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PROPOSAL

From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
date of receipt:	18 June 2014
To:	Mr Uwe CORSEPIUS, Secretary-General of the Council of the European Union
No. Cion doc.:	COM(2014) 358 final
Subject:	Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU, Euratom) No 966/2012 on the financial rules applicable to the general budget of the Union

Delegations will find attached document COM(2014) 358 final.

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Brussels, 18.6.2014
COM(2014) 358 final

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Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

**amending Regulation (EU, EURATOM) No 966/2012 on the financial rules applicable to
the general budget of the Union**

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

Following the adoption of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC¹ (“the Directive”) and of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts², provision should be made for the rules contained in these Directives to apply to contracts awarded by the European institutions on their own account.

2. RESULTS OF CONSULTATIONS WITH THE INTERESTED PARTIES AND IMPACT ASSESSMENTS

As the present proposal merely implements the new directives on public procurement and on award of concession contracts, no public consultation was carried out.

3. LEGAL ELEMENTS OF THE PROPOSAL

The modifications brought about to the text of the Financial Regulation (FR) can be classified into three main groups.

A first series of changes is linked to the alignment with the Directive. New provisions are introduced, such as market consultation, the new innovation partnership as a procedure, the introduction of compliance with environmental, social and labour law as a key requirement, evaluation of criteria in no particular order, award methodology based on the most economically advantageous tender. In addition, concessions for works and services are introduced for the first time in the FR and are subject to the same types of procedures as public contracts.

A second group of changes concern the articles on exclusion. The grounds for exclusion are clarified and aligned with the Directive as well as the possibility for the economic operator concerned to take remedial measures. Exclusion is clearly separated from the rejection from a given procedure to avoid confusion. A single system is set up for increasing the protection of the Union financial interests which takes into account the existing Central Exclusion Database. The aim of the system is to ensure the early detection and prevention of risk as well as the publication of information related to excluded economic operators. An exclusion panel is set up to take exclusion decisions after the analysis of the case and it guarantees the right of defence of economic operators.

A third group of changes is linked to clarifications of the text and simplifications. Within the limits of the Directive and below the thresholds where the Directive applies, provisions concerning procurement are reviewed in order to ensure consistency of the vocabulary used throughout the Title and to clarify certain rules. These clarifications and simplifications concern

¹ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28.03.2014, p.65)

² Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ L 94, 28.03.2014, p.1)

publicity measures above and below thresholds, requirements for opening and evaluation, rejection of non-compliant tenders, bank guarantees for works and complex services contracts, the fact that Union institutions are considered central contracting authorities according to the Directive, the reference to applicable Directive thresholds, electronic procedures and the opening up of procurement by institutions to international organisations.

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

amending Regulation (EU, EURATOM) No 966/2012 on the financial rules applicable to the general budget of the Union

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 322 thereof, in conjunction with the Treaty establishing the European Atomic Energy Community, and in particular Article 106a thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments,

Having regard to the opinion of the Court of Auditors³,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council⁴ lays down the rules for the establishment and the implementation of the general budget of the European Union. In particular, it also contains rules on public procurement. On 26 February 2014 Directive 2014/24/EU of the European Parliament and of the Council⁵ on public procurement and Directive 2014/23/EU of the European Parliament and of the Council⁶ on the award of concession contracts have been adopted. It is therefore necessary to adapt Regulation (EU, Euratom) No 966/2012 in order to take into account those Directives for contracts awarded by the Union institutions on their own account.
- (2) Some definitions should be added and certain technical clarifications should be made to ensure that the terminology of Regulation (EU, Euratom) No 966/2012 is in line with that of Directives 2014/24/EU and 2014/23/EU.

³ OJ C , , p. .

⁴ Regulation (EU, EURATOM) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 (OJ L 298, 26.10.2012, p- 1).

⁵ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28.03.2014, p.65).

⁶ Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ L 94, 28.03.2014, p.1).

- (3) The ex-ante and ex-post publicity measures necessary to launch a procurement procedure should be clarified in the cases of contracts above and below the thresholds set out in Directive 2014/24/EU.
- (4) The Regulation (EU, Euratom) No 966/2012 should include an exhaustive list of all the procurement procedures available to the Union institutions regardless of threshold.
- (5) In line with Directive 2014/24/EU, Regulation (EU, Euratom) No 966/2012 should allow for market consultation prior to the launch of a procurement procedure.
- (6) A single system should be set up for increasing the protection of the Union financial interests that takes into account the existing Central Exclusion Database. The aim of the system should be to ensure the early detection of risk as well as the centralisation of excluded economic operators.
- (7) While the operation of the early detection and exclusion system is the responsibility of the Commission other institutions and bodies should participate directly in the early detection of risks.
- (8) The rules for exclusion from participation in procurement procedures should be improved in order to strengthen the protection of the Union's financial interests.
- (9) The decision of exclusion of an economic operator from, in particular, participation in procurement procedures, and the imposition of financial penalty should be taken by a newly created centralised panel, set up by the Commission. It should be composed of the main concerned actors of the Commission and the institutions, bodies or Union offices involved.
- (10) In line with Directive 2014/24/EU, Regulation (EU, Euratom) No 966/2012 should specify the list of illegal activities which constitute ground for exclusion concerning in particular child labour or other forms of trafficking in human beings. It should be clarified that serious breach of a contract is a ground for exclusion.
- (11) The economic operator should not be subject to a decision of exclusion when it can demonstrate its reliability by taking remedial measures. This possibility should not apply in case of most severe criminal activities.
- (12) The newly created panel should exclude the economic operator in case of grave professional misconduct, fraud, corruption, participation in a criminal organisation, money laundering, terrorist financing, terrorist related offences, child labour or other forms of trafficking in human beings, and serious breach of contract on the basis of evidence.
- (13) The panel should guarantee the right of defence of economic operators. In the cases of fraud, corruption or any other illegal activity affecting the financial interest of the Union which are not yet subject to a final judgement, the panel should be given the possibility to defer the opportunity given to the economic operator to submit its observations. This deferral should only be justified where there are compelling legitimate grounds to preserve the confidentiality of the investigation.
- (14) The economic operator should also be excluded by the contracting authority when a final administrative decision or a final judgment has been taken in case of grave

professional misconduct, non-compliance with the obligations related to the payment of social security contributions or the payments of taxes, fraud, corruption, participation in a criminal organisation, money laundering, terrorist financing, terrorist related offences, child labour or other forms of trafficking in human beings.

- (15) The criteria for exclusion should be clearly separated from the criteria leading to a possible rejection from a given procedure.
- (16) Any entity involved in the implementation of the budget should share information about an economic operator when they take a decision of exclusion under their own responsibility in order to protect the Union's financial interests.
- (17) The duration of exclusion should be limited in time, in line with Directive 2014/24/EU.
- (18) In order to improve deterrence of the exclusion and financial penalty rules, information related to economic operators in exclusion situation should be published on the internet site of the Commission in line with data protection requirements set out in Regulation No 45/2001 of the European Parliament and of the Council⁷ and in Directive 95/46/EC of the European Parliament and of the Council⁸.
- (19) In line with Directive 2014/24/EU, Regulation (EU, Euratom) No 966/2012 should allow to verify exclusion, apply selection and award criteria, as well as to verify compliance with the procurement documents in any order. As a result, it should be possible to reject tenders on the basis of award criteria without prior check on exclusion or selection criteria of the corresponding tenderer.
- (20) The award of contracts should be carried out on the basis of the most economically advantageous tender in line with Directive 2014/24/EU.
- (21) It should be clarified that all tenders should be opened and evaluated for any procedure and regardless of whether a specific opening committee or evaluation committee has been appointed. An award decision should always be the outcome of an evaluation.
- (22) Given that criteria are applied in no particular order, it is necessary to provide for the possibility for the rejected tenderers who submitted compliant tenders to receive the characteristics and relative advantages of the successful tender if they so request.
- (23) The possibility to require contractual guarantees in the case of works, supplies and complex services should be provided in order to guarantee compliance with substantial contractual obligations in line with customary practice in these sectors to ensure proper contract implementation throughout its duration.
- (24) It is necessary to provide for the possibility to suspend performance of a contract in order to ascertain whether errors, irregularities or fraud have occurred.

⁷ Regulation (EC) No 45/2001 of 18 December 2000 of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8, 12.1.2001, p.1).

⁸ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23/11/1995 p. 31)

- (25) In order to determine which thresholds and procedures are applicable to Union institutions, it is necessary to clarify that Union institutions are to be considered as central contracting authorities as defined in Directive 2014/24/EU.
- (26) It is appropriate to include a reference to the two thresholds provided for in Directive 2014/24/EU applicable to works and to supplies and services. These thresholds should also be applicable to concession contracts for reasons of simplification as well as sound financial management, considering the specificities of the Union institutions' contracting needs. The update of these thresholds as provided for in Directive 2014/24/EU would therefore be directly applicable to procurement by the Union institutions.
- (27) It is necessary to clarify the conditions of application of the standstill period.
- (28) It is necessary to clarify which economic operators have access to procurement by Union institutions depending on their place of establishment and to provide explicitly for the possibility of such access also to international organisations.
- (29) The application of exclusion grounds should be extended to other instruments of execution of the budget such as grants, prizes, financial instruments and remunerated experts as well as in the case of indirect management.
- (30) Regulation (EU, Euratom) No 966/2012 should therefore be amended accordingly,

HAVE ADOPTED THIS REGULATION:

Article 1

Regulation (EU, Euratom) No 966/2012 is amended as follows:

- (1) In the first subparagraph of Article 60(2), point (d) is replaced by the following:
- “(d) apply appropriate rules and procedures for providing financing from Union funds through procurement, grants, prizes and financial instruments including the obligations set out in Article 108(5);”;
- (2) The heading of title V of Part One is replaced by the following:
- “TITLE V
PUBLIC PROCUREMENT AND CONCESSIONS”;
- (3) In Chapter 1 of Title V of Part One, the sections 1, 2 and 3 are replaced by the following:
- “Section 1
Scope and award principles
Article 101
Definitions for the purpose of this Title

1. 'Procurement' means the acquisition by means of a contract of buildings, works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities.

2. 'Public contract' means a contract for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities within the meaning of Articles 117 and 190, in order to obtain, against payment of a price paid in whole or in part from the budget, the supply of movable or immovable assets, the execution of works or the provision of services.

Public contracts comprise:

(a) building contracts;

(b) supply contracts;

(c) works contracts;

(d) service contracts.

3. 'Concession contract' means a contract for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities within the meaning of Articles 117 and 190, in order to entrust the execution of works or the management of services to an economic operator. The remuneration shall consist either solely in the right to exploit the works or services or in that right together with payment. The award of a works or services concession shall involve the transfer to the concessionaire of an operating risk in exploiting those works or services encompassing demand or supply risk or both. The concessionaire shall be deemed to assume operating risk where, under normal operating conditions, it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services at stake.

4. 'Contract' means a public contract or a concession contract.

5. 'Framework contract' means a public contract concluded between one or more economic operators and one or more contracting authorities, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged.

6. 'Economic operator' means any natural or legal person or public entity which offers to supply products, execute works or provide services.

7. 'Procurement document' means any document produced or referred to by the contracting authority to describe or determine elements of the procedure including the publicity measures set out in Article 103, tender specifications or descriptive document, draft contract and invitation to tender.

8. Except for Articles 106 to 108, this Title shall not apply to grants, or to contracts for technical assistance as defined in accordance with Article 125(8) concluded with the EIB or the European Investment Fund.

9. The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on the definition and scope of public and concession contracts, as well as framework contracts and specific contracts.

Article 102

Principles applicable to procurement procedures and contracts

1. All procurement procedures and contracts shall respect the principles of transparency, proportionality, equal treatment and non-discrimination.
2. All contracts shall be put out to competition on the broadest possible basis, except when use is made of the negotiated procedure referred to in point (d) of Article 104(1).

Contracting authorities shall not use framework contracts improperly or in such a way that their purpose or effect is to prevent, restrict or distort competition.

Section 2

Publicity

Article 103

Publicity measures

1. For procedures equal to or greater than the thresholds under Article 118(1) or Article 190, the contracting authority shall publish in the Official Journal of the European Union:

(a) a contract notice to launch a procedure, except in the case of the procedure under Article 104(1)(d).

(b) a contract award notice on the results of the procedure.

2. Procedures with a value below the thresholds set out in Article 118 or Article 190 shall be advertised by appropriate means.

3. Publication of certain information on contract award may be withheld where its release would impede law enforcement, or otherwise be contrary to the public interest, would harm the legitimate commercial interests of economic operators or might prejudice fair competition between them.

4. The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on the requirements for the advertising of procedures and publication of notices.

Section 3

Procurement procedures

Article 104

Procurement procedures

1. Procurement procedures for awarding concession or public contracts including framework contracts shall take one of the following forms:

- (a) open procedure;
- (b) restricted procedure including through a dynamic purchasing system;
- (c) design contests;
- (d) negotiated procedure;
- (e) competitive dialogue;
- (f) competitive procedure with negotiation;
- (g) innovation partnership;
- (h) procedures involving a call for expression of interest.

2. Where a contract or a framework contract is of interest to two or more institutions, executive agencies or bodies referred to in Article 208 and 209, and whenever there is a possibility for realising efficiency gains, the contracting authorities concerned may carry out the procedure and the management of the subsequent direct or framework contract on an interinstitutional basis under the lead of one of the contracting authorities.

The bodies established by the Council under the CFSP pursuant to Title V of the TEU may also participate in interinstitutional procedures.

The terms of a framework contract may only apply between those contracting authorities that are identified for this purpose from the launch of the procurement procedure and those economic operators party to the framework contract.

3. Where a contract or framework contract is necessary for the implementation of a joint action between an institution and one or more contracting authorities from Member States, the procurement procedure may be carried out jointly by the institution and the contracting authorities, in certain situations, which are to be specified in the delegated acts adopted pursuant to this Regulation.

Joint procurement may be conducted with EFTA states, and Union candidate countries, if this possibility has been specifically provided for in a bilateral or multilateral treaty.

4. The contracting authority may use the negotiated procedure only in cases provided for in the delegated acts adopted pursuant to this Regulation.

5. The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on the types of procurement procedures, dynamic purchasing system, joint procurement, low value contracts and payment against invoices.

Article 105

Preparation of a procedure

1. Before launching a procedure, the contracting authority may conduct a preliminary market consultation with a view to preparing the procurement.
2. In the procurement documents, the contracting authority shall identify the subject matter of the procurement by providing a description of its needs and the characteristics required of the works, supplies or services to be bought and specify the applicable criteria. It shall also indicate which elements define the minimum requirements to be met by all tenders.
3. The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on the content of procurement documents and on the preliminary market consultation.

Article 106

Exclusion criteria

1. An economic operator shall be excluded from participation in procurement procedures in cases of:
 - (a) bankruptcy, insolvency or winding-up proceedings, assets being administered by the courts or a liquidator, arrangement with creditors, suspension of business activities, or any analogous situation arising from a similar procedure provided for in national laws or regulations;
 - (b) grave professional misconduct on the basis of evidence as established by a decision of the panel referred to in Article 108 or by a final judgement or administrative decision;
 - (c) non-compliance with the obligations relating to the payment of social security contributions or the payment of taxes in accordance with the legal provisions of the country in which it is established or with those of the country of the contracting authority or those of the country where the contract is to be performed as established by a final judgement or administrative decision;
 - (d) fraud, corruption, participation in a criminal organisation, money laundering, terrorist financing, terrorist-related offences, child labour or other forms of trafficking in human beings on the basis of evidence established by the panel referred to in Article 108 or as established by a final judgement;
 - (e) serious breach of a contract financed by the Union's budget following a decision of the panel referred to in Article 108;
 - (f) irregularity on the basis of evidence established by a decision of the panel referred to in Article 108 or by a final judgement or administrative decision.

2. The economic operator shall be excluded where a person who is a member of the administrative, management or supervisory body of that economic operator or has powers of representation, decision or control is in a situation listed in paragraph 1.

3. Except for cases provided for in point (d) of paragraph 1, the contracting authority may decide not to exclude the economic operator concerned where it has taken remedial measures to demonstrate its reliability.

For a limited duration and pending the adoption of remedial measures referred to in the first subparagraph, the contracting authority may decide not to exclude the economic operator concerned where it is indispensable to ensure the continuity of service. In such cases, the contracting authority shall justify its decision.

4. Point (a) of paragraph 1 shall not apply in the case of the purchase of supplies on particularly advantageous terms from either a supplier which is definitively winding up its business activities or the liquidators in an insolvency procedure, an arrangement with creditors, or a similar procedure under national law.

5. The economic operator shall declare that it is not in one of the situations of exclusion listed in paragraph 1 of this Article or that it is in one of the cases referred to in paragraph 3 of this Article. Where appropriate, the economic operator shall provide the same declaration for an entity on whose capacity it intends to rely. However, the contracting authority may waive these requirements for very low value contracts.

6. Whenever requested by the contracting authority, the economic operator shall provide appropriate evidence that it is not in one of the situations of exclusion listed in paragraph 1.

Whenever the contracting authority has doubts that paragraph 2 is complied with, the economic operator shall upon request provide information on persons that are members of its administrative, management or supervisory body or that have powers of representation, decision or control. It shall also provide upon request appropriate evidence that one or several of those persons are not in one of the situations of exclusion listed in paragraph 1.

7. The contracting authority may also verify whether a subcontractor is not in a situation of exclusion listed in paragraph 1 of this Article or is in one of the cases referred to in paragraph 3 of this Article.

8. The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on the definition of the situations of exclusion, remedial measures and on declaration and evidence that an economic operator is not in one of the situations of exclusion listed in paragraph 1 of this Article.

Article 107

Rejection from a given procedure

1. A contract shall not be awarded for a given procedure to an economic operator who:

- (a) is in one of the situations of exclusion referred to in Article 106(1) and (2);
- (b) has misrepresented the information required as a condition of participation in the procedure;
- (c) was previously involved in the preparation of procurement documents where this entails a distortion of competition that cannot be remedied otherwise.

2. The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on the measures to avoid distortion of competition and on declaration and evidence that an economic operator is not in one of the situations of exclusion listed in paragraph 1 of this Article.

Article 108

The early detection and exclusion system

1. The Commission shall set up and operate a system to protect the Union's financial interests. This system includes the early detection of risks threatening the Union's financial interests, the exclusion of economic operators which are in one of the situations of exclusion listed in Article 106(1) and the imposition of a financial penalty to an economic operator who is in one of the situations of exclusion listed in points (b), (d), (e) and (f) of Article 106(1).

2. The early detection of risks threatening the Union's financial interests is based on the transmission of information by any of the following:

- (a) by OLAF in accordance with Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council* where an OLAF investigation in progress shows that it might be appropriate to take precautionary measures to protect the financial interests of the Union;
- (b) by an authorising officer of the Commission or of an executive agency in case of presumed grave professional misconduct, irregularity, fraud or serious breach of contract;
- (c) by another institution, body or a European office in case of presumed grave professional misconduct, irregularity, fraud or serious breach of contract.

The information referred to in points (a), (b) and (c) of the first subparagraph shall be transmitted without delay through the accounting system of the Commission to the authorising officers of the Commission and of its executive agencies, all other institutions, bodies and European offices in order to allow them to take preventive temporary and conservatory measures in the implementation of the budget. Those measures shall not go beyond what is foreseen in the terms and conditions of the procurement documents.

3. For the situations referred to in points (b), (d), (e) and (f) of Article 106(1), a panel shall be set up by the Commission at the request of an authorising officer of the Commission or of an executive agency or a joint panel at the request of another institution, body or European office. The panel, on behalf of the Commission and its

executive agencies, other institutions, bodies or European offices, shall apply the following procedure:

- (a) the requester shall refer the case to the panel with the necessary information and the situation of exclusion;
- (b) the panel shall notify without delay the economic operator about the facts in question and their preliminary classification in law, which may qualify as a situation of exclusion listed in Article 106(1) and/or may lead to the imposition of a financial penalty;
- (c) where the request of the authorising officer is based, inter alia, on the information provided by OLAF, the Office shall cooperate with the panel in accordance with Regulation (EU, Euratom) No 883/2013;
- (d) the panel may decide to exclude the economic operator provisionally for a period of up to 6 months;
- (e) before taking a provisional or final decision, the panel shall give the economic operator the opportunity to submit its observations;
- (f) the panel may take an exclusion decision including as regards the duration of the exclusion and/or may impose a financial penalty on the basis of evidence and information received taking into account the principle of proportionality;
- (g) the panel may revise its decision during the exclusion period on request from an excluded economic operator where this operator has taken remedial measures sufficient to demonstrate its reliability or provides new elements demonstrating that the situation of exclusion as referred to in Article 106(1) no longer exists;
- (h) in order to improve deterrence of the exclusion or financial penalty, the Commission shall publish the information related to the decision of the panel on its internet site;
- (i) the decision of the panel shall be communicated to the economic operator.

In the cases set out in points (d) and (f) of Article 106(1) the notification referred to in point (b) of the first subparagraph of this paragraph and the opportunity referred to in point (e) of the first subparagraph of this paragraph may be exceptionally deferred where there are compelling legitimate grounds to preserve the confidentiality of the investigation or of national judicial proceedings.

In exceptional cases, including where natural persons are concerned or where it is necessary to preserve the confidentiality of the investigation or of a national judicial proceeding, the panel may decide not to publish the exclusion or financial penalty as set out in point (h) of the first subparagraph of this paragraph with due consideration to the right to privacy and with due observance of the rights provided for in Regulation (EC) No 45/2001.

The economic operator excluded by decision of the panel or subject to a financial penalty may complain to the European Ombudsman and seek judicial review.

4. The duration of exclusion shall not exceed any of the following:

- (a) the duration if any set by the final judgement;
- (b) five years for the case referred to in point (d) of Article 106(1);
- (c) three years for the cases referred to in points (b), (e) and (f) of Article 106(1).

An economic operator shall be excluded as long as it is in one of the situations referred to in points (a) and (c) of Article 106(1)

The first subparagraph of this paragraph shall not apply where the exclusion is communicated by authorities and entities referred to in paragraph 5 that are not subject to Directive 2014/24/EU of the European Parliament and of the Council**.

5. The authorities of the Member States and third countries as well as the ECB, the EIB, the European Investment Fund and the entities participating in the implementation of the budget in accordance with Articles 58 and 61 shall:

- (a) communicate without delay to the Commission information on economic operators, only for final judgement or administrative decisions taken under their own responsibility, that are in one of the situations referred to in points (a), (b), (c), (d) or (f) of Article 106(1) including the duration of exclusion;
- (b) verify whether there is an exclusion in the system and take it into account when awarding contracts associated with the implementation of the budget.

As part of the measures referred to under point (c) of Article 60(1), the Commission may also exclude an economic operator and/or impose financial penalties under the conditions laid down in paragraph 3 of this Article.

6. The Commission shall publish information related to the exclusion of economic operators, as received from the authorities referred to in paragraph 5, on its internet site. The Commission may publish exclusions received from other sources.

7. The Commission shall inform annually the European Parliament and the Council of the total number of ongoing exclusions and of new decisions.

8. The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on the Union's system for the protection of the Union's financial interests, including its standardised procedures and the details subject to publication, the time limits to exclude, the organisation of the panel, the duration of exclusion and financial penalties.

Article 110

Award of contracts

1. Contracts shall be awarded on the basis of award criteria provided that the contracting authority has verified the following cumulative conditions:

- (a) the tender complies with the minimum requirements specified in the procurement documents;
- (b) the candidate or tenderer is not excluded under Article 106 or rejected under Article 107;
- (c) the candidate or tenderer meets the selection criteria specified in the procurement documents.

2. The contracting authority shall base the award of contracts on the most economically advantageous tender.

3. The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning details on the selection criteria, the award criteria and the most economically advantageous tender. Furthermore, the Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning the documents that give evidence of legal capacity, economic and financial capacity and the evidence of technical and professional capacity and detailed rules on electronic auctions and abnormally low tenders.

Article 111

Submission and evaluation

1. The arrangements for submitting tenders shall be such as to ensure that there is genuine competition and that the contents of tenders remain confidential until they are all opened simultaneously.

2. The Commission shall ensure by appropriate means and in application of Article 95 that tenderers may enter the contents of the tenders and any supporting evidence in an electronic format ("e-procurement").

The Commission shall report regularly to the European Parliament and the Council on the progress of the implementation of this provision.

3. If deemed appropriate and proportionate, the contracting authority may require tenderers to submit a guarantee in advance to make sure that the tenders submitted will not be withdrawn.

4. The contracting authority shall open all requests to participate and tenders. It shall reject:

- (a) requests to participate which do not comply with the time-limit for receipt;
- (b) tenders which do not comply with the time-limit for receipt or which were received already open by the contracting authority.

5. The contracting authority shall evaluate all requests to participate or tenders not rejected during the opening phase laid down in paragraph 4 on the basis of the criteria specified in the procurement documents with a view to award the contract or to proceed with an electronic auction.

6. The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on the time limits for receipt of tenders and requests to participate, access to procurement documents, the time limits to provide additional information, the time limits in urgent cases as well as on the arrangements for submission of tenders and electronic catalogues. Furthermore, the Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning the possibility of requesting a tender guarantee, the opening and evaluation of tenders and requests to participate and the establishment of opening and evaluation committees.

Article 112

Contacts during the procedure

1. While the procurement procedure is under way, all contacts between the contracting authority and candidates or tenderers shall satisfy conditions ensuring transparency and equal treatment. After the time limit for receipt of tenders, these contacts shall not lead to changes to the procurement documents or to substantial changes to the terms of the submitted tender, except where a procedure set out in Article 104(1) specifically allows for these possibilities.

2. The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning contacts that are allowed between the contracting authority and candidates or tenderers during the procurement procedure.

Article 113

Award decision and information of candidates and tenderers

1. The authorising officer responsible shall decide to whom the contract is to be awarded, in compliance with the selection and award criteria specified in the procurement documents.

2. The contracting authority shall notify all candidates or tenderers whose requests to participate or tenders are rejected of the grounds on which the decision was taken, as well as the duration of the standstill period referred to in Article 118(2).

For the award of specific contracts under a framework contract with reopening of competition, the contracting authority shall inform the tenderers of the result of the evaluation.

3. The contracting authority shall inform each tenderer who is not in a situation of exclusion, whose tender is compliant with the procurement documents and who makes a request in writing of any of the following:

(a) the characteristics and relative advantages of the successful tender and the name of the tenderer to whom the contract is awarded, except in the case of a specific contract under a framework contract with reopening of competition;

(b) the progress of negotiation and dialogue with tenderers.

However, the contracting authority may decide to withhold certain information where its release would impede law enforcement, would be contrary to the public interest or would prejudice the legitimate commercial interests of economic operators or might prejudice fair competition between them.

4. The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on the evaluation report, the award decision and information of candidates and tenderers.

Article 114

Cancellation of the procurement procedure

The contracting authority may, before the contract is signed, cancel the procedure without the candidates or tenderers being entitled to claim any compensation.

The decision shall be justified and be brought to the attention of the candidates or tenderers as soon as possible.

* Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999 (OJ L 248, 18.9.2013, p. 1).

** Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28.03.2014, p.65).“;

(4) In chapter 1 of Title V of Part One, Section 4 is replaced by the following:

“Section 4

Performance of the contract, guarantees and corrective actions

Article 114a

Performance and modifications of the contract

1. Performance of the contract may not start before the contract is signed.
2. The contracting authority may modify a contract or framework contract substantially without a procurement procedure only in cases provided for in the delegated acts adopted pursuant to this Regulation and provided the substantial modification does not alter the subject matter of the contract or framework contract.
3. The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on the signature and modifications of contracts.

Article 115

Guarantees

1. Other than in the case of low value contracts, the contracting authority may, if it deems it appropriate and proportionate on a case-by-case basis and subject to a risk-analysis, require contractors to submit a guarantee in order to do any of the following:

(a) limit the financial risks connected with payment of pre-financing;

(b) ensure compliance with substantial contractual obligations in the case of works, supplies or complex services;

(c) ensure full performance of the contract after payment of the balance.

2. The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules, including criteria for risk analysis, on the guarantees that are required from contractors.

Article 116

Substantial errors, irregularities or fraud

1. Where the procedure proves to have been subject to substantial errors, irregularities or fraud, the contracting authority shall suspend it and may take whatever measures necessary, including its cancellation.

2. Where, after the signature of the contract, the procedure or the performance of the contract prove to have been subject to substantial errors, irregularities or fraud, the contracting authority may suspend performance of the contract or, where appropriate, terminate it.

Performance of contracts may also be suspended in order to verify whether presumed substantial errors, irregularities or fraud have occurred.

Where substantial errors, irregularities or fraud are attributable to the contractor, the contracting authority may, in addition, refuse to make payments or recover amounts unduly paid, in proportion to the seriousness of the substantial errors, irregularities or fraud.

3. OLAF shall exercise the power conferred on the Commission by Council Regulation (Euratom, EC) No 2185/96 of 11 November 1996 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities ⁽¹⁾ to carry out on-the-spot inspections and checks in the Member States and, in accordance with the cooperation and mutual assistance agreements in force, in third countries and on the premises of international organisations.

4. The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on the suspension of a contract in the event of substantial errors, irregularities or fraud and the definition of substantial error or irregularity.

- (5) (1) OJ L 292, 15.11.1996, p. 2. ”;Articles 117 and 118 are amended as follows:

“Article 117

The contracting authority

1. The institutions shall be deemed to be central contracting authorities in the meaning of point (2) of Article 2(1) of Directive 2014/24/EU in the case of contracts awarded on their own account. They shall delegate, in accordance with Article 65 of this Regulation, the necessary powers for the exercise of the function of contracting authority.

2. The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on the delegation of the function of contracting authority.

Article 118

Thresholds applicable and standstill period

1. To award public and concession contracts, the contracting authority shall take into account the thresholds laid down in points (a) and (b) of Article 4 of Directive 2014/24/EU when selecting a procedure set out in Article 104(1) of this Regulation. These thresholds shall determine the publication arrangements set out in paragraphs (1) and (2) of Article 103 of this Regulation.

2. Subject to exceptions and conditions to be specified in the delegated acts adopted pursuant to this Regulation, in the case of contracts above the thresholds set out in paragraph 1, the contracting authority shall not sign the contract or framework contract with the successful tenderer until a standstill period has elapsed.

3. The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on separate contracts and contracts with lots, estimating the value of public and concession contracts and the standstill period before the signature of the contract.”;

- (6) Article 119 and 120 are replaced by the following:

“Article 119

Rules on access to procurement

Participation in procurement procedures shall be open on equal terms to all natural and legal persons within the scope of the Treaties and to all natural and legal persons established in a third country which has a special agreement with the Union in the field of public procurement under the conditions laid down in that agreement. It shall also be open to international organisations.

The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on the evidence to be provided in relation to access to procurement.

Article 120

Procurement rules of the World Trade Organisation

Where the Plurilateral Agreement on Government Procurement concluded within the World Trade Organisation applies, the procurement procedure shall also be open to economic operators established in the States which have ratified that agreement, under the conditions laid down therein.”;

- (7) in Article 131, paragraph 4 is replaced by the following:

“4. Paragraphs 1, 2, 3 and 6 of Article 106 and Articles 107 and 108 shall also apply to grant applicants. Applicants shall declare that they are not in one of the situations referred to in Article 106(1) and Article 107 or that they are in one of the cases referred to in Article 106(3). Article 108 shall also apply to beneficiaries.”;

- (8) in Article 131, paragraph 5 is deleted.

- (9) in Article 131, paragraph 6 is replaced by the following:

“6. The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on the arrangements for grant applications, evidence of not falling within an exclusion situation, applicants without legal personality, legal persons forming one applicant, exclusion decisions and financial penalties, eligibility criteria and low value grants.”;

- (10) in paragraph 2 of Article 138 the third subparagraph is replaced by the following:

“The rules of the contest shall at least lay down the conditions for participation including the exclusion criteria provided for in paragraphs 1, 2 and 3 of Article 106 and Article 107, the award criteria, the amount of the prize, the payment arrangements and the right to take exclusion decisions and to impose financial penalties.”;

- (11) in Article 139, the following paragraph 5a is inserted:

“5a. No financial support shall be granted to dedicated investment vehicles, to financial intermediaries and to final recipients which are in one of the situations referred to in points (a), (b) and (d) of Article 106(1) and points (b) and (c) of Article 107(1).”;

- (12) in Article 183 paragraph 4 is replaced by the following:

“4. When participating in grant or procurement procedures in accordance with paragraph 1 of this Article, the JRC shall not be subject to the conditions laid down in Article 106, points (a) and (b) of Article 107(1), Article 108 and Article 131(4) regarding provisions on exclusion and penalties in relation to procurement and grants.”;

- (13) Articles 190 and 191 are replaced by the following:

“Article 190

External action procurement

1. The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on external action procurement.
2. The provisions of Chapter 1 of Title V of Part One relating to the general provisions on procurement shall be applicable to contracts covered by this Title subject to the special provisions relating to thresholds and the arrangements for awarding external contracts to be laid down in the delegated acts adopted pursuant to this Regulation. Articles 117 to 120 shall not be applicable to the procurement set out in this Chapter.

This Chapter shall apply to:

- (a) procurement where the Commission does not award contracts for its own account;
 - (b) procurement by entities or persons entrusted pursuant to point (c) of Article 58(1) where provided for in the financing agreement referred to in Article 189.
3. The procurement procedures shall be laid down in the financing agreements provided for in Article 189.
 4. This Chapter shall not apply to actions under sector-specific basic acts relating to humanitarian crisis management aid, to civil protection operations and to humanitarian aid operations.

Article 191

Rules on access to procurement

1. Participation in procurement procedures shall be open on equal terms to all persons within the scope of the Treaties and to any other natural or legal person in accordance with the specific provisions in the basic instruments governing the cooperation sector concerned. It shall also be open to international organisations.
2. In the cases referred to in Article 54(2), it may be decided, under exceptional circumstances duly justified by the authorising officer responsible, to allow third-country nationals other than those referred to in paragraph 1 of this Article to tender for contracts.
3. Where an agreement on widening the market for procurement of goods or services to which the Union is party applies, the contracts for procurement financed by the budget shall also be open to natural and legal persons established in a third country other than those referred to in paragraphs 1 and 2, under the conditions laid down in that agreement.
4. The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on the access to procurement procedures.”;

(14) in Article 204 the following paragraph is added:

“Experts shall be subject to paragraphs 1, 3 and 5 of Article 106, the first subparagraph of Article 106(6), Article 106(7), and Articles 107 and 108.”.

Article 2

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

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President