

## I

(Legislative acts)

## REGULATIONS

### **REGULATION (EU, EURATOM) 2015/1929 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**of 28 October 2015**

### **amending Regulation (EU, Euratom) No 966/2012 on the financial rules applicable to the general budget of the Union**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 322 thereof,

Having regard to the Treaty establishing the European Atomic Energy Community, and in particular Article 106a thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the Court of Auditors <sup>(1)</sup>,

Acting in accordance with the ordinary legislative procedure <sup>(2)</sup>,

Whereas:

- (1) Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council <sup>(3)</sup> lays down the rules for the establishment and the implementation of the general budget of the European Union. In particular, it also contains rules on public procurement. Directives 2014/23/EU <sup>(4)</sup> and 2014/24/EU <sup>(5)</sup> of the European Parliament and of the Council were adopted on 26 February 2014 and it is therefore necessary to amend Regulation (EU, Euratom) No 966/2012 in order to take them into account for contracts awarded by the Union institutions on their own account.
- (2) Some definitions should be added and certain technical clarifications should be made to ensure that the terminology of Regulation (EU, Euratom) No 966/2012 is in line with that of Directives 2014/23/EU and 2014/24/EU.
- (3) The ex ante and ex post publicity measures necessary to launch a procurement procedure should be clarified in the case of contracts above and below the thresholds set out in Directive 2014/24/EU.

<sup>(1)</sup> Opinion No 1/2015 of 19 January 2015 (OJ C 52, 13.2.2015, p. 1).

<sup>(2)</sup> Position of the European Parliament of 7 October 2015 (not yet published in the Official Journal) and decision of the Council of 22 October 2015.

<sup>(3)</sup> Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 (OJ L 298, 26.10.2012, p. 1).

<sup>(4)</sup> Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ L 94, 28.3.2014, p. 1).

<sup>(5)</sup> Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28.3.2014, p. 65).

- (4) Regulation (EU, Euratom) No 966/2012 should include an exhaustive list of all the procurement procedures available to the Union institutions regardless of the thresholds.
- (5) As is the case in Directive 2014/24/EU, Regulation (EU, Euratom) No 966/2012 should allow for market consultation prior to the launch of a procurement procedure.
- (6) In addition, it should be clarified how the contracting authorities can contribute to the protection of the environment and the promotion of sustainable development, while ensuring that they can obtain the best value for money for their contracts, in particular through requiring specific labels and/or through the use of appropriate award methods.
- (7) In order to ensure that, when executing contracts, economic operators comply with the applicable environmental, social and labour law obligations established by Union law, national legislation, collective agreements or the applicable international social and environmental conventions listed in Annex X to Directive 2014/24/EU, such obligations should be part of the minimum requirements defined by the contracting authority and should be integrated in the contracts signed by the contracting authority.
- (8) In order to protect the Union's financial interests, a single early detection and exclusion system should be set up by the Commission, and the rules for exclusion from participation in procurement procedures should be improved in order to strengthen the protection of those interests.
- (9) The decision of exclusion of an economic operator from participation in procurement procedures or the imposition of a financial penalty and the decision to publish the related information should be taken by the relevant contracting authority, in view of its autonomy in administrative matters. In the absence of a final judgment or final administrative decision and in cases related to a serious breach of contract, the contracting authority should take its decision having regard to the recommendation of a panel on the basis of a preliminary classification in law of the conduct of the economic operator concerned. The panel should also assess the duration of an exclusion in cases where the duration has not been set by the final judgment or the final administrative decision.
- (10) The role of the panel should be to ensure the coherent operation of the exclusion system. The panel should be composed of a standing chair, representatives of the Commission and a representative of the relevant contracting authority.
- (11) The preliminary classification in law does not prejudice the final assessment of the conduct of the economic operator by the competent authorities of Member States under national law. The recommendation of the panel, as well as the decision of the contracting authority, should therefore be reviewed following the notification of such a final assessment.
- (12) Regulation (EU, Euratom) No 966/2012 should specify the situations giving rise to exclusion.
- (13) An economic operator should be excluded by the contracting authority when a final judgment or a final administrative decision has been taken in the case of grave professional misconduct, non-compliance, whether intentional or not, with the obligations related to the payment of social security contributions or the payment of taxes, fraud affecting the general budget of the Union ('the budget'), corruption, participation in a criminal organisation, money laundering, terrorist financing, terrorist related offences, child labour or other forms of trafficking in human beings or irregularity. It should also be excluded in the case of a serious breach of contract or bankruptcy.
- (14) When deciding on the exclusion or the imposition of a financial penalty and on the publication thereof or on the rejection of an economic operator, the contracting authority should ensure compliance with the principle of proportionality by taking into account in particular the seriousness of the situation, its budgetary impact, the time which has elapsed since the relevant conduct, its duration and its recurrence, the intention or degree of negligence and the degree of collaboration of the economic operator with the relevant competent authority and its contribution to the investigation.

- (15) The contracting authority should also be able to exclude an economic operator where a natural or legal person assuming unlimited liability for the debts of that economic operator is bankrupt or in a similar situation of insolvency or where that natural or legal person fails to comply with its obligations to pay social security contributions or taxes, where such situations impact the financial situation of the economic operator.
- (16) An economic operator should not be subject to a decision of exclusion when it has taken remedial measures, thus demonstrating its reliability. This possibility should not apply in case of the most severe criminal activities.
- (17) In the light of the principle of proportionality, it is necessary to distinguish between the cases where a financial penalty may be imposed as an alternative to the exclusion and the cases where the gravity of the conduct of the economic operator concerned in respect of attempting to unduly obtain Union funds justifies the imposition of a financial penalty in addition to the exclusion so as to ensure a deterrent effect. It is also necessary to define the minimum and maximum financial penalty which can be imposed by the contracting authority.
- (18) It is important to underline that the possibility to apply administrative and/or financial penalties on a regulatory basis is independent from the possibility to apply contractual penalties, such as liquidated damages.
- (19) The duration of exclusion should be limited in time, as is the case in Directive 2014/24/EU and in accordance with the principle of proportionality.
- (20) It is necessary to determine the commencement date and the duration of the limitation period for imposing administrative sanctions.
- (21) It is important to be able to reinforce the deterrent effect achieved by the exclusion and the financial penalty. In that regard, the deterrent effect should be reinforced by the possibility to publish the information related to the exclusion and/or to the financial penalty, with full respect for the data protection requirements set out in Regulation (EC) No 45/2001 of the European Parliament and of the Council <sup>(1)</sup> and in Directive 95/46/EC of the European Parliament and of the Council <sup>(2)</sup>. This should contribute to ensuring that the conduct concerned is not repeated. For reasons of legal certainty and in accordance with the principle of proportionality it should be specified in which situations a publication should not take place. In its assessment, the contracting authority should have regard to any recommendation of the panel. As far as natural persons are concerned, personal data should only be published in exceptional cases justified by the seriousness of the conduct or its impact on the Union's financial interests.
- (22) The information related to an exclusion or a financial penalty should only be published in the case of grave professional misconduct, fraud, a significant deficiency in complying with the main obligations of a contract financed by the budget or an irregularity.
- (23) The criteria for exclusion should be clearly separated from the criteria leading to a possible rejection from a given procedure.
- (24) It is appropriate that different cases usually referred to as situations of conflict of interest are identified and treated distinctly. The notion of a 'conflict of interest' should be solely used for cases where an official or an agent of a Union institution is in such a situation. In cases where an economic operator attempts to unduly influence a procedure or obtain confidential information, this should be treated as grave professional misconduct. In addition, economic operators may be in a situation where they should not be selected to implement a contract because of a professional conflicting interest. For instance, a company should not evaluate a project in which it has participated or an auditor should not be in a position to audit accounts it has previously certified.
- (25) The information on the early detection of risks and on the imposition of administrative sanctions on economic operators should be centralised. For that purpose, related information should be stored in a database set up and operated by the Commission as the owner of the centralised system. That system should operate in full compliance with the right to privacy and the protection of personal data.

<sup>(1)</sup> Regulation (EC) No 45/2001 of 18 December 2000 of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8, 12.1.2001, p. 1).

<sup>(2)</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 31).

- (26) While the setting up and the operation of the early detection and exclusion system should be the responsibility of the Commission, other institutions and bodies, as well as all entities implementing the budget in accordance with Articles 59 and 60 of Regulation (EU, Euratom) No 966/2012 should participate in that system by transmitting relevant information to the Commission to ensure an early detection of risks.
- (27) The contracting authority and the panel should guarantee the right of defence of economic operators. The same right should be given to economic operators, in the context of an early detection, where an act envisaged by an authorising officer could adversely affect the rights of the economic operator concerned. In cases of fraud, corruption or any other illegal activity affecting the Union's financial interests which are not yet subject to a final judgment, the contracting authority and the panel should be given the possibility to defer the opportunity given to the economic operator to submit its observations. Such deferral should only be justified where there are compelling legitimate grounds to preserve the confidentiality of the investigation.
- (28) This Regulation respects the fundamental rights and observes the principles enshrined in the Charter of Fundamental Rights of the European Union, in particular the need to ensure the legality and proportionality of sanctions, the right to an effective remedy and to a fair trial, the right of defence and the right to privacy and the protection of personal data.
- (29) The Court of Justice of the European Union should be given unlimited jurisdiction with regard to penalties imposed pursuant to this Regulation, in accordance with Article 261 of the Treaty on the Functioning of the European Union (TFEU).
- (30) In order to facilitate the protection of the Union's financial interests across all management modes, the entities involved in the implementation of the budget in shared and indirect management should take into account, as appropriate, exclusions decided upon by the contracting authorities at Union level.
- (31) In accordance with Directive 2014/24/EU, it should be possible to verify whether an economic operator is excluded, to apply selection and award criteria, as well as to verify compliance with the procurement documents in any order. As a result, it should be possible to reject tenders on the basis of award criteria without a prior check on exclusion or selection criteria of the corresponding tenderer.
- (32) Contracts should be awarded on the basis of the most economically advantageous tender in line with Article 67 of Directive 2014/24/EU. It should be clarified that selection criteria are strictly linked to the evaluation of candidates or tenderers and award criteria are strictly linked to the evaluation of the tenders.
- (33) Union public procurement should ensure that Union funds are used in an effective, transparent, and appropriate way. In that regard, electronic procurement should contribute to a better use of Union funds and enhance access to contracts for all economic operators.
- (34) It should be clarified that there should be an opening phase and an evaluation for any procedure. An award decision should always be the outcome of an evaluation.
- (35) Given that criteria are applied in no particular order, it is necessary to provide for the possibility for the rejected tenderers who submitted compliant tenders to receive the characteristics and relative advantages of the successful tender if they so request.
- (36) For framework contracts with reopening of competition, it is appropriate to waive the obligation to provide the characteristics and relative advantages of the successful tender to an unsuccessful contractor, on the basis that the receipt of such information by parties to the same framework contract each time a competition is reopened might prejudice fair competition between them.
- (37) A contracting authority should be able to cancel a procurement procedure before the contract is signed, without the candidates or tenderers being entitled to claim compensation. This should be without prejudice to situations where the contracting authority has acted in such a way that it may be held liable for damages in accordance with general principles of Union law.

- (38) As is the case in Directive 2014/24/EU, it is necessary to clarify the conditions under which a contract may be modified during its performance without a new procurement procedure. In particular, cases such as administrative changes, universal succession and application of clear and unequivocal revision clauses or options do not alter the minimum requirements of the initial procedure. A new procurement procedure should be required in the case of material modifications to the initial contract, in particular to the scope and content of the mutual rights and obligations of the parties, including the distribution of intellectual property rights. Such modifications demonstrate the parties' intention to renegotiate the essential terms or conditions of that contract, in particular if the modifications would have had an influence on the outcome of the procedure had they been part of the initial procedure.
- (39) The possibility to require contractual guarantees in the case of works, supplies and complex services should be provided in order to guarantee compliance with substantial contractual obligations in line with customary practice in those sectors to ensure proper contract implementation throughout its duration.
- (40) It is necessary to provide for the possibility to suspend performance of a contract in order to ascertain whether errors, irregularities or fraud have occurred.
- (41) In order to determine the applicable thresholds and procedures, it is necessary to clarify whether Union institutions, executive agencies and bodies are deemed to be contracting authorities. They should not be deemed to be contracting authorities in cases where they purchase from a central purchasing body. In addition, Union institutions form a single legal entity and cannot conclude contracts but only administrative arrangements between their departments.
- (42) It is appropriate to include a reference in Regulation (EU, Euratom) No 966/2012 to the two thresholds set out in Directive 2014/24/EU applicable to works and to supplies and services, respectively. Those thresholds should also be applicable to concession contracts for reasons of simplification as well as sound financial management, considering the specificities of the Union institutions' contracting needs. The revision of those thresholds as provided for in Directive 2014/24/EU should therefore be directly applicable to procurement by Union institutions.
- (43) It is necessary to clarify the conditions of application of the standstill period.
- (44) It is necessary to clarify which economic operators have access to procurement by Union institutions depending on their place of establishment and to provide explicitly for the possibility of such access also to international organisations.
- (45) The application of exclusion grounds should be extended to other instruments of implementation of the budget such as grants, prizes, financial instruments and remunerated experts as well as to the implementation of the budget under indirect management.
- (46) The drawing up and adoption of special reports of the Court of Auditors should be done in a timely manner without prejudice to the full independence of the Court of Auditors to determine the duration and timing of its audits.
- (47) The European Data Protection Supervisor was consulted in accordance with Article 28(2) of Regulation (EC) No 45/2001 and expressed an opinion on 3 December 2014.
- (48) This Regulation should enter into force on the day following that of its publication in the *Official Journal of the European Union* in order to ensure that the delegated acts can apply from the beginning of the financial year.
- (49) Regulation (EU, Euratom) No 966/2012 should therefore be amended accordingly,

HAVE ADOPTED THIS REGULATION:

*Article 1*

Regulation (EU, Euratom) No 966/2012 is amended as follows:

(1) In Article 58, paragraph 8 is replaced by the following:

‘8. The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on the methods of implementation of the budget, including direct management, the exercise of powers delegated to executive agencies, and specific provisions for indirect management with international organisations, with bodies referred to in Articles 208 and 209, with public law bodies or bodies governed by private law with a public service mission, with bodies governed by the private law of a Member State and entrusted with the implementation of a public-private partnership and with persons entrusted with the implementation of specific actions in the CFSP. The Commission shall also be empowered to adopt delegated acts in accordance with Article 210 concerning criteria for assimilating non-profit organisations to international organisations.’

(2) Article 60 is amended as follows:

(a) in the first subparagraph of paragraph 2, point (d) is replaced by the following:

‘(d) apply appropriate rules and procedures for providing financing from Union funds through procurement, grants, prizes and financial instruments, including the obligations set out in Article 108(12);’

(b) paragraph 3 is replaced by the following:

‘3. The entities and persons entrusted pursuant to point (c) of Article 58(1) shall prevent, detect, correct and notify the Commission of irregularities and fraud when executing tasks relating to the implementation of the budget. To that end, they shall carry out, in accordance with the principle of proportionality, ex ante and ex post controls including, where appropriate, on-the-spot checks on representative and/or risk-based samples of transactions, to ensure that the actions financed from the budget are effectively carried out and implemented correctly. They shall also recover funds unduly paid, exclude from access to Union funds or impose financial penalties and bring legal proceedings where necessary in that regard.’

(c) paragraphs (7) and (8) are replaced by the following:

‘7. Paragraphs 5 and 6 shall not apply to the contribution of the Union to entities which are subject to a separate discharge procedure under Articles 208 and 209.

8. The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on indirect management, including the establishment of the conditions under indirect management according to which the systems, rules and procedures of entities and persons are to be equivalent to those of the Commission, management declarations and compliance statements, and the procedures for the examination and acceptance of the accounts, the obligation to notify the Commission of detected fraud and irregularities, the exclusion from Union financing of expenditure incurred in breach of the applicable rules and the imposition of financial penalties.’

(3) In Article 66, paragraph 9 is amended as follows:

(a) the second subparagraph is replaced by the following:

‘The activity report shall indicate the results of the operations by reference to the objectives set, the risks associated with those operations, the use made of the resources provided and the efficiency and effectiveness of internal control systems, including an overall assessment of the costs and benefits of controls. It shall also include information on the overall performance of those operations, as well as an assessment of the extent to which the operational expenditure authorised has contributed to policy achievements and generated Union added value.’

(b) the following subparagraph is added:

'The annual activity reports of the authorising officers and, where applicable, authorising officers by delegation of the institutions, offices, bodies and agencies shall be published on the internet site of the respective institution, office, body or agency in an easily accessible way no later than 1 July each year for the preceding year, subject to duly justified confidentiality and security considerations.'

(4) In Article 99, the following paragraph is inserted:

'3a. Each year, the Commission shall, in the context of the discharge procedure and in accordance with Article 319 TFEU, forward on request its annual internal audit report within the meaning of paragraph 3 of this Article with due regard to confidentiality requirements.'

(5) The heading of Title V of Part One is replaced by the following:

TITLE V

**PUBLIC PROCUREMENT AND CONCESSIONS**'.

(6) Article 101 is replaced by the following:

*Article 101*

#### **Definitions for the purposes of this Title**

1. For the purposes of this Title:

- (a) "procurement" means the acquisition by means of a contract of works, supplies or services and the acquisition or rental of land, existing buildings or other immovable property, by one or more contracting authorities from economic operators chosen by those contracting authorities;
- (b) "public contract" means a contract for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities within the meaning of Articles 117 and 190, in order to obtain, against payment of a price paid in whole or in part from the budget, the supply of movable or immovable assets, the execution of works or the provision of services.

Public contracts comprise:

- (i) building contracts;
  - (ii) supply contracts;
  - (iii) works contracts;
  - (iv) service contracts;
- (c) "concession contract" means a contract for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities within the meaning of Articles 117 and 190, in order to entrust the execution of works or the provision and management of services to an economic operator (the "concession"). The remuneration shall consist either solely in the right to exploit the works or services or in that right together with payment. The award of a concession contract shall involve the transfer to the concessionaire of an operating risk in exploiting those works or services encompassing demand risk or supply risk, or both. The concessionaire shall be deemed to assume an operating risk where, under normal operating conditions, there is no guarantee of recouping the investments made or the costs incurred in operating the works or the services at stake;
  - (d) "contract" means a public contract or a concession contract;
  - (e) "framework contract" means a public contract concluded between one or more economic operators and one or more contracting authorities, the purpose of which is to establish the terms governing specific contracts under it to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged;

- (f) “dynamic purchasing system” means a completely electronic process for making commonly used purchases;
- (g) “economic operator” means any natural or legal person, including a public entity, or a group of such persons, which offers to supply products, execute works or provide services or immovable property;
- (h) “procurement document” means any document produced or referred to by the contracting authority to describe or determine elements of the procurement procedure, including:
  - (i) the publicity measures set out in Article 103;
  - (ii) the invitation to tender;
  - (iii) the tender specifications, which shall include the technical specifications and the relevant criteria, or the descriptive documents in case of a competitive dialogue;
  - (iv) the draft contract;
- (i) “final administrative decision” means a decision of an administrative authority having final and binding effect in accordance with the law of the country in which the economic operator is established or in which the contracting authority is located, or in accordance with the applicable Union law;
- (j) “central purchasing body” means a contracting authority providing centralised purchasing activities and, where applicable, ancillary purchasing activities;
- (k) “tenderer” means an economic operator that has submitted a tender;
- (l) “candidate” means an economic operator that has sought an invitation or has been invited to take part in a restricted procedure, a competitive procedure with negotiation, a competitive dialogue, an innovation partnership, a design contest or a negotiated procedure;
- (m) “vendor” means an economic operator registered in a list of vendors to be invited to submit requests to participate or submit tenders;
- (n) “subcontractor” means an economic operator that is proposed by a candidate or tenderer or contractor to perform part of a contract. The subcontractor has no direct legal commitment to the contracting authority.

2. A mixed contract covering two or more types of procurement (works, supplies or services) or concessions (works or services) or both, shall be awarded in accordance with the provisions applicable to the type of procurement that characterises the main subject matter of the contract in question.

3. Except for Articles 105a to 108, this Title shall not apply to grants, or to contracts for technical assistance as defined in accordance with Article 125(8) concluded with the EIB or the European Investment Fund.

4. The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on the further definition and scope of public and concession contracts, on applicable nomenclature by reference to the “Common Procurement Vocabulary”, on mixed contracts, on economic operators, as well as on framework contracts and specific contracts based thereon, covering the maximum duration of framework contracts and the award of and methods for implementing specific contracts based on framework contracts concluded with a single economic operator or with several economic operators, respectively.’.

(7) Article 102 is amended as follows:

(a) paragraph 2 is replaced by the following:

‘2. All contracts shall be put out to competition on the broadest possible basis, except when use is made of the procedure referred to in point (d) of Article 104(1).

The estimated value of a contract may not be determined with a view to circumventing the applicable rules, nor may a contract be split up for that purpose.



The contracting authority shall divide a contract into lots, whenever appropriate, with due regard to broad competition.’;

(b) the following paragraph is added:

‘3. Contracting authorities shall not use framework contracts improperly or in such a way that their purpose or effect is to prevent, restrict or distort competition.’.

(8) Article 103 is replaced by the following:

‘Article 103

#### **Publicity measures**

1. For procedures with a value equal to or greater than the thresholds referred to in Article 118(1) or Article 190, the contracting authority shall publish in the *Official Journal of the European Union*:

(a) a contract notice to launch a procedure, except in the case of the procedure referred to in point (d) of Article 104(1);

(b) a contract award notice on the results of the procedure.

2. Procedures with a value below the thresholds referred to in Article 118(1) or Article 190 shall be advertised by appropriate means.

3. Publication of certain information on a contract award may be withheld where its release would impede law enforcement, or otherwise be contrary to the public interest, would harm the legitimate commercial interests of economic operators or might prejudice fair competition between them.

4. The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on the requirements for the advertising of procedures by reference to their value in comparison to the thresholds referred to in Article 118(1), on advertising which the contracting authority may undertake with full respect for the principle of non-discrimination, and on the content and publication of notices.’.

(9) Article 104 is replaced by the following:

‘Article 104

#### **Procurement procedures**

1. Procurement procedures for awarding concession contracts or public contracts, including framework contracts shall take one of the following forms:

(a) open procedure;

(b) restricted procedure, including through a dynamic purchasing system;

(c) design contest;

(d) negotiated procedure, including without prior publication;

(e) competitive dialogue;

(f) competitive procedure with negotiation;

(g) innovation partnership;

(h) procedures involving a call for expression of interest.

2. In open procedures any interested economic operator may submit a tender.

3. In restricted procedures, competitive dialogues, competitive procedures with negotiation and innovation partnerships, any economic operator may submit a request to participate by providing the information that is requested by the contracting authority. The contracting authority shall invite all candidates, that satisfy the selection criteria and that are not in any of the situations set out in Articles 106 and 107, to submit a tender.

Notwithstanding the first subparagraph, the contracting authority may limit the number of candidates to be invited to participate in the procedure on the basis of objective and non-discriminatory selection criteria, which shall be indicated in the contract notice or the call for expression of interest. The number of candidates invited shall be sufficient to ensure genuine competition.

4. In all procedures involving negotiation, the contracting authority shall negotiate with tenderers the initial and any subsequent tenders or parts thereof, except their final tenders, in order to improve their content. The minimum requirements and the criteria specified in the procurement documents shall not be subject to negotiation.

A contracting authority may award a contract on the basis of the initial tender without negotiation where it has indicated in the procurement documents that it reserves the possibility to do so.

5. The contracting authority may use:

- (a) the open or restricted procedure for any purchase;
- (b) the procedures involving a call for expression of interest for contracts with a value below the thresholds referred to in Article 118(1), to preselect candidates to be invited to submit tenders in response to future restricted invitations to tender, or to collect a list of vendors to be invited to submit requests to participate or submit tenders;
- (c) the design contest to acquire a plan or design selected by a jury after being put out to competition;
- (d) the innovation partnership to develop an innovative product, service or innovative works and for the subsequent purchase of the resulting supply, services or works;
- (e) the competitive procedure with negotiation or the competitive dialogue for concession contracts, for the service contracts referred to in Annex XIV to Directive 2014/24/EU of the European Parliament and of the Council (\*), in cases where only irregular or unacceptable tenders were submitted in response to an open or restricted procedure after the initial procedure has been completed, and for cases where this is justified by the specific circumstances linked, inter alia, to the nature or the complexity of the subject matter of the contract or to the specific type of contract, as further detailed in the delegated acts adopted pursuant to this Regulation;
- (f) the negotiated procedure for contracts with a value below the thresholds referred to in Article 118(1) or the negotiated procedure without prior publication, only for specific types of purchases falling outside the scope of Directive 2014/24/EU and under clearly defined exceptional circumstances as set out in the delegated acts adopted pursuant to this Regulation.

6. The dynamic purchasing system shall be open throughout its duration to any economic operator who satisfies the selection criteria.

The contracting authority shall follow the rules of the restricted procedure for procurement through a dynamic purchasing system.

7. The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on the types of, and additional detailed arrangements for, procurement procedures for the award of contracts referred to in paragraph 1 with reference to their value in comparison to the thresholds referred to in Article 118(1), on the minimum number of candidates to be invited for each type of procedure, on the further conditions for using the different procedures, on a dynamic purchasing system and on irregular and unacceptable tenders.

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(\*) Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28.3.2014, p. 65).'

(10) The following Article is inserted:

*'Article 104a*

**Inter-institutional procurement and joint procurement**

1. Where a contract or a framework contract is of interest to two or more institutions, executive agencies or bodies referred to in Articles 208 and 209, and whenever there is a possibility for realising efficiency gains, the contracting authorities concerned may carry out the procedure and the management of the subsequent contract or framework contract on an inter-institutional basis under the lead of one of the contracting authorities.

The bodies established by the Council under the CFSP pursuant to Title V of the TEU may also participate in inter-institutional procedures.

The terms of a framework contract may only apply between those contracting authorities that are identified for that purpose from the launch of the procurement procedure and those economic operators that are party to the framework contract.

2. Where a contract or framework contract is necessary for the implementation of a joint action between an institution and one or more contracting authorities from Member States, the procurement procedure may be carried out jointly by the institution and the contracting authorities.

Joint procurement may be conducted with EFTA states and Union candidate countries if this possibility has been specifically provided for in a bilateral or multilateral treaty.

In the case of a joint procurement procedure, the procedural provisions applicable to the institutions shall apply.

Where the share pertaining to or managed by the contracting authority of a Member State in the total estimated value of the contract is equal to or above 50 %, or in other duly justified cases, the institution may decide that the procedural rules applicable to the contracting authority of a Member State shall apply to joint procurement, provided that those rules can be considered as equivalent to those of the institution.

The institution and the contracting authority from a Member State, an EFTA State or a Union candidate country, concerned by the joint procurement shall agree in particular upon the detailed practical arrangements for the evaluation of the requests for participation or of the tenders, the award of the contract, the law applicable to the contract and the competent court for hearing disputes.

3. The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on inter-institutional procurement.'

(11) Article 105 is replaced by the following:

*'Article 105*

**Preparation of a procurement procedure**

1. Before launching a procurement procedure, the contracting authority may conduct a preliminary market consultation with a view to preparing the procedure.

2. In the procurement documents, the contracting authority shall identify the subject matter of the procurement by providing a description of its needs and the characteristics required of the works, supplies or services to be bought, and shall specify the applicable exclusion, selection and award criteria. The contracting authority shall also indicate which elements define the minimum requirements to be met by all tenders. Minimum requirements shall include compliance with applicable environmental, social and labour law obligations established by Union law, national legislation, collective agreements or the applicable international social and environmental conventions listed in Annex X to Directive 2014/24/EU.

3. The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on the content of procurement documents, in particular on the draft contracts, on the characteristics of environmental, social or other labels, norms and standards, and on the preliminary market consultation.'

(12) The following Article is inserted:

*Article 105a*

**Protection of the Union's financial interests by means of detection of risks and imposition of administrative sanctions**

1. In order to protect the Union's financial interests, the Commission shall set up and operate an early detection and exclusion system.

The purpose of such a system shall be to facilitate:

- (a) the early detection of risks threatening the Union's financial interests;
- (b) the exclusion of an economic operator which is in one of the exclusion situations listed in Article 106(1);
- (c) the imposition of a financial penalty on an economic operator pursuant to Article 106(13).

2. The decision to exclude and/or to impose a financial penalty shall be taken by the contracting authority. Such a decision shall be based on a final judgment or on a final administrative decision.

However, in the situations referred to in Article 106(2), the contracting authority shall refer the case to the panel referred to in Article 108 in order to ensure a centralised assessment of those situations. In such cases, the contracting authority shall take its decision based on a preliminary classification in law, having regard to a recommendation of the panel.

Where the contracting authority decides to deviate from the recommendation of the panel, it shall justify such decision to the panel.

3. In the cases referred to in Article 107, the contracting authority shall reject an economic operator from a given procedure.'

(13) Article 106 is replaced by the following:

*Article 106*

**Exclusion criteria and administrative sanctions**

1. The contracting authority shall exclude an economic operator from participating in procurement procedures governed by this Regulation where:

- (a) the economic operator is bankrupt, subject to insolvency or winding-up procedures, where its assets are being administered by a liquidator or by a court, where it is in an arrangement with creditors, where its business activities are suspended, or where it is in any analogous situation arising from a similar procedure provided for under national laws or regulations;
- (b) it has been established by a final judgment or a final administrative decision that the economic operator is in breach of its obligations relating to the payment of taxes or social security contributions in accordance with the law of the country in which it is established, with those of the country in which the contracting authority is located or those of the country of the performance of the contract;
- (c) it has been established by a final judgment or a final administrative decision that the economic operator is guilty of grave professional misconduct by having violated applicable laws or regulations or ethical standards of the profession to which the economic operator belongs, or by having engaged in any wrongful conduct which has an impact on its professional credibility where such conduct denotes wrongful intent or gross negligence, including, in particular, any of the following:
  - (i) fraudulently or negligently misrepresenting information required for the verification of the absence of grounds for exclusion or the fulfilment of selection criteria or in the performance of a contract;

- (ii) entering into agreement with other economic operators with the aim of distorting competition;
  - (iii) violating intellectual property rights;
  - (iv) attempting to influence the decision-making process of the contracting authority during the procurement procedure;
  - (v) attempting to obtain confidential information that may confer upon it undue advantages in the procurement procedure;
- (d) it has been established by a final judgment that the economic operator is guilty of any of the following:
- (i) fraud, within the meaning of Article 1 of the Convention on the protection of the European Communities' financial interests, drawn up by the Council Act of 26 July 1995 (\*);
  - (ii) corruption, as defined in Article 3 of the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, drawn up by the Council Act of 26 May 1997 (\*\*), and in Article 2(1) of Council Framework Decision 2003/568/JHA (\*\*\*), as well as corruption as defined in the law of the country where the contracting authority is located, the country in which the economic operator is established or the country of the performance of the contract;
  - (iii) participation in a criminal organisation, as defined in Article 2 of Council Framework Decision 2008/841/JHA (\*\*\*\*);
  - (iv) money laundering or terrorist financing, as defined in Article 1 of Directive 2005/60/EC of the European Parliament and of the Council (\*\*\*\*\*);
  - (v) terrorist-related offences or offences linked to terrorist activities, as defined in Articles 1 and 3 of Council Framework Decision 2002/475/JHA (\*\*\*\*\*), respectively, or inciting, aiding, abetting or attempting to commit such offences, as referred to in Article 4 of that Decision;
  - (vi) child labour or other forms of trafficking in human beings as defined in Article 2 of Directive 2011/36/EU of the European Parliament and of the Council (\*\*\*\*\*);
- (e) the economic operator has shown significant deficiencies in complying with main obligations in the performance of a contract financed by the budget, which has led to its early termination or to the application of liquidated damages or other contractual penalties, or which has been discovered following checks, audits or investigations by an authorising officer, OLAF or the Court of Auditors;
- (f) it has been established by a final judgment or final administrative decision that the economic operator has committed an irregularity within the meaning of Article 1(2) of Council Regulation (EC, Euratom) No 2988/95 (\*\*\*\*\*).

2. In the absence of a final judgment or, where applicable, a final administrative decision in the cases referred to in points (c), (d) and (f) of paragraph 1, or in the case referred to in point (e) of paragraph 1, the contracting authority shall exclude an economic operator on the basis of a preliminary classification in law of a conduct referred to in those points, having regard to established facts or other findings contained in the recommendation of the panel referred to in Article 108.

The preliminary classification referred to in the first subparagraph does not prejudice the assessment of the conduct of the economic operator concerned by the competent authorities of the Member States under national law. The contracting authority shall review its decision to exclude the economic operator and/or to impose a financial penalty on it without delay following the notification of a final judgment or a final administrative decision. In cases where the final judgment or the final administrative decision does not set the duration of the exclusion, the contracting authority shall set this duration on the basis of established facts and findings and having regard to the recommendation of the panel referred to in Article 108.

Where such final judgment or final administrative decision holds that the economic operator is not guilty of the conduct subject to a preliminary classification in law, on the basis of which it has been excluded, the contracting authority shall, without delay, bring an end to that exclusion and/or reimburse, as appropriate, any financial penalty imposed.

The facts and findings referred to in the first subparagraph shall include, in particular:

- (a) facts established in the context of audits or investigations carried out by the Court of Auditors, OLAF or internal audit, or any other check, audit or control performed under the responsibility of the authorising officer;
- (b) non-final administrative decisions which may include disciplinary measures taken by the competent supervisory body responsible for the verification of the application of standards of professional ethics;
- (c) decisions of the ECB, the EIB, the European Investment Fund or international organisations;
- (d) decisions of the Commission relating to the infringement of the Union's competition rules or of a national competent authority relating to the infringement of Union or national competition law.

3. Any decision of the contracting authority taken under Articles 106 to 108 or, where applicable, any recommendation of the panel referred to in Article 108, shall be made in compliance with the principle of proportionality and in particular taking into account the seriousness of the situation, including the impact on the Union's financial interests and image, the time which has elapsed since the relevant conduct, its duration and its recurrence, the intention or degree of negligence, the limited amount at stake for point (b) of paragraph 1 of this Article or any other mitigating circumstances, such as the degree of collaboration of the economic operator with the relevant competent authority and its contribution to the investigation as recognised by the contracting authority, or the disclosure of the exclusion situation by means of the declaration referred to in paragraph 10 of this Article.

4. The contracting authority shall exclude the economic operator where a person who is a member of the administrative, management or supervisory body of that economic operator, or who has powers of representation, decision or control with regard to that economic operator, is in one or more of the situations referred to in points (c) to (f) of paragraph 1. The contracting authority shall also exclude the economic operator where a natural or legal person that assumes unlimited liability for the debts of that economic operator is in one or more of the situations referred to in point (a) or (b) of paragraph 1.

5. Where the budget is implemented under indirect management with third countries, the Commission may, having regard, where applicable, to the recommendation of the panel referred to in Article 108, take an exclusion decision and/or impose a financial penalty under the conditions set out in this Article, following the failure of the third country entrusted pursuant to point (c) of Article 58(1) to do so. This shall not affect the responsibility, under Article 60(3), of the third country to prevent, detect, correct and notify irregularities and fraud, or to take an exclusion decision or to impose financial penalties.

6. In the cases referred to in paragraph 2 of this Article, the contracting authority may exclude an economic operator provisionally without the prior recommendation of the panel referred to in Article 108, where the participation of the economic operator concerned in a procurement procedure would constitute a serious and imminent threat to the Union's financial interests. In such cases, the contracting authority shall immediately refer the case to the panel and shall take a final decision no later than 14 days after having received the recommendation of the panel.

7. The contracting authority, having regard, where applicable, to the recommendation of the panel referred to in Article 108, shall not exclude an economic operator from participating in a procurement procedure where:

- (a) the economic operator has taken remedial measures specified in paragraph 8 of this Article, thus demonstrating its reliability. This point shall not apply in the case referred to in point (d) of paragraph 1 of this Article;
- (b) it is indispensable to ensure the continuity of service, for a limited duration and pending the adoption of remedial measures specified in paragraph 8 of this Article;
- (c) such an exclusion would be disproportionate on the basis of the criteria referred to in paragraph 3 of this Article.

In addition, point (a) of paragraph 1 of this Article shall not apply in the case of the purchase of supplies on particularly advantageous terms from either a supplier which is definitively winding up its business activities or the liquidators in an insolvency procedure, an arrangement with creditors, or a similar procedure under national law.

In the cases of non-exclusion referred to in the first and second subparagraphs of this paragraph, the contracting authority shall specify the reasons for not excluding the economic operator and inform the panel referred to in Article 108 of those reasons.

8. The measures referred to in paragraph 7, which remedy the exclusion situation may include, in particular:

- (a) measures to identify the origin of the situations giving rise to exclusion and concrete technical, organisational and personnel measures within the relevant business area of the economic operator, appropriate to correct the conduct and prevent its further occurrence;
- (b) proof that the economic operator has undertaken measures to compensate or redress the damage or harm caused to the Union's financial interests by the underlying facts giving rise to the exclusion situation;
- (c) proof that the economic operator has paid or secured the payment of any fine imposed by the competent authority or of any taxes or social security contributions referred to in point (b) of paragraph 1.

9. The contracting authority, having regard, where applicable, to the revised recommendation of the panel referred to in Article 108, shall, without delay, revise its decision to exclude an economic operator *ex officio* or on request from that economic operator, where the latter has taken remedial measures sufficient to demonstrate its reliability or has provided new elements demonstrating that the exclusion situation referred to in paragraph 1 of this Article no longer exists.

10. A candidate or tenderer shall declare, at the moment of submitting the request to participate or the tender, whether it is in one of the situations referred to in paragraph 1 of this Article or in Article 107(1), and, where applicable, whether it has taken any remedial measures referred to in point (a) of paragraph 7 of this Article. Where appropriate, the candidate or tenderer shall provide the same declaration signed by an entity on whose capacity it intends to rely. However, the contracting authority may waive these requirements for very low value contracts to be defined in the delegated acts adopted pursuant to Article 210.

11. Whenever requested by the contracting authority and where this is necessary to ensure the proper conduct of the procedure, the candidate or tenderer, as well as the entity on whose capacity the candidate or tenderer intends to rely, shall provide:

- (a) appropriate evidence that the candidate, tenderer or entity is not in one of the exclusion situations referred to in paragraph 1;
- (b) information on persons that are members of the administrative, management or supervisory body of the candidate, tenderer or entity or that have powers of representation, decision or control with regard to that candidate, tenderer or entity and appropriate evidence that one or several of those persons are not in one of the exclusion situations referred to in points (c) to (f) of paragraph 1;
- (c) appropriate evidence that natural or legal persons that assume unlimited liability for the debts of that candidate, tenderer or entity are not in an exclusion situation referred to in point (a) or (b) of paragraph 1.

12. The contracting authority may also apply paragraphs 1 to 11 to a subcontractor. In such a case, the contracting authority shall require that a candidate or tenderer replaces a subcontractor or an entity on whose capacity the candidate or tenderer intends to rely, which is in an exclusion situation.

13. In order to ensure a deterrent effect, the contracting authority may, having regard, where applicable, to the recommendation of the panel referred to in Article 108, impose a financial penalty on an economic operator who has attempted to obtain access to Union funds by participating or requesting to participate in a procurement procedure while being, without having declared it in accordance with paragraph 10 of this Article, in one of the following exclusion situations:

- (a) regarding the situations referred to in points (c), (d), (e) and (f) of paragraph 1 of this Article, as an alternative to a decision to exclude the economic operator, where such an exclusion would be disproportionate on the basis of the criteria referred to in paragraph 3 of this Article;
- (b) regarding the situations referred to in points (c), (d) and (e) of paragraph 1 of this Article, in addition to an exclusion which is necessary to protect the Union's financial interests, where the economic operator has adopted a systemic and recurrent conduct with the intention to unduly obtain Union funds.

The amount of the financial penalty shall represent between 2 % and 10 % of the total value of the contract.

14. The duration of exclusion shall not exceed any of the following:

- (a) the duration, if any, set by the final judgement or the final administrative decision of a Member State;
- (b) five years for the cases referred to in point (d) of paragraph 1;
- (c) three years for the cases referred to in points (c), (e) and (f) of paragraph 1.

An economic operator shall be excluded as long as it is in one of the situations referred to in points (a) and (b) of paragraph 1.

15. The limitation period to exclude and/or impose financial penalties on an economic operator shall be five years calculated from any of the following:

- (a) the date of the conduct giving rise to exclusion or, in the case of continued or repeated acts, the date on which the conduct ceases, in the cases referred to in points (b), (c), (d) and (e) of paragraph 1 of this Article;
- (b) the date of the final judgment of a national jurisdiction or of the final administrative decision in the cases referred to in points (b), (c) and (d) of paragraph 1 of this Article.

The limitation period shall be interrupted by an act of the Commission, OLAF, the panel referred to in Article 108 or of any entity involved in the implementation of the budget, notified to the economic operator and relating to investigations or judicial proceedings. A new limitation period shall begin to run on the day following the interruption.

For the purpose of point (f) of paragraph 1 of this Article, the limitation period to exclude and/or impose financial penalties on an economic operator provided for in Article 3 of Regulation (EC, Euratom) No 2988/95 shall apply.

Where the conduct of the economic operator qualifies under several of the grounds listed in paragraph 1 of this Article, the limitation period of the most serious of those grounds shall apply.

16. In order to, where necessary, reinforce the deterrent effect of the exclusion and/or financial penalty, the Commission shall, subject to a decision of the contracting authority, publish on its internet site the following information related to the exclusion and, where applicable, the financial penalty in the cases referred to in points (c), (d), (e) and (f) of paragraph 1 of this Article:

- (a) the name of the economic operator concerned;
- (b) the exclusion situation by reference to paragraph 1 of this Article;
- (c) the duration of the exclusion and/or the amount of the financial penalty.

Where the decision on the exclusion and/or financial penalty has been taken on the basis of a preliminary classification as referred to in paragraph 2 of this Article, the publication shall indicate that there is no final judgment or, where applicable, final administrative decision. In those cases, information about any appeals, their status and their outcome, as well as any revised decision of the contracting authority, shall be published without delay. Where a financial penalty has been imposed, the publication shall also indicate whether that penalty has been paid.

The decision to publish the information is taken by the contracting authority either following the relevant final judgment or, where applicable, final administrative decision, or following the recommendation of the panel referred to in Article 108, as the case may be. That decision shall take effect three months after its notification to the economic operator.

The information published shall be removed as soon as the exclusion has come to an end. In the case of a financial penalty, the publication shall be removed six months after payment of that penalty.

In accordance with Regulation (EC) No 45/2001, where personal data is concerned, the contracting authority shall inform the economic operator of its rights under the applicable data protection rules and of the procedures available for exercising those rights.



17. The information referred to in paragraph 16 of this Article shall not be published in any of the following circumstances:

- (a) where it is necessary to preserve the confidentiality of an investigation or of national judicial proceedings;
- (b) where publication would cause disproportionate damage to the economic operator concerned or would otherwise be disproportionate on the basis of the proportionality criteria set out in paragraph 3 of this Article and to the amount of the financial penalty;
- (c) where a natural person is concerned, unless the publication of personal data is exceptionally justified, inter alia, by the seriousness of the conduct or its impact on the Union's financial interests. In such cases, the decision to publish the information shall duly take into consideration the right to privacy and other rights provided for in Regulation (EC) No 45/2001.

18. The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on the content of the declaration referred to in paragraph 10 of this Article, on the evidence referred to in point (a) of paragraph 11 of this Article, that an economic operator is not in one of the exclusion situations, including by reference to the European Single Procurement Document as provided for in Article 59(2) of Directive 2014/24/EU, and on the situations in which the contracting authority may or may not require the submission of such a declaration or evidence.

(\*) OJ C 316, 27.11.1995, p. 48.

(\*\*) OJ C 195, 25.6.1997, p. 1.

(\*\*\*) Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector (OJ L 192, 31.7.2003, p. 54).

(\*\*\*\*) Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime (OJ L 300, 11.11.2008, p. 42).

(\*\*\*\*\*) Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (OJ L 309, 25.11.2005, p. 15).

(\*\*\*\*\* ) Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism (OJ L 164, 22.6.2002, p. 3).

(\*\*\*\*\* ) Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (OJ L 101, 15.4.2011, p. 1).

(\*\*\*\*\* ) Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests (OJ L 312, 23.12.1995, p. 1).'

(14) Article 107 is replaced by the following:

*'Article 107*

#### **Rejection from a given procurement procedure**

1. The contracting authority shall not award a contract for a given procurement procedure to an economic operator who:

- (a) is in an exclusion situation established in accordance with Article 106;
- (b) has misrepresented the information required as a condition for participating in the procedure or has failed to supply that information;
- (c) was previously involved in the preparation of procurement documents where this entails a distortion of competition that cannot be remedied otherwise.

2. Before taking a decision to reject an economic operator from a given procurement procedure, the contracting authority shall give the economic operator the opportunity to submit its observations, unless the rejection has been justified in accordance with point (a) of paragraph 1 by an exclusion decision taken with regard to the economic operator, following an examination of its observations.

3. The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on the measures to avoid distortion of competition and on the declaration and evidence that an economic operator is not in one of the situations listed in paragraph 1 of this Article.’

(15) Article 108 is replaced by the following:

*Article 108*

### **The early detection and exclusion system**

1. Information exchanged within the early detection and exclusion system referred to in Article 105a of this Regulation shall be centralised in a database set up by the Commission and shall be managed in full compliance with the right to privacy and other rights provided for in Regulation (EC) No 45/2001 (“the database”).

Information shall be entered in the database by the relevant contracting authority in the context of its ongoing procurement procedures and existing contracts after notifying the economic operator concerned. Such notification may be exceptionally deferred, where there are compelling legitimate grounds to preserve the confidentiality of an investigation or of national judicial proceedings, until such compelling legitimate grounds to preserve the confidentiality cease to exist.

In accordance with Regulation (EC) No 45/2001, any economic operator subject to the early detection and exclusion system shall have the right to be informed of the data stored in the database upon its request to the Commission.

The information contained in the database shall be updated, where appropriate, following a rectification or an erasure or any modification of data. It shall only be published in accordance with Article 106(16) and (17) of this Regulation.

2. The early detection of risks threatening the Union’s financial interests, as referred to in point (a) of Article 105a(1) of this Regulation, shall be based on the transmission of information to the Commission by any of the following:

- (a) OLAF in accordance with Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council (\*) where an OLAF investigation in progress shows that it might be appropriate to take precautionary measures to protect the Union’s financial interests, with due regard to the respect for procedural and fundamental rights, and to the protection of whistle-blowers;
- (b) an authorising officer of the Commission, of a European office set up by the Commission or of an executive agency in case of presumed grave professional misconduct, irregularity, fraud, corruption or serious breach of contract;
- (c) an institution, a European office or an agency other than those referred to in point (b) of this paragraph or a body in the cases of presumed grave professional misconduct, irregularity, fraud, corruption or serious breach of contract;
- (d) entities implementing the budget in accordance with Article 59 of this Regulation, in cases of detected fraud and/or irregularity, where required by sector-specific rules;
- (e) entities implementing the budget in accordance with Article 60 of this Regulation, in cases of detected fraud and/or irregularity.

3. Except where information is to be submitted in accordance with sector-specific rules, the information to be transmitted pursuant to paragraph 2 of this Article shall include:

- (a) the identification of the economic operator concerned;
- (b) a summary of the risks detected or the facts in question;

- (c) information that could assist the authorising officer in carrying out the verification referred to in paragraph 4 of this Article or in taking a decision on exclusion as referred to in Article 106(1) or (2), or a decision to impose a financial penalty as referred to in Article 106(13);
- (d) where applicable, any special measures necessary to ensure the confidentiality of the information transmitted, including measures for the safeguarding of evidence to protect the investigation or the national judicial proceedings.

4. The Commission shall transmit the information referred to in paragraph 3 of this Article without delay to its authorising officers and those of its executive agencies, all other institutions, bodies, European offices and agencies in order to allow them to carry out the necessary verification in respect of their ongoing procurement procedures and existing contracts.

In carrying out this verification, the authorising officer shall exercise his or her powers as foreseen under Article 66 and shall not go beyond what is foreseen in the terms and conditions of the procurement documents and contractual provisions.

The retention period for the information transmitted in accordance with paragraph 3 of this Article shall not exceed one year. If, during this period, the contracting authority requests the panel to issue a recommendation in an exclusion case, the retention period may be extended until such time as the contracting authority has taken a decision.

5. The contracting authority may take a decision to exclude and/or to impose a financial penalty and a decision to publish the related information only after having obtained a recommendation of the panel where such a decision is based on a preliminary classification as referred to in Article 106(2).

6. The panel shall be convened at the request of any contracting authority, as referred to in Article 117.

7. The panel shall be composed of:

- (a) a standing high-level independent chair;
- (b) two representatives of the Commission as the owner of the system, who shall express a joint position; and
- (c) one representative of the requesting contracting authority.

The composition of the panel shall ensure the appropriate legal and technical expertise.

The panel shall be assisted by a permanent secretariat, provided by the Commission, which shall ensure the continuous administration of the panel.

8. The following procedure shall apply before the panel:

- (a) the requesting contracting authority shall refer the case to the panel with the necessary information referred to in paragraph 3 of this Article, the facts and findings referred to in Article 106(2) and the alleged exclusion situation;
- (b) the panel shall notify the economic operator without delay of the facts in question and their preliminary classification in law, which may qualify as an exclusion situation referred to in points (c), (d), (e) and (f) of Article 106(1) and/or may lead to the imposition of a financial penalty. The panel shall simultaneously make the same notification to the other contracting authorities;
- (c) before adopting any recommendation, the panel shall give the economic operator and the notified contracting authorities the opportunity to submit observations. The economic operator and the notified contracting authorities shall have at least 15 days to submit their observations;

- (d) in the cases referred to in points (d) and (f) of Article 106(1), the notification referred to in point (b) of this paragraph and the opportunity referred to in point (c) of this paragraph may be exceptionally deferred where there are compelling legitimate grounds to preserve the confidentiality of an investigation or of national judicial proceedings, until such compelling legitimate grounds to preserve the confidentiality cease to exist;
- (e) where the request of the contracting authority is based, inter alia, on the information provided by OLAF, that Office shall cooperate with the panel in accordance with Regulation (EU, Euratom) No 883/2013, with due regard to the respect for procedural and fundamental rights, and to the protection of whistle-blowers;
- (f) the panel shall adopt its recommendation within 45 days from the receipt of the request of the contracting authority. Where the panel requests additional information from the economic operator, that period shall be extended by up to 15 days. In exceptional and duly justified cases, the panel may further extend the period to adopt its recommendation by up to one month. Where the economic operator fails to submit its observations or supply requested information within the time limit specified, the panel may proceed with the adoption of its recommendation.

9. The recommendation of the panel to exclude and/or impose a financial penalty shall contain, where applicable, the following elements:

- (a) the facts or findings referred to in Article 106(2) and their preliminary classification in law;
- (b) an assessment of the need to impose a financial penalty and its amount;
- (c) an assessment of the need to exclude the economic operator concerned and, in that case, the suggested duration of such an exclusion;
- (d) an assessment of the need to publish the information related to the economic operator who is excluded and/or subject to a financial penalty;
- (e) an assessment of remedial measures taken by the economic operator, if any.

Where the contracting authority envisages taking a more severe decision than what has been recommended by the panel, it shall ensure that such a decision is taken with due respect for the right to be heard and for the rules of personal data protection.

10. The panel shall revise its recommendation during the exclusion period on request from the contracting authority in the cases referred to in Article 106(9) or following the notification of a final judgment or a final administrative decision establishing the grounds for exclusion where such a judgment or decision does not set the duration of the exclusion, as referred to in second subparagraph of Article 106(2).

The panel shall notify the requesting contracting authority without delay of its revised recommendation, following which the contracting authority shall review its decision.

11. The Court of Justice of the European Union shall have unlimited jurisdiction to review a decision whereby the contracting authority excludes an economic operator and/or imposes on it a financial penalty, including reducing or increasing the duration of the exclusion and/or cancelling, reducing or increasing the financial penalty imposed.

12. All entities participating in the implementation of the budget in accordance with Article 58 shall be granted access by the Commission to the information on exclusion decisions pursuant to Article 106 to enable them to verify whether there is an exclusion in the system with a view to taking this information into account, as appropriate and on their own responsibility, when awarding contracts in the implementation of the budget.

13. As part of the annual report of the Commission to the European Parliament and to the Council, as referred to in Article 325(5) TFEU, the Commission shall provide aggregate information on the decisions taken by the contracting authorities under Articles 105a to 108 of this Regulation. That report shall also provide further information on any decisions taken by the contracting authorities pursuant to point (b) of Article 106(7) of this Regulation and Article 106(17) of this Regulation and on any decisions by the contracting authorities to deviate from the recommendation of the panel pursuant to the third subparagraph of Article 105a(2) of this Regulation.

The information referred to in the first subparagraph of this paragraph shall be provided with due regard to confidentiality requirements and shall, in particular, not allow for the identification of the economic operator concerned.

14. The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on the Union's system for the protection of the Union's financial interests, including its database and its standardised procedures, on the organisation and composition of the panel, on the appointment and the independence of the chair, and on the prevention and management of conflicts of interest of the chair and of the members of the panel.

(\*) Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999 (OJ L 248, 18.9.2013, p. 1).'

(16) Article 109 is deleted.

(17) Article 110 is replaced by the following:

*'Article 110*

#### **Award of contracts**

1. Contracts shall be awarded on the basis of award criteria provided that the contracting authority has verified the following conditions:

- (a) the tender complies with the minimum requirements specified in the procurement documents;
- (b) the candidate or tenderer is not excluded under Article 106 or rejected under Article 107, and
- (c) the candidate or tenderer meets the selection criteria specified in the procurement documents and is not subject to conflicting interests which may negatively affect the performance of the contract.

2. The contracting authority shall apply the selection criteria to evaluate the capacity of the candidate or tenderer. Selection criteria may only relate to the legal and regulatory capacity to pursue the professional activity, the economic and financial capacity, and the technical and professional capacity.

3. The contracting authority shall apply the award criteria to evaluate the tender.

4. The contracting authority shall base the award of contracts on the most economically advantageous tender, which shall consist in one of three award methods: lowest price, lowest cost or best price-quality ratio.

For the lowest cost method, the contracting authority shall use a cost-effectiveness approach including life-cycle costing.

For the best price-quality ratio, the contracting authority shall take into account the price or cost and other quality criteria linked to the subject matter of the contract.

5. The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning details on the selection criteria, the award criteria, including quality criteria, and the most economically advantageous tender as well as the methods used to assess the life cycle costs of the purchase. The Commission shall also be empowered to adopt delegated acts in accordance with Article 210 concerning the documents that give evidence of legal capacity, economic and financial capacity and evidence of technical and professional capacity and detailed rules on electronic auctions and abnormally low tenders.'

(18) Article 111 is replaced by the following:

*'Article 111*

#### **Submission, electronic communication and evaluation**

1. The arrangements for submitting tenders shall be such as to ensure that there is genuine competition and that the contents of tenders remain confidential until they are all opened simultaneously.

2. The Commission shall ensure by appropriate means and in application of Article 95 that tenderers may enter the contents of the tenders and any supporting evidence in an electronic format ("e-procurement"), except in duly justified cases specified in the delegated acts adopted in accordance with Article 210. Any electronic communication system used to support communications and information exchanges shall be non-discriminatory, generally available and interoperable with information and communication technology (ICT) products in general use and shall not restrict economic operators' access to the procurement procedure.

The Commission shall report regularly to the European Parliament and to the Council on the progress of the implementation of this paragraph.

3. If deemed appropriate and proportionate, the contracting authority may require tenderers to submit a guarantee in advance to make sure that the tenders submitted are not withdrawn. The required guarantee shall be proportionate to the estimated value of the contract and shall be set at an appropriate level in order to prevent discrimination against diverse economic operators.

4. The contracting authority shall open all requests to participate and tenders. However, it shall reject:

- (a) requests to participate and tenders which do not comply with the time limit for receipt, without opening them;
- (b) tenders received already open, without examining their content.

5. The contracting authority shall evaluate all requests to participate or tenders not rejected during the opening phase laid down in paragraph 4 on the basis of the criteria specified in the procurement documents with a view to awarding the contract or to proceeding with an electronic auction.

6. Requests to participate and tenders which do not comply with all the minimum requirements set out in the procurement documents shall be rejected.

Except in duly justified cases, the evaluation committee or the contracting authority shall ask candidates or tenderers to provide additional material or missing documents, to clarify the documents supporting exclusion and selection criteria or to explain an abnormally low tender, within the time limit it specifies.

7. The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on the time limits for receipt of tenders and requests to participate, access to procurement documents, the time limits to provide additional information, the time limits in urgent cases, as well as on the means of communication for the submission of tenders and electronic catalogues, detailed rules on the technical and legal requirements for electronic exchange systems and on the exception from the use of electronic submission of tenders in duly justified cases. Furthermore, the Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on the possibility of requesting a tender guarantee and the conditions for call in and release of the guarantee, the opening and evaluation of tenders and requests to participate and the establishment and composition of opening and evaluation committees.'

(19) Article 112 is replaced by the following:

*'Article 112*

#### **Contacts during the procurement procedure**

1. While the procurement procedure is under way, all contacts between the contracting authority and candidates or tenderers shall satisfy conditions ensuring transparency, equal treatment and good administration, as set out in Article 96. After the time limit for receipt of tenders has expired, the contracting authority shall contact the tenderer in order to correct obvious clerical errors or to require confirmation of a specific or technical element, except in duly justified cases. The aforementioned contacts as well as any other contacts shall not lead to changes to the procurement documents or to substantial changes to the terms of the submitted tender, except where a procurement procedure set out in Article 104(1) specifically allows for those possibilities.

2. The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on contacts that are allowed and contacts which are required between the contracting authority and candidates or tenderers during the procurement procedure.'

(20) Article 113 is replaced by the following:

*Article 113*

#### **Award decision and information to candidates or tenderers**

1. The authorising officer responsible shall decide to whom the contract is to be awarded, in compliance with the selection and award criteria specified in the procurement documents.

2. The contracting authority shall notify all candidates or tenderers, whose requests to participate or tenders are rejected, of the grounds on which the decision was taken, as well as the duration of the standstill period referred to in Article 118(2).

For the award of specific contracts under a framework contract with reopening of competition, the contracting authority shall inform the tenderers of the result of the evaluation.

3. The contracting authority shall inform each tenderer who is not in an exclusion situation, whose tender is compliant with the procurement documents and who makes a request in writing, of any of the following:

(a) the name of the tenderer, or tenderers in the case of a framework contract, to whom the contract is awarded and, except in the case of a specific contract under a framework contract with reopening of competition, the characteristics and relative advantages of the successful tender, the price paid or contract value, whichever is appropriate;

(b) the progress of negotiation and dialogue with tenderers.

However, the contracting authority may decide to withhold certain information where its release would impede law enforcement, would be contrary to the public interest or would prejudice the legitimate commercial interests of economic operators or might distort fair competition between them.

4. The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on the requirements for, and content of, the evaluation report and the award decision, and on information to candidates and tenderers.’

(21) Article 114 is replaced by the following:

*Article 114*

#### **Cancellation of the procurement procedure**

The contracting authority may, before the contract is signed, cancel the procurement procedure without the candidates or tenderers being entitled to claim any compensation.

The decision shall be justified and brought to the attention of the candidates or tenderers as soon as possible.’

(22) The following Article is inserted:

*Article 114a*

#### **Performance and modifications of the contract**

1. Performance of the contract shall not start before the contract is signed.

2. The contracting authority may modify a contract or framework contract without a procurement procedure only in the cases provided for in paragraph 3 and provided the modification does not alter the subject matter of the contract or framework contract.

3. A contract or a specific contract under a framework contract may be modified without a new procurement procedure in any of the following cases:
- (a) for additional works, supplies or services by the original contractor that have become necessary and that were not included in the initial procurement, where the following conditions are fulfilled:
    - (i) a change of contractor cannot be made for technical reasons linked to interchangeability or interoperability requirements with existing equipment, services or installations;
    - (ii) a change of contractor would cause substantial duplication of costs for the contracting authority; and
    - (iii) any increase in price, including the net cumulative value of successive modifications, does not exceed 50 % of the initial contract value;
  - (b) where the following conditions are fulfilled:
    - (i) the need for modification has been brought about by circumstances which a diligent contracting authority could not foresee; and
    - (ii) any increase in price does not exceed 50 % of the initial contract value;
  - (c) where the value of the modification is below the following thresholds:
    - (i) the thresholds referred to in Article 118(1) and the delegated acts adopted pursuant to Article 190(2) in the field of external actions applicable at the time of the modification; and
    - (ii) 10 % of the initial contract value for public service and supply contracts and works or services concession contracts and 15 % of the initial contract value for public works contracts;
  - (d) where the minimum requirements of the initial procurement procedure are not altered. In that case any ensuing modification of value shall comply with the conditions set under point (c) of this subparagraph, unless such modification of value results from the strict application of the procurement documents or contractual provisions.

Points (a), (c) and (d) of the first subparagraph of this paragraph may also apply to framework contracts.

The initial contract value shall not take into account price revisions.

The net cumulative value of several successive modifications under point (c) of the first subparagraph of this paragraph shall not exceed any threshold referred to therein.

The contracting authority shall apply the ex post publicity measures set out in Article 103.1.

- (23) Articles 115 to 120 are replaced by the following:

*Article 115*

#### **Guarantees**

1. In cases other than low value contracts, the contracting authority may, if it deems it appropriate and proportionate on a case-by-case basis and subject to a risk-analysis, require contractors to submit a guarantee in order to do any of the following:
- (a) limit the financial risks connected with payment of pre-financing;
  - (b) ensure compliance with substantial contractual obligations in the case of works, supplies or complex services;
  - (c) ensure full performance of the contract during the contract liability period.



2. The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on the types of guarantees that may be required from contractors, including criteria for risk analysis, and on the maximum amount of each type of guarantee as a percentage of the total value of the contract.

#### *Article 116*

##### **Substantial errors, irregularities or fraud**

1. For the purposes of this Article, a “substantial error” means any infringement of a provision of a contract resulting from an act or an omission, which causes or might cause a loss to the budget.

2. Where the procedure proves to have been subject to substantial errors, irregularities or fraud, the contracting authority shall suspend it and may take any necessary measures, including the cancellation of the procedure.

3. Where, after the signature of the contract, the procedure or the performance of the contract proves to have been subject to substantial errors, irregularities or fraud, the contracting authority may suspend performance of the contract or, where appropriate, terminate it.

Performance of contracts may also be suspended in order to verify whether presumed substantial errors, irregularities or fraud have occurred.

Where substantial errors, irregularities or fraud are attributable to the contractor, the contracting authority may, in addition, refuse to make payments or recover amounts unduly paid, to an extent proportionate to the seriousness of the substantial errors, irregularities or fraud.

4. OLAF shall exercise the power conferred on the Commission by Council Regulation (Euratom, EC) No 2185/96 (\*) to carry out on-the-spot inspections and checks in the Member States and, in accordance with the cooperation and mutual assistance agreements in force, in third countries and on the premises of international organisations.

5. The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on the suspension of the performance of a contract in the event of substantial errors, irregularities or fraud.

#### *Article 117*

##### **The contracting authority**

1. The institutions within the meaning of Article 2, executive agencies and bodies within the meaning of Articles 208 and 209 shall be deemed to be contracting authorities in the case of contracts awarded on their own account, except where they purchase from a central purchasing body. Departments of those institutions shall not be deemed to be contracting authorities where they conclude administrative arrangements amongst themselves.

Those institutions shall delegate, in accordance with Article 65, the necessary powers for the exercise of the function of contracting authority.

2. The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on the delegation of the function of contracting authority and on central purchasing bodies.

#### *Article 118*

##### **Thresholds applicable and standstill period**

1. To award public and concession contracts, the contracting authority shall respect the thresholds laid down in points (a) and (b) of Article 4 of Directive 2014/24/EU when selecting a procedure set out in Article 104(1) of this Regulation. Those thresholds shall determine the publicity measures set out in Article 103(1) and (2) of this Regulation.

2. Subject to exceptions and conditions to be specified in the delegated acts adopted pursuant to this Regulation, in the case of contracts the value of which exceeds the thresholds referred to in paragraph 1, the contracting authority shall not sign the contract or framework contract with the successful tenderer until a standstill period has elapsed.

3. The standstill period shall have a duration of 10 days when using electronic means of communication and 15 days when using other means.

4. The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on separate contracts and contracts with lots, estimating the value of public and concession contracts and the standstill period before the signature of the contract.

#### *Article 119*

##### **Rules on access to procurement**

Participation in procurement procedures shall be open on equal terms to all natural and legal persons within the scope of the Treaties and to all natural and legal persons established in a third country which has a special agreement with the Union in the field of public procurement under the conditions laid down in that agreement. It shall also be open to international organisations.

The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on the evidence to be provided in relation to access to procurement.

#### *Article 120*

##### **Procurement rules of the World Trade Organisation**

Where the plurilateral Agreement on Government Procurement concluded within the World Trade Organisation applies, the procurement procedure shall also be open to economic operators established in the states which have ratified that agreement, under the conditions laid down therein.

(\*) Council Regulation (Euratom, EC) No 2185/96 of 11 November 1996 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities (OJ L 292, 15.11.1996, p. 2).'

(24) Article 131 is amended as follows:

(a) paragraph 4 is replaced by the following:

'4. Article 105a, paragraphs 1 to 4, 6 and 7, except point (b) of the first subparagraph and the second subparagraph of that paragraph, paragraphs 8, 9, 11 and 13 to 17 of Article 106 and Article 108 shall apply to grant applicants and beneficiaries. Article 107 shall apply to applicants. Applicants shall declare whether they are in one of the situations referred to in Article 106(1) or Article 107 and, where applicable, whether they have taken remedial measures as referred to in point (a) of Article 106(7).

When carrying out the necessary verification in respect of its ongoing grant procedures and existing agreements in accordance with Article 108(4), the authorising officer shall ensure that the applicant or beneficiary has been given the opportunity to present its observations before adopting any measure adversely affecting its rights.;

(b) paragraph 5 is deleted;

(c) paragraph 6 is replaced by the following:

'6. The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on the arrangements for grant applications, evidence of not falling within an exclusion situation, applicants without legal personality, legal persons forming one applicant, eligibility criteria and low value grants.'

(25) In Article 138(2), the third subparagraph is replaced by the following:

‘The rules of the contest shall at least lay down the conditions for participation including the exclusion criteria, the award criteria, the amount of the prize and the payment arrangements. Article 105a, paragraphs 1 to 4, 6 and 7, except point (b) of the first subparagraph and the second subparagraph of that paragraph, paragraphs 8, 9, 11 and 13 to 17 of Article 106 and Article 108 shall apply to participants and winners. Article 107 shall apply to participants.’

(26) In Article 139, the following paragraph is inserted:

‘5a. Article 105a, paragraph 1, except points (e) and (f) of that paragraph, paragraphs 2 to 4, 6 to 9 and 13 to 17 of Article 106, and Articles 107 and 108 shall apply to dedicated investment vehicles or to financial intermediaries. Final recipients shall provide financial intermediaries with a signed declaration of honour confirming that they are not in one of the situations referred to in points (a), (b), (c) and (d) of Article 106(1) or points (b) and (c) of Article 107(1).’

(27) In Article 163, paragraph 1 is replaced by the following:

‘1. The Court of Auditors shall transmit to the institution or the body concerned any observations which are, in its opinion, such that they should appear in a special report. Those observations shall remain confidential and shall be subject to an adversarial procedure.

The institution or the body concerned shall inform the Court of Auditors, in general, within six weeks of transmission of those observations, of any replies it wishes to make in relation to those observations. That period shall be suspended in duly justified cases, in particular where, during the adversarial procedure, it is necessary for the institution or body concerned to obtain feedback from Member States in order to finalise its reply.

The replies of the institution or the body concerned shall directly and exclusively address the observations of the Court of Auditors.

The Court of Auditors shall ensure that special reports are drawn up and adopted within an appropriate period of time, which shall, in general, not exceed 13 months.

The special reports, together with the replies of the institutions or bodies concerned, shall be transmitted without delay to the European Parliament and to the Council, each of which shall decide, where appropriate in conjunction with the Commission, what action is to be taken in response.

The Court of Auditors shall take all necessary steps to ensure that the replies to its observations from each institution or body concerned, as well as the timeline for the drawing up of the special report, are published together with the special report.’

(28) Article 166 is replaced by the following:

‘Article 166

#### **Follow-up measures**

1. In accordance with Article 319 TFEU and Article 106a of the Euratom Treaty, the Commission, the other institutions and the bodies referred to in Articles 208 and 209 of this Regulation shall take all appropriate steps to act on the observations accompanying the European Parliament’s discharge decision and on the comments accompanying the recommendation for discharge adopted by the Council.

2. At the request of the European Parliament or the Council, the institutions and bodies referred to in paragraph 1 shall report on the measures taken in the light of those observations and comments, and, in particular, on the instructions they have given to any of their departments which are responsible for the implementation of the budget. The Member States shall cooperate with the Commission by informing it of the measures they have taken to act on those observations so that the Commission may take them into account when drawing up its own report. The reports from the institutions shall also be transmitted to the Court of Auditors.’

(29) In Article 183(4), the first subparagraph is replaced by the following:

‘4. When participating in grant or procurement procedures in accordance with paragraph 1 of this Article, the JRC shall not be subject to the conditions laid down in Articles 105a, 106, points (a) and (b) of Article 107(1), Article 108 and Article 131(4) regarding provisions on exclusion and penalties in relation to procurement and grants.’

(30) Article 190 is amended as follows:

(a) paragraph 2 is replaced by the following:

‘2. The provisions of Chapter 1 of Title V of Part One relating to the general provisions on procurement shall be applicable to contracts covered by this Title subject to the special provisions relating to thresholds and the arrangements for awarding external contracts to be laid down in the delegated acts adopted pursuant to this Regulation. Articles 117 and 120 shall not be applicable to the procurement set out in this Chapter.

This Chapter shall apply to:

(a) procurement where the Commission does not award contracts for its own account;

(b) procurement by entities or persons entrusted pursuant to point (c) of Article 58(1) where provided for in the financing agreement referred to in Article 189.’;

(b) paragraph 4 is replaced by the following:

‘4. This Chapter shall not apply to actions under sector-specific basic acts relating to humanitarian crisis management aid, civil protection operations and humanitarian aid operations.’

(31) Article 191 is replaced by the following:

*Article 191*

### **Rules on access to procurement**

1. Participation in procurement procedures shall be open on equal terms to all persons within the scope of the Treaties and to any other natural or legal person in accordance with the specific provisions in the basic instruments governing the cooperation sector concerned. It shall also be open to international organisations.

2. In the cases referred to in Article 54(2), it may be decided, under exceptional circumstances duly justified by the authorising officer responsible, to allow third-country nationals, other than those referred to in paragraph 1 of this Article, to tender for contracts.

3. Where an agreement on widening the market for procurement of goods or services to which the Union is party applies, the procurement procedures for contracts financed by the budget shall also be open to natural and legal persons established in a third country other than those referred to in paragraphs 1 and 2, under the conditions laid down in that agreement.

4. The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on access to procurement procedures.’

(32) In Article 204 the following paragraph is added:

‘Experts shall be subject to Article 105a, paragraphs 1 to 3 and 7, except point (b) of the first subparagraph and the second subparagraph of that paragraph, paragraphs 8 to 10, point (a) of paragraph 11 and paragraphs 13 to 17 of Article 106, and Articles 107 and 108.’

(33) Article 209 is amended as follows:

- (a) the first four paragraphs become paragraph 1;
- (b) the following paragraph is added:

‘2. Paragraphs 2 to 4 of Article 208 shall apply.’.

(34) In Article 211, the second paragraph is replaced by the following:

‘Such review shall cover, inter alia, the implementation of the provisions of Title VIII of Part One and the deadlines set out in Article 163(1).’.

#### *Article 2*

This Regulation shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

It shall apply from 1 January 2016.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Strasbourg, 28 October 2015.

*For the European Parliament*  
*The President*  
M. SCHULZ

*For the Council*  
*The President*  
N. SCHMIT

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