

Directive 2004/17/EC of the European Parliament and of the Council
of 31 March 2004 coordinating the procurement procedures of entities
operating in the water, energy, transport and postal services sectors (repealed)

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PARLIAMENT AND OF THE COUNCIL

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THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular
Article 47(2) and Article 55 and Article 95 thereof,

Having regard to the proposal from the Commission⁽¹⁾,

Having regard to the Opinion of the Economic and Social Committee⁽²⁾,

Having regard to the Opinion of the Committee of the Regions⁽³⁾,

Acting in accordance with the procedure laid down in Article 251 of the Treaty⁽⁴⁾, in the light
of the joint text approved by the Conciliation Committee on 9 December 2003,

Whereas:

- (1) On the occasion of new amendments being made to Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors⁽⁵⁾, which are necessary to meet requests for simplification and modernisation made by contracting entities and economic operators alike in their responses to the Green Paper adopted by the Commission on 27 November 1996, the Directive should, in the interests of clarity, be recast. This Directive is based on Court of Justice case-law, in particular case-law on award criteria, which clarifies the possibilities for the contracting entities to meet the needs of the public concerned, including in the environmental and/or social area, provided that such criteria are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the contracting entity, are expressly mentioned and comply with the fundamental principles mentioned in recital 9.
- (2) One major reason for the introduction of rules coordinating procedures for the award of contracts in these sectors is the variety of ways in which national authorities can influence the behaviour of these entities, including participation in their capital and representation in the entities' administrative, managerial or supervisory bodies.
- (3) Another main reason why it is necessary to coordinate procurement procedures applied by the entities operating in these sectors is the closed nature of the markets in which they operate, due to the existence of special or exclusive rights granted by the Member

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States concerning the supply to, provision or operation of networks for providing the service concerned.

- (4) Community legislation, and in particular Council Regulation (EEC) No 3975/87 of 14 December 1987 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector⁽⁶⁾ and Regulation (EEC) No 3976/87 of 14 December 1987 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector⁽⁷⁾, is designed to introduce more competition between carriers providing air transport services to the public. It is therefore not appropriate to include such entities in the scope of this Directive. In view of the competitive position of Community shipping, it would also be inappropriate to make the contracts awarded in this sector subject to the rules of this Directive.
- (5) The scope of Directive 98/38/EEC covers, at present, certain contracts awarded by contracting entities operating in the telecommunications sector. A legislative framework, as mentioned in the Fourth report on the implementation of the telecommunications regulations of 25 November 1998, has been adopted to open this sector. One of its consequences has been the introduction of effective competition, both de jure and de facto, in this sector. For information purposes, and in the light of this situation, the Commission has published a list of telecommunications services⁽⁸⁾ which may already be excluded from the scope of that Directive by virtue of Article 8 thereof. Further progress has been confirmed in the Seventh report on the implementation of telecommunications regulations of 26 November 2001. It is therefore no longer necessary to regulate purchases by entities operating in this sector.
- (6) It is therefore no longer appropriate to maintain the Advisory Committee on Telecommunications Procurement set up by Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy transport and telecommunications sectors⁽⁹⁾.
- (7) Nevertheless, it is appropriate to continue to monitor developments in the telecommunications sector and to reconsider the situation if it is established that there is no longer effective competition in that sector.
- (8) Directive 93/38/EEC excludes from its scope purchases of voice telephony, telex, mobile telephone, paging and satellite services. Those exclusions were introduced to take account of the fact that the services in question could frequently be provided only by one service provider in a given geographical area because of the absence of effective competition and the existence of special or exclusive rights. The introduction of effective competition in the telecommunications sector removes the justification for these exclusions. It is therefore necessary to include the procurement of such telecommunications services in the scope of this Directive.
- (9) In order to guarantee the opening up to competition of public procurement contracts awarded by entities operating in the water, energy, transport and postal services sectors, it is advisable to draw up provisions for Community coordination of contracts above a certain value. Such coordination is based on the requirements inferable from Articles 14, 28 and 49 of the EC Treaty and from Article 97 of the Euratom Treaty, namely

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the principle of equal treatment, of which the principle of non-discrimination is no more than a specific expression, the principle of mutual recognition, the principle of proportionality, as well as the principle of transparency. In view of the nature of the sectors affected by such coordination, the latter should, while safeguarding the application of those principles, establish a framework for sound commercial practice and should allow maximum flexibility.

For public contracts the value of which is lower than that triggering the application of provisions of Community coordination, it is advisable to recall the case-law developed by the Court of Justice according to which the rules and principles of the Treaties referred to above apply.

- (10) To ensure a real opening up of the market and a fair balance in the application of procurement rules in the water, energy, transport and postal services sectors it is necessary for the entities covered to be identified on a basis other than their legal status. It should be ensured, therefore, that the equal treatment of contracting entities operating in the public sector and those operating in the private sector is not prejudiced. It is also necessary to ensure, in keeping with Article 295 of the Treaty, that the rules governing the system of property ownership in Member States are not prejudiced.
- (11) Member States should ensure that the participation of a body governed by public law as a tenderer in a procedure for the award of a contract does not cause any distortion of competition in relation to private tenderers.
- (12) Under Article 6 of the Treaty, environmental protection requirements are to be integrated into the definition and implementation of the Community policies and activities referred to in Article 3 of the Treaty, in particular with a view to promoting sustainable development. This Directive therefore clarifies how the contracting entities may contribute to the protection of the environment and the promotion of sustainable development, whilst ensuring the possibility of obtaining the best value for money for their contracts.
- (13) Nothing in this Directive should prevent the imposition or enforcement of measures necessary to protect public morality, public policy, public security, health, human and animal life or the preservation of plant life, in particular with a view to sustainable development, provided that these measures are in conformity with the Treaty.
- (14) Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the Agreements reached in the Uruguay Round multilateral negotiations (1986 to 1994)⁽¹⁰⁾, approved in particular the WTO Agreement on Government Procurement (hereinafter referred to as the ‘Agreement’), the aim of which is to establish a multilateral framework of balanced rights and obligations relating to public contracts with the aim of achieving the liberalisation and expansion of world trade. In view of the international rights and commitments devolving on the Community as a result of the acceptance of the Agreement, the arrangements to be applied to tenderers and products from signatory third countries are those defined by the Agreement. The Agreement does not have direct effect. The contracting entities covered by the Agreement which comply with this Directive and which apply the latter to economic operators of third countries which are

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signatories to the Agreement should therefore be in conformity with the Agreement. It is also appropriate that this Directive should guarantee for Community economic operators conditions for participation in public procurement which are just as favourable as those reserved for economic operators of third countries which are signatories to the Agreement.

- (15) Before launching a procurement procedure, contracting entities may, using a technical dialogue, seek or accept advice which may be used in the preparation of the specifications, provided, however, that such advice does not have the effect of precluding competition.
- (16) In view of the diversity of works contracts, contracting entities should be able to make provision for contracts for the design and execution of work to be awarded either separately or jointly. It is not the intention of this Directive to prescribe either joint or separate contract awards. The decision to award contracts separately or jointly should be determined by qualitative and economic criteria, which may be defined by national law. A contract may be considered to be a works contract only if its subject-matter specifically covers the execution of activities listed in Annex XII, even if the contract covers the provision of other services necessary for the execution of such activities. Service contracts, in particular in the sphere of property management services, may in certain circumstances include works. However, insofar as such works are incidental to the principal subject-matter of the contract, and are a possible consequence thereof or a complement thereto, the fact that such works are included in the contract does not justify the qualification of the contract as a works contract.
- For the purpose of calculating the estimated value of a works contract it is appropriate to take as a basis the value of the works themselves as well as the estimated value of supplies and services, if any, that the contracting entities place at the disposal of contractors, insofar as these services or supplies are necessary for the execution of the works in question. It should be understood that, for the purposes of this paragraph, the services concerned are those rendered by the contracting entities through their own personnel. On the other hand, calculation of the value of services contracts, whether or not to be placed at the disposal of a contractor for the subsequent execution of works, follows the rules applicable to service contracts.
- (17) The field of services is best delineated, for the purpose of applying the procedural rules of this Directive and for monitoring purposes, by subdividing it into categories corresponding to particular headings of a common classification and by bringing them together in two Annexes, XVII A and XVII B, according to the regime to which they are subject. As regards services in Annex XVII B, the relevant provisions of this Directive should be without prejudice to the application of Community rules specific to the services in question.
- (18) As regards service contracts, full application of this Directive should be limited, for a transitional period, to contracts where its provisions will permit the full potential for increased cross-frontier trade to be realised. Contracts for other services need to be monitored during this transitional period before a decision is taken on the full application of this Directive. In this respect, the mechanism for such monitoring needs

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to be defined. This mechanism should, at the same time, enable interested parties to have access to the relevant information.

- (19) Obstacles to the free provision of services should be avoided. Therefore, service providers may be either natural or legal persons. This Directive should not, however, prejudice the application, at national level, of rules concerning the conditions for the pursuit of an activity or a profession, provided that they are compatible with Community law.
- (20) Certain new electronic purchasing techniques are continually being developed. Such techniques help to increase competition and streamline public purchasing, particularly in terms of the savings in time and money which their use will allow. Contracting entities may make use of electronic purchasing techniques, provided that such use complies with the rules of this Directive and the principles of equal treatment, non-discrimination and transparency. To that extent, a tender submitted by a tenderer, in particular under a framework agreement or where a dynamic purchasing system is being used, may take the form of that tenderer's electronic catalogue if the latter uses the means of communication chosen by the contracting entity in accordance with Article 48.
- (21) In view of the rapid expansion of electronic purchasing systems, appropriate rules should now be introduced to enable contracting entities to take full advantage of the possibilities afforded by these systems. Against this background, it is necessary to define a completely electronic dynamic purchasing system for commonly used purchases and to lay down specific rules for setting up and operating such a system in order to ensure the fair treatment of any economic operator who wishes to join. Any economic operator which submits an indicative tender in accordance with the specification and meets the selection criteria should be allowed to join such a system. This purchasing technique allows the contracting entity, through the establishment of a list of tenderers already selected and the opportunity given to new tenderers to join, to have a particularly broad range of tenders, as a result of the electronic facilities available, and hence to ensure optimum use of funds through broad competition.
- (22) Since use of the technique of electronic auctions is likely to increase, such auctions should be given a Community definition and be governed by specific rules in order to ensure that they operate fully in accordance with the principles of equal treatment, non-discrimination and transparency. To that end, provision should be made for such electronic auctions to deal only with contracts for works, supplies or services for which the specifications can be determined with precision. Such may in particular be the case for recurring supplies, works and service contracts. With the same objective, it should also be possible to establish the respective ranking of the tenderers at any stage of the electronic auction. Recourse to electronic auctions enables contracting entities to ask tenderers to submit new prices, revised downwards, and, when the contract is awarded to the most economically advantageous tender, also to improve elements of the tenders other than prices. In order to guarantee compliance with the principle of transparency, only the elements suitable for automatic evaluation by electronic means, without any intervention and/or appreciation by the contracting entity, may be the object of electronic auctions, that is, only the elements which are quantifiable so that they

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can be expressed in figures or percentages. On the other hand, those aspects of tenders which imply an appreciation of non-quantifiable elements should not be the object of electronic auctions. Consequently, certain works contracts and certain service contracts having as their subject-matter intellectual performances, such as the design of works, should not be the object of electronic auctions.

- (23) Certain centralised purchasing techniques have been developed in Member States. Several contracting authorities are responsible for making acquisitions or awarding contracts/framework agreements for contracting entities. In view of the large volumes purchased, those techniques help increase competition and streamline public purchasing. Provision should therefore be made for a Community definition of central purchasing bodies used by contracting entities. A definition should also be given of the conditions under which, in accordance with the principles of non-discrimination and equal treatment, contracting entities purchasing works, supplies and/or services through a central purchasing body may be deemed to have complied with this Directive.
- (24) In order to take account of the different circumstances obtaining in Member States, Member States should be allowed to choose whether contracting entities may use central purchasing bodies, dynamic purchasing systems or electronic auctions, as defined and regulated by this Directive.
- (25) There has to be an appropriate definition of the concept of special or exclusive rights. The consequence of the definition is that the fact that, for the purpose of constructing networks or port or airport facilities, an entity may take advantage of a procedure for the expropriation or use of property or may place network equipment on, under or over the public highway will not in itself constitute exclusive or special rights within the meaning of this Directive. Nor does the fact that an entity supplies drinking water, electricity, gas or heat to a network which is itself operated by an entity enjoying special or exclusive rights granted by a competent authority of the Member State concerned in itself constitute an exclusive or special right within the meaning of this Directive. Nor may rights granted by a Member State in any form, including by way of acts of concession, to a limited number of undertakings on the basis of objective, proportionate and non-discriminatory criteria that allow any interested party fulfilling those criteria to enjoy those rights be considered special or exclusive rights.
- (26) It is appropriate for the contracting entities to apply common procurement procedures in respect of their activities relating to water and for such rules also to apply where contracting authorities within the meaning of this Directive award contracts in respect of their projects in the field of hydraulic engineering, irrigation, land drainage or the disposal and treatment of sewage. However, procurement rules of the type proposed for supplies of goods are inappropriate for purchases of water, given the need to procure water from sources near the area in which it will be used.
- (27) Certain entities providing bus transport services to the public were already excluded from the scope of Directive 93/38/EEC. Such entities should also be excluded from the scope of this Directive. In order to forestall the existence of a multitude of specific arrangements applying to certain sectors only, the general procedure that permits the effects of opening up to competition to be taken into account should also apply to

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all entities providing bus transport services that are not excluded from the scope of Directive 93/38/EEC pursuant to Article 2(4) thereof.

- (28) Taking into account the further opening up of Community postal services to competition and the fact that such services are provided through a network by contracting authorities, public undertakings and other undertakings, contracts awarded by contracting entities providing postal services should be subject to the rules of this Directive, including those in Article 30, which, safeguarding the application of the principles referred to in recital 9, create a framework for sound commercial practice and allow greater flexibility than is offered by Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts⁽¹¹⁾. For a definition of the activities in question, it is necessary to take into account the definitions of Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service⁽¹²⁾. Whatever their legal status, entities providing postal services are not currently subject to the rules set out in Directive 93/38/EEC. The adjustment of contract award procedures to this Directive could therefore take longer to implement for such entities than for entities already subject to those rules which will merely have to adapt their procedures to the amendments made by this Directive. It should therefore be permissible to defer application of this Directive to accommodate the additional time required for this adjustment. Given the varying situations of such entities, Member States should have the option of providing for a transitional period for the application of this Directive to contracting entities operating in the postal services sector.
- (29) Contracts may be awarded for the purpose of meeting the requirements of several activities, possibly subject to different legal regimes. It should be clarified that the legal regime applicable to a single contract intended to cover several activities should be subject to the rules applicable to the activity for which it is principally intended. Determination of the activity for which the contract is principally intended may be based on an analysis of the requirements which the specific contract must meet, carried out by the contracting entity for the purposes of estimating the contract value and drawing up the tender documents. In certain cases, such as the purchase of a single piece of equipment for the pursuit of activities for which information allowing an estimation of the respective rates of use would be unavailable, it might be objectively impossible to determine for which activity the contract is principally intended. The rules applicable to such cases should be indicated.
- (30) Without prejudice to the international commitments of the Community, it is necessary to simplify the implementation of this Directive, particularly by simplifying the thresholds and by rendering applicable to all contracting entities, regardless of the sector in which they operate, the provisions regarding the information to be given to participants concerning decisions taken in relation to contract award procedures and the results thereof. Furthermore, in the context of Monetary Union, such thresholds should be established in euro in such a way as to simplify the application of these provisions while at the same time ensuring compliance with the thresholds laid down in the Agreement,

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which are expressed in Special Drawing Rights (SDR). In this context, provision should also be made for periodic reviews of the thresholds expressed in euro so as to adjust them, where necessary, in line with possible variations in the value of the euro in relation to the SDR. In addition, the thresholds applicable to design contests should be identical to those applicable to service contracts.

- (31) Provision should be made for cases in which it is possible to refrain from applying the measures for coordinating procedures on grounds relating to State security or secrecy, or because specific rules on the awarding of contracts which derive from international agreements, relating to the stationing of troops, or which are specific to international organisations are applicable.
- (32) It is appropriate to exclude certain service, supply and works contracts awarded to an affiliated undertaking having as its principal activity the provision of such services, supply or works to the group of which it is part, rather than offering them on the market. It is also appropriate to exclude certain service, supply and works contracts awarded by a contracting entity to a joint venture which is formed by a number of contracting entities for the purpose of carrying out activities covered by this Directive and of which that entity is part. However, it is appropriate to ensure that this exclusion does not give rise to distortions of competition to the benefit of the undertakings or joint ventures that are affiliated with the contracting entities; it is appropriate to provide a suitable set of rules, in particular as regards the maximum limits within which the undertakings may obtain a part of their turnover from the market and above which they would lose the possibility of being awarded contracts without calls for competition, the composition of joint ventures and the stability of links between these joint ventures and the contracting entities of which they are composed.
- (33) In the context of services, contracts for the acquisition or rental of immovable property or rights to such property have particular characteristics which make the application of procurement rules inappropriate.
- (34) Arbitration and conciliation services are usually provided by bodies or individuals designated or selected in a manner which cannot be governed by procurement rules.
- (35) In accordance with the Agreement, the financial services covered by this Directive do not include contracts relating to the issue, purchase, sale or transfer of securities or other financial instruments; in particular, transactions by the contracting entities to raise money or capital are not covered.
- (36) This Directive should cover the provision of services only where based on contracts.
- (37) Pursuant to Article 163 of the Treaty, the encouragement of research and technological development is a means of strengthening the scientific and technological basis of Community industry, and the opening up of service contracts contributes to this end. This Directive should not cover the cofinancing of research and development programmes: research and development contracts other than those where the benefits accrue exclusively to the contracting entity for its use in the conduct of its own affairs, on condition that the service provided is wholly remunerated by the contracting entity, are therefore not covered by this Directive.

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- (38) To forestall the proliferation of specific arrangements applicable to certain sectors only, the current special arrangements created by Article 3 of Directive 93/38/EEC and Article 12 of Directive 94/22/EC of the European Parliament and of the Council of 30 May 1994 on the conditions for granting and using authorisations for the prospection, exploration and production of hydrocarbons⁽¹³⁾ governing entities exploiting a geographical area for the purpose of exploring for or extracting oil, gas, coal or other solid fuels should be replaced by the general procedure allowing for exemption of sectors directly exposed to competition. It has to be ensured, however, that this will be without prejudice to Commission Decision 93/676/EEC of 10 December 1993 establishing that the exploitation of geographical areas for the purpose of exploring for or extracting oil or gas does not constitute in the Netherlands an activity defined by Article 2(2)(b)(i) of Council Directive 90/531/EEC and that entities carrying on such an activity are not to be considered in the Netherlands as operating under special or exclusive rights within the meaning of Article 2(3)(b) of the Directive⁽¹⁴⁾, Commission Decision 97/367/EC of 30 May 1997 establishing that the exploitation of geographical areas for the purpose of exploring for or extracting oil or gas does not constitute in the United Kingdom an activity defined by Article 2(2)(b)(i) of Council Directive 93/38/EEC and that entities carrying on such an activity are not to be considered in the United Kingdom as operating under special or exclusive rights within the meaning of Article 2(3)(b) of the Directive⁽¹⁵⁾, Commission Decision 2002/205/EC of 4 March 2002 following a request by Austria applying for the special regime provided for in Article 3 of Directive 93/38/EEC⁽¹⁶⁾ and Commission Decision 2004/73/EC on a request from Germany to apply the special procedure laid down in Article 3 of Directive 93/38/EEC⁽¹⁷⁾.
- (39) Employment and occupation are key elements in guaranteeing equal opportunities for all and contribute to integration in society. In this context, sheltered workshops and sheltered employment programmes contribute efficiently towards the integration or reintegration of people with disabilities in the labour market. However, such workshops might not be able to obtain contracts under normal conditions of competition. Consequently, it is appropriate to provide that Member States may reserve the right to participate in award procedures for contracts to such workshops or reserve performance of contracts to the context of sheltered employment programmes.
- (40) This Directive should apply neither to contracts intended to permit the performance of an activity referred to in Articles 3 to 7 nor to design contests organised for the pursuit of such an activity if, in the Member State in which this activity is carried out, it is directly exposed to competition on markets to which access is not limited. It is therefore appropriate to introduce a procedure, applicable to all sectors covered by this Directive, that will enable the effects of current or future opening up to competition to be taken into account. Such a procedure should provide legal certainty for the entities concerned, as well as an appropriate decision-making process, ensuring, within short time limits, uniform application of Community law in this area.
- (41) Direct exposure to competition should be assessed on the basis of objective criteria, taking account of the specific characteristics of the sector concerned. The

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implementation and application of appropriate Community legislation opening a given sector, or a part of it, will be considered to provide sufficient grounds for assuming there is free access to the market in question. Such appropriate legislation should be identified in an annex which can be updated by the Commission. When updating, the Commission takes in particular into account the possible adoption of measures entailing a genuine opening up to competition of sectors other than those for which a legislation is already mentioned in Annex XI, such as that of railway transports. Where free access to a given market does not result from the implementation of appropriate Community legislation, it should be demonstrated that, de jure and de facto, such access is free. For this purpose, application by a Member State of a Directive, such as Directive 94/22/EC opening up a given sector to competition, to another sector, such as the coal sector, is a circumstance to be taken into account for the purposes of Article 30.

- (42) The technical specifications drawn up by purchasers should allow public procurement to be opened up to competition. To this end, it should be possible to submit tenders which reflect the diversity of technical solutions. Accordingly, it should be possible to draw up the technical specifications in terms of functional performance and requirements and, where reference is made to the European standard or, in the absence thereof, to the national standard, tenders based on other equivalent arrangements which meet the requirements of the contracting entities and are equivalent in terms of safety should be considered by the contracting entities. To demonstrate equivalence, tenderers should be permitted to use any form of evidence. Contracting entities should be able to provide a reason for any decision that equivalence does not exist in a given case. Contracting entities that wish to define environmental requirements for the technical specifications of a given contract may lay down the environmental characteristics, such as a given production method, and/or specific environmental effects of product groups or services. They may use, but are not obliged to use appropriate specifications that are defined in eco-labels, such as the European Eco-label, (multi-) national eco-labels or any other eco-label provided that the requirements for the label are drawn up and adopted on the basis of scientific information using a procedure in which stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations can participate, and provided that the label is accessible and available to all interested parties. Contracting entities should, whenever possible, lay down technical specifications so as to take into account accessibility criteria for people with disabilities or design for all users. The technical specifications should be clearly indicated, so that all tenderers know what the requirements established by the contracting entity cover.
- (43) In order to encourage the involvement of small and medium-sized undertakings in the public contracts procurement market, it is advisable to include provisions on subcontracting.
- (44) Contract performance conditions are compatible with the Directive provided that they are not directly or indirectly discriminatory and are indicated in the notice used to make the call for competition, or in the specifications. They may in particular be intended to encourage on-site vocational training, the employment of people experiencing particular difficulty in integration, the fight against unemployment or the protection of the environment. For example, mention may be made of the requirements —

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- applicable during the performance of the contract — to recruit long-term job-seekers or to implement training measures for the unemployed or for young persons, to comply in substance with the provisions of the basic International Labour Organisation (ILO) Conventions, assuming that such provisions have not been implemented in national law, and to recruit more handicapped persons than are required under national legislation.
- (45) The laws, regulations and collective agreements, at both national and Community level, which are in force in the areas of employment conditions and safety at work apply during the performance of a contract, provided that such rules, and their application, comply with Community law. In cross-border situations where workers from one Member State provide services in another Member State for the purpose of performing a contract, Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services⁽¹⁸⁾ lays down the minimum conditions which must be observed by the host country in respect of such posted workers. If national law contains provisions to this effect, non-compliance with those obligations may be considered to be grave misconduct or an offence concerning the professional conduct of the economic operator concerned, liable to lead to the exclusion of that economic operator from the procedure for the award of a contract.
- (46) In view of new developments in information and telecommunications technology, and the simplifications these can bring in terms of publicising contracts and the efficiency and transparency of procurement procedures, electronic means should be put on a par with traditional means of communication and information exchange. As far as possible, the means and technology chosen should be compatible with the technologies used in the other Member States.
- (47) The use of electronic means leads to savings in time. As a result, provision should be made for reducing the minimum periods where electronic means are used, subject, however, to the condition that they are compatible with the specific mode of transmission envisaged at Community level. However, it is necessary to ensure that the cumulative effect of reductions of time limits does not lead to excessively short time limits.
- (48) Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures⁽¹⁹⁾ and Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market ('Directive on electronic commerce')⁽²⁰⁾ should, in the context of this Directive, apply to the transmission of information by electronic means. The public procurement procedures and the rules applicable to service contests require a level of security and confidentiality higher than that required by these Directives. Accordingly, the devices for the electronic receipt of offers, requests to participate and plans and projects should comply with specific additional requirements. To this end, use of electronic signatures, in particular advanced electronic signatures, should, as far as possible, be encouraged. Moreover, the existence of voluntary accreditation schemes

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could constitute a favourable framework for enhancing the level of certification service provision for these devices.

- (49) It is appropriate that the participants in an award procedure are informed of decisions to conclude a framework agreement or to award a contract or to abandon the procedure within time limits that are sufficiently short so as not to render the lodging of requests for review impossible; this information should therefore be given as soon as possible and in general within 15 days following the decision.
- (50) It should be clarified that contracting entities which establish selection criteria in an open procedure should do so in accordance with objective rules and criteria, just as the selection criteria in restricted and negotiated procedures should be objective. These objective rules and criteria, just as the selection criteria, do not necessarily imply weightings.
- (51) It is important to take into account Court of Justice case-law in cases where an economic operator claims the economic, financial or technical capabilities of other entities, whatever the legal nature of the link between itself and those entities, in order to meet the selection criteria or, in the context of qualification systems, in support of its application for qualification. In the latter case, it is for the economic operator to prove that those resources will actually be available to it throughout the period of validity of the qualification. For the purposes of that qualification, a contracting entity may therefore determine the level of requirements to be met and in particular, for example where the operator lays claim to the financial standing of another entity, it may require that that entity be held liable, if necessary jointly and severally. Qualification systems should be operated in accordance with objective rules and criteria, which, at the contracting entities' choice, may concern the capacities of the economic operators and/or the characteristics of the works, supplies or services covered by the system. For the purposes of qualification, contracting entities may conduct their own tests in order to evaluate the characteristics of the works, supplies or services concerned, in particular in terms of compatibility and safety.
- (52) The relevant Community rules on mutual recognition of diplomas, certificates or other evidence of formal qualifications apply when evidence of a particular qualification is required for participation in a procurement procedure or a design contest.
- (53) In appropriate cases, in which the nature of the works and/or services justifies applying environmental management measures or schemes during the performance of a contract, the application of such measures or schemes may be required. Environmental management schemes, whether or not they are registered under Community instruments such as Regulation (EC) No 761/2001 (EMAS)⁽²¹⁾, can demonstrate that the economic operator has the technical capability to perform the contract. Moreover, a description of the measures implemented by the economic operator to ensure the same level of environmental protection should be accepted as an alternative to environmental management registration schemes as a form of evidence.
- (54) The award of public contracts to economic operators who have participated in a criminal organisation or who have been found guilty of corruption or of fraud to the detriment of the financial interests of the European Communities or of money laundering should

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be avoided. Given that contracting entities, which are not contracting authorities, might not have access to indisputable proof on the matter, it is appropriate to leave the choice of whether or not to apply the exclusion criteria listed in Article 45(1) of Directive 2004/18/EC to these contracting entities. The obligation to apply Article 45(1) should therefore be limited only to contracting entities that are contracting authorities. Where appropriate, the contracting entities should ask applicants for qualification, candidates or tenderers to supply relevant documents and, where they have doubts concerning the personal situation of these economic operators, they may seek the cooperation of the competent authorities of the Member State concerned. The exclusion of such economic operators should take place as soon as the contracting authority has knowledge of a judgment concerning such offences rendered in accordance with national law that has the force of *res judicata*.

If national law contains provisions to this effect, non-compliance with environmental legislation or legislation on unlawful agreements in contracts which has been the subject of a final judgment or a decision having equivalent effect may be considered an offence concerning the professional conduct of the economic operator concerned or grave misconduct.

Non-observance of national provisions implementing the Council Directives 2000/78/EC⁽²²⁾ and 76/207/EEC⁽²³⁾ concerning equal treatment of workers, which has been the subject of a final judgment or a decision having equivalent effect may be considered an offence concerning the professional conduct of the economic operator concerned or grave misconduct.

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

To ensure compliance with the principle of equal treatment in the award of contracts, it is appropriate to lay down an obligation — established by case-law — to ensure the necessary transparency to enable all tenderers to be reasonably informed of the criteria and arrangements which will be applied to identify the most economically advantageous tender. It is therefore the responsibility of contracting entities to indicate the criteria for the award of the contract and the relative weighting given to each of those criteria in sufficient time for tenderers to be aware of them when preparing their tenders. Contracting entities may derogate from indicating the weighting of the criteria for the award of the contract in duly justified cases for which they must be able to give reasons, where the weighting cannot be established in advance, in particular on account of the complexity of the contract. In such cases, they must indicate the descending order of importance of the criteria.

Where contracting entities choose to award a contract to the most economically advantageous tender, they should assess the tenders in order to determine which one offers the best value for money. In order to do this, they should determine the economic and quality criteria which, taken as a whole, must make it possible to determine the most economically advantageous tender for the contracting entity. The determination of these criteria depends on the object of the contract since they must allow the level

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of performance offered by each tender to be assessed in the light of the object of the contract, as defined in the technical specifications, and the value for money of each tender to be measured. In order to guarantee equal treatment, the criteria for the award of the contract must enable tenders to be compared and assessed objectively. If these conditions are fulfilled, economic and qualitative criteria for the award of the contract, such as meeting environmental requirements, may enable the contracting entity to meet the needs of the public concerned, as expressed in the specifications of the contract. Under the same conditions, a contracting entity may use criteria aiming to meet social requirements, in particular in response to the needs — defined in the specifications of the contract — of particularly disadvantaged groups of people to which those receiving/using the works, supplies or services which are the object of the contract belong.

- (56) The award criteria must not affect the application of national provisions on the remuneration of certain services, such as the services provided by architects, engineers or lawyers.
- (57) Council Regulation (EEC, Euratom) No 1182/71 of 3 June 1971 determining the rules applicable to periods, dates and time limits⁽²⁴⁾ should apply to the calculation of the time limits contained in this Directive.
- (58) This Directive should be without prejudice to the existing international obligations of the Community or of the Member States and should not prejudice the application of the provisions of the Treaty, in particular Articles 81 and 86 thereof.
- (59) This Directive should not prejudice the time-limits set out in Annex XXV, within which Member States are required to transpose and apply Directive 93/38/EEC.
- (60) The measures necessary for the implementation of this Directive should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission,⁽²⁵⁾.

HAVE ADOPTED THIS DIRECTIVE:

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- (1) [OJ C 29 E, 30.1.2001, p. 112](#) and [OJ C 203 E, 27.8.2002, p. 183](#).
- (2) [OJ C 193, 10.7.2001, p. 1](#).
- (3) [OJ C 144, 16.5.2001, p. 23](#).
- (4) Opinion of the European Parliament of 17 January 2002 ([OJ C 271 E, 7.11.2002, p. 293](#)), Council Common Position of 20 March 2003 ([OJ C 147 E, 24.6.2003, p. 137](#)) and Position of the European Parliament of 2 July 2003 (not yet published in the Official Journal). Legislative Resolution of the European Parliament of 29 January 2004 and Decision of the Council of 2 February 2004.
- (5) [OJ L 199, 9.8.1993, p. 84](#). Directive as last amended by Commission Directive 2001/78/EC ([OJ L 285, 29.10.2001, p. 1](#)).
- (6) [OJ L 374, 31.12.1987, p. 1](#). Regulation as last amended by Regulation (EC) No 1/2003 ([OJ L 1, 4.1.2003, p. 1](#)).
- (7) [OJ L 374, 31.12.1987, p. 9](#). Regulation as last amended by the 1994 Act of Accession.
- (8) [OJ C 156, 3.6.1999, p. 3](#).
- (9) [OJ L 297, 29.10.1990, p. 1](#). Directive as last amended by Directive 94/22/EC of the European Parliament and of the Council ([OJ L 164, 30.6.1994, p. 3](#)).
- (10) [OJ L 336, 23.12.1994, p. 1](#).
- (11) See page 114 of this Official Journal.
- (12) [OJ L 15, 21.1.1998, p. 14](#). Directive as last amended by Regulation (EC) No 1882/2003 ([OJ L 284, 31.10.2003, p. 1](#)).
- (13) [OJ L 164, 30.6.1994, p. 3](#).
- (14) [OJ L 316, 17.12.1993, p. 41](#).
- (15) [OJ L 156, 13.6.1997, p. 55](#).
- (16) [OJ L 68, 12.3.2002, p. 31](#).
- (17) [OJ L 16, 23.1.2004, p. 57](#).
- (18) [OJ L 18, 21.1.1997, p. 1](#).
- (19) [OJ L 13, 19.1.2000, p. 12](#).
- (20) [OJ L 178, 17.7.2000, p. 1](#).
- (21) Regulation (EC) No 761/2001 of the European Parliament and of the Council of 19 March 2001 allowing a voluntary participation by organisations in a Community eco-management and audit scheme (EMAS) ([OJ L 114, 24.4.2001, p. 1](#)).
- (22) Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ([OJ L 303, 2.12.2000, p. 16](#)).
- (23) Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, ([OJ L 39 of 14.2.1976, p. 40](#)). Directive as amended by Directive 2002/73/EC of the European Parliament and of the Council ([OJ L 269, 5.10.2002, p. 15](#)).
- (24) [OJ L 124, 8.6.1971, p. 1](#).
- (25) [OJ L 184, 17.7.1999, p. 23](#).