



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 27 April 2012**

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**Interinstitutional File:  
2011/0438 (COD)**

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**9315/12**

**MAP 40  
MI 273  
CODEC 1122**

**NOTE**

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from: General Secretariat  
to: Working Party on Public Procurement

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No Cion prop.: 18966/11 MAP 10 MI 686

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Subject: Proposal for a Directive of the European Parliament and of the Council on  
public procurement  
- Cluster 10: Scope

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Delegations will find in the Annex a non-paper prepared by the Commission services (DG Internal Market) on Cluster 10 of the above proposal.

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## Cluster 10

### Scope

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Changes to the substance are highlighted in **bold**; minor modifications or purely linguistic adaptations are not highlighted.

#### 1. Concept of procurement

##### *Article 1*

##### *Subject-matter and scope*

- 1. This Directive establishes rules on the procedures for procurement by contracting authorities with respect to public contracts as well as design contests, whose value is estimated to be not less than the thresholds laid down in Article 4.**

In line with current practice, an article has been included at the beginning of the enacting terms to define the subject matter and scope of the Directive.

- 2. Procurement within the meaning of this Directive is the purchase or other forms of acquisition of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose.**

This provision aims at better circumscribe the notion of procurement itself. Directive 2004/18/EC only provides for a definition of "public contract" without providing a proper definition of the underlying concept of "procurement", i.e. the act of public purchasing, which is however the first determining factor for the application or not of the Directive.

A few elements of definition have been set out in various judgements of the European Court of Justice; the definition above proposes to codify the most fundamental ones:

- Public procurement must be more than simple disbursement of public money. According to the ECJ, public procurement are only those forms of spending of public money where the economic operators provide, in return for remuneration, works, goods or services which are of direct economic benefit to the contracting authority (see judgement in case C-451/08, Helmut Müller, para 49). This criterion has been codified through the reference to "the purchase or other forms of acquisition".
- It does not make a difference for the definition as procurement whether the purchase serves the purpose of meeting needs in the general interest or not (see case C-126/03, Commission/Germany ("Donauwald"), para. 18 and case C-44/96, Mannesmann Anlagenbau Austria AG and Others v Strohal Rotationsdruck GesmbH, para. 31 and 32.). This important principle has been codified through the mention "whether or not the works, supplies or services are intended for a public purpose".

Finally, it also seemed important to clarify that public procurement necessarily presupposes an element of selectivity, which distinguishes procurement from simple authorization schemes: Only such contracts can be considered as procurement where one or several economic operators are chosen to fulfil the task in question against remuneration. Situations where all operators fulfilling certain conditions are entitled to perform a given task, without any selectivity, are normally not procurement but simple authorization schemes (e.g. licenses for medicines or medical services).

See also the explanations in Recital 3:

"The increasingly diverse forms of public action have made it necessary to define more clearly the notion of procurement itself. The Union rules on public procurement are not intended to cover all forms of disbursement of public money, but only those aimed at the acquisition of works, supplies or services for consideration. The notion of acquisition should be understood broadly in the sense of obtaining the benefits of the works, supplies or services in question, not necessarily requiring a transfer of ownership to the contracting authorities. Furthermore, the mere financing of an activity, which is frequently linked to the obligation to reimburse the amounts received where they are not used for the purposes intended, does not usually fall under the public procurement rules."

**An entirety of works, supplies and/or services, even if purchased through different contracts, constitutes a single procurement within the meaning of this Directive, if the contracts are part of one single project.**

Whereas the first subparagraph of paragraph 2 defines the notion of procurement rationae materiae, the second subparagraph tackles the question from a quantitative angle. It addresses the recurrent problem of deciding whether a set of related purchases has to be considered as "one procurement", with the consequence that the sum of these purchases will be the relevant factor for the application of the Directives (e.g.: threshold values determined on the basis of the aggregate value; type of procurement regime determined following Article 3, taking into account the entirety of purchases related to this procurement, ...).

The European Court of Justice has so far only considered this question once, with regard to works contracts. In this case, the Court concluded that several purchases constituted one single procurement because "taken as a whole, they fulfilled one economic and technical function" (case C-16/98, Commission / France, "electrification of Vendée", para 64).

Keeping in mind also the provisions of Article 9(3)<sup>1</sup> of Directive 2004/18/EC, the draft Directive proposes to build on this jurisprudence in order to establish a more general rule, according to which purchases which are part of one single project should be considered as an entirety, and hence one single procurement. Recital 4 provides further elements for assessing the existence of one single project, combining both objective element such as the single economic and technical function, but also subjective elements such as the prior overall planning and conception as one single project.

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<sup>1</sup> "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."

Recital 4: "It has also proven necessary to clarify what should be understood as a single procurement, with the effect that the aggregate value of all contracts concluded for the purpose of this procurement has to be taken into account with regard to the thresholds of this directive, and that the procurement should be advertised as a whole, possibly split into lots. The concept of single procurement encompasses all supplies, works and services needed to carry out a particular project, for instance a works project or an entirety of works, supplies and/or services. Indications for the existence of one single project can for instance consist in overall prior planning and conception by the contracting authority, the fact that the different elements purchased fulfil a single economic and technical function or that they are otherwise logically interlinked and carried out in a narrow time frame."

## **2. Definitions**

### Article 2 Definitions

*[Directive 2004/18/EC: Art. 1]*

The list of definitions has been adapted to the changed content of the Directive, taking into account developments in ECJ case-law and the relations with the EU's international partners.

For the purposes of this Directive, the following definitions shall apply:

- (1) ‘contracting authorities’ means the State, regional or local authorities, bodies governed by public law, associations formed by one or more such authorities or one or more such bodies governed by public law;
- (2) ‘**central government authorities**’ means the contracting authorities listed in Annex I and, insofar as corrections or amendments have been made at national level, their successor entities;
- (3) ‘**sub-central contracting authorities**’ means all contracting authorities which are not central government authorities;

Under Directive 2004/18/EC, the distinction between "central government authorities" and "sub-central contracting authorities" is relevant only for the determination of thresholds (Article 7 of Directive 2004/18/EC). The proposal refers to this distinction which is based on the GPA also in other contexts, making full use of the procedural flexibilities reserved to sub-central contracting authorities by the GPA (see Article 24(2)(b) on calls for competition and Article 26(4) on the time-limit for receipt of tenders in restricted procedures).

- (4) **‘regional authorities’ include all authorities of the administrative units falling under NUTS 1 and 2, as referred to by Regulation (EC) No. 1059/2003 of the European Parliament and of the Council<sup>2</sup>;**
- (5) **‘local authorities’ include all authorities of the administrative units falling under NUTS 3 and smaller administrative units, as referred to by Regulation (EC) No. 1059/2003;**

The definitions of "regional authorities" and "local authorities" have been added for the sake of clarity, also in the relationship with the EU's international partners. They are not exhaustive.

- (6) ‘bodies governed by public law’ means bodies that have all of the following characteristics:
- (a) they are established for or have the specific purpose of meeting needs in the general interest, not having an industrial or commercial character; **for that purpose, a body which operates in normal market conditions, aims to make a profit, and bears the losses resulting from the exercise of its activity does not have the purpose of meeting needs in the general interest, not having an industrial or commercial character;**
  - (b) they have legal personality;
  - (c) they are financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or have an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law.

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<sup>2</sup> OJ L 154, 21.6.2003, p. 1.

The definition of "bodies governed by public law" remains essentially unchanged. The clarification in point (a) has been added in order to better reflect the approach developed by ECJ case-law (see, for instance, Case C-18/01 *Korhonen and others*, paragraph 51).

- (7) ‘public contracts’ means contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive;
- (8) ‘public works contracts’ means public contracts having as their object one of the following:
- (a) the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex II;
  - (b) the execution, or both the design and execution, of a work;
  - (c) the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority **exercising a decisive influence on the type or design of the work**;

The definitions of "public works contracts" is now presented in a clearer manner separating the three hypotheses; hypothesis (c) has been clarified in the light of the ECJ judgment in Case C-451/08 *Helmut Müller GmbH*, paragraph 67.

- (9) ‘a work’ means the outcome of building or civil engineering works taken as a whole which is sufficient in itself to fulfil an economic or technical function;
- (10) ‘public supply contracts’ means public contracts having as their object the purchase, lease, rental or hire-purchase, with or without an option to buy, of products. A public supply contract may include, as an incidental matter, siting and installation operations;

- (11) ‘public service contracts’ means public contracts having as their object the provision of services other than those referred to in point (9);
- (12) ‘economic operator’ means any natural or legal person or public entity or group of such persons and/or entities which offers the execution of works and/or a work, the supply of products or the provision of services on the market;
- (13) ‘tenderer’ means an economic operator that has submitted a tender;
- (14) ‘candidate’ means an economic operator that has sought an invitation or has been invited to take part in a restricted procedure, in a competitive procedure with negotiation or in a negotiated procedure without prior publication, in a competitive dialogue or in an innovation partnership;
- (15) **‘procurement document’ means any document produced or referred to by the contracting authority to describe or determine elements of the procurement or the procedure, including the contract notice, the prior information notice where it is used as a means of calling for competition, the technical specifications, the descriptive document, proposed conditions of contract, formats for the presentation of documents by candidates and tenderers, information on generally applicable obligations and any additional documents.**

*[Underlining indicates change to this article made in cluster 1.]*

The term "procurement documents" has been introduced for the sake of clarity. It replaces the notions of "contract documentation", "contract documents", "tender documents" or "specifications" which were used intermittently in Directive 2004/18/EC.

- (16) **‘centralised purchasing activities’ means activities conducted on a permanent basis, in one of the following forms:**



- (a) the acquisition of supplies and/or services intended for contracting authorities,
- (b) the award of public contracts or the conclusion of framework agreements for works, supplies or services intended for contracting authorities;

**(17) ‘ancillary purchasing activities’ means activities consisting in the provision of support to purchasing activities, in particular in the following forms:**

- (a) technical infrastructure enabling contracting authorities to award public contracts or to conclude framework agreements for works, supplies or services;**
- (b) advice on the conduct or design of public procurement procedures;**
- (c) preparation and management of procurement procedures on behalf and for the account of the contracting authority concerned;**

**(18) ‘central purchasing body’ means a contracting authority providing centralised purchasing activities and, possibly, ancillary purchasing activities;**

**(19) ‘procurement service provider’ means a public or private body which offers ancillary purchasing activities on the market;**

*[Points (16) to (19) to be adapted following issue of discussions in cluster 6]*

The terminology related to central and ancillary purchasing activities has been adapted to the new provisions on techniques and instruments for electronic and aggregated procurement (Articles 35 and 36, see cluster 6). The definition of "central purchasing activities" in point (16) is based on the definition of "central purchasing body" in Article 1(10) of Directive 2004/18/EC.

(20) ‘written’ or ‘in writing’ means any expression consisting of words or figures which can be read, reproduced and subsequently communicated, including information transmitted and stored by electronic means;

(21) ‘electronic means’ means electronic equipment for the processing (including digital compression) and storage of data which is transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means;

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

The definition of "life cycle" forms the basis for life cycle costing in awarding contracts (Articles 66 and 67, see cluster 2).
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(23) ‘design contests’ means those procedures which enable the contracting authority to acquire, mainly in the fields of town and country planning, architecture and engineering or data processing, a plan or design selected by a jury after being put out to competition with or without the award of prizes.

## ANNEX I

### CENTRAL GOVERNMENT AUTHORITIES

[for list – unchanged -, please refer to the proposal]

## ANNEX II

### LIST OF THE ACTIVITIES REFERRED TO IN ARTICLE 2(8)(a)

In the event of any difference of interpretation between the CPV and the NACE, the CPV nomenclature will apply.

[for list – unchanged -, please refer to the proposal]

### **3. Mixed procurement**

#### *Article 3 Mixed procurement*

1. Contracts which have as their subject two or more types of procurement (works, services or supplies) shall be awarded in accordance with the provisions applicable to the type of procurement that characterises the main subject of the contract in question.

In the case of mixed contracts consisting of services within the meaning of Chapter I of Title III and other services or of services and supplies, the main object shall be determined by a comparison of the values of the respective services or supplies.

The first subparagraph continues current law concerning mixed contracts covering both works and supplies or works and services, namely that such a contract will follow the provisions applicable to the principal subject-matter of the contract, cf. Article 1(2)(c), 2<sup>nd</sup> subparagraph and Article 1(2)(d)3<sup>rd</sup> subparagraph of Directive 2004/18/EC.

In turn, the second subparagraph continues, *mutatis mutandis*, the current line that mixed contracts including both priority and non-priority services or supplies and services follow the provisions applicable to the part whose value is the greater, cf. Articles 22 and 1(2)(d)2<sup>nd</sup> subparagraph of Directive 2004/18/EC.

2. **In the case of contracts which have as their object procurement covered by this Directive as well as procurement or other elements not covered by it or by Directives [replacing 2004/17/EC] or 2009/81/EC<sup>3</sup>, the part of the contract which constitutes procurement covered by this Directive shall be awarded in accordance with the provisions of this Directive.**

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<sup>3</sup> OJ L 217, 20.8.2009, p. 76.

This provision is based on the Court's jurisprudence in case C-3/88<sup>4</sup>, and it establishes the principle that if the Directive would have been applicable to a procurement if awarded separately, then it remains applicable also in case the contracting authority chooses to associate it with procurements or other elements which are not subject to the Directive 2009/81/EC, nor to this proposal or the proposal for a new Utilities Directive. As was the case in the procurement examined by the Court<sup>5</sup>, this applies also where the value of the excluded parts is greater than that of the covered procurement. Of course, nothing would prevent the contracting authority from awarding two contracts, one in conformity with the provisions of this Directive and the other without applying those rules. In case the different parts of the procurement cannot be separated, then the third subparagraph applies, cf. below.

**In the case of mixed contracts containing elements of public contracts and of concessions, the part of the contract which constitutes a public contract covered by this Directive shall be awarded in accordance with the provisions of this Directive.**

Given the difference in the applicable procedural rules (a full set of procedural rules on the one hand and a light touch regime on the other), this provision entails that if this Directive would have been applicable to a procurement if awarded separately, then it remains applicable also in case the contracting authority chooses to associate it with a concession. Here as well the relative values do not matter. An example might be a service concession for the operation of a database combined with a public service contract for the maintenance and updating of all IT equipment of the contracting authority concerned. Here as well, the contracting authority has the choice of awarding two separate contracts, one in accordance with the provisions applicable under this Directive and the other in accordance with the rules on concessions.

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<sup>4</sup> Judgment of the Court of 5 December 1989, Commission of the European Communities v Italian Republic, European Court reports 1989, p. 04035. See in particular point 19 of the judgment. When reading the judgment, it should be kept in mind that, at that time, no detailed procurement rules were applicable to public service contracts.

<sup>5</sup> See point 47 of the Advocate General's conclusions in the above-mentioned Case C-3/88, equally published in European Court reports 1989, p. 04035.

**Where the different parts of the contract in question are objectively not separable, the application of this Directive shall be determined on the basis of the main subject of that contract.**

The fall-back position in case the different parts of a mixed contract as provided for under the 1<sup>st</sup> and 2<sup>nd</sup> subparagraph cannot be objectively separated is that the contract in its entirety is awarded in accordance with the rules that apply (or do not apply) to the main subject of the contract.

#### **4. Thresholds**

##### *Article 4*

##### *Thresholds amounts*

*[Directive 2004/18/EC: Articles 7, 67; Article 2 of Commission Regulation (EU) no. 1251/2011<sup>6</sup>]*

This Directive shall apply to procurements with a value exclusive of value-added tax (VAT) estimated to be equal to or greater than the following thresholds:

- (a) EUR 5 000 000 for public works contracts;

Unchanged

- (b) EUR 130 000 for public supply and service contracts awarded by central government authorities and design contests organised by such authorities; where public supply contracts are awarded by contracting authorities operating in the field of defence, that threshold shall apply only to contracts concerning products covered by Annex III;

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<sup>6</sup> Commission Regulation (EU) No 1251/2011 of 30 November 2011 amending Directives 2004/17/EC, 2004/18/EC and 2009/81/EC of the European Parliament and of the Council in respect of their application thresholds for the procedures for the awards of contract

Point (b) has been simplified in two respects: firstly, the special threshold for former "B-services" has been eliminated as a consequence of the proposed elimination of the distinction between A and B services; secondly, the special threshold for R&D services and certain telecommunications services (currently set at 200 000 € that applies to "the services listed in Category 8 of Annex IIA, Category 5 telecommunications services the positions of which in the CPV are equivalent to CPC reference Nos. 7524, 7525 and 7526") has been eliminated. A similar simplification of thresholds already applies under the current Utilities Directive, whose Article 16(a) provides for a unified threshold applicable to all services contracts, whether A or B and including the just-mentioned R&D and telecommunications services.

- (c) EUR 200 000 for public supply and service contracts awarded by sub-central contracting authorities and design contests organised by such authorities.

The same simplifications concerning B-services, R&D services and certain telecommunications services have been carried out as just described under point (b).

However, due to a drafting error, the current threshold of 200 000€, applicable to supply contracts awarded by central government authorities operating in the field of defence and concerning products not covered by Annex III (cf. Article 7(b), 2<sup>nd</sup> indent, of Directive 2004/18/EC) has been omitted. It should be re-established to avoid legal uncertainty.

- [(d) EUR 500 000 for public contracts for social and other specific services listed in Annex XVI. – dealt with in cluster 2]

*Article 5*  
*Methods for calculating the estimated value of procurement*  
*[Directive 2004/18/EC: Article 9]*

These provisions have been left largely unchanged as to substance; however, the sequence of paragraphs has been rearranged so as to start with provisions applicable to all three types of contracts (works, supplies and services), followed by provisions applicable to several types of contracts and ending with provisions that apply to one type of contracts only. This corresponds to the approach of Article 17 of Directive 2004/17/EC.

1. The calculation of the estimated value of a procurement shall be based on the total amount payable, net of VAT, as estimated by the contracting authority, including any form of option and any renewals of the contract.

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.

Corresponds as to substance to the provisions of the current Article 9(1).

2. The choice of the method used to calculate the estimated value of a procurement shall not be made with the intention of excluding it from the scope of this Directive. A **single procurement** shall therefore not be subdivided with the effect of preventing it from falling within the scope of this Directive, unless justified by objective reasons.

The first sentence is identical as to substance to the current provision of Article 9(7), 2<sup>nd</sup> subparagraph, whereas the second sentence reproduces the current Art. 9(3), simplified in the light of the new provisions set out in Art. 1(2), 2<sup>nd</sup> subparagraph of this proposal.

3. This estimate shall be valid at the moment at which the call for competition is sent, or, in cases where such notice is not foreseen, at the moment at which the contracting authority commences the procurement procedure, **in particular by defining the essential characteristics of the intended procurement.**

Based on the current Article 9(2); an attempt has been made to better circumscribe the moment in which the contracting authority "commences" the procurement procedure.

4. With regard to framework agreements and dynamic purchasing systems, the value to be taken into consideration shall be the maximum estimated value net of VAT of all the contracts envisaged for the total term of the framework agreement or the dynamic purchasing system.

Reproduces the current Article 9(9) without changes.

5. **In the case of innovation partnerships, the value to be taken into consideration shall be the maximum estimated value net of VAT of the research and development activities to take place during the all stages of the envisaged partnership as well as of the supplies, services or works to be developed and procured at the end of the envisaged partnership.**

New. This provision applies the general principle set out in paragraph 1 (basing the estimate on the total amount payable) and specifies that this must include both the costs of the R&D stage and the cost of the ensuing works, supplies or services to be procured at the end of the procedure.

6. With regard to public works contracts, calculation of the estimated value shall take account of both the cost of the works and the total estimated value of the supplies **and services** that are made available to the contractor by the contracting authorities provided that they are necessary for executing the works.

Based on the current Article 9(4). It has been aligned on the provisions of Article 17(4) of the Directive 2004/17/EC and thus includes the value of both supplies and services that the contracting authority places at the disposal of the contractor and which are necessary for the execution of the works.

7. 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 shall 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 4, this Directive shall apply to the awarding of each lot.

Reproduces – without changes as to substance – the provisions of the current Article 9(5)(a), first and second subparagraph. The third subparagraph of that provision of Directive 2004/18/EC is dealt with in paragraph 9 below.



8. 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 shall be taken of the total estimated value of all such lots when applying Article 4(b) and (c).

Where the aggregate value of the lots is equal to or exceeds the threshold laid down in Article 4, this Directive shall apply to the awarding of each lot.

Reproduces – without changes as to substance – the provisions of the current Article 9(5)(b), first and second subparagraph. The third subparagraph of that provision of Directive 2004/18/EC is dealt with in paragraph 9 below.

9. Contracting authorities may award contracts for individual lots without applying the procedures provided for under this Directive, provided that the estimated value net of VAT of the lot concerned is less than EUR 80 000 for supplies or services or EUR 1 million for works. However, the aggregate value of the lots thus awarded without applying this Directive shall not exceed 20% of the aggregate value of all the lots into which the proposed work, the proposed acquisition of similar supplies or the proposed purchase of services has been divided.

This provision corresponds to the third subparagraph of both Article 9(5)(a) and Article 9(5)(b) of Directive 2004/18/EC. It is unchanged as to substance, but has been reformulated so as to clarify the content.

10. 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 total actual value of the successive contracts of the same type awarded during the preceding 12 months or financial year adjusted, where possible, to take account of the changes in quantity or value which would occur in the course of the 12 months following the initial contract;

- (b) or the total estimated value of the successive contracts awarded during the 12 months following the first delivery, or during the financial year where that is longer than 12 months.

Paragraph 10 of this Article reproduces Article 9(7), 1<sup>st</sup> subparagraph, of Directive 2004/18/EC without any changes. As already mentioned, Article 9(7), 2<sup>nd</sup> subparagraph, of Directive 2004/18/EC has been moved to paragraph 2 of this Article.

11. 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, where that term is less than or equal to 12 months, the total estimated value for the term of the contract or, where the term of the contract is greater than 12 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.

Reproduces the current Article 9(6) without changes.

12. With regard to public service contracts, the basis for calculating the estimated contract value shall, where appropriate, be the following:
- (a) insurance services: the premium payable and other forms of remuneration;
  - (b) banking and other financial services: the fees, commissions, interest and other forms of remuneration;
  - (c) design contracts: fees, commission payable and other forms of remuneration.

Reproduces the provisions of the current Article 9(8)(a) without changes.

13. With regard to public service contracts which do not indicate a total price, the basis for calculating the estimated contract value shall be the following:

- (a) in the case of fixed-term contracts, where that term is less than or equal to 48 months: the total value for their full term;
- (b) in the case of contracts without a fixed term or with a term greater than 48 months: the monthly value multiplied by 48.

Reproduces the provisions of the current Article 9(8)(b) without changes.

*Article 6*  
*Revision of the thresholds*  
*[Directive 2004/18/EC: Articles 78, 79(2)(a)]*

The main substance of this Article – that the Commission may revise the threshold each two years in accordance with a strict and well established methodology that does not leave it any margin of appreciation whatsoever – remains unchanged. Such is also the case in respect of certain thresholds (subsidised works and service contracts as referred to in Article 12 of this proposal) which the Commission may align – again without any margin of manoeuvre – on those applicable, respectively, to public works and public service contracts. The only new power that this Article would give to the Commission is the power, provided for in the second subparagraph of paragraph 3, see below for explanations.

1. Every two years **from 30 June 2014**, the Commission shall verify that the thresholds set out in points (a), (b) and (c) of Article 4 correspond to the thresholds established in the Government Procurement Agreement and shall, where necessary, revise them.

In accordance with the calculation method set out in the Government Procurement Agreement, the Commission shall calculate the value of these thresholds on the basis of the average daily value of the euro in terms of the special drawing rights (SDRs), over a period of 24 months terminating on the last day of August preceding the revision with effect from 1 January. The value of the thresholds thus revised shall, where necessary, be rounded down to the nearest thousand euros so as to ensure that the thresholds in force provided for by the Agreement, expressed in SDRs, are observed.

2. When carrying out the revision pursuant to paragraph 1 of this Article, the Commission shall, in addition, revise:
  - (a) the threshold established in point (a) of the first paragraph of Article 12 by aligning it with the revised threshold applying to public works contracts;
  - (b) the threshold established in point (b) of the first paragraph of Article 12 by aligning it with the revised threshold applying to public service contracts awarded by sub-central contracting authorities.
3. Every two years **from 1 January 2014**, the Commission shall determine the values, in the national currencies of the Member States which are not participating in monetary union, of the thresholds referred to in points (a), (b) and (c) of Article 4, revised pursuant to paragraph 1 of this Article.

Due to a clerical error, the date for the determination of the counter-value in the national currencies other than the euro of the revised thresholds has been indicated as the first of January 2014. This is obviously a mistake, as paragraph 1 of this Article entails that the first revised threshold under this proposal only enter into force as of **1 January 2015**. This error should consequently be corrected.

**At the same time, the Commission shall determine the value, in the national currencies of the Member States which are not participating in monetary union, of the threshold referred to in point (d) of Article 4.**

This separate provision is necessary since the special threshold set out in Article 4(d) for social and other specific services is not subject to any two years revision, as it is not subject to the GPA. It does therefore not need to be adjusted in function of currency fluctuations in the exchange rates SRs-euros. It is, however, appropriate ensure that exchange rate fluctuations between the euro and the other national currencies in the EU are taken into account.

In accordance with the calculation method set out in the Government Procurement Agreement, the determination of such value shall be based on the average daily values of those currencies corresponding to the applicable threshold expressed in euros over the 24 months terminating on the last day of August preceding the revision with effect from 1 January.

4. The revised thresholds referred to in paragraph 1 and their corresponding values in the national currencies referred to in paragraph 3 shall be published by the Commission in the *Official Journal of the European Union* at the beginning of the month of November following their revision.
5. The Commission shall be empowered to adopt **delegated acts in accordance with Article 89** to adapt the methodology set out in the second subparagraph of paragraph 1 **to any change in the methodology provided in the Government Procurement Agreement** for the revision of the thresholds referred to in points (a), (b) and (c) of Article 4 and for the determination of the thresholds in the national currencies of the Member States not participating in monetary union, as referred to in paragraph 3 of this Article.

It shall also be empowered to adopt **delegated acts in accordance with Article 89** to revise the thresholds referred to in points (a), (b) and (c) of Article 4 pursuant to paragraph 1 of this Article. It shall also be empowered to adopt **delegated acts in accordance with Article 89** to revise the thresholds referred to in points (a) and (b) of the first paragraph of Article 12 pursuant to paragraph 2 of this Article.

6. Where it is necessary to revise the thresholds referred to in points (a), (b) and (c) of Article 4 and the thresholds referred to in points (a) and (b) of the first paragraph of Article 12 and time constraints prevent the use of the procedure set in article 89 and therefore imperative grounds of urgency so require, **the procedure provided for in Article 90** shall apply to delegated acts adopted pursuant to the second subparagraph of paragraph 5 of this Article.

Explanations to paragraph 5 and 6: In its Article 78(1) and 78(2) and the last subparagraph of Article 79(2), Directive 2004/18/EC provides that the corresponding powers are to be exercised by the regulatory procedure with scrutiny or, on imperative grounds of urgency, the regulatory procedure with scrutiny with shortened deadlines. These procedures have been abolished, following the Lisbon Treaty, and are here replaced by delegated acts as provided for in **Article 290** of the Treaty on the Functioning of the European Union.

*Article 94*  
*Review*  
*[New]*

**The Commission shall review the economic effects on the internal market resulting from the application of the thresholds set in Article 4 and report thereon to the European Parliament and the Council by 30 June 2017.**

**In the event of any change to the threshold amounts applicable under the Agreement, the report shall, where appropriate, be followed by a legislative proposal amending the thresholds set out in this Directive.**

This provision explicitly engages the Commission to carry out a review of the functioning of the Directive which focuses explicitly on the "economic effects on the internal market of the application of the thresholds" and to report thereon to the Union legislators. Where thresholds as set out pursuant to the GPA have changed, the report shall, as appropriate, be accompanied by suitable proposals to change the thresholds set out in this Directive.

### **ANNEX III**

#### **LIST OF PRODUCTS REFERRED TO IN ARTICLE 4(b) WITH REGARD TO CONTRACTS AWARDED BY CONTRACTING AUTHORITIES IN THE FIELD OF DEFENCE**

The only text applicable for the purposes of this Directive is that in Annex 1 point 3 of the Government Procurement Agreement on which the following indicative list of products is based:

[for list – unchanged -, please refer to the proposal]

#### **5. Exclusions and specific situations**

##### *Article 7*

*Contracts in the water, energy, transport and postal services sectors [Directive 2004/18/EC, Article 12]*

This Directive shall not apply to public contracts and design contests which, under [Directive replacing 2004/17/EC], are awarded or organised by contracting authorities exercising one or more of the activities referred to in Articles [5 to 11] of that Directive and are awarded for the pursuit of those activities, or to public contracts excluded from the scope of that Directive under [Articles 15, 20 and 27] thereof.

Unchanged, except for the deletion of the second subparagraph of Article 12 of Directive 2004/18/EC. This paragraph is no longer needed due to the fact that the transitional period for phasing-in the Utilities Directive for the postal sector has expired (cf. the 2<sup>nd</sup> subparagraph of Article 71 of Directive 2004/17/EC).

*Article 8*  
*Specific exclusions in the field of electronic communications*  
*[Directive 2004/18/EC: Articles 1(15), 13 and 68(b)]*

This Directive shall not apply to public contracts and design contests for the principal purpose of permitting the contracting authorities to provide or exploit public **communications** networks or to provide to the public one or more **electronic communications** services.

**For the purposes of this Article:**

- (a) **'public communications network'** means an electronic communications network used wholly or mainly for the provision of electronic communications services available to the public which support the transfer of information between network termination points;
- (b) **'electronic communications network'** means transmission systems and, where applicable, switching or routing equipment and other resources, including network elements which are not active, which permit the conveyance of signals by wire, radio, optical or other electromagnetic means, including satellite networks, fixed (circuit and packet-switched, including Internet) and mobile terrestrial networks, electricity cable systems, to the extent that they are used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed;
- (c) a **'network termination point'** (NTP) means the physical point at which a subscriber is provided with access to a public communications network; in the case of networks involving switching or routing, the NTP is identified by means of a specific network address, which may be linked to a subscriber number or name;



**(d) ‘electronic communications services’ means a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting, but exclude services providing, or exercising editorial control over, content transmitted using electronic communications networks and services; it does not include information society services, as defined in Article 1 of Directive 98/34/EC, which do not consist wholly or mainly in the conveyance of signals on electronic communications networks.**

The exception (including the definitions so far set out in Article 1, paragraph 15 of Directive 2004/18/EC) has been broadened to encompass not only telecommunications networks but all kinds of public communications networks, and to align it on the Union "Telecoms Framework" as amended in 2002 and 2009. Television, broadcasting and cable television networks are thus also covered by the notion of "electronic communications network".

*Article 9*

*Contracts awarded and design contests organised pursuant to international rules  
[Directive 2004/18/EC: Articles 15, 68(b)]*

The exception for contract awards governed by international rules has essentially been clarified by putting more emphasis on the basic conditions for its application: the contract in question must fall within the scope of international rules (as defined in points a to d) providing a specific procedure which the contracting authority must follow in awarding the contract. The new wording makes also clear that the exception concerns only contracts awarded by contracting authorities of the Member States since international organisations are not subject to the rules of EU law and do therefore not require a formal exception for their contract awards, cf. in this sense Recital 13.

This Directive shall not apply to public contracts and design contests **which the contracting authority is obliged to award or organise in accordance with procurement procedures different from those of this Directive established by any of the following:**

- (a) an international agreement concluded in conformity with the Treaty between a Member State and one or more third countries and covering works, supplies or services intended for the joint implementation or exploitation of a **project** by the signatory States;
- (b) an international agreement relating to the stationing of troops and concerning the undertakings of a Member State or a third country;
- (c) a particular procedure of an international organisation;
- (d) **procurement rules provided by an international organisation or international financing institution for public contracts and design contests fully financed by this organisation or institution; in the case of public contracts and design contests co-financed to a considerable extent by an international organisation or international financing institution the parties shall agree on applicable procurement procedures, which shall be in conformity with the Treaty.**

Point (d) addresses specifically contract awards made under procurement rules of an international organisation or international financing institution. Where such projects are fully financed by the organisation or institution in question, they are exempted under the normal conditions of Article 9; however, if they are co-financed, Member States are obliged to agree with the organisation or institution on procurement rules that are in conformity with the Treaty.

All agreements referred to in point (a) of the first subparagraph shall be communicated to the Commission, which may consult the Advisory Committee for Public Contracts referred to in Article 91.

*Article 10*  
*Specific exclusions for service contracts [Directive 2004/18/EC, Article 16]*

This Directive shall not apply to public service contracts for:

- (a) the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property or concerning rights thereon; however, financial service contracts concluded at the same time as, before or after the contract of acquisition or rental, in whatever form, shall be subject to this Directive;
- (b) the acquisition, development, production or co-production of programme material intended for **audiovisual media services, that are awarded by broadcasters**, or contracts for broadcasting time **that are awarded to audiovisual media service providers**;

The wording of the exception now clarifies that the first part of the exception (contracts for programme material) applies to contracts concluded **by** broadcasters (bound to apply the Directive where they are contracting authorities, see case C-337/06, Bayrischer Rundfunk), whereas the second part (contracts for broadcasting time) applies to contracts awarded **to** broadcasters.

Furthermore, the language has been adapted in order to align it with the Audiovisual Media Services Directive; the new language includes providers of non-linear services such as catch-up TV as well as traditional linear broadcasting. (See also clarification at the end of the Article).

- (c) arbitration and conciliation services;

(c a) any of the following legal services:

- (i) legal representation of a client in judicial proceedings before the national courts, tribunals or public authorities of a Member State by a lawyer within the meaning of Article 1 of Directive 77/249/EEC;
- (ii) document certification services which must be provided by notaries;

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

(iv) other legal services which in the Member State concerned are connected, even occasionally, with the exercise of official authority;

*[Underlining indicates changes to this article made in cluster 2.]*

(d) financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments **within the meaning of Directive 2004/39/EC of the European Parliament and of the Council<sup>7</sup>, central bank services and operations conducted with the European Financial Stability Facility;**

The reference to Directive 2004/39/EC ("MiFiD") aims at clarifying the notion of "financial instruments".

The reference in Article 16(c) of Directive 2004/18/EC to "transaction by the contracting authorities to raise money or capital" has been deleted. Credit services not involving derivatives are hence not exempted any more, sheltering such operations from competitive pressure seems not justified in times of strained public budgets.

On the other hand, the exception has been broadened to encompass operations conducted with the European Financial Stability Facility, which should be exempted in the same way as central bank services.

(e) employment contracts;

**(f) public passenger transport services by rail or metro.**

Contracts for public passenger transport services by rail or metro are regulated by Regulation (EC) 1370/2007. To avoid any legal uncertainty, it was appropriate to provide for an explicit exclusion from the scope of the present Directive.

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<sup>7</sup> OJ L 145, 30.4.2004, p. 1.

**The audiovisual media services referred to in point (b) of the first paragraph shall include any transmission and distribution using any form of electronic network.**

*Article 11*

*Relations between public authorities*

In the absence of legislative rules on the exemption for cooperation between public authorities, this issue has been left to the case-law of the European Court of Justice. The case-law has evolved over time, providing certain guiding principles, but leaving considerable room for interpretation as regards the concrete conditions for such exemption. The Commission services published on 4 October 2011 a Staff Working Paper with a view to provide a broad and consolidated overview of the existing case law of the Court, and to draw some conclusions insofar as the findings of the Court allowed. However, the degree of legal uncertainty has become such that a step further is necessary and legislative clarification is indispensable. Therefore, the present provision aims at codifying the guiding principles of this jurisprudence, while streamlining and translating them into practically applicable criteria, harmonising to the maximum possible, the conditions for the various forms of cooperation.

For both hypotheses, the rules aim at ensuring a fair balance between respecting the freedom of public authorities to decide how to organise the way they carry out their public service tasks and the need to avoid distortions of competition in relation to private economic operators.

- 1. A contract awarded by a contracting authority to another legal person shall fall outside the scope of this Directive where the following cumulative conditions are fulfilled:**
  - (a) the contracting authority exercises over the legal person concerned a control which is similar to that which it exercises over its own departments.**
  - (b) at least 90 % of the activities of that legal person are carried out for the controlling contracting authority or for other legal persons controlled by that contracting authority;**
  - (c) there is no private participation in the controlled legal person.**

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

Paragraph 1 codifies the case-law of the ECJ for In-House awards, notably the principles set out in cases C-107/98, Teckal – points (a) and (b) – and C-26/03, Stadt Halle – point (c).

As to the minimum percentage set in point (b), it was considered that a small percentage of outside activity had to be possible, to allow for efficient use of temporary overcapacity. This percentage must however remain limited to the strict minimum to avoid distortions of competition to the detriment of private market operators.

The Court already indicated that the conditions set out in Article 23 of Directive 2004/17/EC<sup>8</sup> (amongst these, a turnover requirement of minimum 80 %) cannot be applied to determine if the In-House entity carries out an essential part of its activities for the controlling entity (C-340/04, Carbotermo). Hence, the requirement of 90 % of activities for the controlling entity would seem a reasonable benchmark.

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

The case-law of the Court has left open so far, whether contracts awarded by an In-House entity to the controlling entity ("bottom-up") or contracts between In-House entities of a common controlling entity ("In-House sisters") should be covered by the exemption as well. In a situation of in-house control, it is to be understood that there is a lack of two entities which are truly independent. Therefore, *agreements* between the controlling and the controlled entities are, in fine, within the same group.

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<sup>8</sup> Or Article 13 of the preceding Directive, 93/38/EEC.

Therefore, as long as there is no private participation in the contracting authority to which the contract is awarded, it seems logical to subsume these situations under the In-House exemption, as the reasons for the exemption are valid in the same way as for the classical In-House situation and differentiating between these two types of situation seemed overly formalistic.

- 3. A contracting authority, which does not exercise over a legal person control within the meaning of paragraph 1, may nevertheless award a public contract without applying this Directive to a legal person which it controls jointly with other contracting authorities, where the following conditions are fulfilled:**
- (a) the contracting authorities exercise jointly over the legal person a control which is similar to that which they exercise over their own departments;**
  - (b) at least 90 % of the activities of that legal person are carried out for the controlling contracting authorities or other legal persons controlled by the same contracting authorities;**
  - (c) there is no private participation in the controlled legal person.**

**For the purposes of point (a), contracting authorities shall be deemed to jointly control a legal person where the following cumulative conditions are fulfilled:**

- (a) the decision-making bodies of the controlled legal person are composed of representatives of all participating contracting authorities;**
- (b) those contracting authorities are able to jointly exert decisive influence over the strategic objectives and significant decisions of the controlled legal person;**
- (c) the controlled legal person does not pursue any interests which are distinct from that of the public authorities affiliated to it;**

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

Paragraph 3 sets out the conditions for the joint In-House exemption, based on the relevant case-law of the ECJ, in particular case C-324/07, Coditel.

The basic conditions for establishing an In-House situation are the same as for individual In-House - first subparagraph, points (a) to (c).

Obviously, the concept of "control similar to that over own departments" in point (a) needs to be further circumscribed in the case of joint control. In order to ensure that this joint control does not become a pure legal fiction, certain minimum conditions must be met, which are set out in points (a) to (d) of the second subparagraph.

Point (a) concerning the composition of the decision-making bodies and point (b) on the decisive influence on significant decisions aim at guaranteeing the formal conditions for the exercising effective control (see the explicit mention of these conditions in paras 33-35 of the judgement in case C-324/07).

Even where decisive influence on decision-making is guaranteed, the control can be rendered tenuous if the controlled entity becomes market-oriented (see the judgements in Cases C-324/07, para 36 and C-573/07, SEA, para 73). Such market orientation significantly increases the risk that the cooperation between the public entities leads to distortions of competition to the detriment of private economic operators. Allowing that a potentially large number of participating contracting authorities award contracts without call for tender to such a market-oriented entity which competes on an equal footing with private operators on the market would give an unfair advantage to this entity and infringe the principle of equal treatment.

Thus, points (c) and (d) of subparagraph provide concrete criteria for avoiding such unfair competitive advantages to market-oriented entities, prohibiting (i) that the controlled entity pursues interests other than those of the controlling entities, and (ii) any gains other than reimbursement of costs.



- 4. An agreement concluded between two or more contracting authorities shall not be deemed to be a public contract within the meaning of Article 2(6) of this Directive where the following cumulative conditions are fulfilled:**
- (a) the agreement establishes a genuine cooperation between the participating contracting authorities aimed at carrying out jointly their public service tasks and involving mutual rights and obligations of the parties;**
  - (b) the agreement is governed only by considerations relating to the public interest;**
  - (c) the participating contracting authorities do not perform on the open market more than 10 % in terms of turnover of the activities which are relevant in the context of the agreement;**
  - (d) the agreement does not involve financial transfers between the participating contracting authorities, other than those corresponding to the reimbursement of actual costs of the works, services or supplies;**
  - (e) there is no private participation in any of the contracting authorities involved.**

Paragraph 4 addresses the situation of the so-called "horizontal cooperation", dealt with by the European Court of Justice in case C-480/06 ("*Hamburg*"). The provision aims at translating the principles set out by the Court into concrete criteria which are workable in practice and provide sufficient legal certainty to public authorities and economic operators.

The starting point (point (a) of paragraph 4), strongly emphasized by the Court is that the agreement must go beyond the simple exchange of services, works or supplies against remuneration, but must be a genuine cooperation between the participating contracting authorities aimed at carrying out jointly a public service task that they all have to perform (judgement in case C-480/06, para 37). Such true cooperation presupposes that all participating contracting authorities contribute to the performance of the task in a way or another, and that none of the participating contracting authorities is a simple "buyer" of works, services or supplies – translated in the provision into the requirement of "involving mutual rights and obligations of the parties".

Building on the case-law of the Court, point (b) to (e) of paragraph 4 aim more particularly at avoiding that the exempted cooperation entails distortions of competition to the detriment of private market operators, by conferring unfair advantages upon public entities competing with these operators on the open market. The risks of distortion of competition are quite similar in the two cases dealt with under paragraphs 3 and 4 (Joint In-House and so-called "horizontal cooperation"); both situations are comparable from a structural point of view, the aim being to put in place cooperation between several contracting authorities. The choice of the legal form in which the cooperation is organised should not lead to fundamental differences on substance in the conditions for exempting the cooperation. The criteria aiming at avoiding distortions of competition have therefore been aligned as much as possible for the two hypotheses:

- The requirement of considerations relating purely to the public interest in point (b), taken over literally from the judgement in Case C-480/06, para 47, which excludes cooperations serving commercial objectives. This corresponds to the requirement in paragraph 3 that the controlled entity may not pursue any interests which are distinct from that of the public authorities affiliated to it.
  
- A cap of 10% on commercial activities on the open market in point (c). This rule aims at preventing that gains from the cooperation are used to undercut private competitors on the open market, through internal cross-subsidizing of the activities. With a view to aligning as much as possible the criteria between vertical and horizontal cooperation, this figure is coherent with the 90% requirement in the in-house scenario.

- The absence of financial transfers other than cost reimbursement in point (d), directly taken over from the judgement in case C-480/06, para 43.
- The prohibition of private participation in any of the participating contracting authorities; which is a logical consequence of the requirement that cooperation between public authorities must not undermine the principle of equal treatment of the persons concerned, and that no private undertaking is placed in a position of advantage vis-à-vis competitors (see para 47 of the judgement in case C-480/06, quoting the judgement in case C-26/03, Stadt Halle).

**5. The absence of private participation referred to in paragraphs 1 to 4 shall be verified at the time of the award of the contract or of the conclusion of the agreement.**

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

Codification of the principles set out by the Court in case C-573/07, SEA (para 53), that a contract concluded under a valid In-House exemption must be put out for tender when during the period for which that contract was valid, private shareholders were permitted to hold capital in the company performing the contract.

*Article 12*  
*Contracts subsidised by contracting authorities*  
*[Directive 2004/18/EC: Article 8]*

This Directive shall apply to the awarding of the following contracts:

- (a) works** contracts which are subsidised directly by contracting authorities by more than 50% and the estimated value of which, net of VAT, is equal to or greater than EUR 5 000 000, where those contracts involve one of the following activities:

- (i) civil engineering activities within the meaning of Annex II,
  - (ii) building work for hospitals, facilities intended for sports, recreation and leisure, school and university buildings and buildings used for administrative purposes;
- (b) service contracts which are subsidised directly by contracting authorities by more than 50 % and the estimated value of which, net of VAT, is equal to or greater than EUR 200 000 and which are connected to a works contract within the meaning of point (a).

The contracting authorities providing the subsidies referred to in points (a) and (b) of the first subparagraph shall ensure compliance with this Directive where they do not award themselves the subsidised contracts or where they award that contract for and on behalf of other entities.

The wording of this provision including certain subsidised contracts into the scope of the Directive has been slightly clarified and streamlined.

*Article 13*  
*Research and development services*  
*[Directive 2004/18/EC: Article 16]*

**1. This Directive shall apply to public service contracts for research and development services with CPV reference numbers 73000000-2 to 73436000-7, except 73200000-4, 73210000-7 or 73220000-0, provided that the following conditions are both fulfilled:**

- (a) the benefits accrue exclusively to the contracting authority for its use in the conduct of its own affairs,
- (b) the service provided is wholly remunerated by the contracting authority.

**This Directive shall not apply to public service contracts for research and development services with CPV reference numbers 73000000-2 to 73436000-7, except 73200000-4, 73210000-7 or 73220000-0 where one of the conditions referred to in points (a) or (b) of the first subparagraph is not met.**

2. **The Commission shall be empowered to adopt delegated acts in accordance with Article 89 to amend the CPV reference numbers referred to in paragraph 1 to reflect changes in the CPV nomenclature provided that such amendments do not imply a modification of the scope of this Directive.**

The rules on research and development services remain unchanged in substance. However, the wording has been revised and clarified since the presentation in Directive 2004/18/EC has led to confusion.

*Article 14*  
*Defence and security*  
*[Directive 2004/18/EC, Articles 10, 14, 68(b)]*

1. Subject to Article 346 of the Treaty on the Functioning of the European Union, this Directive shall apply to the awarding of public contracts and to design contests organised in the fields of defence and security, with the exception of the following contracts:
  - (a) contracts falling within the scope of Directive 2009/81/EC;
  - (b) contracts to which Directive 2009/81/EC does not apply pursuant to Articles 8, 12 and 13 thereof.
2. This Directive shall not apply to public contracts and design contests **other than those referred to in paragraph 1 to the extent that the protection of the essential security interests of a Member State cannot be guaranteed in a procurement procedure as provided for in this Directive.**

The legal framework for procurement in the field of defence and security has undergone a fundamental change with the entry into force of Directive 2009/81/EC. The exception in paragraph 2 draws the consequences of the fact that the vast majority of sensitive security contracts does now fall within the scope of that Directive. The remaining contracts are exempted on the condition that a procurement procedure under the Directive would put in jeopardy essential security interests of the Member State.

## **6. Nomenclatures**

### *Article 20*

#### *Nomenclatures [Directive 2004/18/EC, Article 1 (14)]*

1. Any references to nomenclatures in the context of public procurement shall be made using the ‘Common Procurement Vocabulary (CPV)’ as adopted by Regulation (EC) No 2195/2002<sup>9</sup>.
2. The Commission shall be empowered to adopt delegated acts in accordance with Article 89 to adapt the reference numbers used in Annex II and XVI, whenever changes in the CPV nomenclature must be reflected in this Directive and they do not imply a modification of the scope of this Directive.

Directive 2004/18/EC already provides for the reference to the CPV – Article 1 (14) – as well as for an empowerment to adapt the reference numbers – Article 79, paragraph 2 lit. (e) and (f).

The only relevant change is the deletion of Article 1(14), second subparagraph of Directive 2004/18/EC, which stated a prevalence of NACE and CPC over the CPV.

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<sup>9</sup> OJ L 340, 16.12.2002, p. 1.

As concerns NACE, the proposal now foresees a prevalence of CPV over NACE (first sentence of Annex II: "In the event of any difference of interpretation between the CPV and the NACE, the CPV nomenclature will apply." This reflects the fact that the CPV (but not the NACE) is a procurement-specific nomenclature at EU level, and therefore better adapted to the specific needs of contracting authorities. This latter fact also justifies the abandon of any reference to the CPC, following the model of Directive 2009/81/EC.

## **7. International compliance**

### *Article 23*

*Conditions relating to the Government Procurement Agreement and other international agreements  
[Directive 2004/18/EC, Article 5 and recital 7]*

1. As far as covered by **Annexes I, II, IV and V and the General Notes to the European Union's Appendix 1 to the Government Procurement Agreement and by the other international agreements by which the Union is bound**, as listed in Annex V to this Directive, contracting authorities shall accord to **the works, supplies, services and economic operators of the signatories** to those agreements treatment no less favourable than the treatment accorded to the works, supplies, services and economic operators of the Union. **By applying this Directive to economic operators of the signatories to those agreements, contracting authorities shall comply with those agreements.**
2. **The Commission shall be empowered to adopt delegated acts in accordance with Article 89 to amend the list in Annex V, where necessary due to the conclusion of new international agreements or modification of existing international agreements.**

The provision clarifies the obligations for contracting authorities as regards treatment of third country operators. It clarifies in particular

1. the scope of these obligations (paragraph 1, 1<sup>st</sup> sentence):
  - obligation only for procurement which has been committed to the trade partners (reference to the Annexes to the GPA)
  - obligation to treat "no less favourable" not only economic operators from trading partner countries but also works, supplies and services from these countries
  - obligation extended to cover not only GPA partners but also partners of bilateral trade agreements (agreements listed in Annex V).
2. that the application of the Directive to these third country operators or goods and services entails a presumption of compliance with the international agreements (paragraph 1, 2<sup>nd</sup> sentence) – statement moved from recital 7 in Directive 2004/18/EC to the operational part, in order to give it more weight.

Finally, the proposal does not contain any more the obligation (currently in Article 5, 2<sup>nd</sup> sentence of Directive 2004/18/EC) for Member States to consult each other within the ACPC on the measures taken pursuant to the Agreement), as the practical impact of this obligation seemed minor.



## ANNEX V

### LIST OF INTERNATIONAL AGREEMENTS REFERRED TO IN ARTICLE 23

Agreements with the following countries or groupings of countries:

- Albania (OJ L 107, 28.4.2009)
- Former Yugoslav Republic of Macedonia (OJ L 87, 20.03.2004)
- CARIFOUM (OJ L 289, 30.10.2008)
- Chile (OJ L352, 30.12.2002)
- Croatia (OJ L 26, 28.1.2005)
- Mexico (OJ L 276, 28.10.2000, L 157/30.6.2000)
- Montenegro (OJ L 345 of 28.12.2007)
- South Korea - (OJ L 127/14.5.2011)
- Switzerland (OJ L 300, 31/12/1972)

### 8. Delegated powers, implementing powers and final provisions

#### *Article 89*

*Exercise of the delegation of powers [Directive 2004/18/EC, Article 77 paragraphs 3 and 4]*

- 1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.**
  
- 2. The delegation of power referred to in Articles 6, 13, 19, 20, 23, 54, 59, 67 and 86 shall be conferred on the Commission for an indeterminate period of time from the [date of entry into force of the present Directive].**

3. **The delegation of power referred to in Articles 6, 13, 19, 20, 23, 54, 59, 67 and 86 may be revoked at any time by the European Parliament or by the Council. A revocation decision shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the *Official Journal of the European Union* or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.**
4. **As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.**
5. **A delegated act adopted pursuant to this Article shall enter into force only where no objection has been expressed either by the European Parliament or by the Council within a period of two months of notification of the act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by two months at the initiative of the European Parliament or the Council.**

This provision indicates the rules for adopting delegated Acts, as established by Article 290 of the Treaty on the Functioning of the European Union, following the standard clauses as agreed between the three institutions in the Common understanding on delegated Acts.

*Article 90*

*Urgency procedure [Directive 2004/18/EC, Article 77 paragraph 5]*

1. **Delegated acts adopted under this Article shall enter into force without delay and shall apply as long as no objection is expressed in accordance with paragraph 2. The notification of a delegated act to the European Parliament and to the Council shall state the reasons for the use of the urgency procedure.**

2. **Either the European Parliament or the Council may object to a delegated act in accordance with the procedure referred to in Article 89(5). In such a case, the Commission shall repeal the act without delay following the notification of the decision to object by the European Parliament or the Council.**

Urgency procedure foreseen in Article 77 paragraph 5 of Directive 2004/18/EC adapted to post-Lisbon general rules on delegated Acts (following the standard clauses of the "Common understanding").

*Article 91*

*Committee procedure [Directive 2004/18/EC, Article 77 paragraphs 1 and 2]*

1. The Commission shall be assisted by the Advisory Committee for Public Contracts established by Council Decision 71/306/EEC<sup>10</sup>. **That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.**
2. Where reference is made to this Article, **Article 4 of Regulation (EU) No 182/2011 shall apply.**

Alignment on new Comitology Regulation, Regulation no. 182/2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers<sup>11</sup>.

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<sup>10</sup> OJ L 185, 16.8.1971, p. 15.

<sup>11</sup> OJ L 55, 28.2.2011, p. 13.

*Article 92*  
*Transposition and transitional provisions*

*[Underlining indicates changes to this article made in clusters 3 and 4.]*

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 30 June 2014 at the latest. They shall forthwith communicate to the Commission the text of those provisions.
  
2. Notwithstanding paragraph 1, Member States may postpone the application of Article 19(1) until 30 June 2016.

Where a Member State chooses to postpone the application of Article 19(1), that Member State shall provide that contracting authorities, except where use of electronic means is mandatory pursuant to Articles 32, 33, 34, Articles 35(4) or 49(2) or Article 51, may choose between the following means of communication for all communication and information exchange:

- (a) electronic means in accordance with Article 19 (3), (4) and (5);
  - (b) post;
  - (c) a combination of those means.
- 
- 2a. Notwithstanding paragraph 1, Member States may postpone the application of Article 58(2) until [2 years later than the date provided for in paragraph 1].
  
  3. When Member States adopt the measures referred to in paragraphs 1 and 2, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.
  
  4. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Transposition deadline of 30 June 2014 = 18 months running from an adoption date end 2012 as foreseen in the Single Market Act commitments.

*Article 93*  
*Repeals [Directive 2004/18/EC, Article 82]*

Directive **2004/18/EC** shall be repealed with effect from **30 June 2014**.

References to the repealed Directive shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex XVII.

*Article 95*  
*Entry into force [Directive 2004/18/EC, Article 83]*

This Directive shall enter into force on **the twentieth day following that** of its publication in the *Official Journal of the European Union*.

A time span of 20 days between publication in the JO and entry into force has been introduced in line with the general practice.

*Article 96*  
*Addressees [Directive 2004/18/EC, Article 84]*

This Directive is addressed to the Member States.

**ANNEX XVII**  
**CORRELATION TABLE**

[For text, please refer to proposal; to be adapted when text is stable]