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Subject: Proposal for a Directive of the European Parliament and of the Council on  
public procurement  
- Cluster 9: Governance

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Delegations will find in the Annex a non-paper prepared by the Commission services (DG Internal Market) on Cluster 9 of the above proposal.

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## Cluster 9

### Governance

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

#### 1. Enforcement and oversight

##### *Article 83*

##### *Enforcement*

*[Article 81 Directive 2004/18/EC]*

In conformity with Council Directive 89/665/EEC, Member States shall ensure correct application of this Directive by effective, available and transparent mechanisms which complement the system in place for the review of decisions taken by contracting authorities.

Article 81, 1<sup>st</sup> subparagraph of Directive 2004/18/EC has been kept unchanged as to substance.

##### *Article 84*

##### *Public oversight*

- 1. Member States shall appoint a single independent body responsible for the oversight and coordination of implementation activities (hereinafter 'the oversight body'). Member States shall inform the Commission of their designation.**

**All contracting authorities shall be subject to such oversight.**

In its Article 81, 2<sup>nd</sup> subparagraph, Directive 2004/18/EC already provides for the possibility to ensure effective enforcement by appointing an independent specialised body. A number of Member States have taken up this option and entrusted a national authority with monitoring and enforcement tasks.

The proposal reinforces the text currently in force and indicates that an institutional oversight on procurement market and contracting authorities is necessary to enhance the implication of national authorities in the enforcement of EU law. Entrusting them to a single body is an efficient way to ensure that the monitoring, oversight and advisory activities as well as the enforcement decisions can be taken in a consistent and effective manner.

- 2. The competent authorities involved in the implementation activities shall be organised in such a manner that conflicts of interests are avoided. The system of public oversight shall be transparent. For this purpose, all guidance and opinion documents and an annual report illustrating the implementation and application of rules laid down in this Directive shall be published.**

The oversight body should assume a neutral position and not be steered by political and business influences. Transparency on its activities is the most effective way to provide credibility and reinforce its authority over the market.

**The annual report shall include the following:**

The activities of the oversight body fall in two parts, the first of which consists in achieving detailed knowledge on how the market functions. Hence, it is requested to monitor and collect information that can be shared where appropriate with the EU institutions. Full knowledge of the context is a pre-condition for any assessment and subsequent action. These tasks which aim at establishing an appropriate knowledge base are detailed in paragraph 2.

- (a) an indication of the success rate of small and medium-sized enterprises (SMEs) in public procurement; where the percentage is lower than 50 % in terms of values of contracts awarded to SMEs, the report shall provide an analysis of the reasons therefore;**

On the background of their knowledge of the market and of the legal framework applicable in their country, the national oversight bodies should be well placed to analyse specific aspects of that market such as the level of access for SMEs to procurement markets and to analyse possible structural causes in case their success rate might be below 50%. This provision thus establishes a "soft target" of SME participation in public contracts on an "apply or explain" basis. The analysis of the reasons for weak SME participation will help both Member States and the EU to address the issue of fostering SME participation more efficiently in the future.

- (b) a global overview of the implementation of sustainable procurement policies, including on procedures taking into account considerations linked to the protection of the environment, social inclusion including accessibility for persons with disabilities, or fostering innovation;**

Public procurement is proposed in the new directive as a powerful vehicle to promote other policies in line with societal challenges. Apart from certain obligations in sector-specific legislation, Member States remain free to set the level of ambition with regard to strategic procurement. Knowing and understanding the national plans and of the needs expressed by contracting authorities in the Member State concerned is necessary to draw a faithful picture and analyse it. This material is necessary to evaluate the achievements and the effects of new rules and policies.

- (c) information on the monitoring and follow-up of breaches to procurement rules affecting the budget of the Union in accordance with paragraphs 3 to 5 of the present article;**

Breaches of procurement rules represent a high percentage of the violations detected by auditors in the execution of projects co-financed by the EU<sup>1</sup>. A stronger monitoring of the legal obligations linked to co-financed projects from the procurement perspective (i.e. in addition to audits which are already performed at national level) could therefore improve compliance with EU law and ensure full use of EU funding. This closer monitoring and possibility of early advice at the various stages of the projects, in addition to the audits carried out by the EU institutions, is likely to reduce violations and prevent financial corrections. In this context, presence on the territory and the dialogue with beneficiaries is a *conditio sine qua non* and should be performed by the oversight body.

- (d) centralized data about reported cases of fraud, corruption, conflict of interests and other serious irregularities in the field of public procurement, including those affecting projects cofinanced by the budget of the Union.**

An increased awareness of irregularities due to illegal or criminal behaviours though a centralised data collection system is necessary to identify the main risks and the most structural difficulties, if any. This knowledge is necessary both at national and at EU level to address at the root recurring problems and violations, if any.

### **3. The oversight body shall be responsible for the following tasks:**

In addition to the general monitoring of the procurement market, the oversight body should be able to act from a more legal perspective, by checking current practices, by monitoring possible systemic problem areas or frequent violations, if any, in the national market and, where needed, providing relevant advice or correction suggestions. Paragraph 3, which sets out the second part of the oversight body's activities, is therefore more oriented to enforcement tasks.

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<sup>1</sup> See impact assessment, SEC (2011) 1585, page 135-137

- (a) monitoring the application of public procurement rules and the related practice by contracting authorities and in particular by central purchasing bodies;**
- (b) providing legal advice to contracting authorities on the interpretation of public procurement rules and principles and on the application of public procurement rules in specific cases;**
- (c) issuing own-initiative opinions and guidance on questions of general interest pertaining to the interpretation and application of public procurement rules, on recurring questions and on systemic difficulties related to the application of public procurement rules, in the light of the provisions of this Directive and of the relevant case-law of the Court of Justice of the European Union;**

Points a), b) and c) focus on how the oversight body can contribute towards a better application of EU (and national) procurement legislation, and could thus be able to prevent violations from occurring. On the basis of these activities it will be able to detect whether there might be any structural or more recurring violations and if possible address them by suggesting legislative changes at the national level or flag the issues to the EU institutions in view of finding an appropriate solution at EU level.

The oversight body will thus be able to contribute towards increased legal certainty and a more reliable procurement practice, which would increase the confidence of the economic operators in the openness of the procurement market; this should also lead to an enhancement and sophistication of contracting authorities' procurement management capabilities.

- (d) establishing and applying comprehensive, actionable 'red flag' indicator systems to prevent, detect and adequately report instances of procurement fraud, corruption, conflict of interest and other serious irregularities;**

This provision aims at establishing a sort of "early warning" set of indicators that would enable the oversight body to contribute efficiently to the fight against fraud, conflict of interests or other serious problems. Such indicators could for instance combine factors concerning the individual procurements (e. g. prices with an extremely low spread might be used as an indication of possible collusion, to be verified) or problematic practices (e. g. frequent recourse to substantial modifications of contracts following their award), for instance in connection with specific types of procurements or individual contracting authorities.

- (e) **drawing the attention of the national competent institutions, including auditing authorities, to specific violations detected and to systemic problems;**

Experience shows that problems in respect of a correct application of procurement rules may be linked to the way in which the provision concerned is implemented in national legislation or the interaction between different legislations. Should the oversight body encounter such situations then they should be able to draw the attention of the competent national authorities and suggest ways of finding long-term solutions.

- (f) **examining complaints from citizens and businesses on the application of public procurement rules in specific cases and transmitting the analysis to the competent contracting authorities, which shall have the obligation to take it into account in their decisions or, where the analysis is not followed, to explain the reasons for disregarding it;**

The oversight body should have the possibility to flag its advice to the contracting authority, which is not bound by it, but will have to explain their reasons in case they chose not to follow it. This could offer an alternative problem solving mechanism to solutions to be found through litigation before the national judicial system, the review procedures or the administrative means otherwise available for challenging administrative measures. In line with what the Commission proposes in many areas of law, alternative informal procedures for the treatment of complaints may result in time and public money savings.

- (g) monitoring the decisions taken by national courts and authorities following a ruling given by the Court of Justice of the European Union on the basis of Article 267 of the Treaty or findings of the European Court of Auditors establishing violations of Union public procurement rules related to projects cofinanced by the Union; the oversight body shall report to the European Anti-Fraud Office any infringement to Union procurement procedures where these were related to contracts directly or indirectly funded by the European Union.**

Due to the national judicial organisation, the EU institutions have no direct access to the outcome of the procedures for which a preliminary ruling has been issued. There is therefore a strong need of follow-up at national level for judgements, especially where they may have an impact broader than the individual case.

**The tasks referred to in point (e) shall be without prejudice to the exercise of rights of appeal under national law or under the system established on the basis of Directive 89/665/EEC.**

**Member States shall empower the oversight body to seize the jurisdiction competent according to national law for the review of contracting authorities' decisions where it has detected a violation in the course of its monitoring and legal advising activity.**

This gives the oversight body another tool which they may choose to use in order to address problems detected in the course of their oversight or advisory functions.

- 4. Without prejudice to the general procedures and working methods established by the Commission for its communications and contacts with Member States, the oversight body shall act as a specific contact point for the Commission when it monitors the application of Union law and the implementation of the budget from the Union on the basis of Article 17 of the Treaty on the European Union and Article 317 of the Treaty on the Functioning of the European Union. It shall report to the Commission any violation of this Directive in procurement procedures for the award of contracts directly or indirectly funded by the Union.**



**The Commission may in particular refer to the oversight body the treatment of individual cases where a contract is not yet concluded or a review procedure can still be carried out. It may also entrust the oversight body with the monitoring activities necessary to ensure the implementation of the measures to which Member States are committed in order to remedy a violation of Union public procurement rules and principles identified by the Commission.**

**The Commission may require the oversight body to analyse alleged breaches to Union public procurement rules affecting projects co-financed by the budget of the Union. The Commission may entrust the oversight body to follow-up certain cases and to ensure that the appropriate consequences of breaches to Union public procurement rules affecting projects co-financed are taken by the competent national authorities which will be obliged to follow its instructions.**

- 5. The investigation and enforcement activities carried out by the oversight body to ensure that contracting authorities' decisions comply with this Directive and the principles of the Treaty shall not replace or prejudice the institutional role of the Commission as guardian of the Treaty. When the Commission decides to refer the treatment of an individual case pursuant to paragraph 4, it shall also retain the right to intervene in accordance with the powers conferred to it by the Treaty.**

Paragraphs 4 and 5 should enhance the close cooperation between EU and national authorities and make it easier to find the solution which fits the needs of each specific case best. They also stress that the enquiries and investigations carried out by the oversight body by its own initiative or upon request of the Commission do not replace / overrule the institutional role of the Commission.

- 6. Contracting authorities shall transmit to the national oversight body the full text of all concluded contracts with a value equal to or greater than**
- (a) 1 000 000 EUR in the case of public supply contracts or public service contracts;**
  - (b) 10 000 000 EUR in the case of public works contracts.**

**7. Without prejudice to the national law concerning access to information, and in accordance with national and EU legislation on data protection, the oversight body shall, upon written request, give unrestricted and full direct access, free of charge, to the concluded contracts referred to in paragraph 6. Access to certain parts of the contracts may be refused where their disclosure would impede law enforcement or otherwise be contrary to the public interest, would harm the legitimate commercial interests of economic operators, public or private, or might prejudice fair competition between them.**

**Access to the parts that may be released shall be given within a reasonable delay and no later than 45 days from the date of the request.**

**The applicants filing a request for access to a contract shall not need to show any direct or indirect interest related to that particular contract. The recipient of information should be allowed to make it public.**

Explanation for paragraphs 6 and 7:

There has been evidence during the consultation process that an increased transparency of the results of procurement procedures would contribute to a reduction of irregularities like conflicts of interest, corruption or unlawful modification of the contract during the execution phase.

Business and citizens welcome this initiative which ensure more access to documents and decisions of public interest as they represent the justification on how public money is spent to achieve objectives of general interest.

In order to balance all the interests at stake (transparency and incentive to reduce certain violations vs. administrative burden for contracting authorities in giving access to their contracts and protection of confidential business information), the proposal suggests that only higher value contracts should be systematically transmitted to the oversight body and provided upon request, with the appropriate confidentiality limitations.

According to estimations based on previous statistics, not more than around 10% of supply and services contracts should be concerned, as well as not more than 5% of works contracts.<sup>2</sup>

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<sup>2</sup> See data in the impact assessment, page 112 and 113.

8. A summary of all the activities carried out by the oversight body in accordance with paragraphs 1 to 7 shall be included in the annual report referred to in paragraph 2.

## **2. Individual reports**

### *Article 85*

*[Article 43 Directive 2004/18/EC]*

This provision is unchanged as to substance, except for the new provisions of point (h) and the 2<sup>nd</sup> subparagraph. Point (h) is a direct consequence of the new provisions in Article 21 (to be examined in cluster 8). The second subparagraph, concerning the obligations to document the conduct of procurement procedures, has been strengthened, not least in view of the broadened access to competitive procedures with negotiations.

For every contract or framework agreement, and every time a dynamic purchasing system is established, contracting authorities shall draw up a written report which shall include at least the following:

- (a) the name and address of the contracting authority, the subject-matter and value of the contract, framework agreement or dynamic purchasing system;
- (b) the names of the successful candidates or tenderers and the reasons for their selection;
- (c) the names of the candidates or tenderers rejected and the reasons for their rejection;
- (d) the reasons for the rejection of tenders found to be abnormally low;
- (e) the name of the successful tenderer and the reasons why its tender was selected and, where known, the share of the contract or framework agreement which the successful tenderer intends to subcontract to third parties;

- (f) for negotiated procedures without prior publication, the circumstances referred to in Article 30 which justify the use of this procedure;
- (g) where necessary, the reasons why the contracting authority has decided not to award a contract or framework agreement or to establish a dynamic purchasing system
- (h) where applicable, conflicts of interests detected and subsequent measures taken.**

The contracting authorities shall document the progress of all procurement procedures, **whether or not those are conducted by electronic means. To that end, they shall document all stages in the procurement procedure, including all communications with economic operators and internal deliberations, preparation of the tenders, dialogue or negotiation if any, selection and award of the contract.**

In order to ensure transparency of procurement procedures, the Directive now clarifies that the communications between the contracting authority and candidates / tenderers throughout the process must be documented. This is particularly important to ensure greatest possible objectivity of decisions, notably in procedures with negotiations which become much more widely available than under the current Directives (see Article 24).

The report, or its main elements, shall be communicated to the Commission **or to the national oversight body where they so request.**

In line with the governance objectives set by the proposal, the reports must be available upon request also to the oversight body.

### **3. National reporting**

#### *Article 86*

#### *National reporting and lists of contracting authorities*

*[Article 75 and 76 of Directive 2004/18/EC]*

The proposal would add a more qualitative summary of the way procurement legislation functions and is applied in each Member State to the current reporting obligations. On the other hand, the proposed statistical obligations would be significantly less detailed than the provisions of Articles 75 and 76 of Directive 2004/18/EC.

The Commission proposes to move away from the current "book-keeping" formula of statistical reporting, where Member States are obliged to provide very detailed statistical information that might generate significant workload for the national administrations (in practical terms, the current provisions sometimes lead to the submission of detailed information on single contracts).

The underlying principle of the new provisions is that data of the abovementioned level of granularity can be extracted from OJ/TED. Instead, the new provisions foresee only the collection of few key macroeconomic aggregates on the size of the domestic public procurement market (i.e. number and value of contracts).

1. The **bodies established or appointed in accordance with Article 84** shall forward to the Commission **an implementation and** statistical report on each year, based on a standard form, not later than 31 October of the following year.
2. The report referred to in paragraph 1 shall contain at least the following information:
  - (a) a complete and up-to-date list of **all central government authorities, sub-central contracting authorities and** bodies governed by public law, including sub-central authorities and associations of contracting authorities awarding public contracts or framework agreements, **indicating for each authority the unique identification number where such number is provided for in national legislation**; this list shall be grouped by type of authority;

The last subparagraph of Article 1(9) of Directive 2004/18/EC provides that " Non-exhaustive lists of bodies and categories of bodies governed by public law ... are set out in Annex III. Member States shall periodically notify the Commission of any changes to their lists of bodies and categories of bodies." This provision extends the obligation to the other categories of "contracting authorities" and the frequency is set to yearly (instead of the unclear "periodically"). The submission of the unique identification number for authorities is only required where a relevant system of identifiers exists in a Member State. The objective of this new provision is to facilitate the automation of data collection by the Commission services.

**(b) a complete and up-to-date list of all central purchasing bodies;**

(c) for all contracts above the thresholds laid down in Article 4 of this Directive:

The provision of the following key macroeconomic aggregates are necessary, in order to allow high level checks and validation of OJ/TED data to be carried out by the Commission services.

- (i) the number and value of contracts awarded broken down for each type of authority by procedure and by works, supplies and services identified by division of the CPV nomenclature;
- (ii) where the contracts have been concluded under the negotiated procedure without prior publication, the data referred to in point (i) shall also be broken down according to the circumstances referred to in Article 30 and shall specify the number and value of contracts awarded, by Member State and third country of the successful contractor;

**(d) for all contracts which fall below the thresholds laid down in Article 4 of this Directive, but would be covered by this Directive if their value exceeded the threshold, the number and value of contracts awarded broken down by each type of authority.**

The key aggregates mentioned in point 2(c)(i) and point 2(d) can be based on estimations (e.g. calculated on the basis of statistically representative samples or by using any method of imputing missing data, which is statistically viable). The only exception to the above rule would be the requirement stipulated in point 2 (c) (ii) which is derived from the GPA and, although relatively detailed, must be kept in the current form.

3. The Commission shall be empowered to adopt delegated acts in accordance with Article 89 to amend Annex I, in order to update the list of contracting authorities following notifications from Member States, where such amendments prove necessary to correctly identify contracting authorities;

**The Commission may periodically publish the list of bodies governed by public law transmitted according to point (a) of paragraph 2 for information in the *Official Journal of the European Union*.**

To streamline and simplify the text of the Directive, it has been decided to renounce the list of bodies governed by public law in the former Annex III, which was anyway only indicative. Instead, the Commission is entitled to publish and easily update such lists on internet, for simple information purposes.

4. **Member States shall make available to the Commission information on their institutional organisation related to the implementation, monitoring and enforcement of this Directive, as well as on national initiatives taken to provide guidance on or assist in implementation of Union rules on public procurement, or to respond to challenges confronting the implementation of those rules.**

The purpose of this summary information is to allow a comparison of the various organisational models and institutional contexts, which would feed the evaluation process following the implementation of the new Directive. These data are also of interest for the general public and business interested in cross border bidding.

- 5. The Commission shall establish the standard form for the annual implementation and statistical report referred to in paragraph 1. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 91.**

Information provided by Member States under the current legal framework are often difficult to compare and there is a strong need to establish rules which enable the analysis of more homogeneous data.

#### **4. Assistance to contracting authorities and businesses**

##### *Article 87*

- 1. Member States shall make available technical support structures in order to provide legal and economic advice, guidance and assistance to contracting authorities in preparing and carrying out procurement procedures. Member States shall also ensure that each contracting authority can obtain competent assistance and advice on individual questions.**

Evolving markets, public needs and technologies require an increased legal, technical and administrative capacity to prepare and carry out an efficient and effective procurement policy. Not all administrations (or not all administrations for any type of contract envisaged) possess sufficient in-house expertise. For instance, the most frequently given explanations of obstacles to the uptake of green or innovative procurement principles are the lack of know-how within the contracting authorities, the reluctance to face possible risks and the lack of concrete guidance by their own authorities.



Obtaining expertise on an ad hoc basis is often too expensive. Appropriate, targeted and on-going assistance services will enable all administrations to better identify their needs, the most appropriate solutions for their needs, implement national strategic action plans, exploit the various tools put at their disposal by EU and national procurement legislation and finally carry out smoothly their procurement process<sup>3</sup>.

Member States will be able to choose how to ensure the availability of technical assistance, via public or private entities, using existing structures, organise the assistance at central or decentralise level.

One of the expected effects of this ad hoc assistance is not only better procurement outcomes, but also less time needed to conclude contracts and less litigation with business due to poor preparation.

- 2. With a view to improving access to public procurement for economic operators, in particular SMEs, and in order to facilitate correct understanding of the provisions of this Directive, Member States shall ensure that appropriate assistance can be obtained, including by electronic means or using existing networks dedicated to business assistance.**
  
- 3. Specific administrative assistance shall be available to economic operators intending to participate in a procurement procedure in another Member State. Such assistance shall at least cover administrative requirements in the Member State concerned, as well as possible obligations related to electronic procurement.**

**Member States shall ensure that interested economic operators have easy access to appropriate information on the obligations relating to taxes, environmental protection, and to social and labour law obligations, which are in force in the Member State, in the region or locality where the works are to be carried out or the services are to be provided and which will be applicable to the works carried out on site or to the services provided during the performance of the contract.**

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<sup>3</sup> See Impact assessment page 133-134;196.

- 4. For the purposes of paragraphs 1, 2 and 3, Member States may appoint a single body or several bodies or administrative structures. Member States shall ensure due coordination between those bodies and structures.**

Experience shows that business has often difficulties in managing the administrative context linked to public contracts. These difficulties vary from purely legal obligations, to administrative requirements that change from one Member State to another or even between different contracting authorities of the same Member State, when they enjoy a certain room of flexibility.

Business have flagged "lack of experience" and "language barriers" as the two most significant obstacles to cross border bidding.<sup>4</sup> Appropriate support can therefore facilitate business opportunities for all companies and in particular to those companies which encounter difficulties when preparing themselves to an administrative context with which they are not familiar.

Web portals, on-line assistance services and more generally existing business support services can be used and better developed to respond to the specific needs of business wishing to expand their activities with public contracts. The purpose is not to re-invent business support models, but to extend effective assistance tools which are already in place and known by business community.

## **5. Administrative cooperation**

### *Article 88*

- 1. Member States shall provide mutual assistance to each other, and shall put in place measures for effective cooperation with one another, in order to ensure exchange of information on issues referred to in Articles 40, 41, 42, 55, 57, 59, 60, 61, 63 and 69. They shall ensure the confidentiality of the information which they exchange.**

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<sup>4</sup> See Impact assessment, page 128-129,

- 2. The competent authorities of all Member States concerned shall exchange information in compliance with personal data protection legislation provided for in Directives 95/46/EC of the European Parliament and of the Council<sup>5</sup> and 2002/58/EC of the European Parliament and of the Council<sup>6</sup>.**
- 3. For the purposes of this Article, Member States shall designate one or more liaison points, the contact details of which shall be communicated to the other Member States, the oversight bodies and the Commission. Member States shall publish and regularly update the list of liaison points. The oversight body shall be in charge of the coordination of such liaison points.**

A similar mechanism for mutual assistance is provided for in the context of Article 45(1) of Directive 2004/18/EC. This mechanism has been extended, as the application of the simplification of procurement procedures provided for in other sections of the proposal should be facilitated as much as possible for contracting authorities, also where they may need to exchange information concerning documents, certificates, financial situation of candidates. And there is no need to provide for new structures for that purpose as EU legislation already offers the ideal platform for this exchange: IMI system.

The forthcoming adoption of a regulation allowing the use to IMI for the implementation of multiple Internal Market legal instruments will render accessible an efficient tool which overcomes many of the most recurring difficulties when administrations of different MS wish to communicate: an on-line translation facility, common templates for questions and answers; a commonly understandable administrative language. The Commission remains in charge of the management of the IT tool and therefore the actions required to adhere to IMI for public procurement purposes are minimal. Some specific features have been however designed for the procurement context: the appointment of liaison points is necessary to avoid that the system collapses with the access to thousands of contracting authorities. In addition, the oversight body will ensure some consistency in the replies.

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<sup>5</sup> OJ L 281, 23.11.1995, p. 31.

<sup>6</sup> OJ L 201, 31.7.2002, p. 37.

- 4. The exchange of information shall take place via the Internal Market Information system established pursuant to Regulation (EU) N° XXX/XXXX of the European Parliament and Council<sup>7</sup> [proposal for a Regulation of the European Parliament and Council on the administrative cooperation through the Internal Market Information System ('the IMI Regulation') COM(2011) 522]. Member States shall supply information requested by other Member States within the shortest possible period of time.**
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<sup>7</sup> OJ L [...]