



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 27 January 2012

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

**5369/1/12
REV 1**

**MAP 3
MI 16**

NOTE

from:	General Secretariat
to:	Working Party on Public Procurement
on:	1 February 2012
No Cion prop.:	18966/11 MAP 10 MI 686
N° previous doc.:	5369/12 MAP 3 MI 16
Subject:	Proposal for a Directive of the European Parliament and of the Council on public procurement - Cluster 2: Strategic use of public procurement

In view of the Working Party on Public Procurement on 1 February 2012, delegations will find in the Annex a revised version of the non-paper prepared by the Commission services (DG Internal Market) on Cluster 2 of the above proposal.

Changes compared to doc. 5369/12 concern the numbering of some paragraphs only and do not concern the substance.

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Cluster 2

Strategic use of public procurement

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

1. Contract award criteria

Article 66

Contract award criteria

[Directive 2004/18/EC: Art. 53]

1. Without prejudice to national laws, regulations or administrative provisions concerning the remuneration of certain services, the criteria on which contracting authorities shall base the award of public contracts shall be one of the following:
 - (a) the most economically advantageous tender;
 - (b) the lowest cost.**

Costs may be assessed, on the choice of the contracting authority, on the basis of the price only or using a cost-effectiveness approach, such as a life-cycle costing approach, under the conditions set out in Article 67.

The provision replaces the criterion of the "lowest price" by the criterion of the "lowest cost". This change enlarges the toolbox of contracting authorities, allowing them to base their decisions on more comprehensive costs assessments.

It is for contracting authorities to decide how they want to assess costs: either by the price only, as under Directive 2004/18/EC, or by a broader assessment including all forms of costs, price and costs occurring over the life-cycle of the product or service, as defined in Articles 2(22), 67.

2. The most economically advantageous tender referred to in point (a) of paragraph 1 from the point of view of the contracting authority shall be identified on the basis of criteria linked to the subject-matter of the public contract in question. Those criteria **shall include, in addition to the price or costs referred to in point (b) of paragraph 1, other criteria** linked to the subject-matter of the public contract in question, such as:

The new wording clarifies that the criterion of the most economically advantageous tender (MEAT) consists of the price or cost criterion and other, additional criteria. The assessment can therefore not be based on non-cost criteria only.

- (a) quality, including technical merit, aesthetic and functional characteristics, **accessibility, design for all users**, environmental characteristics and **innovative character**;
- (b) **for service contracts and contracts involving the design of works, the organisation, qualification and experience of the staff assigned to performing the contract in question may be taken into consideration, with the consequence that, following the award of the contract, such staff may only be replaced with the consent of the contracting authority, which must verify that replacements ensure equivalent organisation and quality**;

Clarification that the qualification and experience of the staff/personnel assigned to performing the specific contract in question can, under certain conditions, be taken into account at the award stage. This is in line with the principal distinction between selection and award criteria which is maintained by the proposal. In fact, the quality of the staff employed may affect the performance of the contract for the provision of a service in terms of quality and, as a result, influence the economic value of a tender for such a contract (see recital 41).

If the contracting authority makes use of this possibility it must ensure that any replacements of staff during contract performance offer equivalent quality, so as to avoid distortions of competition.

- (c) after-sales service and technical assistance, delivery date and delivery period or period of completion;
- (d) **the specific process of production or provision of the requested works, supplies or services or of any other stage of its life cycle as referred to in point (22) of Article 2, to the extent that those criteria are specified in accordance with paragraph 4 and they concern factors directly involved in these processes and characterise the specific process of production or provision of the requested works, supplies or services.**

1. This point constitutes one of the major innovations of the proposal. Under Directive 2004/18/EC, opinions are divided whether and to what extent factors relating to the process of production or provision of the purchased good, service or works can be taken into account in the award phase.

2. The proposal explicitly allows such factors to be taken into account, provided that they are **directly linked** to the production or provision of the specific good or service, e.g.:

- the purchased product is manufactured using energy-efficient machines or without toxic chemicals;
- the product is manufactured or a service is provided by persons with disabilities.

3. This requirement of a "direct link" **excludes**:

- conditions and criteria relating to the manufacturing company or plant in general (examples: gender equality in management; requirement that a certain percentage of the employees are disadvantaged persons. Obviously, this does not preclude the possibility to **reserve** the contract for sheltered workshops etc. in conformity with Article 17);
- conditions or criteria that are only remotely linked to the production process (example: requirement that a percentage of the price paid for the purchased product is invested in social projects in the region of production – Fair Trade Premium).

4. As concerns more specifically **social considerations**, further limitations result

a. from the **international commitments of the EU**:

As social considerations are closely linked to the regulatory environment, they might be considered as a de facto barrier to market access of third country operators, contrary to the GPA. Hence, such considerations may only be taken into account to the extent that they are covered by the relevant exception of the GPA:

Article III Security and General Exceptions

2. *Subject to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between Parties where the same conditions prevail or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent any Party from imposing or enforcing measures:*

(b) necessary to protect human, animal or plant life or health;

(...)

(d) relating to goods or services of persons with disabilities, philanthropic institutions or prison labour.

b. from the need to ensure coherence with Directive 96/71/EC ("Posting of Workers" Directive)

These limitations are expressed in recital 41:

"In order to better integrate social considerations in public procurement, procurers may also be allowed to include, in the award criterion of the most economically advantageous tender, characteristics related to the working conditions of the persons directly participating in the process of production or provision in question. Those characteristics may only concern the protection of health of the staff involved in the production process or the favouring of social integration of

disadvantaged persons or members of vulnerable groups amongst the persons assigned to performing the contract, including accessibility for persons with disabilities. Any award criteria which include those characteristics should in any event remain limited to characteristics that have immediate consequences on staff members in their working environment. They should be applied in accordance with 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 services¹ and in a way that does not discriminate directly or indirectly against economic operators from other Member States or from third countries parties to the Agreement or to Free Trade Agreements to which the Union is party."

- 3. Member States may provide that the award of certain types of contracts shall be based on the most economically advantageous tender as referred to in point (a) of paragraph 1 and in paragraph 2.**

Under the current Directives, the possibilities for Member States to restrict the use of one of the two possible award criteria (lowest price and MEAT) are at least unclear (see the case-law of the ECJ, Case C-247/02, Sintesi).

This new provision responds to the growing call to restrict or exclude the criterion of the lowest price in order to encourage a greater quality orientation of public procurement. In respect of the principle of subsidiarity, such restrictions should however not be made at EU level. It should rather be left to Member States to decide whether and for which types of contracts such rules could be useful (e.g. intellectual services).

- 4. Award criteria shall not confer an unrestricted freedom of choice on the contracting authority. They shall ensure the possibility of effective competition and shall be accompanied by requirements that allow the information provided by the tenderers to be effectively verified. Contracting authorities shall verify effectively, on the basis of the information and proof provided by the tenderers, whether the tenders meet the award criteria.**

¹ OJ L 18, 21.1.1997, p.1.

This provision codifies the case-law of the ECJ - C-448/01, EVN Wienstrom, (paras 45 ff)- according to which the principle of equal treatment requires that contracting authorities effectively verify whether tenders meet the award criteria.

With the extension of possible award criteria to encompass notably criteria relating to the production process, this requirement of effective verification becomes even more important to guarantee a transparent and non-discriminatory procedure.

5. In the case referred to in point (a) of paragraph 1 the contracting authority shall specify, in the contract notice, in the invitation to confirm interest, in the procurement documents or, in the case of a competitive dialogue, in the descriptive document, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender. Those weightings may be expressed by providing for a range with an appropriate maximum spread. Where weighting is not possible for objective reasons, the contracting authority shall indicate the criteria in decreasing order of importance.

Article 67

Life-cycle costing

1. **Life-cycle costing shall to the extent relevant cover the following costs over the life cycle of a product, service or works as defined in point (22) of Article 2:**
 - (a) **internal costs, including costs relating to acquisition, such as production costs, use, such as energy consumption, maintenance costs, and end of life, such as collection and recycling costs and**
 - (b) **external environmental costs directly linked to the life cycle, provided their monetary value can be determined and verified, which may include the cost of emissions of greenhouse gases and of other pollutant emissions and other climate change mitigation costs.**

Experience shows that contracting authorities are reluctant to use life-cycle costing in their award decisions. Clarification in the Directive, indicating which criteria can be taken into account under EU public procurement law will create legal certainty and incentivise the use of LCC.

The text proposes a broad, ambitious approach, including not only internal costs of the product/service itself over its whole life cycle, but also certain externalities. To avoid arbitrary or intransparent decisions, only monetisable externalities can be taken into account.

It has to be pointed out that life-cycle costing is a cost-effectiveness approach within the meaning of Article 66(1). As such, it can be used both in the case of an award on the basis of the lowest cost and in an award to the most economically advantageous tender.

2. Where contracting authorities assess the costs using a life-cycle costing approach, they shall indicate in the procurement documents the methodology used for the calculation of the life-cycle costs. The methodology used must fulfil all of the following conditions:

- (a) it has been drawn up on the basis of scientific information or is based on other objectively verifiable and non-discriminatory criteria;**
- (b) it has been established for repeated or continuous application;**
- (c) it is accessible to all interested parties.**

Given the multitude of different approaches for the calculation of life-cycle costs, it is indispensable for a transparent and non-discriminatory procedure that economic operators know beforehand the methodology to be used for this calculation.

As long as there is no common EU methodology (see below, paragraph 3), the proposal allows the use of any methodology that fulfills certain minimum guarantees of objectivity.

The condition that the methodology must have "been established for repeated or continuous application" aims at avoiding that contracting authorities put in place a particular LCC methodology for a specific market, as using such a "tailor-made" methodology might favour certain products or economic operators.

National or regional methodologies are not excluded as long as they are accessible to all interested parties.

Contracting authorities shall allow economic operators, including economic operators from third countries, to apply a different methodology for establishing the life-cycle costs of their offer, provided that they prove that this methodology complies with the requirements set out in points a, b and c and is equivalent to the methodology indicated by the contracting authority.

Requiring the use of specific methodologies can result in high costs for economic operators and even close markets. The mandatory acceptance of LCC assessments performed on the basis of alternative, equivalent methodologies aims at preventing undue restrictions of market access.

3. Whenever a common methodology for the calculation of life-cycle costs is adopted as part of a legislative act of the Union, including by delegated acts pursuant to sector specific legislation, it shall be applied where life-cycle costing is included in the award criteria referred to in Article 66(1).

A list of such legislative and delegated acts is set out in Annex XV. The Commission shall be empowered to adopt delegated acts in accordance with Article 89 concerning the update of this list, when on the basis of the adoption of new legislation, repeal or modification of such legislation, such amendments prove necessary.

The use of diverging methodologies for the LCC assessment bears a certain risk of fragmentation and market access barriers, notably for cross-border barriers. The use of these methodologies should hence remain limited to situations where no common methodology has been established yet.

Where the procurement in question is covered by a common methodology established in EU sector-specific legislation (like in Directive 2009/33/EC, the so-called "Clean vehicles" Directive), the use of this methodology is mandatory. For reasons of legal certainty and for information purposes the sector-specific legislations establishing such common methodologies are listed in Annex XV to the Directive.

The provision only makes mandatory the use of this common methodology where contracting authorities have decided to use LCC. Contracting authorities remain free in all cases to decide whether they assess costs using LCC or not.

ANNEX XV

LIST OF EU LEGISLATION REFERRED TO IN ARTICLE 67(3)

Directive 2009/33/EC²

Directive 2009/33/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of clean and energy-efficient road transport vehicles;

Article 6 - Methodology for the calculation of operational lifetime costs

1. For the purposes of Article 5(3)(b), second indent, operational lifetime costs for energy consumption, as well as for CO₂ emissions and pollutant emissions as set out in Table 2 of the Annex, which are linked to the operation of the vehicles under purchase, shall be monetised and calculated using the methodology set out in the following points:

(a) The operational lifetime cost of the energy consumption of a vehicle shall be calculated using the following methodology:

- the fuel consumption per kilometre of a vehicle according to paragraph 2 shall be counted in units of energy consumption per kilometre whether this is given directly, which is the case for instance for electrical cars, or not. Where the fuel consumption is given in different units, it shall be converted into energy consumption per kilometre, using the conversion factors as set out in Table 1 of the Annex for the energy content of the different fuels,

- a single monetary value per unit of energy shall be used. This single value shall be the lower of the cost per unit of energy of petrol or diesel before tax when used as a transport fuel,

² OJ L 120, 15.5.2009, p. 5.

- operational lifetime cost of the energy consumption of a vehicle shall be calculated by multiplying the lifetime mileage, where needed, taking into account the mileage already performed, according to paragraph 3, by the energy consumption per kilometre according to the first indent of this point, and by the cost per unit of energy according to the second indent of this point.

(b) The operational lifetime cost for the CO₂ emissions of a vehicle shall be calculated by multiplying the lifetime mileage, where needed, taking into account the mileage already performed, according to paragraph 3, by the CO₂ emissions in kilograms per kilometre according to paragraph 2, and by the cost per kilogram taken from the range as set out in Table 2 of the Annex.

(c) The operational lifetime cost for the pollutant emissions, as listed in Table 2 of the Annex, of a vehicle shall be calculated by adding up the operational lifetime costs for emissions of NO_x, NMHC and particulate matter. The operational lifetime cost for each pollutant shall be calculated by multiplying the lifetime mileage, where needed, taking into account the mileage already performed, according to paragraph 3, by the emissions in grams per kilometre according to paragraph 2, and by the respective cost per gram. The cost shall be taken from the Community-averaged values set out in Table 2 of the Annex.

Contracting authorities, contracting entities and operators referred to in Article 3 may apply higher costs provided these costs do not exceed the relevant values set out in Table 2 of the Annex multiplied by a factor of 2.

2. Fuel consumption, as well as CO₂ emissions and pollutant emissions as set out in Table 2 of the Annex per kilometre for vehicle operation, shall be based on standardised Community test procedures for the vehicles for which such test procedures are defined in Community type approval legislation. For vehicles not covered by standardised Community test procedures, comparability between different offers shall be ensured by using widely recognised test procedures, or the results of tests for the authority, or information supplied by the manufacturer.

3. Lifetime mileage of a vehicle, if not otherwise specified, shall be taken from Table 3 of the Annex.

2. Contract performance clauses

Article 70

Conditions for performance of contracts

Contracting authorities may lay down special conditions relating to the performance of a contract, provided that they are indicated in the **call for competition** or in the specifications. Those conditions may, in particular, concern social and environmental considerations.

The first two sentences of Art. 70 are largely identical with the wording of Directive 2004/18/EC. The current interpretation of the Article, according to which contract performance clauses may only include conditions which have a direct link with the execution of the contract remains valid, as is now explicitly clarified in recital 43.

Only the reference to the contract notice has been replaced by a reference to the "call for competition", to mirror the changes in Article 24.2; the reference to compliance with Community law has been deleted; it goes without saying that contracting authorities must act in compliance with Union law in general.

They may also include the requirement that economic operators foresee compensations for risks of price increases that are the result of price fluctuations (hedging) and that could substantially impact the performance of a contract.

The third sentence of Art. 70 clarifies the possibility to foresee, in the contract execution clauses, mechanisms to hedge price fluctuations, with the consequences that such hedged risks cannot be a valid reason for later contractual modifications (see Article 72.7).

3. Technical specifications

Article 40

Technical specifications

1. The technical specifications as defined in point 1 of Annex VIII shall be set out in the **procurement documents. They shall define the characteristics required of a works, service or supply.**

"Procurement documents": adaptation to streamlined wording, see Article 2 (15).

The second sentence provides a general definition of the content of the technical specifications.

These characteristics may also refer to the specific process of production or provision of the requested works, supplies or services or of any other stage of its life cycle as referred to in point (22) of Article 2.

This provision clarifies that technical specifications may include the requirement of a specific process of production or provision (as already mentioned in Annex VI, point 1 to Directive 2004/18/EC).

This includes environmental aspects of the production, such as, for instance, resource-efficient production methods or the use of environmentally-friendly products ("paper produced without chemical bleach").

Social criteria linked to the production process (e.g., working conditions of the workers producing the purchased goods) cannot be required in the technical specifications since they do not concern the qualities of the works, supplies or services, but only in the award criteria or in contract performance clauses (see recital 41).

The technical specifications shall also specify whether the transfer of intellectual property rights will be required.

Experience shows that contracting authorities often omit to specify how intellectual property rights linked to the purchase in question are to be treated. This omission entails considerable risks of legal uncertainty and litigation; the use of the purchased good over time can be jeopardized (e.g., if the need for changes/ adaptations occurs or IPs are needed for complementary works, services or supplies).

The provision aims at remedying this situation by obliging contracting authorities to decide upfront how IPs are to be dealt with.

For all procurement the subject of which is intended for use by persons, whether general public or staff of the contracting authority, those technical specifications shall, except in duly justified cases, be drawn up so as to take into account accessibility criteria for people with disabilities or design for all users.

Where mandatory accessibility standards are adopted by a legislative act of the Union, technical specifications shall, as far as accessibility criteria are concerned, be defined by reference thereto.

The proposal strengthens the importance of accessibility requirements – the former "should whenever possible" becomes a "shall, except in duly justified cases".

It also clarifies that appropriate accessibility standards must be required for all purchases that are intended to be used by persons, even if they are only internal users of the contracting authority.

Where accessibility standards have been set out in EU legislation, contracting authorities are obliged to use these standards in order to avoid distortions of the internal market.

2. Technical specifications shall guarantee equal access of economic operators to the procurement procedure and not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.

3. Without prejudice to mandatory national technical rules, to the extent that they are compatible with Union law, the technical specifications shall be formulated in one of the following ways:
- (a) in terms of performance or functional requirements, including environmental characteristics, provided that the parameters are sufficiently precise to allow tenderers to determine the subject-matter of the contract and to allow contracting authorities to award the contract;
 - (b) by reference to technical specifications and, in order of preference, to national standards transposing European standards, European technical approvals, common technical specifications, international standards, other technical reference systems established by the European standardisation bodies or — when those do not exist — national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the supplies; each reference shall be accompanied by the words ‘or equivalent’;
 - (c) in terms of performance or functional requirements as referred to in point (a), with reference to the technical specifications referred to in point (b) as a means of presuming conformity with such performance or functional requirements;
 - (d) by reference to the technical specifications referred to in point (b) for certain characteristics, and by reference to the performance or functional requirements referred to in point (a) for other characteristics.

The two basic methods of establishing technical specifications – performance or functional requirements, on the one hand, and reference to standards and other instruments, on the other, remain unchanged. However, the order of the two options has been inversed in comparison to Directive 2004/18/EC, to show preference for performance or functional requirements as the method most apt to foster innovation.

4. Unless justified by the subject-matter of the contract, technical specifications shall not refer to a specific make or source, or a particular process, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products. Such reference shall be permitted on an exceptional basis, where a sufficiently precise and intelligible description of the subject-matter of the contract pursuant to paragraph 3 is not possible. Such reference shall be accompanied by the words "or equivalent".
5. Where a contracting authority uses the option of referring to the specifications referred to in point (b) of paragraph 3, it shall not reject a tender on the grounds that the works, supplies and services tendered for do not comply with the specifications to which it has referred, once the tenderer proves in its tender by whatever appropriate means, including the means of proof referred to in Article 42, that the solutions it proposes satisfy in an equivalent manner the requirements defined by the technical specifications.
6. Where a contracting authority uses the option laid down in point (a) of paragraph 3 to formulate technical specifications in terms of performance or functional requirements, it shall not reject a tender for works, supplies or services which comply with a national standard transposing a European standard, a European technical approval, a common technical specification, an international standard or a technical reference system established by a European standardisation body, where those specifications address the performance or functional requirements which it has laid down.

In its tender, the tenderer shall prove by any appropriate means, including those referred to in Article 42, that the work, supply or service in compliance with the standard meets the performance or functional requirements of the contracting authority.

ANNEX VIII
DEFINITION OF CERTAIN TECHNICAL SPECIFICATIONS

For the purposes of this Directive:

- (1) "technical specification" means one of the following:
 - (a) in the case of public works contracts the totality of the technical prescriptions contained in particular in the procurement documents, defining the characteristics required of a material, product or supply, so that it fulfils the use for which it is intended by the contracting authority; those characteristics include levels of environmental and climate performance, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, safety or dimensions, including the procedures concerning quality assurance, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions and production processes and methods at any stage of the life cycle of the works; those characteristics 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;
 - (b) in the case of public supply or service contracts a specification in a document defining the required characteristics of a product or a service, such as quality levels, environmental and climate performance levels, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, use of the product, 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 processes and methods at any stage of the life cycle of the supply or service and conformity assessment procedures;

- (2) (a) "standard" means a technical specification approved by a recognised standardising body for repeated or continuous application, compliance with which is not compulsory and which falls into one of the following categories:
- (b) international standard: a standard adopted by an international standards organisation and made available to the general public,
- (c) European standard: a standard adopted by a European standards organisation and made available to the general public,
- (d) national standard: a standard adopted by a national standards organisation and made available to the general public;
- (3) "European technical approval" means a favourable technical assessment of the fitness for use of a product for a particular purpose, based on the 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 technical approvals are issued by an approval body designated for this purpose by the Member State;
- (4) **"Common technical specification" means a technical specification laid down in accordance with a procedure recognised by the Member States or in accordance with Articles 9 and 10 of Parliament and Council Regulation [XXX] on European standardisation [and amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/105/EC and 2009/23/EC of the European Parliament and the Council] which has been published in the *Official Journal of the European Union*;**

This enlarges the range of technical documents to which contracting authorities may refer when defining their technical specifications to include documents which, while not being national, European or international standards, nevertheless offers sufficient guarantees as to their suitability and impartiality. In particular, this would concern interoperability standards such as the Internet and World Wide Web related standards or other such "Fora and Consortia Standards".

Draft Regulation [XXX] on European standardisation:

"Chapter IV

Standards in the field of ICT

Article 9

Recognition of technical specifications in the field of ICT

Either on proposal from a public authority referred to in Directive 2004/18/EC or on its own initiative the Commission may decide to recognise technical specifications which are not national, European or international standards and meet the requirements set out in Annex II, as ICT standards.

Article 10

Use of ICT standards in public procurement

ICT standards referred to in Article 9 shall constitute common technical specifications referred to in Directives 2004/17/CE and 2004/18/CE, and Regulation (EC) No 2342/2002.

ANNEX II

REQUIREMENTS FOR THE RECOGNITION OF TECHNICAL SPECIFICATIONS IN THE FIELD OF ICT

1. the technical specifications have market acceptance and their implementations do not hamper interoperability with the implementations of existing European or international standards. Market acceptance can be demonstrated by operational examples of compliant implementations from different vendors.

2. the technical specifications were developed by a non-profit making organisation which is a professional society, industry or trade association or any other membership organisation that within its area of expertise develops standards in the field of information and communication technologies and which is not a European, national or international standardisation body, through processes which fulfil the following criteria:

(a) openness:

the technical specifications were developed on the basis of open decision-making accessible to all interested operators in the market or markets affected by the standard.

(b) consensus:

the standardisation process was collaborative and consensus based and did not favour any particular stakeholder. Consensus means a general agreement, characterised by the absence of sustained opposition to substantial issues by any important part of the concerned interests and by a process that involves seeking to take into account the views of all parties concerned and to reconcile any conflicting arguments. Consensus does not imply unanimity.

(c) transparency:

(i) all information concerning technical discussions and decision making was archived and identified.

(ii) information on (new) standardisation activities was widely announced through suitable and accessible means.

(iii) participation of all interested categories of interested stakeholders was sought with a view to achieving balance.

(iv) consideration and response were given to comments by interested parties.

3. the technical specifications reflect the following requirements:

(a) maintenance: Ongoing support and maintenance of published specifications are guaranteed over a long period.

(b) availability: Specifications are publicly available for implementation and use on reasonable terms (including for a reasonable fee or free of charge).

(c) intellectual property rights essential to the implementation of specifications are licensed to applicants on a (fair) reasonable and non-discriminatory basis ((F)RAND), which includes, at the discretion of the intellectual property rightholder, licensing essential intellectual property without compensation.

(d) relevance:

(i) the specifications are effective and relevant;

(ii) specifications need to respond to market needs and regulatory requirements;

(e) neutrality and stability:

(i) specifications whenever possible are performance oriented rather than based on design or descriptive characteristics;

(ii) specifications do not distort the market or limit the possibilities for implementers to develop competition and innovation based upon them.

(iii) specifications are based on advanced scientific and technological developments."

(f) quality:

(i) the quality and level of detail are sufficient to permit the development of a variety of competing implementations of interoperable products and services;

(ii) standardised interfaces are not hidden or controlled by anyone other than the organisations that adopted the technical specifications.

(5) "Technical reference" means any deliverable produced by European standardisation bodies, other than European standards, according to procedures adapted to the development of market needs.

4. Labels and certification

Article 41

Labels

[Article 23(6), Directive 2004/18/EC]

1. Where contracting authorities lay down environmental, **social or other characteristics** of a works, service or supply in terms of performance or functional requirements as referred to in point (a) of Article 40(3) **they may require that these works, services or supplies bear a specific label**, provided that all of the following conditions are fulfilled:
 - (a) the requirements for the label only concern characteristics which are linked to the subject-matter of the contract and are appropriate to define characteristics of the works, supplies or services that are the subject-matter of the contract;
 - (b) the requirements for the label are drawn up on the basis of scientific information or based on other objectively verifiable and non-discriminatory criteria;
 - (c) the labels are established in an open and transparent procedure in which all stakeholders, including government bodies, consumers, manufacturers, distributors and environmental organisations, may participate,
 - (d) the labels are accessible to all interested parties;
 - (e) **the criteria of the label are set by a third party which is independent from the economic operator applying for the label.**

This implies a major simplification for contracting authorities that set out technical specifications in terms of performance of functional requirements: instead of "copy-pasting" the underlying specifications of a given, suitable label, they may now simply require the label itself. However, this presupposes that the label meets the requirements set out under points a to e. As to substance, these correspond to the requirements set out in Art. 23(6) of Directive 2004/18/EC.

Contracting authorities requiring a specific label shall accept **all equivalent labels that fulfil the requirements of the label indicated by the contracting authorities. For products that do not bear the label, contracting authorities shall also accept a technical dossier of the manufacturer or other appropriate means of proof.**

This safeguards the position of economic operators whose works, supplies or services do not bear the chosen label, in that they may nevertheless prove conformity with the requirements, either by means of an equivalent label or by another appropriate means of proof.

This provisions aims in particular at avoiding that economic operators are precluded from participating in a procurement procedure where they have no access to the required or equivalent labels, or no possibility of obtaining them within the relevant time limits.

2. Where a label fulfils the conditions provided in points (b), (c), (d) and (e) of paragraph 1 **but also sets out requirements not linked to the subject-matter of the contract**, contracting authorities may define the technical specification by reference to those of the detailed specifications of that label, or, where necessary, parts thereof, that are linked to the subject-matter of the contract and are appropriate to define characteristics of this subject-matter.

Paragraph 2 reverts to the current system, i. e. that the technical specifications are set out not by reference to the labels as such but rather to the underlying specifications (or the parts thereof) which are suitable.

Article 42

Test reports, certification and other means of proof

[Article 23(4),(5),(6)&(7), Directive 2004/18/EC]

1. Contracting authorities **may require** that economic operators provide a test report from a recognised body or a certificate issued by such a body as means of proof of conformity with the technical specifications.

Where contracting authorities require the submission of certificates drawn up by recognised bodies attesting conformity with a particular technical specification, certificates from equivalent other recognised bodies shall also be accepted by the contracting authorities.

Under the ECJ case-law EVN-Wienstrom (Case C-448/01), award criteria must be verifiable and verified. However, in the case of e. g. requirements relating to the supply chain or technically complex issues, contracting authorities may not always dispose of the necessary expertise to do so on their own. This provision therefore allows them to require third party certification or test reports. This possibility to require third party verification is new, given that the current Directive 2004/18/EC imposes the obligation always to accept "other appropriate means of proof".

2. Contracting authorities shall accept other appropriate means of proof than those referred to in paragraph 1, such as a technical dossier of the manufacturer **where the economic operator concerned has no access to the certificates or test reports referred to in paragraph 1, or no possibility of obtaining them within the relevant time limits.**

As a safeguard for economic operators, this provision offers the possibility to have recourse to other means of proof, in particular where the economic operator cannot obtain the third party documentation referred to in paragraph 1 in time for participating in the award procedure concerned. A similar provision was present in Article 33 of Directive 92/50/EC.

3. Recognised bodies within the meaning of paragraph 1 of this Article shall be test and calibration laboratories and any certification and inspection bodies accredited in accordance with Regulation (EC) No 765/2008 of the European Parliament and of the Council³.
4. Member States shall make available to other Member States, upon request, any information related to the evidence and documents submitted in accordance with Article 40(6), Article 41 and paragraphs 1, 2 and 3 of this Article to prove compliance with technical requirements. The competent authorities of the Member State of establishment shall provide this information in accordance with Article 88.

5. Exclusions for violations of social and environmental obligations

Article 54

General principles

1. [...]
2. **Contracting authorities may decide not to award a contract to the tenderer submitting the best tender where they have established that the tender does not comply, at least in an equivalent manner, with obligations established by Union legislation in the field of social and labour law or environmental law or of the international social and environmental law provisions listed in Annex XI.**

Possibility – but not obligation – for contracting authorities not to award the contract to economic operators in case of non-compliance of the tender with the obligations laid down in EU legislation in social and labour law or environmental law or in international social and environmental provisions of Annex XI. This allows to ensure compliance with basic social and environmental law obligations and to prevent encouraging “social dumping”.

The reference to international instruments and to compliance “in an equivalent manner” guarantees fair access for bidders from third countries.

³ OJ L 218, 13.8.2008, p. 30.

Article 55

Exclusion grounds

[...]

3. A contracting authority may exclude from participation in a public contract any economic operator if one of the following conditions is fulfilled:

- (a) where it is aware of any violation of obligations established by Union legislation in the field of social and labour law or environmental law or of the international social and environmental law provisions listed in Annex XI. Compliance with Union legislation or with international provisions also includes compliance in an equivalent manner.**

[...]

Article 55 allows it for contracting authorities to exclude economic operators from the procedure if they are aware that these operators have infringed obligations laid down in EU legislation in social and labour law or environmental law or in international social and environmental provisions of Annex XI. Unlike Article 54 which concerns infringements by the content of the tender itself, this provision aims at sanctioning violations in the past general behaviour of the tenderer. Again, the legitimate interests of third country operators are safeguarded by the reference to international instruments and to compliance “in an equivalent manner”.

Article 69

Abnormally low tenders

1. Contracting authorities shall require economic operators to explain the price or costs charged, where all of the following conditions are fulfilled:

[...]

4. The contracting authority shall verify the information provided by consulting the tenderer. It may only reject the tender where the evidence does not justify the low level of price or costs charged, taking into account the elements referred to in paragraph 3.

Contracting authorities shall reject the tender, where they have established that the tender is abnormally low because it does not comply with obligations established by Union legislation in the field of social and labour law or environmental law or by the international social and environmental law provisions listed in Annex XI.

[...]

New obligation for the contracting authority to reject tenders if it has established that they are abnormally low because of violations of EU legislation in social and labour law or environmental law or in international social and environmental provisions of Annex XI. It reinforces the respect of EU and international obligations in these fields and prevents rewarding of competitive advantages obtained by non-respect of legal obligations. Again, the legitimate interests of third country operators are safeguarded by the reference to international instruments and to compliance “in an equivalent manner”.

ANNEX XI

LIST OF INTERNATIONAL SOCIAL AND ENVIRONMENTAL CONVENTIONS

REFERRED TO IN ARTICLES 54(2), 55(3)(a) AND 69(4)

- **Convention 87 on Freedom of Association and the Protection of the Right to Organise;**
- **Convention 98 on the Right to Organise and Collective Bargaining;**
- **Convention 29 on Forced Labour;**
- **Convention 105 on the Abolition of Forced Labour;**
- **Convention 138 on Minimum Age;**
- **Convention 111 on Discrimination (Employment and Occupation);**
- **Convention 100 on Equal Remuneration;**
- **Convention 182 on Worst Forms of Child Labour;**
- **Vienna Convention for the protection of the Ozone Layer and its Montreal Protocol on substances that deplete the Ozone Layer;**
- **Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention);**
- **Stockholm Convention on Persistent Organic Pollutants (Stockholm POPs Convention);**
- **Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (UNEP/FAO) (The PIC Convention) Rotterdam, 10/09/1998 and its 3 regional Protocols.**

The conventions listed are setting core standards in the social and environmental fields.

The ILO conventions mentioned are identical to those listed in Annex XXIII of the current Utilities Directive.

6. Reserved contracts

Article 17

Reserved contracts

[Directive 2004/18/EC: Art. 19]

Member States may reserve the right to participate in public procurement procedures to sheltered workshops **and economic operators whose main aim is the social and professional integration of disabled and disadvantaged workers** or provide for such contracts to be performed in the context of sheltered employment programmes, **provided that more than 30% of the employees of those workshops, economic operators or programmes are disabled or disadvantaged workers.**

The **call for competition** shall make reference to this provision.

The current exception of Article 19 of Directive 2004/18/EC is applicable to:

- sheltered workshops or contracts to be performed in the context of sheltered employment programmes
- where most of the employees
- are handicapped persons who by reason of the seriousness of their disabilities, cannot carry out occupations under normal conditions.

The conditions laid down are considered too restrictive in all three aspects. Therefore, it is suggested to extend the scope of the exception:

- to economic operators whose main aim is the social and professional integration in order to cover other national existing experiences of social inclusion. The notion of "sheltered workshop" seems to be obsolete on one hand and to refer only to experiences in some Member States on the other. A wider formulation would not alter the rationale of the provisions, that remains based on the fact that these operators also are not in the same competitive position as the others but would have the merit to include all similar structures that are put in place all over the EU;

- to reduce the proportion of disabled and disadvantaged employees from 50% to 30%, in order to reflect what is currently foreseen in some national legislation. On the basis of the more advanced experiences on social inclusion, the percentage of 30% of disadvantaged employees seems in fact more suitable to achieve a real integration of those people in a working context.
- to disadvantaged workers, because the current reference to handicapped persons is too restrictive.

7. Social services

Title III

Particular procurement regimes

The distinction between A and B categories of services is being deleted. The evaluation has shown that it is no more justified to restrict the application of the normal procurement regime to certain services, given that the cross-border tradability of the services which were not covered by the full regime is not significantly lower than those of the others. For legal services and hotel and restaurant services in particular, the evaluation has evidenced that the percentage of cross-border trade is significantly higher than the average for services falling under the full procurement regime. Therefore and except for social, cultural, educational and health services, the standard rules will now apply to all services.

CHAPTER I

Social and other specific services

It should be recalled that the provisions of this Chapter all of Title III are applicable not only to social services, but also to cultural, health and education services and other related services. See the definitions set out in Annex XVI below. It should further be kept in mind that these services are not subject to the GPA (hence no ties in respect of thresholds.)

Social services of general economic interest have a fundamental role in the EU citizens' life quality.

The European public procurement rules respect the competence of Member State in this field as they do not in anyway oblige Member States to externalise the execution of such services. If contracting authorities decide to externalise such services, they have to comply with EU rules. The objective is now to give more flexibility to Member States to organise the tender procedures for these services.

Under the current rules, social services already benefit from the simplified regime applicable to the "B" or "non-priority" services. As they generally are of limited cross-border dimension, social, health and education services will now benefit from a specific and much simpler regime. They will be subject to a higher threshold (500 000 €) above which Member States will remain free to determine the procedural rules applicable, while respecting the basic principles of transparency and equal treatment. To this aim, the only obligations shall consist in the publication of a contract notice and of a contract award notice.

In addition, Member States will have to make sure that contracting authorities may take into account the specificities of the services in question, and *inter alia* all quality and continuity criteria they consider necessary for the services in question. Member States may also eliminate the price as sole award criterion for such services.

Contracts below the threshold of 500 000 € are presumed not to be of interest for providers of other Member States unless there are concrete indications of the contrary, such as Union financing for transborder projects (see Recital (11)). In this latter case, the basic principles of the TFEU, such as the transparency requirement and the obligation to treat economic operators equally without discrimination will have to be complied with.

Recital 11:

Other categories of services continue by their very nature to have a limited cross-border dimension, namely what are known as services to the person, such as certain social, health and educational services. These services are provided within a particular context that varies widely amongst Member States, due to different cultural traditions. A specific regime should therefore be established for public contracts for these services, with a higher threshold of EUR 500 000. Services to the person with values below this threshold will typically not be of interest to providers from other Member States, unless there are concrete indications to the contrary, such as Union financing for transborder projects.

Contracts for services to the person above this threshold should be subject to Union-wide transparency. Given the importance of the cultural context and the sensitivity of these services, Member States should be given wide discretion to organise the choice of the service providers in the way they consider most appropriate. The rules of this directive take account of that imperative, imposing only observance of basic principles of transparency and equal treatment and making sure that contracting authorities are able to apply specific quality criteria for the choice of service providers, such as the criteria set out in the voluntary European Quality Framework for Social Services of the European Union's Social Protection Committee⁴. Member States and/or public authorities remain free to provide these services themselves or to organise social services in a way that does not entail the conclusion of public contracts, for example through the mere financing of such services or by granting licences or authorisations to all economic operators meeting the conditions established beforehand by the contracting authority, without any limits or quotas, provided such a system ensures sufficient advertising and complies with the principles of transparency and non-discrimination.

⁴ SPC/2010/10/8 final,6.10.2010.

Article 4
Thresholds amounts

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

[...]

- (d) EUR 500 000 for public contracts for social and other specific services listed in Annex XVI.**

Article 74
Award of contracts for social and other specific services

Contracts for social and other specific services listed in Annex XVI shall be awarded in accordance with this Chapter, where the value of the contracts is equal to or greater than the threshold indicated in Article 4 (d).

Article 75
Publication of notices

- 1. contracting authorities intending to award a public contract for the services referred to in Article 74 shall make known their intention by means of a contract notice.**
- 2. contracting authorities that have awarded a public contract for the services referred to in Article 74 shall make known the results of the procurement procedure by means of a contract award notice.**
- 3. The notices referred to in paragraphs 1 and 2 shall contain the information referred to in Annexes VI Part H and I, in accordance with the standard forms.
The Commission shall establish the standard forms. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 91.**

- 4. The notices referred to in paragraphs 1 and 2 shall be published in accordance with Article 49.**

The provision foresees an obligation of transparency prior to the procedure in addition to the post award information that is foreseen under the current rules. This is in line with the new higher threshold and aims at guaranteeing that cross border interest is adequately taken into account.

Article 76

Principles of awarding contracts

- 1. Member States shall put in place appropriate procedures for the award of contracts subject to this Chapter, ensuring full compliance with the principles of transparency and equal treatment of economic operators and allowing contracting authorities to take into account the specificities of the services in question.**

As under the current rules, no specific procedures are foreseen. Reference to rules on technical specifications has been abandoned.

- 2. Member States shall ensure that contracting authorities may take into account the need to ensure quality, continuity, accessibility, availability and comprehensiveness of the services, the specific needs of different categories of users, the involvement and empowerment of users and innovation. Member States may also provide that the choice of the service provider shall not be made solely on the basis of the price for the provision of the service.**

Quality considerations in the award of social services contracts should be favoured to the maximum extent, given the importance that such considerations have for the beneficiaries of such services. The provision aims at promoting quality criteria and at making it possible for Member States that so wish to eventually prohibit the use of the lowest price award criteria in this context.

ANNEX XVI

SERVICES REFERRED TO IN ARTICLE 74

<u>CPV Code</u>	<u>Description</u>
79611000-0 and from 85000000-9 to 85323000-9 (except 85321000-5 and 85322000-2)	Health and social services
75121000-0, 75122000-7, 75124000-1; from 79995000-5 to 79995200-7; from 80100000- 5 to 80660000-8 (except 80533000-9, 80533100-0, 80533200-1); from 92000000-1 to 92700000-8 (except 92230000-2, 92231000-9, 92232000-6)	Administrative educational, healthcare and cultural services
75300000-9	Compulsory social security services
75310000-2, 75311000-9, 75312000-6, 75313000-3, 75313100-4, 75314000-0, 75320000-5, 75330000-8, 75340000-1	Benefit services
98000000-3	Other community, social and personal services
98120000-0	Services furnished by trade unions
98131000-0	Religious services

The services listed in this annex are the ones of the current categories n° 24, 25 and 26 of Annex II B of Directive 2004/18/EC and some services of the current n° 27 residual category "other services" which have a social character.

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