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**5th March 2013 NSDPP assessment of Council and EP positions –recommendations for the trilogues**

*Please find below a summary of the Network for Sustainable Development in Public Procurement (NSDPP) main demands for the upcoming trilogues on the public procurement Directive, a brief explanation of these arguments and a detailed analysis of each of the provisions where changes are required in order to ensure that the sustainability provisions in the future Directive are interpreted and applied in a consistent manner.*

**Key recommendations for the trilogues:**

- **Keep the deletion of lowest price (pages 13-16)**
- **Reinforce compliance with legislation and mandatory provisions throughout the supply chain (pages 4-5, 20)**
- **Clarify the scope of production characteristics throughout the text, especially in technical specifications (pages 8, 25-26)**
- **Ensure the "link to the subject matter" is interpreted broadly and consistently throughout the text (pages 8,10,13-14,21**)

One of the main concerns of the NSDPP has been the reinforcement in the public procurement legislation of opportunities to pursue sustainability considerations. This means enabling contracting authorities to seek to pursue common societal goals (such as of the quality of work, clean air, Fair Trade, and the efficient and sustainable management and use of natural resources environment, employment and social inclusion and ensuring the best possible conditions for the provision of high quality social services). In particular, it must be clear that procurers may look at more than just the use phase of products and services that they need, for example bringing in processes of production or provision of services or goods.

In this respect we note that the EP has taken a more forward looking approach and, in line with constant demands of the NSDPP, has deleted the lowest price option. This will encourage contracting authorities to consider the wider consequences of their purchasing rather than default to the cheapest option. The NSDPP welcomes this step forward and calls upon all the parties in the trilogue to preserve this achievement.

Additionally, the EP has set as general principle compliance with law and collective agreements and has therefore helpfully underscored that environmental and social issues are relevant in the procurement context. It also indicates that monitoring of compliance with social and environmental laws is necessary, which will in itself improve the attention that is given to monitoring of contract performance.

The term "economic operators" should be interpreted in such a way that it applies to entities that are part of the supply chain.

The NSDPP also welcomes that both the EP and the Council texts reflect the recent changes in case law (e.g. the "North Holland" ruling) and acknowledge a broad discretion for contracting authorities. However, **the extent to which social elements of the production process may be**

**considered is still unclear. The NSDPP asks for clarification on this point during the trilogies. It should also be made explicit that such considerations are permissible at all stages of the procurement process, not just as award criteria**.

In both the EP and the Council texts, the definition of **'life-cycle'** is fundamental and it is good to see that the full spectrum of stages of the life-cycle has been included – from raw material acquisition to disposal. This comprehensive definition, used in several places in the text, promotes the idea that characteristics resulting from production choices or end-of-life impacts can be required. It also ensures that life-cycle costing (LCC) can take into account externalities from such non-use phases. **There is no reason not to allow the inclusion of social externalities in the same way as environmental externalities.**

The requirement of a **'link to the subject matter'** constrains the types of characteristics that contracting authorities may seek at the various stages of the procurement process. It is therefore important that the scope of this requirement is clear. In line with CJEU case law, the scope of the link to the subject matter should be broad. In its analysis of award criteria, the CJEU's judgements clearly show that criteria other than strict functional ones demonstrate a link to the subject matter. **Most notably, environmental and social aspects of production processes and methods can be taken into consideration, even when these do not impact on the functional characteristics of a product or service**. Whereas this wide interpretation of the link to the subject matter is accepted in the context of award criteria and contract performance clauses in both the Council and the EP positions, it should also consistently be made clear that the same scope is to be applied with regards to the technical specifications and the selection criteria.

There is also concern around the impact of the Council's position that criteria and conditions relating to general corporate policy of the tenderer are not linked to the subject matter. Firstly it seems inconsistent with the acceptance of quality and environmental management measures at the selection stage. Secondly it is potentially in tension with the above-mentioned broad interpretation and specific CJEU judgments on the link to the subject matter (particularly the recent judgment in case C—368/10 ("North Holland") if interpreted such that something that may be a general policy (e.g. fair trade purchasing policy or refusing to contract with suppliers who use child labour) can never be a factor characterising a specific process of production (i.e. the goods or services to be procured are fair trade or have not been produced using child labour).

**These issues must be addressed to meet the objectives of ensuring legal clarity and simplification. Throughout the text there is a need to clarify and align all the references to and explanations of the link with the subject matter with the jurisprudence.**

| Council - General Approach position Document 16725/1/12 | IMCO – according to vote on 18 December 2012 | Which text is most enabling for sustainable public procurement? | What elements should be kept/ what is missing? |
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| **Art.1 Subject-matter and scope** | | | |
| 4.This Directive does not affect the freedom of Member States to define, in conformity with Union law, what they consider to be services of general economic interest, how those services should be organised and financed, in compliance with the State aid rules, and what specific obligations they should be subject to. Equally, this Directive does not affect the way in which the Member States organise their social security legislation.<br><br>5. The scope of this Directive shall not include non-economic services of general interest | 2a.This Directive is without prejudice to the right of public authorities at all levels to decide whether, how, and to what extent they want to perform public functions themselves pursuant to Protocol (No 26) on Services of General Interest and Article 14 TFEU.<br><br>2b This Directive does not affect the way in which the Member States organise their social security legislation. | In 2a of the EP text the right to in-house provision is more clearly stated than in the Council text.<br><br>Both the EP and Council have also added references to the Directive not affecting non-economic services, and social security is explicitly mentioned in the EP text in 2b, which may be helpful. | The IMCO text should be maintained. |

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| **Art. 2 point 22 Definition of 'life cycle'** | | | |
| 22) 'life cycle' means all consecutive and/or interlinked stages, including production, commercialisation, transport, use and maintenance, throughout the existence of a product or a works or the provision of a service, from raw material acquisition or generation of resources to disposal, clearance and end of life cycle. | 22) 'life cycle' also means all consecutive or interlinked stages throughout the existence of a product or a work or the provision of a service, including research, development, production, transport, use and maintenance, from raw material acquisition or generation of resources to disposal, clearance and finalisation. | The two texts should be combined. | A compromise text could include the additional examples added by both institutions:<br><br>***'life cycle' means all consecutive or interlinked stages throughout the existence of a product or a work or the provision of a service, including research, development, production, transport, use and maintenance, from raw material acquisition or generation of resources to disposal, clearance and finalisation.*** |
| **Article 15 Principles of procurement** | | | |
| Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.<br><br>The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of unduly favouring or disadvantaging certain economic operators or certain works, supplies or services. | 1. Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate way.<br><br>The design of the procurement shall not be made with the objective of excluding it from the scope of this Directive or of artificially narrowing competition. | The IMCO text is very important because it helpfully underscores that environmental and social issues are relevant in the procurement context and compliance with law and collective agreements should be sought. It also indicates that monitoring of compliance with social and environmental laws is necessary, which will in itself improve the attention that is given to monitoring of contract | The IMCO text should be maintained. |

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| | 2. Member States shall ensure that economic operators comply with the environmental, social and labour law provisions which apply at the place where the works are executed, services provided or goods produced or supplied, as set out in international conventions listed in Annex XI, in Union and national law as well as in collective agreements concluded in accordance with national law and practices which respect Union law. | performance.<br><br>The term "economic operators" should be interpreted in such a way that it applies to entities that are part of the supply chain. | |
| **Article 17 Reserved contracts** | | | |
| 1. 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 persons or provide for such contracts to be performed in the context of sheltered employment programmes, provided that at least 30% of the employees of those workshops, economic operators or programmes are disabled or disadvantaged workers.<br>~~2. Member States may also reserve the right to participate in procedures for the award of public service contracts to organisations whose main aim is the integration of former employees of public authorities into the private sector, provided that the following cumulative conditions~~ | | The Council text enlarges scope of EC text by adding a second paragraph. This is an unwelcome proposal to encourage 'soft' route to privatisation (following UK government demand).<br><br>This addition also raises issues in relation to the protections afforded by the transfer of undertakings Directive.<br><br>We deplore the introduction of "reserved contracts" for organisations whose main aim is the integration of former employees of public authorities into the private sector and therefore call for the deletion of the second paragraph | The second paragraph as added by the Council should be removed. |

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| ~~are fulfilled:~~<br>~~(a) at least 75% of the employees of these organisations are, or will be at the relevant time, individuals who have left their position of employment within a contracting authority in order to deliver public services by way of that organisation;~~<br>~~(b)the organisation provides its services exclusively for contracting authorities;~~<br>~~(c) employee ownership or engagement has, or will have at the relevant time, a significant impact on the governance of the organisation.~~<br><br>~~This provision only applies where the contract awarded is fully performed within the period of three years beginning from the date on which the organisation first begins to supply any services.~~<br>~~For the purposes of this paragraph, 'relevant time' means the date on which the organisation would be required to begin the supply of services under a contract awarded pursuant to this provision.~~<br>~~3. The call for competition shall make reference to this provision.~~ | | suggested by the Council. This doesn't pursue the original aim of reserved contracts, which is the social and professional integration of people with disabilities and other disadvantaged people and it encourages the privatisation of public services, which is in contradiction with recital (3a) adopted by the Council and recital (3b) adopted by the IMCO Committee | |

| Article 18 Confidentiality | | | |
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| 1. Unless otherwise provided in this Directive or in the national law to which the contracting authority is subject, in particular legislation concerning access to information, and without prejudice to the obligations relating to the advertising of awarded contracts and to the information to candidates and tenderers set out in Articles 48 and 53 of this Directive, the contracting authority shall not disclose information forwarded to it by economic operators which they have designated as confidential, including, but not limited to, technical or trade secrets and the confidential aspects of tenders.<br><br>2. Contracting authorities may impose on economic operators requirements aimed at protecting<br>the confidential nature of information which the contracting authorities make available throughout the procurement procedure. | 2a. This Article shall not prevent public disclosure of non-confidential parts of concluded contracts, including any subsequent changes. | Neither the Council nor EP reflect the NSDPP demands that there should be full transparency of public contracts as a principle in itself (set out in Article 15), given the use of public money. The EP has taken part this suggestion, but only in relation to 'non-confidential' information.<br><br>Both formulations are too broad. | A clear reference to transparency under Article 15 is still needed, e.g. "***Traceability and transparency of public procurement procedures is essential for ensuring the optimal use of public money, including fighting corruption and fraud, and in order to monitor and evaluate the performance public contracts from a social, environmental and economic perspective. Member States and contracting authorities shall therefore ensure that the necessary transparency requirements are in place to support these objectives and that the confidentiality requirements set out in Article 18 do not prevent information that is in the public interest from being passed on to relevant bodies at any stage of the procurement process or that the details of contracts once awarded are made public and subject to scrutiny, including those covered by Articles 74-76 of this Directive***."<br><br>Article 18. 2a of the EP text could also be further strengthened: 2a This Article shall not prevent public disclosure of ***concluded contracts, or parts thereof, when this is in the general interest.*** |

| Article 40 Technical specifications Paragraph 1, first subparagraph | | | |
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| 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. | 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 provided that they are linked to the subject-matter of the contract and proportionate to its value and its objectives. | The CJEU has interpreted this link broadly.<br><br>The language 'proportionate to contract objectives' leaves the space for a technical specification to be considered in relation to 'sustainability objectives' of a contract. | It would be even better to state explicitly at the start of Article 40 that technical specifications can relate to sustainability objectives of a particular public procurement, as indicated in recital 27 |
| **Article 40 Technical specifications Paragraph 1, second subparagraph** | | | |
| These characteristics may also refer to the specific process or method of production or provision of the requested works, supplies or services or to a specific process for another stage of its life cycle even where such factors do not form part of their material substance. | 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. | The Council text is better because It explicitly clarifies that production choices do not need to manifest in the use phase in order to be technical specifications.<br><br>This clarification that production choices do not need to manifest in the use phase is explained by the fact that very often the sustainability choices made during the production phase will not impact the function or appearance of the product. For instance, you don't see in a coffee grain whether it has been produced with or without child labour. | The Council text could be further strengthened by rephrasing, '***even where such factors are not apparent in the physical characteristics or functional qualities of the resulting product or service***'. |

| Article 40 Technical specifications Paragraph 1, fourth subparagraph | | | |
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| For all procurement which is intended for use by natural 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 persons with disabilities or design for all users. | 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. | The United Nations Convention on the Rights of Persons with Disabilities came into force in the European Union in January 2011. Article 4 (d) of the Convention specifies that State Parties should refrain from engaging in any act or practice that is inconsistent with the Convention and ensure that public authorities and institutions act in conformity with the Convention. Articles 4, 9, and articles 19 to 30 of the Convention are very clear about general and specific obligations regarding equal access for disabled people and set out obligations of parties in relation to accessibility. There are no exceptions to these principles in the Convention. | We would recommend the removal of the provision in both EP and Council texts **~~"except in duly justified cases"~~**<br><br>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 be drawn up so as to take into account accessibility criteria for people with disabilities or design for all users. |
| **Annex VIII Definition of certain technical specifications** | | | |
| | | IMCO and Council texts have maintained the EC's proposal. We would have preferred a clarification that characteristics specified in the technical specifications may go towards both the use and sustainability objectives of the contracting authority, as expressed in recital 27. | If there is any possibility to discuss further, then such a clarification would be helpful. |

| Article 41 Labels Paragraph 1 subparagraph 1 | | | |
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| 1. Where contracting authorities intend to purchase works, supplies or services with specific environmental, social or other characteristics they may, in the technical specifications, the award criteria or the contract performance clauses, require and refer to a specific label as means of proof that the works, services or supplies correspond to such requirements or criteria, provided that all of the following conditions are fulfilled: | 1. Where contracting authorities lay down environmental, social or other requirements or criteria, in the technical specifications, the award criteria or the contract performance clauses they may require a specific label or certificate as means of proof that these works, services or supplies correspond to such requirements or criteria provided that all of the following conditions are fulfilled: | The EP addition of including certificates is welcomed because labels are not the only way to proof sustainability claims.<br><br>Furthermore, both texts miss the opportunity to clarify that the contracting authority could specify that more than one label or certificate will be accepted as means of proof that the purchased items correspond to the desired characteristics.<br><br>For example where the contracting authority has already decided that two or more labels or certificates are equivalent, it would be helpful to tenderers to state upfront that such labels will be accepted. | The IMCO texts should be maintained. |
| **Article 41 Labels Paragraph 1 subparagraph 1 point a** | | | |
| (a) the requirements to be met in order to obtain the label only concern criteria 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; | (a) the requirements to be met in order to obtain the label or the certificate are appropriate to define characteristics of the works, supplies or services that are the subject-matter of the contract; | The IMCO text is better since it does not systematically exclude the choice for labels and certificates that by themselves go beyond the requirements for the subject-matter. | Subject to clarification of the interpretation of Article 41(1) second subparagraph, the IMCO text is better.<br><br>In any event, the need for Article 41(2) should also be re-considered. Particularly if the IMCO text is adopted, Article 41(2) will be illogical. |

| Article 41 Labels Paragraph 1 subparagraph 1 point c | | | |
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| (c) the labels are established in an open and transparent procedure in which all relevant stakeholders, including government bodies, consumers, manufacturers, distributors and non-governmental organisations, may participate; | (c) the labels or certificates are established in an open and transparent procedure in which all relevant stakeholders, including governmental and non governmental organisations, have a substantial role. | This Council text is better because It is administratively less burdensome for a contracting authority to check that a label/certification allows participation of all stakeholders, than to check that the role of all stakeholders is 'substantial'. | However, the list of example stakeholders could be cut as the term 'relevant stakeholders' means there is a case by case judgment for the contracting authority. This would result in this text:<br><br>***(c) the labels or certificates are established in an open and transparent procedure in which all relevant stakeholders may participate;*** |
| **Article 41 Labels Paragraph 1 subparagraph 1 point e** | | | |
| (e) the requirements to be met in order to obtain the label are set by a third party which is independent from the economic operator applying for the label. | (e) the requirements to be met in order to obtain the label, or the certificate are set by a third party which is independent from the economic operator applying for the label or certificate. The third party may be a specific national or governmental body or organisation. | Both texts may lead to the complete exclusion of labels and certificates that are based on multi-stakeholder governance including (representatives of) the business sector. Also in cases where these are a structural minority as part of a multi-stakeholder structure.<br><br>It is not necessary to stipulate who the third-party should be. | A more straightforward formulation would serve the purpose of avoiding self-declarations without setting requirement that would exclude robust labels and certificates. ***"labels* and certificates *that are dominated in its governance structure by business interests are not allowed for use"***<br><br>The reference to third party should be deleted. |
| **Article 41 Labels Paragraph 1 subparagraph 2** | | | |
| Contracting authorities requiring a specific label shall accept all equivalent labels that use the requirements of the specific label indicated by the contracting authorities. Contracting authorities shall accept other appropriate means of proving such requirements, which may include a technical dossier of the manufacturer, where the economic operator concerned has no possibility | Contracting authorities requiring a specific label or certificate shall accept all equivalent labels that fulfil the requirements of the specific label or certificate indicated by the contracting authorities. Contracting authorities shall also accept other appropriate means of proof for such requirements, which may include a technical dossier of the | Both texts effectively make the reference point for equivalence of the requirements of the indicated label or certificate rather than with the contracting authority's specified characteristics to be proven by the label or certificate.<br><br>This seems contrary to the intent of Article 41(1) subparagraph 1, notwithstanding the fact that the | The IMCO text is better but it should include allow for labels that may go beyond the requirements laid down by the contracting authority in its call for tenders. |

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| of obtaining the label within the relevant time limits, provided that the lack of access is not attributable to the economic operator concerned. | manufacturer or other appropriate means of proof where the economic operator concerned has no access to the label, or no possibility of obtaining them within the relevant time limit, provided that the lack of access is not attributable to the economic operator concerned. It shall be the responsibility of the tenderer to prove equivalence with the label requested. | contracting authority might have simply copied the text of relevant criteria of a label or certificate. Surely the Directive should not anticipate only this eventuality.<br><br>As it stands, IMCO's text is better because by using 'fulfil' rather than 'use' it arguably does not raise the standard from equivalent to identical, and it is explicit about where the burden for showing equivalence lies.<br><br>It is a positive improvement from the Commission proposal that the burden of proof is on the tenderer claiming the equivalence, not on the contracting authority that identifies a certain label or certificate. | |
| **Article 41 Labels Paragraph 2** | | | |
| 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 shall not require the label as such but 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. | 2. Where a label or certificate 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 the detailed specifications of that label or certificate, 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. | As regards the Council formulation "shall not require the label", the same objections apply as expressed in relation to 41.1.a<br><br>Moreover, in both cases, the relation between labels and the tender is limited to technical specifications, whereas both texts, in their amendments to 41.1.a. extend the scope to "technical specifications, the award criteria or the contract performance clauses". In order to ensure consistency, the second paragraph needs to be modified in that sense. | We recommend that the following addition is taken on board:<br><br>2. Where a label or certificate 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 specifications, ***the award criteria or the contract performance clauses*** by reference to the detailed specifications of that label or certificate, or, where necessary, parts thereof, that are linked to the subject-matter of the contract and are appropriate to define characteristics |

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| **Article 56 Selection criteria** | | | |
| Contracting authorities may only impose criteria referred to in paragraphs 2, 3 and 4 of this Article on economic operators as requirements for participation. They shall limit any requirements to those that are appropriate to ensure that a candidate or tenderer has the legal and financial capacities and the technical and professional abilities to perform the contract to be awarded. All requirements shall be related and proportionate to the subject-matter of the contract. | Contracting authorities shall limit any conditions for participation to those that are appropriate to ensure that a candidate or tenderer has the legal and financial capacities and the commercial and technical abilities to perform the contract to be awarded. All requirements shall be linked to the subject-matter of the contract, taking into account the need to ensure genuine competition. | The reference by the Council to the proportionality of the link to the subject matter of the contract here is superfluous. The IMCO text is better since it is less restrictive. | The link to the subject matter should be interpreted broadly (see comment on North Holland). |
| **Article 66 Contract award criteria Paragraph 1** | | | |
| 1. Without prejudice to national laws, regulations or administrative provisions concerning the price of certain supplies or the remuneration of certain services, contracting authorities shall base the award of public contracts on one of the following criteria:<br><br>(a) the most economically advantageous tender;<br><br>(b) the lowest cost. | 1. Without prejudice to national laws, regulations or administrative provisions concerning the remuneration of certain services, the criterion on which contracting authorities shall base the award of public contracts shall be the most economically advantageous tender. | The IMCO text is better because by requiring contracting authorities to make a decision based on the most economically advantageous offer, they are first required to consider what that means. Therefore, they will actively have to consider whether sustainability considerations need to be evaluated. | We should keep the IMCO text. |

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| Cost may be assessed, at the choice of the contracting authority, on the basis of the price only or using a cost-effectiveness approach, such as life-cycle costing under the conditions set out in Article 67. | | | |
| **Article 66 Contract award criteria- Council: Paragraphs 2 and 3/Parliament: Paragraph 2** | | | |
| 2. The most economically advantageous tender referred to in point (a) of paragraph 1 shall be identified by an assessment on the basis of award criteria affecting the value of the tender from the point of view of the contracting authority.<br><br>Those criteria shall include, in addition to the price or cost, other criteria linked to the subject matter of the public contract in question, for instance quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, environmental and social characteristics, innovative aspects, conditions of commercialisation, after-sales service and technical assistance, delivery conditions such as delivery date, delivery process and delivery period or period of completion. Where the quality of the staff employed can significantly impact the level of performance of the contract, the organisation, qualification and | 2. The most economically advantageous tender referred to 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 may include, in addition to the price or costs, qualitative, environmental and social considerations such as<br><br>(a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics, including cost effectiveness of short-distance procurement where relevant and the costs over the life cycle in accordance with Article 67;<br><br>(b) wherever relevant for the performance of the contract, qualification and experience of the | The two texts have much overlap in substance e.g. both texts state that price or costs must be included in an assessment of the most economically advantageous tender, but there are also points of divergence (big and small).<br><br>However, the Council is more restrictive in respect of situations where the qualification and experience of staff can be taken into account, but refers to organisation of work, which is important.<br><br>Characteristics relating to production are dealt with differently. In the IMCO text they are specifically referenced in point (d), whereas, in the Council's text, Article 66(3) clarifies that factors involved in the specific process of production are linked to the subject matter, meaning that 'environmental and social characteristics' listed as examples in Article 66(2) can be | The most positive text from the point of view of enabling sustainable public procurement would be a combination of both IMCO and Council positions, for instance:<br><br>***The most economically advantageous tender shall be identified by an assessment on the basis of award criteria affecting the value of the tender from the point of view of the contracting authority.***<br><br>***Those criteria shall include, in addition to the price or cost, other criteria linked to the subject matter of the public contract in question, for instance quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, environmental and social characteristics, innovative aspects, conditions of commercialisation, after-sales service and technical assistance, delivery conditions such as delivery date, delivery process and delivery period or period of completion. Wherever relevant*** |

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| experience of the staff assigned to performing the contract in question may also be taken into consideration.<br><br>The cost element may also take the form of a fixed price or cost on the basis of which economic operators will compete on quality criteria only.<br><br>3. Award criteria shall be considered to be linked to the subject-matter of the public contract where they relate to the works, supplies or services to be provided under that contract in any respect and at any stage of their life cycle, including factors involved:<br><br>· in the specific process of production, provision or commercialisation of those works, supplies or services, or<br><br>· in a specific process for another stage of their life cycle, even where such factors do not form part of their material substance. | staff assigned to performing the contract in question may be taken into consideration;<br><br>(c) after-sales service, technical assistance, and delivery conditions such as delivery date and delivery period or period of completion;<br><br>(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. | interpreted as including environmental and/or social aspects of the production process. | ***for the performance of the contract, <u>the organisation,</u> the qualification and experience of the staff assigned to performing the contract in question <u>shall</u> also be taken into consideration.***<br><br>***The cost element may also take the form of a fixed price or cost on the basis of which economic operators will compete on quality criteria only.***<br><br>***3. Award criteria shall be considered to be linked to the subject-matter of the public contract where they relate to the works, supplies or services to be provided under that contract in any respect and at any stage of their life cycle, including factors involved:***<br><br>***· in the specific process of production, provision or commercialisation of those works, supplies or services, or***<br><br>***· in a specific process for another stage of their life cycle,***<br><br>***even where such factors do not form part of their material substance.*** |
| **Article 66 Contract award criteria-Council: Paragraphs 4/ Parliament: Paragraph 3** | | | |
| 4. Award criteria shall not have the effect of conferring an unrestricted freedom of choice on the contracting | 3. Award criteria shall not confer an unrestricted freedom of choice on the contracting authority. They | The Council text is better because it is clear that contracting authorities can go beyond the information | The Council text should be maintained. |

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| authority. They shall ensure the possibility of effective competition and shall be accompanied by specifications that allow the information provided by the tenderers to be effectively verified in order to assess how well the tenders meet the award criteria. In case of doubt, contracting authorities shall verify effectively the accuracy of the information and proof provided by the tenderers. | 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. | offered by the tenderers to check the accuracy of the information and whether the tender meets the criteria.<br><br>Both texts include an objective test in relation to whether the chosen criteria result in an unrestricted freedom of choice for the contracting authority. | |
| **Article 67 Life-cycle costing Paragraph 1** | | | |
| 1. Life-cycle costing shall to the extent relevant cover parts or all of the following costs over the life cycle of a product, service or works: | 1. Life-cycle costing shall to the extent relevant cover parts or all of the following costs borne by contracting authorities over the life cycle of a product, service or works as defined in point (22) of Article 2: | | The Council text should be maintained. |

| Article 67 Life-cycle costing Paragraph 1, point b | | | |
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| (b) costs imputed to environmental externalities linked to the product, service or works during its life cycle, provided their monetary value can be determined and verified; these costs may include the cost of emissions of greenhouse gases and of other pollutant emissions and other climate change mitigation costs. | (b) external costs such as social or 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. | The big difference between the two texts is the inclusion of social externalities. There is no reason not to include social externalities in the same way as environmental externalities – the Directive should be forward looking.<br><br>This restriction to environmental only should be removed as it hinders the potential of LCC i.e. to ensure that the full costs or benefits of producing or consuming a product or service are understood. | The best text therefore would be a modified version of the Council's text:<br><br>***(b) costs imputed to externalities linked to the product, service or works during its life cycle, provided their monetary value can be determined and verified; these costs may include the cost of emissions of greenhouse gases and of other pollutant emissions and other climate change mitigation costs.*** |
| **Article 67 Life-cycle costing Paragraph 2, point a** | | | |
| (a) it is based on objectively verifiable and non-discriminatory criteria; | (a) it has been drawn up in close consultation with stakeholders and is based on objectively verifiable and non-discriminatory criteria; | Council text is better because It minimises the administrative burden by avoiding the contracting authority potentially becoming involved in a time-consuming process of consultation – something which would probably lessen the uptake of LCC by contracting authorities. | The Council text should be maintained. |
| **Article 67 Life-cycle costing Paragraph 2, point b** | | | |
| (b) it has been established for repeated or continuous application; | No text | The IMCO position is better because it leaves space for contracting authorities to design bespoke LCC | The IMCO text should be maintained. |

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| | | methods for one-off purchases. | |
| **Article 67 Life-cycle costing Paragraph 3** | | | |
| **3.** Whenever a common method for the calculation of life-cycle costs has been made mandatory by a legislative act of the Union, that common method shall be applied for the assessment of costs imputed to environmental externalities. | **3.** Any common methodology for the calculation of life-cycle costs adopted as part of a legislative act of the Union, including by delegated acts pursuant to sector specific legislation or as part of a European technical specification shall be deemed to meet the criteria set out in paragraph 2 and may be included in the award criteria referred to in Article 66(1). | The welcome opportunity for contracting authorities to use LCC is embraced in principle by both the EP and the Council. However, the Directive should not impose a ceiling of ambition on contracting authorities and the Council's positions that EU methods be made mandatory and effectively prohibiting bespoke methods would have such an effect. The criteria set out for acceptable methods should ensure that where reliable methods have not been developed then social externalities cannot be included. | The IMCO text is preferable. |
| **Article 69-Parliament:paragraph 1** | | | |
| ~~Contracting authorities shall require economic operators to explain the price or costs charged, where all of the following conditions are fulfilled:~~<br><br>~~(a) the price or cost charged is more than 50 % lower than the average price or costs of the remaining tenders~~<br><br>~~(b) the price or cost charged is more than 20 % lower than the price or costs of the~~ | 1. Contracting authorities shall require economic operators to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services. | The IMCO text is better because it makes it easier for CAs to enquire about the low value of a tender. Both texts however delete the percentage % criteria which makes the application very arbitrary.<br><br>The IMCO text is also better as it says that "contracting authorities shall (against may in the Council text) require explanation" when the tender is abnormally low if it breaches labour laws as defined per art.15 (2). However, the Council | We would support the reinsertion of a % criteria, on a higher level than in the EC proposal. |

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| ~~second lowest tender;~~<br><br>~~(c) at least five tenders have been submitted.~~ | | texts leaves the discretion to MS to oblige contracting authorities to give an explanation which if applied has a more binding effect. Both texts eliminate the criteria of the number of tenders submitted which is in line with our position. | |
| **Article 69-Council: paragraph 1/Parliament: paragraph 2** | | | |
| Where tenders appear to be abnormally low in relation to the works, supplies or services, the contracting authority may require, or be obliged by a Member State to […] require, economic operators to explain the price or costs proposed in the tender. | deleted | The IMCO text is better because it makes it easier for CAs to enquiry about the low value of a tender. | We support the IMCO text. |

| Article 69 – Council: paragraph 2 – point d / Parliament: paragraph 3 – point d | | | |
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| (d) compliance 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 or, where not applicable, with other provisions ensuring an equivalent level of protection; | (d) compliance with social, environmental and labour law provisions referred to in Article 15(2); | We welcome that the reference to "compliance, at least in an equivalent manner" has been deleted in both texts. This contributes to providing legal clarity and avoids confusion. | We should keep the deletion of in compliance at least in an equivalent manner. |
| **Article 69 – Parliament: paragraph 3 – point d a(new)** | | | |
| | **(**da) compliance with subcontracting requirements set out in Article 71. | We welcome this addition | We support the IMCO text. |
| **Article 69 –Council: paragraph 3 – subparagraph 2/ Parliament: : paragraph 4 – subparagraph 2** | | | |
| Contracting authorities shall reject the tender, where they have established that the tender is abnormally low because it does not comply with applicable obligations established by Union law or national law compatible with it in the field of social and labour law or environmental law or by the international social and environmental law provisions listed in Annex XI. | Contracting authorities shall reject the tender, where they have established that the tender is abnormally low because it does not comply with social, environmental and labour law provisions referred to in Article 15(2) or with data protection law. | The Council text is better because it extends the scope of obligations that tenders have to comply with ILO Conventions listed in Annex XI. | We support the Council text. |

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| **Article 70 contract performance conditions** | | | |
| 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. 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. | Contracting authorities may lay down special conditions linked to the subject matter and relating to the performance of a contract, provided that they are indicated in the call for competition or in the technical specifications. Those conditions may include economic, innovation-related, environmental, social or employment related considerations. | The inclusion of "linked to subject matter" is not necessary here.<br><br>The reference to employment related considerations in the IMCO text welcomed. | Combination of Council "in particular" with better parts of IMCO text would be the best position, and removal of linked to subject matter. A reference to ILO C94 here is very pertinent, and linked to recital 43..<br><br>Those conditions may **include economic, innovation-related, environmental, social or employment related** considerations**, including social clauses as required by ILO Convention 94.** |
| **Article 71 sub-contracting – paragraph 1** | | | |
| In the procurement documents, the contracting authority may ask or may be required by a Member State to ask the tenderer to indicate in its tender any share of the contract it may intend to subcontract to third parties and any proposed subcontractors. | 1. In the procurement documents, the contracting authority shall ask the tenderer to indicate in its tender any share of the contract it may intend to subcontract to third parties. | IMCO introduction of " shall" is stronger and is welcome | The IMCO text should be supported. |
| **Article 71 sub-contracting – paragraph 1 a (new)** | | | |
| | 1a. After the tenderer has been selected, it shall indicate to the contracting authorities the name, contact details and legal representatives of the subcontractors and any changes related to that information during the course of the contract. The information shall be provided to the tenderer by each | 1a. in IMCO text develops much further the brief wording in Council Art 71 para 1 "and any proposed contractors" and is therefore stronger and better | We support the IMCO text. |

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| | subcontractor in the subcontracting chain through the subcontractor's direct contractor. Each subcontractor shall keep the information up to date during the course of the contract. | | |
| **Article 71 sub-contracting – paragraphs 3 a and 3 b (new)** | | | |
| | 3a. Member States shall ensure that subcontractors respect all mandatory legal, regulatory and administrative provisions in force in the Member States of contract performance, including the obligations referred to in Article 15(2). To this end, Member States may provide for a system of liability throughout the subcontracting chain so that the direct contractor of a subcontractor is liable in the event that the subcontractor fails to comply with one of those provisions or is insolvent. When a direct contractor is insolvent, such system should provide that the next solvent direct contractor up the subcontracting chain, including the main contractor, is liable.<br>3b. Member States may provide for more stringent liability rules under national law. | IMCO text is much better here as Council text ignores liability issues.<br><br>The reference in 3a to Art 15 (2) is welcomed, though the IMCO text leaves it to MS "may" provide system of liability throughout the subcontracting chain. And 3b "may" apply more stringent liability rules. This is a welcomed progress from EC text, too | We support he IMCO text but would strengthen further: ***To this end, Member States shall provide for a system of liability throughout the subcontracting chain…etc"*** |
| **Article 74 Award of contracts for social and other specific services** | | | |
| Public contracts for social and other specific services, such as hotel and restaurant services or certain legal, rescue or administrative services, listed in Annex XVI shall be awarded in accordance with this Chapter, where the value of the contracts is equal to | 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). | Which ever approach is followed, there should e a clear reference to Article 15.2 and Annex XI. The IMC O text could be strengthened further. | The text could read:<br><br>***Public*** contracts for social and other specific services~~, such as hotel and restaurant services or certain legal, rescue or administrative services,~~ listed in Annex XVI shall be awarded in |

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| or greater than the threshold indicated in Article 4(d). | | | accordance with this Chapter ***and in respect of 15.2 and Annex XI*** , where the value of the contracts is equal to or greater than the threshold indicated in Article 4(d). |
| **Article 76 Principles of awarding contracts** | | | |
| 1. Member States shall put in place national rules for the award of contracts subject to this Chapter in order to ensure contracting authorities comply with the principles of transparency and equal treatment of economic operators. Member States are free to determine the procedural rules applicable as long as such rules allow contracting authorities to take into account the specificities of the services in question.<br><br>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. | (b) Member States shall put in place appropriate simplified procedures in accordance with Article 75(1), 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.<br><br>2. Member States shall ensure that contracting authorities ~~may~~ take into account the need to ensure high quality, continuity, accessibility, affordability**,** availability and comprehensiveness of the services, the specific needs of different categories of users, including disadvantaged and vulnerable groups, the involvement and empowerment of users and innovation. Member States shall ensure that the choice of the service provider **is** not made solely on the basis of the price for the provision of the service but takes into account quality and sustainability | Again IMCO text could be strengthened further. | 2. Member States shall ensure that contracting authorities take into account the need to ensure ***high*** quality, continuity, accessibility, ***affordability,*** availability and comprehensiveness of the services, the specific needs of different categories of users, ***including disadvantaged and vulnerable groups***, the involvement and empowerment of users and innovation.<br><br>***Member States shall ensure that the choice of the service provider is made on the basis of the most economically advantageous offer for the provision of the service and takes into account quality and sustainability criteria for social services. When drawing up quality criteria, contracting authorities may refer to the criteria set out in the voluntary European Quality Framework for Social Services.*** |

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| | criteria for social services. | | |
| **Article 84 public oversight paragraph 2 b)** | | | |
| **deleted** | **deleted** | This paragraph, which read as follows:<br><br>~~(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;~~<br><br>has been deleted in both texts but we support the creation of oversight bodies where they do not yet exist. | If possible to reintroduce, then could add ENVI wording: Member States shall appoint a single independent body responsible for the oversight and coordination of implementation activities (hereinafter 'the oversight body') ***in cases in which no such independent body yet exists***. Member States shall inform the Commission of their designation. |
| **Article 87.3 Assistance to contracting authorities and businesses** | | | |
| 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.<br><br>Member States shall ensure that interested economic operators have | **deleted** | The Council text is better on second paragraph of 87.3 relating to obligations concerning taxes, environmental protections social and labour law obligations. It is positive text says MS ***shall*** (This wording is the remnants of former Art 27 of 2004 Directive but that text only said *may* - however 2004 wording was better in relation to referring to *employment protections and working conditions*) | We recommend to negotiate to agree this text from Council, keeping ***shall***, whilst improving wording to include ***employment protections and working conditions*** |

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| 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. | | | |

| **Recital 41** | | | |
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| Furthermore, in view of a better integration of social and environmental considerations in the procurement procedures, contracting authorities should be allowed to use award criteria or contract performance conditions relating to the works, supplies or services to be provided under the public contract in any respect and at any stage of their life cycles from extraction of raw materials for the product to the stage of disposal of the product, including factors involved in the specific process of production, provision or commercialisation of those works, supplies or services or a specific process during a later stage of their life cycle, even where such factors do | Furthermore, in technical specifications, in award criteria and in contract performance clauses, contracting authorities should be allowed to refer to a specific production process including for example social and environmental aspects, a specific mode of provision of services, or a specific process for any other stage of the life cycle of a product or service, provided that they are linked to the subject-matter of the public contract.<br><br>[...] | The IMCO text clarifies that production choices are relevant to technical specifications as well as award criteria and CPC.<br><br>The Council text provides the needed clarification that production choices do not need to manifest in the use phase (though see commentary in respect of the accessibility of the phrasing) and provides some helpful concrete examples, but unfortunately misses the opportunity to give an example catering to the social dimension. | A mixture of the two texts with some improvements would be the best result for enabling sustainable public procurement:<br><br>*Furthermore, in view of a better integration of social and environmental considerations in the procurement procedures, contracting authorities should be allowed to use technical specifications, award criteria or contract performance conditions relating to the works, supplies or services to be provided under the public contract in any respect and at any stage of their life cycles from extraction of raw materials for the product to the stage of disposal of the product, including factors involved in the specific process of production, provision* |

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| not form part of their material substance.<br><br>Criteria and conditions referring to such a production or provision process are for example that the manufacturing of the purchased goods did not involve toxic chemicals, or that the purchased services are provided using energy-efficient machines. In accordance with the case-law of the Court of Justice of the European Union, this includes also award criteria or contract performance conditions relating to the supply or utilisation of fair trade products in the course of the performance of the contract to be awarded. Contract performance conditions pertaining to environmental considerations may include, for example, the delivery, package and disposal of products, and in respect of works and services contracts, waste minimisation or resource efficiency.<br><br>However, the condition of a link with the subject-matter of the contract excludes criteria and conditions relating to general corporate policy, which cannot be considered as a factor characterising the specific process of production or provision of the purchased works, supplies or | | Corporate Social Policy: The statement that contracting authorities are not permitted to require certain corporate social policies is potentially misleading. As was expressed by the CJEU in the North Holland case, a general policy can be relevant (in that case, a fair trade purchasing policy), providing that all the contracting authority is asking for is that it applies to the procured | *or commercialisation of those works, supplies or services or a specific process during a later stage of their life cycle* ***even where such factors are not apparent in the physical characteristics or functional qualities of the resulting product or service***.<br><br>*Examples include specifying that the manufacturing of the purchased goods did not involve toxic chemicals, or that the purchased services are provided using energy-efficient machines or that fair trade products are supplied or utilised in the course of the performance of the contract. Other considerations may include, for example, the delivery, package and disposal of products, and in respect of works and services contracts, waste minimisation or resource efficiency.*<br><br>*However, the condition of a link with the subject-matter of the contract excludes criteria and conditions relating to general corporate policy, unless it can be considered as a factor characterising the specific process of production or provision of the purchased works, supplies or services.* |

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| services. Contracting authorities should hence not be allowed to require tenderers to have a certain corporate social or environmental responsibility policy in place. | | goods or services. The phrasing in this text might lead to the conclusion that something that can also be a general policy can never be a factor characterising a specific process of production | |

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| **Recitals 41a and 41b** | **Recital 41** | | |
| It is essential that award criteria or contract performance conditions concerning social aspects of the production process relate to the works, supplies or services to be provided under the contract. In addition, 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 services , as interpreted by the European Court of Justice and should not be chosen or applied in a way that discriminates 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. | [...]<br><br>In order to better integrate social considerations in public procurement, procurers may include, in the award criteria and in contract performance clauses, characteristics related to the working, employment and environmental conditions, and require the production of certificate or labels drawn up by independent bodies attesting compliance by the economic operator with rules and standards set in those fields, which apply where the works are executed, services provided or goods produced or supplied, as set out in international conventions, in Union and national law as well as in collective agreements concluded in accordance with national law and practices which respect Union law. | This reference to labels and certificates in the IMCO text is limited to those that confirm compliance with existing legislation and collective agreements. In combination with the current version of article 41 (see analysis above) this could be a hindrance to the development of sustainable public procurement by preventing the reference to labels certifying compliance with higher standards than those set out by law. | We prefer this reference to be included in Article 41 (see comments on Article 41, second paragraph, p.12) |

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| ~~Thus, requirements concerning the basic working conditions regulated in Directive 96/71/EC, such as minimum rates of pay, should remain at the level set by national legislation or by collective agreements applied in accordance with Union law in the context of that Directive~~. The laws, regulations, and collective agreements, at both national and Union level, that are in force in the areas of employment conditions and safety at work should apply during the performance of a public contract, provided that such rules, and their application, comply with Union law.<br><br>These obligations could hence be mirrored in contract performance clauses. It should also be possible to include clauses ensuring compliance with collective agreements in compliance with Union law in public contracts. Non-compliance with such obligations set by national legislation or collective agreements may be considered to be grave misconduct on the part of the economic operator concerned, liable to exclusion of that economic operator from the procedure for the award of a public contract. Contract performance conditions may also be intended to | Those characteristics may concern among others 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.<br><br>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 services~~ 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. For service contracts and for contracts involving the design of works, contracting authorities should also be allowed to | Furthermore, judging by the focus on workers in the drafting in recital 41a and 41b, it might be construed that the scope of social considerations envisaged is narrow. There are social impacts on others besides the immediate workers. For example, the impacts on local communities, not just on those workers involved in the harvest, are dimensions to be considered in the sustainable management of resources. | The reference to the posted workers Directive in the IMCO and Council texts should be deleted.<br><br>A reference could be added to state that "***Contracting authorities should be encouraged to include social clauses in public contracts as required by ILO C 94.***"<br><br>f |

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| favour the protection of the environment or animal welfare and, to comply in substance with fundamental International Labour Organization (ILO) Conventions, and to recruit more disadvantaged persons than are required under national legislation.<br><br>(41b) Measures aiming at the protection of health of the staff involved in the production process, the favouring of social integration of disadvantaged persons or members of vulnerable groups amongst the persons assigned to performing the contract or training in the skills needed for the contract in question can also be the subject of award criteria or contract performance conditions provided that they relate to the works, supplies or services to be provided under the contract. For instance, such criteria or conditions may refer, amongst other things, to the employment of long-term job-seekers, the implementation of training measures for the unemployed or young persons in the course of the performance of the contract to be awarded. In technical specifications contracting authorities can provide such social requirements which | use as an award criterion the organisation, qualification and experience of the staff assigned to performing the contract in question, as this may affect the quality of contract performance and, as a result, the economic value of the tender which offers the best value for money. | **Regarding staff qualification:** The text is not consistent with the text of Article 66(2)(b) which does not limit the type of contract where staff qualification etc can be taken into account. | |

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| directly characterise the product or service in question, such as accessibility for persons with disabilities or design for all users. | | | |