



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 25.3.2003
SEC(2003) 366 final

2000/0115 (COD)

**COMMUNICATION FROM THE COMMISSION
TO THE EUROPEAN PARLIAMENT**

pursuant to the second subparagraph of Article 251(2) of the EC Treaty

concerning the

**common position of the Council on the adoption of a Directive of the European
Parliament and of the Council on the coordination of the procedures for the award of
public works contracts, public supply contracts and public service contracts**

**COMMUNICATION FROM THE COMMISSION
TO THE EUROPEAN PARLIAMENT**

pursuant to the second subparagraph of Article 251(2) of the EC Treaty

concerning the

common position of the Council on the adoption of a Directive of the European Parliament and of the Council on the coordination of the procedures for the award of public works contracts, public supply contracts and public service contracts

1- BACKGROUND

Date of transmission of the proposal to the EP and the Council COM(2000) 275 final – 2000/0115 (COD):	12 July 2000
Date of the opinion of the European Economic and Social Committee:	26 April 2001
Date of the opinion of the Committee of the Regions:	13 December 2000
Date of the opinion of the European Parliament at first reading:	17 January 2002
Date of transmission of the amended proposal:	6 May 2002
Date of adoption of the common position:	20 March 2003

2- OBJECTIVE OF THE COMMISSION PROPOSAL

The proposal for a Directive 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 the three objectives of modernising, simplifying and increasing the flexibility of the existing legal framework in this field:

- modernisation in order to take account of new technologies and changes in the economic environment;
- simplification 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 greater flexibility in procedures in order to meet the needs of public procurement bodies 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- COMMENTS ON THE COMMON POSITION

3.1. General comment

The common position of the Council essentially preserves the Commission's initial proposal as amended by the amended proposal. In addition, this common position strengthens certain means of attaining the objectives referred to in the Commission's proposals. However, the Commission was unable to secure the Council's unanimous agreement because of the provisions inserted for financial services.

The unanimous political agreement reached by the Council on 21 May 2002 was taken on board in the common position adopted on 20 March 2003.

The amendments introduced by the common position concern the following in particular:

- greater account to be taken of the **new information technologies** in awarding contracts, in line with the **modernisation** objective set out in the Commission's proposals. In this respect, it is worth drawing attention in particular to the introduction, for purchases of commonly used items, of accelerated procurement systems intended both to provide the contracting authorities with fully-computerised systems which make it possible to simplify and automate the procurement procedures and to ensure that any interested economic operator can take part, where appropriate, by using his electronic catalogue. Moreover, as regards the general framework for purchases using electronic means, the common position clarifies the position on electronic auctions and strengthens the obligations with regard to **confidentiality** in the text referring to Annex X; the latter essentially takes over Parliament's Amendment 117;
- with regard to taking account of **environmental and social** aspects, the Council accepted the Commission's amended proposals subsequent to Parliament's amendments and, in addition, clarified in a recital (No. 44) how environmental and social concerns can be taken into consideration when assessing the tenders at the contract award stage;
- the implementation of the **exclusions** deriving from the personal situation of economic operators is clarified by laying down the powers of the Member States to adopt the conditions under which the exclusions apply. In the case of mandatory exclusion, its implementation is improved through cooperation between the Member States. Account is also taken of situations in which imperative requirements in the general interest could not be satisfied if the exclusion obligation were maintained;
- in view of the process of opening up **postal services** to competition currently under way at Community level, a mechanism has been introduced for transferring the contracts awarded by postal operators for the exercise of certain of their activities from the scope of the "classic" Directive to that of the "utilities" Directive.

On the other hand, the common position has introduced changes concerning financial services, cases in which a negotiated procedure is used, and the weighting of the award criteria.

With regard to **financial services**, the Commission considers that the change introduced unanimously by the Council, which follows Amendment 37 of the European Parliament, could give rise to confusion as regards their inclusion within the scope of the Directive. It has therefore reiterated, in a statement in the minutes of the Council of 21 May 2002 attached as an Annex to this Communication, the position which it had already had occasion to set out in its amended proposal when rejecting Parliament's Amendment 37.

The Commission has accepted that the use of **negotiated procedures** should be made slightly more flexible, since such cases relate to situations which are genuinely exceptional (Article 30) or highly circumscribed and regulated (Article 31).

The obligation to indicate the **weighting of the award criteria** is confirmed; however, the Commission has agreed on the need to take account of cases in which the contracting authority can justify its having been unable to specify the weighting - in particular in the case of especially complex contracts - and to allow it in such cases simply to indicate the descending order of importance of such criteria.

3.2. Parliament amendments taken into account in the common position

3.2.1. Amendments incorporated into the amended proposal and the common position

Recital (4) - Amendment 1: The amendment has been accepted as regards the obligation on Member States to prevent the participation in public contracts of bodies governed by public law producing any distortions of competition. The second sentence proposed in the amendment - the possibility for Member States to lay down the methods to be used to calculate the price/real cost of a tender - was deleted as it concerned only one possibility amongst all those to which Member States can resort in order to prevent such distortion and was therefore considered superfluous.

Recital (5) - Amendment 2: the text of the amended proposal relating to the incorporation of the environmental requirements referred to in Article 6 of the Treaty was taken on board unchanged.

Recital (6) - Amendment 141: the amendment relating to the exceptions provided for in Article 30 of the Treaty was taken on board in a slightly modified form in order to reproduce exactly the wording of that Article with regard to the protection of plants. In addition, the words "*are not discriminatory and do not conflict with the objective of opening up markets in the sector of public contracts or with the Treaty*" were replaced by "*comply with the Treaty*": this is justified by the primacy of the Treaty, as interpreted by the Court, over secondary law, i.e. the objective of opening up markets pursued by the Directive can in no way affect the rights of the Member States acknowledged by the Treaty.

Recital (9) - Amendments 142, 7 and 171-145: the text of the amended proposal relating to the award of service and works contracts was taken on board with only one change for purely linguistic reasons: replacement of "*passation globale*" by "*passation conjointe*" in the French version.

Recital (14), Article 1(10) and Article 11 - Amendments 5 and 168, 126-172, 21 and 175: the texts of the amended proposal relating to purchasing groups were taken on board unchanged.

Recital (27), Article 23 and Annex VI - Amendments 45, 46, 47-123 and 109: the provisions of the amended proposal (Recital 25, Article 24 and Annex VI) on the technical specifications were taken on board unchanged, with the exception of three linguistic changes in Annex VI (Point 1(a) and (b): "*production processes or methods*" instead of "*production procedures or methods*". Point 1(a): "*conformity assessment*" instead of "*assessment of the conformity levels*".

Recital (29), Article 1(11)(3) and Article 29 - Amendments 9, 137 and 138: the texts of the amended proposal relating to the competitive dialogue were taken on board unchanged, except for Article 29(8), where the obligation to provide for prizes or payments to the participants in the dialogue has been made optional. This change allows for the wider participation of competitors in the competitive dialogue procedures: in the case of mandatory prizes or payments, the contracting authorities would, in order to avoid costs, inevitably be tempted to keep the number of participants as low as possible, thereby excluding - on the basis of objective criteria alone - operators whose know-how and innovative ideas were such that they might win the contract if admitted to the dialogue.

Recital (31) and Article 26 - Amendments 10 and 127: the texts of the amended proposal relating to the conditions for the performance of the contract (Recital 29 and Article 26a) and, in particular, their use for social or environmental ends, were taken on board unchanged except for one very minor and purely linguistic change in the recital.

Recital (32) - Amendments 11, 51, 86, 87 and 89: the text of the amended proposal relating to compliance with social regulations was taken on board with one rewording which lays down the possibility of excluding from contracts - pursuant to Article 45(2)(c) and (d) - operators found to have infringed those rules.

Recital (41) - Amendment 170: the text of the amended proposal relating the exclusion of operators found guilty of serious offences was taken on board with minor changes. These are intended: to make it clear that the definitive nature of the judgments must correspond to the authority of *res judicata*; to adapt the text to take account of the different legal situations under the national laws applicable to illegal activities ("decision" instead of "penalty"); to bring exclusion for a "decision" into line with that for a "judgment" ("a decision having equivalent effect"), i.e. to lay down that the contracting authorities can exclude economic operators only on the basis of a decision which is definitive in nature.

Recital (42) - Amendments 30, 93 and 95: Recital 40 in the amended proposal relating to environmental management systems was taken on board unchanged.

Recital (45) - Amendment 125: the amendment - the addition of "*engineers*" to the lists of professions whose remuneration is regulated at national level and must not be affected by the award criteria, was taken on board unchanged.

Article 1(5) - Amendment 24: the text of the amended proposal relating to the definition of a "*framework agreement*" was taken on board unchanged.

Article 1(7) and Article 54 - Amendments 23, 54 and 65: the definition of an "electronic auction" contained in the amended proposal is reworded - "which enables them to be ranked automatically" instead of "which enables them to be evaluated automatically" - since the word "evaluated" presupposes an assessment activity incumbent on the contracting authority, whereas the electronic auction allows only for a simple reordering of the ranking.

Article 54 takes on board the text of Article 53a of the amended proposal with the changes needed to take account of the introduction of new dynamic purchasing systems, and with account being taken of parameters other than the price.

Article 6 - Amendment 31: the text of the amended proposal relating to confidentiality is taken on board, but with changes to allow the non-confidential aspects of tenders to be made public according to the national law applicable, as is particularly the case with certain information which has to appear in the notice of contracts awarded.

Article 9 and Annex VII, Contract notices, point 6(a), first indent, b), first indent, and (c) first indent - Amendments 34 and 35: Article 9 takes on board the text of Article 10 of the amended proposal relating to the method of calculating the value of contracts, by adapting its title so as to include dynamic purchasing systems. In addition, it broadens the account to be taken of renewals: "tacit renewals" are replaced by "renewals" to allow all forms of renewal to be taken into account when calculating the value of the contract. Annex VII ensures a better call for competition for contracts by making it mandatory to indicate such renewals in the contract notice.

Article 16(b) - Amendment 121: this simplifies the text of the amended proposal by setting out the exact scope of the exclusion of contracts awarded by broadcasters.

Article 18 - Amendment 38: this takes on board unchanged Article 19 of the amended proposal relating to contracts awarded to contracting authorities on the basis of a special or exclusive right.

Article 19 - Amendment 36: this takes on board unchanged the text of Article 19b of the amended proposal relating to the reservation of contracts for sheltered workshops.

Article 27 - Amendment 50: the text of Article 27 concerning the obligations regarding taxes, the environment, employment protection and working conditions, as it stood after incorporating Amendment 50 into the amended proposal, has been changed. In the case of the obligation directly imposed on contracting authorities to indicate in the contract documents where information can be obtained on the applicable provisions in these fields, the Council preferred wording similar to that of the Commission's initial proposal, which reflected the provisions in the Directives currently in force. The common position there lays down that this obligation can be imposed only by the Member States. However, in the absence of such an obligation at national level, the contracting authorities may choose to provide this information. In addition, the text is reworded to bring the text of the Article into line with that of its title ("*...the appropriate information on the obligations relating to taxes, ...*" instead of the "*the appropriate information on taxes,...*") and to lay down that this legislation does not apply to services provided in a Member State other than that of the contracting authority.

Article 30 - Amendment 57: negotiated procedures with publication of a notice. Article 29(1)(c) of the amended proposal is taken on board unchanged.

In addition, point (1)(b) of the initial proposal was deleted because of the transformation of the competitive dialogue into a fully-fledged procedure. Paragraph 1(b) extends to supplies the possibility of negotiation set out in point (2) of the initial proposal.

The new paragraphs 2 and 3 introduce provisions intended to provide a framework for the negotiations, to increase their transparency and to ensure better application of the equality of treatment of economic operators:

- paragraph 2 lays down that the negotiations must be held on the basis of tenders, so as to ensure that they are adapted to the requirements previously indicated by the contracting authority and to enable the latter to select the most advantageous tender;
- the new paragraph 3 lays down explicitly the obligation to ensure equality of treatment of all tenderers and the ban on providing information likely to favour certain participants over others.

The new paragraph 4 sets out explicitly the possibility of conducting these procedures in successive phases (see comments on Recital (39)).

Article 41 - Amendment 46: this takes on board the text of the amended proposal relating to information for the candidates and tenderers, by incorporating it in order to take account of dynamic purchasing systems.

Article 42 - Amendment 74: this takes on board unchanged the text of the amended proposal relating to the rules applicable to communications. This text is supplemented by the new Annex X, which sets out the requirements relating to devices for the electronic receipt of offers, requests for participation or plans and projects in contests.

Article 44 - Amendments 77-132: this takes on board Article 43a of the amended proposal relating to the verification of the capacity of economic operators and the award of the contracts by rewording paragraph 2 in order to make it clear that contracting authorities are not obliged to require specific levels of capacity. If they do so, they are then obliged to indicate them.

Article 45 - Amendments 80, 85 and 88: paragraph 1 relating to the obligatory exclusions for criminal activities takes on board Amendment 80 unchanged. Amendment 85 (paragraph (2)(c)) is taken on board with only changes to the wording. The deletion provided for by Amendment 88 (paragraph (2)(h)) is taken on board.

Paragraph 1 of the initial proposal is supplemented by:

- subparagraph 2, which is intended to make it clear that it is for the Member States to establish the conditions for applying the mandatory exclusion, in particular where criminal law is concerned, which this Directive is not intended to harmonise,

- subparagraph 3, setting out explicitly the applicability of the case law relating to imperative requirements in the general interest,
- and by subparagraph 4, which clarifies how the contracting authorities can obtain the information needed for applying the mandatory exclusions, providing in particular for cooperation with the competent authorities in the other Member States.

Subparagraph 3 addresses those cases where the exceptions provided for in the Treaty may apply, on account of the primacy of the latter (see the comments to Recital 6 above), for example in case of public health problems, - serious illnesses for which the only available medicines are provided by an economic operator who is to be excluded for one of the reasons foreseen in paragraph 1. As with any exception this must be justified and proportionate to the objective pursued.

Paragraph 2 relating to optional exclusions has been supplemented, in particular, by adding the second subparagraph, which takes on board the same clarification as added to paragraph 1, second subparagraph.

Articles 47 and 48 - Amendments 30, 93 and 95: Article 48 of the amended proposal, relating to economic/financial capacity, was taken on board unchanged. Article 49, relating to technical capacity, was also taken on board, while extending to supply contracts involving siting and installation operations the possibility, set out in paragraph 4 for works contracts and service contracts, the possibility of taking into account the know-how, effectiveness, experience and reliability of candidates/tenderers.

Article 50 - Amendment 97: this takes on board the text of the amendment by clarifying that the request for EMAS certificates is related to any requirements laid down under Article 48(2)(f) concerning technical capacity. Moreover, as with the amendment to Article 49, it offers economic operators wider opportunities for participating in contracts by introducing the general principle of equivalence of the means capable of ensuring the same level of environmental management as required by the contracting authority (deletion of the words "*who have no access to such certificates or no possibility of obtaining them within the relevant time-limits*").

Article 52 - Amendment 153: the text of the amended proposal relating to the official lists of approved economic operators and certification by public- or private-law bodies was taken on board with the following changes:

- third subparagraph of paragraph 1: this was supplemented to ensure that companies providing their capacity to an economic operator for the purpose of the latter's registration or certification are in a position to continue to do so throughout the period of validity of the registration or certificate;
- a new paragraph 6: this brings the arrangements for registration or obtaining a certificate into line with those laid down for registration in a dynamic purchasing system, i.e. economic operators may apply at any time to be registered or granted a certificate and have the right to be informed of the response to their application within a reasonably short period of time.

Article 55 - Amendments 15 and 100: the text of the amended proposal relating to abnormally low tenders was taken on board unchanged.

Article 61 - Amendment 150: this takes on board Article 73a of the amended proposal relating to the award of additional works to the contractor, with some purely linguistic changes to the first subparagraph.

Chapter II and Chapter III of Title III: Chapter II of the initial proposal containing the rules applicable to contractors, whether contracting authorities or not, was subdivided into two chapters for the purpose of clarity. The rules applicable to contractors which are contracting authorities are thus separated from the rules applicable to other contractors.

Article 71 - Amendment 104: the text of the amended proposal relating to the means of communication and the confidentiality which these must ensure was taken on board unchanged.

Annex VII: the texts of the amended proposal relating to notices were taken on board as set out below:

- *Amendments 110 and 113:* the text was taken on board with the exception of the indication in the contract notice of the name, address, etc. of the body from which information on tax, environmental and social legislation can be obtained. Under Article 27(1), contracting authorities communicating such information are obliged to indicate it in the contract documents (as proposed in Amendment 50);
- *Amendment 112:* the text relating to the full indication of the details of the contracting authority in the contract documents was taken on board unchanged;
- *Amendments 113 and 114:* the texts relating to the indication of the details of appeal bodies in the contract notice and in the award notice were taken on board, while nevertheless providing for the alternative possibility of indicating the details of the body from which that information can be obtained. This addition was inserted in order to take account of certain national situations which would make such an indication over-complicated and would risk misinforming economic operators. The change thus takes into account the substance of the amendments by ensuring that operators can apply to a competent body to obtain all the information needed. Indication of these details is also made mandatory for "*notices for public works concessions*".

In addition, this Annex was supplemented to take account of the changes relating to the competitive dialogue, electronic auctions and dynamic purchasing systems.

3.2.2. *Amendments incorporated into the amended proposal but not taken on board in the common position*

Recital (2) - Amendment 147: this recital takes on board the text of the Commission's initial proposal and not that of the amended proposal. It was considered legally inappropriate and superfluous from the point of view of the scheme of the legislation to reiterate the applicability of the Treaty to contracts which do not fall within the scope of the Directive. However, that does not change the legal situation of contracts below the thresholds, which must be awarded in compliance with the Treaty, and this allowed the Commission to accept it.

Amendments 4 and 40: these amendments relate to the conditions under which contracting authorities may award public contracts directly to an entity which is formally distinct but over which it exercises a control analogous to that which it exercises over its own departments. They were not taken on board because it was impossible to obtain a qualified majority on the text put forward by the Commission in its amended proposal.

Amendment 17: since the Council did not consider it appropriate to include in the text of the Directive an invitation to the Commission to examine ways of reinforcing legal certainty in the field of concessions and public-private partnerships, the Commission made a unilateral statement along the lines of Parliament's amendment which was included in the Council minutes (attached as an Annex).

Amendment 13: this amendment, which proposed a new recital stressing the obligation on the part of Member States to adopt the necessary measures for the enforcement of the Directive and to examine whether it is necessary to create an independent public procurement agency, was not taken on board. This is justified, on the one hand, by the general obligation to adopt the measures needed for implementation of the Directive deriving directly from the Treaty, and which therefore do not need to be reiterated, and on the other by the possible overlaps with the appeal bodies set up in application of the "redress" Directives.

Article 38(3)(a) - Amendment 70: the lengthening of the time-limits for requests for participation - 40 days instead of 37 - in restricted procedures, negotiated procedures with publication of a contract notice and in the event of the competitive dialogue provided for by the amended proposal (Article 37), was refused unanimously by the Council.

3.2.3. *Points of divergence between the amended proposal and the common position*

Recital (26): this amends Recital (13) of the Commission's initial proposal by adding that, "*in compliance with the Agreement*" on public procurement signed within the WTO, "the financial services referred to in the Directive do not include the instruments ... of other policies which involve operations on securities or other financial instruments, and *in particular operations to provide the contracting authorities with money or capital*".

Article 16(d): this amends Article 18(d) of the initial proposal in the same way as the amendment made to the recital, i.e. it adds after "*relating to financial services for the issue, purchase, sale and transfer of securities or other financial instruments*" the words "*and in particular operations to provide the contracting authorities with money or capital*".

The Commission considers that the changes introduced unanimously by the Council, which follow Amendment 37 of the European Parliament, could give rise to confusion as regards the scope of the Directive as far as financial services are concerned. It has therefore reiterated, in a statement in the minutes of the Council of 21st May 2002, attached as an Annex to the present Communication, the position which it had already had occasion to set out in its amended proposal when rejecting Parliament's Amendment 37.

In order to prevent these provisions - amended along the same lines as Amendment 37 of the European Parliament - becoming a source of confusion as to the interpretation of the exclusion provided for by Community law, the Commission included in the Council minutes the statement attached as an annex.

3.3. New provisions

3.3.1. *Provisions which were not the subject of amendment and which were reformulated in the common position, or which are an extension of the provisions already set out in the initial proposal*

General comment: the changes set out below can largely be explained by the need to highlight, throughout the text, the consequences of certain changes introduced; this is the case, for instance, with electronic purchases or dynamic purchasing systems, or with the transformation of the competitive dialogue into a fully-fledged procedure, or where the provisions governing concessions and contests have to be brought into line with the changes made to the provisions governing contracts.

Recital (10): this introduces the provisions relating to Article 1(5) and Article 32, concerning framework agreements. It rewords the text of Recital (19) of the initial proposal by clarifying it, with particular reference to the conclusion of framework agreements. The maximum duration of such agreements was increased by one year (four years instead of three).

Recital (11): this new recital stresses that the new electronic procurement techniques must comply with the rules of the Directive and the principles governing it, and clarifies how bids may assume the form of an electronic catalogue.

Recital (13): this new recital introduces Articles 1(7) and 54 relating to electronic auctions and their use.

Recital (15): this clarifies that the Member States have the choice of using the new procurement methods set out in the Directive - framework agreements, competitive dialogue, dynamic purchasing systems and electronic auctions.

Recital (19) and Article 12: in view of the process of opening up postal services to competition currently under way at Community level, the texts of Recital (6) and Article 14 of the initial Commission proposal were amended in such a way as to provide for the transfer of the contracts awarded by postal operators for the exercise

of certain of their activities from the scope of the "classic" Directive to that of the "utilities" Directive, where those contracts are awarded for the exercise of postal activities as defined by the latter Directive. This transfer is determined by the implementation, by the Member State concerned, of the provisions set out in the "utilities" Directive for such postal services.

Recital (23): since this exclusion applies only to service contracts (acquisition of existing buildings, etc.), the text was been clarified in that sense (addition of the words "*In the framework of services*").

Recital (24): this further clarifies the scope of the exclusion of contracts in the field of broadcasting, without in any way changing the scope of the exclusion.

Recital (35): this supplements the text of Recital (24) of the initial proposal, relating to the transmission of information by electronic means, by stressing the importance of the security and confidentiality requirements inherent in public contracts and contests, and the usefulness of voluntary accreditation schemes to that end.

Recital (37): this rewords Recital (27) of the initial proposal, relating to the criteria for selecting participants in contracts, by clarifying that the verification of capacity required from economic operators must be carried out for any type of procedure with competition, including open procedures.

Recital (38): this new recital explains the arrangements to be respected/applied by contracting authorities which limit the number of candidates to be admitted to restricted and negotiated procedures or to a competitive dialogue.

Recital (39): this introduces and clarifies the possibilities for conducting the competitive dialogue and negotiated procedures (introduced respectively in Article 29(4) and Article 30(4)) in successive phases, and the possibilities for reducing the number of bids to be discussed or negotiated in each phase.

Recital (43): this new recital introduces Article 52 (modified to take account of Amendment 153) relating to the official lists of approved economic operators and certification by public or private bodies. In particular, it clarifies how an economic operator forming part of a group can call upon the capacity of other companies in the group for the purpose of registration or certification.

Recital (44): this rewords Recitals (29) and (30) of the initial proposal relating to the award criteria. It strengthens and clarifies the arrangements for taking account of environmental and social considerations in the award criteria used to identify the most economically advantageous bid. In particular, this recital lays down that a contracting authority may, when defining its requirements and its selection criteria, take account of the interests of the public for which it is responsible. Those requirements and the criteria for assessing the degree to which they are met may be not purely economic in nature.

Article 1: in general terms, the order of the paragraphs has been rearranged so that it follows the order in which the aspects set out appear in the Directive.

Article 1(2): this modifies Article 1(2) and (3) of the initial proposal. The changes concern the definition of public contracts, for which it is further specified that the contract may be concluded by "*several contracting authorities*", and the definitions

of supply contracts - "*public contracts other than those referred to in point (b)*" - and of service contracts - "*other than public works or supply contracts*". The first change is necessary to take account of the need to simplify procedures, for instance in the event of cooperation between contracting authorities in order to achieve the same objective. The other changes underline the background to the adoption of the basic Directives.

Article 1(11)(1), (2) and (4): the text of the initial proposal was taken on board without the word "*national*". This deletion has no legal consequence.

Article 1(14), Annex I (first footnote added) and Annex II (first footnote added): these changes were made in order to clarify the fact that the scope of the Directive cannot be changed because of the use of the "*Common Procurement Vocabulary*".

Article 1(15) (d): this lays down that radio and television broadcasting services are not telecommunications services.

Article 2: this strengthens the application of the principles of equality of treatment, transparency and non-discrimination, referred to in Article 2 of the initial proposal, by imposing directly on contracting authorities the obligation to comply with them.

Article 3: this modifies Article 55 of the initial proposal. The words "*whatever their legal status*" were deleted as being superfluous. The obligation to comply with the rules and principles of the Treaty was replaced by the obligation "*to comply with the principle of non-discrimination on grounds of nationality*", as set out in Article 2(2), of Directive 93/36/EEC currently in force. Since the obligations deriving from the Treaty are in any case applicable as interpreted by the Court, the Commission, while regretting this change, which does not reflect the case law of the Court, accepted the unanimous position of the Council in this respect.

Article 4: this re-words and updates Article 3 of the initial proposal relating to groups of economic operators. The possibility of asking for an indication of the persons who will perform the contract is also provided for in the case of works and supply contracts involving siting and installation operations. This is justified by the confidence in the know-how, effectiveness, experience and reliability needed for such services and thus reflects the change made to Article 48(5).

Article 7: this re-words and updates Article 8 of the initial proposal. It further clarifies the exclusion of certain contracts and brings the amounts of the thresholds into line with the amounts in force for the period 2002-2004, which were recalculated in accordance with the biannual revision mechanism for the thresholds provided for in order to adapt them to the changes that have occurred in the parities between the European currencies and SDR. The increase in the thresholds given in the common position, as compared with those given in the initial proposal, reflects the thresholds expressed in SDRs (special drawing rights) set out in the Government Procurement Agreement.

In addition, a higher threshold was chosen for certain telecommunications services not subject to the Government Procurement Agreement, thereby reflecting the existing legal situation; the Commission's proposal to have only one threshold for service contracts in order to simplify the legal framework was not accepted, as it involved a large reduction in the threshold applicable.

Article 8: this rewords Article 9 of the initial proposal and brings the thresholds - for the same reasons - into line with those set out in Article 7. The re-wording does not involve any change in the scope of the Directive, which has to correspond to those of the "works" and "services" Directives currently in force. It is necessary in order to reflect the primacy of the CPC and NACE set out in Article 1(14) and in Annexes I and II in the event of diverging interpretations between those classifications and the CPV.

Article 10: this re-words Article 7 of the initial proposal relating to contracts awarded in the field of defence, without in any way changing the scope, which remains linked to the application of Article 296 of the Treaty.

Article 17: this new article explicitly excludes service concessions from the scope of Directive 92/50/EEC for the purpose of clarifying the legal situation.

Article 24 and Annex VII, contract notices, point 9: this clarifies the text of Article 25 of the initial proposal relating to variants, which was based on the established case law, so that economic operators can know with certainty whether or not variants are authorised (mandatory indication of the two cases in the contract notice) and under what conditions their variants will be accepted (account taken only of variants which meet the minimum requirements indicated).

Article 25: Article 26 of the initial proposal was modified to clarify that the Member States may oblige contracting authorities to set out requirements relating to subcontracting. On the other hand, the substitution of the words "proposed subcontractors" for the words "appointed subcontractors" leaves some leeway for economic operators to take account of situations in which the specific identification of the subcontractors might be an obstacle to the submission of bids.

Article 28: this is reworded to clarify that contracting authorities must apply their national procedures and to take account of the transformation of the competitive dialogue into a fully-fledged procedure.

Article 32: this rewords Article 32 of the initial proposal relating to framework agreements by changing the maximum duration of such agreements (see comments on Recital (10)), and by introducing the possibility of concluding a framework agreement with a single economic operator. It is set out that the decision to authorise framework agreements or to limit their scope to certain types of contract is a matter for the Member States, since the objective of the Directive is to ensure that their possible implementation complies with the principle of equal treatment.

Article 35: this takes over the text of Article 34 of the initial proposal by adapting it to the transformation of the competitive dialogue into a fully-fledged procedure and to the introduction of dynamic purchasing systems. Two changes in substance were introduced. The first concerns the possibility of publishing the pre-information notice on the buyer profile of the contracting authority. This possibility is supplemented by the obligation to publish a "*a notice announcing the publication of a preinformation notice on a profile*". This change strengthens the role of electronic means in public procurement, while ensuring equal access to all potential tenderers through publication.

The second change concerns the limitation of the obligation to publish such a notice to cases in which the contracting authority wishes to benefit from the reduction of the time-limit for the receipt of bids set out in Article 38(4). The Commission accepted this solution despite the fact that it represents a step backwards from its initial proposal, which proposed mandatory pre-information notices, on the grounds that the Member States reached agreement on this basis.

Article 43: this brings the article of the initial proposal on minutes into line with the introduction of dynamic purchasing systems, and clarifies it with regard to the obligations relating to framework agreements. In addition, it lays down an obligation to strengthen the transparency of procedures awarded by electronic means through an obligation incumbent on contracting authorities to document the progress of procedures conducted by electronic means.

Article 49: Article 50 of the initial proposal relating to quality assurance standards is modified in the same sense as the change made to Amendment 97 cited in point 3.3.1. above.

Article 53: the text relating to the award criteria underwent a restructuring of paragraph 1 and changes to paragraph 2.

In paragraph 1, the order of the two award criteria has been changed, with the most economically advantageous offer henceforth being the first criterion cited, the aim being to combat the prevailing opinion that public contracts give priority to a purely budgetary approach. On the other hand, the words "*directly linked to the subject of the contract*" were replaced by "*justified by the subject of the contract*", with the aim of expressing the idea that each criterion for assessing bids must necessarily be linked to the subject of the contract, without it being necessary to describe that link as "*direct*".

Paragraph 2 was modified as follows: subparagraphs 1 and 3 were merged into subparagraph 1, which was brought into line with the transformation of the competitive dialogue into a fully-fledged procedure; the possibility of indicating, in the invitation to tender/dialogue/negotiate, the weighting or the descending order of importance of the criteria was deleted for reasons of legislative economy (it already appears in Article 40(5)(e)); the possibility of expressing the weighting by a range has been spelt out more clearly; it was thought appropriate to recognise that, in certain cases, the contracting authority may not be able, for demonstrable reasons, to indicate a weighting. Only in such cases can the weighting be replaced by an indication of the criteria in descending order of importance.

Article 56: this modifies Article 64 of the initial proposal by bringing the threshold applicable to public works concessions into line with the recalculated threshold applicable to public works contracts and lays down that the value of concessions must be calculated according to the rules applicable to public contracts.

Article 57: this Article simplifies Article 65 of the initial proposal relating to the exclusions from the scope of the rules applicable to concessions, by making reference to the provisions applicable to public contracts. In the case of concessions granted by contracting authorities exercising one of the activities referred to in the "utilities" Directive, the text is modelled on that of Article 12 applicable to public contracts.

Article 58: this simplifies Article 66 by making references, for the publication of the notice putting a concession out to tender, to the provisions applicable to public contracts.

Article 59: this inserts into Article 67 of the initial proposal, relating to the time-limit for presenting applications for concessions, the possibility of reducing that time-limit in the event of the use of electronic means, as set out in Article 38(5) for public contracts. In addition, it lays down the obligation to extend this time-limit, referred to in paragraph 7 of this same Article.

Article 63: this takes on board Article 71 by bringing the threshold for public contracts awarded by concessionaires which are not contracting authorities into line with the recalculated threshold applicable to public works contracts and introduces, in paragraph 1, a third subparagraph setting out the rules for calculating the value of the contracts.

Article 65: Article 73 is supplemented by the second subparagraph authorising reductions in the time-limit for receipt of bids because of the use of electronic means (Article 38(5) and (6)) and laying down an extension of that time-limit when bids can be drawn up only after an on-site visit (Article 38(7)).

Article 67: Article 57(1) of the initial proposal is modified to bring the thresholds for contests into line with those applicable to public service contracts. Paragraph 2, second and third subparagraphs, contains details of the arrangements for calculating the value of contests.

Article 68: this Article simplifies Article 58 of the initial proposal, relating to exclusions from the scope of the rules applicable to contests, by making references to the provisions applicable to public contracts. In the case of concessions granted by contracting authorities exercising one of the activities referred to in the "utilities" Directive, the text is modelled on that of Article 12 applicable to public contracts.

Articles 69 and 70: Article 59(2), second subparagraph, and (3), and Article 60 are modified to include references to the corresponding articles applicable to public contracts which apply to service contests.

Article 73: for the purpose of clarification, the provisions of Article 63 of the initial proposal were separated: Article 73 is devoted to the composition of the jury, while the provisions relating to the decisions of the jury are set out in Article 74.

Article 74: the provisions of Article 63(2) of the initial proposal were modified in order to further clarify the obligations with regard to anonymity, to strengthen the transparency of the progress of the work of the jury by making minutes mandatory, and to allow for an improved appreciation of the part of the jury by making available to it, if necessary, clarifications on the plans and projects drawn up by the participants.

Article 76: the statistical obligations set out in Article 75(1), second subparagraph, point (b), were simplified by laying down that the statistical report on services and works must be drawn up - was already laid down for supplies - using only the CPV classification.

Article 77: Article 76 of the initial proposal, relating to the Advisory Committee, was the subject of a purely linguistic change in paragraph 2. Paragraph 3 was brought into line with the comitology rules.

Article 78: Article 77 of the initial proposal, relating to the revision of the thresholds was taken on board with one clarification in paragraph 1 (first subparagraph: automatic verification every two years and revision, i.e. modification, only where necessary, i.e. only when the change in parity between euro and SDRs justifies this) and a change concerning the rounding-down of the thresholds when being revised ("*thousand euro*" instead of "*ten thousand*").

Article 79: this partly rewrites Article 78 of the initial proposal relating to changes which may be made by comitology procedure for the purpose of clarification, and inserts a new point (i) to take account of the new Annex X.

Article 80: the time limit for implementation of the Directive is changed to 21 months after its entry into force.

Article 81: the text relating to the effects of the repeal of the Directives currently in force contains one addition ("*and application*") reflecting the obligations of the Member States deriving from the Directives.

Article 82: this is a new Article setting out the date of entry into force of the Directive.

Annex III (List of bodies governed by public law); Annex IV (List of Central Government authorities) and Annex IX (Registers): these annexes were modified to take account of changes in the national situations.

Annex VII A (Notice of the publication of a prior information notice on a buyer profile): this takes account of the changes made to Article 35.

3.3.2. New substantive provisions

Recital (12), Article 1(6), Article 33 and Annex VII A "Simplified contract notice for use in a dynamic purchasing system": these provisions introduce a new, entirely electronic instrument - dynamic purchasing systems for use with objects of common use. This is an instrument which fits in with the objective of modernising the Community coordination rules with a view to deriving full benefit from the possibilities for simplification and efficiency offered by information technologies. It is intended to allow for and ensure open competition for each contract awarded using the system: every operator taking part is automatically invited to submit a bid and, at the same time, new operators can submit bids.

This instrument provides for the establishment of a list of economic operators who will automatically be invited to submit a definitive bid for each specific contract put out to competition. Registration on that list, however, remains open for the entire duration of the system, which is a maximum of four years. Knowledge of the existence of the system is ensured by the notice published when the system is put in place and by the simplified contract notice published on the award of each specific contract.

Registration on these lists is on the basis of "indicative" bids which any economic operator can submit at any time after publication of the notice announcing the establishment of the dynamic purchasing system. To this end, the contracting authority - right from the outset - makes available to interested operators, by electronic means, the contract documents and any other documents.

This system must be considered in the light of Amendment 78 adopted by Parliament proposing a qualification system in the "classic" Directive. The Commission had rejected it on the grounds that it would involve an unacceptable loss of transparency, as only undertakings with prior qualification would be consulted for the award of contracts. On the other hand, the Commission had stressed in its amended proposal that, if such systems were accompanied by appropriate competition and ensured transparency and equality of treatment, it would be in favour of them. The possibility of using electronic means to this end had also been raised. In this context, the Commission believes that the dynamic purchasing system, as inserted in the common position, means the above requirements and could be an appropriate response to the call made by Parliament in its Amendment 78.

Article 1(4): this gives a definition of "*service concessions*" with a view to the exclusion explicitly set out in the new Article 17. This definition is modelled on that for public works concessions and is intended to clarify the exclusion of service concessions.

Article 31: this introduces new cases of negotiated procedures without prior publication of a notice. This involves supplies of raw materials quoted and purchased on a commodity market (paragraph 2(c)), as already provided for by Directive 77/62/EEC, and supplies on particularly advantageous terms resulting from situations clearly regulated in the Member States (paragraph 2(d)).

Annex X: this new Annex relates to the requirements for the provisions on the electronic receipt of bids, applications for participation or plans and projects in contests. It responds to the confidentiality concerns expressed in Parliament's Amendment 117, which was not accepted by the Commission solely because it was not accompanied by an amendment to the provision aimed at introducing the proposed annex, and not for reasons of substance.

4- CONCLUSIONS

The Commission considers that the text of the common position takes on board the key elements contained in the initial proposal and in the amendments of the European Parliament, as taken on board in the amended proposal. Where the Commission has not accepted the common position adopted unanimously by the Council, it is because of the situation of financial services. On the other aspects, the common position meets the objectives of clarification, simplification and modernisation set out in the initial proposal of the Commission.

ANNEXES

Statements in the minutes of the Council of 21 May 2002

Statement by the Commission on Recital 13 and Article 18(d) (*which became in the common position, Recital 26 and Article 16(d) respectively*).

"The Commission considers that the public procurement Directives are subject to Community obligations arising from the Government Procurement Agreement, and will therefore interpret these Directives in a manner compatible with this Agreement. Therefore the Commission considers that Recital 13 and Article 18(d) cannot be interpreted as excluding, among other things, public contracts concerning loans of contracting authorities, in particular local authorities with the exception of loans for "the issue, sale, purchase or transfer of securities or other financial instruments".

In addition, the Commission would reiterate that in any event where the Directives are not applicable, for example below the threshold, the rules and principles of the Treaty must be observed. In accordance with the case law of the Court, this implies in particular the obligation of transparency consisting in ensuring sufficient publicity to allow contracts to be opened up to competition."

Statement by the Commission on services concessions and public/private partnership (Article 1(3)(a) and Article 18(a) (*which became in the common position, Article 1(4) and Article 17 respectively*).

"The Commission considers that questions concerning services concessions and public/private partnerships should be further examined to assess the need for a specific legislative instrument so as to allow economic operators better access to concessions and to the various forms of public/private partnerships and so guarantee that these operators can take full advantage of their rights enshrined in the Treaty."