % of the activities of that legal person, ***subject to the contract***, are carried out for the controlling contracting authorities or other legal persons controlled by the same contracting authorities;

### Amendment 33

#### Proposal for a directive

#### Article 21 – paragraph 3 – subparagraph 1 – point c

*Text proposed by the Commission*

(c) there is no private participation in the controlled legal person.

*Amendment*

(c) there is no private participation in the controlled legal person, ***with the exception of legally enforced forms of private participation.***

### Amendment 34

**Proposal for a directive**  
**Article 21 – paragraph 4 – point c**

*Text proposed by the Commission*

(c) the participating **contracting** authorities do not perform on the open market more than **10** % in terms of turnover of the activities which are **relevant in the context** of the **agreement**;

*Amendment*

(c) the participating **public** authorities do not perform on the open market more than **20** % in terms of turnover of the activities which are **subject** of the **contract**;

*Justification*

*This clarification is necessary in order not to create legal disputes.*

**Amendment 35**

**Proposal for a directive**  
**Article 21 – paragraph 4 – point e**

*Text proposed by the Commission*

(e) **there** is no **private** participation **in any** of the contracting authorities **involved**.

*Amendment*

(e) **the task** is **carried out solely by the public authorities concerned, with** no participation of **a private party with** the **exception of** contracting authorities **participating in the cooperation as a public law body in the sense of Article 2(4)**

**Amendment 36**

**Proposal for a directive**  
**Article 21 – paragraph 5 – subparagraph 2**

*Text proposed by the Commission*

The exclusions provided for in paragraphs 1 to 4 shall cease to apply from the moment any private participation takes place, with the effect that ongoing contracts need to be opened to competition through regular procurement procedures.

*Amendment*

The exclusions provided for in paragraphs 1 to 4 shall cease to apply from the moment any private participation takes place, with the effect that ongoing contracts need to be opened to competition through regular procurement procedures, **unless the private participation is legally enforced and/or the private participation was not foreseeable at the time of the initial contracting.**

## Amendment 37

### Proposal for a directive

#### Article 27 – paragraph 3 a (new)

*Text proposed by the Commission*

*Amendment*

***3a. The protection of the intellectual property of the tenderers shall be ensured.***

## Amendment 38

### Proposal for a directive

#### Article 30 – paragraph 1 – subparagraph 2

*Text proposed by the Commission*

*Amendment*

However, in the case of service and works contracts as well as supply contracts covering in addition services or siting and installation operations, legal persons may be required to indicate, in the tender or the request to participate, the ***names and*** relevant professional qualifications of the staff responsible for the performance of the contract in question.

However, in the case of service and works contracts as well as supply contracts covering in addition services or siting and installation operations, legal persons may be required to indicate, in the tender or the request to participate, the relevant professional qualifications of the staff responsible for the performance of the contract in question.

## Amendment 39

### Proposal for a directive

#### Article 30 – paragraph 2 – subparagraph 1

*Text proposed by the Commission*

*Amendment*

Groups of economic operators may submit tenders or put themselves forward as candidates. Contracting entities shall not establish specific conditions for participation of such groups in procurement procedures which are ***not*** imposed on individual candidates. In order to submit a tender or a request to participate, those groups shall not be required by the contracting entities to assume a specific legal form.

Groups of economic operators may submit tenders or put themselves forward as candidates. ***Groups of economic operators, particularly small and medium-sized enterprises (SMEs), may take the form of a consortium of enterprises.*** Contracting entities shall not establish specific conditions for participation of such groups in procurement procedures which are ***additional or different to those conditions*** imposed on individual candidates. In order

to submit a tender or a request to participate, those groups shall not be required by the contracting entities to assume a specific legal form.

## Amendment 40

### Proposal for a directive Article 31 – paragraph 1

#### *Text proposed by the Commission*

Member States may reserve the right to participate in procurement procedures to *sheltered workshops and economic operators whose main aim is the social and professional integration of disabled and disadvantaged workers or provide for such contracts to be performed in the context of sheltered employment programmes, provided that more than 30% of the employees of those workshops, economic operators or programmes are disabled or disadvantaged workers.*

#### *Amendment*

Member States may reserve the right to participate in **public** procurement procedures to **the following:**

*(a) sheltered workshops or social enterprises, or may provide for such contracts to be performed in the context of sheltered employment programmes, provided that the majority of the employees concerned are disabled persons who, by reason of the nature or the seriousness of their disabilities, cannot carry on occupations under normal conditions or easily find employment on the ordinary market;*

*(b) sheltered workshops or social enterprises and programmes whose main aim is the social and professional integration of disadvantaged workers, such as long-term unemployed, women, young people, migrants, disadvantaged minorities, provided that more than 30 % of the employees of those economic operators or programmes are disabled or disadvantaged workers.*

#### **Amendment 41**

**Proposal for a directive  
Article 31 – paragraph 1 a (new)**

*Text proposed by the Commission*

*Amendment*

***1a. Member States shall safeguard the implementation of adequate training and social standards within the employment programmes or workshops designed for disabled or disadvantaged workers.***

#### **Amendment 42**

**Proposal for a directive  
Article 31 – paragraph 1 a (new)**

*Text proposed by the Commission*

*Amendment*

***1a. The protection of the intellectual property of the tenderers shall be ensured.***

#### **Amendment 43**

**Proposal for a directive  
Article 32 – paragraph 2 a (new)**

*Text proposed by the Commission*

*Amendment*

***2a. The contracting entity shall not use in other competitive procedures the information forwarded to it by economic operators during an earlier competitive procedure.***

#### **Amendment 44**

**Proposal for a directive  
Article 43 – paragraph 3 – subparagraph 3**

*Text proposed by the Commission*

*Amendment*

Only those economic operators invited by

Only those economic operators invited by

the contracting entity following its assessment of the requested information may submit research and innovation projects, aimed at meeting the needs identified by the contracting entity that cannot be met by existing solutions. The contract shall be awarded on the sole basis of the award criterion of the most economically advantageous tender in accordance with Article 76 (1)(a).

the contracting entity following its assessment of the requested information may submit research and innovation projects, aimed at meeting the needs identified by the contracting entity that cannot be met by existing solutions. The contract shall be awarded on the sole basis of the award criterion of the most economically advantageous tender in accordance with Article 76 (1)(a) **and Article 76(2)**.

#### **Amendment 45**

##### **Proposal for a directive Article 54 – paragraph 1 – subparagraph 4**

*Text proposed by the Commission*

For all procurement, the subject of which is intended for use by persons, whether general public or staff of the contracting entity, those technical specifications shall, ***except in duly justified cases***, be drawn up so as to take into account accessibility criteria for people with disabilities or design for all users.

*Amendment*

For all procurement, the subject of which is intended for use by persons, whether general public or staff of the contracting entity, those technical specifications shall be drawn up so as to take into account accessibility criteria for people with disabilities or design for all users ***other than, by way of exception, in duly justified cases, which shall be stated in the call for competition and the tender documents***.

#### **Amendment 46**

##### **Proposal for a directive Article 54 – paragraph 3 – point d a (new)**

*Text proposed by the Commission*

*Amendment*

***da. the organisation, qualification and experience of the staff assigned to performing the contract in question.***

#### **Amendment 47**

##### **Proposal for a directive Article 55 – paragraph 1 – subparagraph 1 – point c**

*Text proposed by the Commission*

(c) the labels are established in an open and transparent procedure in which all stakeholders, including government bodies, consumers, manufacturers, distributors and environmental organisations may participate,

*Amendment*

(c) the labels are established in an open and transparent procedure in which all **relevant** stakeholders, including government bodies, consumers, manufacturers, **trade unions**, distributors, **social** and environmental organisations may participate,.

**Amendment 48**

**Proposal for a directive**

**Article 55 – paragraph 1 – subparagraph 1 – point e**

*Text proposed by the Commission*

(e) the **criteria of** the label are set by a third party which is independent from the economic operator applying for the label.

*Amendment*

(e) the **requirements to be met in order to obtain** the label are set by a third party which is independent from the economic operator applying for the label.

**Amendment 49**

**Proposal for a directive**

**Article 58 – paragraph 1 – subparagraph 1**

*Text proposed by the Commission*

Contracting entities **may** take account of variants which are submitted by a tenderer and meet the minimum requirements specified by the contracting entities.

*Amendment*

Contracting entities **shall** take account of variants which are submitted by a tenderer and meet the minimum requirements specified by the contracting entities.

**Amendment 50**

**Proposal for a directive**

**Article 58 – paragraph 1 – subparagraph 2**

*Text proposed by the Commission*

Contracting entities shall indicate in the specifications **whether or not they authorise variants and, if so**, the minimum requirements to be met by the variants and any specific requirements for their

*Amendment*

Contracting entities shall indicate in the specifications the minimum requirements to be met by the variants, any specific requirements for their presentation **and** they shall also ensure that the chosen

presentation. *Where variants are authorised*, they shall also ensure that the chosen award criteria can be usefully applied to variants meeting those minimum requirements as well as to conforming tenders which are not variants.

award criteria can be usefully applied to variants meeting those minimum requirements as well as to conforming tenders which are not variants.

## Amendment 51

### Proposal for a directive

#### Article 58 – paragraph 1 – subparagraph 2 a (new)

*Text proposed by the Commission*

*Amendment*

***Contracting entities may indicate in the specifications that the variants are not authorised and the related specific reason for such prohibition.***

## Amendment 52

### Proposal for a directive

#### Article 58 – paragraph 2

*Text proposed by the Commission*

*Amendment*

2. In procedures for awarding supply or service contracts, contracting entities ***that have authorised variants*** shall not reject a variant on the sole ground that it would, where successful, lead either to a service contract rather than a supply contract or to a supply contract rather than a service contract.

2. In procedures for awarding supply or service contracts, contracting entities shall not reject a variant on the sole ground that it would, where successful, lead either to a service contract rather than a supply contract or to a supply contract rather than a service contract.

## Amendment 53

### Proposal for a directive

#### Article 70 – paragraph 5

*Text proposed by the Commission*

*Amendment*

5. Contracting entities ***may decide not to*** award a contract to the tenderer submitting the best tender where they have established that the tender does not comply, ***at least in***

5. Contracting entities ***shall*** not award a contract to the tenderer submitting the best tender where they have established that the tender does not comply with obligations in

*an equivalent manner*, with obligations *established by Union legislation* in the field of social and labour law or environmental law or *of* the international social and environmental law provisions listed in Annex XIV.

the field of social and labour law or environmental law established by Union or *national* legislation *or by collective agreements according to Member States practices and traditions, or with obligations in the field of intellectual property law or by* the international social and environmental law provisions listed in Annex XIV.

#### **Amendment 54**

##### **Proposal for a directive**

##### **Article 76 – paragraph 1 – subparagraph 1 – point b**

*Text proposed by the Commission*

*Amendment*

*(b) the lowest cost.*

*deleted*

#### **Amendment 55**

##### **Proposal for a directive**

##### **Article 76 – paragraph 2 – subparagraph 2 – point a a (new)**

*Text proposed by the Commission*

*Amendment*

*(aa) a socially sustainable production process;*

#### **Amendment 56**

##### **Proposal for a directive**

##### **Article 76 – paragraph 2 – subparagraph 2 – point d a (new)**

*Text proposed by the Commission*

*Amendment*

*(da) the application of wage agreements and arbitration awards at national, local, sector and company level and of statutory provisions on health and safety and working conditions at national, European Union and international level.*

#### **Amendment 57**

## Proposal for a directive

### Article 76 – paragraph 2 – subparagraph 2 – point d b (new)

*Text proposed by the Commission*

*Amendment*

***(db) If, in the event of a change of contractor, the new contractor takes over workers from the former contractor, the workers shall be covered by the relevant legal effects of Directive 2001/23/EC.***

## Amendment 58

### Proposal for a directive

#### Article 77 – paragraph 1 – point b

*Text proposed by the Commission*

*Amendment*

(b) external environmental costs directly linked to the life cycle, provided their monetary value can be determined and verified, which may include the cost of emissions of greenhouse gases and of other pollutant emissions and other climate change mitigation costs.

(b) external ***costs such as social and/or*** environmental costs, directly linked to the life cycle, provided their monetary value can be determined and verified, which may include the cost of emissions of greenhouse gases and of other pollutant emissions and other climate change mitigation costs.

## Amendment 59

### Proposal for a directive

#### Article 77 – paragraph 2 – subparagraph 1 – introductory part

*Text proposed by the Commission*

*Amendment*

Where contracting entities assess the costs using a life-cycle costing approach, they shall indicate in the procurement documents the ***methodology used for the calculation of*** the life-cycle costs. The ***methodology*** used must fulfil all of the following conditions:

Where contracting entities assess the costs using a life-cycle costing approach, they shall indicate in the procurement documents the ***data to be provided by the tenderers and the method which the contracting authority will use to determine the*** life-cycle costs. The ***method used for the assessment of those life-cycle costs*** must fulfil all of the following conditions:

## Amendment 60

**Proposal for a directive**  
**Article 79 – paragraph 1 – introductory part**

*Text proposed by the Commission*

The contracting entity shall request economic operators to explain the *price or* costs charged, where all of the following conditions are fulfilled:

**Amendment 61**

**Proposal for a directive**  
**Article 79 – paragraph 1 – point c**

*Text proposed by the Commission*

(c) at least *five* tenders have been submitted.

**Amendment 62**

**Proposal for a directive**  
**Article 79 – paragraph 3 – point (d)**

*Text proposed by the Commission*

(d) compliance, at least in an equivalent manner, with obligations established by Union legislation in the field of social and labour law or environmental law or of the international social and environmental law provisions listed in Annex XIV or, where not applicable, with other provisions ensuring an equivalent level of protection;

**Amendment 63**

**Proposal for a directive**  
**Article 79 – paragraph 3 – point d a (new)**

*Text proposed by the Commission*

*Amendment*

The contracting entity shall request economic operators to explain the costs charged, where all of the following conditions are fulfilled:

*Amendment*

(c) at least *three* tenders have been submitted.

*Amendment*

(d) compliance, at least in an equivalent manner, with obligations established by *national, European Union and international* legislation in the field of social and labour law or environmental law or of the international social and environmental law provisions listed in Annex XIV or, where not applicable, with other provisions ensuring an equivalent level of protection;

*Amendment*

*(da) compliance with rules and standards in the field of health and safety, social*

*law, and labour law.*

## **Amendment 64**

### **Proposal for a directive**

#### **Article 79 – paragraph 4 – subparagraph 2**

##### *Text proposed by the Commission*

It may only reject the tender where the evidence does not justify the low level of price or costs charged, taking into account the elements referred to in paragraph 3.

##### *Amendment*

It may only reject the tender where the evidence does not justify the low level of price or costs charged, taking into account the elements referred to in paragraph 3, ***or when the received justification is not sufficient.***

## **Amendment 65**

### **Proposal for a directive**

#### **Article 79 – paragraph 4 – subparagraph 3**

##### *Text proposed by the Commission*

Contracting entities shall reject the tender, where they have established that the tender is abnormally low because it does not comply with obligations established by ***Union legislation in the field of*** social and labour law or environmental law or by the international social and environmental law provisions listed in Annex XIV.

##### *Amendment*

Contracting entities shall reject the tender, where they have established that the tender is abnormally low because it does not comply with ***national and European Union*** obligations established by social and labour law or environmental law or by the international social and environmental law provisions listed in Annex XIV.

## **Amendment 66**

### **Proposal for a directive**

#### **Article 81 – paragraph 1**

##### *Text proposed by the Commission*

1. In the procurement documents, the contracting entity ***may*** ask, or ***may*** be required by a Member State to ask, the tenderer to indicate in its tender any share of the contract it may intend to subcontract to third parties and any proposed

##### *Amendment*

1. In the procurement documents, the contracting authority ***shall*** ask or ***shall*** be required by a Member State to ask the tenderer to indicate in its tender any share of the contract it may intend to subcontract to third parties and any proposed subcontractors ***and to give information on***

subcontractors.

*the subcontractors, including their names, contact details and legal representatives. Any change in the subcontracting chain and any new subcontractor shall be indicated without delay to the contracting authority, including the subcontractors' names, contact details and legal representatives.*

## Amendment 67

### Proposal for a directive Article 86 – paragraph 1

*Text proposed by the Commission*

1. Member States shall put in place appropriate procedures for the award of contracts subject to this Chapter, ensuring full compliance with the principles of transparency and equal treatment of economic operators and allowing contracting entities to take into account the specificities of the services in question.

*Amendment*

1. Member States shall put in place appropriate procedures for the award of contracts subject to this Chapter, ensuring full compliance with the principles of transparency, ***non-discrimination*** and equal treatment of economic operators and allowing contracting entities to take into account the specificities of the services in question.

## Amendment 68

### Proposal for a directive Article 86 – paragraph 2

*Text proposed by the Commission*

2. Member States shall ensure that contracting entities may take into account the need to ensure quality, continuity, accessibility, availability and comprehensiveness of the services, the specific needs of different categories of users, the involvement and empowerment of users and innovation. Member States may also provide that the choice of the service provider shall not be made solely on the basis of the price for the provision of the service.

*Amendment*

2. Member States shall ensure that contracting entities may take into account the need to ensure ***a high level of*** quality, ***safety***, continuity, accessibility, ***affordability***, availability and comprehensiveness of the services, the specific needs of different categories of users, ***including disadvantaged and vulnerable groups, the necessity to promote the participation of SMEs***, the involvement and empowerment of users and innovation. Member States may also provide that the choice of the service provider shall not be made solely on the

basis of the price for the provision of the service.

## Amendment 69

### Proposal for a directive

#### Article 93 – paragraph 3 – subparagraph 1 – point f

##### *Text proposed by the Commission*

(f) examining complaints from citizens and businesses on the application of public procurement rules in specific cases and transmitting the analysis to the competent contracting entities, which shall have the obligation to take it into account in their decisions or, where the analysis is not followed, to explain the reasons for disregarding it;

##### *Amendment*

(f) examining complaints from citizens and businesses ***and from professional associations or similar bodies*** on the application of public procurement rules in specific cases and transmitting the analysis to the competent contracting entities, which shall have the obligation to take it into account in their decisions or, where the analysis is not followed, to explain the reasons for disregarding it;

## Amendment 70

### Proposal for a directive

#### Article 93 – paragraph 8 a (new)

##### *Text proposed by the Commission*

##### *Amendment*

***8a. The annual report shall also include an annual comparison between the prices submitted and the actual cost of contracts that have already been performed and the potential influence over the number of staff employed by suppliers.***

## PROCEDURE

<b>Title</b>	Procurement by entities operating in the water, energy, transport and postal services sectors		
<b>References</b>	COM(2011)0895 – C7-0007/2012 – 2011/0439(COD)		
<b>Committee responsible</b> Date announced in plenary	IMCO 19.1.2012		
<b>Opinion by</b> Date announced in plenary	EMPL 19.1.2012		
<b>Rapporteur</b> Date appointed	Ramona Nicole Mănescu 16.2.2012		
<b>Discussed in committee</b>	20.6.2012	6.9.2012	17.9.2012
<b>Date adopted</b>	18.9.2012		
<b>Result of final vote</b>	+: -: 0:	38 0 4	
<b>Members present for the final vote</b>	Regina Bastos, Edit Bauer, Heinz K. Becker, Pervenche Berès, Vilija Blinkevičiūtė, Philippe Boulland, Alejandro Cercas, Ole Christensen, Derek Roland Clark, Marije Cornelissen, Emer Costello, Andrea Cozzolino, Frédéric Daerden, Sari Essayah, Thomas Händel, Marian Harkin, Nadja Hirsch, Stephen Hughes, Danuta Jazłowiecka, Ádám Kósa, Jean Lambert, Veronica Lope Fontagné, Olle Ludvigsson, Thomas Mann, Elisabeth Morin-Chartier, Csaba Óry, Siiri Oviir, Licia Ronzulli, Elisabeth Schroedter, Jutta Steinruck, Traian Ungureanu, Inês Cristina Zuber		
<b>Substitute(s) present for the final vote</b>	Cornelia Ernst, Kinga Göncz, Jelko Kacin, Tunne Kelam, Jan Kozłowski, Svetoslav Hristov Malinov, Anthea McIntyre, Antigoni Papadopoulou, Birgit Sippel, Csaba Sógor		

1.10.2012

## **OPINION OF THE COMMITTEE ON INDUSTRY, RESEARCH AND ENERGY**

for the Committee on the Internal Market and Consumer Protection

on the proposal for a directive of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors (COM(2011)0895 – C7-0007/2012 – 2011/0439(COD))

Rapporteur: Zigmantas Balčytis

### **SHORT JUSTIFICATION**

The Europe 2020 strategy for smart, sustainable and inclusive growth [COM(2010) 2020] is based on three interlocking and mutually reinforcing priorities: developing an economy based on knowledge and innovation; promoting a low-carbon, resource-efficient and competitive economy; and fostering a high-employment economy delivering social and territorial cohesion.

Public procurement plays a key role in the Europe 2020 strategy as one of the market-based instruments to be used to achieve those objectives by improving the business environment and conditions for business to innovate and by encouraging wider use of green procurement supporting the shift towards a resource efficient and low-carbon economy. At the same time, the Europe 2020 strategy stresses that public procurement policy must ensure the most efficient use of funds and that procurement markets must be kept open Union-wide.

Public procurement plays an important role in the overall economic performance of the European Union. In Europe, public purchasers spend around 18% of GDP on supplies, works and services. Given the volume of purchases, public procurement can be used as a powerful lever for achieving a Single Market fostering smart, sustainable and inclusive growth.

Together with the proposed new Directive on procurement by public authorities, the proposal will replace Directives 2004/17/EC and 2004/18/EC as the core elements of the European Union public procurement legislative framework. The Directive will be complemented by the further elements of that legislative framework: Directive 2009/81/EC sets specific rules for defence and sensitive security procurement, Directive 92/13/EEC<sup>4</sup> establishes common standards for national review procedures to ensure that rapid and effective means of redress is available in all EU countries in cases where bidders consider that contracts have been awarded unfairly.

## AMENDMENTS

The Committee on Industry, Research and Energy calls on the Committee on the Internal Market and Consumer Protection, as the committee responsible, to incorporate the following amendments in its report:

### Amendment 1

#### Proposal for a directive

#### Recital 4

##### *Text proposed by the Commission*

(4) Public procurement plays a key role in the Europe 2020 strategy<sup>16</sup> as one of the market-based instruments to be used to achieve a smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. For that purpose, the current public procurement rules adopted pursuant to Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors<sup>17</sup> and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts have to be revised and modernised in order to **increase** the efficiency of public spending, facilitating in particular the participation of small and medium-sized enterprises in public procurement **and to enable procurers to make better use of public procurement in support of common societal goals**. There is also a need to clarify basic notions and concepts to ensure better legal certainty and to incorporate certain aspects of related well-established case-law of the Court of Justice of the European Union.

##### *Amendment*

(4) Public procurement plays a key role in the Europe 2020 strategy<sup>16</sup> as one of the market-based instruments to be used to achieve a smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. For that purpose, the current public procurement rules adopted pursuant to Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors<sup>17</sup> and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts have to be revised and modernised in order to **enable public procurers to make better use of public procurement in support of sustainable development and other common societal goals, thereby increasing** the efficiency of public spending **by ensuring the best possible outcome in cost-benefit ratio terms, by reducing costs for both public authorities and enterprises alike and by** facilitating in particular the participation of small and medium-sized enterprises in public procurement and to enable procurers to make better use of public procurement in support of common societal goals. There is also a need to **simplify the EU rules, particularly with regard to how**

*sustainability objectives can be incorporated into public procurement, and to clarify basic notions and concepts to ensure better legal certainty and to incorporate certain aspects of related well-established case-law of the Court of Justice of the European Union.*

## Amendment 2

### Proposal for a directive Recital 5

*Text proposed by the Commission*

(5) Under **Article 11** of the Treaty on the Functioning of the European Union, environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development. This Directive clarifies how the contracting **entities may** contribute to the protection of the environment and the promotion of sustainable development, whilst ensuring that they can obtain the best value for money **for their contracts**.

*Amendment*

(5) Under **Articles 9, 10, and 11** of the Treaty on the Functioning of the European Union, environmental protection requirements and **the concepts underlying ‘socially sustainable’ production processes** must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development **and, throughout the supply chain, protecting health and public safety and ensuring compliance with social standards and national and European labour laws**. This Directive clarifies how the contracting **authorities** contribute to the protection of the environment and the promotion of sustainable development **and use the discretionary power assigned to them to select the technical specifications and award criteria most likely to achieve socially sustainable public procurement whilst establishing the necessary relation to the subject matter of the contract and** ensuring that they can obtain the best value for money.

## Amendment 3

### Proposal for a directive Recital 10 a (new)

***(10a) It is furthermore appropriate to exclude procurement made for postal services and services other than postal services as that sector has consistently been found to be subject to such competitive pressure that the procurement discipline brought about by the Union procurement rules is no longer needed.***

*Justification*

*As a result of the liberalisation process in the postal sector, the introduction of fully-fledged sector-specific regulation and the evolution of the market, it is no longer necessary to regulate purchases by entities operating in the postal sector. Therefore, the time is ripe to exclude postal services and all the more so “other services than postal services”, from the scope of the Directive and allow all entities operating in the sector to base their decisions on purely economic criteria. Since 1997, the postal sector has been increasingly subject to competitive pressure. Three milestones in the EU postal acquis are relevant in this respect: the first and the second Postal Directives (97/67/EC and 2002/39/EC respectively), which followed the 1992 Green Paper, set in motion the process of a controlled liberalisation and gradually opened the postal markets to competition. The third Postal Directive (2008/06/EC) abolished all exclusive rights in the postal sector and set 31st December 2010 as the deadline for full market opening for the majority of Member States (in fact, 95% of the EU postal markets in terms of volumes) and 31st December 2012 for the remaining Member States.*

**Amendment 4**

**Proposal for a directive**

**Recital 14**

*Text proposed by the Commission*

*Amendment*

(14) Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the Agreements reached in the Uruguay Round multilateral negotiations (1986 to 1994)<sup>25</sup>, approved in particular the World Trade Organisation Agreement on Government Procurement, hereinafter referred to as the "Agreement". ***The aim of the Agreement is to establish a*** multilateral framework of balanced rights and

(14) Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the Agreements reached in the Uruguay Round multilateral negotiations (1986 to 1994)<sup>25</sup>, approved in particular the World Trade Organisation Agreement on Government Procurement, hereinafter referred to as the "Agreement". ***Within this*** multilateral framework of balanced rights and obligations relating to public contracts

obligations relating to public contracts with a view to ***achieving the liberalisation and expansion of world trade***. For contracts covered by the Agreement, as well as by other relevant international agreements by which the Union is bound, contracting entities fulfil the obligations under those agreements by applying this Directive to economic operators of third countries that are signatories to the agreements.

***upholding equal opportunities for Union and third country economic operators to compete on equal terms in Union and third country markets*** with a view to ***facilitating the integration of small and medium-sized enterprises (SMEs) and stimulating employment and innovation within the Union***. For contracts covered by the Agreement, as well as by other relevant international agreements by which the Union is bound, contracting entities fulfil the obligations under those agreements by applying this Directive to economic operators of third countries that are signatories to the agreements.

## Amendment 5

### Proposal for a directive Recital 14 a new

*Text proposed by the Commission*

*Amendment*

***(14a) The Union needs an effective instrument to, on the one hand, encourage compliance with the principle of reciprocity and balance in relation to third countries which do not provide equivalent access to European economic operators, particularly through an assessment of substantial reciprocity to be carried out by the Commission, and, on the other hand, ensure fair competition and a level playing field worldwide.***

## Amendment 6

### Proposal for a directive Recital 14 b (new)

*Text proposed by the Commission*

*Amendment*

***(14b) In view of the need to encourage participation by the Union's economic operators in cross-border public markets, it is important that the Member States transpose and implement in a timely and***

*adequate manner the provisions of the Services Directive.*

## **Amendment 7**

### **Proposal for a directive**

#### **Recital 27**

*Text proposed by the Commission*

(27) Electronic means of information and communication can greatly simplify the publication of contracts and increase the efficiency and transparency of procurement processes. They should become the standard means of communication and information exchange in procurement procedures. The use of electronic means also leads to time savings. As a result, provision should be made for reducing the minimum periods where electronic means are used, subject, however, to the condition that they are compatible with the specific mode of transmission envisaged at Union level. Moreover, electronic means of information and communication including adequate functionalities can enable contracting authorities to prevent, detect and correct errors that occur during procurement procedures.

*Amendment*

(27) Electronic means of information and communication can greatly simplify the publication of contracts and increase the efficiency and transparency of procurement processes. They should become the standard means of communication and information exchange in procurement procedures. The use of electronic means also leads to time, *cost and resource* savings. As a result, provision should be made for reducing the minimum periods where electronic means are used, subject, however, to the condition that they are compatible with the specific mode of transmission envisaged at Union level. Moreover, electronic means of information and communication including adequate functionalities can enable contracting authorities to prevent, detect and correct errors that occur during procurement procedures.

## **Amendment 8**

### **Proposal for a directive**

#### **Recital 27 a (new)**

*Text proposed by the Commission*

*Amendment*

***(27a) The use of e-procurement shall be encouraged to ensure that at least 50% of both the EU institutions' and the Member States' public procurement operations are carried out electronically, in line with the commitment made by the Member State governments at the ministerial conference on e-government in Manchester in 2005.***

*In the future, e-procurement, which plays a positive role in reducing the cost and increasing the accessibility of procurement procedures, shall become the main procedure. It is necessary to preserve open standards and technology neutrality in order to ensure the interoperability of different systems and avoid vendor lock-in and to ensure genuine interoperability between the various platforms for e-procurement already in place in Member States.*

## Amendment 9

### Proposal for a directive Recital 33

*Text proposed by the Commission*

(33) Electronic means of communication are particularly well suited to support centralised purchasing practices and tools because of the possibility they offer to re-use and automatically process data and to minimise information and transaction costs. The use of such electronic means of communication should therefore, as a first step, be rendered compulsory for central purchasing bodies, while also facilitating converging practices across the Union. This should be followed by a general obligation to use electronic means of communication in all procurement procedures after a transition period of two years.

*Amendment*

(33) Electronic means of communication are particularly well suited to support centralised purchasing practices and tools because of the possibility they offer to re-use and automatically process data, to minimise information and transaction costs **and to ensure transparency**. The use of such electronic means of communication should therefore, as a first step, be rendered compulsory for central purchasing bodies, while also facilitating converging practices across the Union. This should be followed by a general obligation to use electronic means of communication in all procurement procedures after a transition period of two years.

## Amendment 10

### Proposal for a directive Recital 38

*Text proposed by the Commission*

(38) In order to encourage the involvement of small and medium-sized enterprises (SMEs) in the procurement market, it

*Amendment*

(38) In order to encourage the involvement of small and medium-sized enterprises (SMEs) in the procurement market, **the**

should be provided explicitly that contracts may be divided into lots, whether homogenous or heterogeneous. Where contracts are divided into lots, contracting entities may, for instance in order to preserve competition or to ensure security of supply, limit the number of lots for which an economic operator may tender; they may also limit the number of lots that may be awarded to any one tenderer.

***"think small first" principle must apply and Member States should fully implement the European Code of Best Practices Facilitating Access by SMEs to Public Procurement Contracts.***

***Furthermore,*** it should be provided explicitly that contracts may be divided into lots, whether homogenous or heterogeneous. Where contracts are divided into lots, contracting entities may, for instance in order to preserve competition or to ensure security of supply, limit the number of lots for which an economic operator may tender; they may also limit the number of lots that may be awarded to any one tenderer.

## **Amendment 11**

### **Proposal for a directive Recital 43**

#### *Text proposed by the Commission*

(43) Contracts should be awarded on the basis of objective criteria that ensure compliance with the principles of transparency, non-discrimination and equal treatment. Those criteria should guarantee that tenders are assessed in conditions of effective competition, ***also where*** contracting entities require high-quality works, supplies and services that are optimally suited to their needs. As a result, contracting entities should be allowed to adopt as award criteria either ‘the most economically advantageous tender’ or ‘the lowest cost’, taking into account that in the latter case they ***are free to set*** adequate quality standards by using technical specifications or contract performance conditions.

#### *Amendment*

(43) Contracts should be awarded on the basis of objective criteria that ensure compliance with the principles of transparency, non-discrimination and equal treatment. Those criteria should guarantee that tenders are assessed in conditions of effective competition, ***at the same time ensuring that*** contracting entities require high-quality works, supplies and services that are optimally suited to their needs ***and which include factors linked to socially-sustainable production process criteria.*** As a result, contracting entities should be allowed to adopt as award criteria either ‘the most economically advantageous tender’ or ‘the lowest cost’, taking into account that in the latter case they ***should refer*** to set adequate quality standards by using technical specifications or contract performance conditions.

## **Amendment 12**

**Proposal for a directive**  
**Recital 45**

*Text proposed by the Commission*

(45) *It is of utmost importance to fully* exploit the potential of public procurement to achieve the objectives of the Europe 2020 Strategy for sustainable growth. In view of the important differences between individual sectors and markets, it would however not be appropriate to set general mandatory requirements for environmental, social and innovation procurement. The Union legislature has already set mandatory procurement requirements for obtaining specific goals in the sectors of road transport vehicles (Directive 2009/33/EC of the European Parliament and the Council of 23 April 2009 on the promotion of clean and energy-efficient road transport vehicles) and office equipment (Regulation (EC) No 106/2008 of the European Parliament and the Council of 15 January 2008 on a Community energy-efficiency labelling programme for office equipment). In addition, the definition of common methodologies for life cycle costing has significantly advanced. It therefore appears appropriate to continue on that path, leaving it to sector-specific legislation to set mandatory objectives and targets in function of the particular policies and conditions prevailing in the relevant sector and to promote the development and use of European approaches to life-cycle costing as a further underpinning for the use of public procurement in support of sustainable growth.

**Amendment 13**

**Proposal for a directive**  
**Article 2 – paragraph 1 – point 22**

*Amendment*

(45) *An effort should be made* to exploit the potential of public procurement to achieve the objectives of the Europe 2020 Strategy for sustainable growth, *without encroaching upon the powers of the contracting entities*. In view of the important differences between individual sectors and markets, it would however not be appropriate to set general mandatory requirements for environmental, social and innovation procurement. The Union legislature has already set mandatory procurement requirements for obtaining specific goals in the sectors of road transport vehicles (Directive 2009/33/EC of the European Parliament and the Council of 23 April 2009 on the promotion of clean and energy-efficient road transport vehicles) and office equipment (Regulation (EC) No 106/2008 of the European Parliament and the Council of 15 January 2008 on a Community energy-efficiency labelling programme for office equipment). In addition, the definition of common methodologies for life cycle costing has significantly advanced. It therefore appears appropriate to continue on that path, leaving it to sector-specific legislation to set mandatory objectives and targets in function of the particular policies and conditions prevailing in the relevant sector and to promote the development and use of European approaches to life-cycle costing as a further underpinning for the use of public procurement in support of sustainable growth.

*Text proposed by the Commission*

*Amendment*

(22) ‘life cycle’ means all consecutive and/or interlinked stages, including production, transport, use and maintenance, throughout the existence of a product or a works or the provision of a service, from raw material acquisition or generation of resources to disposal, clearance and finalisation;

(22) ‘life cycle’ means all consecutive and/or interlinked stages, including production ***and location of production***, transport, use and maintenance, throughout the existence of a product or works or the provision of a service, from raw material acquisition or generation of resources to disposal, clearance and finalisation;

#### **Amendment 14**

##### **Proposal for a directive Article 10**

*Text proposed by the Commission*

*Amendment*

[...]

***deleted***

##### *Justification*

*As a result of the liberalisation process in the postal sector, the introduction of fully-fledged sector-specific regulation and the evolution of the market, it is no longer necessary to regulate purchases by entities operating in the postal sector. Therefore, the time is ripe to exclude postal services and all the more so “other services than postal services”, from the scope of the Directive and allow all entities operating in the sector to base their decisions on purely economic criteria. Furthermore, as the experience with the application of Article 30 procedure shows, an increasing number of postal services are already excluded from the scope of application of the Utilities Directive. This was the case for a number of markets in Denmark, Finland, Italy, Sweden, Austria and Hungary.*

#### **Amendment 15**

##### **Proposal for a directive Article 14 a (new)**

*Text proposed by the Commission*

*Amendment*

***Article 14a***

***Reciprocity***

***The practical implementation of the Agreement on Government Procurement (AGP) within the Union legislative framework for public procurement shall***

*be based on prior assessment to ascertain that the principle of substantial reciprocity is being properly applied for the purposes of market opening between the Union and third country signatories. Assessment of substantial reciprocity shall apply equally to third countries which are not party to the Agreement on Government Procurement but have access to the market.*

## **Amendment 16**

### **Proposal for a directive Article 29 – paragraph 1**

*Text proposed by the Commission*

Contracting entities shall treat economic operators equally and without discrimination and shall act in a transparent *and proportionate* way.

*Amendment*

Contracting entities shall treat economic operators equally and without discrimination and shall act in a transparent way.

## **Amendment 17**

### **Proposal for a directive Article 40 – paragraph 3**

*Text proposed by the Commission*

3. Where a state of urgency duly substantiated by the contracting entities renders impracticable the time limit laid down in the second subparagraph of paragraph 1, they may fix a time limit which shall be not less than **20 days** from the date on which the contract notice was sent.

*Amendment*

3. Where a state of urgency duly substantiated by the contracting entities renders impracticable the time limit laid down in the second subparagraph of paragraph 1, they may fix a time limit which shall be not less than **25 days** from the date on which the contract notice was sent.

*A state of urgency may only result in a shorter time limit being set if it has not been brought about by the contracting entities themselves.*

## **Amendment 18**

**Proposal for a directive**  
**Article 40 – paragraph 4**

*Text proposed by the Commission*

4. The contracting entity may reduce by **five** days the time limit for receipt of tenders set out in the second subparagraph of paragraph 1 where it accepts that tenders may be submitted by electronic means in accordance with Article 33(3), (4) and (5).

*Amendment*

4. The contracting entity may reduce by **three** days the time limit for receipt of tenders set out in the second subparagraph of paragraph 1 where it accepts that tenders may be submitted by electronic means in accordance with Article 33(3), (4) and (5).

**Amendment 19**

**Proposal for a directive**  
**Article 45 – paragraph 1 – subparagraph 3**

*Text proposed by the Commission*

The term of a framework agreement shall not exceed **four** years, save in exceptional cases duly justified, in particular by the subject of the framework agreement.

*Amendment*

The term of a framework agreement shall not exceed **eight** years, save in exceptional cases duly justified, in particular, by the subject of the framework agreement.

*Justification*

*The proposed period of four years is too short and reduces the effect and possible savings that can be made from a long-term framework agreement, on the basis of which suppliers generally make better offers. One of the main reasons for these measures is the wish to maximise the cost-effectiveness of contracting entities' procurement expenditure. The timescale proposed therefore runs counter to this objective, since cheaper price terms can be obtained through longer-term contracts.*

**Amendment 20**

**Proposal for a directive**  
**Article 54 – paragraph 1a (new)**

*Text proposed by the Commission*

*Amendment*

***1a. Technical specifications may also include, as appropriate, requirements relating to:***

**Amendment 21**

**Proposal for a directive**  
**Article 54 – paragraph 1a – point a (new)**

*Text proposed by the Commission*

*Amendment*

***(a) performance, including levels of environmental and climate performance and performance in terms of socially sustainable production process;***

**Amendment 22**

**Proposal for a directive**  
**Article 54 – paragraph 1a – point b (new)**

*Text proposed by the Commission*

*Amendment*

***(b) life-cycle characteristics;***

**Amendment 23**

**Proposal for a directive**  
**Article 54 – paragraph 1a – point c (new)**

*Text proposed by the Commission*

*Amendment*

***(c) socially sustainable production process;***

**Amendment 24**

**Proposal for a directive**  
**Article 54 – paragraph 1a – point d (new)**

*Text proposed by the Commission*

*Amendment*

***(d) the organisation, qualification and experience of the staff assigned to performing the contract in question.***

**Amendment 25**

**Proposal for a directive**  
**Article 54 – paragraph 3 – point c a (new)**

*Text proposed by the Commission*

*Amendment*

*(ca) in terms of a socially sustainable production process;*

## **Amendment 26**

### **Proposal for a directive**

#### **Article 58 – paragraph 1 – subparagraph 1**

*Text proposed by the Commission*

*Amendment*

Contracting entities *may* take account of variants which are submitted by a tenderer and meet the minimum requirements specified by the contracting entities.

Contracting entities *must* take account of variants which are submitted by a tenderer and meet the minimum requirements specified by the contracting entities.

## **Amendment 27**

### **Proposal for a directive**

#### **Article 58 – paragraph 1 – subparagraph 2**

*Text proposed by the Commission*

*Amendment*

*Contracting entities shall indicate in the specifications whether or not they authorise variants and, if so, the minimum requirements to be met by the variants and any specific requirements for their presentation. Where variants are authorised, they shall also ensure that the chosen award criteria can be usefully applied to variants meeting those minimum requirements as well as to conforming tenders which are not variants.*

*deleted*

## **Amendment 28**

### **Proposal for a directive**

#### **Article 58 – paragraph 2**

*Text proposed by the Commission*

*Amendment*

2. In procedures for awarding supply or

2. In procedures for awarding supply or

service contracts, contracting entities ***that have authorised variants*** shall not reject a variant on the sole ground that it would, where successful, lead either to a service contract rather than a supply contract or to a supply contract rather than a service contract.

service contracts, contracting entities shall not reject a variant on the sole ground that it would, where successful, lead either to a service contract rather than a supply contract or to a supply contract rather than a service contract.

## Amendment 29

### Proposal for a directive Article 70 – paragraph 5

*Text proposed by the Commission*

5. Contracting entities ***may*** decide not to award a contract to the tenderer submitting the best tender where they have established that the tender does not comply, ***at least in an equivalent manner***, with obligations ***established by Union legislation*** in the field of social and labour law or environmental law or ***of*** the international social and environmental law provisions listed in ***Annex XIV***.

*Amendment*

5. Contracting entities ***must*** decide not to award a contract to the tenderer submitting the best tender where they have established that the tender does not comply with obligations established by Union legislation in the field of social and labour law or environmental law ***established by Union or national legislation or by collective agreements applicable to the place where the work, service, or supply is to be performed***, or by the international social and environmental law provisions listed in ***Annex XI***, or ***with obligations in the field of intellectual property law***.

## Amendment 30

### Proposal for a directive Article 70 – paragraph 5 a (new)

*Text proposed by the Commission*

*Amendment*

***5a. Where such laws do not apply, infringements of other laws applicable to the tenderer which provide an equivalent degree of protection shall likewise constitute grounds for exclusion.***

## Amendment 31

**Proposal for a directive**  
**Article 73 – paragraph 3**

*Text proposed by the Commission*

*Amendment*

**3. In the case of works contracts, service contracts and siting and installation operations in the context of a supply contract, contracting entities may require that certain critical tasks be performed directly by the tenderer itself or, where a tender is submitted by a group of economic operators as referred to in Article 30, a participant in the group.**

**deleted**

**Amendment 32**

**Proposal for a directive**  
**Article 76 – paragraph 2 – subparagraph 2 – point a**

*Text proposed by the Commission*

*Amendment*

(a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, environmental characteristics and innovative character;

(a) quality, including technical merit, aesthetic and functional characteristics, accessibility, **energy efficiency performance**, design for all users, environmental characteristics and innovative character;

**Amendment 33**

**Proposal for a directive**  
**Article 76 – paragraph 2 – subparagraph 2 – point a a (new)**

*Text proposed by the Commission*

*Amendment*

**(aa) a socially sustainable production process;**

**Amendment 34**

**Proposal for a directive**  
**Article 79 – paragraph 3 – point d a (new)**

*Text proposed by the Commission*

*Amendment*

***(da) compliance with rules and standards in the field of health and safety, social law, and labour law laid down in Union and national legislation and by collective agreements applying in the place where the work, service, or supply is to be performed;***

### **Amendment 35**

#### **Proposal for a directive**

#### **Article 79 – paragraph 3 – point d b (new)**

*Text proposed by the Commission*

*Amendment*

***(db) compliance with the subcontracting requirements set out in Article 81.***

### **Amendment 36**

#### **Proposal for a directive**

#### **Article 79 – paragraph 4 – subparagraph 3**

*Text proposed by the Commission*

*Amendment*

Contracting entities shall reject the tender, where they have established that the tender is abnormally low because it does not comply with obligations established by Union legislation in the field of social and labour law or environmental law or by the international social and environmental law provisions listed in Annex XIV.

Contracting entities shall reject the tender, where they have established that the tender is abnormally low because it does not comply with obligations established by Union ***and national*** legislation, and ***by collective agreements applying in the place where the work, service, or supply is to be performed***, in the field of social and labour law or environmental law, or by the international social and environmental law provisions listed in Annex XIV.

### **Amendment 37**

#### **Proposal for a directive**

#### **Article 81 – paragraph 1**

*Text proposed by the Commission*

1. In the procurement documents, ***the contracting entity may ask, or may be required by a Member State to ask***, the tenderer to indicate in its tender any share of the contract it may intend to subcontract to third parties and any proposed subcontractors.

**Amendment 38**

**Proposal for a directive  
Article 81 – paragraph 2**

*Text proposed by the Commission*

2. Member States may provide that, ***at the request of the subcontractor and where the nature of the contract so allows, the contracting entity shall transfer due payments directly*** to the subcontractor for services, supplies or works provided to the main contractor. ***In such case, Member States shall put in place appropriate mechanisms permitting the main contractor to object to undue payments. The arrangements concerning that mode of payment shall be set out in the procurement documents.***

*Amendment*

1. In the procurement documents, the tenderer ***shall indicate to the contracting authority***, in its tender, any share of the contract it may intend to subcontract to third parties and any proposed subcontractors.

*Amendment*

2. Member States may provide that payments to the subcontractor for services, supplies or works provided to the main contractor ***shall become due immediately if and insofar as***

***(a) the contracting authority has performed its obligations to the main contractor, or parts thereof,***

***(b) the contracting authority has accepted the services, supplies or works as having been fully completed, or***

***(c) the contracting authority has, without success, set the main contractor an appropriate time limit within which to provide information about the circumstances referred to at (a) and (b).***

## Amendment 39

### Proposal for a directive Article 82 – paragraph 4

*Text proposed by the Commission*

4. Where the value of a modification can be expressed in monetary terms, the modification shall not be considered to be substantial within the meaning of paragraph 1, where its value ***does not exceed the thresholds set out in Article 12 and where it*** is below 5% of the price of the initial contract, provided that the modification does not alter the overall nature of the contract. ***Where several successive modifications are made, the value shall be assessed on the basis of the cumulative value of the successive modifications.***

*Amendment*

4. Where the value of a modification can be expressed in monetary terms, the modification shall not be considered to be substantial within the meaning of paragraph 1, where its value is below ***10%*** of the price of the initial contract, provided that the modification does not alter the overall nature of the contract.

## Amendment 40

### Proposal for a directive Article 93 – paragraph 1 – subparagraph 1

*Text proposed by the Commission*

Member States shall ***appoint a single*** independent body responsible for the oversight and coordination of implementation activities (hereinafter ‘the oversight body’). Member States shall inform the Commission of their designation.

*Amendment*

Member States shall ***ensure that an*** independent body responsible for the oversight and coordination of implementation activities (hereinafter ‘the oversight body’) ***is in place***. Member States shall inform the Commission of their designation.

## Amendment 41

### Proposal for a directive Article 93 a (new)

*Text proposed by the Commission*

*Amendment*

***Article 93a***

***The Commission shall submit by the end of 2013 a report on the differing practices***

*in awarding contracts below the threshold values laid down in Article 12, particularly in the case of services to which priority has not so far been assigned.*

## Amendment 42

### Proposal for a directive Article 103 – paragraph 1

*Text proposed by the Commission*

The Commission shall review the economic effects on the internal market resulting from the application of the thresholds set in Article 12 and report thereon to the European Parliament and the Council by **30 June 2017**.

*Amendment*

The Commission shall review the economic effects on the internal market resulting from the application of the thresholds set in Article 12 and report thereon to the European Parliament and the Council by **30 June 2015**.

## Amendment 43

### Proposal for a directive Annex VIII – paragraph 1 – point 1 – point a

*Text proposed by the Commission*

(a) in the case of service or supply contracts a specification in a document defining the required characteristics of a product or a service, such as quality levels, environmental and climate performance levels, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, use of the product, safety or dimensions, including requirements relevant to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions, ***production processes and methods at any stage of the life cycle of the supply or service*** and conformity assessment procedures;

*Amendment*

(a) in the case of service or supply contracts a specification in a document defining the required characteristics of a product or a service, such as quality levels, environmental and climate performance levels, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, use of the product, safety or dimensions, including requirements relevant to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions and conformity assessment procedures;

## PROCEDURE

<b>Title</b>	Procurement by entities operating in the water, energy, transport and postal services sectors
<b>References</b>	COM(2011)0895 – C7-0007/2012 – 2011/0439(COD)
<b>Committee responsible</b> Date announced in plenary	IMCO 19.1.2012
<b>Opinion by</b> Date announced in plenary	ITRE 19.1.2012
<b>Rapporteur</b> Date appointed	Zigmantas Balčytis 14.2.2012
<b>Discussed in committee</b>	31.5.2012
<b>Date adopted</b>	24.9.2012
<b>Result of final vote</b>	+: 40 –: 6 0: 2
<b>Members present for the final vote</b>	Amelia Andersdotter, Josefa Andrés Barea, Jean-Pierre Audy, Ivo Belet, Bendt Bendtsen, Reinhard Bütikofer, Maria Da Graça Carvalho, Giles Chichester, Pilar del Castillo Vera, Vicky Ford, Robert Goebbels, Jacky Hénin, Edit Herczog, Kent Johansson, Romana Jordan, Philippe Lamberts, Judith A. Merkies, Angelika Niebler, Jaroslav Paška, Vittorio Prodi, Jens Rohde, Paul Rübig, Amalia Sartori, Salvador Sedó i Alabart, Francisco Sosa Wagner, Evžen Tošenovský, Ioannis A. Tsoukalas, Claude Turmes, Marita Ulvskog, Vladimir Urutchev, Kathleen Van Brempt
<b>Substitute(s) present for the final vote</b>	Daniel Caspary, António Fernando Correia de Campos, Ioan Enciu, Vicente Miguel Garcés Ramón, Elisabetta Gardini, Françoise Grossetête, Andrzej Grzyb, Cristina Gutiérrez-Cortines, Roger Helmer, Jolanta Emilia Hibner, Gunnar Hökmark, Eija-Riitta Korhola, Werner Langen, Pavel Poc, Vladimír Remek
<b>Substitute(s) under Rule 187(2) present for the final vote</b>	Jorgo Chatzimarkakis, Keith Taylor

20.9.2012

## **OPINION OF THE COMMITTEE ON TRANSPORT AND TOURISM**

for the Committee on the Internal Market and Consumer Protection

on the proposal for a directive of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sector (COM(2011)0895– C7-0007/2012 – 2011/0439(COD))

Rapporteur: Eva Lichtenberger

### **SHORT JUSTIFICATION**

Public procurement plays an important role in the overall economic performance of the European Union. Public authorities spend around 18 % of GDP on supplies, works and services. Given the volume of purchases, public procurement can be used as a powerful lever for achieving a Single Market fostering smart, sustainable and inclusive growth.

Public procurement plays also a key role in the Europe 2020 strategy as one of the market-based instruments to be used to achieve the objectives of improving the business environment and conditions for business to innovate and of encouraging wider use of green procurement supporting the shift towards a resource efficient and low-carbon economy. At the same time, the Europe 2020 strategy stresses that public procurement policy must ensure the most efficient use of public funds and that procurement markets must be kept open Union-wide.

The Rapporteur welcomes the Commission's proposal to modernise the public procurement directives. The legislative proposal should result in simpler and more flexible procurement procedures for contracting authorities and provide easier access for companies, especially SMEs. The revision of the legislation should strike a balance between simplification of the rules, sound and effective procedures related to innovative and sustainable award criteria, while also securing a wider use of e-procurement.

Contracts should be awarded on the basis of objective criteria that ensure compliance with the principles of transparency, non-discrimination and equal treatment. These criteria should guarantee that tenders are assessed in conditions of effective competition, also where contracting authorities require high-quality works, supplies and services that are optimally suited to their needs, for instance where the award decision includes factors linked to the production process.

The Rapporteur strongly believes that contracting authorities should use as award criterion the 'most economically advantageous and sustainable tender' (MEAST) and discard the

alternative criterion based on the 'lowest cost'. Given that price is also taken into account in the MEAST, contracting authorities will be able to make the most appropriate choices in relation to their specific needs, including the consideration of cost, strategic societal goals, innovative solutions and social and environmental criteria.

Public procurement should be used as a means to foster innovation. Public purchasers must be encouraged to buy innovative products and services in order to achieve the goals of sustainable development. New innovative solutions and ideas are necessary in particular in the field of transport, and public procurement should be used as a tool to meet such needs.

Life cycle considerations should be upgraded, and the social and environmental effects of the entire production process must be taken into consideration. Contracting authorities should have further possibilities to impose demands on the production process and not only on the product. This will lead to more sustainable procurement, including in the transport sector.

For all procurement intended for use by persons, it is necessary that contracting authorities lay down technical specifications so as to take into account accessibility criteria for people with disabilities or design for all users. This is particularly crucial in the area of public transport and tourism.

The provisions on subcontracting should be strengthened. A tenderer must be required to indicate in its tender any share of the contract it may intend to subcontract to third parties and any proposed subcontractors. Furthermore, it has to be possible for the main contractor and all of the subcontractors involved to be made liable in the event of failure to comply with legislation. There is need for a control system which covers all parts of the contractors' chain.

The Rapporteur has tabled a number of amendments to address the issues outlined above. In some cases, it was considered necessary to delete some provisions proposed by the Commission, as the Rapporteur considers that certain issues can be addressed more effectively in national legislation, taking into account sectoral and regional specificities, in line with the principles of subsidiarity and better regulation.

Last but not least, the Rapporteur would like to stress the need to ensure legal certainty and consistency of the public procurement directives with current Union legislation in the field of transport and postal services.

## **AMENDMENTS**

The Committee on Transport and Tourism calls on the Committee on the Internal Market and Consumer Protection, as the committee responsible, to incorporate the following amendments in its report:

### **Amendment 1 Proposal for a directive Recital 8 a (new)**

*Text proposed by the Commission*

*Amendment*

***(8a) This Directive shall be without prejudice to Union legislation in sectors***

*which have been regulated in a comprehensive manner, in particular in the field of transport and postal services.*

**Amendment 2**  
**Proposal for a directive**  
**Recital 8 b (new)**

*Text proposed by the Commission*

*Amendment*

*(8b) Care needs to be taken to ensure that the social aspect of postal services in rural areas is not neglected when opening this market up to competition.*

**Amendment 3**  
**Proposal for a directive**  
**Article 1 – paragraph 2 – subparagraph 1**

*Text proposed by the Commission*

*Amendment*

**Procurement** within the meaning of this Directive is the ***purchase or other forms of*** acquisition of works, supplies or services by one or more contracting entities from economic operators chosen by those contracting entities, provided that the works, supplies or services are intended for the pursuit of one of the activities referred to in Articles 5 to 11.

**Public procurement** within the meaning of this Directive is ***a contract concluded for pecuniary interest for*** the acquisition of works, supplies or services by one or more contracting entities from economic operators chosen by those contracting entities, provided that the works, supplies or services are intended for the pursuit of one of the activities referred to in Articles 5 to 11.

**Amendment 4**  
**Proposal for a directive**  
**Article 1 – paragraph 2 – subparagraph 2**

*Text proposed by the Commission*

*Amendment*

***An entirety of works, supplies and/or services, even if purchased through different contracts, constitutes a single procurement within the meaning of this Directive, if the contracts are part of one single project.***

***deleted***

**Amendment 5**

**Proposal for a directive**  
**Article 2 – paragraph 1 – point 22**

*Text proposed by the Commission*

(22) ‘life cycle’ means ***all consecutive and/or interlinked stages***, including ***production, transport, use and maintenance, throughout the existence of a product or a works or the provision of a service, from raw material acquisition or generation of resources to disposal, clearance and finalisation;***

*Amendment*

(22) ‘life cycle’ means ***monetising, wherever possible, the full costs associated to the public procurement, including maintenance and resource (including energy) efficiency costs, end-of-life recycling costs, and social impact costs where these relate to performance of the contract. Efficient design, planning and use of electronic means can also be included in life cycle monetisation. For the purposes of public procurement, the life cycle runs from the point of purchase throughout the lifetime of the works, supplies or services and forms an integral and in-dissociable part of the calculation of what constitutes the Most Economically Advantageous Tender.***

*Justification*

*While contracting authorities shall, in the interest of the taxpayer, be responsible for ensuring that value for money is secured as regards whatever solution is selected through public procurement, and that this does not end up costing more to society or the environment overall on the long run, this responsibility can only reasonably run from the point of purchase.*

**Amendment 6**  
**Proposal for a directive**  
**Article 10 – paragraph 1 – introductory part**

*Text proposed by the Commission*

1. This Directive shall apply to activities relating to the provision of:

*Amendment*

1. This Directive shall apply, ***without prejudice to Directive 97/67/EC, to*** activities relating to the provision of:

**Amendment 7**  
**Proposal for a directive**  
**Article 10 – paragraph 2 – point b**

*Text proposed by the Commission*

(b) ‘postal services’ means services consisting of the clearance, sorting, routing

*Amendment*

(b) ‘postal services’ means services consisting of the clearance, sorting, routing

and delivery of postal items. ***This shall include both services falling within as well as services falling outside*** the scope of the universal service set up in conformity with Directive 97/67/EC;

and delivery of ***domestic*** postal items ***and services*** falling within the scope of the universal service set up in conformity with Directive 97/67/EC;

#### *Justification*

*Seeks to exempt postal services that do not form part of the universal service from the obligations under this directive. Given that those services are offered on a competitive market, an obligation to carry out tendering would lead to a competitive disadvantage as compared with market competitors.*

### **Amendment 8** **Proposal for a directive** **Article 27 – paragraph 1**

#### *Text proposed by the Commission*

1. Contracts intended to enable an activity mentioned in Articles 5 to 11 to be carried out shall not be subject to this Directive if the Member State or the contracting entities having introduced the request pursuant to Article 28 can demonstrate that, in the Member State in which it is performed, the activity is directly exposed to competition on markets to which access is not restricted; nor shall design contests that are organised for the pursuit of such an activity in that geographic area be subject to this Directive. Such competition assessment, which will be made in the light of the information available to the Commission and for the purposes of this Directive, is without prejudice to the application of competition law.

#### *Amendment*

1. Contracts intended to enable an activity mentioned in Articles 5 to 11 to be carried out shall not be subject to this Directive if the Member State or the contracting entities having introduced the request pursuant to Article 28 can demonstrate that, in the Member State in which it is performed, the activity, ***or its specific sectors or segments***, is directly exposed to competition on markets to which access is not restricted; nor shall design contests that are organised for the pursuit of such an activity in that geographic area be subject to this Directive. Such competition assessment, which will be made in the light of the information available to the Commission and for the purposes of this Directive, is without prejudice to the application of competition law.

#### *Justification*

*Some sectors of the railway market are already directly exposed to competition and freely accessible, and for this reason should not fall within the scope of this Directive.*

### **Amendment 9** **Proposal for a directive** **Article 27 – paragraph 3 – first subparagraph**

*Text proposed by the Commission*

*Amendment*

For the purposes of paragraph 1, access to a market shall be deemed not to be restricted if the Member State has implemented and applied the Union legislation listed in Annex III.

For the purposes of paragraph 1, access to a market shall be deemed not to be restricted if the Member State has implemented and applied the Union legislation listed in Annex III ***or if the Member State has extended to the market in question the application of principles established by this legislation.***

**Amendment 10**

**Proposal for a directive**

**Article 28 – paragraph 1 – first subparagraph**

*Text proposed by the Commission*

*Amendment*

Where a Member State or, where the legislation of the Member State concerned provides for it, a contracting entity considers that, on the basis of the criteria set out in Article 27(2) and (3), a given activity is directly exposed to competition on markets to which access is not restricted, it may submit a request to establish that this Directive does not apply to the award of contracts or the organisation of design contests for the pursuit of that activity.

Where a Member State or, where the legislation of the Member State concerned provides for it, a contracting entity considers that, on the basis of the criteria set out in Article 27(2) and (3), a given activity is ***completely or partially, even with regard to single sectors or segments of it,*** directly exposed to competition on markets to which access is not restricted, it may submit a request to establish that this Directive does not apply to the award of contracts or the organisation of design contests for the pursuit of that activity ***or of a single sector or segment of it.***

*Justification*

*Some sectors of the railway market are already directly exposed to competition and freely accessible, and for this reason should not fall within the scope of this Directive.*

**Amendment 11**

**Proposal for a directive**

**Article 28 – paragraph 1 – second subparagraph**

*Text proposed by the Commission*

*Amendment*

Requests shall be accompanied by a reasoned and substantiated position adopted by an independent national

Requests shall be accompanied by a reasoned and substantiated position adopted by an independent national

authority that is competent in relation to the activity concerned. This position shall thoroughly analyse the conditions for the possible applicability of Article 27(1) to the activity concerned in accordance with its paragraphs 2 and 3.

authority that is competent in relation to the activity concerned **or a single sector or segment of it**. This position shall thoroughly analyse the conditions for the possible applicability of Article 27(1) to the activity concerned in accordance with its paragraphs 2 and 3.

*Justification*

*Some sectors of the railway market are already directly exposed to competition and freely accessible, and for this reason should not fall within the scope of this Directive.*

**Amendment 12**

**Proposal for a directive**

**Article 28 – paragraph 2 – first subparagraph 1**

*Text proposed by the Commission*

Upon request submitted in accordance with paragraph 1 of this Article, the Commission may, by way of an implementing decision adopted within the periods set out in paragraph 4 of this Article, establish whether an activity referred to in Articles 5 to 11 is directly exposed to competition on the basis of the criteria set out in Article 27. Those implementing decisions shall be adopted in accordance with the advisory procedure referred to in Article 100(2).

*Amendment*

Upon request submitted in accordance with paragraph 1 of this Article, the Commission may, by way of an implementing decision adopted within the periods set out in paragraph 4 of this Article, establish whether an activity, **or a single sector or segment of it**, referred to in Articles 5 to 11 is directly exposed to competition on the basis of the criteria set out in Article 27. Those implementing decisions shall be adopted in accordance with the advisory procedure referred to in Article 100(2).

*Justification*

*Some sectors of the railway market are already directly exposed to competition and freely accessible, and for this reason should not fall within the scope of this Directive.*

**Amendment 13**

**Proposal for a directive**

**Article 28 – paragraph 2 – second subparagraph – introductory part**

*Text proposed by the Commission*

Contracts intended to enable the activity concerned to be carried out and design contests that are organised for the pursuit

*Amendment*

Contracts intended to enable the activity concerned, **or a single sector or segment of it**, to be carried out and design contests

of such an activity shall cease to be subject to this Directive in any of the following cases:

that are organised for the pursuit of such an activity, **or a single sector or segment of it**, shall cease to be subject to this Directive in any of the following cases:

*Justification*

*Some sectors of the railway market are already directly exposed to competition and freely accessible, and for this reason should not fall within the scope of this Directive.*

**Amendment 14**

**Proposal for a directive**

**Article 36 – paragraph 1 – subparagraph 3**

*Text proposed by the Commission*

*Amendment*

*For the purposes of this Article, ‘private interests’ means any family, emotional life, economic, political or other shared interests with the candidates or the tenderers, including conflicting professional interests.*

*deleted*

*Justification*

*This issue can be addressed more effectively in national legislation.*

**Amendment 15**

**Proposal for a directive**

**Article 36 – paragraph 3 – subparagraph 1 – point a**

*Text proposed by the Commission*

*Amendment*

*(a) that staff members referred to in paragraph 2(a) are required to disclose any conflict of interests in relation to any of the candidates or tenderers, as soon as they become aware of such conflicts, in order to enable the contracting authority to take remedial action,*

*deleted*

*Justification*

*This issue can be addressed more effectively in national legislation.*

**Amendment 16**  
**Proposal for a directive**  
**Article 36 – paragraph 3 – subparagraph 2**

*Text proposed by the Commission*

In the event of a conflict of interests, the contracting authority shall take appropriate measures. ***Those measures may include the recusal of the staff member in question from involvement in the affected procurement procedure or the re-assignment of the staff member's duties and responsibilities. Where a conflict of interests cannot be effectively remedied by other means, the candidate or tenderer concerned shall be excluded from the procedure.***

*Amendment*

In the event of a conflict of interests, the contracting authority shall take appropriate measures.

*Justification*

*The precise nature of such measures should be decided at national level.*

**Amendment 17**  
**Proposal for a directive**  
**Article 37 – paragraph 1 – point a**

*Text proposed by the Commission*

***(a) unduly influence the decision-making process of the contracting entity or obtain confidential information that may confer upon them undue advantages in the procurement procedure;***

*Amendment*

***deleted***

**Amendment 18**  
**Proposal for a directive**  
**Article 37 – paragraph 1 – point b**

*Text proposed by the Commission*

***(b) enter into agreements with other candidates and tenderers aimed at distorting competition, or***

*Amendment*

***deleted***

**Amendment 19**  
**Proposal for a directive**  
**Article 37 – paragraph 1 – point c**

*Text proposed by the Commission*

*Amendment*

*(c) deliberately provide misleading information that may have a material influence on decisions concerning exclusion, selection or award.*

*deleted*

**Amendment 20**  
**Proposal for a directive**  
**Article 39 – paragraph 3**

*Text proposed by the Commission*

*Amendment*

3. Member States may provide that contracting entities may apply a negotiated procedure without prior call for competition only in the specific cases and circumstances referred to expressly in Article 42.

3. Member States may provide that contracting entities may apply a negotiated procedure without prior call for competition only in the specific cases and circumstances referred to expressly in Article 42, *provided that they ensure the equal treatment of all tenderers.*

**Amendment 21**  
**Proposal for a directive**  
**Article 45 – paragraph 1 – third subparagraph**

*Text proposed by the Commission*

*Amendment*

The term of a framework agreement shall not exceed **four** years, save in exceptional cases duly justified, in particular by the subject of the framework agreement.

The term of a framework agreement shall not exceed **six** years, save in exceptional cases duly justified, in particular by the subject of the framework agreement.

**Amendment 22**  
**Proposal for a directive**  
**Article 45 – paragraph 4**

*Text proposed by the Commission*

*Amendment*

**4. Where a framework agreement is concluded with more than one economic operator, it may be performed in one of the two following ways:**

*deleted*

**(a) following the terms and conditions of**

*the framework agreement, without reopening competition, where it sets out all the terms governing the provision of the works, services and supplies concerned and the objective conditions for determining which of the economic operators, party to the framework agreement, shall perform them; the latter conditions shall be indicated in the procurement documents;*

*(b) where not all the terms governing the provision of the works, services and supplies are laid down in the framework agreement, through reopening competition amongst the economic operators parties to the framework agreement.*

**Amendment 23**  
**Proposal for a directive**  
**Article 45 – paragraph 5**

*Text proposed by the Commission*

*Amendment*

*5. The competition referred to in paragraph (4)(b) shall be based on the same terms as applied for the award of the framework agreement and, where necessary, more precisely formulated terms, and, where appropriate, other terms referred to in the specifications of the framework agreement, in accordance with the following procedure:*

*deleted*

*(a) for every contract to be awarded, contracting entities shall consult in writing the economic operators capable of performing the contract;*

*(b) contracting entities shall fix a time limit which is sufficiently long to allow tenders for each specific contract to be submitted, taking into account factors such as the complexity of the subject-matter of the contract and the time needed to send in tenders;*

*(c) tenders shall be submitted in writing, and their content shall not be opened until the stipulated time limit for reply has*

*expired;*

*(d) contracting entities shall award each contract to the tenderer that has submitted the best tender on the basis of the award criteria set out in the specifications of the framework agreement.*

#### **Amendment 24**

##### **Proposal for a directive**

##### **Article 45 – paragraph 5 a (new)**

*Text proposed by the Commission*

*Amendment*

***5a. This Article shall be without prejudice to the provisions of Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service and Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70.***

#### **Amendment 25**

##### **Proposal for a directive**

##### **Article 54 – paragraph 1 – subparagraph 4**

*Text proposed by the Commission*

*Amendment*

For all procurement, the subject of which is intended for use by persons, whether general public or staff of the contracting entity, those technical specifications shall, except in duly justified cases, be drawn up so as to take into account accessibility criteria for people with disabilities or design for all users.

For all procurement, the subject of which is intended for use by persons, whether general public or staff of the contracting entity, those technical specifications shall, except in duly justified cases ***that shall be stated in the call for competition***, be drawn up so as to take into account accessibility criteria for people with disabilities or design for all users.

**Amendment 26**  
**Proposal for a directive**  
**Article 54 – paragraph 1 a (new)**

*Text proposed by the Commission*

*Amendment*

***1a. Technical specifications may also include, as appropriate, requirements relating to:***

***(a) performance, including levels of environmental and climate performance and performance in terms of socially sustainable production process;***

***(b) life cycle;***

***(c) socially sustainable production process;***

***(d) the organisation, qualification and experience of the staff assigned to performing the contract in question;***

***(e) safety or dimensions, including the procedures concerning quality assurance, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions;***

***(f) rules relating to design and costing, the test, inspection and acceptance conditions for works and methods or techniques of construction and all other technical conditions which the contracting authority is in a position to prescribe, under general or specific regulations, in relation to the finished works and to the materials or parts which they involve.***

**Amendment 27**  
**Proposal for a directive**  
**Article 69 – paragraph 2 – point c**

*Text proposed by the Commission*

*Amendment*

***(c) any tenderer that has made an admissible tender of the characteristics and relative advantages of the tender selected, as well as the name of the***

***deleted***

*successful tenderer or the parties to the framework agreement;*

**Amendment 28**  
**Proposal for a directive**  
**Article 70 – paragraph 5**

*Text proposed by the Commission*

5. Contracting *entities* may *decide* not to award a contract to the tenderer submitting the best tender where they have established that the tender does not comply, *at least in an equivalent manner*, with obligations established by Union legislation in the field of social *and* labour *law* or environmental law or *of* the international social and environmental law provisions listed in Annex XIV.

*Amendment*

5. Contracting *authorities* may not award a contract to the tenderer submitting the best tender where they have established that the tender does not comply with obligations established by Union *or national* legislation in the field of social, labour, *health, safety* or environmental law, *collective agreements applicable in the place where the work, service or supply is to be performed, or by* the international social and environmental law provisions listed in Annex XIV.

**Amendment 29**  
**Proposal for a directive**  
**Article 76 – paragraph 2 – subparagraph 2 – point b**

*Text proposed by the Commission*

(b) for service contracts and contracts involving the design of works, the organisation, qualification and experience of the staff assigned to performing the contract in question may be taken into consideration, *with the consequence that, following the award of the contract, such staff may only be replaced with the consent of the contracting entity which must verify that replacements ensure equivalent organisation and quality;*

*Amendment*

(b) for service contracts and contracts involving the design of works, the organisation, qualification and experience of the staff assigned to performing the contract in question may be taken into consideration;

**Amendment 30**  
**Proposal for a directive**  
**Article 76 – paragraph 3 a (new)**

*Text proposed by the Commission*

*Amendment*

***3 a. Award criteria shall ensure effective and fair competition and shall be accompanied by requirements that allow the information provided by the tenderers to be effectively verified by the contracting authority in order to determine whether the tenderers meet the award criteria.***

**Amendment 31**  
**Proposal for a directive**  
**Article 79 – title**

*Text proposed by the Commission*

*Amendment*

***Abnormally low tenders***

***Price of the tender***

**Amendment 32**  
**Proposal for a directive**  
**Article 79 – paragraph 1 – introductory part**

*Text proposed by the Commission*

*Amendment*

1. The contracting entity shall request economic operators to explain the price or costs charged, ***where all of the following conditions are fulfilled:***

1. The contracting entity shall request economic operators to explain ***in a detailed manner*** the price or costs charged ***for their tender.***

**Amendment 33**  
**Proposal for a directive**  
**Article 79 – paragraph 1 – point a**

*Text proposed by the Commission*

*Amendment*

***(a) the price or cost charged is more than 50 % lower than the average price or costs of the remaining tenders;***

***deleted***

*Justification*

*This issue can be addressed more effectively in national legislation, taking into account sectoral and regional specificities.*

**Amendment 34**  
**Proposal for a directive**  
**Article 79 – paragraph 1 – point b**

*Text proposed by the Commission*

*Amendment*

***(b) the price or cost charged is more than 20 % lower than the price or costs of the second lowest tender;*** ***deleted***

*Justification*

*This issue can be addressed more effectively in national legislation, taking into account sectoral and regional specificities.*

**Amendment 35**  
**Proposal for a directive**  
**Article 79 – paragraph 1 – point c**

*Text proposed by the Commission*

*Amendment*

***(c) at least five tenders have been submitted.*** ***deleted***

*Justification*

*This issue can be addressed more effectively in national legislation, taking into account sectoral and regional specificities.*

**Amendment 36**  
**Proposal for a directive**  
**Article 79 – paragraph 2**

*Text proposed by the Commission*

*Amendment*

2. Where tenders appear to be abnormally low ***for other reasons***, contracting ***entities*** ***may also*** request ***such*** explanations.

2. Where tenders appear to be abnormally low, contracting ***authorities shall*** request ***additional*** explanations ***before rejecting a tender.***

**Amendment 37**  
**Proposal for a directive**  
**Article 79 – paragraph 3 – point c a (new)**

***(ca) compliance with obligations established by Union or national legislation in the field of social, labour, health, safety or environmental law, collective agreements applicable in the place where the work, service or supply is to be performed, or by the international social and environmental law provisions listed in Annex XIV;***

**Amendment 38**  
**Proposal for a directive**  
**Article 81 – paragraph 1**

*Text proposed by the Commission*

*Amendment*

1. In the procurement documents, the contracting ***entity*** may ask, ***or may be required by a Member State to ask***, the tenderer to indicate in its tender any share of the contract it may intend to subcontract to third parties and any proposed subcontractors.

1. In the procurement documents, the contracting ***authority*** may ask the tenderer to indicate in its tender any share of the contract it may intend to subcontract to third parties and any proposed subcontractors. ***Any change in the subcontracting chain and any new subcontractor shall be indicated without delay to the contracting authority.***

**Amendment 39**  
**Proposal for a directive**  
**Article 81 – paragraph 2**

*Text proposed by the Commission*

*Amendment*

2. Member States may provide that, at the request of the subcontractor and where the nature of the contract so allows, the contracting entity ***shall*** transfer due payments directly to the subcontractor for services, supplies or works provided to the main contractor. ***In such case, Member States shall put in place appropriate mechanisms permitting the main contractor to object to undue payments.*** The arrangements concerning that mode of payment shall be set out in the procurement

2. Member States may provide that, at the request of the subcontractor and where the nature of the contract so allows, the contracting entity ***may*** transfer, ***in duly justified cases***, due payments directly to the subcontractor for services, supplies or works provided to the main contractor. The arrangements concerning that mode of payment shall be set out in the procurement documents.

documents.

### *Justification*

*Directive 2011/7/EU of the European Parliament and of the Council on combating late payment in commercial transactions shall apply (as of March 2013) to transactions between undertakings and public authorities, and transactions between undertakings (B2B).*

**Amendment 40**  
**Proposal for a directive**  
**Article 82 – paragraph 2 – point a**

*Text proposed by the Commission*

*Amendment*

*(a) the modification introduces conditions which, had they been part of the initial procurement procedure, would have allowed for the selection of other candidates than those initially selected or would have allowed for awarding the contract to another tenderer;*

*deleted*

**Amendment 41**  
**Proposal for a directive**  
**Article 82 – paragraph 4**

*Text proposed by the Commission*

*Amendment*

4. Where the value of a modification can be expressed in monetary terms, the modification shall not be considered to be substantial within the meaning of paragraph 1, where its value does not exceed the thresholds set out in Article 12 and where it is below 5% of the price of the initial contract, provided that the modification does not alter the overall nature of the contract. Where several successive modifications are made, the value shall be assessed on the basis of the cumulative value of the successive modifications.

4. Where the value of a modification can be expressed in monetary terms, the modification shall not be considered to be substantial within the meaning of paragraph 1, where its value does not exceed the thresholds set out in Article 12 and where it is below **10%** of the price of the initial contract, provided that the modification does not alter the overall nature of the contract. Where several successive modifications are made, the value shall be assessed on the basis of the cumulative value of the successive modifications.

**Amendment 42**  
**Proposal for a directive**  
**Article 93**

**Article 93**

*deleted*

**Public oversight**

**1. Member States shall appoint a single independent body responsible for the oversight and coordination of implementation activities (hereinafter 'the oversight body'). Member States shall inform the Commission of their designation.**

**All contracting authorities shall be subject to such oversight.**

**2. The competent authorities involved in the implementation activities shall be organised in such a manner that conflicts of interests are avoided. The system of public oversight shall be transparent. For this purpose, all guidance and opinion documents and an annual report illustrating the implementation and application of rules laid down in this Directive shall be published.**

**The annual report shall include the following:**

**(a) an indication of the success rate of small and medium-sized enterprises (SMEs) in public procurement; where the percentage is lower than 50 % in terms of values of contracts awarded to SMEs, the report shall provide an analysis of the reasons therefore;**

**(b) a global overview of the implementation of sustainable procurement policies, including on procedures taking into account considerations linked to the protection of the environment, social inclusion including accessibility for persons with disabilities, or fostering innovation;**

**(c) centralized data about reported cases of fraud, corruption, conflict of interests and other serious irregularities in the field of public procurement, including**

*those affecting projects cofinanced by the budget of the Union.*

*3. The oversight body shall be responsible for the following tasks:*

*(a) monitoring the application of public procurement rules and the related practice by contracting authorities and in particular by central purchasing bodies;*

*(b) providing legal advice to contracting authorities on the interpretation of public procurement rules and principles and on the application of public procurement rules in specific cases;*

*(c) issuing own-initiative opinions and guidance on questions of general interest pertaining to the interpretation and application of public procurement rules, on recurring questions and on systemic difficulties related to the application of public procurement rules, in the light of the provisions of this Directive and of the relevant case-law of the Court of Justice of the European Union;*

*(d) establishing and applying comprehensive, actionable 'red flag' indicator systems to prevent, detect and adequately report instances of procurement fraud, corruption, conflict of interest and other serious irregularities;*

*(e) drawing the attention of the national competent institutions, including auditing authorities, to specific violations detected and to systemic problems;*

*(f) examining complaints from citizens and businesses on the application of public procurement rules in specific cases and transmitting the analysis to the competent contracting authorities, which shall have the obligation to take it into account in their decisions or, where the analysis is not followed, to explain the reasons for disregarding it;*

*(g) monitoring the decisions taken by national courts and authorities following a ruling given by the Court of Justice of*

*the European Union on the basis of Article 267 of the Treaty or findings of the European Court of Auditors establishing violations of Union public procurement rules related to projects cofinanced by the Union; the oversight body shall report to the European Anti-Fraud Office any infringement to Union procurement procedures where these were related to contracts directly or indirectly funded by the European Union.*

*The tasks referred to in point (e) shall be without prejudice to the exercise of rights of appeal under national law or under the system established on the basis of Directive 89/665/EEC.*

*Member States shall empower the oversight body to seize the jurisdiction competent according to national law for the review of contracting authorities' decisions where it has detected a violation in the course of its monitoring and legal advising activity.*

*4. Without prejudice to the general procedures and working methods established by the Commission for its communications and contacts with Member States, the oversight body shall act as a specific contact point for the Commission when it monitors the application of Union law and the implementation of the budget from the Union on the basis of Article 17 of the Treaty on the European Union and Article 317 of the Treaty on the Functioning of the European Union. It shall report to the Commission any violation of this Directive in procurement procedures for the award of contracts directly or indirectly funded by the Union.*

*The Commission may in particular refer to the oversight body the treatment of individual cases where a contract is not yet concluded or a review procedure can still be carried out. It may also entrust the oversight body with the monitoring activities necessary to ensure the*

***implementation of the measures to which Member States are committed in order to remedy a violation of Union public procurement rules and principles identified by the Commission.***

***The Commission may require the oversight body to analyse alleged breaches to Union public procurement rules affecting projects co-financed by the budget of the Union. The Commission may entrust the oversight body to follow-up certain cases and to ensure that the appropriate consequences of breaches to Union public procurement rules affecting projects co-financed are taken by the competent national authorities which will be obliged to follow its instructions.***

***5. The investigation and enforcement activities carried out by the oversight body to ensure that contracting authorities' decisions comply with this Directive and the principles of the Treaty shall not replace or prejudge the institutional role of the Commission as guardian of the Treaty. When the Commission decides to refer the treatment of an individual case pursuant to paragraph 4, it shall also retain the right to intervene in accordance with the powers conferred to it by the Treaty.***

***6. Contracting authorities shall transmit to the national oversight body the full text of all concluded contracts with a value equal to or greater than***

***(a) 1 000 000 EUR in the case of public supply contracts or public service contracts;***

***(b) 10 000 000 EUR in the case of public works contracts.***

***7. Without prejudice to the national law concerning access to information, and in accordance with national and EU legislation on data protection, the oversight body shall, upon written request, give unrestricted and full direct access, free of charge, to the concluded contracts***

*referred to in paragraph 6. Access to certain parts of the contracts may be refused where their disclosure would impede law enforcement or otherwise be contrary to the public interest, would harm the legitimate commercial interests of economic operators, public or private, or might prejudice fair competition between them.*

*Access to the parts that may be released shall be given within a reasonable delay and no later than 45 days from the date of the request.*

*The applicants filing a request for access to a contract shall not need to show any direct or indirect interest related to that particular contract. The recipient of information should be allowed to make it public.*

*8. A summary of all the activities carried out by the oversight body in accordance with paragraphs 1 to 7 shall be included in the annual report referred to in paragraph 2.*

#### **Amendment 43**

##### **Proposal for a directive**

##### **Article 94 – paragraph 1 – second subparagraph**

###### *Text proposed by the Commission*

Contracting entities shall document the progress of all procurement procedures, whether or not the procedures are conducted by electronic means. To that end, they shall document all stages in the procurement procedure, including all communications with economic operators *and internal deliberations*, preparation of the tenders, dialogue or negotiation if any, selection and award of the contract.

###### *Amendment*

Contracting entities shall document the progress of all procurement procedures, whether or not the procedures are conducted by electronic means. To that end, they shall document all stages in the procurement procedure, including all communications with economic operators, preparation of the tenders, dialogue or negotiation if any, selection and award of the contract.

#### **Amendment 44**

##### **Proposal for a directive**

##### **Article 98 – paragraph 2**

*Text proposed by the Commission*

*Amendment*

2. The delegation of power referred to in Articles 4, 35, 33, 38, 25, 65, 70, 77, 85 and 95 shall be conferred on the Commission for ***an indeterminate*** period of ***time*** from the [date of entry into force of ***this*** Directive].

2. The delegation of power referred to in Articles 4, 35, 33, 38, 25, 65, 70, 77, 85 and 95 shall be conferred on the Commission for ***a*** period of ***five years*** from the [date of entry into force of ***the present*** Directive]. ***The Commission shall draw up a report in respect of the delegation of power not later than nine months before the end of the five-year period. The delegation of power shall be tacitly extended for periods of an identical duration, unless the European Parliament or the Council opposes such extension not later than three months before the end of each period.***

**Amendment 45**  
**Proposal for a directive**  
**Annex III – point D – point 1**

*Text proposed by the Commission*

*Amendment*

Rail ***Freight*** transport

Rail transport

*Justification*

*Not only rail freight market but also part of the rail passenger market has been opened to competition.*

**Amendment 46**  
**Proposal for a directive**  
**Annex III – point D – point 2**

*Text proposed by the Commission*

*Amendment*

***Rail passenger transport***

***deleted***

***None***

## PROCEDURE

<b>Title</b>	Procurement by entities operating in the water, energy, transport and postal services sectors	
<b>References</b>	COM(2011)0895 – C7-0007/2012 – 2011/0439(COD)	
<b>Committee responsible</b> Date announced in plenary	IMCO 19.1.2012	
<b>Opinion by</b> Date announced in plenary	TRAN 19.1.2012	
<b>Rapporteur</b> Date appointed	Eva Lichtenberger 27.2.2012	
<b>Discussed in committee</b>	10.7.2012	6.9.2012
<b>Date adopted</b>	18.9.2012	
<b>Result of final vote</b>	+: 38	–: 3
	0: 0	
<b>Members present for the final vote</b>	Magdi Cristiano Allam, Inés Ayala Sender, Georges Bach, Erik Bánki, Izaskun Bilbao Barandica, Philip Bradbourn, Antonio Cancian, Michael Cramer, Luis de Grandes Pascual, Christine De Veyrac, Saïd El Khadraoui, Ismail Ertug, Carlo Fidanza, Knut Fleckenstein, Jacqueline Foster, Mathieu Grosch, Jim Higgins, Juozas Imbrasas, Dieter-Lebrecht Koch, Georgios Koumoutsakos, Werner Kuhn, Jörg Leichtfried, Eva Lichtenberger, Marian-Jean Marinescu, Gesine Meissner, Hubert Pirker, Dominique Riquet, Vilja Savisaar-Toomast, Olga Sehnalová, Brian Simpson, Keith Taylor, Silvia-Adriana Țicău, Giommara Uggias, Dominique Vlasto, Artur Zasada, Roberts Zīle	
<b>Substitute(s) present for the final vote</b>	Spyros Danellis, Nathalie Griesbeck, Zita Gurmai, Sabine Wils, Janusz Władysław Zemke	

18.10.2012

## **OPINION OF THE COMMITTEE ON REGIONAL DEVELOPMENT**

for the Committee on the Internal Market and Consumer Protection

on the proposal for a directive of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors (COM(2011)0895 – C7-0007/2012 – 2011/0439(COD))

Rapporteur: Ramona Nicole Mănescu

### **SHORT JUSTIFICATION**

Transparent and credible public procurement plays a particularly important role in the efficiency of public spending and also in the impact of public investment on the economy, particularly on sustainable growth and innovation.

The public procurement regime is by nature highly complex, in particular for small local authorities and SMEs, and a broader access to clear information and advice concerning EU rules on public procurement for contracting authorities, in particular at regional and local level and SMEs alike should be a must. The objective of further developing EU procurement law must be to make procurement procedures simultaneously simpler, cheaper and more SME- and investment-friendly.

The Commission and the Member States share a great responsibility of ensuring the training and the consultation needed to inform and assist regional and local authorities and SMEs, and also to involve other interested parties, in order to ensure that there is effective informed participation in public procurement, thus reducing the frequency of errors and irregularities and developing the required expertise among the contracting authorities of local and regional authorities in the field of public procurement.

Indeed, SMEs have a huge potential for job creation, growth and innovation, and in order to derive maximum benefit from the economic and innovative potential of SMEs in the context of procurement procedures, these should be encouraged to participate in public procurement procedures organised by local and regional authorities.

As your Rapporteur, with the support of the Committee, has made clear in her opinion on the modernisation of public procurement, public procurement should not follow the lowest price principle but should take into account the sustainable and economically most advantageous tender, including life-cycle cost. This rule should be further strengthened in the

It should be made clear, however, that the effectiveness and efficiency of any rules enacted at European level on public is conditional upon a sound and as much simplified as possible transposition of those rules into the laws of the Member States. Member States, with the assistance and monitoring of the Commission, should therefore ensure that fragmentation of rules across the Union is avoided, and that simplification of regimes is not hampered, due to the quite very complex and detailed nature of the rules contained in the proposed directives.

Legal and practical clarification of the directives in order to avoid further failures in applying the public procurement rules is crucial. In this context, your Rapporteur hopes that the serious failures to comply with public procurement rules repeatedly identified by the Court of Auditors in the implementation of projects under the ERDF and the Cohesion Fund, mainly due to the complexity of public procurement procedures, the lack of consistency between them and those on which the use of the Structural Funds and Cohesion Fund is based and the incorrect implementation of EU legislation into national law, will be finally solved and duly taken into account in the framework of the interpretation and application of future public procurement rules.

## AMENDMENTS

The Committee on Regional Development calls on the Committee on the Internal Market and Consumer Protection, as the committee responsible, to incorporate the following amendments in its report:

### Amendment 1

#### Proposal for a directive

#### Recital 2

##### *Text proposed by the Commission*

(2) In order to guarantee the opening up to competition of procurement by entities operating in the water, energy, transport and postal services sectors, provisions should be drawn up coordinating procurement procedures in respect of contracts above a certain value. Such coordination is needed to ensure the effect of the principles of the Treaty on the Functioning of the European Union and in particular the free movement of goods, the freedom of establishment and the freedom to provide services as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and

##### *Amendment*

(2) In order to guarantee the opening up to competition of procurement by entities operating in the water, energy, transport and postal services sectors, provisions should be drawn up coordinating procurement procedures in respect of contracts above a certain value. Such coordination is needed to ensure the effect of the principles of the Treaty on the Functioning of the European Union and in particular the free movement of goods, the freedom of establishment and the freedom to provide services as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and

transparency. In view of the nature of the sectors affected by such coordination, the latter should, while safeguarding the application of those principles, establish a framework for sound commercial practice and should allow maximum flexibility.

transparency. In view of the nature of the sectors affected by such coordination, the latter should, while safeguarding the application of those principles, establish a framework for sound commercial practice and should allow maximum flexibility *at every level of the public procurement procedure, particularly favouring small and medium-sized enterprises. Public procurement rules have to respect the distribution of competences as enshrined in Article 14 TFEU and the Protocol No 26 thereof. The application of those rules should not interfere with the freedom of public authorities to decide how they carry out their public service tasks.*

#### *Justification*

*Adaption to the new provisions of the Lisbon Treaty.*

### **Amendment 2**

#### **Proposal for a directive**

#### **Recital 4**

##### *Text proposed by the Commission*

(4) Public procurement plays a key role in the Europe 2020 strategy as one of the market-based instruments to be used to achieve a smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. For that purpose, the current public procurement rules adopted pursuant to Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts have to be revised and modernised in order to increase the efficiency of public spending, *facilitating*

##### *Amendment*

(4) Public procurement plays a key role in the Europe 2020 strategy as one of the market-based instruments to be used to achieve a smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. For that purpose, the current public procurement rules adopted pursuant to Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts have to be revised and modernised in order to increase the efficiency of public spending, *simplifying*

in particular ***the participation of*** small and medium-sized enterprises in public procurement and to enable procurers to make better use of public procurement in support of common societal goals. There is also a need to clarify basic notions and concepts to ensure better legal certainty and to incorporate certain aspects of related well-established case-law of the Court of Justice of the European Union.

***and encouraging*** in particular ***access for*** small and medium-sized enterprises in public procurement ***procedures*** and to enable procurers to make better use of public procurement in support of common societal goals, ***without prejudice to the latter autonomy of decision on what to procure and to buy.*** There is also a need to clarify basic notions and concepts to ensure ***transparency, fairness and*** better legal certainty and to incorporate certain aspects of related well-established case-law of the Court of Justice of the European Union.

### *Justification*

*Procurers autonomy to decide what to buy should not be interfered with.*

### **Amendment 3**

#### **Proposal for a directive**

#### **Recital 13**

##### *Text proposed by the Commission*

(13) Illicit conduct by participants in a procurement procedure, such as attempts to unduly influence the decision-making process or to enter into agreements with other candidates to manipulate the outcome of the procedure can result in violations of the basic principles of Union law and in serious distortions of competition. Economic operators should therefore be required to submit a declaration on honour that they do not engage in such illicit activities and be excluded if this declaration proves to be false.

##### *Amendment*

(13) Illicit conduct by participants in a procurement procedure, such as attempts to unduly influence the decision-making process or to enter into agreements with other candidates to manipulate the outcome of the procedure can result in violations of the basic principles of Union law and in serious distortions of competition. Economic operators should therefore be required to submit a declaration on honour that they do not engage in such illicit activities and ***will*** be excluded ***from both the corresponding and subsequent procurement procedures within the EU*** if this declaration proves to be false.

### **Amendment 4**

#### **Proposal for a directive**

#### **Recital 25**

*Text proposed by the Commission*

(25) Research and innovation, including eco-innovation and social innovation, are among the main drivers of future growth and have been put at the centre of the Europe 2020 strategy for smart, sustainable and inclusive growth. Contracting entities should make the best strategic use of public procurement to spur innovation. Buying innovative goods and services plays a key role in improving the efficiency and quality of public services while addressing major societal challenges. It contributes to achieving best value for money as well as wider economic, environmental and societal benefits in terms of generating new ideas, translating them into innovative products and services and thus promoting sustainable economic growth. This directive should contribute to facilitating procurement of innovation and help Member States in achieving the Innovation Union targets. A specific procurement procedure should therefore be provided for which allows contracting entities to establish a long-term innovation partnership for the development and subsequent purchase of a new, innovative product, service or works provided it can be delivered to agreed performance levels and costs. The partnership should be structured in such a way that it can provide the necessary “market-pull” incentivising the development of an innovative solution without foreclosing the market.

*Amendment*

(25) Research and innovation, including eco-innovation and social innovation, are among the main drivers of future growth and have been put at the centre of the Europe 2020 strategy for smart, sustainable and inclusive growth. Contracting entities should make the best strategic use of public procurement to spur **research and innovation, particularly at regional and local level**. Buying innovative goods and services plays a key role in improving the efficiency and quality of public services while addressing major societal challenges. It contributes to achieving best value for money as well as wider economic, environmental and societal benefits in terms of generating new ideas, translating them into innovative products and services and thus promoting sustainable economic growth. This directive should contribute to facilitating procurement of innovation and help Member States in achieving the Innovation Union targets. A specific procurement procedure should therefore be provided for which allows contracting entities to establish a long-term innovation partnership for the development and subsequent purchase of a new, innovative product, service or works provided it can be delivered to agreed performance levels and costs. The partnership should be structured in such a way that it can provide the necessary “market-pull” incentivising the development of an innovative solution without foreclosing the market.

**Amendment 5**

**Proposal for a directive**  
**Recital 27**

*Text proposed by the Commission*

(27) Electronic means of information and communication can greatly simplify the

*Amendment*

(27) Electronic means of information and communication **in particular** can greatly

publication of contracts and increase the efficiency and transparency of procurement processes. They should become the standard means of communication and information exchange in procurement procedures. The use of electronic means also leads to time savings. As a result, provision should be made for reducing the minimum periods where electronic means are used, subject, however, to the condition that they are compatible with the specific mode of transmission envisaged at Union level. Moreover, electronic means of information and communication including adequate functionalities can enable contracting authorities to prevent, detect and correct errors that occur during procurement procedures.

simplify the publication of contracts and increase the efficiency and transparency of procurement processes **by reducing obstructive regulatory complexity**. They should become the standard means of communication and information exchange in procurement procedures. The use of electronic means also leads to time savings. As a result, provision should be made for reducing the minimum periods where electronic means are used, subject, however, to the condition that they are compatible with the specific mode of transmission envisaged at Union level. Moreover, electronic means of information and communication including adequate functionalities can enable contracting authorities to prevent, detect and correct errors that occur during procurement procedures.

## Amendment 6

### Proposal for a directive Recital 28

#### *Text proposed by the Commission*

(28) There is a strong trend emerging across Union public procurement markets towards the aggregation of demand by public purchasers, with a view to obtaining economies of scale, including lower prices and transaction costs, and to improving and professionalising procurement management. This can be achieved by concentrating purchases either by the number of contracting entities involved or by volume and value over time. However, the aggregation and centralisation of purchases should be carefully monitored in order to avoid excessive concentration of purchasing power and collusion, and to preserve transparency and competition, as well as market access opportunities for small and medium-sized enterprises.

#### *Amendment*

(28) There is a strong trend emerging across Union public procurement markets towards the aggregation of demand by public purchasers, with a view to obtaining economies of scale, including lower prices and transaction costs, and to improving and professionalising procurement management. This can be achieved by concentrating purchases either by the number of contracting entities involved or by volume and value over time. However, the aggregation and centralisation of purchases should be carefully monitored in order to avoid excessive concentration of purchasing power and collusion, and to preserve transparency and competition, as well as **to enhance** market access opportunities for small and medium-sized enterprises **by encouraging greater flexibility and suppleness in public**

## Amendment 7

### Proposal for a directive Recital 34

#### *Text proposed by the Commission*

(34) Joint awarding of contracts by contracting entities from different Member States currently encounters specific legal difficulties, with special reference to conflicts of national laws. Despite the fact that Directive 2004/17/EC implicitly allowed for cross-border joint public procurement, in practice several national legal systems have explicitly or implicitly rendered cross-border joint procurement legally uncertain or impossible. Contracting entities from different Member States may be interested in cooperating and in jointly awarding contracts in order to derive maximum benefit from the potential of the internal market in terms of economies of scale and risk-benefit sharing, not least for innovative projects involving a greater amount of risk than reasonably bearable by a single contracting entity. Therefore new rules on cross-border joint procurement designating the applicable law should be established in order to facilitate cooperation between contracting entities across the Single Market. In addition, contracting entities from different Member States may set up joint legal bodies established under national or Union law. Specific rules should be established for such form of joint procurement.

#### *Amendment*

(34) Joint awarding of contracts by contracting entities from different Member States currently encounters specific legal difficulties, with special reference to conflicts of national laws. Despite the fact that Directive 2004/17/EC implicitly allowed for cross-border joint public procurement, in practice several national legal systems have explicitly or implicitly rendered cross-border joint procurement legally uncertain or impossible. Contracting entities from different Member States may be interested in cooperating and in jointly awarding contracts in order to derive maximum benefit from the potential of the internal market in terms of economies of scale and risk-benefit sharing, not least for innovative projects involving a greater amount of risk than reasonably bearable by a single contracting entity. Therefore new rules on cross-border joint procurement designating the applicable law should be established in order to facilitate cooperation between contracting entities across the Single Market. In addition, contracting entities from different Member States may set up joint legal bodies established under national or Union law. Specific rules should be established for such form of joint procurement. ***Similarly, in the context of cross-border public procurement, it is absolutely necessary to clarify the aspects relating to intellectual property law.***

## Amendment 8

### Proposal for a directive Recital 43

#### *Text proposed by the Commission*

(43) Contracts should be awarded on the basis of objective criteria that ensure compliance with the principles of transparency, non-discrimination and equal treatment. Those criteria should guarantee that tenders are assessed in conditions of effective competition, ***also where contracting*** entities require high-quality works, supplies and services that are optimally suited to their needs. As a result, contracting entities should be allowed to adopt as award criteria ***either*** "the most economically advantageous tender" ***or*** "***the lowest cost***", ***taking into account that in the latter case they are free to set adequate quality standards by using technical specifications or contract performance conditions.***

#### *Amendment*

(43) Contracts should be awarded on the basis of objective criteria that ensure compliance with the principles of transparency, non-discrimination and equal treatment. Those criteria should guarantee that tenders are assessed in conditions of effective competition, ***while ensuring that*** entities ***may also*** require high-quality works, supplies and services that are optimally suited to their needs ***as long as they are linked to the subject matter of the contract.*** As a result, contracting entities should be allowed to adopt as award criteria ***preferably*** "the most economically, ***socially and environmentally*** advantageous tender" ***in line with the principle of cost-effectiveness and adequate quality.***

## Amendment 9

### Proposal for a directive Recital 44

#### *Text proposed by the Commission*

(44) Where contracting entities ***choose to*** award a contract to the most economically advantageous tender, they must determine the award criteria on the basis of which they will assess tenders in order to identify which one offers the best value for money. The determination of those criteria depends on the subject-matter of the contract, since they must allow the level of performance offered by each tender to be assessed in the light of the subject-matter of the contract, as defined in the technical specifications, and the value for money of each tender to be measured. Furthermore, the chosen award criteria should not confer an

#### *Amendment*

(44) Where contracting entities award a contract to the most economically advantageous tender, they must determine the award criteria on the basis of which they will assess tenders in order to identify which one offers the best value for money. The determination of those criteria depends on the subject-matter of the contract, since they must allow the level of performance offered by each tender to be assessed in the light of the subject-matter of the contract, as defined in the technical specifications, and the value for money of each tender to be measured. Furthermore, the chosen award criteria should not confer an

unrestricted freedom of choice on the contracting entity and they should ensure the possibility of effective competition and be accompanied by requirements that allow the information provided by the tenderers to be effectively verified.

unrestricted freedom of choice on the contracting entity and they should ensure the possibility of effective competition and be accompanied by requirements that allow the information provided by the tenderers to be effectively verified.

## Amendment 10

### Proposal for a directive Recital 57

#### *Text proposed by the Commission*

(57) The evaluation has shown that Member States do not consistently and systematically monitor the implementation and the functioning of public procurement rules. This has a negative impact on the correct implementation of provisions stemming from those directives, which is a major source of cost and uncertainty. Several Member States have appointed a national central body dealing with public procurement issues, but the **functions that** such bodies **are empowered with** vary considerably across Member States. Clearer, more consistent and authoritative monitoring and control mechanisms would increase knowledge of the functioning of procurement rules, legal certainty for businesses and contracting **entities**, and contribute to establish a level playing field. Such mechanisms could serve as tools for detection and early resolution of problems, **especially with regard to** projects cofunded by the Union, and for the identification of structural deficiencies. **There is in particular a strong need to coordinate** those mechanisms to ensure consistent application, controls and monitoring of public procurement policy, as well as systematic assessment of **the** outcomes of **procurement policy** across the Union.

#### *Amendment*

(57) The evaluation has shown that Member States do not consistently and systematically **promote and** monitor the implementation and the functioning of public procurement rules. This has a negative impact on the correct implementation of provisions stemming from those directives, which is a major source of cost and uncertainty. Several Member States have appointed a national central body dealing with public procurement issues, but the **tasks entrusted to** such bodies vary considerably across Member States. Clearer, more consistent and authoritative **information**, monitoring and control mechanisms would increase knowledge of the functioning of procurement rules, improve legal certainty for businesses and contracting **authorities**, and contribute to establishing a level playing field. Such mechanisms could serve as tools for **the prevention**, detection and early resolution of problems, **particularly in the case of** projects cofunded by the Union, and for the identification of structural deficiencies. **It is vital that** those mechanisms **be coordinated** to ensure consistent application, control and monitoring of public procurement policy, as well as systematic assessment of **its** outcomes across the Union.

## Amendment 11

### Proposal for a directive Recital 59

#### *Text proposed by the Commission*

(59) Not all contracting entities may have the internal expertise to deal with economically or technically complex contracts. Against this background, appropriate professional support **would be** an effective complement to monitoring and control activities. On the one hand, this objective can be achieved by knowledge sharing tools (knowledge centres) offering technical assistance to contracting entities; on the other hand, business, **not least** SMEs, should benefit from administrative assistance, in particular when participating in procurement procedures on a cross-border basis.

#### *Amendment*

(59) Not all contracting entities, **and particularly local authorities**, may have the internal expertise to deal with economically or technically complex contracts. Against this background, appropriate professional support **constitutes** an effective complement to monitoring and control activities. On the one hand, this objective can be achieved by knowledge sharing tools (knowledge centres) offering technical assistance to contracting entities; on the other hand, business, **and in particular** SMEs, should benefit from administrative assistance, in particular when participating in procurement procedures on a cross-border basis.

#### *Justification*

*It is particularly important to enhance the role of SMEs in the field of public procurement.*

## Amendment 12

### Proposal for a directive Recital 60

#### *Text proposed by the Commission*

(60) Monitoring, oversight and support structures or mechanisms exist already at national level and can of course be used to ensure monitoring, implementation and control of public procurement and to provide the required support to contracting entities and economic operators.

#### *Amendment*

(60) Monitoring, oversight and support structures or mechanisms exist already at national level and can of course be used to ensure monitoring, implementation and control of public procurement and to provide the required support **at all stages of the public procurement process** to contracting entities, and **particularly local and regional authorities**, and to economic operators, **and particularly small and medium-sized enterprises**.

## Amendment 13

### Proposal for a directive Recital 61 a (new)

*Text proposed by the Commission*

*Amendment*

***(61a) The way this Directive is transposed is of utmost importance to the efforts of simplification, as well as to ensure an uniform approach to the interpretation and application of the EU rules on public procurement, thus contributing to the necessary legal certainty required by contracting authorities, in particular at sub-central level, and by SMEs alike. The Commission and the Member States should therefore ensure that transposition of this Directive is done having also in mind the major impact of the public procurement national legislation on the process of accessing the European Union funds. Therefore it is of utmost importance for the Member States to avoid as much as possible any fragmentation in the interpretation and application, while contributing as well to the simplification at national level.***

#### *Justification*

*It is necessary to ensure that transposition does not hamper the efforts of simplification and harmonisation, in order to avoid the fragmentation of rules across the Union, which would affect mostly SMEs and smaller contracting authorities, at regional and local level.*

## Amendment 14

### Proposal for a directive Recital 61 b (new)

*Text proposed by the Commission*

*Amendment*

***(61b) The Commission should encourage the Member States to conduct regular training and awareness-raising campaigns and engage in consultation targeted at regional and local authorities and SMEs, and also to involve other***

*interested parties, in order to ensure there is informed participation in public procurement and reduce the frequency of errors and to develop the required expertise among the contracting authorities of local and regional administrations in order to implement innovative procurement.*

## **Amendment 15**

### **Proposal for a directive**

#### **Article 2 – paragraph 1 – point 4 – point a**

*Text proposed by the Commission*

(a) It is established for or has the specific *purpose of meeting needs in the general interest, not having an industrial or commercial character; for that purpose, a body which operates in normal market conditions, aims to make a profit, and bears the losses resulting from the exercise of its activity does not have the* purpose of meeting needs in the general interest, not having an industrial or commercial character;

*Amendment*

(a) It is established for or has the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;

*Justification*

*Going back to the current definition from Directive 2004/17/EC, Article 2.1 (a) this definition is approved and will avoid legal uncertainty.*

## **Amendment 16**

### **Proposal for a directive**

#### **Article 12 – paragraph 1 a (new)**

*Text proposed by the Commission*

*Amendment*

*The value of the thresholds will be adjusted according to changes in the harmonized European Economic Area Index of Consumer Prices on a yearly basis.*

*Justification*

*A fixed value for thresholds does not reflect constant changes in real purchasing power. To link and adjust the thresholds according to a well-established index would be an appropriate action.*

**Amendment 17**

**Proposal for a directive**

**Article 14 – paragraph 1 – subparagraph 1**

*Text proposed by the Commission*

Every two years from 30 June 2014, the Commission shall verify that the thresholds set out in points (a) and (b) of Article 12 correspond to the thresholds established in the Government Procurement Agreement, and shall, where necessary, revise them.

*Amendment*

Every two years from 30 June 2014, the Commission shall verify that the thresholds set out in points (a) and (b) of Article 12 correspond to the thresholds established in the Government Procurement Agreement, and shall, where necessary ***and after consulting the Member States on the application of the thresholds to certain sectors and types of contacts***, revise them.

*Justification*

*Member States should be consulted before the revision of the thresholds in certain sectors and types of contracts.*

**Amendment 18**

**Proposal for a directive**

**Article 19 – paragraph 1 - point b**

*Text proposed by the Commission*

(b) arbitration and conciliation services;

*Amendment*

(b) arbitration and conciliation services, ***including dispute adjudication services***;

*Justification*

*"Dispute adjudication services" is a specific conciliation service linked to the use of the international FIDIC conditions of contracts for building and engineering works, adopted by the World Bank.*

**Amendment 19**

**Proposal for a directive**

**Article 19 a (new)**

*Text proposed by the Commission*

*Amendment*

**Article 19a**

***Service contracts awarded on the basis of exclusive rights***

***This Directive shall not apply to service contracts awarded to an entity which is itself a contracting authority within the meaning of Article 2(1) or to an association of contracting authorities on the basis of an exclusive right which they enjoy pursuant to the published legislation in force, regulation or administrative provision which is compatible with the Treaty.***

*Justification*

*To reintroduce Article 25 from the current Directive 2004/17/EC. This Article is important for operations of services of general economic interest it excludes public service contracts that are based on an exclusive right enshrined in public law, regulations or administrative provision, compatible with the Treaty. The ECJ has applied this provision in C-360/96.*

**Amendment 20**

**Proposal for a directive**

**Article 21 – paragraph 1 – point b**

*Text proposed by the Commission*

(b) ***at least 90 % of*** the activities of that legal person are carried out for the controlling contracting authority or for other legal persons controlled by that contracting authority;

*Amendment*

(b) the activities ***in their entirety*** of that legal person are carried out for the controlling contracting authority or for other legal persons controlled by that contracting authority ***or with respect to the provision of services of general interest;***

*Justification*

*The provision of Services of general interest (SGI) is not profit-oriented, but aimed to fulfil the citizen's needs. Therefore activities in the field of SGIs have to be taken into account.*

**Amendment 21**

**Proposal for a directive**

**Article 21 – paragraph 2**

*Text proposed by the Commission*

*Amendment*

2. Paragraph 1 also applies where a controlled entity which is a contracting authority awards a contract to its controlling entity, or to another legal person controlled by the same contracting authority, provided that there is no private participation in the legal person being awarded the public contract.

2. Paragraph 1 also applies where a controlled entity which is a contracting authority awards a contract to its controlling entity **or entities**, or to another legal person controlled by the same contracting authority, provided that there is no private participation in the legal person being awarded the public contract.

**Amendment 22**

**Proposal for a directive**

**Article 21 – paragraph 3 – subparagraph 1 – point b**

*Text proposed by the Commission*

*Amendment*

(b) at least **90** % of the activities of that legal person are carried out for the controlling contracting authorities or other legal persons controlled by the same contracting authorities;

(b) at least **80** % of the activities of that legal person, **which are subject to the contract**, are carried out for the controlling contracting authorities or other legal persons controlled by the same contracting authorities;

**Amendment 23**

**Proposal for a directive**

**Article 21 – paragraph 3 – subparagraph 2 – point a**

*Text proposed by the Commission*

*Amendment*

(a) the decision-making bodies of the controlled legal person are composed of representatives of all participating contracting authorities;

(a) the decision-making bodies of the controlled legal person are composed of representatives of all participating contracting authorities **whereas contracting authorities can appoint mutual representatives only**;

*Justification*

*It is a common practice to appoint mutual representatives. There is no reason to prohibit this efficient mode of mutually agreed collaboration.*

**Amendment 24**

**Proposal for a directive**  
**Article 21 – paragraph 4 – point a**

*Text proposed by the Commission*

(a) the **agreement establishes a genuine co-operation between the participating contracting authorities aimed at carrying out jointly their public service tasks and involving mutual rights and obligations of the parties;**

*Amendment*

(a) the **purpose of the partnership is the provision of a public-service task conferred on all participating public authorities, or the provision of an ancillary task necessary to deliver the public service task conferred on all the public authorities;**

**Amendment 25**

**Proposal for a directive**  
**Article 21 – paragraph 4 – point b**

*Text proposed by the Commission*

(b) **the agreement is governed only by considerations relating to the public interest;**

*Amendment*

**deleted**

**Amendment 26**

**Proposal for a directive**  
**Article 21 – paragraph 4 – point c**

*Text proposed by the Commission*

(c) the participating **contracting** authorities do not perform on the open market more than **10** % in terms of turnover of the activities which are **relevant in the context** of the **agreement**;

*Amendment*

(c) the participating **public** authorities do not perform on the open market more than **20** % in terms of turnover of the activities which are **subject** of the **contract**;

*Justification*

*This clarification is necessary in order not to create legal disputes.*

## Amendment 27

### Proposal for a directive

#### Article 21 – paragraph 5 – subparagraph 2

*Text proposed by the Commission*

The exclusions provided for in paragraphs 1 to 4 shall cease to apply from the moment any private participation takes place, with the effect that ongoing contracts need to be opened to competition through regular procurement procedures.

*Amendment*

The exclusions provided for in paragraphs 1 to 4 shall cease to apply from the moment any private participation takes place, with the effect that ongoing contracts need to be opened to competition through regular procurement procedures, ***unless the private participation is legally enforced at the time of initial contracting.***

## Amendment 28

### Proposal for a directive

#### Article 29 – title

*Text proposed by the Commission*

Principles of procurement

*Amendment*

***Purpose and*** principles of procurement

*Justification*

*Some Member States indicated that a reference to the purpose of the directive should be included.*

## Amendment 29

### Proposal for a directive

#### Article 29 – paragraph 2 a (new)

*Text proposed by the Commission*

*Amendment*

***The purpose of this Directive is to safeguard the efficiency of the use of public funds, promote high-quality procurement, strengthen competition and the functioning of the public procurement markets and safeguard equal opportunities for companies and other providers in offering supply, service and public works contracts under competitive bidding for public procurement.***

### *Justification*

*Some Member States indicated that a reference to the purpose of the directive should be included.*

## **Amendment 30**

### **Proposal for a directive**

#### **Article 30 – paragraph 2 – subparagraph 2**

##### *Text proposed by the Commission*

Contracting entities may establish specific conditions for the performance of the contract by a group, provided that those conditions are justified by objective reasons and proportionate. Those conditions may require a group to assume a specific legal form once it has been awarded the contract, to the extent that this change is necessary for the satisfactory performance of the contract.

##### *Amendment*

Contracting entities may establish specific conditions for the performance of the contract by a group, provided that those conditions are justified by objective reasons and proportionate. Those conditions may require a group to assume a specific legal form once it has been awarded the contract, ***if and*** to the extent that this change is ***strictly*** necessary for the satisfactory performance of the contract.

### *Justification*

*This requirement should be limited as much as possible in order to avoid any unnecessary burdens on businesses and especially SMEs.*

## **Amendment 31**

### **Proposal for a directive**

#### **Article 31 – paragraph 1**

##### *Text proposed by the Commission*

Member States may reserve the right to participate in procurement procedures to sheltered workshops ***and economic operators whose main aim is the social and professional integration of disabled and disadvantaged workers*** or provide for such contracts to be performed in the context of sheltered employment programmes, provided that more than 30% of the employees of those ***workshops, economic operators*** or programmes are disabled or disadvantaged ***workers***.

##### *Amendment*

Member States may reserve the right to participate in procurement procedures to:

***a)*** sheltered workshops, or provide for such

contracts to be performed in the context of sheltered employment programmes, provided that *the majority of the employees concerned are disabled persons who, by reason of the nature of the seriousness of their disabilities, cannot carry on occupations under normal conditions or easily find employment on the ordinary market;*

*b) social enterprises or programmes whose main aim is the social and professional integration of disadvantaged workers, provided that more than 30% of the employees of those enterprises or programmes are disabled and/or disadvantaged persons. 'Disadvantaged persons' include amongst others: the unemployed, people experiencing particular difficulty in achieving integration, people at risk of exclusion, members of vulnerable groups and members of disadvantaged minorities.*

## Amendment 32

### Proposal for a directive Article 32 – paragraph 2

#### *Text proposed by the Commission*

2. Unless otherwise provided in this Directive or in the national law concerning access to information, and without prejudice to the obligations relating to the advertising of awarded contracts and to the information to candidates and tenderers set out in Articles 64 and 69 of this directive the contracting entity shall not disclose information forwarded to it by economic operators *which* they have designated as confidential, including, but not limited to, technical or trade secrets and the confidential aspects of tenders.

#### *Amendment*

2. Unless otherwise provided in this Directive or in the national law concerning access to information, and without prejudice to the obligations relating to the advertising of awarded contracts and to the information to candidates and tenderers set out in Articles 64 and 69 of this directive the contracting entity shall not disclose *any* information forwarded to it by economic operators *either* they have designated *it* as confidential *or not*, including, but not limited to, technical or trade secrets and the confidential aspects of tenders, *unless it is absolutely necessary for the purpose of this directive or of the applicable national law.*

*Justification*

*For businesses, and especially SMEs, it is important that no information at all is disclosed, unless there is a justification to do otherwise.*

**Amendment 33**

**Proposal for a directive**

**Article 40 – paragraph 1 – subparagraph 2**

*Text proposed by the Commission*

The minimum time limit for the receipt of tenders shall be **40** days from the date on which the contract notice was sent.

*Amendment*

The minimum time limit for the receipt of tenders shall be **52** days from the date on which the contract notice was sent.

*Justification*

*New time limits are too short in practical terms, and in particular for SMEs, and could limit competition*

**Amendment 34**

**Proposal for a directive**

**Article 41 – paragraph 1 – subparagraph 2**

*Text proposed by the Commission*

The minimum time limit for the receipt of requests to participate shall, as a general rule, be fixed at no less than **30** days from the date on which the contract notice or the invitation to confirm interest is sent and may in no case be less than 15 days.

*Amendment*

The minimum time limit for the receipt of requests to participate shall, as a general rule, be fixed at no less than **37** days from the date on which the contract notice or the invitation to confirm interest is sent and may in no case be less than 15 days.

*Justification*

*New time limits are too short in practical terms, and in particular for SMEs, and could limit competition.*

## **Amendment 35**

### **Proposal for a directive**

#### **Article 41 – paragraph 2 – subparagraph 3**

##### *Text proposed by the Commission*

Where it is not possible to reach agreement on the time limit for the receipt of tenders, the contracting entity shall fix a time limit which shall in no case be less than **10** days from the date on which the invitation to tender is sent.

##### *Amendment*

Where it is not possible to reach agreement on the time limit for the receipt of tenders, the contracting entity shall fix a time limit which shall in no case be less than **20** days from the date on which the invitation to tender is sent.

##### *Justification*

*New time limits are too short in practical terms, and in particular for SMEs, and could limit competition.*

## **Amendment 36**

### **Proposal for a directive**

#### **Article 42 – paragraph 1 – subparagraph 2**

##### *Text proposed by the Commission*

The minimum time limit for the receipt of requests to participate shall, as a general rule, be fixed at no less than **30** days from the date on which the contract notice or, where a periodic indicative notice is used as a means of calling for competition, the invitation to confirm interest is sent and may in no case be less than 15 days.

##### *Amendment*

The minimum time limit for the receipt of requests to participate shall, as a general rule, be fixed at no less than **37** days from the date on which the contract notice or, where a periodic indicative notice is used as a means of calling for competition, the invitation to confirm interest is sent and may in no case be less than 15 days.

##### *Justification*

*New time limits are too short in practical terms, and in particular for SMEs, and could limit competition.*

## **Amendment 37**

### **Proposal for a directive**

#### **Article 42 – paragraph 2 – subparagraph 3**

##### *Text proposed by the Commission*

Where it is not possible to reach agreement

##### *Amendment*

Where it is not possible to reach agreement

on the time limit for the receipt of tenders, the contracting entity shall fix a time limit which shall in no case be less than **10** days from the date on which the invitation to tender is sent.

on the time limit for the receipt of tenders, the contracting entity shall fix a time limit which shall in no case be less than **20** days from the date on which the invitation to tender is sent.

#### *Justification*

*New time limits are too short in practical terms, and in particular for SMEs, and could limit competition.*

### **Amendment 38**

#### **Proposal for a directive Article 44 – paragraph 4**

*Text proposed by the Commission*

*Amendment*

*For the purposes of point (g) of paragraph 1 of this Article, the basic project shall indicate the extent of possible additional works or services and the conditions under which they will be awarded. As soon as the first project is put up for tender, notice shall be given that this procedure might be adopted and the total estimated cost of subsequent works or services shall be taken into consideration by the contracting entities when they apply Articles 12 and 13.*

*deleted*

#### *Justification*

*Possible additional works or services to the basic project will be indicated via the instrument of an "Option". Therefore an additional declaration is redundant.*

### **Amendment 39**

#### **Proposal for a directive Article 45 – paragraph 1 – subparagraph 3**

*Text proposed by the Commission*

*Amendment*

*The term of a framework agreement shall not exceed **four years, save in exceptional cases duly justified, in particular by the subject** of the **framework agreement**.*

*A framework agreement shall not exceed **the term put in place by national provisions** of the **individual Member States. The term of a framework agreement regarding the maintenance is***

*based on the life cycle of the work or supply.*

#### **Amendment 40**

##### **Proposal for a directive**

##### **Article 47 – paragraph 1 – subparagraph 1**

*Text proposed by the Commission*

Contracting entities may use electronic auctions in which new prices, revised downwards, and/or new values concerning certain elements of tenders are presented.

*Amendment*

***Only for standardised services and supplies*** contracting entities may use electronic auctions in which new prices, revised downwards, and/or new values concerning certain elements of tenders are presented. ***Service contracts and works' contracts having as their subject-matter intellectual property, such as the design of works, may not be the objects of electronic auctions.***

#### **Amendment 41**

##### **Proposal for a directive**

##### **Article 52 – paragraph 5 – subparagraph 1 - introductory part**

*Text proposed by the Commission*

In the absence of an agreement determining the applicable public procurement law, the national legislation governing the contract award shall be determined following the rules set out below:

*Amendment*

In the absence of an agreement determining the applicable public procurement law ***under paragraph 3***, the national legislation governing the contract award shall be determined following the rules set out below:

*Justification*

*Like in paragraph 6, the concrete situation of a lack of agreement to which this paragraph applies should be specified as well.*

## Amendment 42

### Proposal for a directive

#### Article 53 – paragraph 2 – subparagraph 2

##### *Text proposed by the Commission*

Such measures shall include the communication to the other candidates and tenderers of any relevant information exchanged in the context of or resulting from the involvement of the candidate or tenderer in the preparation of the procurement procedure and the fixing of adequate time limits for the receipt of tenders. The candidate or tenderer concerned shall only be excluded from the procedure where there are no other means to ensure compliance with the duty to observe the principle of equal treatment.

##### *Amendment*

Such measures shall include the communication to the other candidates and tenderers of any relevant information exchanged in the context of or resulting from the involvement of the candidate or tenderer in the preparation of the procurement procedure and the fixing of adequate time limits for the receipt of tenders. The candidate or tenderer concerned shall only be excluded from the procedure where ***the contracting authority proves that*** there are no other means to ensure compliance with the duty to observe the principle of equal treatment.

##### *Justification*

*To the legitimate mean of allowing companies that are involved with regards to a decision of exclusion founded on the risk of competition distortion, to be heard; the last subparagraph of point 2 reverses the burden of proof so that it falls on the company in question. Indeed in order to challenge a decision to exclude, the company must "prove" that its participation does not distort competition. In the absence of relevant proof, the decision to exclude will then be legitimised. In fact, it is up to the contracting authority, upon its intention to announce the exclusion of a company, to supply proof that the participation of such company would distort competition. The company in question should be able to challenge such a decision, provided that the inverted proof, that its participation would not distort competition, cannot fall under its responsibility.*

## Amendment 43

### Proposal for a directive

#### Article 54 – paragraph 1 – subparagraph 3

##### *Text proposed by the Commission*

The technical specifications shall also specify whether the transfer of intellectual property rights will be required.

##### *Amendment*

The technical specifications shall also specify whether the transfer of intellectual property rights will be required ***and if so, the conditions of remuneration for the acquisition of such rights.***

### *Justification*

*Promoting the innovation of companies relies on the confidence of the operators towards the internal market, and in particular when it comes to protecting their property rights. In order to ensure a perfect coherence between the European regulation ensuring the protection of intellectual property rights, such as the Directive 2004/48/EC of 29 April 2009 on measures and procedures on the reinforcement of intellectual property rights and the " public procurement" directives, it is important to underline that the acquisition of intellectual property rights must be based on the remuneration of the right holder.*

#### **Amendment 44**

##### **Proposal for a directive Article 61 – paragraph 1**

###### *Text proposed by the Commission*

1. Contracting entities **may** make known their intentions of planned procurement through the publication of a periodic indicative notice as soon as possible after the beginning of the budgetary year. Those notices shall contain the information set out in part A, section I of Annex VI. They shall be published either by the Commission or by the contracting entities on their buyer profiles in accordance with point 2(b) of Annex IX. Where the notice is published by the contracting entities on their buyer profile, they shall send a notice of the publication of the periodic indicative notice on a buyer profile in accordance with point 3 of Annex IX.

###### *Amendment*

1. Contracting entities **shall** make known their intentions of planned procurement through the publication of a periodic indicative notice as soon as possible after the beginning of the budgetary year. Those notices shall contain the information set out in part A, section I of Annex VI. They shall be published either by the Commission or by the contracting entities on their buyer profiles in accordance with point 2(b) of Annex IX. Where the notice is published by the contracting entities on their buyer profile, they shall send a notice of the publication of the periodic indicative notice on a buyer profile in accordance with point 3 of Annex IX.

### *Justification*

*The publication of prior information notices should be mandatory, for the sake of transparency and of full information to businesses, and in particular SMEs, giving them time to prepare tenders well in advance.*

#### **Amendment 45**

##### **Proposal for a directive Article 70 – paragraph 5**

###### *Text proposed by the Commission*

5. Contracting entities may decide not to award a contract to the tenderer submitting

###### *Amendment*

5. Contracting entities may decide not to award a contract to the tenderer submitting

the best tender where *they have established that* the tender does not comply, *at least in an equivalent manner*, with obligations established by Union legislation in the field of social and labour law or environmental law or *of* the international social and environmental law provisions listed in Annex XIV.

the best tender where the tender does not comply with obligations established by Union *or national* legislation, *regulations and other binding provisions* in the field of social and labour law or environmental law or *collective agreements which apply in the place where the work, service or supply is performed or by the* international social and environmental law provisions listed in Annex XIV *and provided they are linked to the subject matter of the contract*.

#### Amendment 46

##### Proposal for a directive

##### Article 76 – paragraph 1 – subparagraph 1 – introductory part

###### *Text proposed by the Commission*

Without prejudice to national laws, regulations or administrative provisions on the remuneration of certain services, the criteria on which contracting entities shall base the award of contracts shall be *one of the following*:

###### *Amendment*

Without prejudice to national laws, regulations or administrative provisions on the remuneration of certain services, the criteria on which contracting entities shall base the award of contracts shall be:

#### Amendment 47

##### Proposal for a directive

##### Article 76 – paragraph 1 – subparagraph 1

###### *Text proposed by the Commission*

1. Without prejudice to national laws, regulations or administrative provisions on the remuneration of certain services, the criteria on which contracting *entities* shall base the award of contracts shall be *one of the following*:

- a) the most economically advantageous tender;
- b) the lowest cost.

###### *Amendment*

1. Without prejudice to national laws, regulations or administrative provisions on the remuneration of certain services, the criteria on which contracting *authorities* shall base the award of *public* contracts shall be:

- a) the most economically, *socially and environmentally* advantageous tender;
- b) the lowest cost.

*The criterion referred to in point (a) takes in general precedence over the criterion*

*referred to in point (b);*

## **Amendment 48**

### **Proposal for a directive**

#### **Article 76 – paragraph 2 – subparagraph 2 – point a**

*Text proposed by the Commission*

(a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, environmental characteristics and innovative character;

*Amendment*

(a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, environmental **and social** characteristics, **contributing to sustainable growth** and **employment, and** innovative character;

*Justification*

*More effective social criteria in the spirit of the EU2020 Strategy, in order to contribute more effectively to sustainable growth, should be included.*

## **Amendment 49**

### **Proposal for a directive**

#### **Article 76 – paragraph 3**

*Text proposed by the Commission*

3. Member States may provide that the award of certain types of contracts shall be based on the most economically advantageous tender *referred to in point (a) of* paragraph 1 and *in* paragraph 2.

*Amendment*

3. Member States may provide that the award of certain types of contracts shall be based on the most economically advantageous tender **and the principle of cost-effectiveness and adequate quality, in line with the arrangements set out in** paragraph 1 and paragraph 2.

## **Amendment 50**

### **Proposal for a directive**

#### **Article 76 – paragraph 5 – subparagraph 1**

*Text proposed by the Commission*

In the case referred to in **point (a) of** paragraph 1, the contracting entity shall specify the relative weighting which it gives to each of the criteria chosen to

*Amendment*

In the case referred to in paragraph 1, the contracting entity shall specify the relative weighting which it gives to each of the criteria chosen to determine the most

determine the most economically advantageous tender.

economically advantageous tender.

## Amendment 51

### Proposal for a directive

#### Article 79 – paragraph 3 – point b

##### *Text proposed by the Commission*

(b) the technical solutions chosen or any exceptionally favourable conditions available to the tenderer for the supply of the goods or services or for the execution of the work;

##### *Amendment*

(b) the technical solutions chosen **and/or** any exceptionally favourable conditions available to the tenderer for the supply of the goods or services or for the execution of the work;

##### *Justification*

*Reinstatement of the wording of the current directive.*

## Amendment 52

### Proposal for a directive

#### Article 81 – paragraph 2

##### *Text proposed by the Commission*

2. Member States may provide that, at the request of the subcontractor and where the nature of the contract so allows, the contracting entity shall transfer due payments directly to the subcontractor for services, supplies or works provided to the main contractor. In such case, Member States shall put in place appropriate mechanisms permitting the main contractor to object to undue payments. The arrangements concerning that mode of payment shall be set out in the procurement documents.

##### *Amendment*

2. Member States may provide that, at the request of the subcontractor and where the nature of the contract so allows, the contracting entity shall transfer due payments directly to the subcontractor for services, supplies or works provided to the main contractor. In such case, Member States shall put in place appropriate mechanisms permitting the main contractor to object to undue payments ***ex-post and provide for regulation that allow the contracting authority to take over the main contractor's signatory status without re-tendering if necessary, in order to ensure legal certainty.*** The arrangements concerning that mode of payment shall be set out in the procurement documents.

### *Justification*

*If necessary, (ex: in case of an insolvent main contractor) the contracting authority has to be able to bring the mandate to a termination without losing legal certainty. Therefore national provisions should make it possible to take over the signatory status and renegotiate disputed terms of the contracts. In addition the right to object undue payments for the main contractor should be permitted only after fulfilment of the contract, otherwise sub-contractors would eventually block competition.*

### **Amendment 53**

#### **Proposal for a directive**

#### **Article 82 – paragraph 3 – subparagraph 2**

##### *Text proposed by the Commission*

However, the first subparagraph shall not apply in the event of universal or partial succession into the position of the initial contractor, following corporate restructuring operations or insolvency, of another economic operator that fulfils the criteria for qualitative selection initially established provided that this does not entail other substantial modifications to the contract and is not aimed at circumventing the application of this Directive.

##### *Amendment*

However, the first subparagraph shall not apply in the event of universal or partial succession into the position of the initial contractor, following corporate restructuring operations, ***transfer of capital or assets, insolvency or on the basis of a contractual clause***, of another economic operator that fulfils the criteria for qualitative selection initially established provided that this does not entail other substantial modifications to the contract and is not aimed at circumventing the application of this Directive.

### *Justification*

*It is perfectly legitimate for the contracting authority to, under the Court's control, oppose a substitution of contractual partner because the new contracting party would not submit the same financial and competence guarantees as that which it is replacing, for the proper performance of the contract - unchanged terms - in progress.*

### **Amendment 54**

#### **Proposal for a directive**

#### **Article 83 – point c**

##### *Text proposed by the Commission*

(c) the Court of Justice of the European Union finds, in a procedure under Article 258 of the Treaty, that a Member State has failed to fulfil its obligations under the

##### *Amendment*

(c) the Court of Justice of the European Union finds, in a procedure under Article 258 of the Treaty, that a Member State has failed to fulfil its obligations under the

Treaties due to the fact that a contracting entity belonging to that Member State has awarded the contract in question without complying with its obligations under the Treaties and this Directive.

Treaties due to the fact that a contracting entity belonging to that Member State has awarded the contract in question without complying with its obligations under the Treaties and this Directive, ***subject to the right of compensation of the contractual partner.***

#### *Justification*

*The reference to "conditions established by national law" is not sufficient to overcome the lack of principle of compensation in the case of termination - without contractual fault - before the foreseen end of the contract. Also, the principle of compensation must be written in EU law in order to ensure its effectiveness in all Member States.*

### **Amendment 55**

#### **Proposal for a directive Article 86 – paragraph 2**

##### *Text proposed by the Commission*

2. Member States shall ensure that contracting entities may take into account the need to ensure quality, continuity, accessibility, availability and comprehensiveness of the services, the specific needs of different categories of users, the involvement and empowerment of users and innovation. Member States may also provide that the choice of the service provider shall not be made solely on the basis of the price for the provision of the service.

##### *Amendment*

2. Member States shall ensure that contracting entities may take into account the need to ensure ***universal access***, quality, continuity, accessibility, ***affordability***, availability, ***safety*** and comprehensiveness of the services, the specific needs of different categories of users, the involvement and empowerment of users and innovation. Member States may also provide that the choice of the service provider shall not be made solely on the basis of the price for the provision of the service.

#### *Justification*

*These characteristics of SGIs are essential and should be ensured as much as possible in this framework.*

## Amendment 56

### Proposal for a directive Article 93 – paragraph 3 – point b

*Text proposed by the Commission*

(b) providing legal advice to contracting entities on the interpretation of public procurement rules and principles **and on the application of public procurement rules in specific cases**;

*Amendment*

(b) providing **general and specific** legal advice **and practical guidance** to contracting entities on the interpretation **and on the application** of public procurement rules and principles;

*Justification*

*As a specialised and central body, the independent body should be responsible to provide legal advice and practical guidance in general terms and in specific cases to contracting authorities, both on the interpretation and on the application of rules and principles of public procurement.*

## Amendment 57

### Proposal for a directive Article 93 – paragraph 3 – point d

*Text proposed by the Commission*

(d) establishing and applying comprehensive, actionable 'red flag' indicator systems to prevent, detect and adequately report instances of procurement fraud, corruption, conflict of interest **and other serious** irregularities;

*Amendment*

(d) establishing and applying comprehensive, actionable 'red flag' indicator systems to prevent, detect and adequately report instances of procurement fraud, corruption, conflict of interest **or any** irregularities;

*Justification*

*To further reinforce the regularity of the procedures organised by contracting authorities and with a pedagogical objective, it is important to include here all types of irregularities, irrespective of how serious they are.*

## Amendment 58

### Proposal for a directive Article 94 – paragraph 1 – subparagraph 1 - introductory part

*Text proposed by the Commission*

Contracting entities shall keep appropriate

*Amendment*

Contracting entities shall keep appropriate

information on each contract, framework agreement and each time a dynamic purchasing system is established. This information shall be sufficient to permit them at a later date to justify decisions taken in connection with:

information on each contract, framework agreement, **where these are above the thresholds**, and each time a dynamic purchasing system is established. This information shall be sufficient to permit them at a later date to justify decisions taken in connection with:

#### *Justification*

*The need to draw up written reports in line with the provisions made in Art. 85 should only be necessary for "above threshold procurement". Doing so for "below threshold procurement" would lead to a lot of bureaucratic procedures. Such burdens have to be in a reasonable proportion to the monetary values at stake.*

### **Amendment 59**

#### **Proposal for a directive Article 94 – paragraph 2**

##### *Text proposed by the Commission*

2. The information shall be kept for at least four years from the date of award of the contract so that the contracting entity will be able, during that period, to provide the necessary information to the Commission or the national oversight body **where they so request it**.

##### *Amendment*

2. The information shall be kept for at least four years from the date of award of the contract so that the contracting entity will be able, during that period, to provide the necessary information to the Commission or the national oversight body.

#### *Justification*

*It doesn't make much sense to impose a reporting obligation of this nature if its is not for the purposes of mandatory submitting of its findings.*

### **Amendment 60**

#### **Proposal for a directive Article 96 – paragraph 1**

##### *Text proposed by the Commission*

1. Member States shall make available technical support structures in order to provide legal and economic advice, guidance and assistance to contracting entities in preparing and carrying out procurement procedures. Member States

##### *Amendment*

1. Member States shall make available technical support structures in order to provide legal and economic advice, guidance and assistance to contracting entities in preparing and carrying out procurement procedures. Member States

shall also ensure that each contracting entity can obtain competent assistance and advice on individual questions.

shall also ensure that each contracting entity can obtain competent assistance and advice on individual questions. ***Special attention and increased support should be provided in this respect to local authorities, and particularly to small local authorities.***

## Amendment 61

### Proposal for a directive Article 96 – paragraph 2

*Text proposed by the Commission*

2. With a view to improving access to public procurement for economic operators, in particular SMEs, and in order to facilitate correct understanding of the provisions of this Directive, Member States shall ensure that appropriate assistance can be obtained, including by electronic means or using existing networks dedicated to business assistance.

*Amendment*

2. With a view to improving access to public procurement for economic operators, in particular SMEs, and in order to facilitate correct understanding of the provisions of this Directive, ***the Commission and the*** Member States shall ensure that appropriate ***and timely information and*** assistance can be obtained, including by electronic means or using existing networks dedicated to business assistance.

#### *Justification*

*The Commission should also participate in this effort, given the highly technical nature of the texts. Moreover, it is crucial that SMEs may obtain the information they need in due time.*

## Amendment 62

### Proposal for a directive Article 96 – paragraph 4 a (new)

*Text proposed by the Commission*

*Amendment*

***4a. The notices referred to in Articles 61, 62, 63 and 64 shall include the information on the body or bodies as referred to in paragraph 4 of this Article.***

#### *Justification*

*There should be widespread and easy to find information on the bodies providing assistance*

*to contracting authorities and businesses.*

### **Amendment 63**

#### **Proposal for a directive Article 97 – paragraph 1 a (new)**

*Text proposed by the Commission*

*Amendment*

***Ia. Member States shall cooperate, with the assistance of the Commission, on the guidance to contracting authorities in assessing the existence or not of a cross-border interest in specific cases, in particular in order to increase spending efficiency in the implementation of programmes funded by cohesion policy instruments or other EU instruments.***

*Justification*

*This is in line with REGI opinion on the modernisation of public procurement, and in particular paragraphs 7 and 15 of that opinion.*

### **Amendment 64**

#### **Proposal for a directive Annex XVII a (new)**

*Text proposed by the Commission*

*Amendment*

***- The following legal services:***  
***79112000-2 Legal representation services***  
***79100000-5 Legal services***  
***79110000-8 Legal advisory and representation services***  
***79111000-5 Legal advisory services***  
***79112100-3 Stakeholders representation services***  
***79120000-1 Patent and copyright consultancy services***  
***79121000-8 Copyright consultancy services***  
***79121100-9 Software copyright***

*consultancy services*

*79130000-4 Legal documentation and certification services*

*79131000-1 Documentation services*

*79132000-8 Certification services*

*79140000-7 Legal advisory and information services*

### *Justification*

*A specific treatment of services is only justified in so far as it applies to all services of the same type.*

## **PROCEDURE**

<b>Title</b>	Procurement by entities operating in the water, energy, transport and postal services sectors
<b>References</b>	COM(2011)0895 – C7-0007/2012 – 2011/0439(COD)
<b>Committee responsible</b> Date announced in plenary	IMCO 19.1.2012
<b>Opinion by</b> Date announced in plenary	REGI 19.1.2012
<b>Rapporteur</b> Date appointed	Ramona Nicole Mănescu 26.1.2012
<b>Date adopted</b>	10.10.2012
<b>Result of final vote</b>	+: 32 –: 7 0: 1
<b>Members present for the final vote</b>	François Alfonsi, Luís Paulo Alves, Charalampos Angourakis, Jean-Jacob Bicep, Victor Boștinăru, John Bufton, Alain Cadec, Salvatore Caronna, Nikos Chrysogelos, Francesco De Angelis, Rosa Estaràs Ferragut, Danuta Maria Hübner, Filiz Hakaeva Hyusmenova, Vincenzo Iovine, María Irigoyen Pérez, Seán Kelly, Mojca Kleva, Constanze Angela Krehl, Petru Constantin Luhan, Elżbieta Katarzyna Łukacijewska, Ramona Nicole Mănescu, Vladimír Maňka, Iosif Matula, Erminia Mazzoni, Miroslav Mikolášik, Ana Miranda, Lambert van Nistelrooij, Jan Olbrycht, Markus Pieper, Monika Smolková, Ewald Stadler, Nuno Teixeira, Oldřich Vlasák, Kerstin Westphal, Hermann Winkler, Joachim Zeller
<b>Substitute(s) present for the final vote</b>	Karin Kadenbach, Lena Kolarska-Bobińska, Czesław Adam Siekierski, Giommara Uggias

15.10.2012

## **OPINION OF THE COMMITTEE ON LEGAL AFFAIRS**

for the Committee on the Internal Market and Consumer Protection

on the proposal for a directive of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors (COM(2011)0895 – C7-0007/2012 – 2011/0439(COD))

Rapporteur: Giuseppe Gargani

### **SHORT JUSTIFICATION**

Public procurement contracts must be used to contribute to the achievement of the Single Market and to boost economic growth in the Member States. In Europe, public purchasers spend around 18% of GDP on supplies, works and services.

Your rapporteur takes the view that the updating of the Directives on procurement by entities operating in the water, energy, transport and postal services sectors should:

- simplify procedures to the benefit of all economic operators;
- facilitate SME participation;
- ensure the best possible results in terms of value for money;
- use public funds efficiently and transparently.

Your rapporteur explicitly welcomes the aims of the Commission's legislative proposal, which are to strengthen and update existing legislation governing procurement by entities operating in the water, energy, transport and postal services sectors in Europe.

More specifically, your rapporteur welcomes the substance of the proposal concerning the aim of strengthening the legal framework relating to procurement, so that this instrument can be used to boost public and private investment in infrastructure and strategic services. He also agrees with the need to innovate and to simplify procurement procedures, in addition to striking a fair balance between priorities against a background of budgetary austerity and the need to ensure that public purchasing is effective.

Your rapporteur takes the view that procurement should continue to be regulated in the sectors in which there is a partial opening of the markets in which the entities operate, given the existence of special or exclusive rights granted by the Member States concerning the supply to, provision or operation of networks for providing the service concerned.

However, he believes that a number of changes are necessary in order to achieve the best

possible outcome with regard to the achievement of the proposed aims:

- Legal services, which are typically based on trust, are governed by stringent ethical codes and are linked to the traditions of Member States, should be excluded from the proposal for a directive, since they call for an assessment of subjective elements relating to the specific requirements of the client.
- The inclusion of the postal sector in the proposal for a directive does not adequately take into account the changes which have taken place in Europe over the past few years, in particular the growth in competition in the market for such services, which is already the subject of Directive 2004/17/EC. In keeping with the rationale for the relevant rules and the evolution of case-law, this sector should therefore be excluded, given that there is already competition based on criteria such as the characteristics of the goods and services in question, the existence of alternatives, prices and the presence of several competitors.
- With reference to recent rulings of the Court of Justice of the European Union (Judgment of 10 April 2008, Case C-393/05, Fourth Chamber), an interpretation has been given of the definition of a body governed by public law which includes also commercial companies under public control. The 'industrial or commercial character', therefore, relates to the goals to be pursued and the needs to be met rather than to the type of organisation and activities.
- The stipulation that a framework agreement may not exceed four years, even for the special sectors, appears to be restrictive to the extent that it might hamper, in specific cases (assistance agreements and plant maintenance), the efficiency of the contracting authorities.
- The obligation to inform economic operators of the conduct and progress of negotiations with tenderers, if so requested by an economic operator, is too burdensome for contracting entities and infringes the tenderers' right to confidentiality.
- The compulsory and no longer optional establishment of a single independent body responsible for the oversight and coordination of implementation activities relating to the directives under Article 93(1) is of undoubted value. However, such oversight should not be an end in itself; it should ensure that the objectives of quality, cost-effectiveness, efficiency and transparency laid down in the directives are achieved and should not delay or hamper the activity of the public authorities.

## **AMENDMENTS**

The Committee on Legal Affairs calls on the Committee on the Internal Market and Consumer Protection, as the committee responsible, to incorporate the following amendments into its report:

### **Amendment 1** **Proposal for a directive** **Recital 10 a (new)**

***(10a) It is also appropriate to exclude contracts for other services than the postal one, as it has been noticed that the postal sector is enough competitive not to be included in the scope of this directive.***

## **Amendment 2**

### **Proposal for a directive**

#### **Recital 16**

*Text proposed by the Commission*

*Amendment*

(16) The results of the Evaluation demonstrated that the exclusion of certain services from the full application of this directive should be reviewed. As a result, the full application of *the* Directive is extended to a number of services (***such as hotel and legal services, which both showed a particularly high percentage of cross-border trade***).

(16) The results of the Evaluation ***on the Impact and Effectiveness of EU Public Procurement Legislation*** demonstrated that the exclusion of certain services from the full application of the Directive should be reviewed. As a result, the full application of ***this*** directive is extended to a number of services.

#### *Justification*

*- Legal services, which are typically based on trust and linked to the traditions of Member States, should be excluded from the proposal for a directive, since they call for an assessment of subjective elements relating to the specific requirements of the client.*

## **Amendment 3**

### **Proposal for a directive**

#### **Recital 26**

*Text proposed by the Commission*

*Amendment*

(26) In view of the detrimental effects on competition, negotiated procedures without a call for competition ***should*** only be used in very exceptional circumstances. This exception should be limited to cases where publication is either not possible, for reasons of force majeure in line with the standing case-law of the Court of Justice of

(26) In view of the detrimental effects on competition, negotiated procedures without a call for competition ***can*** only be used in very exceptional circumstances ***with adequate justification, to be sent to the national governance authority as defined by Article 93***. This exception should be limited to cases where publication is either

the European Union, or where it is clear from the outset that publication would not trigger more competition, not least because there is objectively only one economic operator that can perform the contract. Only situations of objective exclusivity can justify the use of the negotiated procedure without a call for competition, where the situation of exclusivity has not been created by the contracting entity itself with a view to the future procurement procedure, and where there are no adequate substitutes, the availability of which should be assessed thoroughly.

not possible, for reasons of force majeure in line with the standing case-law of the Court of Justice of the European Union, or where it is clear from the outset that publication would not trigger more competition, not least because there is objectively only one economic operator that can perform the contract. Only situations of objective exclusivity can justify the use of the negotiated procedure without a call for competition, where the situation of exclusivity has not been created by the contracting entity itself with a view to the future procurement procedure, and where there are no adequate substitutes, the availability of which should be assessed thoroughly.

#### Amendment 4

##### Proposal for a directive Recital 49

###### *Text proposed by the Commission*

(49) Tenders that appear abnormally low in relation to the works, supplies or services might be based on technically, economically or legally unsound assumptions or practices. In order to prevent possible disadvantages during contract performance, contracting entities should be obliged to ask for an explanation of the price charged where a tender significantly undercuts the prices demanded by other tenderers. Where the tenderer cannot provide a sufficient explanation, the contracting entity should **be entitled to** reject the tender. Rejection should be mandatory in cases where the contracting entity has established that the abnormally low price results from non-compliance with **mandatory** Union legislation in the fields of social, labour or environmental law **or international labour law provisions**.

###### *Amendment*

(49) Tenders that appear abnormally low in relation to the works, supplies or services might be based on technically, economically or legally unsound assumptions or practices. In order to prevent possible disadvantages during contract performance, contracting entities should be obliged to ask for an explanation of the price charged where a tender significantly undercuts the prices demanded by other tenderers. Where the tenderer cannot provide a sufficient explanation, the contracting entity should reject the tender. Rejection should be **also** mandatory in cases where the contracting entity has established that the abnormally low price results from non-compliance with **national, international and European** Union legislation, **in particular** in the fields of social, labour or environmental law.

## Amendment 5

### Proposal for a directive Recital 50 a (new)

*Text proposed by the Commission*

*Amendment*

***(50a) In order to ensure the correct functioning of public procurement, the subcontracting instrument must be correctly regulated, in order to ensure that the public procurement is performed in accordance with the bid. Subcontracting should be limited to a maximum of three consecutive vertical subcontracts without prejudice to more restrictive national legislation in this field.***

## Amendment 6

### Proposal for a directive Recital 56 a (new)

*Text proposed by the Commission*

*Amendment*

***(56a) Contracting entities should respect the delay of payment as established in Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions<sup>1</sup>.***

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<sup>1</sup> OJ L 48, 23.2.2011, p. 1.

## Amendment 7

### Proposal for a directive Article 1 – paragraph 2 a (new)

*Text proposed by the Commission*

*Amendment*

***2a. This Directive is without prejudice to the right of contracting entities, as defined in Article 4, to decide whether, how and to what extent they want to perform public functions themselves. Contracting entities***

*may perform public interest tasks using their own resources, without being obliged to call on outside economic operators. They may do so in cooperation with other contracting entities.*

## **Amendment 8**

### **Proposal for a directive**

#### **Article 2 - point 4 - points a and b**

##### *Text proposed by the Commission*

*(a) It is established for or has the specific purpose of meeting needs in the general interest, not having an industrial or commercial character; for that purpose, a body which operates in normal market conditions, aims to make a profit, and bears the losses resulting from the exercise of its activity does not have the purpose of meeting needs in the general interest, not having an industrial or commercial character;*

*(b) it has legal personality;*

##### *Amendment*

*(a) it has legal personality;*

*(b) it is established for the specific purpose of meeting needs in the general interest, not having a merely industrial or commercial character;*

## *Justification*

*I punti a) e b) della proposta della Commissione sono diventati, per motivi legati alla coerenza legislativa del testo, rispettivamente i punti b) e a). Il punto a), nuovo punto b) è stato altresì emendato. In particolare, quest'ultima modifica si basa su recenti pronunce della Corte di Giustizia dell'Unione europea (Sentenza 10/04/2008 causa C - 393/05/ IV sez.) nelle quali si riconosce un'interpretazione della definizione di organismo di diritto pubblico che comprende anche le società commerciali sotto controllo pubblico. Il carattere industriale o commerciale, riguarda, pertanto, le finalità da perseguire e i bisogni da soddisfare, piuttosto che il tipo di organizzazione e di attività.*

### **Amendment 9**

#### **Proposal for a directive Article 2 – point 10**

##### *Text proposed by the Commission*

(10) "supply contracts" means contracts having as their object the purchase, lease, rental or hire-purchase, with or without an option to buy, of products. A supply contract may include, as an incidental matter, siting and installation operations;

##### *Amendment*

(10) "supply contracts" means contracts having as their object the purchase, lease, rental or hire-purchase, with or without an option to buy, of products. ***A supply contract may include an on-demand contract involving multiple deliveries.*** A supply contract may include, as an incidental matter, siting and installation operations;

## *Justification*

*This definition of supply contracts should also include on-demand supply contracts involving multiple deliveries. This would govern a number of increasingly widespread contractual practices whereby supplies are provided in multiple deliveries according to the requirements of the contracting authorities throughout the duration of the contract.*

### **Amendment 10**

#### **Proposal for a directive Article 10**

##### *Text proposed by the Commission*

1. This Directive shall apply to activities relating to the provision of:  
**(a)** postal services;

##### *Amendment*

1. This Directive shall apply to activities relating to the provision of postal services.

***(b) other services than postal services, on condition that such services are provided by an entity which also provides postal services within the meaning of point (b) of paragraph 2 and provided that the conditions set out in Article 27(1) are not satisfied in respect of the services falling within point (b) of paragraph 2.***

2. For the purpose of this Directive and without prejudice to Directive 97/67/EC:

(a) "postal item": means an item addressed in the final form in which it is to be carried, irrespective of weight. In addition to items of correspondence, such items also include for instance books, catalogues, newspapers, periodicals and postal packages containing merchandise with or without commercial value, irrespective of weight;

(b) "postal services": means services consisting of the clearance, sorting, routing and delivery of postal items. This shall include both services falling within as well as services falling outside the scope of the universal service set up in conformity with Directive 97/67/EC;

***(c) "other services than postal services": means services provided in the following areas:***

***(i) mail service management services (services both preceding and subsequent to despatch, including "mailroom management services");***

***(ii) added-value services linked to and provided entirely by electronic means (including the secure transmission of coded documents by electronic means, address management services and transmission of registered electronic mail);***

***(iii) services concerning postal items not included in point (a), such as direct mail bearing no address;***

***(iv) financial services, as defined in the CPV under the reference numbers from 66100000-1 to 66720000-3 and in Article***

2. For the purpose of this Directive and without prejudice to Directive 97/67/EC:

(a) "postal item": means an item addressed in the final form in which it is to be carried, irrespective of weight. In addition to items of correspondence, such items also include for instance books, catalogues, newspapers, periodicals and postal packages containing merchandise with or without commercial value, irrespective of weight;

(b) "postal services": means services consisting of the clearance, sorting, routing and delivery of postal items. This shall include both services falling within as well as services falling outside the scope of the universal service set up in conformity with Directive 97/67/EC;

**19(c) and including in particular postal money orders and postal giro transfers;**

**(v) philatelic services;**

**(vi) logistics services (services combining physical delivery and/or warehousing with other non-postal functions).**

*Justification*

*Directive 2008/6/EC opened the postal sector up to competition also because it eliminated the remaining areas that were still reserved for the universal service provider. The postal sector has therefore gradually attained a satisfactory level of liberalisation.*

*Non-postal services provided by postal operators, i.e. 'other services than postal services', should therefore be excluded from the scope of the new directives.*

**Amendment 11**

**Proposal for a directive  
Article 19 – point b**

*Text proposed by the Commission*

*Amendment*

(b) arbitration and conciliation services;

(b) **legal**, arbitration and conciliation services;

*Justification*

*In view of the discretionary and trust-based nature of legal services, they should be excluded from the scope of this directive.*

**Amendment 12**

**Proposal for a directive  
Article 29 – paragraph 2 a (new)**

*Text proposed by the Commission*

*Amendment*

***The details of procurement contracts shall be made public.***

**Amendment 13**

**Proposal for a directive  
Article 44 – paragraph 1 – point a**

*Text proposed by the Commission*

*Amendment*

(a) where no tenders or no suitable tenders or no requests to participate have been submitted in response to a procedure with a prior call for competition, provided that the initial conditions of the contract are not **substantially** altered;

(a) where no tenders or no suitable tenders or no requests to participate have been submitted in response to a procedure with a prior call for competition, provided that the initial conditions of the contract are not altered **and providing adequate justifications to the oversight body referred to in Article 93;**

**Amendment 14**

**Proposal for a directive**

**Article 58 – paragraph 1 – subparagraph 1**

*Text proposed by the Commission*

*Amendment*

1. Contracting entities may take account of variants which are submitted by a tenderer **and** meet the minimum requirements specified by the contracting entities.

1. Contracting entities may take account of variants which are submitted by a tenderer **where they** meet the minimum requirements specified by the contracting entities **and do not exceed 1/6 of the overall price agreed upon.**

*Justification*

*An unscrupulous use of variants could distort competition and create problems of legal certainty. A specific provision should be introduced to provide for a maximum permissible price for variants. National legislation provides benchmarks in this regard, confirming the effectiveness of such a provision.*

**Amendment 15**

**Proposal for a directive**

**Article 59 – paragraph 1 – subparagraph 2**

*Text proposed by the Commission*

*Amendment*

Contracting entities shall indicate, in the contract notice, in the invitation to confirm interest, or, where the means of calling for competition is a notice on the existence of a qualification system, in the invitation to

Contracting entities shall indicate, in the contract notice, in the invitation to confirm interest, or, where the means of calling for competition is a notice on the existence of a qualification system, in the invitation to

tender or to negotiate, whether tenders are limited to one or more lots only.

tender or to negotiate, whether tenders are limited to one or more lots only ***and if they are not subdivided into lots, providing a specific explanation for this.***

## Amendment 16

### Proposal for a directive Article 65 – paragraph 3

*Text proposed by the Commission*

*Amendment*

3. Calls for competition within the meaning of Article 39(2) shall be published in full in an official language of the Union as chosen by the contracting entity. That language version shall constitute the sole authentic text. ***A summary of the important elements of each notice shall be published in the other official languages.***

3. Calls for competition within the meaning of Article 39(2) shall be published in full in an official language of the Union as chosen by the contracting entity. That language version shall constitute the sole authentic text.

#### *Justification*

*The requirement to publish a summary of the important elements of each notice in all the official languages of the EU is unsustainable owing to time constraints, costs and legal certainty.*

## Amendment 17

### Proposal for a directive Article 69 - paragraph 2 - point d

*Text proposed by the Commission*

*Amendment*

***(d) any tenderer that has made an admissible tender of the conduct and progress of negotiations and dialogue with tenderers.***

***deleted***

#### *Justification*

*The obligation to inform economic operators of the conduct and progress of negotiations with tenderers, if so requested by an economic operator, is too burdensome for contracting entities and infringes the tenderers' right to confidentiality.*

## Amendment 18

### Proposal for a directive Article 70 – paragraph 7

*Text proposed by the Commission*

7. The Commission shall be empowered to adopt delegated acts in accordance with Article 98 to **amend** the list in Annex XIV, where necessary due to the conclusion of new international agreements or modification of existing international agreements.

*Amendment*

7. The Commission shall be empowered to adopt delegated acts in accordance with Article 98 to **complement** the list in Annex XIV, where necessary due to the conclusion of new international agreements or modification of existing international agreements.

## Amendment 19

### Proposal for a directive Article 73 – paragraph 1 – subparagraph 1

*Text proposed by the Commission*

1. Where the objective rules and criteria for the exclusion and selection of economic operators requesting qualification in a qualification system include requirements relating to the economic and financial capacity of the economic operator, or to its technical and professional abilities, the economic operator may where necessary rely on the capacity of other entities, **whatever** the legal nature of the link between itself and those entities. In this case the economic operator shall prove to the contracting entity that those resources will be available to it throughout the period of the validity of the qualification system, for example by producing an undertaking by those entities to that effect. **In the case of economic and financial standing**, contracting entities **may** require that the economic operator and those entities are jointly liable for the execution of the contract.

*Amendment*

1. Where the objective rules and criteria for the exclusion and selection of economic operators requesting qualification in a qualification system include requirements relating to the economic and financial capacity of the economic operator, or to its technical and professional abilities, the economic operator may where necessary rely **only** on the **material** capacity of other entities, **with due regard for** the legal nature of the link between itself and those entities. In this case the economic operator shall prove to the contracting entity that those resources will be available to it throughout the period of the validity of the qualification system, for example by producing an undertaking by those entities to that effect. Contracting entities **shall** require that the economic operator and those entities are jointly liable for the execution of the contract.

*Justification*

*To ensure legal and economic certainty in the award and performance of contracts, the use of*

*the opportunity to rely on the capacities of other entities should be restricted to the acquisition of only material requirements; joint liability should also be strengthened between economic operators and those on whom they rely for performance of the contract, by making it mandatory. This can only be achieved if there is a legal relationship between the two parties.*

## **Amendment 20**

### **Proposal for a directive Article 73 – paragraph 1 a (new)**

*Text proposed by the Commission*

*Amendment*

***1a. The fulfilment of pooling requirements may not be used at the same time by the assisting and benefiting entities.***

## **Amendment 21**

### **Proposal for a directive Article 74 – paragraph 1 – subparagraph 1**

*Text proposed by the Commission*

*Amendment*

1. The objective rules and criteria for the exclusion and selection of economic operators requesting qualification in a qualification system and the objective rules and criteria for the exclusion and selection of candidates and tenderers in open, restricted or negotiated procedures or in innovation partnerships **may** include the exclusion grounds listed in Article 55 of Directive **2004/18** on the terms and conditions set out therein.

1. The objective rules and criteria for the exclusion and selection of economic operators requesting qualification in a qualification system and the objective rules and criteria for the exclusion and selection of candidates and tenderers in open, restricted or negotiated procedures or in innovation partnerships **shall** include the exclusion grounds listed in Article 55 of Directive [.../.../EU][on **public procurement**] on the terms and conditions set out therein.

## **Amendment 22**

### **Proposal for a directive Article 74 – paragraph 1 – subparagraph 2**

*Text proposed by the Commission*

*Amendment*

***Where the contracting entity is a***

***deleted***

*contracting authority, those criteria and rules shall include the exclusion grounds listed in Article 55(1) and (2) of Directive 2004/18 on the terms and conditions set out in that Article.*

## Amendment 23

### Proposal for a directive Article 76

#### *Text proposed by the Commission*

1. Without prejudice to national laws, regulations or administrative provisions on the remuneration of certain services, the criteria on which contracting entities shall base the award of contracts shall be ***one of the following***:

***(a) the most economically advantageous tender;***

***(b) the lowest cost.***

***Costs may be assessed, at the choice of the contracting entity, on the basis of the price only or using a cost-effectiveness approach, such as a life-cycle costing approach, under the conditions set out in Article 77.***

2. The most economically advantageous tender referred to ***in point (a) of paragraph 1) from the point of view of the contracting entity shall be identified*** on the basis of criteria linked to the subject-matter of the contract in question.

Those criteria shall include in addition to the price or costs ***referred to in point (b) of paragraph 1***, other criteria linked to the subject-matter of the contract in question, ***such as***:

#### *Amendment*

1. Without prejudice to national laws, regulations or administrative provisions on the remuneration of certain services, the ***criterion*** on which contracting entities shall base the award of contracts shall be ***that of the most economically advantageous tender.***

2. ***The contracting entity shall assess*** the most economically advantageous tender referred to in paragraph 1) on the basis of criteria linked to the subject-matter of the contract in question.

Those criteria shall include in addition to the price or costs, other criteria linked to the subject-matter of the contract in question.

***Costs may be assessed using a cost-effectiveness approach, such as a life-cycle costing approach, under the conditions set out in Article 77.***

***Price/cost criterion may be the decisive award criterion in case of standardized products and services whose content can be predetermined by its own nature.***

***Other criteria may include:***

- (a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, environmental characteristics and innovative character;
- (b) for service contracts and contracts involving the design of works, the organisation, qualification and experience of the staff assigned to performing the contract in question ***may*** be taken into consideration, with the consequence that, following the award of the contract, such staff may only be replaced with the consent of the contracting entity which must verify that replacements ensure equivalent organisation and quality;
- (c) after-sales service and technical assistance, delivery date and delivery period or period of completion, commitments with regard to parts and security of supply;
- (d) the specific process of production or provision of the requested works, supplies or services or of any other stage of its life cycle, as referred to in point 22 of Article 2, to the extent that those criteria are specified in accordance with paragraph 4 and they concern factors directly involved in those processes and characterise the specific process of production or provision of the requested works, supplies or services.

***3. Member States may provide that the award of certain types of contracts shall be based on the most economically advantageous tender referred to in point (a) of paragraph 1 and in paragraph 2.***

4. Award criteria shall ***not confer an unrestricted freedom of choice on the contracting entity. They shall*** ensure the possibility of effective competition and

- (a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, environmental ***and social*** characteristics and innovative character;
- (b) for service contracts and contracts involving the design of works, the organisation, qualification and experience of the staff assigned to performing the contract in question ***shall*** be taken into consideration, with the consequence that, following the award of the contract, such staff may only be replaced with the consent of the contracting entity which must verify that replacements ensure equivalent organisation and quality
- (c) after-sales service and technical assistance, delivery date and delivery period or period of completion, commitments with regard to parts and security of supply;
- (d) the specific process of production or provision of the requested works, supplies or services or of any other stage of its life cycle, as referred to in point 22 of Article 2, to the extent that those criteria are specified in accordance with paragraph 4 and they concern factors directly involved in those processes and characterise the specific process of production or provision of the requested works, supplies or services.

4. Award criteria shall ensure effective competition and shall be accompanied by requirements which allow the information provided by the tenderers to be effectively

shall be accompanied by requirements which allow the information provided by the tenderers to be effectively verified. Contracting entities shall verify effectively, on the basis of the information and proof provided by the tenderers, whether the tenders meet the award criteria.

**5. In the case referred to in point (a) of paragraph 1,** the contracting entity shall specify the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender.

Those weightings may be expressed by providing for a range with an appropriate maximum spread.

Where weighting is not possible for objective reasons, the contracting entity shall indicate the criteria in descending order of importance.

The relative weighting or order of importance shall be specified, as appropriate, in the notice used as a means of calling for competition, in the invitation to confirm interest, in the invitation to tender or to negotiate, or in the specifications.

verified. Contracting entities shall verify, on the basis of the information and proof provided by the tenderers, whether the tenders meet the award criteria.

5. The contracting entity shall specify the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender.

Those weightings may be expressed by providing for a range with an appropriate maximum spread.

Where weighting is not possible for objective reasons, the contracting entity shall indicate the criteria in descending order of importance.

The relative weighting or order of importance shall be specified, as appropriate, in the notice used as a means of calling for competition, in the invitation to confirm interest, in the invitation to tender or to negotiate, or in the specifications.

## **Amendment 24**

### **Proposal for a directive**

#### **Article 77 – paragraph 3 – subparagraph 1**

##### *Text proposed by the Commission*

Whenever a common methodology for the calculation of life-cycle costs is adopted as part of a legislative act of the Union, including by delegated acts pursuant to sector specific legislation, it shall be applied **where life-cycle costing is included in** the award criteria referred to in *Article 76 (1)*.

##### *Amendment*

Whenever a common methodology for the calculation of life-cycle costs is adopted as part of a legislative act of the Union, including by delegated acts pursuant to sector specific legislation, it shall be applied **in accordance with** the award criteria referred to in *Article 76(1)*.

## **Amendment 25**

**Proposal for a directive**  
**Article 81 – paragraph 2**

*Text proposed by the Commission*

2. Member States may provide that, **at the request of** the subcontractor and where the nature of the contract so allows, the contracting entity shall transfer due payments directly to the subcontractor for services, supplies or works provided to the main contractor. In such case, Member States shall put in place appropriate mechanisms permitting the main contractor to object to undue payments. The arrangements concerning that mode of payment shall be set out in the procurement documents.

*Amendment*

2. Member States may provide that, **if requested by** the subcontractor and where the nature of the contract so allows, the contracting entity shall transfer due payments directly to the subcontractor for services, supplies or works provided to the main contractor. In such case, Member States shall put in place appropriate mechanisms permitting the main contractor to object to undue payments. The arrangements concerning that mode of payment shall be set out in the procurement documents.

**Amendment 26**

**Proposal for a directive**  
**Article 82 – paragraph 4**

*Text proposed by the Commission*

4. Where the value of a modification can be expressed in monetary terms, the modification shall not be considered to be substantial within the meaning of paragraph 1, where its value does not exceed the thresholds set out in Article 12 and where it is below **5%** of the price of the initial contract, provided that the modification does not alter the overall nature of the contract. Where several successive modifications are made, the value shall be assessed on the basis of the cumulative value of the successive modifications.

*Amendment*

4. Where the value of a modification can be expressed in monetary terms, the modification shall not be considered to be substantial within the meaning of paragraph 1, where its value does not exceed the thresholds set out in Article 12 and where it is below **10%** of the price of the initial contract, provided that the modification does not alter the overall nature of the contract. Where several successive modifications are made, the value shall be assessed on the basis of the cumulative value of the successive modifications.

*Justification*

*The proposal limits to 5% of the value of the contract any modifications that might be made during the performance of the contract. This limitation is too restrictive. The limit should therefore be raised, so that it may not exceed 10% of the overall price.*

## Amendment 27

### Proposal for a directive Article 86 – paragraph 2

*Text proposed by the Commission*

2. Member States shall ensure that contracting entities may take into account the need to ensure quality, continuity, accessibility, availability and comprehensiveness of the services, the specific needs of different categories of users, the involvement and empowerment of users and innovation. Member States may also provide that the choice of the service provider shall not be made solely on the basis of the price for the provision of the service.

*Amendment*

2. Member States shall ensure that contracting entities may take into account the need to ensure quality, continuity, accessibility, availability and comprehensiveness of the services, the specific needs of different categories of users, the involvement and empowerment of users and innovation ***and consumers' protection and social inclusion***. Member States may also provide that the choice of the service provider shall not be made solely on the basis of the price for the provision of the service.

## Amendment 28

### Proposal for a directive Article 93 – paragraph 1

*Text proposed by the Commission*

1. Member States shall appoint ***a single*** independent body responsible for the oversight and coordination of implementation activities (hereinafter "the oversight body"). Member States shall inform the Commission of their designation.

*Amendment*

1. ***In accordance with their national or federal structure***, Member States shall appoint ***one or more*** independent bodies responsible for the oversight and coordination of implementation activities (hereinafter "the oversight bodies"). Member States shall inform the Commission of their designation.

***Member States that already have in place independent bodies can retain these bodies as long as they fulfil all responsibilities as stated below.***

## Amendment 29

### Proposal for a directive Article 93 – paragraph 3 – subparagraph 1 – point f a (new)

*Text proposed by the Commission*

*Amendment*

***(fa) examining the reports issued by the contracting entities that intend to resort to a negotiated procedure without publication;***

### **Amendment 30**

#### **Proposal for a directive**

#### **Article 93 – paragraph 3 – subparagraph 1 – point b**

*Text proposed by the Commission*

*Amendment*

***(b) providing legal advice to contracting entities on the interpretation of public procurement rules and principles and on the application of public procurement rules in specific cases;*** ***deleted***

#### *Justification*

*Legal services have always been based upon a relationship of trust with the professional in question, underpinned by the latter's professional skills and governed by stringent professional ethical codes. They cannot therefore be assigned to a public oversight body and neither should they fall within the scope of this directive.*

### **Amendment 31**

#### **Proposal for a directive**

#### **Article 93 – paragraph 3 – subparagraph 1 – point c**

*Text proposed by the Commission*

*Amendment*

***(c) issuing own initiative opinions and guidance*** on questions of general interest pertaining to the interpretation and application of public procurement rules, on recurring questions and on systemic difficulties related to the application of public procurement rules, in the light of the provisions of this Directive and of the relevant case-law of the Court of Justice of the European Union;

***(c) drawing up guidelines*** on questions of general interest pertaining to the interpretation and application of public procurement rules, on recurring questions and on systemic difficulties related to the application of public procurement rules, in the light of the provisions of this Directive and of the relevant case-law of the Court of Justice of the European Union;

### *Justification*

*The new wording proposed is more relevant to the remit of the body, which is to monitor the implementation and application of the rules.*

### **Amendment 32**

#### **Proposal for a directive**

#### **Article 93 – paragraph 3 – subparagraph 3**

##### *Text proposed by the Commission*

Member States shall empower the oversight body to seize the jurisdiction competent according to national law for the review of contracting entities' decisions where it has detected a violation in the course of its monitoring *and legal advising* activity.

##### *Amendment*

Member States shall empower the oversight body to seize the jurisdiction competent according to national law for the review of contracting entities' decisions where it has detected a violation in the course of its monitoring activity.

### **Amendment 33**

#### **Proposal for a directive**

#### **Article 96 – paragraph 1**

##### *Text proposed by the Commission*

1. Member States shall make available technical support structures in order to provide legal and economic advice, guidance and assistance to contracting authorities in preparing and carrying out procurement procedures. Member States shall also ensure that each contracting authority can obtain competent assistance and advice on individual questions.

##### *Amendment*

*deleted*

### *Justification*

*Legal services have always been based upon a relationship of trust with the professional in question, underpinned by the latter's professional skills and governed by stringent professional ethical codes. They cannot therefore be assigned to a public oversight body and neither should they fall within the scope of this directive.*

### **Amendment 34**

**Proposal for a directive**  
**Annex 14 – indent 1 a (new)**

*Text proposed by the Commission*

*Amendment*

***- Convention 94 on Labour Clauses in  
Public Contracts;***

## PROCEDURE

<b>Title</b>	Procurement by entities operating in the water, energy, transport and postal services sectors		
<b>References</b>	COM(2011)0895 – C7-0007/2012 – 2011/0439(COD)		
<b>Committee responsible</b> Date announced in plenary	IMCO 19.1.2012		
<b>Opinion by</b> Date announced in plenary	JURI 19.1.2012		
<b>Rapporteur</b> Date appointed	Giuseppe Gargani 1.3.2012		
<b>Discussed in committee</b>	26.4.2012	30.5.2012	19.6.2012
<b>Date adopted</b>	11.10.2012		
<b>Result of final vote</b>	+: -: 0:	13 9 0	
<b>Members present for the final vote</b>	Luigi Berlinguer, Sebastian Valentin Bodu, Giuseppe Gargani, Lidia Joanna Geringer de Oedenberg, Gerald Häfner, Sajjad Karim, Klaus-Heiner Lehne, Antonio Masip Hidalgo, Bernhard Rapkay, Evelyn Regner, Francesco Enrico Speroni, Rebecca Taylor, Alexandra Thein, Rainer Wieland, Cecilia Wikström, Tadeusz Zwiefka		
<b>Substitute(s) present for the final vote</b>	Piotr Borys, Eva Lichtenberger, József Szájer, Axel Voss		
<b>Substitute(s) under Rule 187(2) present for the final vote</b>	Sylvie Guillaume, Salvatore Tatarella		

## PROCEDURE

<b>Title</b>	Procurement by entities operating in the water, energy, transport and postal services sectors			
<b>References</b>	COM(2011)0895 – C7-0007/2012 – 2011/0439(COD)			
<b>Date submitted to Parliament</b>	20.12.2011			
<b>Committee responsible</b> Date announced in plenary	IMCO 19.1.2012			
<b>Committee(s) asked for opinion(s)</b> Date announced in plenary	INTA 19.1.2012	ECON 19.1.2012	EMPL 19.1.2012	ENVI 19.1.2012
	ITRE 19.1.2012	TRAN 19.1.2012	REGI 19.1.2012	JURI 19.1.2012
	LIBE 19.1.2012			
<b>Not delivering opinions</b> Date of decision	ECON 13.2.2012	ENVI 24.1.2012	LIBE 28.2.2012	
<b>Rapporteur(s)</b> Date appointed	Marc Tarabella 29.11.2011			
<b>Discussed in committee</b>	25.1.2012	29.2.2012	20.3.2012	30.5.2012
	18.9.2012	25.9.2012	10.10.2012	5.11.2012
	23.1.2013			
<b>Date adopted</b>	24.1.2013			
<b>Result of final vote</b>	+ : 25 - : 5 0 : 8			
<b>Members present for the final vote</b>	Preslav Borissov, Cristian Silviu Buşoi, Jorgo Chatzimarkakis, Birgit Collin-Langen, Lara Comi, Anna Maria Corazza Bildt, Cornelis de Jong, Christian Engström, Evelyne Gebhardt, Thomas Händel, Małgorzata Handzlik, Philippe Juvin, Sandra Kalniete, Hans-Peter Mayer, Claudio Morganti, Pier Antonio Panzeri, Phil Prendergast, Mitro Repo, Heide Rühle, Christel Schaldemose, Olle Schmidt, Andreas Schwab, Barbara Weiler			
<b>Substitute(s) present for the final vote</b>	Raffaele Baldassarre, Adam Bielan, Françoise Castex, Frank Engel, Ashley Fox, Ildikó Gáll-Pelcz, Anna Hedh, Ian Hudghton, Constance Le Grip, Emma McClarkin, Raimon Obiols, Antonyia Parvanova, Olga Sehnalová, Marc Tarabella, Wim van de Camp			
<b>Date tabled</b>	7.2.2013			