

Amended proposal for a European Parliament and Council Directive coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors ⁽¹⁾

(2002/C 203 E/30)

(Text with EEA relevance)

COM(2002) 235 final — 2000/0117(COD)

(Submitted by the Commission pursuant to Article 250(2) of the EC Treaty on 6 May 2002)

1. Background

Proposal submitted to the Council and the European Parliament (COM(2000) 276 final — 2000/0117(COD)) pursuant to Article 175(1) of the Treaty: 11 July 2000

Economic and Social Committee Opinion: 26 April 2001

Committee of the Regions Opinion: 13 December 2000

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

2. Objective of the Commission proposal

The Directive coordinating the procurement procedures of entities operating in the water, energy and transport sectors pursues a threefold objective of modernising, simplifying and rendering more flexible the existing legal framework. Modernisation is required in order to take account of new technologies and changes in the economic environment, including the liberalisations under way or set to take place in some of the activities covered. The purpose of simplification is to make the current texts more easily comprehensible for users, so that contracts are awarded in complete conformity with the standards and principles governing this area, and the entities involved (whether purchasers or suppliers) are in a better position to know their rights. Procedures need to be flexible in order to meet the needs of purchasers and economic operators.

3. Commission opinion on Parliament's amendments

The Commission has accepted, either in their entirety or in part, and with reformulations where appropriate, 47 of the 83 amendments adopted by the European Parliament.

3.1. *Amendments accepted by the Commission in their entirety or reformulated for purely formal reasons (Amendments 111, 7, 8, 67, 68 and 69)*

Amendment 111 introduces a new recital stating that nothing in this Directive shall prevent any contracting entity from imposing or enforcing measures necessary to protect public morality, public policy, public security or human, animal or plant life or health. The Commission accepts this amendment, stressing that it is drafted in such a way as to reflect the provisions of the Treaty (Article 30):

Recital: '(2c) Nothing in this Directive shall prevent any contracting entity from imposing or enforcing measures necessary to protect public morality, public policy, public security or human, animal or plant life or health, in particular with a view to sustainable development, provided that these measures are not discriminatory and do not conflict either with the objective of opening up markets in the sector of public contracts or with the Treaty.'

Amendment 7 modifies recital 34 in order to specify that tenders based on solutions other than those envisaged by the contracting entity must be taken into account if they are equivalent, and that contracting entities must give reasons for any decision concluding that there is no equivalence.

It is necessary to combine Amendment 7 with other amendments concerning the same problems — see comments on Amendments 35, 36, 38, 40, 95 and 99/118.

Amendment 8 modifies recital 42. It adds engineers' services to the examples of services whose remuneration is governed by national laws and which must not be affected.

Amendments 67, 68 and 69 remove the very detailed provisions concerning the arrangements for indicating the weighting given to each of the criteria applied in determining the most economically advantageous tender. The deletion of the three paragraphs is acceptable in order to simplify the arrangements for indicating weighting.

⁽¹⁾ OJ C 29 E, 30.1.2001, p. 112.

3.2. *Amendments accepted by the Commission with reformulation, in part or in substance (Amendments 89-96, 4, 33, 9, 70, 35, 36, 38, 40, 95, 99-118, 64, 18, 57, 109, 60, 43, 47, 13, 16, 21, 22, 26, 27, 29, 30, 117, 51, 53, 56, 66, 75, 76, 78, 79, 80, 81, 82, 83, 85 and 86)*

Amendments 89-96 introduce a new recital designed to emphasise the integration of environmental policy into public procurement policy. Article 6 of the Treaty stipulates that environmental protection requirements must be integrated into other policies: this means that the respective policies on the environment and public contracts must be reconciled. The Commission therefore considers that contracting entities must be enabled to procure 'green' products/services at the best value for money. It therefore takes up the amendment and reformulates it as follows:

Recital: '(2b) Under Article 6 of the Treaty establishing the European Community, environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3 of that Treaty, in particular with a view to promoting sustainable development.'

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

Amendment 4 introduces a new recital specifying that contracting entities may require particular conditions concerning the performance of contracts, especially concerning the promotion of social objectives, provided that these clauses are compatible with Community law. In order to ensure consistency between the two public procurement Directives, it is appropriate to extend this possibility to conditions relating to environmental protection ⁽¹⁾.

Amendment 33, modifying Article 33, third subparagraph, specifies that conditions concerning performance of the contract may include conditions linked to the promotion of social policy objectives; it is also intended to further reinforce compliance with the principles of equal treatment, non-discrimination and transparency, where contracting entities require particular conditions concerning performance of contracts. This amendment actually clarifies in a specific provision what is already contained in the generally valid provision set out in Article 9.

⁽¹⁾ Refer to European Parliament Amendment 10 to the Proposal for a Directive of the European Parliament and of the Council on the coordination of procedures for the award of public supply contracts, public service contracts and public works contracts.

The Commission therefore incorporates Amendments 4 and 33 by means of the following texts:

Recital: '(32) Contract performance conditions are compatible with the Directive provided that they are not directly or indirectly discriminatory and are indicated in the contract notice used to call for competition, or in the specifications. They may be aimed at promoting on-the-job training and the employment of people who are facing particular difficulties in finding work, at combating unemployment or protecting the environment and give rise to obligations — applicable to contract performance — such as, in particular to recruit the long-term unemployed or implement training schemes for the unemployed and young persons, to comply with the substance of the provisions of the ILO core conventions in the event that these have not been implemented in national law, and to recruit a number of handicapped persons above that required under national legislation.'

'Article 37a

Contract performance conditions

Contracting entities may lay down special conditions relating to the performance of a contract, provided such conditions are compatible with Community law and indicated in the contract notice used as a means of calling for competition or in the contract documents. Contract performance conditions may relate in particular to social and environmental considerations.'

Amendment 9 introduces a new recital 42a specifying that contracting authorities may reject tenders which are abnormally low owing to non-compliance with social legislation. As this possibility already exists under existing law, it suffices to clarify it in an appropriate way.

Amendment 70 modifies Article 55 concerning abnormally low tenders by changing the words 'in relation to the service to be provided' into 'in relation to the supply, service or works to be provided'. The underlying intention (that this provision should also apply to supplies and works, and not just to services) clearly shows that this amendment is based on a misunderstanding due to a translation problem. The provision is in fact applicable to the three types of contract. With a view to consistency with the 'classic' Directive and in order to avoid subsequent differences of interpretation, it would be inappropriate to amend the existing legislation in the French version, which makes it sufficiently clear that the provision is applicable to the three types of contract. What is more, care should be taken to ensure that this is also the case in all language versions ⁽²⁾.

⁽²⁾ The English version should therefore refer to 'goods, works or services'.

The Commission incorporates Amendments 9 and 70 as follows:

'Article 55

Abnormally low tenders

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

Those details may relate in particular to:

- (a) the economics of the manufacturing process, of the services provided and of the construction method;
- (b) the technical solutions chosen and/or the exceptionally favourable conditions available to the tenderer for the supply of the goods or services or for the execution of the work;
- (c) the originality of the supplies, services or works proposed by the tenderer;
- (ca) compliance with provisions on health and safety at work and working conditions in force at the place of performance;
- (d) the possibility of the tenderer obtaining State aid.

2. The contracting entity shall verify those constituent elements by consulting the tenderer, taking account of the evidence supplied.

3. Where a contracting entity establishes that a tender is abnormally low on the grounds that the tenderer has obtained a State aid, the tender can be rejected on such grounds alone only after consultation with the tenderer, where the latter is unable to prove, within an adequate timeframe fixed by the contracting entity, that the aid in question was lawfully granted. Where the contracting entity rejects a tender in these circumstances, it shall inform the Commission of that fact.'

Amendments 35, 36, 38, 40, 95 and 99/118 relate to Article 34 concerning technical specifications.

Amendment 35 provides that technical specifications may be formulated in terms of requirements with regard to the environmental impact of the product throughout its lifetime. The Commission shares this approach.

Amendment 36 introduces a new definition, namely the 'equivalent standard', at a place where, on the contrary, a tender ensuring an equivalent solution is what is meant. Even if the amendment is understood to be concerned with equivalent solutions, the inclusion of costs in the definition of equivalent solutions is not acceptable, as the price element must come into play at the stage where tenders are evaluated on the basis of the award criteria, and not in order to enable tenders based on other solutions to be excluded for non-compliance with the technical specifications of the contracting entity.

Amendments 99-118 modify Article 34 to clarify that a contracting entity cannot reject a tender if the tenderer has proven to it that the tender satisfies contract requirements in an equivalent manner.

Amendment 38 specifies, on the one hand, that a test report from a recognised body may constitute an appropriate means of proof and, on the other, that a contracting entity that rejects a solution on grounds of non-equivalence must state the reasons for that decision and inform economic operators thereof on request. The obligation to communicate the reasons is taken into account in general terms in Article 48(2).

Amendment 40 permits reference to be made to particular production processes or to specific producers or suppliers in exceptional cases.

The possibility of referring to a particular production process may be acceptable provided that it does not have the effect of reserving the contract for a particular supplier.

Amendment 95, modifying Annex XX, alters the definition of technical specifications by adding the taking into account of environmental impact, user-instructions and production processes or methods.

This part of the amendment clarifies the text in line with the Commission Communication of 4 July 2001 on public procurement and the environment ⁽¹⁾ and is thus acceptable with reformulation.

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

⁽¹⁾ 'Interpretative communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement', COM(2001) 274 final (OJ C 333, 29.11.2001, p. 13).

Also taking into account Amendment 7, dealt with in point 3.1 above, the Commission incorporates Amendments 35, 36, 38, 40, 95 and 99/118 in recital 32, Article 34, Article 48(2) and Annex XX, reformulated as follows:

Recital: '(34) The technical specifications drawn up by public procurers must allow public procurement to be opened up to competition. To this end, it must be possible to submit bids which reflect the diversity of possible technical solutions. Accordingly, it must be possible to draw up the technical specifications in terms of functional performance and requirements; and, where reference is made to the European standard or, in the absence thereof, to the national standard, tenders based on other equivalent arrangements meeting the requirements of the contracting entities and equivalent in terms of security must be taken into account by contracting entities. To demonstrate equivalence, tenderers should be permitted to use any form of evidence. Contracting entities must be able to provide a reason for any decision that equivalence does not exist in a given case.

Contracting entities that wish to lay down environmental requirements for the technical specifications of a given contract may specify the environmental characteristics and/or specific environmental effects of product groups or services. They can, but are not obliged to, use appropriate specifications to specify the supplies or services sought, as defined by eco-labels such as the European eco-label, the (pluri)national eco-label or any other eco-label or parts of those specifications. However, this possibility must be admissible only if the requirements for the label are drawn up on the basis of scientific information and adopted using a procedure in which all stakeholders, such as government bodies, consumers, manufacturers, retail and environmental organisations can participate, and providing the label is accessible to all interested parties.'

'Article 34

Technical specifications

1. The technical specifications as defined in point 1 of Annex XX shall be set out in the contract documentation, such as contract notices, contract documents or additional documents.

2. Technical specifications shall afford equal access for tenderers and not have the effect of creating unjustified obstacles to the opening-up of public procurement to competition.

3. Without prejudice to legally binding technical rules, insofar as they are compatible with Community legislation, the technical specifications must be formulated:

(a) by referring to specifications defined in Annex XX and, by order of preference, to national standards implementing

European standards, European technical approvals, common technical specifications, international standards, other technical reference material produced by European standardisation bodies or, where these do not exist, national standards, national technical approvals or national technical specifications relating to design and the method of calculation and execution of works and use of material. Each reference shall be accompanied by the words "or equivalent";

(b) or in terms of performance or of functional requirements; these may include environmental characteristics. However, they must be sufficiently precise to allow tenderers to determine the subject matter of the contract and to allow contracting entities to award the contract;

(c) or in terms of performance or functional requirements as referred to in point (b), referring as a means of presumption of conformity with these requirements or performance capabilities to the specifications cited in point (a);

(d) or by referring to the specifications in point (a) for certain characteristics, and to the performance capabilities or functional requirements in point (b) for other characteristics.

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

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

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

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

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

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

The contracting entities may indicate that the products and services bearing the eco-label are presumed to comply with the technical specifications laid down in the contract documents; they must accept any other appropriate means of proof, such as a technical dossier of the manufacturer or a test report from a recognised body.

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

Contracting entities shall accept certificates from recognised bodies established in other Member States.

7. Unless justified by the object of the contract, the technical specifications shall not refer to a specific make or source, or to a particular process, or to a trade mark, patent, type or specific origin or production which would have the effect of favouring or eliminating certain enterprises or certain products. Such reference shall be permitted on an exceptional basis, where a sufficiently precise and intelligible description of the subject matter of the contract is not possible in terms of paragraphs 3 and 4; such reference shall be accompanied by the words "or equivalent".

'Article 48

Information to applicants for qualification, candidates and tenderers

1. ...

2. The contracting entity shall, upon request, inform any unsuccessful candidate or tenderer as soon as possible of the reasons for the rejection of his application or his tender, and shall inform any tenderer who has made an admissible tender of the characteristics and relative advantages of the tender selected, as well as of the name of the successful tenderer or the parties to the framework agreement. Under no circumstances may the time taken to provide such information exceed fifteen days, counting from receipt of the written request.

However, contracting entities may decide that certain information on the contract award or the conclusion of the framework agreement, referred to in the first subparagraph, is to be withheld where release of such information would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of public or private economic operators, including those of the economic operator to whom the contract has been awarded, or might prejudice fair competition between economic operators.

3. ...

4. ...

5. ...'

'ANNEX XX

DEFINITION OF CERTAIN TECHNICAL SPECIFICATIONS

For the purposes of this Directive:

1. (a) "technical specification", in the case of public service or supply contracts, means a specification in a document defining the required characteristics of a product or service, such as quality and environmental performance levels, design for all requirements (including accessibility for disabled people) and use of the product, its safety or dimensions, including requirements relevant to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions, production methods and procedures, as well as conformity assessment procedures;
- (b) "technical specifications", in the case of public works contracts, means the totality of the technical prescriptions contained in particular in the tender documents, defining the characteristics required of a material, product or supply, which permits a material, a product or a supply to be described in a manner such that it fulfils the use for which it is intended by the contracting entity. These characteristics include environmental performance levels, design for all requirements (including accessibility for disabled people) and conformity assessment levels, use of the product, safety or dimensions, including procedures relating to quality assurance, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions and production procedures and methods. They shall also include rules relating to design and costing, the test, inspection and acceptance conditions for works and methods or techniques of construction and all other technical conditions which the contracting authority is in a position to prescribe, under general or specific regulations, in relation to the finished works and to the materials or parts which they involve;

2. "standard" means a technical specification approved by a recognised standardisation body for repeated or continuous application, compliance with which is not compulsory and which falls into one of the following categories:

— international standard: a standard adopted by an international standards organisation and made available to the general public;

— European standard: a standard adopted by a European standards organisation and made available to the general public;

— national standard: a standard adopted by a national standards organisation and made available to the general public;

3. "European technical approval" means a favourable technical assessment of the fitness for use of a product, based on fulfilment of the essential requirements for building works, by means of the inherent characteristics of the product and the defined conditions of application and use. European approval shall be issued by an approval body designated for this purpose by the Member State;

4. "common technical specifications" means a technical specification drawn up in accordance with a procedure recognised by the Member States and published in the *Official Journal of the European Communities*;

5. "technical reference" means any product produced by European standardisation bodies, other than official standards, according to procedures adapted in line with market developments.'

Amendment 64 introduces a new Article 53a which provides that, should a contracting entity require the production of a certificate relating to an environmental management system, it must accept EMAS certificates, certificates attesting to compliance with international standards, as well as any other equivalent means of proof. In some appropriate cases — e.g. where the ability to comply with an eco-management scheme during the realisation of a public work is concerned ⁽¹⁾ — an environmental management system may attest to technical capacity. For such cases, it is appropriate to make provision for the possible means of proof and for the recognition of equivalence, so as to ensure that contracts are not reserved for holders of certain certificates only. This amendment broadly takes over the provisions of Article 51(2) concerning quality assurance certificates. Given this affinity, this amendment may be inserted into Article 51 and be reformulated as follows in order to guarantee parallelism between

these two provisions. The Commission therefore takes over Amendment 64 as follows:

Recital: '(39a) In appropriate cases, where the nature of the works and/or services justifies the application of environmental management measures or systems for the performance of the public contract, the application of such measures or systems may be required. Independently of their registration in accordance with the Community instruments (EMAS), environmental management systems may demonstrate the technical capacity of the economic operator to perform the contract. Moreover, a description of the measures taken by the economic operator to ensure the same level of environmental protection must be accepted as an alternative means of proof to the registered environmental management systems.'

'Article 51

Mutual recognition concerning administrative, technical or financial conditions, and certificates, tests and evidence

1. ...

2. Where they request production of certificates produced by independent bodies, certifying that the economic operator satisfies certain quality guarantee standards, contracting entities shall refer to quality assurance systems based on the series of European standards on the subject and certified by bodies meeting European standards of certification.

They shall recognise equivalent certificates from bodies established in other Member States. They shall also accept other evidence of equivalent quality guarantees produced by economic operators.

3. For public works and service contracts, and in appropriate cases only, contracting entities may require an indication of the environmental management measures which the economic operator will be able to take during performance of the contract. If, in these cases, contracting entities require the production of certificates drawn up by independent bodies attesting to the compliance of the economic operator with certain environmental management standards, they shall refer to the Community Eco-Management and Audit Scheme (EMAS) or to environmental management standards based on the relevant European or international standards certified by bodies conforming to Community law or the relevant European or international standards concerning certification.

They shall recognise equivalent certificates from bodies established in other Member States. They shall also accept other evidence of equivalent environmental management measures produced by economic operators.'

⁽¹⁾ Cf. the Interpretative Communication referred to above.

Amendment 18 is designed to enable economic operators tendering as a group to bring their collective capacities to bear for selection purposes, as regards: suitability to pursue the professional activity concerned, economic and financial capacity and technical and/or professional capability. However, the length of any professional experience required may not be cumulated. Moreover, the amendment provides that there may be a requirement for minimum criteria to be met by the head of the group.

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

This problem may arise in various contexts (both in the management of a qualification system and in open, restricted or negotiated procedures with a prior call for competition, and for each of these situations both for groupings of economic operators in the true sense and for economic operators acting alone but intending to draw on the capacity of other entities such as controlled enterprises, subcontractors, etc.). It must, therefore, be taken into account in the reformulation of Articles 52 and 53.

This reformulation must also take account of Amendments 57 and 109 which, without making any distinction between compulsory and optional exclusion criteria, make all the exclusion criteria provided for under Article 46 of the proposal for a classic Directive compulsory in the management of qualification systems and in the selection of participants in open, restricted or negotiated procedures with a prior call for competition.

Concerning the application of the optional criteria provided for under Article 46(2) of the classic Directive (bankruptcy, grave professional misconduct, etc.), these amendments need to be reformulated in order to retain the optional nature of these exclusion criteria.

As far as the compulsory exclusion criteria provided for under Article 46(1) of the classic Directive are concerned (convictions by final judgment, e.g. for participation in a criminal organisation), it is acceptable to make these provisions applicable where contracting authorities award contracts which are subject to the Utilities Directive, all the more so as it is often the case that one and the same contracting authority operates in both the utilities and the 'classic' sectors.

As regards contracting entities other than public authorities (e.g. public and private undertakings operating on the basis

of special or exclusive rights), by contrast, such an obligation to apply these criteria is not acceptable, as compliance with these obligations by entities other than contracting authorities would necessarily presuppose that these entities can have access to information in the judicial record, which could give rise to serious problems in terms of data protection. What is more, account has to be taken of the fact that such information may relate to competing companies.

Amendment 60 would introduce a list of exclusion criteria in Article 53 concerning the selection of participants in open, restricted or negotiated procedures with a prior call for competition. The amendment cannot be taken over as it stands, as some of the cases would create unjustified differences to those referred to in the 'classic' Directive (e.g. the list includes the possibility of exclusion because of convictions for 'environmental' offences, whereas this case does not feature explicitly in Article 46(2) of the classic Directive). In order to ensure consistency between the two Directives, therefore, the substance of this amendment needs to be incorporated by way of a referral to Article 46(2).

To the extent indicated above, therefore, the Commission can take over Amendments 18, 57, 109 and 60 in Articles 52 (redrafted) and 53, formulated as follows:

'Article 52

Qualification systems

1. Contracting entities which so wish may establish and operate a system of qualification of economic operators.

Entities which establish or operate a system of qualification shall ensure that economic operators are at all times able to request qualification.

2. The system under paragraph 1 may involve different qualification stages.

It shall be operated on the basis of objective criteria and rules to be established by the contracting entity.

Where those criteria and rules include technical specifications, the provisions of Article 34 shall apply. The criteria and rules may be updated as required.

2a. The rules and criteria referred to in paragraph 2 may include the exclusion criteria listed in Article 46 of Directive .../.../EC (concerning the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts).

Where a contracting entity is a public authority within the meaning of Article 2(1)(a), these criteria and rules shall include the compulsory exclusion criteria listed in Article 46 of Directive .../.../EC.

2b. Where the criteria and rules of qualification referred to in paragraph 2 include requirements relating to the economic and financial standing of an economic operator, the economic operator may, where appropriate, bring to bear the resources of other entities, regardless of the legal links which it has with them. It must in that case prove to the contracting entity that it will have those resources at its disposal during the entire period of validity of the qualification system, e.g. by producing an undertaking given by those entities to that effect.

Under the same conditions, a grouping of economic operators, such as referred to in Article 10, may bring to bear the resources of the group participants or of other entities.

2c. Where the criteria and rules of qualification referred to in paragraph 2 include requirements relating to the technical and professional capabilities of an economic operator, the economic operator may, where appropriate, bring to bear the resources of other entities, regardless of the legal links which it has with them. It must in that case prove to the contracting entity that it will have those resources at its disposal during the entire period of validity of the qualification system, e.g. by producing an undertaking given by those entities to place the necessary resources at the disposal of the economic operator.

Under the same conditions, a grouping of economic operators, such as referred to in Article 10, may bring to bear the resources of the group participants or of other entities.

3. The criteria and rules for qualification referred to in paragraph 2 shall be made available, on request, to the economic operators concerned. The updating of these criteria and rules shall be communicated to the economic operators concerned.

Where a contracting entity considers that the qualification system of certain other entities or bodies meets its requirements, it shall communicate to the economic operators concerned the names of such other entities or bodies.

4. A written record of qualified economic operators shall be kept; it may be divided into categories according to the type of contract for which the qualification is valid.

5. When a call for competition is made by means of a notice on the existence of a qualification system, tenderers in a restricted procedure or participants in a negotiated procedure shall be selected from the qualified candidates in accordance with such a system.'

'Article 53

Criteria for qualitative selection

1. Contracting entities which establish selection criteria in an open procedure shall do so in accordance with objective rules and criteria which are available to economic operators.

2. Contracting entities which select candidates for restricted or negotiated procedures shall do so according to objective criteria and rules which they have laid down and which are available to interested economic operators.

3. In restricted or negotiated procedures, the criteria may be based on the objective need of the contracting entity to reduce the number of candidates to a level which is justified by the need to balance the particular characteristics of the procurement procedure with the resources required to conduct it. The number of candidates selected shall, however, take account of the need to ensure adequate competition.

4. The criteria set out in paragraphs 1 and 2 may include the exclusion criteria listed in Article 46 of Directive .../.../EC [on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts].

Where a contracting entity is a public authority within the meaning of Article 2(1)(a), the criteria referred to in paragraphs 1 and 2 of this Article shall include the compulsory exclusion criteria listed in Article 46(1) of Directive .../.../EC.

5. Where the criteria referred to in paragraphs 1 and 2 include requirements relating to the economic and financial standing of an economic operator, the economic operator may, where appropriate, and for a particular contract, bring to bear the resources of other entities, regardless of the legal links which it has with them. It must in that case prove to the contracting entity that it will have at its disposal the resources necessary, e.g. by producing an undertaking given by those entities to that effect.

Under the same conditions, a grouping of economic operators, such as referred to in Article 10, may bring to bear the resources of the group participants or of other entities.

6. Where the criteria referred to in paragraphs 1 and 2 include requirements relating to the technical and professional capabilities of an economic operator, the economic operator may, where appropriate, and for a particular contract, bring to bear the capabilities of other entities, regardless of the legal links which it has with them. It must in that case prove to the contracting entity that it will have at its disposal the resources necessary for the execution of the contract, for example, by producing an undertaking given by those entities to place the necessary resources at the disposal of the economic operator.

Under the same conditions, a grouping of economic operators, such as referred to in Article 10, may bring to bear the resources of the group participants or of other entities.'

Amendment 43 modifies the title of Article 38, adding a reference to obligations relating to environmental protection. The implication is that entities may state the authorities from which operators can obtain information concerning the relevant obligations in force at the place where the works or services are to be executed.

Although the modification of the title provided for in this amendment does not correspond to the content of the provision on account of the amendments modifying the content of this article having been rejected, its substance can nevertheless be accepted, given that the content of Article 38 will have to be altered in order to avoid unjustified discrepancies between this provision and those of the classic Directive (Article 27), as amended (see Amendment 50 to the 'classic' Directive).

Amendment 47 introduces a new subparagraph in Article 41(1) with the aim of increasing transparency regarding the information to be provided to economic operators on obligations under social legislation, in accordance with Article 38. Although the amendment would have required the adoption of the (rejected) amendments to Article 38, the principle that economic operators must be aware of the legislation to be complied with during execution of the contract in order to take it into account during the tender preparation phase is acceptable. However, such information cannot be limited solely to obligations deriving from social legislation, as other (environmental or tax) legislation — covered by Article 38 — must also be taken into account. There is, however, a risk of this information becoming so extensive that it could not be included in the notice where the call for competition is made by means of a periodic indicative notice or a notice on the existence of a qualification system, which may not only relate to a large number of individual contracts, but may also be published so far in advance of the launch of a particular contract (sometimes one or two years) that the information is at risk of becoming obsolete. It is preferable, therefore, to limit the obligation to provide this information to contracts for which the call for competition is made by means of a contract notice. Where this is not the case, the necessary transparency will nevertheless be assured, as the contract documents relating to individual contracts must contain the particulars needed to enable economic operators to obtain relevant and up-to-date information.

The Commission can incorporate Amendment 43 and Amendment 47 into Article 38(1) and Annex XII as reformulated below:

'Article 38

Obligations relating to taxes, environmental protection, health and safety at work and working conditions

The contracting entity shall state in the contract documents the body or bodies from which a candidate or tenderer may obtain the appropriate information on obligations relating to the provisions on health and safety at work and the working

conditions which are in force in the Member State, region or locality in which works are to be carried out or services provided and which shall be applicable to works carried out or services provided on site during the performance of the contract.'

'ANNEX XII

INFORMATION TO BE INCLUDED IN CONTRACT NOTICES

A. OPEN PROCEDURES

1. Name, address, telegraphic address, electronic address, telephone number, telex and fax numbers of the contracting entity.
- 1a. Where public works and supply contracts involve siting and installation operations: name, address, telephone and fax numbers, and electronic address of the departments from which information can be obtained concerning the provisions on taxes, environmental protection, health and safety at work and working conditions applicable in the place where the contract is to be performed.

...

B. RESTRICTED PROCEDURES

1. Name, address, telegraphic address, electronic address, telephone number, telex and fax numbers of the contracting entity.
- 1a. Where public works and supply contracts involve siting and installation operations: name, address, telephone and fax numbers, electronic address of the departments from which information can be obtained concerning the provisions on taxes, environmental protection, health and safety at work and working conditions applicable in the place where the contract is to be performed.

...

C. NEGOTIATED PROCEDURES

1. Name, address, telegraphic address, electronic address, telephone number, telex and fax numbers of the contracting entity.
- 1a. Where public works and supply contracts involve siting and installation operations: name, address, telephone and fax numbers, electronic address of the departments from which information can be obtained concerning the provisions on taxes, environmental protection, health and safety at work and working conditions applicable in the place where the contract is to be performed.

...'

Amendment 13 is linked to Amendment 16. They are intended to ensure that contracting authorities in the postal sector currently subject to the classic Directive are subject to the more flexible rules of the 'Utilities Directive' in order to take account of the liberalisation under way in that sector.

Amendment 13 would thus add a reference to postal activities in the definition of the scope of this Directive, both for contracting authorities and for public and private undertakings engaged in a postal activity on the basis of exclusive or special rights.

Amendment 16, paragraph 2, provides moreover that the Directive is not applicable to postal services which can be supplied by other agencies on an unrestricted basis or are simply subject to a licensing procedure. Paragraph 3 is difficult to summarise, as there are substantial differences between the various language versions. On the basis of what appears to be the common denominator of the majority of versions, paragraph 3 would add to the amendment by providing that the Directive would not apply to contracts awarded by entities engaged in a postal activity (not excluded under paragraph 2) for their own undertaking, where the possibility exists that other undertakings could offer, on broadly the same terms and in the same geographic zone, all postal services whose economic importance is not secondary or negligible.

The principle of treating the postal sector in the same way as other forms of activity covered by this Directive is acceptable to the Commission. This is, in effect, a sector which is characterised by an activity carried out by both public and private entities operating across a network, often in monopolistic or oligopolistic situation, and for which the opening-up of postal services in the Community to competition is ongoing. When making the transfer, it has to be ensured that the definition of the activities referred to guarantees, on the one hand, that all activities linked directly or indirectly to the postal activity are included and, on the other, that the definition does not give a *carte blanche* for a transfer of activities linked neither directly nor indirectly to traditional postal services. To this end, the definitions contained in Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service ⁽¹⁾ are a good starting point. It should be noted that the partial acceptance of Amendment 16 in Article 6a renders superfluous the modifications proposed by Amendment 13 to Article 2(2), without any change being made to the substance.

⁽¹⁾ OJ L 15, 21.1.1998, p. 14.

The Commission cannot accept the exceptions proposed in Amendment 16, given that paragraph 2 contrasts starkly with the overall approach of the proposal by seeking to ensure that there is a single mechanism for removal from the field of application, applicable under identical conditions to all activities covered by this Directive. However, the idea that operators might — whatever their legal status — be excluded from the field of application once the liberalisation process currently under way has produced adequate results can be accepted. Concerning the proposed changes to Article 29 aimed at making it applicable to public authorities engaged in a liberalised activity, see the comments on Amendment 117. Recital 14 is therefore deleted. It should also be pointed out that the general scheme of the text ensures that private entities operating in the postal sector will be subject to these rules only to the extent that they have exclusive or special rights for the exercise of the activities referred to. Paragraph 3 is not acceptable in the form proposed, as its application would appear to be linked solely to the possibility of other entities being able to offer postal services with a certain level of economic importance. It should be emphasised, however, that the existing exceptions, including in particular that provided for in Article 20 concerning contracts awarded for purposes of resale or hire to third parties, will also apply to the postal sector.

The Commission can, therefore, accept the substance of Amendments 13 and 16 as follows:

Title: 'EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE

coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors'

Recital: '(2) The procedures for the award of contracts which are applied by entities operating in the water, energy, transport and postal services sectors call for coordination based on the requirements inferable from Articles 14, 28 and 49 of the EC Treaty and from Article 97 of the Euratom Treaty, namely the principles of equality of treatment, of which the principle of non-discrimination is no more than a specific expression, mutual recognition, transparency and the opening-up of public procurement to competition. Whilst ensuring the application of those principles, this coordination should establish a framework for sound commercial practice and should allow a maximum of flexibility.'

Recital: '(2a) In view of the further opening-up of postal services to competition, and given that such services are provided across a network by public authorities, public undertakings and other undertakings, it is necessary to provide that contracts awarded by contracting entities offering postal services are subject to rules which, whilst ensuring the application of the principles referred to in recital 2, establish a framework for sound commercial practice and allow greater flexibility than offered by the provisions of Directive 2002/00/EC of the European Parliament and of the Council of ... [title of the works Directive etc.], while waiting for the liberalisation process to reach such a level as to make exclusion under the general mechanism envisaged to that effect possible. For the definition of the activities referred to, account has to be taken, when adapting them in line with the objectives of this Directive, of the provisions of Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service⁽¹⁾, as amended by Directive .../.../EC of the European Parliament and of the Council amending Directive 97/67/EC insofar as concerns the further opening to competition of Community postal services.'

Recital: '(8) The need to ensure a real opening-up of the market and a fair balance in the application of procurement rules in the water, energy, transport and postal services sectors requires that the entities to be covered must be identified on a basis other than by reference to their legal status. It has to be ensured, therefore, that the equal treatment of contracting entities operating in the public sector and those operating in the private sector is not prejudiced. It is also necessary to ensure, in keeping with Article 295 of the Treaty, that the rules governing the system of property ownership in Member States are not prejudiced.'

Recital (14): deleted.

'Article 5a

Provisions relating to postal services

1. This Directive shall apply to activities concerned with the provision of basic postal services, other postal services and auxiliary postal services.

2. For the purposes of this Article, and without prejudice to Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service⁽¹⁾, as amended by Directive .../.../EC of the European Parliament and of the Council of ... amending Directive insofar as concerns the further opening to competition of Community postal services the following definitions shall apply:

(a) "postal item": an item addressed in the final form in which it is to be carried, irrespective of weight. In addition to items of correspondence, such items also include for

instance books, catalogues, newspapers, periodicals and postal packages containing merchandise with or without commercial value, irrespective of weight. Also included are other forms of mail such as unaddressed direct mail;

(b) "Basic postal services": services which are or may be reserved on the basis of Article 7 of Directive 97/67/EC, comprising the clearance, sorting, transport and delivery of postal items;

(c) "Other postal services": services other than those referred to in point (b) comprising the clearance, sorting, transport and delivery of postal items; and

(d) "auxiliary postal services": service provided in the following areas:

— mail management services (both upstream and downstream of posting such as mailroom management services); and

— value-added services associated with e-mail (including secure transmission of encrypted documents);

— financial services; and

— logistical services,

where these services are provided by an entity also providing postal services within the meaning of points (b) or (c).'

'ANNEX Va

CONTRACTING ENTITIES IN THE POSTAL SERVICES SECTOR

BELGIUM

De Post/La Poste

DENMARK

Post Danmark

GERMANY

Deutsche Post AG

GREECE

ELTA

⁽¹⁾ OJ L 15, 21.1.1998, p. 14.

SPAIN

'ANNEX X

Correos y Telégrafos, SA

LIST OF LEGISLATION REFERRED TO IN ARTICLE 29(3)

Ga CONTRACTING ENTITIES IN THE POSTAL SERVICES SECTOR

FRANCE

Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service ⁽¹⁾.

La Poste

IRELAND

Amendments 21 and 22 modify Article 19 regarding the methods for estimating the value of service contracts.

An Post

ITALY

Amendment 21, which concerns the calculation of the value of insurance service contracts, is designed to take into account other forms of remuneration comparable with insurance premiums.

Poste Italiane SpA

LUXEMBOURG

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

Entreprise des Postes et Télécommunications Luxembourg

NETHERLANDS

Amendment 22 specifically regulates the calculation of the value of contracts of indefinite duration with a tacit renewal clause.

TNT Post Groep (TPG)

AUSTRIA

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

Österreichische Post AG

PORTUGAL

To facilitate agreement between the co-legislators, the Commission takes the view that the four articles concerning calculation methods should be merged — Article 16 containing general rules, Article 17 for works contracts, Article 18 for supply contracts and Article 19 for service contracts. The Commission therefore incorporates Amendments 21 and 22 as follows:

CTT — Correios de Portugal

FINLAND

Suomen Posti OYJ

SWEDEN

'Article 16

Posten Sverige AB

Methods of calculating the estimated value of contracts and framework agreements

Posten Logistik AB

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

UNITED KINGDOM

Consignia plc'

⁽¹⁾ OJ L 15, 21.1.1998, p. 14. Directive last amended by Directive .../.../EC of ... of the European Parliament and of the Council of ... amending Directive 97/67/EC insofar as concerns the further opening to competition of Community postal services (OJ L ...).

List to be completed

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

2. Contracting entities may not circumvent this Directive by splitting works projects or proposed purchases of a certain quantity of supplies and/or services or by using special methods for calculating the value of contracts.

3. The basis for calculating the value of a framework agreement shall be the estimated maximum value, net of VAT, of all the contracts envisaged for the period in question.

4. For the purposes of Article 15, contracting entities shall include in the estimated value of a works contract both the cost of the works and the value of any supplies or services necessary for the execution of the works which they make available to the contractor.

5. The value of supplies or services which are not necessary for the execution of a particular works contract may not be added to that of the works contract, when doing so would result in removing the procurement of those supplies or services from the scope of this Directive.

6. Where a supply, service or work is the subject of several lots, the total estimated value of all those lots shall be taken into account. Where the aggregate value of the lots equals or exceeds the threshold laid down in Article 15, the provisions of that Article shall apply to all the lots.

However, in the case of works contracts, contracting entities may derogate from Article 15 in respect of lots whose estimated value net of VAT is less than one million euro, provided that the aggregate value of those lots does not exceed 20 % of the overall value of the lots.

7. In the case of procurement of supplies or services over a given period by means of a series of contracts to be awarded to one or more suppliers or service providers, or of contracts which are to be renewed, the contract value shall be calculated on the basis of:

- (a) the total value of contracts with similar characteristics which were awarded over the previous financial year or 12 months, adjusted where possible to reflect anticipated changes in quantity or value over the subsequent 12 months; or
- (b) the aggregate value of contracts to be awarded during the 12 months following the first award or during the whole term of the contract, where this is longer than 12 months.

8. The basis for calculating the estimated value of a contract including both supplies and services shall be the total value of the supplies and services, regardless of their respective shares. The calculation shall include the value of the siting and installation operations.

9. In the case of supply contracts for lease, rental or hire-purchase, the value to be used as the basis for calculating the contract value shall be:

- (a) in the case of fixed-term contracts, where their term is 12 months or less, the estimated total value for the contract's duration, or, where their term exceeds 12 months, the contract's total value including the estimated residual value;
- (b) in the case of contracts for an indefinite period, or in cases where there is doubt as to the duration of the contracts, the anticipated total instalments to be paid in the first four years.

10. For the purposes of calculating the estimated contract amount of financial services, the following amounts shall be taken into account:

- (a) in the case of insurance services, the premium payable and other forms of remuneration;
- (b) in the case of banking and other financial services, the fees, commissions and interest and other forms of remuneration;
- (c) in the case of contracts involving design tasks, the fees, or commissions and other forms of remuneration.

11. In the case of service contracts which do not indicate a total cost, the value to be used as the basis for calculating the estimated contract value shall be:

- (a) in the case of fixed-term contracts, where their term is 48 months or less, the total contract value for their duration;
- (b) in the case of contracts of indefinite duration, or with a term of more than 48 months, the anticipated total of the instalments to be paid in the first four years.'

Amendments 26 and 27 modify, respectively, the title and first paragraph of Article 26 concerning the possibility of awarding service contracts to an affiliated undertaking or to a contracting entity forming part of a joint venture.

Overall, these amendments are aimed firstly at extending the provision to include supply or works contracts.

They then provide for the following exclusions for contracts awarded to:

1. an undertaking affiliated to the contracting authority, or
2. a joint venture formed by several contracting authorities for the purpose of engaging in one of the activities covered by this Directive.

In these two cases, the amendment reduces the turnover requirement to 50 %. It is also envisaged that this condition can be met where the undertaking to which the contract is awarded has been in existence for less than three years, if the turnover required is likely to be attained at the end of the first three years of its existence.

The amendment also provides for exceptions for contracts awarded by a joint venture.

3. to one of the contracting entities which set it up, or
4. to an undertaking which is affiliated to one of those contracting entities.

In these last two cases, no other condition is laid down.

This extension to include works and supply contracts is unacceptable, in that it would question the *acquis communautaire*, without valid justification, by excluding from the scope of the Directive contracts which are currently covered by it. What is more, the possible acceptance of this extension could distort competition by reserving for certain undertakings the opportunity to gain income or experience which these same undertakings could invoke in calls — by other contracting entities — for competition in connection with comparable contracts, to the disadvantage of competing undertakings which had not had the opportunity to gain the same income and experience.

For the same reasons, the reduction of the turnover required for the exclusion to be applicable from 80 % to 50 % is also unacceptable, as is the removal of all conditions in the case of a contract awarded by a joint venture to an undertaking affiliated to one of the contracting entities which set up the joint venture (case No 4).

By contrast, the principle of providing for the possibility of awarding contracts to affiliated undertakings during the first three years of their existence is acceptable, if reformulated. The possibility of a contracting entity awarding contracts to a joint venture is consistent with the broad thrust of the provision and is therefore acceptable. Cases 1 and 3 are

already provided for under existing legislation and thus do not pose any problems in terms of substance.

The Commission therefore incorporates Amendments 26 and 27 as follows:

Recital: '(28) It is appropriate to exclude certain service contracts awarded to an affiliated undertaking having as its principal activity, with respect to services, the provision of such services to the group of which it is part, rather than the offering of its services on the market. It is also appropriate to exclude certain service contracts awarded by a contracting entity to a joint venture set up by several contracting entities for the purpose of engaging in activities covered by this Directive and of which it itself forms part.'

'Article 26

Service contracts awarded to an affiliated undertaking, a joint venture or a contracting entity forming part of a joint venture

1. For the purposes of this Article, "affiliated undertaking" means any undertaking whose annual accounts are consolidated with those of the contracting entity in accordance with the requirements of the Seventh Council Directive 83/349/EEC⁽¹⁾, or, in the case of entities not subject to that Directive, any undertaking over which the contracting entity may exercise, directly or indirectly, a dominant influence within the meaning of point (b) of Article 2(1), or which may exercise a dominant influence over the contracting entity or which, in common with the contracting entity, is subject to the dominant influence of another undertaking by virtue of ownership, financial participation, or the rules which govern it.

2. This Directive shall not apply to service contracts:

- (a) which a contracting entity awards to an affiliated undertaking;
- (b) awarded by a joint venture formed by a number of contracting entities for the purpose of carrying on activities within the meaning of Articles 3 to 6 to an undertaking which is affiliated with one of these contracting entities;

provided that at least 80 % of the average turnover of that undertaking with respect to services for the preceding three years derives from the provision of such services to undertakings with which it is affiliated.

Where, because of the date on which the affiliated undertaking was set up or commenced its activities, the turnover for the preceding three years is not available, it shall suffice for that undertaking to demonstrate that the turnover referred to in the first subparagraph will probably be achieved, particularly on the basis of activity forecasts.

⁽¹⁾ OJ L 193, 18.7.1983, p. 1. Directive last amended by Directive 90/605/EEC (OJ L 317, 16.11.1990, p. 60).

Where more than one undertaking affiliated with the contracting entity provides the same service or similar services, the total turnover deriving from the provision of services by those undertakings shall be taken into account.

3. This Directive shall not apply to service contracts:

(a) awarded by a joint venture formed by a number of contracting entities for the purpose of carrying out activities within the meaning of Articles 3 to 6 to one of those contracting entities;

(b) awarded by a contracting entity to such a joint venture of which it forms part.

4. The contracting entities shall notify to the Commission, at its request, the following information regarding the application of the provisions of paragraphs 2 and 3:

(a) the names of the undertakings or joint ventures concerned;

(b) the nature and value of the service contracts involved;

(c) such proof as may be deemed necessary by the Commission that the relationship between the contracting entity and the undertaking or joint venture to which the contracts are awarded complies with the requirements of this Article.'

Amendment 29, modifying Article 27(1) reintroduces an exclusion, existing in the current Directive, for purchases of energy or fuels for the production of energy made by contracting entities operating in the energy sector in the broad sense of the term (production, transport and distribution of electricity, gas or heat, as well as the exploration for and extraction of oil, gas, coal or other solid fuels). However, a reformulation of a purely technical nature is required, replacing the references to annexes, which imply a reference to the contracting entities, with a reference to the articles defining the relevant activities.

Amendment 30 is designed to ensure that any modification to the exclusion provided for in paragraph 1 is carried out in agreement with the European Parliament. Given that any and every proposal to amend this provision will have to follow the co-decision procedure provided for by the Treaty, and that the Commission will always have the possibility of securing a re-examination of the provision by the two co-legislators by submitting appropriate and reasoned proposals, the amendment, while not being taken over explicitly, can be accepted in substance by deleting paragraph 2 of Article 27.

The Commission incorporates Amendments 29 and 30 in Article 27 as follows:

'Article 27

Contracts awarded by certain contracting entities for the purchase of water and for the supply of energy or fuels for the production of energy

This Directive shall not apply to:

(a) contracts for the purchase of water, insofar as they are awarded by contracting entities engaged in the activity referred to in Article 4,

(b) contracts for the supply of energy or fuel intended for production of energy by contracting entities engaged in an activity referred to in Article 3(1), Article 3(3) or Article 6, point (a).'

Amendment 117 introduces the possibility for contracting entities themselves of requesting the opening of an exemption procedure under Article 29. Such a possibility is acceptable to the Commission. By incorporating Amendment 117, it is also possible to take into account the fear underlying Amendment 31 that the decision-making procedure under Article 31 is too complicated and long. Amendment 117 can therefore be incorporated as follows:

Recital (14): deleted.

'Article 29

General mechanism for the exclusion of activities directly exposed to competition

1. Contracts intended to permit the performance of a service mentioned in Articles 3 to 6 shall not be subject to this Directive if, in the Member State in which the activity is to be performed, it is directly exposed to competition on markets to which access is not restricted.

2. For the purposes of paragraph 1, the question of whether an activity is directly exposed to competition shall be decided on the basis of criteria such as the characteristics of the goods or services concerned, the existence of alternative goods or services, prices and the actual or potential presence of more than one supplier of the goods or services in question.

3. For the purposes of paragraph 1, access to a market shall be deemed not to be restricted if the Member State has implemented and applied the provisions of Community legislation referred to in Annex X.

If free access to a given market cannot be presumed on the basis of the first subparagraph, a Member State or the contracting entity seeking exemption must demonstrate that access to the market in question is free de facto and de jure.

4. In order to benefit from an exemption under paragraph 1, a Member State or a contracting entity shall ask the Commission to grant an exemption. If the request comes from a contracting entity, the Commission shall immediately inform the Member State concerned.

That Member State shall, taking account of paragraphs 2 and 3, inform the Commission of all the relevant facts, and in particular of any law, regulation, administrative provision or agreement concerning compliance with the conditions set out in paragraph 1.

The Commission may also initiate the procedure for adoption of an exemption decision at its own initiative.

For the adoption of a decision under this Article, in accordance with the procedure provided for in Article 65(2), the Commission shall be allowed a period of three months, commencing on the first working day following the date on which it receives the exemption request. This period may be extended once by one, two or three months in duly justified cases where the information contained in the request or in the documents attached is incomplete or inaccurate, or where the facts reported in the request subsequently change substantially.

If, at the end of this period, the Commission has not adopted a decision as to exemption, paragraph 1 shall be deemed to be applicable.

The Commission shall adopt the arrangements for application of this paragraph in accordance with the procedure provided for under Article 65(2).'

Amendment 51 specifies that the obligation on the part of the purchaser to preserve the confidentiality and integrity of the data submitted to it covers the entire operational cycle of the procedure: storage, processing and holding.

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

The Commission incorporates Amendment 51 by modifying Article 47 as follows:

‘Article 47

Rules applicable to communication

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

combination of those means, according to the choice of the contracting entity.

2. The means of communication chosen must be generally available and thus not restrict economic operators' access to the tendering procedure.

3. Communication and the exchange and storage of information shall be carried out in such a way as to ensure that the integrity of data and the confidentiality of tenders and requests to participate are preserved, and that the contracting entities examine the content of tenders and requests to participate only after the time limit set for submitting them has expired.

4. The tools to be used for communicating by electronic means, as well as their technical characteristics, must be non-discriminatory, reasonably available to the public and interoperable with the information and communication technology products in general use.

5. The following rules are applicable to devices for the electronic receipt of offers and requests to participate:

(a) information regarding the specifications necessary for the electronic submission of tenders and requests to participate, including encryption, must be available to interested parties. In addition, the equipment for the electronic receipt of tenders and requests to participate shall comply with the requirements of Annex XXII;

(b) the Member States may introduce or maintain voluntary accreditation schemes aiming at enhanced levels of certification service provision for these devices;

(c) tenderers or candidates shall undertake to submit, before expiry of the time limit laid down for submission of tenders or requests to participate, the documents, certificates, attestations and declarations referred to in Article 51(2) and Articles 52 and 53 if they do not exist in electronic format.

6. Rules applicable to the transmission of requests to participate:

(a) requests to participate in procedures for the award of public contracts may be made in writing or by telephone;

(b) where requests to participate are made by telephone, a written confirmation must be sent before expiry of the time limit set for their receipt;

(c) contracting entities may require that requests for participation made by fax must be confirmed by post or by electronic means, where this is necessary for the purposes of legal proof. Any such requirement, together with the time limit by which it must be met, must be stated by the contracting entity in the notice used as a means of calling for competition or in the invitation referred to in Article 46(3).'

Amendment 53 modifies Article 48(4), introducing a maximum period of two months within which economic operators whose application for qualification under a qualification system has been refused must be informed of the reasons for the refusal. The current provision does not set a time limit. The principle of including a time limit may be useful. However, a maximum period of two months could be too long in view of national time limits for appeals. Moreover, given that the same problems arise as those associated with the absence of a time limit for informing economic operators in respect of which a negative decision has been taken, the Commission can incorporate this amendment as follows:

'Article 48

Information to applicants for qualification, candidates and tenderers

1. Contracting entities shall, as soon as possible and at all events within a maximum period of fifteen days, inform the economic operators involved of decisions reached concerning the conclusion of a framework agreement or the award of a contract, including the grounds for any decision not to conclude a framework agreement or award a contract for which there has been a call for competition, or to recommence the procedure, and shall do so in writing if requested.

2. The contracting entity shall, upon request, inform any unsuccessful candidate or tenderer as soon as possible of the reasons for the rejection of his application or his tender, and shall inform any tenderer who has made an admissible tender of the characteristics and relative advantages of the tender selected, as well as the name of the successful tenderer or the parties to the framework agreement. Under no circumstances may the time taken to provide such information exceed fifteen days, counting from receipt of the written request.

However, contracting entities may decide that certain information on the contract award or the conclusion of the framework agreement, referred to in the first subparagraph, is to be withheld where the release of such information would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of a particular public or private economic operator, including those of the economic operator to whom the contract has been awarded, or might prejudice fair competition between economic operators.

3. Contracting entities who establish and operate a system of qualification shall inform applicants of their decision as to qualification within a reasonable period.

If the decision will take longer than six months from the presentation of an application, the contracting entity shall inform the applicant, within two months of the application, of the reasons justifying an extension of the time limit and of the date by which his application will be accepted or refused.

4. Applicants whose qualification is refused shall be informed of this decision and the reasons for refusal as soon as possible, and at all events within a maximum period of fifteen days. The reasons must be based on the criteria for qualification referred to in Article 52(2).

5. Contracting entities who establish and operate a system of qualification may terminate the qualification of an economic operator only for reasons based on the criteria referred to in Article 52(2). The intention to terminate qualification must be notified in writing to the economic operator, together with the reason or reasons justifying the proposed action. This notification must be given as soon as possible, and at all events within a maximum period of fifteen days, commencing on the date envisaged for terminating qualification.'

Amendment 56 modifies Article 50, describing the procedure, so as to introduce an obligation to check tenderers' or candidates' compliance with obligations under environmental, social and tax legislation, defined by reference to Article 38. It is clear from the link-up with amendments rejected during the voting that this amendment is essentially targeted at non-compliance with social legislation. Therefore, the amendment would, *per se*, have required the adoption of the (rejected) amendments to Article 38.

It is nevertheless true that non-compliance with labour law may constitute grounds for exclusion of a tenderer under the provisions proposed by the Commission, without it being necessary to refer explicitly to this case in the substantive provisions; it may also constitute grounds for exclusion on account of 'grave professional misconduct' within the meaning of Article 46(2) of the classic Directive, to which contracting entities may explicitly refer (see comments on Amendments 57, 109 and 60 above). In its Communication of 15 October 2001 concerning the integration of social considerations into public procurement⁽¹⁾, the Commission explained the extent to which these cases were already covered by existing legislation. This also applies to this proposal; it is therefore acceptable to clarify this. The Commission can therefore incorporate Amendment 56 as follows:

⁽¹⁾ 'Interpretative communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement', COM(2001) 566 final (OJ C 333, 29.11.2001, p. 13).

Recital: '(32a) National and Community laws, regulations and collective agreements in force on social protection and social security apply throughout the performance of a public contract, provided that the rules concerned, and also their implementation, comply with Community law. In cross-border situations, where workers from one Member State provide services in another Member State for the purpose of performing a public contract, Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services ⁽¹⁾ lays down the minimum conditions which must be observed by the host country in respect of such posted workers. Non-observance of these obligations may be considered by contracting entities, depending on the national law applicable, to be grave misconduct or an offence concerning the professional conduct of the economic operator concerned.'

Amendment 66 is aimed firstly at deleting the obligation for contracting entities to state the weighting given to each of the award criteria which they will apply to determine the most economically advantageous tender. The amendment replaces this with a requirement merely to state the order of importance of the criteria.

The introduction of a provision imposing weighting is a major element of the proposal designed to prevent manipulations, encountered in practice, favouring certain operators, and allows any tenderer to be reasonably informed in accordance with the principles laid down by the Court in the 'SIAC' judgment ⁽²⁾. It is essential that the weighting of the criteria be indicated in advance.

Amendment 66 also aims to simplify the arrangements for informing economic operators about each of the criteria.

The Commission can incorporate part of Amendment 66 as follows in Recitals 40 and 41, combined, as well as in Article 54(2).

Recital: '(40) The contract must also be awarded on the basis of objective criteria which ensure compliance with the principles of transparency, non-discrimination and equality of treatment, and which guarantee that tenders are assessed in conditions of effective competition. As a result, it is appropriate to allow the application of two award criteria only: "the lowest price" and "the most economically advantageous tender".'

Moreover, in order to ensure compliance with the principle of equality of treatment in the awarding of contracts, the obligation to ensure the necessary transparency should be codified to allow any tenderer to be reasonably informed as to the

criteria chosen to determine the most economically advantageous tender. Therefore, contracting entities should be obliged to indicate the relative weighting given to each of these criteria in time for economic operators to be aware of it when they draw up their tenders. The contracting entity should be allowed to confine itself to setting out a simple descending order of importance attaching to the criteria. However, it is sufficient to indicate such an order of importance if, in exceptional circumstances, a weighting is not possible, in particular owing to the subject-matter of the contract.'

'Article 54

Contract award criteria

1. ...

2. In the case referred to in point (b) of paragraph 1, the contracting authority shall specify the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender.

This weighting can be expressed by providing for a range with an appropriate maximum spread.

If a weighting is not possible in exceptional cases, in particular owing to the subject-matter of the contract, the contracting entity shall indicate the order of importance of the application of the criteria.

This relative weighting or order of importance shall be specified in the notice used as a means of calling for competition, the invitation to confirm the interest referred to in Article 46(3), the invitation to submit a tender or to negotiate or in the specifications.'

Amendment 75 specifies that the obligation on the part of the purchaser to preserve the confidentiality and integrity of the data submitted to it covers the entire operational cycle of the procedure: storage, processing and holding.

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

'Article 62

Means of communication

1. Article 47(1), (2) and (4) shall apply to all communications relating to the design contest.

⁽¹⁾ OJ L 18, 21.1.1997, p. 1.

⁽²⁾ Judgment of 18 October 2001 in case C-19/2000, ECR 2001, p. I-7725.

2. Communications, exchanges and the storage of information shall be such as to ensure that the integrity and the confidentiality of all information communicated by the participants in a contest are preserved, and that the jury ascertains the contents of plans and projects only after the expiry of the time limit for their submission.

3. The following rules shall apply to the devices for the electronic receipt of plans and projects:

(a) the information relating to the specifications which is necessary for the presentation of plans and projects by electronic means, including encryption, shall be available to the parties concerned. In addition, the equipment for the electronic receipt of plans and projects shall comply with the requirements of Annex XXII;

(b) the Member States may introduce or maintain voluntary accreditation schemes aiming at enhanced levels of certification service provision for these devices.'

Amendment 76, which addresses a specifically German situation, would introduce a legal presumption of freedom of access to activities comprising exploration for and extraction of coal or other solid fuels in the event of a Member State voluntarily making a Directive (94/22/EC) relating to hydrocarbons licences⁽¹⁾ applicable to the coal sector. This amendment links up with the general exclusion mechanism provided for in Article 29.

The introduction of a legal presumption linked to the voluntary application of a Community Directive beyond its actual scope poses major problems in terms of legal certainty and does not take into account the differences between the hydrocarbons sector and that of coal and other solid fuels. Such a voluntary application cannot be ignored, however. The Commission therefore incorporates Amendment 76 into recital 13, modified as follows:

Recital: '(13) Direct exposure to competition must be assessed on the basis of objective criteria, taking account of the specific characteristics of the sector concerned. The implementation and application of appropriate Community legislation liberalising a given sector, or a part of it, will be considered to provide sufficient grounds for assuming that there is free access to the market in question. Such appropriate legislation should be identified in an annex which can be updated by the Commission. Where access to a given market is not liberalised by Community legislation, the Member States must demonstrate that, de jure and de facto, such access is free. The voluntary application in national law of a Directive liberalising a given sector to another sector constitutes a fact which has to be taken into account for the purposes of Article 29.'

⁽¹⁾ Directive 94/22/EC of the European Parliament and of the Council of 30 May 1994 on the conditions for granting and using authorisations for the prospecting, exploration and production of hydrocarbons (OJ L 164, 30.6.1994, p. 3).

Amendments 78, 79 and 80, respectively, impose in the case of open, restricted and negotiated procedures for which the prior call for competition is issued by way of a contract notice an obligation on the part of contracting entities to state in the contract notice the name and address of the body responsible for appeals in relation to the award of public contracts.

Increased transparency in this domain is desirable.

The Commission therefore incorporates Amendments 78, 79 and 80 as follows:

'ANNEX XII

INFORMATION TO BE INCLUDED IN CONTRACT NOTICES

A. OPEN PROCEDURES

...

19a. Name and address of the body responsible for appeal and, where appropriate, mediation procedures. Precise information concerning deadlines for lodging appeals.

...

B. RESTRICTED PROCEDURES

...

17a. Name and address of the body responsible for appeal and, where appropriate, mediation procedures. Precise information concerning deadlines for lodging appeals.

...

C. NEGOTIATED PROCEDURES

...

18a. Name and address of the body responsible for appeal and, where appropriate, mediation procedures. Precise information concerning deadlines for lodging appeals.

...'

Amendments 81 and 82 relate to contracts for which the call for competition is made by means of a notice on the existence of a qualification system, or a periodic indicative notice, and impose an obligation on the part of contracting entities to state in these notices the name and address of the body responsible for appeals in relation to the award of public contracts. As regards periodic indicative notices, however, this new obligation of transparency should be limited to cases where the periodic indicative notice is used as the means of calling for competition, or where it enables the time limits for the receipt of applications or tenders to be reduced. Where the notice does not fulfil these functions, the added value of an obligation to provide information regarding appeals has not been demonstrated.

Amendment 83 introduces the same obligation in the case of contract award notices.

Increased transparency in this domain is desirable.

The Commission therefore incorporates Amendments 81, 82 and 83 as follows:

'ANNEX XIII

INFORMATION TO BE INCLUDED IN THE NOTICE ON THE EXISTENCE OF A SYSTEM OF QUALIFICATION

...

6a. Name and address of the body responsible for appeal and, where appropriate, mediation procedures. Precise information concerning deadlines for lodging appeals.

...'

'ANNEX XIV

INFORMATION TO BE INCLUDED IN THE PERIODIC NOTICE

I. HEADINGS TO BE COMPLETED IN ALL CASES

...

II. INFORMATION WHICH MUST BE SUPPLIED WHERE THE NOTICE IS USED AS A MEANS OF CALLING FOR COMPETITION OR PERMITS A REDUCTION OF THE TIME LIMITS FOR THE RECEIPT OF APPLICATIONS OR TENDERS

...

14a. Name and address of the body responsible for appeal and, where appropriate, mediation procedures. Precise information concerning deadlines for lodging appeals.

...'

'ANNEX XV

INFORMATION TO BE INCLUDED IN THE CONTRACT AWARD NOTICE

I. Information for publication in the *Official Journal of the European Communities* ⁽¹⁾

...

11a. Name and address of the body responsible for appeal and, where appropriate, mediation procedures. Precise information concerning deadlines for lodging appeals.

12. Optional information:

...'

Amendments 85 and 86, respectively, impose, in the case of notices of design contests and notices concerning the results of contests, an obligation on the part of contracting entities to state in those notices the name and address of the body responsible for appeals in relation to the award of public contracts.

Increased transparency in this domain is desirable.

The Commission therefore incorporates Amendments 85 and 86 as follows:

'ANNEX XVII

INFORMATION TO BE INCLUDED IN THE CONTEST NOTICE

...

13a. Name and address of the body responsible for appeal and, where appropriate, mediation procedures. Precise information concerning deadlines for lodging appeals.

...'

⁽¹⁾ Information under headings 6, 9 and 11 is regarded as information that is not to be published if a contracting entity takes the view that its publication would prejudice a sensitive commercial interest.

'ANNEX XVIII

**INFORMATION TO BE INCLUDED IN THE RESULTS OF
CONTEST NOTICES**

...

8a. Name and address of the body responsible for appeal and, where appropriate, mediation procedures. Precise information concerning deadlines for lodging appeals.

...'

3.3. *Amendments not accepted by the Commission (Amendments 1, 5, 6, 123, 124, 10, 11, 106, 14, 19, 23, 25, 28, 31, 32, 91-98, 100, 120, 45, 48, 49, 50, 103, 52, 54, 55, 58, 61, 62, 125, 71, 73, 74, 77, 84 and 88)*

Amendment 1 is aimed at including among the objectives pursued by the Directive a guarantee of 'a high standard of reliable services of general interest at affordable prices'. This amendment is unacceptable because the Directive is aimed merely at coordinating procedures for the award of contracts, and does not address the standard of services of a general interest offered in the various Member States.

Amendment 5 modifies recital 8 by adding: 'The reason for regulating the water, energy and transport sectors by means of this Directive is that the entities which provide services in those areas are in certain cases public ones and, in other cases, private ones.'

It is indisputable that the activities addressed by the Directive are carried out by both public and private entities. However, to reduce the *raison d'être* of legislation coordinating procedures for the award of contracts to its application to all entities, whatever their legal status, is nevertheless unacceptable. The reasons for regulating contract award procedures in these sectors are in fact linked to the completion of the internal market in these sectors, which are characterised by an activity carried out by both public and private entities operating across a network, often in monopolistic or oligopolistic situations, where barriers to the smooth operation of the single market may persist. The fact that the entities operating in these sectors are in some cases public ones and in other cases private ones does not, *per se*, justify the introduction of regulatory measures, but has the effect that the scope of the Directive has to be defined otherwise than by a simple reference to the legal status of entities.

Amendment 6 aims to justify the extension, to supply and works contracts, of the exemption provided for in Article 26 (affiliated undertakings), as amended. Such an extension is not acceptable, for the reasons set out above with regard to Amendments 26 and 27.

Amendments 123 and 124 seek to change the concept of 'framework agreement', which is part of established law, into that of 'framework contract' ⁽¹⁾, in the definitions in Article 1, and in Article 13 governing its use. These amendments are unacceptable: for one thing, they would create without any justification whatsoever a major difference between the two public procurement Directives (a definition of framework agreements closely based on that in the current sectors Directive will be introduced in the classic Directive); for another, they would deprive contracting entities of a flexible and useful instrument.

Amendment 10 is specifically designed to regulate framework contracts ⁽²⁾ in the field of translation and interpretation.

This amendment is also unacceptable: for one thing, contracting entities which have to procure translation and interpreting services may need the same flexibility as other contracting entities; for another, there is no justification whatsoever for making the award of framework contracts or agreements concerning this category of services covered by Annex XVIB subject to detailed rules of procedure different from those applicable to other services covered by the same Annex.

Amendment 11 sets out to make the awarding of prizes to participants in design contests compulsory and accordingly modifies the definition of 'design contests' by limiting them exclusively to contests in which prizes are awarded

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

Amendment 106 includes 'purchasing groups' among public authorities in order to enhance legal certainty vis-à-vis such joint procurement bodies. To this end, the amendment inserts, on the one hand, an explicit reference to such purchasing groups, while on the other hand modifying the second subparagraph, first indent, i.e. the first cumulative criterion defining the concept of a body governed by public law, by deleting the words 'not having an industrial or commercial character'.

⁽¹⁾ According to the original (DE) version and eight other language versions. The IT version, by contrast, has remained unchanged. The Finnish language apparently does not admit of a distinction between the two concepts.

⁽²⁾ It should be noted, however, that the original version (IT) refers to framework agreements, nine other language versions to framework contracts. The Finnish language apparently does not admit of a distinction between the two concepts.

The amendment is inappropriate for several reasons:

- the modification of the definition of a 'body governed by public law' would create an unjustified difference between the two Directives, as the split vote on Amendments 126 and 172 to the classic Directive resulted in this change to the concept of a body governed by public law being rejected. This part of the amendment would also create a great deal of legal uncertainty in the demarcation of 'public authorities', including in particular bodies governed by public law and 'public undertakings'. This legal uncertainty would be all the greater as some rules would apply to 'public authorities' and not to 'public undertakings', and vice versa;
- the inclusion of purchasing groups among contracting entities would not entail any legal effect, as there are no proposals to set up a suitable framework to govern relations between contracting entities and purchasing groups;
- the purchasing groups of which the Commission is currently aware do not carry out any of the activities referred to by this Directive and are thus not subject to its rules;
- apart from this amendment, the justification for which shows that it is geared more to situations governed by the classic Directive, neither the debates in the European Parliament nor those in the Council have demonstrated a real need for specific rules on the subject in the framework of this Directive.

Amendment 14 rejects the modifications to the definition of exclusive and special rights proposed by the Commission, and thus has the effect of reverting to existing law.

The modification of the definition of exclusive rights is desirable, firstly in order to bring it more closely into line with other definitions of the same concept in other areas of Community legislation (especially in some telecommunications Directives and in the 'transparency' Directive⁽¹⁾), and secondly because practical experience has shown that the current definition is too broad. Reverting to existing law on this point is therefore inappropriate as far as the Commission is concerned.

Amendment 19 would introduce into the substantive provisions a new recital stating that nothing in this Directive shall prevent any contracting entity from imposing or

enforcing measures necessary to protect public morality, public policy, public security or human, animal or plant life or health.

This amendment, the content of which is essentially identical to that of Amendment 111, is superfluous, as the Commission has accepted the latter.

Amendment 23 would enable the Commission to request Member States to provide information on which to base a decision on the applicability of the exclusion provided for by Article 22 in the case of contracts declared to be secret. The amendment is superfluous and would, moreover, lend itself to contradictory conclusions concerning all provisions in which such a possibility was not referred to, and could thus militate against the Commission addressing questions to Member States under Article 10 or Article 226 of the Treaty.

Amendment 25 extends to supply and works contracts an exclusion which relates to service contracts only. This extension to the exception provided for in Article 25 is unacceptable, as it would call into question the *acquis communautaire* without valid justification by excluding from the scope of the Directive contracts which are currently covered by it.

Amendment 28, modifying Article 26(3)(b), is a direct consequence of the extension, proposed in Amendments 26 and 27, of the exception provided for in Article 26(1), in respect of services only, to supply and works contracts. Given that this part of Amendments 26 and 27 is unacceptable to the Commission, the same applies to Amendment 28.

Amendment 31 modifies the general exclusion mechanism provided for in Article 29 by reducing the substantive conditions for exclusion to the sole condition that access to the activity concerned is not restricted, and adds that access to an activity shall legally be deemed not to be restricted if Community legislation liberalising that activity has been transposed. What is more, the amendment would eliminate the procedure for the Commission to decide whether an activity had been liberalised to such an extent as to render application of the public procurement rules superfluous.

The amendment is unacceptable to the Commission; firstly, because of the complete absence of legal certainty, both for the contracting entities concerned — they could find themselves facing a plethora of disputes following a decision not, or above all no longer, to apply the public procurement rules — and for economic operators, who would no longer know the legal framework governing their relations with contracting entities. Moreover, competitive distortions could arise where divergent assessments were made — for example depending on whether this is done by long-established operators or by recent entrants to the sector — of the state of liberalisation in a given sector, especially in the case of an activity which was not the subject of Community liberalisation legislation.

⁽¹⁾ Commission Directive 2000/52/EC of 26 July 2000 amending Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings (OJ L 193, 29.7.2000, p. 75).

Secondly, this amendment is unacceptable also because it eliminates the condition under which unrestricted access must have had the effect of fully exposing the activity in question to competition. It is not unusual, especially where services are provided across networks, for there to be a time-lag between the adoption of liberalisation legislation and the point at which this begins actually to have an impact. It is also possible to imagine cases where established operators had enjoyed advantages over a long period, such that the entry into the market of other operators could remain purely theoretical for a long time.

Amendment 32 turns into an obligation the option, provided for in Article 33 of the Commission's initial proposal and taken over from existing law, for contracting entities to require information on the subject of any subcontracting envisaged.

It also makes it obligatory to stipulate conditions concerning provisions on health and safety at work and working conditions. The amendment also adds conditions relating to environmental protection.

As regards the first aspect, see the comments concerning the second aspect of Amendment 120 above.

The second part of the amendment is superfluous, as the possibility of stipulating conditions relating to environmental protection has been explicitly provided for elsewhere in the proposal (see comments on Amendments 3 and 33), while the new recital 32a — cited in the comments to amendment 56 — provides a reminder of the obligation to comply with social legislation. Under these conditions, an obligation to impose conditions going beyond the obligations deriving from legislation or from the applicable collective agreements is not appropriate.

Amendments 91-98 include, in particular, eco-labels and environmental management systems among the instruments which may be used as technical references for drawing up technical specifications. Moreover, they introduce a preference for European eco-labels.

The preference given to European eco-labels is inappropriate, given that these labels do not replace national or plurinational labels. The reference to environmental management systems is inappropriate, as this does not concern a technical specification characterising a product or a service. By contrast, where a contracting entity prescribes a particular environmental performance level, it may use the criteria of European or national eco-labels or any other eco-label, provided it has been drawn up by all the parties concerned and is accessible.

Amendment 100 relates to the means by which economic operators may prove to the satisfaction of the contracting entity the equivalence of the technical solutions proposed. It deletes any explicit reference to any means of proof other than test reports from impartial outside bodies — which can be very expensive.

Although the amendment is ambiguous in that it states that such a report 'may constitute' an appropriate means, it leaves open to serious doubt the question as to whether other means, such as a manufacturer's technical dossier, would be acceptable. The amendment, if actually intended to exclude other means of proof, runs counter to the objective of clarification underlying the Commission's proposal.

Amendment 120 is intended to:

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

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

1. If an economic operator can demonstrate that he can effectively draw on the capacity of other entities, for example through subcontracting, he is entitled, according to case law, to avail himself thereof for the purposes of selection. By contrast, there is nothing under current law to prevent a contracting entity from prohibiting (subsequent) subcontracting at the contract performance stage.

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

However, it could be taken into account in accordance with the principle of subsidiarity (obligation imposed, where appropriate, by Member States).

As regards contracts awarded by contracting entities other than public authorities, imposing such an obligation on subcontractors would be impracticable, quite apart from the problems cited in the comments on Amendments 57 and 109 above concerning the obligatory application of the compulsory exclusion criteria listed in 46(1) of the classic Directive.

A possible obligation to exclude subcontractors in other cases (non-compliance with labour law, cf. paragraph 2 of the same Article) could be envisaged in accordance with the principle of subsidiarity (with the obligation being imposed by Member States where appropriate) but would pose the same problems as in cases where the contracting entity is a public authority.

As regards the aspects of point 3 relating to economic and financial standing and technical and professional capabilities, as referred to in Articles 48 and 49 of the classic Directive, this would mean that subcontractors would have to have the same capacity as the principal contractor, which would unjustifiably exclude SMEs. These aspects cannot, therefore, be taken into consideration, especially as contracting entities are in no way obliged to include such criteria among the rules and criteria applied for the selection of principal contractors or in the management of a qualification system.

As far as Article 47 of the classic Directive is concerned, the amendment proposes to apply in respect of subcontractors a stricter regime than that envisaged for candidates and tenderers (in the latter case, contracting entities would not be obliged to include such requirements among the rules and criteria applicable to the selection of candidates and tenderers or in the management of qualification systems, nor to request information, whereas in the case of subcontractors they would have to do so systematically). However, where provided for in the rules and criteria relating to the selection of participants or to the management of a qualification system, it is already possible to apply Article 47 of the classic Directive to subcontractors for selection purposes where a tenderer relies on means made available to him by subcontractors ('Holst Italia' judgment ⁽¹⁾).

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

Amendment 45 aims to broaden the scope for awarding contracts for the purpose of research, experiment, study or development without a call for competition, by eliminating the conditions provided for under existing law, according to which such contracts cannot be awarded 'for the purpose of securing a profit or of recovering research and development costs and in so far as the award of such contracts does not prejudice the competitive award of subsequent contracts which do seek, in particular, those ends.'

By eliminating these conditions, the amendment would have the effect of excluding from the scope of the Directive contracts which are currently covered by it, thus calling the *acquis communautaire* into question. What is more, the amendment could create captive markets over very long periods, as the application of this exception could easily be followed by the use of another exception invoking technical reasons as grounds for continuing to award contracts to the successful tenderer for the initial research contract. The amendment is therefore unacceptable.

Amendment 48 adds a clarification that any 'other specific conditions for taking part', which must be included in the invitation to submit a tender or to negotiate in the restricted and negotiated procedures respectively, may not 'unduly discriminate between tenderers'.

⁽¹⁾ Judgment of the Court of 2 December 1999, *Holst Italia SpA v Comune di Cagliari*, intervener: *Ruhrwasser AG International Water Management*, Case C-176/98, [1999] ECR I-8607.

The goal pursued by this amendment is in line with the proposal for a directive. This addition is superfluous, however, as the matter is already covered by Article 9 concerning the fundamental principles to be observed in general.

Amendment 49 is designed to prevent the contracting entity from being able to choose the means by which communication and the exchange of information must be performed in the context of an award procedure or of the management of a qualification system.

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

Amendment 50 states that tenders submitted by electronic means are to be rejected unless an advanced electronic signature within the meaning of Directive 1999/93/EC and a reliable means of encrypting the contents are used.

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

Amendment 103 imposes an obligation to involve an accredited third party in order to guarantee the confidentiality of data transmitted by tenderers.

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

Amendment 52 specifies that contracting entities must inform economic operators of their decisions regarding applications for qualification within a maximum period of two months.

Insofar as the goal of the amendment is to oblige contracting entities to complete the evaluation of applications for qualification within a maximum period of two months, this is unacceptable, given that qualification systems were added to this Directive *inter alia* to take account of the fact that the contracting entities need highly complex industrial equipment (e.g. rolling stock for railways), the technical evaluation of which may require testing, analysis, etc. over a long period of time. Moreover, if the intention of the amendment is to ensure that economic operators are provided with information by the two-month deadline, it is superfluous, as the second subparagraph already states that 'if the decision will take longer than six months from the presentation of an application, the contracting entity shall inform the applicant, within two months of the application, of the reasons justifying the longer period and of the date by which his application will be accepted or refused.'

Amendment 54 is intended to extend the period for which the contracting entities must store information on the course of an award procedure from 4 to 6 years.

The provision in question was added 'so that the contracting entity will be able, during that period, to provide the necessary information to the Commission if the latter so requests'. In view of the rules which govern the treatment of complaints and the code of good behaviour, requiring such an extension seems disproportionate, particularly given that the contracting entities would incur considerable expense applying it (particularly in terms of room for archives). It should be noted that Member States would be free to lay down a longer period if this were to prove necessary to safeguard the rights of economic operators (or to harmonise the length of time with that laid down in the national provisions, for example).

Amendment 55 aims to introduce a system for appeals against the decisions made by the contracting entities and to provide for it to be open to workers and their representatives.

There is already a separate and specific directive concerning appeals concerning public contracts (for utilities, this is Directive 92/13/EEC and not 89/665/EEC). Moreover, appeals by workers and their representatives with regard to social legislation in respect of public contracts are provided for. Specific methods of appeal for posted workers are set out in the Directive on the posting of workers (96/71/EC). These two systems of appeal cannot be combined. An identical amendment (Article 41a) was rejected by the Committee on Legal Affairs and was not put forward for the classic Directive. Adopting the amendment for this Directive would thus result in unjustified differences between the two Directives.

Amendment 58 introduces a rule according to which the provisions which apply to a given sector overrule the rules for public contracts if there is a conflict.

According to its justification, the amendment is aimed particularly at the rail sector (Proposal for a Regulation concerning passenger transport by rail, road and inland waterway ⁽¹⁾).

The amendment should be rejected as it contradicts the approach taken by the Commission, particularly in the proposal for a Regulation, i.e. that sectoral rules be without prejudice to the general rules which apply to all public contracts, in the sense that they cannot introduce procedural rules for contracts for which competition is obligatory under the detailed rules of the public procurement Directives. Moreover, the amendment would create unjustified differences between the two Directives, as no similar amendment was put forward for the classic Directive, where the same problem may arise.

Under Amendment 61, the system of official lists of approved economic operators provided for in the classic Directive would apply to the contracting entities.

First of all, it should be pointed out that nothing prevents a contracting entity from accepting certificates of registration in the list as proof of capacity. Secondly, it is important to remember that, even under the classic Directive, other types of proof must be accepted. The amendment also contradicts the general approach taken by this Directive, which sets out more flexible rules than the classic Directive, except where the fundamental principles of Community law require the same rules, in order to take into account the fact that the scope includes public and private undertakings.

Amendment 62 is intended to establish that the criteria and rules used to select participants do not prejudice any conditions of performance.

As their name indicates, performance conditions are conditions which apply to the way the contract is performed. They are thus neither selection criteria nor award criteria. This has been confirmed in case law. Moreover, accepting this amendment would create an unacceptable difference between the two Directives, as no similar amendment was put forward for the classic Directive.

Amendment 125 is intended, as far as the award criterion of the 'most economically advantageous tender' is concerned, to:

1. remove the clarification that this means the most economically advantageous tender 'for the contracting entities';
2. specify that environmental characteristics may include 'production methods';

3. add the criterion of 'equal treatment policy'.

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

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

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

Amendment 71 modifies Article 57. This provision, which currently applies only to service contracts, is aimed at possible difficulties of access to service contracts in third countries which may be encountered by economic operators. It requires the Commission to strive to resolve problems concerning access to contracts in third countries. The amendment would extend the current provisions to three kinds of contracts, in addition to introducing a requirement to take action in the event of the third countries not complying with certain ILO conventions.

There is no justification for extending the existing requirements to take action to supply and works contracts. In fact, there are other instruments for these types of contracts, both in this Directive (e.g. Article 56), and as part of bi-, pluri- or multi-lateral agreements or negotiations. This aspect of the amendment is therefore unacceptable.

⁽¹⁾ OJ C 365, 19.12.2000, p. 169.

As for the new cases requiring action, a public procurement Directive is not an appropriate instrument for introducing an obligation on the Commission to monitor the compliance of third countries with international labour law.

Amendment 73 removes, in Article 62(1), the part of the sentence which clearly states that the means of communication to be used in a contest is to be that chosen by the contracting entity.

Without this part of the sentence, the text would give participants the possibility of choosing the means of communication themselves, and the consequences would be those described with regard to Amendment 49.

Amendment 74 introduces, in Article 62, a new paragraph 1a making it compulsory, when transmitting drafts or plans by electronic means in the context of design contests for services, to use an advanced electronic signature and a reliable means of encryption.

See the reasons given for rejecting Amendment 50 and the text of Article 62 as amended (Amendment 75).

Amendment 77 introduces a legal presumption of freedom of access to the rail sector in the event of the transposition and correct application of Directive 91/440/EEC on the development of the Community's railways⁽¹⁾. The amendment links up with the general exclusion mechanism described in Article 29.

It is not acceptable, as Directive 91/440/EEC is not, strictly speaking, a liberalisation directive.

Amendment 84 is intended to completely exclude banking services from the scope of the Directive.

This amendment is unacceptable, insofar as it would call into question the *acquis communautaire* by excluding contracts which are currently covered by the Directive. In addition, the reasons often given to justify such an exclusion (i.e. that it would be impossible to apply the procedures due to the volatility of rates) are not valid. The Directive provides means which can meet the needs expressed with regard to awarding these contracts (use of qualification systems, framework agreements, electronic means, etc.).

Amendment 88 introduces a new annex which lists the international conventions on working conditions for the purposes of Amendment 71.

Given that this annex is only relevant to Amendment 71 to Article 57, and that Amendment 71 is unacceptable for the reasons given above, Amendment 88 is itself unacceptable for the same reasons.

3.4. Amended proposal

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

⁽¹⁾ OJ L 237, 24.8.1991, p. 25.