



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 6.5.2002
COM(2002) 236 final

2000/0115 (COD)

Amended proposal for a

EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE

**concerning the coordination of procedures for the award of public supply contracts,
public service contracts and public works contracts**

(presented by the Commission pursuant to Article 250 (2) of the EC Treaty)

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1. BACKGROUND

Proposals submitted to the Council and the European Parliament

(COM(2000) 275 final 2000/0115 (COD))

pursuant to Article 175(1) of the Treaty: 12 July 2000

Economic and Social Committee Opinion: 26 April 2001

Committee of the Regions Opinion: 13 December 2000

Opinion of the European Parliament at first reading: 17 January 2002

2. OBJECTIVE OF THE COMMISSION PROPOSAL

The proposal is aimed at recasting Community legislation on public procurement, the objective being to create a genuine internal European market in this area. This legislation is intended not to replace national law but to ensure compliance with the principles of equality of treatment, non-discrimination and transparency in the award of public contracts in all Member States.

This proposal, which follows on from the debate launched by the Green Paper on Public Procurement, pursues a threefold objective of modernising, simplifying and rendering more flexible the existing legal framework in this field: modernisation is required in order to take account of new technologies and changes in the economic environment; the purpose of simplification is to make the current texts more easily comprehensible for users, so that contracts are awarded in complete conformity with the standards and principles governing this area and the companies involved are in a better position to know their rights; and procedures need to be rendered more flexible in order to meet the needs of public purchasers and economic operators.

Moreover, the recasting of the three Directives in force will make available to economic operators, contracting authorities and European citizens a single, clear and transparent text.

3. COMMISSION OPINION ON PARLIAMENT'S AMENDMENTS

The Commission has accepted, either in their entirety, in part, in spirit or with reformulation, 63 of the 103 amendments adopted by the European Parliament.

3.1 Amendments accepted by the Commission in their entirety or reformulated for purely formal reasons (Amendments 1, 141, 4, 13, 125, 17, 50, 85, 88, 97 and 112)

Amendment 1 proposes a new recital which recognises that the participation of a body governed by public law as a tenderer in a procedure for the award of a public contract is liable to distort competition; it therefore provides that Member States may lay down rules relating to the methods to be used for calculating the price/real cost of a tender.

Amendment 141 introduces a new recital stating that nothing in this Directive shall prevent any contracting authority from imposing or enforcing measures necessary to protect public morality, public policy, public security or human, animal or plant life or health. The Commission accepts this amendment, while stressing that it needs to be framed in such a way as to reflect the provisions of the Treaty (Article 30): Recital 6: "*Nothing in this Directive shall prevent any contracting authority from imposing or enforcing measures necessary to protect public morality, public policy, public security or human, animal or plant life or health, in particular with a view to sustainable development, provided that these measures are not discriminatory and do not conflict either with the objective of opening up markets in the sector of public contracts or with the Treaty.*"

Amendment 4 introduces a new recital linked to Amendment 40. It aims to clarify, in line with the case law of the European Court of Justice ("Teckal" judgment¹) the conditions under which a contracting authority may award a public contract directly to an entity which is formally a separate legal entity but over which it exercises a control analogous to that which it exercises over its own departments.

Amendment 13 introduces a new recital which stresses the obligation on the part of Member States to adopt the necessary measures for the enforcement and operation of the Directive and to examine whether it is necessary to create an independent public procurement agency.

Amendment 125 modifies recital 31. It adds engineers' services to the examples of services whose remuneration is governed by national laws which must not be affected.

Amendment 17 introduces a new recital asking the Commission to examine the possibility of adopting a proposal for a Directive to regulate the concessions sector and project financing.

This amendment is accepted with slight changes for institutional reasons: "(46) *The Commission is asked to examine the possibility of reinforcing legal certainty in the concessions sector and in public/private partnerships, and to adopt a legislative proposal if it feels this is necessary.*"

Amendment 50 modifies Article 27 - title and paragraph 1 - so as to ensure that tenderers have the necessary information on environmental, tax and social legislation in force at the place of performance and to oblige contracting authorities to state in the contract documents the body or bodies from which the appropriate information on this legislation can be obtained.

Amendment 85 modifies Article 46(2)(c) - regarding the possibility of excluding a candidate or a tenderer for having committed an offence concerning professional conduct - to the effect that exclusion will only occur after a final judgment pursuant to the law of the Member State in question.

¹ Judgment of 18 November 1999 in case C-107/98, [1999] ECR I-8121.

Amendment 88 deletes from point h) of Article 46(2) the "possibility" of excluding a candidate or a tenderer who has been convicted by a judgment of fraud or any other illegal activity within the meaning of Article 280 of the Treaty, other than those referred to in the first paragraph (mandatory exclusion).

Amendment 97 introduces a new Article 50a which provides that, should a contracting authority require the production of a certificate relating to an environmental management system, it must accept EMAS certificates, certificates attesting to compliance with international standards, as well as any other equivalent means of proof. This amendment must be read in conjunction with Amendment 93 relating to technical capacity; in some appropriate cases - e.g. where the ability to comply with an eco-management scheme during the realisation of a public work is concerned - an environmental management system may attest to technical capacity. For such cases, it is appropriate to make provision for the possible means of proof and for the recognition of equivalence so as to ensure that contracts are not reserved for holders of certain certificates only. This amendment broadly takes over the provisions of Article 50 concerning quality assurance certificates.

Amendment 112 introduces the additional requirement in Annex VII A, Contract notices, point 1, indent (a) - concerning the name and address of the service from which contract documents and additional documents can be requested - to include the telephone number, fax number and e-mail address.

3.2 **Amendments accepted by the Commission with reformulation, in part or in substance (Amendments 2, 5, 168, 126 - 172, 21, 175, 7, 142, 171 - 145, 9, 137, 138, 45, 46, 47 - 123, 109, 10, 127, 11, 51, 15, 100, 170, 23, 54, 65, 24, 30, 93, 95, 31, 147, 34, 35, 36, 121, 38, 40, 5, 150, 70, 74, 77 - 132, 80, 86, 87, 89, 153, 104, 110, 113, 114)**

Amendment 2 introduces a new recital designed to emphasise the integration of environmental policy into public procurement policy. Article 6 stipulates that environmental protection requirements must be integrated into other policies: this means that the respective policies on the environment and public contracts must be reconciled. The Commission therefore considers that public purchasers must be enabled to procure "green" products/services at the best value for money. It therefore takes up the amendment and reformulates it as follows:

Recital 5: "In accordance with Article 6 of the Treaty establishing the European Community, environmental requirements are integrated into the definition and implementation of the policies and activities of the Community referred to in Article 3 of that Treaty, in particular with a view to promoting sustainable development.

This Directive therefore clarifies how the contracting authorities may contribute towards the protection of the environment and the promotion of sustainable development, whilst ensuring that the contracting authorities are in a position to obtain the best value for money when awarding their contracts.

*

Amendment 5 is linked to **Amendments 168, 126 - 172 and 21**: in essence, these amendments introduce provisions enabling contracting authorities to make their purchases via purchasing groups.

Amendment 5 provides for a new recital explaining the need to establish a Community definition of purchasing groups and to define the procedures applicable to them and the manner in which contracting authorities may have recourse to purchasing groups, provided that the latter are themselves contracting authorities.

Amendment 168 introduces a new recital aimed at justifying purchases of supplies and services from or through purchasing groups provided that these groups have complied with the procedural rules of the Directive. The Commission takes the view that recourse to such purchasing groups must also be possible for works.

The Commission accepts the amendments, modified and combined in a single recital, as follows: "*(13) Certain techniques for centralising purchases have been developed in Member States. Several contracting authorities are charged with the task of making purchases or awarding public contracts on behalf of other contracting authorities. Given the scale of the volumes purchased, these techniques make for broader competition and improved efficiency of public procurement. It is necessary, therefore, to establish a Community definition for purchasing groups dedicated to contracting authorities. It is also necessary to define the conditions, subject to observance of the principles of equal treatment, non-discrimination and transparency, under which contracting authorities which acquire works, supplies and/or services from or through a purchasing group can be deemed to have complied with the provisions of this Directive.*"

*

Amendments 126 - 172, 21 and 175 introduce specific provisions governing purchasing groups.

Amendments 126 - 172 includes among contracting authorities within the meaning of the Directive purchasing groups set up by contracting authorities.

Amendment 21 introduces a definition of a purchasing group and stipulates that purchasing groups meeting that definition must be notified to the Commission.

The objective pursued by Amendments 126 - 172 and 21 is legitimate, as purchasing groups contribute towards economies of scale, reinforce competition at European level given the size of the contracts involved and assist local authorities. It is nevertheless necessary to provide for the broadest possible arrangements for the configurations already in place in Member States.

Amendment 175 obliges purchasing groups to comply fully with the Directive and enables contracting authorities to acquire supplies or services directly from a purchasing group or through the intermediary of a third party without subsequent application of the Directive on their part.

The amendment can be accepted as regards the principle concerning recourse to a purchasing group, with this possibility being extended to include works in order to facilitate agreement between the co-legislators.

The Commission therefore takes up the spirit of these amendments by defining a purchasing group and including an article which, in accordance with the principle of subsidiarity, gives Member States the right to use purchasing groups and, where appropriate, to limit such use to certain contracts.

"Article 1

Definitions

1. *For the purpose of this Directive, the definitions set out in paragraphs 2 to 12 shall apply.*

...

7a *A purchasing group is a contracting authority which:*

- *procures supplies and/or services intended for contracting authorities and/or*
- *awards public contracts or concludes framework agreements relating to works, supplies or services intended for contracting authorities."*

"Article 7a

Public contracts awarded and framework agreements concluded by purchasing groups

1. *Member States may provide for the possibility of contracting authorities procuring works, supplies and/or services by having recourse to purchasing groups.*

2 *Contracting authorities which procure works, supplies and/or services by having recourse to a purchasing group in the cases referred to in Article 1(7a), shall be deemed to have complied with the provisions of this Directive provided that the purchasing group has complied with them."*

*

Amendments 7, 142 and 171 - 145 concern mixed "services/works contracts".

Amendment 7 is linked to Amendments 171 - 145. It introduces a new recital stipulating that the choice between awarding a joint contract covering both the design and execution of works or separate contracts is for contracting authorities to make and is not to be prescribed by the Directive. It specifies that the choice made by a contracting authority must be determined by qualitative and economic criteria, and that the award of a joint contract must be duly justified by the contracting authority.

The Commission acknowledges that it is appropriate to state that the free choice made between awarding joint or separate contracts must be based on qualitative and economic criteria. However, it does not share the view that there should be an obligation to justify the choice of a design and execution contract. As such an obligation would in effect apply only in the case of a "joint" contract being opted for, it would actually encourage the award of separate contracts, which would be presumed to be an award method that automatically satisfies the qualitative and economic criteria. This presumption is not accepted; moreover, it contradicts the freedom of choice which is an expression of the subsidiarity principle. Finally, it would not appear appropriate to penalise the award of joint contracts, as joint award makes it easy to reach the trigger level for application of the procedural rules of the Directive by grouping together design services and execution works.

Amendment 142 is linked to Amendments 171 - 145; it introduces a new recital clarifying the distinction between public works contracts and public service contracts (contracts in the real estate management sector including consecutive or complementary works and works contracts providing for the provision of services which are necessary in order to carry out works). This amendment is in line with the case law of the European Court of Justice ("*Gestión Hotelera*" judgment)².

Amendments 171 - 145 modify Article 1 in order to specifically mention mixed works/services and services/works contracts. It explains, in particular, the conditions under which a real estate management service contract that includes works has to be deemed to be a public works contract. It also contains a provision concerning the separate or joint award of contracts for works or services (criteria for choice of award method and obligation to justify joint award) referred to in Amendment 7. The situations in which a contract includes both services and works are settled by applying the criterion of the principal object of the contract as indicated in the Commission's proposal. The amendment also clarifies this rule in the specific case of real estate management services involving works. Its substance would thus be better located in a recital. Moreover, it should be noted that the limitation to "*execution*" works only is not justified.

As a result, the Commission reformulates Amendments 7, 142 and 171 - 145 in a single recital: "(10) *In view of the diversity shown by public works contracts, contracting authorities must be able to award separate or joint contracts for works and design services. It is not the intention of the Directive to prescribe separate or joint award. The decision as to whether to award separate contracts or a joint contract should be based on qualitative and economic criteria which may be laid down by national laws.*

A contract may be deemed to be a public works contract only if its object specifically relates to the performance of the activities referred to in Annex I, although the contract may include other services necessary for the performance of those activities. Public service contracts, particularly in the area of real estate management, may include works in certain cases; however, these works, where they are of an ancillary nature and are thus merely consecutive or complementary to the main object of the contract, cannot justify the categorisation of the contract as a public works contract."

*

Amendments 9 and 137 concern competitive dialogue, while **Amendment 138** relates to a new possibility of exclusive dialogue.

Amendment 9 modifies Recital 18 so as to specify that, in a competitive dialogue, negotiations end once the consultation stage has been completed, without the definitive contract documents (necessarily) having been drawn up.

Amendment 137 is chiefly intended to:

1) make the submission of an outline solution compulsory. Having consulted the groups concerned, the Commission takes the view that an obligation to submit an outline solution would be a source of legislative complications and risks of "cherry picking" (intellectual "theft" against which there could be no protection). As a result, the Commission does not accept this obligation.

² Judgment of 19 April 1994 in case C-331/92, [1994] ECR I-1329.

2) reinforce the confidentiality of data provided by economic operators. In order to facilitate agreement between the co-legislators, contracting authorities should continue to have the possibility of communicating to the other participants the data provided by one participant, with this possibility being reserved solely for cases where the participant concerned has given its consent to communication.

3) limit negotiations during the dialogue phase to aspects other than economic ones. To the extent that the amendment effectively aims to limit the subjects that could be dealt with during the dialogue phase to non-economic aspects only, that part of the amendment is not acceptable. The approach taken by the Commission is that the procedure, if it is to serve a useful purpose, must enable all aspects of the project to be discussed during the dialogue phase.

4) expand the possibilities already provided for or introduce new possibilities for contracting authorities to amend contract specifications, award criteria and their weighting; (concerning this last aspect, the amendment is inconsistent, explicitly referring both to weighting and a straightforward order of importance of these criteria). The Commission's initial proposal provided for the possibility of amending the award criteria in the event of their no longer being appropriate for the solution adopted in the definitive contract documents. However, it is recognised that, in order to take widespread fears of "cherry picking" into account and to facilitate adoption by the co-legislators, it is necessary to abandon the idea that the contract documents could be definitively established at the end of the dialogue phase, possibly on the basis of a mix of several solutions. Therefore, the possibility of amending the award criteria during the course of the procedure would create serious risks of manipulation.

5) introduce an obligatory monetary payment to participants (not exceeding in the aggregate 15% of the estimated value of the contract). The principle of an obligatory monetary payment to participants may be accepted, especially as the costs linked to the conduct of a dialogue may lead contracting authorities to reserve this new procedure for particularly complex contracts. By contrast, it is not appropriate, for reasons of subsidiarity, to law down the amounts to be paid.

Amendment 138 introduces a new Article 30a providing, in the case of contracts "whose objective is the creation of a public-private partnership", that the contracting authority may conduct an "exclusive dialogue" with the tenderer that has submitted the most economically advantageous tender, provided that this dialogue does not substantially alter fundamental aspects of the tender or distort competition. Although ambiguous on this point, the amendment would appear to introduce this possibility irrespective of the award procedure chosen.

If part of the amendment relates to all procedures and not just to the final phase of a competitive dialogue, it is not acceptable. The new competitive-dialogue procedure was introduced precisely to take into account, amongst other things, flexibility requirements, which may arise in connection with projects involving the creation of public-private partnerships.

By contrast, the idea underlying this amendment, namely that it may prove necessary to clarify certain aspects of the tender identified as being the most economically advantageous one or to confirm commitments featuring in it, can be accepted, provided there are appropriate safeguards, ensuring in particular that this will not have the effect of altering fundamental aspects of the tender or of the contract as put up for tender, falsifying competition or result in discrimination. It is also appropriate to ensure that clarifications do not involve any tenderer other than the one who submitted the most economically advantageous tender. To this extent, the idea of the amendment can be accepted, using formulations in line with recital (18) and Article 30 itself.

The Commission takes into account Amendments 9, 137 and 138 by reformulating them as follows:

Recital: *"(27) Contracting authorities carrying out particularly complex projects may find it objectively impossible to define the tools likely to meet their needs or assess what the contract can offer in terms of technical or financial/legal solutions, without their being open to criticism in this regard. This situation may arise in particular in the setting-up of major integrated transport infrastructures, of major computer networks or of projects involving complex and structured financing, whose legal and financial package cannot be stipulated in advance. Inasmuch as recourse to open or restricted procedures would not enable such contracts to be awarded, a flexible procedure needs to be provided for which safeguards both competition between economic operators and the need on the part of contracting authorities to discuss all the aspects of the contract with each candidate. However, this procedure must not be used in such a way as to restrict or falsify competition, in particular by altering fundamental elements of the tender or imposing on the selected tenderer substantial new elements, or by involving any tenderer other than the one who has submitted the most economically advantageous bid."*

"Article 1

Definitions

1. For the purpose of this Directive, the definitions set out in paragraphs 2 to 12 shall apply.

8....

The "competitive dialogue" is a procedure in which any economic operator may ask to participate and in which the contracting authority conducts a dialogue with the candidates invited to this procedure, with a view to developing one or more solutions likely to meet its requirements and on the basis of which the selected candidates are invited to submit a tender."

... »

" Article 30

Competitive dialogue

1. *Member States may provide that a contracting authority which believes that recourse to the open or restricted procedure would not enable a contract to be awarded may have recourse to a competitive dialogue in accordance with the provisions of this article.*

a) *where it is objectively unable to define, in accordance with Article 24(3)(b), (c) or (d), the technical means likely to meet its needs and/or*

b) *where it is objectively unable to establish the legal and/or financial package for a project.*

The public contract is to be awarded solely on the basis of the award criterion of the most economically advantageous tender.

2. *Contracting authorities shall publish a contract notice setting out their needs and requirements, which they shall define either in the same notice and/or in a descriptive document.*
3. *Contracting authorities shall open a dialogue with the candidates selected in accordance with the relevant provisions of Articles 43a to 52, the objective being to identify and define the means likely best to meet their needs. In the course of this dialogue, they may discuss all aspects of the contract with the selected candidates.*

During the course of the dialogue, contracting authorities must ensure equality of treatment for all tenderers. In particular, they shall not provide, in a discriminatory manner, information that is likely to place certain candidates at an advantage over others.

Contracting authorities may not disclose to the other participants the solutions proposed or any other confidential information given by a candidate participating in the dialogue without the latter's consent.

4. *Contracting authorities may arrange for the procedure to take place in successive phases so as to reduce the number of solutions to be discussed during the dialogue phase, applying the award criteria set out in the contract notice or the descriptive document. This option shall be pointed out in the contract notice or in the descriptive document.*
5. *The contracting authority shall continue the dialogue until such time as it can identify the solution or solutions, after having compared them if necessary, which is/are likely to meet its needs.*
6. *After announcing the end of the dialogue and informing the participants thereof, contracting authorities shall invite them to submit their final tender on the basis of the solution or solutions presented and specified in the course of the dialogue. These tenders must comprise all the elements required and necessary for the implementation of the project.*

At the request of the contracting authority, these tenders may be clarified and explained. However, these explanations, clarifications or items of supplementary information shall not have the effect of altering the fundamental elements of the tender or of the invitation to tender, the variation of which is liable to falsify competition or have a discriminatory effect.

7. *Contracting authorities shall assess tenders on the basis of the criteria established in the contract notice and shall select the most economically advantageous tender in accordance with Article 53.*

At the request of the contracting authority, the tenderer identified as having submitted the most economically advantageous tender may have to clarify aspects of its tender or confirm commitments featuring therein, provided that that this will not have the effect of altering fundamental elements of the tender or of the invitation to tender, of falsifying competition or of leading to discrimination.

8. *The contracting authorities shall specify prices and payments to the participants in the dialogue.*

*

Amendments 45, 46, 47 - 123 and 109 relate to Article 24 concerning the technical specifications to be used for defining works, supplies and/or services sought by the contracting authority.

Amendment 45 introduces a reference to European eco-labels as being an obligatory reference. This cannot be accepted, as Community policy on eco-labels does not introduce a hierarchy between European, plurinational and national eco-labels.

Moreover, it provides that technical specifications may be formulated in terms of requirements with regard to the environmental impact of the product throughout its lifetime. The Commission shares this approach.

On the other hand, it introduces a new definition, namely the "equivalent standard", at a place where, on the contrary, a tender ensuring an equivalent solution is what is meant.

Amendment 46 modifies Article 24 in order to clarify that a contracting authority may not reject a tender where the tenderer has proved that it satisfies the requirements of the contract in an equivalent manner, to ensure the widest range of means of proof, and to guarantee that the tenderer is given the necessary information on the non-conformity of its tender. This last point is taken into account in general terms in Article 41(2).

Amendments 47 - 123 are aimed at avoiding discrimination through specifications referring to specific producers, suppliers or operators.

Amendment 109 introduces into the definition of technical specifications referred to in Annex VI environmental performance/compatibility and production methods or processes.

This part of the amendment clarifies the text in line with the Commission Communication³ on public contracts and the environment and is thus acceptable with reformulation.

Environmental performance, by contrast, is not a specification as such; however, it may give rise to the definition of technical specifications in terms of environmental performance. The same applies for environmental compatibility.

It also brings in design for all requirements, including accessibility for disabled people.

The Commission takes up Amendments 45, 46, 47 - 123 and 109 in recital 25 (ex 17), Article 24, Article 41 (restructured) and Annex VI, reformulated as follows:

Recital: "(25) The technical specifications drawn up by public purchasers need to allow public procurement to be opened up to competition. To this end, it must be possible to submit bids which reflect the diversity of technical solutions. Accordingly, it must be possible to draw up the technical specifications in terms of functional performance and requirements, and, where reference is made to the European standard or, in the absence thereof, to the national stan-

³ "Interpretative communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement", OJ C 333, 28 November 2001, pp. 13 - 26.

dard, tenders based on other equivalent arrangements must be taken into account by the contracting authorities. To demonstrate equivalence, tenderers should be permitted to use any form of evidence. The contracting authority must be able to justify any decision drawing the conclusion of non-equivalence.

Contracting authorities wishing to define environmental requirements in the technical specifications of a particular contract may prescribe specific environmental characteristics and/or effects of groups of products or services. They can, but are not obliged to, use the detailed specifications, or parts thereof which are suitable, to specify the supplies or services sought, as defined by eco-labels such as the European eco-label, the (pluri)national eco-label or any other eco-label if the requirements for the label are drawn up on the basis of scientific information and adopted using a procedure in which all stakeholders, such as government bodies, consumers, manufacturers, retail and environmental organisations can participate, and providing that the label is accessible to all interested parties."

" Article 24

Technical specifications

- 1. The technical specifications as defined in point 1 of Annex VI shall be set out in the contract documentation, such as contract notices, contract documents or additional documents.*
- 2. Technical specifications shall afford equal access for tenderers and not have the effect of creating unjustified obstacles to the opening of public procurement to competition.*
- 3. Without prejudice to legally binding technical rules, insofar as they are compatible with Community law, the technical specifications must be formulated:*
 - a) by referring to specifications defined in Annex VI and, by order of preference, to national standards implementing European standards, European technical approvals, common technical specifications, international standards, other technical reference material produced by European standardisation bodies or, where these do not exist, national standards, national technical approvals or national technical specifications relating to design and method of calculation and execution of works and use of material. Each reference shall be accompanied by the words "or equivalent".*
 - b) or in terms either of performance or of functional requirements; these may include environmental characteristics. They shall, however, be sufficiently precise to allow tenderers to determine the subject-matter of the contract and to allow contracting authorities to award the contract.*
 - c) or in terms of performance or functional requirements as referred to in point (b), referring as a means of presumption of conformity with these requirements or performance capabilities to the specifications cited in point a);*
 - d) or by referring to the specifications in point (a) for certain characteristics, and to the performance capabilities or functional requirements in point (b) for other characteristics.*

4. *Where contracting authorities avail themselves of the possibility of referring to the specifications referred to in paragraph 3(a), they may not reject a bid on the grounds that the products and services offered are not in conformity with the specifications to which they have made reference, provided that the tenderer proves in its tender to the satisfaction of the contracting authority, by any appropriate means, that the solutions it proposes meet the requirements defined by the technical specifications in an equivalent fashion.*

An appropriate means may be constituted by a technical dossier of the manufacturer or a test report from a recognised body.

5. *Where a contracting authority uses the option provided in the second subparagraph of paragraph 3 to prescribe in terms of performance, it may not reject a tender for products, services or works which comply with a national standard transposing a European standard, with a European technical approval, a common technical specification, an international standard or a technical reference produced by a European standardisation body if these specifications address the same functional and performance requirements which it required.*

In its tender, the tenderer must prove to the satisfaction of the contracting authority, by any appropriate means, that the products, services and works in compliance with the standard meets the functional or performance requirements of the contracting authority.

An appropriate means may be constituted by a technical dossier of the manufacturer or a test report from a recognised body.

- 5a *Where a contracting authority prescribes environmental characteristics in terms of performance or functional requirements, such as those referred to in paragraph 3(b), it may use detailed specifications or, if necessary, parts thereof, as defined by eco-labels such as the European eco-label, the (pluri)national eco-label or any other eco-label, provided they are suitable for defining the characteristics of the supplies or services forming the object of the contract and that the requirements for the label are drawn up on the basis of scientific information, that the eco-labels are adopted using a procedure in which all stakeholders, such as government bodies, consumers, manufacturers, retail and environmental organisations can take part, and that they are accessible to all interested parties.*

Contracting authorities may indicate that products or services carrying the eco-label are presumed to satisfy the technical specifications defined in the contract documents. They must accept any other appropriate means of proof, such as a technical dossier of the manufacturer or a test report from a recognised body.

6. *"Recognised bodies" within the meaning of the present article shall be understood to mean test and calibration laboratories, and inspection and certification bodies which are in compliance with the applicable European standards.*

Contracting authorities shall accept certificates issued by bodies recognised in other Member States.

7. *Unless justified by the object of the contract, the technical specifications shall not refer to a specific make or source, or to a particular process, or to a trade mark,*

patent, type or specific origin or production which would have the effect of favouring or eliminating certain enterprises or certain products. Such reference shall be permitted on an exceptional basis, where a sufficiently precise and intelligible description of the subject-matter of the contract pursuant to paragraphs 3 and 4 is not possible; such reference shall be accompanied by the words "or equivalent".

" Article 41

Informing candidates and tenderers

1. *The contracting authorities shall as soon as possible inform candidates and tenderers of decisions reached concerning the conclusion of a framework agreement or the award of the contract, including the grounds for any decision not to conclude a framework agreement or not to award a contract for which there has been a call for competition or to recommence the procedure, and shall do so in writing if requested.*
2. *The contracting authority shall, upon request, inform any unsuccessful candidate or tenderer as soon as possible of the reasons for the rejection of his application or his tender, and shall inform any tenderer who has made an admissible tender of the characteristics and relative advantages of the tender selected, as well as the name of the successful tenderer or the parties to the framework agreement. Under no circumstances may the time taken to provide such information exceed fifteen days, counting from receipt of the written request.*

However, contracting authorities may decide to withhold certain information on the contract award or conclusion of a framework agreement, referred to in the preceding subparagraph, where release of such information would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of economic operators, public or private, or might prejudice fair competition between them.

"ANNEX VI

DEFINITION OF CERTAIN TECHNICAL SPECIFICATIONS

For the purposes of this Directive:

1.
 - a) *"technical specification", in the case of public service or supply contracts, means a specification in a document defining the required characteristics of a product, such as quality levels, environmental performance, design for all requirements (including accessibility for disabled people), 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 methods and procedures, as well as conformity assessments procedures.*
 - b) *"technical specifications", in the case of public works contracts, means the totality of the technical prescriptions contained in particular in the tender documents, defining the characteristics required of a material, product or supply, which permits them to be described in a manner such that they fulfil the use for which they are intended by the contracting authority. These characteristics include environmental performance levels, design for all requirements (including*

accessibility for disabled people) and conformity assessment levels, use of the product, safety or dimensions, including procedures relating to quality assurance, terminology, symbols, testing and test methods, packaging, marking and labelling and production procedures and methods. They also include 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;

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:*
 - *international standard: a standard adopted by an international standards organisation and made available to the general public,*
 - *European standard: a standard adopted by a European standards organisation and made available to the general public,*
 - *national standard: a standard adopted by a national standards organisation and made available to the general public;*
3. *"European technical approval" means a favourable technical assessment of the fitness for use of a product for a particular purpose, based on fulfilment of the essential requirements for building works, by means of the inherent characteristics of the product and the defined conditions of application and use. A European technical approval is issued by an approval body designated for this purpose by the Member State;*
4. *"common technical specification" means a technical specification drawn up according to a procedure recognised by the Member States and published in the Official Journal of the European Communities;*
5. *"technical reference" means any product produced by European standardisation bodies, other than official standards, according to procedures adapted in line with market developments."*

*

Amendments 10 and 127 relate to contract performance conditions.

Amendment 10 comprises changes to recital 22 designed to clarify further that contract performance conditions must not constitute discrimination and that they may be intended to achieve, amongst other things, specific environmental goals.

The first part of the amendment modifies the wording proposed by the Commission ("*provided that they are not directly or indirectly discriminatory*"). The Commission's wording is based on the case law of the European Court of Justice ("*Beentjes*" judgment⁴) and therefore should not be amended, especially as it does not have any restrictive effect on taking into ac-

⁴ Judgment of 20 September 1988 in case C-31/87, [1988] ECR p. 4635.

count the environmental considerations referred to in the second part of the amendment, the principle of which is fully accepted.

Amendment 127 aims to further reinforce compliance with the principles of equal treatment, non-discrimination and transparency, where contracting authorities impose particular conditions concerning performance of public contracts. This amendment actually clarifies in a specific provision what is already contained in the generally valid provision set out in Article 2.

The Commission therefore incorporates Amendments 10 and 127 in the following texts, which also take into account the appropriateness of facilitating agreement between the co-legislators.

Recital: *"(29) Contract performance conditions are compatible with the Directive provided that they are not directly or indirectly discriminatory and provided that they are indicated in the contract notice and in the contract documents. They may be aimed at promoting on-the-job training and the employment of people who are facing particular difficulties in finding work, at combating unemployment or at protecting the environment, and may give rise to obligations - applicable to contract performance - to, in particular, recruit the long-term unemployed or implement training schemes for the unemployed and young persons, or to comply with the substance of the provisions of the ILO core conventions, in the event that these have not been implemented in national law, to recruit a number of handicapped persons above that required under national legislation."*

" Article 26a

Contract performance conditions

Contracting authorities may impose particular conditions concerning performance of the contract, provided that those conditions are compatible with Community law and provided that they are stated in the contract notice or in the contract documents. Contract performance conditions may relate in particular to social and environmental considerations."

*

Amendments 11 and 51 relate to compliance with social protection provisions,

Amendment 11 introduces a new recital serving as a reminder of the applicability of the Directive on the posting of workers (96/71/EC), which sets out the minimum labour protection conditions which must be observed in which services are provided by such posted workers. This amendment is akin to what the Commission itself reiterated in its communication of 15 October 2001 on the social aspect of public contracts⁵. It contributes to the information available to the tenders and thus creates added value.

Amendment 51 obliges tenderers to comply with social legislation, including collective as well as individual rights, judicial decisions and collective decisions which are deemed to be

⁵ "Interpretative communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement", OJ C 333, 28 November 2001, pp. 27 – 41.

generally binding. These obligations must not prejudice the application of more favourable employment protections rules and working conditions.

It is indisputable that companies tendering for public contracts must comply with the social legislation applicable in the country of establishment and, where appropriate, at the place where a service is rendered (cf. Commission communication of 15 October 2001 on the social aspects of public contracts). This reminder of applicable legislation could be the subject of a recital; it should not feature in the substantive provisions, however, as the objective of the public contracts Directives is to coordinate procedures for the award of public contracts and not to impose on companies specific obligations concerning social or other legislation.

The Commission takes the view that the concerns underlying this amendment are sufficiently taken into account by recital 29 mentioned above and by recital 30 below.

As a result, the Commission incorporates Amendments 11 and 51 by adding the following recital: "(30) *The laws, regulations and collective agreements in force at both national and Community level in the social and employment protection fields shall apply during the performance of a public contract provided that such rules, as well as their application, are in conformity with Community law. In cross-border situations, where workers from one Member State provide services in another Member State in respect of a public procurement contract, European Parliament and Council Directive 96/71/EC of 6 December 1996 concerning the posting of workers in the framework of a transnational provision of services⁶ sets out conditions which should be observed in the host country in respect of such posted workers. Non-observance of these obligations may be considered, depending on the national law applicable, to be grave misconduct or an offence concerning the professional conduct of the economic operator concerned.*"

*

Amendments 15 and 100 relate to abnormally low tenders.

Amendment 15, linked to **Amendment 100**, introduces a new recital 31a specifying that contracting authorities may reject tenders which are abnormally low owing to non-compliance with social legislation. As this possibility already exists under current law, it suffices to clarify it in an appropriate way.

Amendment 100 removes in its first part the words specifying that, to be rejected, tenders must be abnormally low in relation to the goods, works or services. The removal of the words "in relation to the goods, works or services", which are contained in the Directives in force, would eliminate a key element of the provision. Consequently, this part of the amendment cannot be accepted.

The second part of Amendment 100 adds to the list of explanations (of the apparently too low price) which have to be taken into account by the contracting authority in order to determine whether a tender is abnormally low the fulfilment of obligations relating to health and safety at work and working conditions by the tenderer and subcontractors in performance of the contract, including, in the case of supply of products and services originating from third countries, compliance during production with the international standards referred to in an Annex IXb proposed by Amendment 116.

⁶ OJ L 18, 21.01.1997, pp. 1 - 6

Contracting authorities may be interested in verifying that the price is not too low on account of the non-application of labour law; to this end, the Commission takes up this amendment by clarifying in the text that the list of explanations is not exhaustive.

As regards the internationally agreed core labour standards, it should be noted that compliance with these standards is not the object of the "public contracts" directive. Where these standards have been transposed into national law, compliance with them can be verified when selecting candidates or tenderers.

The Commission incorporates Amendments 15 and 100 as follows:

"Article 54

Abnormally low tenders

1. *If, for a given contract, tenders appear to be abnormally low in relation to the goods, works or services, the contracting authority shall, before it may reject those tenders, request in writing details of the constituent elements of the tender which it considers relevant.*

Those details may relate in particular to:

- a) *the economics of the manufacturing process, of the services provided and of the construction method;*
 - b) *the technical solutions chosen and/or the 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;*
 - ca) *compliance with the provisions on health and safety at work and working conditions in force at the place of performance.*
 - d) *the possibility of the tenderer obtaining State aid.*
2. *The contracting authority shall verify those constituent elements by consulting the tenderer, taking account of the evidence supplied.*
 3. *Where a contracting authority establishes that a tender is abnormally low on the grounds that the tenderer has obtained a State aid, the tender can be rejected on such grounds alone only after consultation with the tenderer where the latter is unable to prove, within an adequate timeframe fixed by the contracting authority, that the aid in question was lawfully granted. Where the contracting authority rejects a tender in these circumstances, it shall inform the Commission of that fact.*

*

Amendment 170 introduces a new recital 33 a) which provides for the mandatory exclusion of tenderers found guilty of the offences of participation in a criminal organisation, fraud and corruption, as well as of violations of environmental law and of non-compliance with social

legislation. It also states that any conviction relating to unlawful agreements should be taken into account, and that a conviction in respect of grave professional misconduct would also justify exclusion.

This amendment makes it possible to justify by way of a recital the cases referred to in Article 46(1) (mandatory exclusions) as proposed by the Commission; however, it adds other elements which are better accommodated among the cases referred to in Article 46(2), in that they are already implicitly covered by that paragraph.

The Commission incorporates the amendment as follows: "*(39) The award of public contracts to economic operators who have participated in a criminal organisation or who have been found guilty of corruption or of fraud to the detriment of the financial interests of the European Communities, or of money laundering, must be avoided. The exclusion of such economic operators should take place as soon as the contracting authority has knowledge of a final judgment concerning such offences rendered in accordance with national law.*

To this end, contracting authorities may require candidates/tenderers to provide appropriate documentation; where they have any doubts as to the personal situations of these candidates/tenderers, they may seek the cooperation of the competent authorities in the Member State concerned.

If national law contains provisions to this effect, non-compliance with environmental legislation sanctioned by a judgment having the force of res judicata or a conviction or sanction for unlawful agreement in connection with public contracts may be regarded as, respectively, an offence concerning the professional conduct of the economic operator concerned or as grave misconduct."

*

Amendments 23, 54 and 65 relate to electronic auctions.

Amendment 23 provides a definition of a reverse auction for electronic tendering. This definition limits the use of such auctions solely to award procedures which result in the contract being awarded on the basis of the lowest price tendered.

It is appropriate to accept the introduction of such auctions with a view to electronic public purchasing. A definition must therefore be inserted and reformulated in order to bring it more closely into line with the Council's approach, where the scope of the auctions has been widened to include variables other than price.

Amendment 54 proposes the possibility of awarding a contract by electronic auction. However, the introduction of electronic auctions requires a reformulation so as to provide for the possibility of also holding an auction when a contract is awarded to the tenderer submitting the most economically advantageous tender and to introduce procedural guarantees and the necessary techniques.

Amendment 65 proposes the possibility of awarding a contract by electronic auction. However, it organises this possibility as a separate procedure, which runs counter to the aim of simplification and flexibility pursued in the Commission's proposal.

Consequently, the Commission incorporates Amendments 23, 54 and 65, modifying them in the following texts.

"Article 1

Definitions

1. *For the purpose of this Directive, the definitions set out in paragraphs 2 to 12 shall apply.*

...

5b *An "electronic auction" is a repetitive process involving an electronic device for the presentation of new prices, revised downwards, and of new values relating to certain elements of tenders which occurs after the first complete evaluation of the tenders and which enables them to be evaluated automatically.*

.... "

"Article 53a

Use of electronic auctions

1. *Member States may provide for the possibility of contracting authorities using electronic auctions.*

2. *In open, restricted or negotiated procedures in the case referred to in Article 29(1)(a), the contracting authorities may decide that the award of a public contract shall be preceded by an electronic auction when the contract concerns works, supplies or services the specifications of which can be established with sufficient precision. An electronic auction may take place in several successive stages.*

In the same circumstances, an electronic auction may be held on the reopening of competition among the parties to a framework agreement, as provided for in the second indent of the second subparagraph of Article 32(3).

3. *Contracting authorities which decide to hold an electronic auction shall state that fact in the contract notice. The contract documents shall comprise, inter alia, the following information:*

- a) *the elements whose values will be the subject of the electronic auction, provided that these elements are quantifiable in such a way that they can be expressed in figures or percentages;*
- b) *the limits for the values which may be presented, as deriving from the entirety of the specifications of the subject of the contract;*
- c) *the information which will be made available to tenderers in the course of the electronic auction, and when it will be made available to them;*
- d) *the relevant information concerning the electronic auction process;*
- e) *the conditions under which the tenderers will be able to bid and, in particular, the minimum differences which will be required;*

f) *the relevant information concerning the electronic equipment used and the arrangements and technical specifications for connection.*

4. *Before holding an electronic auction, contracting authorities shall evaluate tenders in accordance with the chosen award criterion or criteria.*

An electronic auction shall concern

- a) *prices only, where the contract is awarded on the basis of the lowest price;*
- b) *or prices and/or the new values of the elements of the tenders set out in the contract documents where the contract is awarded to the tenderer submitting the most economically advantageous tender.*

All tenderers who have submitted admissible tenders shall be invited simultaneously by electronic means to submit new prices and/or new values; the invitation shall contain all relevant information concerning individual connection to the electronic equipment being used and shall state the date and time of the start of the electronic auction. The electronic auction may not start sooner than two working days after the date on which invitations are sent out.

5. *When the contract is to be awarded on the basis of the most economically advantageous offer, the invitation shall be accompanied by the outcome of the full evaluation of the recipient's offer, carried out in accordance with the weighting provided for in the first subparagraph of Article 53(2).*

The invitation shall also state the mathematical formula to be used in the electronic auction to determine the automatic rankings on the basis of the new prices and/or new values submitted. That formula shall express the relative weighting of each of the criteria chosen to determine the most economically advantageous offer, as indicated in the contract notice or in the specifications; any brackets shall, however, be reduced to a specified value.

Where variants are authorised, a separate formula shall be provided for each variant.

6. *Throughout each phase of an electronic auction, the contracting authorities shall continually and instantaneously communicate to all tenderers at least sufficient information to enable them to ascertain their relative rankings at any moment; they may also communicate other information concerning other prices submitted, provided that that is stated in the specifications; they may also at any time announce the number of participants in that phase of the auction; in no case, however, may they disclose the identities of the tenderers during any phase of an electronic auction.*

7. *The contracting authorities shall close an electronic auction in one of the following manners:*

- a) *in the invitation to take part in the auction they shall indicate the date and time fixed in advance;*
- b) *when they receive no more new prices which meet the requirements concerning minimum differences or no more new values. In that event, the contracting authorities shall state in the invitation to take part in the auction the time*

which they will allow to elapse after receiving the last bid before they close the electronic auction;

- c) *when the number of phases in the auction, fixed in the invitation to take part, has been completed.*

When the contracting authorities have decided to close an electronic auction in accordance with subparagraph (c), possibly in combination with the arrangements laid down in subparagraph (b), the invitation to take part in the auction shall indicate the timetable for each phase of the auction.

8. *When they have closed an electronic auction the contracting authorities shall award the contract in accordance with Article 53 on the basis of the results of the electronic auction.*
9. *Contracting authorities may not use electronic auctions improperly or in such a way as to restrict or distort competition or as to alter the subject of the contract as put up for tender by publication of the contract notice and defined in the contract documents."*

*

Amendment 24 aims to align the definition of a framework contract with that contained in the "Utilities Directive" 93/38. The definitions contained in the amendment can be accepted, but have to be reformulated so as to enable several contracting authorities to conclude the same framework agreement at the same time.

The amendment is therefore incorporated as follows:

"Article 1

Definitions

1. *For the purpose of this Directive, the definitions set out in paragraphs 2 to 12 shall apply.*

....

5. *A "framework agreement" is an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged.*

.... "

*

Amendments 30, 93 and 95 concern economic and financial capacity, as well as technical and/or professional capability.

Amendment 30 is designed to enable economic operators tendering as a group to bring their collective capacities to bear for selection purposes, as regards suitability to pursue the profes-

sional activity concerned, economic and financial capacity and technical and/or professional capability. However, the length of any professional experience required may not be accumulated. Moreover, the amendment provides that there may be a requirement for minimum criteria to be met by the head of the group.

The amendment is in line with case law. However, it must be possible to apply the requirement "suitability to pursue the professional activity" to each participant in a group, depending on the activity which the participant concerned will be called upon to carry out in the performance of the contract. As regards the minimum criteria which the contracting authority may require the head of the group to meet, it has to be ensured that the word "minimum" is interpreted in such a way as to guarantee to the contracting authority that at least one participant in the group has the skills required for the performance of the contract.

The Commission feels that the spirit of the amendment should be incorporated into Articles 48 and 49, which relate more particularly to economic and financial capacity and technical and/or professional capability.

Amendment 93 adds to the means of proof of technical/professional capability for the provision of services an indication of the technicians or technical bodies responsible for environmental management or the health and safety of workers.

Amendment 95 proposes for works the same addition as Amendment 93 proposes for services.

Amendments **93 and 95** are designed to provide a way of judging the technical capability of an economic operator to deliver services or carry out works which are both environmentally friendly and geared to the health and safety of workers. These aspects are covered either by the description of the service specifications or by the requirement, in other phases in the award procedure, of compliance with social or environmental legislation. However, "environmental management measures" may testify, in appropriate cases, to an "environmental" technical capability.

The Commission therefore incorporates Amendments 30, 93 and 95 into Articles 48 and 49, modified as follows:

"Article 48

Economic and financial standing

1. *Proof of the economic operator's economic and financial standing may, as a general rule, be furnished by one or more of the following references:*
 - a) *appropriate statements from banks or, where appropriate, evidence of relevant professional risk indemnity insurance;*
 - b) *the presentation of balance-sheets or extracts from the balance-sheets, where publication of the balance-sheet is required under the law of the country in which the economic operator is established;*
 - c) *a statement of the undertaking's overall turnover and, where appropriate, of turnover in the area covered by the contract for a maximum of the last three fi-*

nancial years available, depending on the date on which the undertaking was set up or the economic operator started trading, insofar as the references of this turnover are available.

2. *An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing the undertaking of those entities to that effect.*
- 2a *Under the same conditions, a group of economic operators, such as referred to in Article 3, may bring to bear the capacities of the group participants or of other entities.*
3. *Contracting authorities shall specify, in the contract notice or in the invitation to tender, which reference or references mentioned in paragraph 1 they have chosen and which other references must be provided.*
4. *If, for any valid reason, the economic operator is unable to provide the references requested by the contracting authority, he may prove his economic and financial standing by any other document which the contracting authority considers appropriate."*

Recital: "(40) In appropriate cases, where the nature of the works and/or the services justifies the application of environmental management systems during the execution of a public contract, the application of such measures or systems may be required. Irrespective of their registration in accordance with Community instruments (EMAS Regulation), environmental management systems may demonstrate the technical capability of the economic operator to execute the contract. Moreover, a description of the measures applied by the economic operator in order to ensure the same level of environmental protection must be accepted as an alternative means of proof to registered environmental management systems.

"Article 49

Technical and/or professional capability

1. *The technical and/or professional capabilities of the economic operators shall be assessed and examined in accordance with paragraphs 2 and 3.*
2. *Evidence of the economic operators' technical capability may be furnished by one or more of the following means according to the nature, quantity or scale, and purpose of the supplies, services or works:*
 - 1) a) *a list of the works carried out over the past five years, accompanied by certificates of satisfactory execution for the most important works. These certificates shall indicate the value, date and site of the works and shall specify whether they were carried out according to the rules of the trade and properly completed. Where necessary, the competent authority shall submit these certificates to the contracting authority direct;*

- b) *a list of the principal deliveries effected or the main services provided in the past three years, with the sums, dates and recipients, public or private, involved. Evidence of delivery and services provided shall be given:*
- where the recipient was a contracting authority, in the form of certificates issued or countersigned by the competent authority;*
 - where the recipient was a private purchaser, by the purchaser's certification or, failing this, simply by a declaration by the economic operator;*
- 2) *indication of the technicians or technical bodies involved, whether or not belonging directly to the economic operator, especially those responsible for quality control and, in the case of public works contracts, which the contractor can call upon for carrying out the work;*
- 3) *a description of the technical facilities and measures used by the supplier or service provider for ensuring quality, and of his undertaking's study and research facilities;*
- 4) *where the products or services to be provided are complex or, exceptionally, are required for a special purpose, a check carried out by the contracting authority or on its behalf by a competent official body of the country in which the supplier or service provider is established, subject to that body's agreement, on the production capacities of the supplier or the technical capacity of the service provider and, if necessary, on his study and research facilities and quality control measures;*
- 5) *the educational and professional qualifications of the service provider or contractor and/or those of the undertaking's managerial staff and, in particular, those of the person or persons responsible for providing the services or managing the work;*
- 5a) *for public works and service contracts, and in appropriate cases only, the environmental management measures which the economic operator will be able to take during performance of the contract;*
- 6) *a statement of the average annual manpower of the service provider or contractor and the number of managerial staff for the last three years;*
- 7) *a statement of the tools, plant or technical equipment available to the service provider or contractor for carrying out the services;*
- 8) *an indication of the proportion of the contract which the services provider intends possibly to subcontract;*
- 9) *with regard to the products to be supplied:*
- a) *samples, descriptions and/or photographs, the authenticity of which must be certified if the contracting authority so requests;*

- b) *certificates drawn up by official quality control institutes or agencies of recognised competence attesting the conformity of products clearly identified by references to specifications or standards.*
3. *An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary for the execution of the contract, for example, by producing the undertaking of those entities to place the necessary resources at the disposal of the economic operator.*
- 3a *Under the same conditions, a group of economic operators, such as referred to in Article 3, may bring to bear the capacities of the group participants or of other entities.*
4. *In the procedures for awarding public contracts having as their object the provision of services and/or the execution of works, the ability of economic operators to perform this service or to execute this work may be evaluated in particular with regard to their skills, efficiency, experience and reliability.*
5. The contracting authority shall specify, in the notice or in the invitation to tender, which references under paragraph 2 it wishes to receive.

*

Amendment 31 adds to contracting authorities' obligations concerning compliance with confidentiality requirements in relation to data submitted by economic operators, particularly by giving the list of information or documents concerned and by specifying that these obligations must be met both during and after the award procedures.

The listing of the information and documents concerned, as envisaged by the amendment, would appear to be excessive, but can be taken over in the form of examples. As regards the technical solutions proposed in the competitive dialogue, Article 30 already governs this aspect (paragraph 3, third subparagraph). By contrast, the absolute character of the provision "both throughout and after the award procedure" could have the effect of impeding competition: an enterprise which had designed a project within the framework of a service contract would subsequently be the only one able to carry out that project, as the plans could not be divulged to any other candidate or tenderer. What is more, a contradiction could arise between transparency obligations, e.g. vis-à-vis control bodies, and confidentiality obligations.

Taking due account of Amendment 31, which has recognised the right of economic operators to demand that the information which they provide be treated confidentially, in accordance with the applicable national legislation, the Commission amends Article 5 as follows:

"Article 5

Confidentiality

This Directive shall not limit the right of economic operators to require a contracting authority, in accordance with national law, to respect the confidential nature of information which they make available; such information shall include in particular technical or commercial secrets and the tenders."

*

Amendment 147 introduces a new provision recalling that the principles of the Treaty are applicable to all public contracts, including those falling below the Directive's application threshold. As regards the principle of non-discrimination, this provision stipulates that this implies an obligation of transparency and that this transparency consists of ensuring an adequate level of publicity in order to open up public service contracts to competition and ensure impartiality in the award procedures. In order to guarantee compliance with this obligation, Member States would have to refer to the relevant provisions of the Directive.

A reminder of the obligation to comply with the rules of the Treaty when awarding public contracts below the thresholds for application of the Directive is in line with Community law and with the case law of the European Court of Justice. However, it would in no way be justified to limit the transparency principle's implications solely to public service contracts as proposed in the amendment.

Nor would it be appropriate to provide that, in order to implement the obligation of transparency, Member States should refer to the "relevant provisions of this Directive", which would both create legal uncertainty and go beyond compliance with the rules of the Treaty. Those principles do not imply publicity and procedural obligations as specific as those provided for by the Directive, and it would appear neither justified nor appropriate to subject contracts of whatever value to those rules.

The Commission incorporates the amendment by reformulating recital 2 of its proposal as follows: "(2) *The principles of freedom of movement of goods, freedom of establishment and freedom of services, and the principles deriving therefrom, such as the principles of equality of treatment, of which the principle of non-discrimination is no more than a specific expression, mutual recognition, proportionality and transparency, apply to contracts concluded by entities subject to the Treaty or in the name or on behalf of those entities. These principles shall apply whatever the value of the contracts. However, in order to facilitate their application in the case of high-value contracts, it is appropriate to coordinate national award procedures under this Directive. These coordination provisions must be interpreted in accordance both with the aforementioned rules and principles and in conformity with the other Treaty rules.*"

*

Amendments 34 and 35 relate to the methods for estimating the value of service contracts.

Amendment 34, which concerns the calculation of the value of insurance service contracts, is designed to take into account other forms of remuneration comparable with insurance premiums.

This amendment is justified by the type of services concerned and the mode of remuneration.

Amendment 35 specifically regulates the calculation of the value of contracts of indefinite duration with a tacit renewal clause.

The amendment is aimed at avoiding improper fragmentation designed to evade the obligations imposed by the Directive - it thus pursues a laudable aim. However, recourse to competition-reducing renewal clauses should be avoided.

The Commission incorporates Amendments 34 and 35 by means of a reformulation also aimed at simplifying the text by merging the four articles concerning calculation methods - Article 10 for framework agreements, Article 11 for supplies, Article 12 for services and Article 13 for works, as follows:

"Article 10

Methods for calculating the estimated value of public contracts and of framework agreements

1. *The calculation of the estimated value of a public contract shall be based on the total amount net of VAT payable as estimated by the contracting authority. This calculation shall take account of the estimated total amount, including any form of option and any tacit contract renewal clauses.*

Where the contracting authority provides for prizes or payments to candidates or tenderers, it shall take them into account when calculating the estimated value of the contract.

2. *This estimate must be valid at the moment at which the contract notice is sent, as provided for in Article 34(2), or, in cases where such notice is not required, at the moment at which the contracting authority commences the contract awarding procedure.*
3. *No works project or proposed purchase of a certain quantity of supplies and/or services may be subdivided to prevent its coming within the scope of this Directive.*
6. *With regard to public works contracts, calculation of the estimated value must take account of both the cost of the works and the total estimated value of the supplies necessary for executing the works and placed at the contractor's disposal by the contracting authorities.*
7. a) *Where a proposed work or purchase of services may result in contracts being awarded at the same time in the form of separate lots, account must be taken of the total estimated value of all such lots.*

Where the aggregate value of the lots is equal to or exceeds the threshold laid down in Article 8, the Directive shall apply to the awarding of each lot.

However, the contracting authorities may waive such application in respect of lots the estimated value of which net of VAT is less than EUR 80 000 for services or EUR 1 million for works, provided that the aggregate cost of those lots does not exceed 20% of the aggregate value of the lots as a whole.

- b) *Where a proposal for the acquisition of similar supplies may result in contracts being awarded at the same time in the form of separate lots, account must be taken of the total estimated value of all such lots when applying Article 8(a) and (b).*

Where the aggregate value of the lots is equal to or exceeds the threshold laid down in Article 8, the Directive shall apply to the awarding of each lot.

4. *With regard to public supply contracts relating to the leasing, hire, rental or hire purchase of products, the value to be taken as a basis for calculating the estimated contract value shall be as follows:*
- a) *in the case of fixed-term public contracts, if that term is less than or equal to twelve months, the total estimated value for the term of the contract or, if the term of the contract is greater than twelve months, the total value including the estimated residual value;*
 - b) *in the case of public contracts without a fixed term or the term of which cannot be defined, the monthly value multiplied by 48.*
8. *In the case of public supply or service contracts which are regular in nature or which are intended to be renewed within a given period, the calculation of the estimated contract value shall be based on the following:*
- a) *either the actual aggregate value of similar successive contracts awarded over the previous fiscal year or 12 months, adjusted, where possible, for anticipated changes in quantity or value over the 12 months following the initial contract;*
 - b) *or the estimated aggregate value of successive contracts awarded during the 12 months following the first delivery or during the term of the contract, where this is greater than 12 months.*

The choice of method used to calculate the estimated value of a public contract may not be made with the intention of excluding it from the scope of this Directive.

5. *With regard to public service contracts, the value to be taken as a basis for calculating the estimated contract value shall be as follows:*
- a) *for the following types of services:*
 - i) *insurance services: the premium payable and other forms of remuneration;*
 - ii) *banking and other financial services: the fees, commissions, interest and other forms of remuneration;*
 - iii) *design contracts: fees, commission payable and other forms of remuneration;*
 - b) *for service contracts which do not indicate a total price:*
 - i) *in the case of fixed-term contracts, if that term is less than or equal to forty-eight months: the total value for their full term;*
 - ii) *in the case of contracts without a fixed term or with a term greater than forty-eight months: the monthly value multiplied by 48.*
9. *The calculation of the value of a framework agreement shall be based on the maximum estimated value net of VAT of all the contracts envisaged for the total term of the agreement."*

*

Amendment 36 provides for the possibility of Member States reserving contracts for sheltered employment schemes or sheltered workshops.

This amendment can be accepted if modified in order further to clarify that reservation does not imply exemption from the application of all other provisions of the Directive applicable to public contracts.

The Commission incorporates this amendment as follows:

"Article 19b

Reserved Contracts

The Member States may reserve the right to participate in public contract award procedures to sheltered workshops or provide for their execution in the context of sheltered employment programmes where most of the employees concerned are handicapped persons who, by reason of the nature or the seriousness of their disabilities, cannot carry on occupations under normal conditions.

The contract notice shall make reference to this provision."

*

Amendment 121 modifies Article 18(b); its origin lies in the different language versions of the "services" Directive 92/50/EEC and highlights the need for better harmonisation of language versions. This would be useful but would require the reformulation of the text of the amendment for it to be interpreted in conformity with the principle of the freedom of movement of goods.

The Commission incorporates this amendment, modified as follows:

"Article 18

Specific exclusions

This Directive shall not apply to public service contracts for:

...

- b) *the acquisition, development, production or co-production of programmes by broadcasters and contracts for broadcasting time. This exclusion shall not apply to supplies of technical equipment needed for the production, co-production and transmission of these programmes;*

... "

*

Amendment 38 extends to supply and works contracts an exclusion which relates to service contracts only. This extension is unacceptable, as it would call into question the *acquis communautaire* without valid justification by excluding from the scope of the Directive contracts which are currently covered by it.

On the other hand, the amendment clarifies the notion of an "entity which is itself a contracting authority": this part is acceptable, as it does not call the *acquis communautaire* into question; on the contrary, it clarifies the provision.

The Commission therefore incorporates Amendment 38 as follows:

"Article 19

Service contracts awarded on the basis of an exclusive right

This Directive shall not apply to public service contracts awarded by a contracting authority to another contracting authority 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."

*

Amendment 40 introduces a new article designed to exclude from the scope of the Directive contracts concluded by a contracting authority with an entity completely dependent on it, or with a joint venture formed by that contracting authority with other contracting authorities.

This amendment incorporates the spirit of current case law ("Teckel" judgment). Reformulation is necessary so as to take up the elements covered by the judgment, adapt them to the situation of a group of contracting authorities and accommodate them in the appropriate place in the Directive.

"Article 19a

Contracts awarded to entities owned by a contracting authority

1. *This Directive shall not apply to public contracts awarded by a contracting authority to a legally distinct entity owned exclusively by that contracting authority, if:*
 - *the entity concerned does not have autonomous decision-making powers in relation to the contracting authority on account of the latter exercising over that entity a control which is similar to that which it exercises over its own departments;*
 - *the entity carries out all its activities with the contracting authority which owns it.*
2. *Where such an entity is itself a contracting authority, it shall, when meeting its own needs, comply with the contract award rules provided for in this Directive.*

3. *Where such an entity is not a contracting authority, Member States shall take the measures necessary to ensure that, when meeting its own needs, it applies the contract award rules provided for in this Directive."*

*

Amendment 57 is intended to:

- 1) introduce a new possibility of using a negotiated procedure with prior publicity for supply contracts
- 2) and clarify the applicability of the current provision as regards "intellectual" services.

Part 1) of the amendment is unacceptable, as it would call into question the *acquis communautaire* by extending without valid justification the scope for the negotiation of tenders to include supply contracts. It should be emphasised that, by virtue of the possibilities opened up by the definition of the technical specifications in terms of performance and by the variants, contracting authorities can find it impossible to adequately define the supplies they are looking for only in the cases covered by the competitive dialogue procedure.

Part 2) of the amendment, by contrast, is accepted, reformulated as follows:

"Article 29

Cases justifying use of the negotiated procedure with publication of a contract notice

1. *Contracting authorities may award their public contracts by negotiated procedure, after publication of a contract notice, in the following cases:*

....

- c) *(c) in the case of services, inter alia services within category 6 of Annex IIA, and intellectual services such as services involving the design of works, insofar as the nature of the services to be procured is such that contract specifications cannot be established with sufficient precision to permit the award of the contract by selection of the best tender according to the rules governing open or restricted procedures;*

... "

It should be noted that the Commission feels it would be useful to change the "supplies, services and works" into "works, supplies and services", so as to bring it into line with the order used at the time of the adoption of the initial Directives. Annex I A has consequently become Annex II A.

*

Amendment 150 is designed to ensure that contracting authorities are able to use the negotiated procedure without publication of a contract notice in order to award directly to the contractor additional works not included in the initial project which have, through unforeseen circumstances, become necessary for the performance of the work, when such additional works

cannot be technically or economically separated from the main work without major inconvenience or when such works, though separable from the performance of the main work, are strictly necessary for its completion.

This amendment can be accepted in this form:

Article 73a

Cases justifying the direct award of additional contracts to the concessionnaire

Contracting authorities may award directly to the concessionnaire public contracts relating to additional works not included either in the project initially considered for the concession or in the original contract but which have, through unforeseen circumstances, become necessary for the performance of the work described therein, on condition that the award is made to the economic operator performing the service or work:

- *when such additional services or works cannot be technically or economically separated from the original contract without major inconvenience to the contracting authorities,*

or

- *when such services or works, although separable from the performance of the original contract, are strictly necessary for its completion.*

However, the aggregate value of contracts awarded for additional works may not exceed 50% of the amount of the value of the initial work forming the subject of the concession."

*

Amendment 70 is intended to:

- 1) simplify the provisions concerning the time-limits applicable to the various stages of contract award procedures;
- 2) remove the provision shortening the time-limits in the case of the publication of a periodic indicative notice;
- 3) remove any possibility of shortening these time-limits where electronic means are used.

Re point 1): in order to avoid a legal vacuum regarding the time-limits for the receipt of tenders in restricted procedures, it is necessary to reformulate the amendment, acceptance of which means some time-limits being extended by three days.

Re point 2): the amendment is not justified, as it poses a twofold problem: firstly, it constitutes reverse discrimination against European contracting authorities compared with their counterparts in non-EU countries which have acceded to the WTO Agreement on Public Procurement; secondly, it threatens to deprive companies of information concerning the intentions of contracting authorities.

Re point 3): removal of time-limit reduction possibilities which in no way penalise companies; this would run counter to the objective of encouraging purchasers to use electronic means as called for by the Lisbon Council.

The Commission incorporates Amendment 70 as follows:

"Article 37

Time-limits for requests to participate and receipt of tenders

1. *When fixing the time-limits for the receipt of tenders and requests to participate, contracting authorities shall take account in particular of the complexity of the contract and the time required for drawing up tenders, without prejudice to the minimum time limits set by this Article.*
2. *In the case of open procedures, the minimum time-limit for the receipt of tenders is 52 days from the date on which the contract notice was sent.*
3. *In the case of restricted procedures, negotiated procedures with publication of a contract notice referred to in Article 29 and the competitive dialogue*
 - a) *the minimum time-limit for receipt of requests to participate shall be 40 days from the date on which the contract notice was sent;*
 - b) *In the case of restricted procedures, the minimum time-limit for the receipt of tenders shall be 40 days from the date on which the invitation was sent.*
4. *When contracting authorities have published a prior information notice, the minimum time-limit for the receipt of tenders under paragraphs 2 and 3(b) may, as a general rule, be shortened to 36 days, but under no circumstances to less than 22 days.*

The period shall run from the date on which the contract notice was sent in open procedures, and from the date on which the invitation to submit a tender was sent in restricted procedures.

The shortened time-limits referred to in the first subparagraph shall be permitted, provided that the prior information notice has included all the information required in the model contract notice in Annex VII A, insofar as that information is available at the time the notice is published and was sent for publication between no less than 52 days and no more than twelve months before the date on which the contract notice was sent.

5. *Where notices are drawn up and transmitted by electronic means in accordance with the format and procedure for transmission indicated in Annex VIII, paragraph 3, the time-limits for the receipt of tenders referred to in paragraphs 2 and 4 in open procedures, and the time-limit for the receipt of the requests to participate referred to in point (a) of paragraph 3, in restricted and negotiated procedures and the competitive dialogue, may be shortened by seven days.*

6. *The time-limits for receipt of tenders set out in paragraphs 2 and 3(b) above may be reduced by five days where the contracting authority offers free and full direct access by electronic means to the contract documents and any supporting documents from the date of publication of the notice in accordance with Annex VIII, specifying in the text of the notice the Internet address at which this documentation is accessible.*

This reduction may be aggregated with the reduction referred to in paragraph 5.

7. *If, for whatever reason, the specifications and the supporting documents or additional information, although requested in good time, have not been supplied within the time-limits set in Article 38, or where tenders can be drawn up only after a visit to the site or after on-the-spot inspection of the documents supporting the contract documents, the time-limits for the receipt of tenders shall be extended so that all economic operators concerned may be aware of all the information needed to produce a tender.*

8. *In the case of restricted procedures and negotiated procedures with publication of a contract notice referred to in Article 29, where urgency renders impracticable the time-limits laid down in the present Article, contracting authorities may fix:*

- a) *a time-limit for the receipt of requests to participate which may not be less than 15 days from the date on which the contract notice was sent, or less than 10 days if the notice was sent by electronic means, in accordance with the format and procedure for sending notices indicated in Annex VIII, paragraph 3;*
- b) *and, in the case of restricted procedures, a time-limit for the receipt of tenders which shall be not less than 10 days from the date of the invitation to tender."*

*

Amendment 74 specifies that the obligation on the part of the purchaser to preserve the confidentiality and integrity of the data submitted to it covers the entire operational cycle of the procedure: storage, processing and holding.

The clarifications proposed will be taken over in the relevant provisions of the text, but reformulated to take into account the requirements of the various types of electronic submission.

The Commission incorporates Amendment 74 by modifying Article 42 of its proposal as follows:

"Article 42

Rules applicable to communication

1. *All communication and information exchange referred to in this Title may be performed by letter, by fax, by electronic means in accordance with paragraphs 4 and 5, by telephone in the cases and circumstances referred to in paragraph 6, or by a combination of those means, according to the choice of the contracting authority.*

2. *The means of communication chosen must be generally available and thus not restrict economic operators' access to the tendering procedure.*
3. *Communication and the exchange and storage of information shall be carried out in such a way as to ensure that the integrity of data and the confidentiality of tenders and requests to participate are preserved, and that the contracting authorities examine the content of tenders and requests to participate only after the time-limit set for submitting these has expired.*
4. *The tools to be used for communicating by electronic means, as well as their technical characteristics, must be non-discriminatory, reasonably available to the public and interoperable with the information and communication technology products in general use.*
5. *The following rules are applicable to devices for the electronic receipt of offers and requests to participate:*
 - a) *information regarding the specifications necessary for the electronic submission of offers and requests to participate, including encryption, must be available to interested parties. Moreover, the devices for the electronic receipt of offers and requests to participate must conform to the requirements of Annex X;*
 - b) *the Member States may introduce or maintain voluntary accreditation schemes aiming at enhanced levels of certification service provision for these devices;*
 - c) *tenderers or candidates shall undertake to submit, before expiry of the time-limit laid down for submission of tenders or requests to participate, the documents, certificates, attestations and declarations referred to in Articles 46 to 50 and Article 52 if they do not exist in electronic format.*
6. *Rules applicable to the transmission of requests to participate:*
 - a) *requests to participate in procedures for the award of public contracts may be made in writing or by telephone;*
 - b) *where requests to participate are made by telephone, a written confirmation must be sent before expiry of the time-limit set for their receipt;*
 - c) *contracting authorities may require that requests for participation made by fax must be confirmed by post or by electronic means, where this is necessary for the purposes of legal proof. Any such requirement, together with the deadline for sending confirmation by post or electronic means, must be stated by the contracting authority in the contract notice."*

*

Amendments 77 - 132 are designed to:

- 1) clarify that requirements relating to the selection of participants must be proportional to the subject matter of the contract.

- 2) increase the obligations of the contracting authority as regards the confidential treatment of information supplied by economic operators.

As far as the first aspect is concerned, the amendments are consistent with the proposal and can be accepted in spirit. By contrast, the second aspect is superfluous, as it is already covered by Amendment 31 concerning Article 5.

The Commission takes over amendments 77 - 132 as follows, reformulating them and merging Articles 44 and 45 in such a way as to simplify the text and facilitate agreement between the co-legislators:

"Article 43a

Verification of aptitude and choice of participants, award of contracts

1. *Contracts shall be awarded on the basis of the criteria laid down in Articles 53 and 54, taking into account Article 25, after the suitability of the economic operators not excluded under Articles 46 and 47 has been checked by contracting authorities in accordance with the criteria of economic and financial standing and of professional and technical knowledge or ability referred to in Articles 48 to 52 and, where appropriate, with the non-discriminatory rules and criteria referred to in paragraph 3.*
2. *The contracting authorities shall specify in the contract notice the minimum levels of ability in accordance with Articles 48, 49 and 50 which candidates and tenderers must meet.*

The extent of the information referred to in Articles 48 and 49 and the minimum capacity levels required for a specific contract shall be linked to and proportionate to the subject matter of the contract.

3. *In restricted procedures, negotiated procedures with publication of a contract notice and in the competitive dialogue, contracting authorities may restrict the number of suitable candidates they will invite to tender, to negotiate or to participate, provided a sufficient number of suitable candidates is available. The contracting authorities shall indicate in the contract notice the objective and non-discriminatory criteria or rules they intend to apply, the minimum number of candidates they intend to invite and, where appropriate, the maximum number.*
4. *In the restricted procedure the minimum shall be five. In the negotiated procedure with publication of a contract notice and the competitive dialogue the minimum shall be three. In any event the number of candidates invited shall be sufficient to ensure genuine competition.*

The contracting authorities shall invite a number of candidates at least equal to the minimum number set in advance. Where the number of candidates meeting the selection criteria and the minimum levels is below the minimum number, the contracting authority may continue the procedure by inviting the candidate(s) with the required capabilities. In the context of this same procedure, the contracting authority may not include other economic operators who did not request to participate, or candidates who do not have the required capabilities.

5. *Where the contracting authorities exercise the option of reducing the number of solutions to be discussed or of tenders to be negotiated, as provided for in Articles 30(4) and 29(4), they shall do so by applying the award criteria stated in the contract notice, in the specifications or in the descriptive document. In the final stage, the number arrived at shall make for genuine competition insofar as there are enough solutions or suitable candidates.*

*

Amendment 80 supplements the compulsory exclusions referred to in Article 46(1) by adding the offence of money laundering within the meaning of Article 1 of Council Directive 91/308/EEC of 10 June 1991.

In order to facilitate agreement between the co-legislators, the Commission takes over the amendment as follows:

"Article 46

Personal situation of the candidate or tenderer

1. *Any candidate or tenderer shall be excluded from participation in a public contract who, to the knowledge of the contracting authority, has been convicted by definitive judgment for one or more of the reasons set out below:*
- a) *participation in a criminal organisation, as defined in Article 2(1) of the Joint Action of 21 December 1998;*
 - b) *corruption, as defined in Article 3 of the Council Act of 26 May 1997 and Article 3(1) of the Joint Action of 22 December 1998 respectively;*
 - c) *fraud within the meaning of Article 1 of the Convention relating to the protection of the financial interests of the European Communities established by the Council Act of 26 July 1995.*
 - d) *money laundering as defined in Article 1 of Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering⁷, as amended by Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001⁸.*

... "

*

Amendments 86, 87 and 89 modify Article 46(2).

Amendment 86 modifies Article 46(2)(d) by providing for the possibility of excluding on the grounds of grave professional conduct any economic operator who has been guilty of violat-

⁷ OJ L 166, 28.06.1991, pp. 77 - 83.

⁸ OJ L 344, 28.12.2001, pp. 76 - 82.

ing international core labour standards or infringement of "fundamental" European legislation relating to employment protection and working conditions.

Non-compliance with labour law may constitute grounds for exclusion under the provisions proposed by the Commission without it being necessary to refer explicitly to this case in the substantive provisions; it may also constitute grounds for exclusion on account of "grave professional misconduct" within the meaning of Article 46(2) as proposed. In its Communication of 15 October 2001 concerning the integration of social considerations into public procurement, the Commission explained the extent to which these cases were already covered by existing legislation. This also applies to this proposal; the Commission has therefore explained this in recital 30 cited in Amendment 51 above.

Amendment 87 introduces the possibility of excluding any operator who has not fulfilled his employment-protection obligations towards workers or labour-law obligations towards their representatives in accordance with the applicable legal provisions or the collective agreements in force: non-compliance must have been established by a court judgment.

This amendment clarifies the possibility, already offered by Article 46(2)(c) of the proposal, of excluding any tenderer who has been convicted by a judgment of any offence concerning his professional conduct; this explanation is provided by recital 30 referred to above.

Amendment 89 introduces the possibility of exclusion for failure to comply with social legislation, as established by judgment or any other means.

As in the case of Amendments 86 and 87, the Commission has taken this amendment into account in recital 30 referred to above.

*

Amendment 153 is designed to enable Member States to entrust private-law certification bodies with the task of checking the requirements referred to in Articles 46, 47, 48, 49, 50 and 50a.

In order to facilitate verification of the exclusion and selection criteria, Member States are allowed to assign this task to private- or public-law certification bodies. However, this must not have the effect of making certification solely by national bodies a condition for participation in invitations to tender in a Member State.

The Commission incorporates this amendment, reformulated as follows:

"Article 52

Official lists of approved economic operators and certification by public- or private-law bodies

1. *Member States may draw up either official lists of approved contractors, suppliers or service providers or introduce a system of certification by public or private certification bodies.*

They shall adapt the conditions for inclusion in these lists and for the issue of certificates by certification bodies to the provisions of Article 46(1) and (2)(a) to (d) and

(g), Articles 47, 48 (1), (3) and (4), Article 49(1), (2), (4) and (5), and Articles 52 and 50a.

They shall also adapt them to Articles 48(2) and 49(3) as regards applications for registration submitted by economic operators belonging to a group and claiming resources made available to them by the other companies in the group. In such case, these operators must prove to the authority establishing the official list that they will have these resources at their disposal throughout the period of validity of the certificate attesting to their being registered in the official list.

2. *Economic operators registered in the official lists or in possession of a certificate may, for each contract, submit to the contracting authority a certificate of registration issued by the competent authority or the certificate issued by the competent certification body. These certificates shall state the reference which enabled them to be registered in the list/certified and the classification given in that list.*
3. *Certified registration in official lists by the competent bodies or the certificate issued by the certification body shall not, for the purposes of the contracting authorities of other Member States, constitute a presumption of suitability except as regards Articles 46(1) and (2)(a) to (d) and (g) 47, 48(1)(b) and (c) and 49(2)(1)(a), (2), (5),(6) and (7) in the case of contractors, (2)(1)(b),(2),(3),(4) and (9) in the case of suppliers and 2(1)(b), and (3) to (8) in the case of service providers.*
4. *Information which can be deduced from registration in official lists or from certification may not be questioned without justification. With regard to the payment of social security contributions and taxes, an additional certificate may be required of any registered economic operator whenever a contract is offered.*

The contracting authorities of other Member States shall apply paragraph 3 and the first subparagraph of this paragraph only in favour of economic operators established in the country holding the official list.

5. *For any registration of economic operators of other Member States in an official list or for their certification by the bodies referred to paragraph 1, no further proof or statements can be required other than those requested of national economic operators and, in any event, only those provided for under Articles 46 to 50a.*

However, such registration or certification cannot be stipulated as a requirement which economic operators from other Member States must fulfil in order to tender for a public contract. Contracting authorities shall recognise equivalent certificates from bodies established in other Member States. They shall also accept other equivalent means of proof.

6. *The certification bodies referred to in paragraph 1 shall be bodies which comply with European certification standards.*
7. *Member States which have official lists or certification bodies as referred to in paragraph 1 shall be obliged to inform the other Member States of the address of the body to which applications should be sent."*

*

Amendment 104 specifies that the obligation on the part of the purchaser to preserve the confidentiality and integrity of the information submitted to it covers part of the operational cycle of the procedure: storage, processing and holding.

In order to take into account the requirements of the various types of electronic submission, the clarifications proposed are reformulated and taken over as follows:

"Article 61

Means of communication

1. *Article 42(1), (2) and (4) shall apply to all communications relating to contests.*
2. *Communications, exchanges and the storage of information shall be such as to ensure that the integrity and the confidentiality of all information communicated by the participants in a contest are preserved and that the jury ascertains the contents of plans and projects only after the expiry of the time-limit for their submission.*
3. *The following rules shall apply to the devices for the electronic receipt of plans and projects:*
 - a) *the information relating to the specifications which is necessary for the presentation of plans and projects by electronic means, including encryption, shall be available to the parties concerned. In addition, the devices for the electronic receipt of plans and projects shall comply with the requirements of Annex X;*
 - b) *the Member States may introduce or maintain voluntary accreditation schemes aiming at enhanced levels of certification service provision for these devices."*

*

Amendments 110 and 113 modify Annex VII A as regards contract notices.

Amendment 110 obliges contracting authorities to state in the pre-information notice the body from which information on tax, social and environmental legislation can be obtained.

Economic operators must have knowledge of the elements necessary for the preparation of their tenders. Where a works or service contract is to be performed in the contracting authority's country, some elements will relate to national legislation there. It is therefore legitimate that contracting authorities should be obliged to state where they can obtain such information. However, it would be more appropriate for this information to be featured in the contract notice.

Amendment 113 imposes on contracting authorities an obligation to state in contract notices the names and addresses of bodies responsible for appeals relating to the award of public contracts.

Increased transparency in this domain is desirable.

The Commission therefore incorporates Amendments 110 and 113 as follows:

"CONTRACT NOTICES

Open and restricted procedures, competitive dialogues, negotiated procedures:

1. *Name, address, telephone and telefax numbers, electronic address of the contracting authority.*

1a *Where public works and supply contracts involve siting and installation operations: name, address, telephone and telefax numbers, electronic address of the departments from which information can be obtained concerning the rules and regulations on taxes, environmental protection, health and safety at work and working conditions applicable in the place where the contract is to be performed.*

...

23a) *Name and address of the body responsible for appeal and, where appropriate, mediation procedures. Precise information concerning deadlines for lodging appeals.*

... "

*

Amendment 114 imposes on contracting authorities an obligation to provide in notices on contracts awarded the names and addresses of bodies responsible for appeals relating to the award of public contracts.

Increased transparency in this domain is desirable. The Commission therefore incorporates this amendment as follows

"NOTICES ON CONTRACTS AWARDED

...

12a *Name and address of the body responsible for appeal and, where appropriate, mediation procedures. Precise information concerning deadlines for lodging appeals."*

3.3 Amendments not accepted by the Commission (162, 8, 173, 25, 29, 32, 37, 159, 49, 151, 68, 78, 63, 139, 66, 69, 161, 71, 72, 131, 73, 75, 76, 81, 82, 83, 84, 90, 92, 94, 176, 99, 102, 103, 107, 108, 111, 115, 117 and 116)

Amendment 162 introduces a new recital 1a designed to have account taken in award procedures of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment.

This amendment is superfluous, as it lies outside the scope of this Directive. It reaffirms the applicability of a Directive which imposes obligations on the private and public sectors prior to the launch of any project and, hence, of any award procedure.

Amendment 8 supplements the recital concerning technical specifications by underlining that, where there are no European specifications, contracting authorities must be able to lay down precise national criteria in advance in order to keep maintenance and repair costs as low as possible. This amendment has to be considered in conjunction with Amendment 45, which enables a contracting authority to reject an equivalent solution - a national one, as the case may be - on the grounds that it would entail higher costs. This part of Amendment 45 is unac-

ceptable, as it is in contradiction to Article 28 of the Treaty. Therefore, Amendment 8 is also unacceptable. What is more, it is not for contracting authorities to lay down national criteria which are generally applicable. As regards the reference to a national standard, the recital in the Commission initial proposal is already explicit.

Amendment 173 modifies Article 1 in order to define particularly complex contracts which may be the subject of a competitive dialogue. The amendment relates to Article 1 rather than Article 30, which sets out the details of the procedure, giving a non-exhaustive list of examples. This is in fact more than a definition. Rather, it is a listing of cases in which a competitive dialogue may be held, namely when a contracting authority is unable either to define the technical or other means of meeting its requirements or to determine the solutions that the market can offer. As regards inability to define the means, this must not be attributable to the absence of a prior design competition or to the fact that a functional contract notice could have sufficed. The Commission takes the view that the concept of a complex contract is not necessary and that it is preferable to define - in Article 30 - the objective conditions permitting recourse to a competitive dialogue.

As regards the condition according to which the organisation of a prior design contest had not enabled the contracting authority to define the means suitable to meet its needs, the amendment is unacceptable, as it poses the same problems in terms of subsidiarity as Amendments 142, 7 and 171 - 145 aimed at introducing an obligatory separation between the design and execution of works.

Amendment 25 is specifically designed to regulate framework agreements in the field of translation and interpretation.

It should be emphasised that the services to which this amendment refers are covered by Annex IB and are therefore not subject to all the procedural rules of the Directive (call for competition and detailed rules).^e Consequently, by providing for specific rules to govern framework agreements, the amendment would, without justification, make the legislation applicable to such agreements more inflexible than that applicable to public contracts awarded in the same sector.

Amendment 29 sets out to make the awarding of prizes to participants in design contests compulsory and accordingly modifies the definition of "design contests" by limiting them exclusively to contests in which prizes are awarded

The principle of making the awarding of prizes to participants compulsory may be justified where a design contest relates to projects incurring real costs, such as design contests organised with a view to the execution of a structure or an urban or landscaping project. However, it should be pointed out that design contests may be organised in other fields where the compulsory awarding of prizes would not be justified. What is more, the definition proposed by the amendment, according to which only design contests with prizes could be held, would not appear to be an appropriate way of achieving this objective. Indeed, such a definition would not prevent design contests without prizes being organised, but it would remove such contests from the scope of the Directive.

Amendment 32 proposes to increase the thresholds indicated in the Commission's proposals by around 50%.

The thresholds in the Directives in force are such that Community regulations cover only the biggest contracts in value terms. Raising the thresholds of the Directive would lead to an unjustified reduction in the guarantees concerning the opening-up of public contracts currently

offered to economic operators in the European Union. It should be noted that the supposed complexity of the procedures under the Directives and the associated administrative costs could not justify raising the thresholds: these factors are in fact comparable with the complexity and costs of other national contract award procedures in force for contracts below the thresholds.

What is more, a unilateral raising of the thresholds by the European Union would be incompatible with its obligations within the WTO. In addition, a European request to raise the thresholds within the framework of the current revision of the Government Procurement Agreement would entail a loss of credibility for Europe in the context of the negotiations involved in that revision, as the negotiating mandate clearly refers to the objective of broadening the Agreement's coverage. Also, such a request would provoke either a demand by our partners for compensation or the reciprocal closing of international markets.

It should further be noted that the mechanism for the biennial revision of thresholds, designed to adapt them in line with changes in parities between European currencies and SDRs, may already result in a significant raising of thresholds, as is currently the case for the thresholds applicable for the period 2002-2004.

Amendment 37 adds an exclusion concerning transactions enabling the contracting authority to contract borrowings intended for investments and cash flow requirements.

This exclusion would have the effect of making it possible for the financing of any public (and particularly local) authority project to be raised without a call for competition at European level. This runs counter to the objectives of the liberation of financial services and is not justified by the argument put forward concerning the volatility of interest rates. Procedures already exist - e.g. framework agreements combined with electronic means and, in particular, reverse auctions - which are sufficiently flexible to enable this volatility to be taken into account.

Amendment 159 is intended to:

- 1) ensure that contracting authorities do not impose any "quantitative restrictions on the exercise, by the undertakings, of freedom of organisation of their own inputs";
- 2) oblige contracting authorities to ask the tenderer to indicate in his tender the share of the contract he may intend to subcontract to third parties and any designated subcontractors;
- 3) oblige contracting authorities to prohibit any subcontracting to undertakings which are in the situation referred to in Article 46 "and/or undertakings which do not meet the requirements laid down in Articles 47, 48 and 49";
- 4) prohibit the contracting out of "intellectual services, with the exception of translation and interpretation services and management and related services".

The Commission cannot accept this amendment, the reasons being as follows:

- 1) If an economic operator can demonstrate that he can effectively draw on the capacity of other entities, for example through subcontracting, he is entitled, according to case law, to avail himself thereof for the purposes of selection. By contrast, there is nothing under current legislation to prevent a contracting authority prohibiting the execution of the contract, in whole or in part, from being subcontracted.

- 2) By dint of this obligation, tenders would be required to single out in the tender both the portion of the contract to be subcontracted and the choice of subcontractors. Imposing such an obligation at Community level would appear to be excessive, given the fact that it is always the successful tenderer who is responsible for the execution of the contract. In view of the principle of subsidiarity, it would be up to Member States to provide, where necessary, for an obligation to request the names of subcontractors.
- 3) The possibility of excluding subcontractors would appear to be legitimate as regards companies/persons convicted of certain offences (organised crime/corruption/fraud against the financial interest of the Community, cf. Article 46(1)) or in other cases (non-compliance with labour law, cf. Article 46(2)); it nevertheless poses difficulties in terms of application. It presupposes knowledge of (see point 2) and *a priori* control over subcontractors, which would excessively lengthen award procedures. However, it could be taken into account in accordance with the principle of subsidiarity (obligation imposed, where appropriate, by Member States).

As regards the aspects of point 3) relating to economic and financial standing and technical and professional capabilities, as referred to in Articles 48 and 49, this would mean that subcontractors would have to have the same capacity as the principal contractor, which would unjustifiably exclude SMEs. These aspects cannot, therefore, be taken into consideration.

As far as Article 47 is concerned, the amendment proposes to apply in respect of subcontractors a stricter regime than that envisaged for candidates and tenderers (in the latter case, contracting authorities would not be obliged to request information, whereas in the case of subcontractors they would have to do so systematically). However, it is already possible to apply Article 47 to subcontractors for selection purposes where a tenderer relies on means made available to him by subcontractors ("Holst Italia"⁹ judgment).

- 4) It would not appear justified to lay down such a general prohibition: contracting authorities, which are the parties concerned, are already able, if they so wish, to prohibit subcontracting by imposing conditions for the execution of the contract; this goes for all types of contracts and not just for certain services. By the same token, they must be free to allow subcontracting.

Amendment 49 inserts into Article 26 a new subparagraph imposing on subcontractors the same requirements regarding economic, financial and social performance as apply to candidates or tenderers.

For the same reasons as set out in the comments on Amendment 159 (point 3, 2nd and 3rd paragraphs), Amendment 49 cannot be accepted.

Amendments 151, 68 and 78 are aimed essentially at introducing qualification systems such as those provided for in the "Utilities Directive" 93/38/EEC.

Amendment 151 adds a new paragraph 2a to Article 32 in order to introduce the possibility for contracting authorities of setting up a qualification system, to be the subject of an annual

⁹ Judgment of 2 December 1999 in case C-176/98, [1999] ECR I-8607.

notice where the duration of the system exceeds three years and of a single notice in other cases.

Amendment 68 introduces the possibility of calling for competition by means of a notice on the existence of a qualification system.

Amendment 78 introduces the rules applicable to qualification systems. These provisions are closely aligned on analogous provisions of the "Utilities Directive" which are in force. However, the amendment does not incorporate the provisions concerning the obligations to state reasons for decisions taken regarding qualification, nor those imposing mutual recognition and equality of treatment within the framework of qualification systems. Regarding the selection of economic operators, the amendment merely indicates that the system is to be operated on the basis of "objective criteria and rules to be established by the contracting authority", with no reference being made to the general rules applying to qualitative selection.

Amendments 151, 68 and 78 (Article 45a) should be analysed together. Their effect is to introduce the regime of the "Utilities Directive", namely the possibility of using a qualification system - specific to each contracting authority - as a means of calling for competition for several individual contracts to be awarded during the period of validity of the system. In other words, instead of having as many notices as there are award procedures, there would be either one notice per year calling for competition for all the contracts covered by the system during that year or, if the system had a period of validity of more than one year, a single notice calling for competition for all contracts to be awarded during that period. The qualification system would in theory be open at all times. In practice, accessibility to the system would be very uncertain, as it would presuppose that economic operators became aware of the very existence of the system - through a notice published months or even years in advance. This would militate against putting contracts out to competition and would place newly-created enterprises at a disadvantage. The amendment would thus entail an unacceptable loss of transparency and risk contracts being reserved for companies which had taken note of the initial notice. Matters could be otherwise if such systems and the contracts awarded on the basis thereof were accompanied by an appropriate call for competition and were put in place by electronic means making it possible to ensure transparency and equality of treatment. It should also be noted that the introduction of qualification systems would be in breach of the GPA to the extent that it was applied to central contracting authorities.

Amendment 63 is aimed at prohibiting the application of framework agreements to intellectual services and introducing specific rules for translation and interpretation services.

The first part of the amendment is void, as the amendment designed to separate intellectual services from other services was not adopted. The origin of the second part of the amendment lies in the problems raised by the translation services of the European Institutions, in particular that of the European Parliament, which have meanwhile been resolved to the full satisfaction of those services.

Moreover, it should be emphasised that the services to which the amendment refers, and which are covered by Annex IB, are not subject to all the procedural rules of the Directive (call for competition and detailed rules).^e Consequently, by providing for specific rules to govern framework agreements, the amendment would, without justification, make the legislation applicable to such agreements more inflexible than that applicable to public contracts awarded in the same sector.

Amendment 139 prohibits the use of framework agreements for works contracts.

Framework agreements can be used for works contracts, in particular for "standard" works such as road surfacing or repairs. The exclusion envisaged by the amendment is therefore unacceptable.

Amendment 66 modifies Article 33 in order to extend the scope of the particular procedure, concerning public housing schemes, to all "public works which, for reasons of size, complexity and duration and/or financing, require collaborative project planning..."

This amendment is wholly unacceptable, as it broadens the scope for contract negotiation, in a very vague manner to boot. Moreover, it should be noted that Article 30 already makes it possible to cover a large number of the cases referred to by this amendment.

Amendment 69 adds to Article 35(1), first subparagraph, an explicit reference to the *Official Journal of the European Communities* for the publication of notices.

This amendment would institutionalise the publication arrangements and make it impossible to take into account technological changes which could, in future, make it more appropriate to publish notices by other means.

Amendment 161 deletes the provision stipulating that the time limits for receipt of requests to participate and for submission of tenders must be sufficiently long to ensure that economic operators are allowed the time actually needed.

As the aim of this provision is to contribute towards ensuring that public contracts are the subject of a better and genuine call for competition, the amendment is unacceptable.

Amendment 71 modifies Article 40 by specifying that any specific conditions for taking part in the tendering process must not unduly discriminate between tenderers. It adds this provision to the conditions stated in the invitation to tender.

The goal pursued by this amendment is in line with the proposal for a Directive. This addition is superfluous, however, as the matter is already covered by Article 2 concerning the fundamental principles to be observed throughout the award procedure.

Amendment 72 limits to two specific situations the scope for closing an award procedure before a contract has been awarded: where no tender has been received which meets the award criteria and where there are other serious grounds which lie outside the powers of the contracting authority.

This amendment is laudable as regards its objectives (to avoid possible manipulations and contribute towards greater security of planning for companies), but is unacceptable as regards its form, as it restricts in a drastic, disproportionate and inappropriate manner the scope for not awarding a contract.

Reasons for non-award must not be listed in an exhaustive manner, as contracting authorities act as purchasers and consequently must have at their disposal options that are geared to coping with highly variable situations which the Directive could not demarcate. It is appropriate to point out that one of the possibilities which the amendment would exclude is the early clo-

sure of a procedure on grounds of non-compliance with applicable Community law, which is in contradiction with the "review procedures" Directive¹⁰.

Moreover, it should be pointed out that contracting authorities are already obliged to inform participants of the reason why no contract has been awarded. This provision is aimed precisely at avoiding arbitrary manipulations and enables participants to check the soundness of a decision made by a contracting authority.

Amendment 131 is designed to prevent contracting authorities from being able to choose the means by which communication and the exchange of information must be performed in the context of an award procedure.

The effect of this amendment would be to oblige contracting authorities to receive tenders by whatever means, regardless of whether they have the technical facilities to receive them by a particular means. The amendment therefore has to be rejected.

Amendment 73 provides that tenders submitted by electronic means are to be rejected unless an advanced electronic signature within the meaning of Directive 1999/93/EC and a reliable means of encrypting the contents are used.

This amendment reflects the current situation regarding electronic signatures. However, technical developments in this area are proceeding apace. The amendment would make it necessary to amend the Directive in line with each new development. Guarantees concerning electronic signatures can be obtained by way of referral to national provisions on the subject (avoiding subsequent amendments to the text if and when Community legislation changes). Also, encryption is not necessary, as other means can be used to ensure the inviolability of tenders. What is more, compulsory encryption would incur additional costs for both the purchaser and the tenderers. Therefore, this amendment cannot be accepted.

Amendment 75 imposes an obligation to involve an accredited third party in order to guarantee the confidentiality of data transmitted by tenderers.

It should be stressed that Community policy has always been geared precisely towards ensuring that an accreditation system is never compulsory, given the risks of distortion and increased disparities between Member States.

Amendment 76 proposes that, in the context of determining the specific level of capacity and experience required for a particular contract, a lack of experience may be offset by evidence of "special capacity".

On its own, special capacity could not, in practical terms, replace experience and provide contracting authorities with sufficient guarantees for the purposes of the sound execution of the contract (certificates of studies cannot replace experience on the ground). Moreover, the thresholds applicable mean that contracts subject to the Directives involve large amounts and consequently require appropriate guarantees. What is more, neither the "special capacity" to

¹⁰ Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, OJ L 395, 30.12.1989, pp. 33-35, as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, OJ L 209, 24.07.1992, pp. 1 - 24.

which the amendment refers nor the means of proving the same is defined. This is liable to create a major source of dispute for contracting authorities.

Amendment 81 supplements Article 46(1) by adding "*of fraudulent or any other form of anti-competitive behaviour in connection with the award of public contracts in the common market*".

Under current Community legislation, there is no harmonisation of the penalties for these phenomena under the third pillar; nor do all Member States have systems of penal sanctions in place. Under these circumstances, the mechanism set up by the first paragraph of Article 46 cannot be implemented.

Amendment 82 supplements Article 46(1) by including among the grounds for compulsory exclusion non-compliance with collective agreements and other provisions and laws relating to employment and social security in the country of establishment or in another relevant country.

For the same reasons as in the case of the previous instruments (penalties/violations of employment law not being the subject of approximation under a third pillar instrument), the amendment is not accepted,

By contrast, Article 46(2) already provides scope for such exclusions; the principle can be explicitly set out in a recital (see Amendment 86).

Amendment 83 supplements Article 46(1) by adding drugs-related offences within the meaning of the United Nations Convention (Vienna, 19 December 1988).

Under current Community legislation, there is no harmonisation of the penalties for these phenomena under the third pillar; nor do all Member States have systems of penal sanctions in place. Under these circumstances, the mechanism set up by the first paragraph cannot be implemented.

Amendment 84 removes the possibility, currently available to contracting authorities, of excluding from the award procedure a tenderer or candidate who is bankrupt or is being wound up, whose affairs are being administered by the court, who has entered into an arrangement with creditors, who has suspended business activities or who is in any analogous situation. Under Amendment 90, this possibility becomes an obligation.

Amendment 90 provides for the compulsory exclusion of any economic operators who are bankrupt, whose affairs are being wound up by the court, who have entered into an arrangement with creditors or have suspended business activities.

Amendments 84 and 90 would have the effect of prohibiting any contracting authority in the EU from concluding a contract, as the case may be, with a company which has entered into an arrangement with creditors, without giving that company any chance whatsoever and thus automatically condemning it to closure. That is why it would appear more appropriate to make the exclusion of operators in this situation simply an option for all purchasers.

Amendment 92 expands the list of proofs of technical capacity for supplies by including therein a description of the measures employed for ensuring environmental protection and protection of the health and safety of workers, as well as an indication of the technicians or technical bodies responsible for environmental management and protection of the health and safety of workers.

The amendment is designed to provide a way of judging the technical capability of an enterprise to supply a product which is both environmentally friendly and does not endanger the health and safety of workers. These aspects are covered either by the description of the product specifications (prescribing a less polluting production process) or by the requirement, in other phases in the award procedure, of compliance with social or environmental legislation (exclusion of any non-complying tenderers).

Amendment 94 introduces reliability as an element to be demonstrated alongside the technical/professional capability of an undertaking.

As reliability is a particularly subjective element, it cannot be added in parallel with these capabilities. For this reason, the amendment is not acceptable.

Amendment 176 is intended, as far as the award criterion of the "most economically advantageous tender" is concerned, to:

- 1) remove the clarification that this means the most economically advantageous tender "for the contracting authorities",
- 2) specify that environmental characteristics may include "production methods",
- 3) and add the criterion of "equal treatment policy".

Re point 1): removal of the words "for the contracting authorities" would enable various, often non-measurable, elements to be taken into account in relation to a possible benefit to "society" in the broad sense of the word. Such award criteria would no longer fulfil their function, which is to permit an evaluation of the intrinsic qualities of tenders in order to determine which one offers the purchaser the best value for money. This would completely disrupt the objective of the public contracts Directives and would amount to the institutionalisation of this legislation to the benefit of sectoral policies, while also introducing serious risks of inequality of treatment.

Re point 2): the contract award stage is not the appropriate time at which to choose a less polluting method. Less polluting production methods can be prescribed once the subject of the contract has been defined in the technical specifications when the purchaser chooses to purchase the solution causing the least pollution. If he wishes to compare different solutions and evaluate the advantages/cost of lower- or higher-pollution solutions, he may allow or insist on the presentation of variants.

Re point 3): the concept of equality of treatment takes on a particular meaning in the context of public contracts (= treating all candidates/tenders in the same way), whereas the amendment seems to be concerned with the non-discrimination within the meaning of Article 13 of the Treaty. To the extent that this concerns a criterion relating to the policy of the enterprise and not to the qualities of a tender, it cannot be an award criterion. The introduction of criteria linked to the undertaking would lead to a situation where certain undertakings were given preference on the basis of non-measurable elements during the award phase, even if their tenders did not give the purchaser the best value for money.

Amendment 99 removes the obligation to apply a weighting to award criteria, replacing it with a requirement to specify the selection criteria in order of importance.

The introduction of a provision making weighting obligatory is an important element of the proposal and is designed to prevent manipulations, encountered in practice, favouring certain

operators, and to enable any tenderers to be reasonably informed in accordance with the principles laid down by the Court in the "SIAC"¹¹ judgment. It is essential that the weighting of the criteria be indicated in advance.

Amendment 102 removes, in Article 61(1), the part of the sentence which clearly states that the means of communication to be used in a design contest is to be that chosen by the contracting authority.

Without this part of the sentence, the text would give participants the possibility of choosing the means of communication themselves, and the consequences would be those set out in the case of Amendment 131.

Amendment 103 introduces, in Article 61, a new paragraph 1a making it compulsory, when transmitting drafts or plans by electronic means in the context of design contests for services, to use an advanced electronic signature and a reliable means of encryption.

See the reasons given for rejecting Amendment 73 and the text of Article 61 with which Amendment 104 is concerned.

Amendment 107 removes some delegated powers which enable the Commission, after obtaining the opinion of the Advisory Committee for Public Contracts, to amend aspects of the Directive which are essential if it is to operate properly. These delegated powers relate to threshold adjustments which are necessary in order to take account of fluctuations in SRD/euro parities, to possible amendments to conditions for the drawing-up, transmission and publication of opinions and statistical reports, and to amendments to Annex VIII enabling technical developments to be taken into account, as well as to amendments to the nomenclatures contained in Annexes I and II.

Firstly, it should be noted that the amendment removes a number of powers already delegated to the Commission by the legislation in force. As regards the new powers, these are limited to domains where the pace of technological change (use of electronic means) is such that, if the Directive were not adapted, it would quickly become obsolete, as would the codecision procedure, given the time it takes.

Amendment 108 introduces a new article obliging Member States to establish effective and transparent mechanisms to ensure implementation of the Directive. It goes on to specify that Member States may, to this effect, set up an independent Public Procurement Agency vested with broad powers, including the power to set aside contract awards and reopen contract award procedures.

Directive 89/665/EEC already requires Member States to provide efficient national review procedures regarding the award of contracts, including interlocutory procedures, the power to annul illegal decisions and award damages. Member States may fulfil this obligation either by ensuring that national courts have these powers or by setting up bodies endowed with the appropriate powers. The obligation introduced by the amendment is thus already the subject of Community legislation in force and must not be reiterated. As regards the possibility of setting up independent bodies, this is also possible under the legislation in force, and an explicit reminder is given in the new recital 30a referred to in Amendment 13, which is accepted by the Commission. This repetition is therefore superfluous.

¹¹ Judgement of 18 October 2001 in case C-19/00, 2001 ECR I-7725

Amendment 111 introduced an obligation to state in preinformation notices the contact details - including electronic addresses - of the bodies responsible for appeals relating to the award of public contracts.

Although greater transparency regarding appeals is desirable, preinformation notices are not the appropriate instrument.

Amendment 115, in the majority of language versions, stipulates that public-sector Internet sites containing information on award procedures must comply with the European Union guidelines on Internet access. (It should be noted that the FR version is radically different.)

There is no reason to provide for specific legal arrangements governing this type of Internet site. An issue such as this must be addressed by horizontal legislation and not harmonised via the "public contracts" Directive.

Amendment 117 introduces a new annex designed to guarantee that, where electronic means of communication are used to submit tenders or requests to participate, this is done under conditions which ensure that confidentiality is maintained.

While the concerns underlying these amendments are legitimate, the new annex cannot be inserted in the absence of any reference in the substantive provisions, as amended, to a new annex. The legal arrangements governing the annex would thus remain unspecified.

Amendment 116 introduces a new annex linked to a new point c)a of Article 54, second subparagraph, proposed by Amendment 100. As Amendment 100 has not been accepted, this amendment is likewise not accepted: see comments on Amendment 100 above.

3.4 Amended proposal

Pursuant to Article 250(2) of the EC Treaty, the Commission amends its proposal in the foregoing terms.