

**EC proposal of 20/12/2011 for a Directive on public procurement – COM(2011)896
(replacing “classical” directive 2004/18/EC)
FIEC POSITION**

FIEC is the European Construction Industry Federation, representing via its 33 national Member Federations in 29 countries (27 EU & EFTA, Croatia and Turkey) construction enterprises of all sizes, i.e. craftsmen, small and medium-sized enterprises as well as “global players”, carrying out all forms of building and civil engineering activities.

This document presents FIEC's preliminary position and proposed specific amendments on some targeted issues contained in the Commission proposal COM(2011)896 on directive 2004/18 (“classical”).

The order of the presentations follows the numerical order of the proposed directive:

1. Relation between public authorities (art. 11):	2
2. Confidentiality (art. 18):	4
3. Competitive procedure with negotiation (art. 27):	5
4. Competitive dialogue (art. 28):	7
5. Electronic Auctions (art. 33):	9
6. Variants (art. 43):	10
7. Division of contracts into lots (art. 44):	11
8. Flexibility between selection and award phases in open procedure (art. 54, paragr. 3):	12
9. Abnormally Low Tenders (art. 69):	13
10. Subcontracting (art. 71):	15

1. Relation between public authorities (art. 11):

Commission's proposal: Article 11 codifies the jurisprudence of the European Court of Justice regarding situations of in-house procurement and inter-municipal cooperation, though it is not limited to a mere codification. In-house and inter-municipal cooperation fall out of the scope of the proposed directive.

FIEC's position: FIEC disagrees with this proposal.

AMENDMENT:

Proposal for a Directive

Article 11 paragraph 1

<i>Text proposed by the Commission</i>	<i>Amendment</i>
Article 11 Relations between public authorities (...)	Entire deletion of this article

Justification:

In-house and inter-municipal cooperation are an exception to the internal market and public procurement principles. Being exceptions, they need to remain limited. Moreover, these specific cases depend on evolving Court law and national practices which cannot be codified in one single legislative text. A better option in this regard would be to update the guidance provided by the European Commission (see EC Staff Working Document on public-public cooperation – SEC(2011)1169 dated 4/10/2011).

AMENDMENT:**Proposal for a Directive****Recital 14**

<i>Text proposed by the Commission</i>	<i>Amendment</i>
(14) There is considerable legal uncertainty as to how far cooperation between public authorities should be covered by public procurement rules. The relevant case-law of the Court of Justice of the European Union is interpreted divergently between Member States and even between contracting authorities. It is therefore necessary to clarify in what cases contracts concluded between contracting authorities are not subject to the application of public procurement rules. Such clarification should be guided by the principles set out in the relevant case-law of the Court of Justice. The sole fact that both parties to an agreement are themselves contracting authorities does not as such rule out the application of procurement rules. However, the application of public procurement rules should not interfere with the freedom of public authorities to decide how to organise the way they carry out their public service tasks. Contracts awarded to controlled entities or cooperation for the joint execution of the public service tasks of the participating contracting authorities should therefore be exempted from the application of the rules if the conditions set out in this directive are fulfilled. This directive should aim to ensure that any exempted public-public cooperation does not cause a distortion of competition in relation to private economic operators. Neither should the participation of a contracting authority as a tenderer in a procedure for the award of a public contract cause any distortion of competition.	Deleted.

*Justification:**Same justification as above.*

2. Confidentiality (art. 18):

Commission's proposal: A very slight change of wording is introduced in this article, from “*such information includes, in particular...*” (directive 2004/18/EC) to “*including, but not limited to...*” (proposed directive).

FIEC's position: There is no real improvement in the new wording proposed. Both the current wording and the proposed new wording are insufficient to safeguard the confidentiality of contractor's offers. A stronger wording is needed.

AMENDMENT:

Proposal for a Directive

Article 18 paragraph 1

<i>Text proposed by the Commission</i>	<i>Amendment</i>
1. Unless otherwise provided in this Directive or in the national law concerning access to information, and without prejudice to the obligations relating to the advertising of awarded contracts and to the information to candidates and tenderers set out in Articles 48 and 53 of this Directive, the contracting authority shall not disclose information forwarded to it by economic operators which they have designated as confidential, including, but not limited to , technical or trade secrets and the confidential aspects of tenders .	1. Unless otherwise provided in this Directive or in the national law concerning access to information, and without prejudice to the obligations relating to the advertising of awarded contracts and to the information to candidates and tenderers set out in Articles 48 and 53 of this Directive, the contracting authority shall not disclose information forwarded to it by economic operators, such as technical or trade secrets. The contracting authorities shall bear full responsibility for any disclosure.

Justification:

Although contractors' tenders are in most cases not protected by Intellectual Property Rights, they contain a real intellectual added-value which needs to be protected.

Indeed, the respect of the confidentiality of the offers is extremely important, namely in terms of promoting innovation through public procurement, and the “cherry-picking” of innovative solutions is a major issue for contractors, in particular with regard to procedures where negotiations intervene.

Paragraph 1 leaves too much room for manoeuvre, a grey zone of uncertainty, for contracting authorities, with a high level risk of “cherry-picking”. All the aspects of an economic operator's offer are confidential and contracting authorities should be held responsible for “cherry-picking”.

In addition, requesting economic operators to designate every single confidential aspect of their tender represents an unnecessary administrative burden, both for economic operators who have to clearly specify this in their tenders and for contracting authorities who have to check what is confidential or not.

AMENDMENT:

Proposal for a Directive

Article 18 paragraph 2

<i>Text proposed by the Commission</i>	<i>Amendment</i>
2. Contracting authorities may impose on economic operators requirements aimed at protecting the confidential nature of information which the contracting authorities make available throughout the procurement procedure.	2. In the context of a particular procurement process , contracting authorities may impose on economic operators requirements aimed at protecting the confidential nature of information which the contracting authorities make available throughout the procurement procedure.

Justification:

It should be made clear that this provision applies in the context of a particular procurement process.

3. Competitive procedure with negotiation (art. 27):

Commission's proposal: This is basically the new name given to the "negotiated procedure with prior publication". The list of cases where this procedure can be used has been simplified in art. 24.1 of the proposal.

FIEC's position: The principle of negotiation should not be broadened but remain used under strict conditions for specific cases only, as currently under art. 30 of Directive 2004/18, because of higher transaction costs, a tendency to negotiate on the price only and major confidentiality problems.

To the extent that the Member States decide to transpose into their national law negotiated procedures, they shall provide that contracting authorities shall conduct the negotiations in an efficient manner and compensate unsuccessful tenderers for time and additional work over and above the initial tender submitted.

AMENDMENT:

Proposal for a Directive

Article 24 paragraph 1 (a) new

<i>Text proposed by the Commission</i>	<i>Amendment</i>
	1.(a). To the extent that the Member States decide to transpose into their national law negotiated procedures, they shall provide that contracting authorities shall conduct the negotiations in an efficient manner and compensate unsuccessful tenderers for time and additional work necessary over and above the initial tender submitted.

Justification:

Time and cost necessary for participating in negotiated procedures following the submission of the initial tender are difficult/ impossible to estimate correctly. Consequently, the perspective of receiving some compensation for additional efforts is likely to attract contractors who would otherwise prefer to abstain from participation. This is likely to be beneficial for both competition and the quality of the works.

(Note: Adopting this amendment would require deletion of Article 28 paragraph 8)

AMENDMENT:

Proposal for a Directive

Article 27 paragraph 1

<i>Text proposed by the Commission</i>	<i>Amendment</i>
1. (...) The minimum time limit for receipt of requests to participate shall be 30 days from the date on which the contract notice or, where a prior information notice is used as a means of calling for competition, the invitation to confirm interest is sent; the minimum time limit for the receipt of tenders shall be 30 days from the date on which the invitation is sent. Article 26 (3) to (6) shall apply.	1. (...) The minimum time limit for receipt of requests to participate shall be 37 days from the date on which the contract notice or, where a prior information notice is used as a means of calling for competition, the invitation to confirm interest is sent; the minimum time limit for the receipt of tenders shall be 37 days from the date on which the invitation is sent. Article 26 (3) to (6) shall apply.

Justification:

The amendment here above proposed for article 27 reintroduce the current deadlines, because the good preparation of a tender procedure takes time and so does the preparation of a tender by contractors.

AMENDMENT:**Proposal for a Directive****Article 27 paragraph 3 (d) new**

<i>Text proposed by the Commission</i>	<i>Amendment</i>
	3. (...) (d) the price, if there is no modification of other elements of the tender.

Justification:

The price should not be an element for negotiation, as long as there is no modification of other elements of the tender.

AMENDMENT:**Proposal for a Directive****Article 27 paragraph 4**

<i>Text proposed by the Commission</i>	<i>Amendment</i>
4. (...) Contracting authorities shall not reveal to the other participants solutions proposed or other confidential information communicated by a candidate participating in the negotiations without its agreement. Such agreement shall not take the form of a general waiver but shall be given with reference to the intended communication of specific solutions or other confidential information.	4. (...) Contracting authorities shall not reveal to the other participants solutions proposed or other confidential information communicated by a candidate participating in the negotiations without its explicit agreement. Such agreement shall not take the form of a general waiver but shall be given with reference to the intended communication of specific solutions or other confidential information. The contracting authorities shall bear full responsibility for any disclosure.

Justification:

The agreement of the candidate cannot be presumed. It has to be explicitly expressed.

4. Competitive dialogue (art. 28):

FIEC's position: This procedure receives diverging feedbacks from country to country. It is often used and works well in some countries, while abuses linked to this procedure are criticized in other countries. In general, it is reported that this procedure leads to higher transaction costs, a tendency to negotiate on the price only and confidentiality problems. The same safeguards as for the competitive procedure with negotiation are needed for appropriate deadlines, confidentiality and fairness of negotiation.

AMENDMENT:

Proposal for a Directive

Article 28 paragraph 1

<i>Text proposed by the Commission</i>	<i>Amendment</i>
1. (...) The minimum time limit for receipt of requests to participate shall be 30 days from the date on which the contract notice is sent. (...)	1. (...) The minimum time limit for receipt of requests to participate shall be 37 days from the date on which the contract notice is sent. (...)

Justification:

The amendment here above proposed for article 28 reintroduce the current deadlines because the good preparation of a tender procedure takes time and so does the preparation of a tender by contractors.

AMENDMENT:

Proposal for a Directive

Article 28 paragraph 3

<i>Text proposed by the Commission</i>	<i>Amendment</i>
3. (...) Contracting authorities shall not reveal to the other participants solutions proposed or other confidential information communicated by a candidate participating in the dialogue without its agreement. Such agreement shall not take the form of a general waiver but shall be given with reference to the intended communication of specific solutions or other specific confidential information.	3. (...) Contracting authorities shall not reveal to the other participants solutions proposed or other confidential information communicated by a candidate participating in the negotiations without its explicit agreement. Such agreement shall not take the form of a general waiver but shall be given with reference to the intended communication of specific solutions or other confidential information. The contracting authorities shall bear full responsibility for any disclosure.

Justification:

The agreement of the candidate cannot be presumed. It has to be explicitly expressed.

AMENDMENT:**Proposal for a Directive****Article 28 paragraph 7**

<i>Text proposed by the Commission</i>	<i>Amendment</i>
7. Contracting authorities shall assess the tenders received on the basis of the award criteria laid down in the contract notice or in the descriptive document. Where necessary, in order to finalise financial commitments or other terms of the contract, the contracting authority may negotiate the final terms of the contract with the tenderer identified as having submitted the most economically advantageous tender in accordance with Article 66(1)(a) provided such negotiations do not have the effect of modifying essential aspects of the tender or of the public procurement, including the needs and requirements set out in the contract notice or in the descriptive document and does not risk distorting competition or causing discrimination.	7. Contracting authorities shall assess the tenders received on the basis of the award criteria laid down in the contract notice or in the descriptive document. At the request of the contracting authority, the tenderer identified as having submitted the most economically advantageous tender may be asked to clarify aspects of the tender or confirm commitments contained in the tender provided this does not have the effect of modifying substantial aspects of the tender or of the call for tender and does not risk distorting competition or causing discrimination.

Justification:

The proposed new wording is dangerous as it introduces the possibility for the contracting authorities to put a pressure on the price towards the tenderer identified as having submitted the most economically advantageous tender, which is not acceptable. The existing wording of directive 2004/18/EC (art. 29 par. 7) is therefore more appropriate.

AMENDMENT:**Proposal for a Directive****Article 28 paragraph 8**

<i>Text proposed by the Commission</i>	<i>Amendment</i>
8. The contracting authorities may specify prizes or payments to the participants in the dialogue.	8. The contracting authorities shall specify prizes or payments to the participants in the dialogue.

Justification:

Time and cost necessary for participating in negotiated procedures following the submission of the initial tender are difficult/ impossible to estimate correctly. Consequently, the perspective of receiving some compensation for additional efforts is likely to attract contractors who would otherwise prefer to abstain from participation. This is likely to be beneficial for both competition and the quality of the works.

5. Electronic Auctions (art. 33):

Commission's proposal: Compared to the existing Directive, these tools have been improved and clarified with a view to facilitating e-procurement. The use of electronic communications and transaction processing by public purchasers can deliver significant savings and improved procurement outcomes while reducing waste and error.

FIEC's position: FIEC considers that construction contracts, which may cover design, execution or both, usually concern individual made-to-measure solutions which require, contrary to off-the-shelves products a certain inter-action between contractor and contracting authority, in order to provide the envisaged quality and success. This cannot be ensured through electronic auctions, of which the main aim is achieving the lowest possible price/ cost in a repetitive procedure.

AMENDMENT:

Proposal for a Directive

Article 33 paragraph 1:

<i>Text proposed by the Commission</i>	<i>Amendment</i>
1. Contracting authorities may use electronic auctions, in which new prices, revised downwards, and/or new values concerning certain elements of tenders are presented. For this purpose, contracting authorities shall use a repetitive electronic process (electronic auction), which occurs after an initial full evaluation of the tenders, enabling them to be ranked using automatic evaluation methods.	1. Except for works and service contracts, contracting authorities may use electronic auctions, in which new prices, revised downwards, and/or new values concerning certain elements of tenders are presented. For this purpose, contracting authorities shall use a repetitive electronic process (electronic auction), which occurs after an initial full evaluation of the tenders, enabling them to be ranked using automatic evaluation methods.

Justification:

According to Recital 14 of Directive 2004/18/EC, this procedure is totally inappropriate for all construction contracts, especially because of the complexity of the works to be carried out. Also, this procedure does not allow taking into account possible variants. Moreover, it favours the award of contracts to the lowest cost (i.e. price), rather than to the Most Economically Advantageous Tender. Finally, it obliges contractors to propose very high prices at the beginning of the procedure, in order to be able to lower their price afterwards, which does not correspond to the general principle of best value for money.

6. Variants (art. 43):

Commission's proposal: The possibility to present variants is not anymore reserved to awards where the MEAT criterion is used. However, it is still up to the contracting authority to allow tenderers to submit variants.

FIEC's position: FIEC has been requesting for many years that contracting authorities should systematically accept variants. There should rather be a specific indication in the contract documents if variants are not allowed.

AMENDMENT:

Proposal for a Directive

Article 43

<i>Text proposed by the Commission</i>	<i>Amendment</i>
1. Contracting authorities may authorise tenderers to submit variants. They shall indicate in the contract notice or, where a prior information notice is used as a means of calling for competition, in the invitation to confirm interest whether or not they authorise variants. Variants shall not be authorised without such indication. 2. Contracting authorities authorising variants shall state in the procurement documents the minimum requirements to be met by the variants and any specific requirements for their presentation. They shall also ensure that the chosen award criteria can be usefully applied to variants meeting those minimum requirements as well as to conforming tenders which are not variants. 3. Only variants meeting the minimum requirements laid down by the contracting authorities shall be taken into consideration. In procedures for awarding public supply or service contracts, contracting authorities that have authorised variants shall not reject a variant on the sole ground that it would, where successful, lead to either a service contract rather than a public supply contract or a supply contract rather than a public service contract.	1. Contracting authorities shall authorise tenderers to submit variants. If they do not authorise variants, they shall indicate this in the contract notice or, where a prior information notice is used as a means of calling for competition, in the invitation to confirm interest. Variants shall not be rejected without such indication. 2. Contracting authorities shall state in the procurement documents the minimum requirements to be met by the variants and any specific requirements for their presentation. They shall also ensure that the chosen award criteria can be usefully applied to variants meeting those minimum requirements as well as to conforming tenders which are not variants. 3. Only variants meeting the minimum requirements laid down by the contracting authorities shall be taken into consideration. In procedures for awarding public supply or service contracts, contracting authorities shall not reject a variant on the sole ground that it would, where successful, lead to either a service contract rather than a public supply contract or a supply contract rather than a public service contract.

Justification:

In order to promote innovation from enterprises, and in particular SMEs, in public procurement, as wished for by the European Commission, variants should systematically be accepted by public procurers.

7. Division of contracts into lots (art. 44):

Commission's proposal: The contracting authority may split the contract into lots.

However, for contracts of not less than €500,000 – which means that all public works contracts above the EU thresholds are concerned – the “apply or explain” principle applies. That is, when the contracting authority does not split the contract into lots, it shall provide a specific explanation of its reasons.

FIEC's position: Due to diverging practices in the various Member States – to split or to not split – there are several different approaches amongst FIEC Member Federations on this issue.

One approach advocates that the division of contracts into lots should be encouraged, claiming that this, amongst others, facilitates the participation of SMEs in public procurement.

The other approach advocates that the directive should be neutral and favour neither the division of contracts into lots nor a single contract, a decision which has to be taken on a case-by-case basis taking into consideration the complexity of the project and the qualification/ capacities of the contracting authority. In any case, division into lots leads at least to higher coordination needs.

In this situation, FIEC considers that this issue is perhaps best left for Member States to decide at their national level.

AMENDMENT:

Proposal for a Directive

Article 44 paragraph 1

<i>Text proposed by the Directive</i>	<i>Amendment</i>
1. Public contracts may be subdivided into homogenous or heterogeneous lots. For contracts with a value equal to or greater than the thresholds provided for in Article 4 but not less than EUR 500 000, determined in accordance with Article 5, where the contracting authority does not deem it appropriate to split into lots, it shall provide in the contract notice or in the invitation to confirm interest a specific explanation of its reasons. Contracting authorities shall indicate, in the contract notice or in the invitation to confirm interest, whether tenders are limited to one or more lots only.	1. Member States may provide for provisions on the subdivision of contracts into lots at their national level.

Justification:

See "FIEC's position" here above.

8. Flexibility between selection and award phases in open procedure (art. 54, paragr. 3):

Commission's proposal: For open procedures, the possibility for contracting authorities to examine tenders before verifying the fulfilment of the selection criteria has been introduced; that is, a greater flexibility between the selection and award phases.

FIEC's position: FIEC disagrees with this proposal for more flexibility. Justification see below.

AMENDMENT:

Proposal for a Directive

Article 54 paragraph 3

<i>Text proposed by the Commission</i>	<i>Amendment</i>
3. In open procedures, contracting authorities may decide to examine tenders before verifying the fulfilment of the selection criteria, provided that the relevant provisions of this section are observed, including the rule that the contract shall not be awarded to a tenderer that should have been excluded pursuant to Article 55 or that does not meet the selection criteria set out by the contracting authority, in accordance with subsection 1 of this section.	Deleted.

Justification:

In order to avoid abuses, confusion and misinterpretation, the selection and award phases should remain clearly distinct and follow the current order. verifying fulfilment of selection criteria first.

Putting the selection phase before the award phase obliges contracting authorities to properly verify the fulfilment of the qualitative selection criteria by tenderers.

Doing it the other way round would increase the danger that selection criteria are not seriously checked, because the offer is considered "too good to exclude".

9. Abnormally Low Tenders (art. 69):

Commission's proposal: Three cumulative conditions, according to which a tender is deemed to be abnormally low and contracting authorities shall require justifications, have been introduced. The proposal also introduces an obligation to reject a tender, but only when it is abnormally low because of non-compliance with social, labour or environmental law.

FIEC's position: These changes represent an improvement compared to the current provision, but they remain insufficient considering the challenges and expectations in this field.

AMENDMENT:

Proposal for a Directive Article 69 paragraph 1

<i>Text proposed by the Directive</i>	<i>Amendment</i>
1. Contracting authorities shall require economic operators to explain the price or costs charged, where all of the following conditions are fulfilled: (a) the price or cost charged is more than 50 % lower than the average price or costs of the remaining tenders (b) the price or cost charged is more than 20 % lower than the price or costs of the second lowest tender; (c) at least five tenders have been submitted.	1. Contracting authorities shall require economic operators to explain the price or costs charged, where: (a) the price or cost charged is more than 20 % lower than the average price or costs of the remaining tenders; or (b) the price or cost charged is more than 20 % lower than the price or costs of the second lowest tender.

Justification:

It is positive that the Commission proposes clear conditions for identifying an abnormally low tender. However, the proposed cumulative set of conditions will never be fulfilled in the practice of public works contracts, because its field of application is much too narrow.

The proposal to lower, in (a), the percentage deviation from the average takes into consideration that even lower figures are being used in some countries and that thresholds in EU-directives invariably lead to adaptation in the Member States, even if this means worsening the situation (current example: late payment directive and its draft implementation into German law)

The proposal to delete (c) is based on the fact that the existence of abnormally low tenders does not depend on a minimum number of tenders submitted.

Any tender appearing abnormally low should have to be justified by the tenderer.

AMENDMENT:

Proposal for a Directive Article 69 paragraph 2

<i>Text proposed by the Directive</i>	<i>Amendment</i>
2. Where tenders appear to be abnormally low for other reasons, contracting authorities may also request such explanations.	2. Despite what is stated in paragraph 1, where tenders appear to be abnormally low for other reasons, contracting authorities shall also request such explanations.

Justification:

As soon as a tender appears to be abnormally low, and whatever the reason is, contracting authorities shall be obliged to request explanations. This is a matter of coherency and efficiency.

AMENDMENT:**Proposal for a Directive****Article 69 paragraph 5**

<i>Text proposed by the Directive</i>	<i>Amendment</i>
5. Where a contracting authority establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender may be rejected on that ground alone only after consultation with the tenderer where the latter is unable to prove, within a sufficient time limit fixed by the contracting authority, that the aid in question was compatible with the internal market within the meaning of Article 107 of the Treaty. Where the contracting authority rejects a tender in those circumstances, it shall inform the Commission thereof.	5. Where a contracting authority suspects a tender to be abnormally low because the tenderer has obtained State aid, the tender shall be rejected on that ground alone after consultation with the tenderer, where the latter is unable to prove, within a sufficient time limit fixed by the contracting authority, that the aid in question was compatible with the internal market within the meaning of Article 107 of the Treaty, i.e. respecting the principles laid down in EU competition law . Where the contracting authority rejects a tender in those circumstances, it shall inform the Commission thereof.

AMENDMENT:**Proposal for a Directive****Article 69 paragraph 5a new**

<i>Text proposed by the Directive</i>	<i>Amendment</i>
	5a Where a tenderer whose tender the contracting authority intends to accept is a state-owned or state-supervised and –managed enterprise, it is deemed to receive or have received state aid. In this case, the contracting authority can accept the tender only after consultation with the tenderer where the tenderer is able to prove, within a sufficient time limit fixed by the contracting authority, that no aid had been granted or that the aid in question was granted legally, i.e. respecting the principles laid down in EU competition law. Where the contracting authority rejects a tender in these circumstances, it shall inform the Commission thereof.

Justification regarding the 2 amendments above:

According to recent developments within the European construction sector, the State aid issue is very much linked to the arrival on the EU public procurement market of third country state-owned or state-aided contractors. In order to ensure a level-playing field for all companies – both EU and non-EU companies – they should all strictly respect the EU rules in the field of State aid. If this is not the case such State aid would be illegal and give an unfair competitive advantage to the company benefitting from this illegal State aid. The negative effect of state aid on fair competition is not smaller only because such state aid is being given by third countries. The argument, the EU cannot extend its rules to third countries is correct, but irrelevant in this situation, in which the aim simply is to have EU rules respected inside the EU.

This aspect has not been taken into account in the proposed directive at all. Hence, the identification and rejection of ALTs based on illegal State aid from third countries needs to be reinforced.

In general, the question is whether it would not be more efficient to address all aspects of ALT in the public procurement directives to which the present Regulation could then simply refer.

10. Subcontracting (art. 71):

Commission's proposal: Article 71 paragraph 2 introduces a possibility for Member States to establish at their national level direct payment to subcontractors.

FIEC's position: FIEC disagrees with this proposal.

Contractual issues depend above all on Court Law, national legislations and the provisions of the Remedies Directive. For this reason, there is in principle no need to address contractual issues in the framework of the public procurement directives.

AMENDMENT:

Proposal for a Directive

Article 71 paragraph 2

<i>Text proposed by the Commission</i>	<i>Amendment</i>
2. Member States may provide that at the request of the subcontractor and where the nature of the contract so allows, the contracting authority shall transfer due payments directly to the subcontractor for services, supplies or works provided to the main contractor. In such case, Member States shall put in place appropriate mechanisms permitting the main contractor to object to undue payments. The arrangements concerning that mode of payment shall be set out in the procurement documents.	Deleted.

Justification:

Article 71 interferes with the contractual structure and is outside the scope of public procurement rules. In particular article 71 paragraph 2 causes problems.

Indeed, it could lead to a situation where the contracting authority pays a subcontractor who has not yet fulfilled his contractual obligations. In this case, the general contractor has no more incentive means towards its subcontractor to finish the work. If the subcontractor has failed to meet the relevant contractual obligations, the main contractor should retain the right to hold back a proportionate fee, in the same way as the contracting authority can do this if the main contractor fails to meet the obligations set out by the contracting authority.

Finally, public procurement should not become the container for any legislative suggestion not belonging to the scope of public procurement. Should additional issues be introduced regarding the execution of the contract, FIEC will provide further arguments in this regard.