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*Committee on the Internal Market and Consumer Protection*

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# **WORKING DOCUMENT**

on a proposal for a Directive of the European Parliament and of the Council on public procurement (2011/0438(COD) and 2011/0439(COD))

Committee on the Internal Market and Consumer Protection

Rapporteur: Marc Tarabella

## Draft list of controversial issues by cluster

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In the present document your Rapporteur would like to set out his proposed working method with a view to structuring the discussions on the amendments. The document contains four sections:

1. Summary
2. Information per cluster
3. Proposed order of discussions
4. Annex: Repartition of amendments by cluster (detail)

### 1. Summary

<b>Total number of amendments tabled</b>	<b>1593</b>
- from draft report	166
- from amendments	1427

Among these 1593 amendments, **some core issues** have tentatively been identified on which discussions could focus during the autumn. These core issues include:

- Public - public cooperation
- Sub-contracting
- Award criteria
- Re-introducing the distinction between A and B services / additional exclusions
- Reciprocity
- e-procurement: time-frame
- (- Concessions)

More generally, the thematic clusters used in both the Council Working Group and IMCO can be grouped in terms of political relevance, depending on how controversial they seem to be. The list below provides a first tentative assessment, based on the number and content of the specific amendments tabled.

- **Highly controversial:**
  - Cluster 2 (award criteria, technical specifications, labels, social services, subcontracting)
  - Cluster 5 (lots and subcontracting)
  - Cluster 9: tasks and structure of governance oversight body
  - Cluster 10 (scope, exclusions, A&B services, reciprocity, concessions)
- **Moderately controversial / some open issues:**
  - Cluster 1: mandatory transposition of all procedures, innovation partnership,
  - Cluster 4: transition date for mandatory e-procurement,
  - Cluster 10: public-public cooperation
  - (potentially cluster 7 on variants and cluster 8 on conflicts of interests)
- **Least controversial:**
  - Clusters 3, 6 and 7

**In annex** you will find a detailed table listing the clusters by subject and number of amendments tabled.

## 2. Detailed information per cluster

*N.B. The most controversial clusters / issues are highlighted in bold.*

### Cluster 1: Wider choice of procedures

- **Number of amendments tabled: 194 amendments**
- **General Assessment:** Moderately controversial cluster. While the procedures (including the new / revised competitive procedure with negotiation and the innovation partnership) have generally been accepted, a number of amendments modify some aspects of these procedures.
- **Key issues:**
  - **Mandatory** ("shall" instead of "may") procedures or mandatory in certain cases?
  - **Time limits** for open and restricted procedures: demand for longer deadlines.
  - **art. 24 flexibility for sub-central** contracting authorities: support

### Cluster 2: Strategic use of public procurement

- **Number of amendments tabled: 621 amendments**
- **General Assessment:** Cluster 2 is one of the most controversial clusters.
- **Key issues:**
  - **art. 66 Contract award criteria:**
    - MEAT only: to be made mandatory?
    - Content of the MEAT criterion (LCC)
  - **Contract performance clauses and technical specifications:** strong debate on how to ensure more social dimension
  - **Labels:** rather wide support for extending concept
  - **art. 54(2), 55(3) Exclusions on social grounds:** wide support
  - **art. 71(1) and (3) Sub-contracting:** liability of the principal economic operator

### Cluster 3: Reducing document requirements

- **Number of amendments tabled: 41 amendments**
- **General Assessment:** uncontroversial cluster.
- **Key issues:**
  - art. 54 general principles: small debate about possibility to verify award before selection
  - art. 55 exclusions: some divergence on introducing concept of 'grave professional misconduct'
  - art. 57 self-declarations: principle generally accepted
  - art. 59 public procurement passport: general support

#### Cluster 4: e-procurement

- **Number of amendments tabled: 54 amendments**
- **General Assessment:** rather uncontroversial cluster, general support for e-procurement.
- **Key issues:**
  - **art. 19 mandatory use of e-procurement:** general support, different proposals for longer transition deadlines
  - **art. 33 e-auctions:** general support for standardised goods/services only

#### Cluster 5: SME access

- **Number of amendments tabled: 70 amendments**
- **General Assessment: Rather controversial cluster;** clear divergences on rules for lots and on stronger regulation of sub-contracting.
- **Key issues:**
  - **art. 44 lots:** mixed support for apply or explain principle
  - **sub-contracting**
    - **art. 56(3) turnover cap:** some support
    - **art. 71(2) direct payment of sub-contractors:** some divergence

#### Cluster 6: Aggregation of demand

- **Number of amendments tabled: 52 amendments**
- **General Assessment:** uncontroversial cluster, limited interest in aggregation issues.
- **Key issues:**
  - art. 31 framework agreements and art. 32 DPS: small procedural adjustments
  - core aggregation instruments (CPBs, joint procurement, cross-border): few amendments, no substantial changes

#### Cluster 7: Other procedural requirements (publications, variants, design contests)

- **Number of amendments tabled: 28 amendments**
- **General Assessment:** uncontroversial cluster
- **Key issues:**
  - art. 43 variants: to be generally allowed, cross-party interest
  - design contests and publications: no / minor amendments to procedural requirements

## Cluster 8: Sound procedures

- **Number of amendments tabled: 166 amendments**
- **General Assessment:** rather uncontroversial cluster; cross-party interest in new instruments to strengthen sound procedures.
- **Key issues:**
  - **art. 17 confidentiality:** wide support
  - **art. 21 conflict of interest:** general support, and calls for even stronger rules (e.g. on whistle-blower protection)
  - **art. 69 abnormally low tenders:** general support, some debate about thresholds triggering investigation
  - **art. 72 modification of contracts:** general support, different proposals for increasing the de minimis percentage

## Cluster 9: Governance

- **Number of amendments tabled: 119 amendments**
- **General Assessment:** The issue of governance is one of the controversial ones but the amendments tabled seem to converge.
- **Key issues:**
  - Register of non compliance
  - **Art. 84 Single oversight body:**
    - Either deletion of the whole article or deletion of only the references to the "single national oversight body".
  - **Addition of new tasks** for the oversight body
  - **Art. 86 National reporting obligations:** deletions.

## Cluster 10: Definitions and scope

- **Number of amendments tabled: 366 amendments**
- **General Assessment:** Cluster 10 is one of the most controversial clusters and includes a number of key issues
- **Key issues:**
  - **Art. 1(2) Definition** of public procurement
  - **Art. 4 Thresholds:** most amendments in favour of higher thresholds
  - **Concessions:** clear divergences (either not mentioned in the Directive, or exclusion, or new Chapter on concessions)
  - **General exclusions:** exclusion of postal services, of goods at fixed price, of contracts awarded on the basis of exclusive rights
  - **Specific exclusion** of service contracts: requests for more, including
    - legal services, notaries, lawyers, independent officials

- transactions to raise money or capital
- civil protection and emergency response services
- **Art. 11 public-public cooperation: 'hotspot'**. strong interest in and some divergences on
  - Public public vertical cooperation: private participation, joint control, % of activities carried out for controlling entity
  - Many proposals on the conditions listed for a public-public contract to fall outside the scope of the Directive
  - horizontal cooperation: all elements contested
- **Social and other specific Services:** a few proposals for reintroducing the existing distinction between A and B services.
- **Reciprocity:** clear divergences
  - Two main options: introduction of provisions from the Reciprocity Regulation or re-introduction of former Art. 58 and 59 from Directive 2009/17/EC.

### 3. Timetable and Order of discussions

**Possible set of dates for shadows meetings and issues/compromises to be discussed/decided, with corresponding IMCO meetings:**

Shadows Meetings	IMCO Meetings
<ul style="list-style-type: none"> <li>- <b>13/09</b> (9h30-10h30) - <u>Shadows' meeting</u>: general discussion, timing + methodology</li> <li>- <b>20/09</b> (10h-12h) - <u>Shadows' meeting</u>: clusters 1 and 4</li> <li>- <b>25/09</b> (9h-10h) - in camera <u>IMCO meeting</u>: Discussion on clusters 3, 7, and 8</li> <li>- <b>10/10</b> (9h-10h) - in camera <u>IMCO meeting</u>: Discussion on cluster 2</li> <li>- <b>18/10</b> (13h-15h) - <u>Shadows' meeting</u>: continue cluster 2; start cluster 10</li> <li>- <b>25/10</b> (10h-12h) - <u>Shadows' meeting</u>: clusters 10 and start cluster 9;</li> <li>- <b>7/11</b> and / or <b>13/11</b> (tbc) - <u>Shadows' meeting</u>: clusters 5 and 6 and remaining issues</li> <li>- <b>21/11</b> (tbc) - <u>Shadows' meeting</u>: Remaining issues</li> </ul>	<ul style="list-style-type: none"> <li>- <b>18/09</b> (9h-10h30) - <u>IMCO meeting</u>: Discussion on clusters 1 to 5</li> <li>- <b>5/11</b> - <u>IMCO meeting</u>: Discussion on clusters 6 to 10</li> <li>- <b>28/11</b> - <u>IMCO meeting</u>: Consideration of compromise amendments</li> <li>- <b>29/11</b> - <u>IMCO meeting</u>: Vote</li> <li>- <b>10/12</b> - <u>IMCO meeting</u>: Possible date for the vote on Utilities</li> <li>- <b>18/12</b> - <u>IMCO meeting</u>: Possible date for the vote on Utilities</li> </ul>

## Annex - repartition of amendments by clusters

<b>Total number of amendments</b>		<b>1593</b>
<b>Cluster 1: Greater choice of procedures</b>		<b>194</b>
Wider Choice of procedures	Art. 24 (1) choice of procedure, conditions	38
	Art. 24(2) - call for competition	3
Standard procedures	Open procedure Art. 25 - OP	15
	Restricted procedure Art. 26 - RP	20
Competitive procedure with negotiation	Art. 27 - CP with N (NP)	41
Competitive dialogue	Art. 28 -	23
Innovation partnership	Art. 29	12
Use of negotiated procedure without prior publication	Art. 24(3) and Art. 30	37
Possibility for sub-central CAs to call for competition by PIN notice only	Art. 24(2)(b) and Art. 46 - PIN	5
<b>Cluster 2: Strategic use of public procurement</b>		<b>621</b>
<b><i>Green public procurement</i></b>		
Exclusion and selection criteria	Art. 54 -general principles	21
	Art. 55 - exclusion grounds (except Art. 54.2; 55.3(1)(a) - see Cluster 2 Strategic use)	48
	Art. 56 - selection criteria (except Art. 56.3 para (2)- see cluster 5 SMEs) [NOT CWP LIST]	18
Award criteria, notably production process and life-cycle costing	Art. 66 - Contract award criteria	103
	Art. 67 - LCC	37
Contract performance clauses	Art. 70 - Performance clauses	14
Technical specifications	Art. 40 - TS	52
	Annex VIII (Title II)	19
Labels and certification	Art. 41	46
	Art. 42	7
Exclusions for violation of social and environmental obligations	Art. 54.2	10
	Art. 55.3	38
	Art. 69.4	8
	Annex XI	5



<b><i>Social criteria in public procurement</i></b>		
Allow social criteria related to production process	Rec 41 [Art. 66: s.o. green criteria]	-
Reserved contracts (sheltered workshops)	Art. 17	3
Social services:	Rec 11	5
	Art. 4(1)(d)	12
	Art. 74-76	60
	Annex XVI (Title III)	10
Exclusions for violation of obligations relating to taxes, environmental protection, employment protection provisions and working conditions (see above "Green PP"))	Art. 54.2	12
	Art. 55.3	38
	Art. 69.4 - abnormally low tenders/State aid	9
	Annex XI [NOT CWP LIST]	10
Sub-contracting (SEE ALSO cluster 5 SME access)	Art. 71 [NOT CWP LIST]	36
<b>Cluster 3: Reducing documentation requirements</b>		<b>41</b>
Exclusion and selection criteria	see cluster 2	
Reliance on capacities of others	Art. 62	1
Means of proof, notably self-declarations and procurement passport	Art. 57	8
eCERTIS online certificate repository	Art. 58	1
European Procurement Passport	Art. 59 and Annex XIII	9
Certificates	Art. 60	4
Quality assurance and environmental standards	Art. 61 and Annexes XII-XIV	11
Lists of approved economic operators	Art. 63	5
Reduction of the number of candidates, tenders and solutions	Art. 64	2
	Art. 65	
<b>Cluster 4: e-procurement</b>		<b>54</b>
Electronic communication	Art. 19 - general principles and Annex IV (Title I)	14
Electronic availability of procurement documents - enhanced use of e-Certis (see cluster 3) - European Procurement Passport	Art. 51 e-access	13
	Art. 58 - eCertis	
	Art. 59 - PPP	
Dynamic Purchasing System (DPS)	Art. 32	13
Electronic catalogues	Art. 34	2
Electronic auctions	Art. 33 and Annex VII	11
Electronic signatures	Art. 19(5)(d) and Annex X	-
Empowerment for COM to adopt interoperability standards	Art. 19.3	1

<b>Cluster 5: SME access</b>		<b>70</b>
Sub-division into lots	Art. 44 (Title II) - lots	31
Direct payment for sub-contractors (sub-contracting) and Control of sub-contracting	Art. 71 (Title II) - Direct payments	35
Turnover cap	Art. 56.3 para (2)	4
<b>Cluster 6: Aggregation of demand</b>		<b>52</b>
Framework Agreements	Art. 31	17
Dynamic Purchasing System (DPS) (SEE Cluster 4)	Art. 32	13
Central and ancillary purchasing systems (CPBs)	Art. 35, Art. 36, Art. 37	10
Joint procurement	Art. 38	12
<b>Cluster 7: Other procedural requirements</b>		<b>28</b>
Publication/transparency and time-limits	Art. 45 to 50 and Art 52-53 and Annexes VI, IX and X	10
Variants	Art. 43	14
Design contests	Art 77 to 82 and Title 3	4
<b>Cluster 8: Sound procedures</b>		<b>166</b>
General rules	Art. 15, Art. 16, Art. 18	26
Conflicts of interest (Safeguards against undue influence or advantages)	Art. 21	20
Illicit conduct	Art. 22	3
Preliminary market consultation/ prior involvement of candidates and tenderers	Art. 39	9
Impediments to award	Art. 68	4
Abnormally low tenders	Art. 69 (except 69(4) 2nd sub-para - see Strategic use) (Title II)	62
Modification during contract execution	Art. 72 (	29
Termination of contracts	Art. 73 (	13
<b>Cluster 9: Governance</b>		<b>119</b>
Enforcement and oversight	Art 83-84	60
Register of non compliance		3
Individual reports	Art. 85	18
National reporting	Art. 86	19
Assistance to contracting authorities and businesses	Art. 87	13
Administrative cooperation	Art. 88	6

<b>Cluster 10: Definitions and scope</b>		<b>366</b>
Concept of procurement	Art 1 and 1a	23
Definitions	Art 2 , Annexes I and II	36
Mixed procurement	Art. 3	5
Thresholds	Art. 4-5-6	29
Exclusions and specific situations, including public-public cooperation	Art. 7-8-8a-9-10-11-12-13-14	179
Nomenclatures	Art. 20	-
International compliance	Art. 23 and Annex V	1
Delegated powers, implementing powers and final provisions	Art 91 to 96 and Annex XVII	5
Social and other specific Services	Art 1(2a), Art 4(1)(d) - threshold for services listed in Annex XVI, Art 6a new (Annexes XVIA/XVIB), Art 48(1), Articles 74 to 76, Annex XVI	70
Reciprocity (tenders comprising products from third country)	Rec 9a and 9b, Art 2(23a), new Chapter IIA (Art 22a to 22c) Old Art. 58 and 59 (Art. 69a)	12
Concessions	Art. 2 (new definitions), Art. 7A and 10c (new Article) and Title 3a and 3b -new titles on works and services concessions)	6

