

EN

ANNEX

### **Guidelines**

**for determining financial corrections to be made to expenditure financed by the Union under shared management, for non-compliance with the rules on public procurement**

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## 1. Introduction

### 1.1. Purpose and scope of the guidelines

Guidelines for the financial corrections should be applied primarily in the case of irregularities which constitute breaches of public procurement rules applicable to contracts financed from the Union budget and subject to the shared management method. These public procurement rules are laid out in the Directives on public procurement as specified in section 1.2 (hereinafter - the 'Directives') and in the relevant national law.

The rates of corrections provided in section 2 are also applicable to contracts not (or not fully) subject to the Directives<sup>1</sup>. The range of rates between 5% and 100% established in section 2 are the same as the ones set out in the Commission Decision of 19 October 2011 on the approval of guidelines on the principles, criteria and indicative scales to be applied in respect of financial corrections made by the Commission under Articles 99 and 100 of Council Regulation (EC) No 1083/2006<sup>1</sup> (hereafter – the "Decision on financial corrections"). For Articles 97 and 98 of Council Regulation (EC) N°1198/2006 of 27 July 2006, the same range of rates of correction was reproduced, *mutantis mutandis*, in the "Guidelines on financial corrections principles, criteria and indicative scales to be applied in respect of financial corrections made by the Commission under Council Regulation (EC) No 1198/2006", applicable to the European Fisheries Fund (hereafter - the "EFF guidelines"). For Article 44 of Council Decision 2007/435/EC of 25 June 2007, Article 46 of Decision No 573/2007/EC of the European Parliament and of the Council of 23 May 2007, Article 48 of Decision No 574/2007/EC of the European Parliament and of the Council of 23 May 2007 and Article 46 of Decision No 575/2007/EC of the European Parliament and of the Council of 23 May 2007, a similar approach was also applied with the Commission Decision C(2011)9771 of 22 December 2011 on the approval of guidelines on the principles, criteria and indicative scales to be applied in respect of financial corrections made by the Commission under the four Funds of the General Programme "Solidarity and Management of Migration Flows" (hereafter "the IF, ERFIII, EBF and RF Decision on financial corrections").

These guidelines replace and update the previous guidelines on the same subject (see recital 5 of this Decision). The updated guidelines reflect the experience drawn from the application of the previous guidelines and intends to bring clarification on the level of corrections to be applied in line with the principle of proportionality and taking into account the relevant case-law. The main differences compared to previous guidance are: 1) clarification on the level of corrections to be applied for some cases, introducing clearer criteria; 2) inclusion of further irregularities not specified in previous guidance but corresponding to cases where irregularities were detected during Union audits and for which financial corrections have been made; 3) harmonization of the level of corrections covering contracts subject to Directives and to Treaty principles. Furthermore, the scope of the guidelines has been widened as the new guidelines apply also to other expenditure than that of the Structural Funds or the Cohesion Fund.

These guidelines should be applied when making financial corrections related to irregularities detected after the date of their adoption. In relation to audit findings and financial corrections of

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<sup>1</sup> C(2011) 7321 final.

the Structural Funds, Cohesion Fund, EFF and the four Funds of the General Programme "Solidarity and Management of Migration Flows" for which the contradictory procedure with the Member State is on-going as at the date of adoption of these guidelines, the Commission will apply the previous existing guidelines (mentioned in recital 5 of this Decision) or these guidelines, ensuring that the rate of correction is the one more favourable to the Member State.

These guidelines also address the need to correct tender evaluations affected by conflicts of interests in respect of which a specific type of irregularity is introduced in section 2 (see irregularity n° 21).

These guidelines also contribute to address the European Parliament 2010 discharge recommendation to harmonise the treatment of public procurement errors for the following policy areas: Agriculture and Natural Resources, Cohesion, Energy and Transport and to promote an increased harmonisation of the European Court of Auditors' and the Commission's quantification of irregularities in public procurement. The Commission will invite the European Court of Auditors to apply these guidelines in the context of their audit work, in order to address the above-mentioned European Parliament's recommendation.

The types of irregularities described in section 2 are the most frequently found types of irregularities. Other irregularities not indicated in that section should be dealt with in accordance with the principle of proportionality and, where possible, by analogy to the types of irregularities identified in these guidelines.

Where the Commission detects irregularities related to the non-compliance with public procurement rules, it determines the amount of the financial correction applicable in accordance with these guidelines. The amount of the financial correction is calculated in view of the expenditure amount declared to the Commission and related to the contract (or part of it) affected by the irregularity. The percentage of the suitable scale applies to the amount of the affected expenditure declared to the Commission for the contract in question. The same correction rate should be applied also to any future expenditure related to the same affected contract, before such expenditure is certified to the Commission. Practical example: The amount of the expenditure declared to the Commission for a works contract concluded after the application of illegal criteria is EUR 10 000 000. If the applicable correction rate is 25%, the amount to be deducted from the expenditure statement to the Commission is EUR 2 500 000. Accordingly, the Union financing is reduced on the basis of the relevant financing rate. If afterwards the national authorities intend to declare further expenditure concerning the same contract and affected by the same irregularity, that expenditure should be subject to the same correction rate. In the end, the entire value of the payments related to the contract are corrected on the basis of the same correction rate.

The Member States also detect irregularities<sup>ii</sup>; in such event, they are required to make the necessary corrections. The competent authorities in the Member States are recommended to apply the same criteria and rates when correcting irregularities detected by their own services, unless they apply stricter standards.

## 1.2. Legal basis and reference documents

These guidelines take into account Article 80(4) of the Regulation (EU, EURATOM) No 966/2012 on the financial rules applicable to the general budget of the Union, sector-specific rules applicable to the Union co-financing subject to the shared management method, the Directives<sup>iii</sup>,

and the reference documents specified in sections 1.2.1 and 1.2.2, namely the Decision on financial corrections, the EFF guidelines and the Commission interpretative communication n° 2006/C 179/02 on the "Community law applicable to contract awards not (or not fully) subject to the provisions of the Public Procurement Directives".

In section 2, reference is made to Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors<sup>2</sup> and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts<sup>3</sup>. If a public procurement procedure or contract is governed by a prior or subsequent Directive, the correction will be made in line with section 2, where possible, or by analogy to the cases described in that section. Furthermore, the various national public procurement provisions transposing the mentioned Directives should also be considered as a reference when analysing the irregularities at stake.

### *1.2.1. Guidelines on financial corrections*

The Decision on financial corrections applies to the programming period 2007-2013<sup>iv</sup> and sets out the general framework and the scales of flat-rate financial corrections applied by the Commission under shared management method for the European Regional Development Fund, the European Social Fund and the Cohesion Fund. The EFF guidelines also reflect the same approach set out in the Decision on financial corrections. The present guidelines follow the same reasoning and scale of corrections. The IF, ERFIII, EBF and RF Decision on financial corrections reflects this approach in regard to the four Funds of the General Programme "Solidarity and Management of Migration Flows". The document VI/5330/97 fixes the Guidelines for the calculation of financial consequences when preparing the decision regarding the Clearance of the Accounts of EAGGF Guarantee.

### *1.2.2. Union law applicable to contract awards not (or not fully) subject to the Public Procurement Directives*

As set out in Commission interpretative communication No 2006/C 179/02 on the Community law applicable to contract awards not (or not fully) subject to the provisions of the Public Procurement Directives (hereinafter "the interpretative communication"), the Court of Justice of the European Union has confirmed that "the rules and the principles of the EC Treaty apply also to contracts that fall outside the scope of the Directives".

According to points 1.1 and 1.2 of the interpretative communication, contracting entities from Member States have to comply with the rules and principles of the Treaty on the Functioning of the European Union whenever they conclude public contracts falling into the scope of the Treaty. These principles include the free movement of goods (Article 34 TFEU), the right of establishment (Article 49 TFEU), the freedom to provide services (Article 56 TFEU), non-discrimination and equal treatment, transparency, proportionality and mutual recognition."

The Court of Justice has developed a set of basic standards for the award of public contracts which are derived directly from the rules and principles of the EC Treaty. The principles of equal

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<sup>2</sup> OJ L 134, 30.4.2004, p. 1–113.

<sup>3</sup> OJ L 134, 30.4.2004, p. 114–240.

treatment and non-discrimination on grounds of nationality imply an obligation of transparency. This obligation, according to the case-law of the Court of Justice<sup>v</sup>, "*consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of the procedures to be reviewed*".

The concept of "sufficient degree of advertising"<sup>vi</sup> must be interpreted in the light of the principles enshrined in the Treaty, as interpreted by the Court of Justice and summed up in the interpretative communication.

In light of judgments of the Court of Justice in cases C-412/04<sup>4</sup>, joined cases C-147/06 and C-148/06<sup>5</sup>, and C-507/03<sup>6</sup>, within the context of an infringement procedure, when claiming non-compliance with the rules and principles of the Treaty "*it is for the Commission to establish that*"

- notwithstanding the fact that a contract is not (or not fully) subject to the provisions of the Directives, the contract at stake "*was of certain interest to an undertaking located in a different Member State to that of the relevant contracting authority, and*

- *that that undertaking was unable to express its interest in that contract because it did not have access to adequate information before the contract was awarded*"<sup>vii</sup>.

According to paragraph 34 of the judgment in Case C-507/03, "*a mere statement by [the Commission] (...) that a complaint was made to it in relation to the contract in question is not sufficient to establish that the contract was of certain cross-border interest and that there was therefore a failure to fulfil obligations*".

In this context, when detecting cases of apparent non-respect of principles of transparency and non-discrimination in contracts not (or not fully) subject to the provisions of the Directives, there is a need to determine whether there are elements that would substantiate cross-border interest, including the following:

- the subject-matter of the contract,
- its estimated value, the specifics of the sector concerned (size and structure of the market, commercial practices, etc.),
- the geographic location of the place of performance,
- evidence of tenders from other Member States or expressed interest by companies from a different Member State.

Regardless of the existence of a certain cross-border interest<sup>viii</sup> in relation to a given contract not (or not fully) subject to the provisions of the Directives, there is a need to examine whether the expenditure declared for that contract complies with the national rules on public procurement.

If cross-border interest exists or there is non-compliance with national legislation, the Commission may propose the application of a financial correction based on the criteria

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<sup>4</sup> *Commission v. Italy* [2008] ECR I-619.

<sup>5</sup> *SECAP SpA and Santorso Soc. V. Comune di Torino* [2008] ECR I-3565.

<sup>6</sup> *Commission v. Ireland* [2007] ECR I-9777.

established below in section 1.3 and on the scales of corrections defined in section 2. When assessing the cases of non-compliance with national public procurement law the Commission shall take into consideration the national interpretative rules by the competent national authorities.

### 1.3. Criteria to consider when deciding which rate of correction to apply

These guidelines set out a range of corrections of 5%, 10%, 25% and 100% that are applied to the expenditure of a contract. They take into account the seriousness of the irregularity and the principle of proportionality. These rates of corrections are applied when it is not possible to quantify precisely the financial implications for the contract in question.

The seriousness of an irregularity related to non-compliance with the rules on public procurement and the related financial impact to the Union budget is assessed taking into account the following factors: level of competition, transparency and equal treatment. When the non-compliance at stake has a deterrent effect to potential tenderers or when the non-compliance leads to the award of a contract to a tender other than the one that should have been awarded, this is a strong indicator that the irregularity is serious.

When the irregularity is only of a formal nature without any actual or potential financial impact, no correction will be made.

Where a number of irregularities are detected in the same tender procedure, the rates of correction are not cumulated, the most serious irregularity being taken as an indication to decide the rate of correction (5 %, 10%, 25% or 100%).

After a correction of a certain type of irregularities has been implemented and the Member State does not take the appropriate corrective measures in regard to other tender procedures affected by the same type of irregularities, the rates of financial corrections may be increased to a higher level of correction (i.e. 10%, 25% or 100%).

A financial correction of 100% may be applied in the most serious cases when the irregularity favours certain tenderer(s)/ candidate(s) or where the irregularity relates to fraud, as established by a competent judicial or administrative body.

## 2. MAIN TYPES OF IRREGULARITIES AND CORRESPONDING RATES OF FINANCIAL CORRECTIONS

### 2.1. Contract notice and tender specifications

No	Type of irregularity	Applicable law / reference document	Description of the irregularity	Rate of correction
1.	Lack of publication of contract notice.	<p>Articles 35 and 58 of Directive 2004/18/EC</p> <p>Article 42 of Directive 2004/17/EC</p> <p>Section 2.1 of the Commission interpretative communication n° 2006/C 179/02</p>	The contract notice was not published in accordance with the relevant rules (e.g. publication in the Official Journal of the European Union (OJEU) where this is required by the Directives <sup>ix</sup> ).	<p>100%</p> <p>25% if publication of a contract notice(s) is required by the Directives and the contract notice(s) was(not published in the OJEU but it was published in a way that ensures that an undertaking located in another Member State has access to appropriate information regarding the public procurement before it is awarded, so that it would be in a position to submit a tender or express its interest to participate in obtaining that contract. In practice, this means that either the contract notice was published at national level (following the national legislation or rules in that regard) or the basic standards for the publication of contract notice was respected. For more details on these standards, see section 2.1 of the Commission interpretative</p>



No	Type of irregularity	Applicable law / reference document	Description of the irregularity	Rate of correction
				communication n° 2006/C 179/02.
2.	Artificial splitting of works/services/supplies contracts.	Article 9(3) of Directive 2004/18/EC  Article 17(2) of Directive 2004/17/EC	A works project or proposed purchase of a certain quantity of supplies and/or services is subdivided resulting in its coming outside the scope of the Directives, i.e., preventing its publication in OJEU for the whole set of works, services or supplies at stake.	100%  25% if publication of a contract notice is required by the Directives and the contract notice was not published in the OJEU but it was published in a way that ensures that an undertaking located in another Member State has access to appropriate information regarding the public procurement before it is awarded, so that it would be in a position to submit a tender or express its interest to participate in obtaining that contract. In practice, this means that either the contract notice was published at national level (following the national legislation or rules in that regard) or the basic standards for the publication of contract notice was respected. For more details on these standards, see section 2.1 of the Commission interpretative communication n° 2006/C 179/02.

No	Type of irregularity	Applicable law / reference document	Description of the irregularity	Rate of correction
3.	<p>Non-compliance with</p> <ul style="list-style-type: none"> <li>- time limits for receipt of tenders;</li> </ul> <p>or</p> <ul style="list-style-type: none"> <li>- time limits for receipt of requests to participate<sup>x</sup>.</li> </ul>	<p>Article 38 of Directive 2004/18/EC</p> <p>Article 45 of Directive 2004/17/EC</p>	<p>The time limits for receipt of tenders (or receipt of requests to participate) were lower than the time limits in the Directives.</p>	<p>25% if reduction in time limits <math>\geq</math> 50%</p> <p>10% if reduction in time limits <math>\geq</math> 30%</p> <p>5% if any other reduction in time limits (this correction rate may be reduced to between 2% and 5%, where the nature and gravity of the deficiency is not considered to justify a 5% correction rate).</p>
4.	<p>Insufficient time for potential tenderers/candidates to obtain tender documentation</p>	<p>Article 39(1) of Directive 2004/18/EC</p> <p>Article 46(1) of Directive 2004/17/EC</p>	<p>Time for potential tenderers/candidates to obtain tender documentation is too short, thus creating an unjustified obstacle to the opening up of public procurement to competition.</p> <p>Corrections are applied on a case by case basis. In determining the level of the correction, account will be taken of possible mitigating factors related to the specificity and complexity of the contract, in particular a possible administrative burden or difficulties in providing</p>	<p>25% if the time that potential tenderers/candidates have to obtain tender documentation is less than 50% of time limits for receipt of tenders (in line with relevant provisions).</p> <p>10% if the time that potential tenderers/candidates have to obtain tender documentation is less than 60% of time limits for receipt of tenders (in line with relevant provisions).</p> <p>5% if the time that potential</p>

No	Type of irregularity	Applicable law / reference document	Description of the irregularity	Rate of correction
			the tender documentation.	tenderers/candidates have to obtain tender documentation is less than 80% of time limits for receipt of tenders (in line with relevant provisions).
5.	Lack of publication of - extended time limits for receipt of tenders; or - extended time limits for receipt of requests to participate <sup>xi</sup> .	Article 2 and Article 38(7) of Directive 2004/18/EC  Articles 10 and 45(9) of Directive 2004/17/EC	The time limits for receipt of tenders (or receipt of requests to participate) were extended without publication in accordance with the relevant rules (i.e., publication in the OJEU if the public procurement is covered by the Directives).	10%  The correction can be decreased to 5% depending on the seriousness of the irregularity.
6.	Cases not justifying the use of the negotiated procedure <u>with</u> prior publication of a contract notice.	Article 30(1) of Directive 2004/18/EC	Contracting authority awards a public contract by negotiated procedure, after publication of a contract notice, but such procedure is not justified by the relevant provisions.	25%  The correction can be reduced to 10% or 5% depending on the seriousness of the irregularity.
7.	For the award of contracts in the field of defence and security falling under directive 2009/81/EC specifically,	Directive 2009/81/EC	Contracting authority awards a public contract in the area of defence and security by means of a competitive dialogue or negotiated	100%.  The correction can be decreased to 25%, 10% or 5% depending on the

No	Type of irregularity	Applicable law / reference document	Description of the irregularity	Rate of correction
	inadequate justification for the lack of publication of a contract notice		procedure without publication of a contract notice whereas the circumstances do not justify the use of such a procedure.	seriousness of the irregularity.
8.	<p>Failure to state:</p> <ul style="list-style-type: none"> <li>- the selection criteria in the contract notice;</li> </ul> <p>and/or</p> <ul style="list-style-type: none"> <li>- the award criteria (and their weighting) in the contract notice or in the tender specifications.</li> </ul>	<p>Articles 36, 44, 45 to 50 and 53 of Directive 2004/18/EC and Annexes VII-A (public contract notices: points 17 and 23) and VII-B (public works concessions notices: point 5) thereof.</p> <p>Articles 42, 54 and 55 and Annex XIII of Directive 2004/17/EC</p>	<p>The contract notice does not set out the selection criteria.</p> <p>And/or</p> <p>When neither the contract notice nor the tender specifications describe in sufficient detail the award criteria as well as their weighting.</p>	<p>25%</p> <p>The correction can be decreased to 10% or 5% if the selection/award criteria were stated in the contract notice (or in the tender specifications, as regards award criteria) but with insufficient detail.</p>
9.	Unlawful and/or discriminatory selection and/or award criteria laid down in the contract notice or tender documents	<p>Articles 45 to 50 and 53 of Directive 2004/18/EC</p> <p>Articles 54 and 55 of Directive 2004/17/EC</p>	<p>Cases in which operators have been deterred from bidding because of unlawful selection and/or award criteria laid down in the contract notice or tender documents. For example:</p> <ul style="list-style-type: none"> <li>- obligation to already have an establishment or representative in the country or region;</li> </ul>	<p>25%</p> <p>The correction can be decreased to 10% or 5% depending on the seriousness of the irregularity.</p>

No	Type of irregularity	Applicable law / reference document	Description of the irregularity	Rate of correction
			- tenderers' possession of experience in the country or region.	
10.	Selection criteria not related and proportionate to the subject-matter of the contract	Article 44 (2) of Directive 2004/18/EC Article 54(2) of Directive 2004/17/EC	When it can be demonstrated that the minimum capacity levels of ability for a specific contract are not related and proportionate to the subject-matter of the contract, thus not ensuring equal access for tenderers or having the effect of creating unjustified obstacles to the opening up of public procurement to competition.	25%  The correction can be decreased to 10% or 5% depending on the seriousness of the irregularity.
11.	Discriminatory technical specifications	Article 23(2) of Directive 2004/18/EC Article 34(2) of Directive 2004/17/EC	Setting technical standards that are too specific, thus not ensuring equal access for tenderers or having the effect of creating unjustified obstacles to the opening up of public procurement to competition.	25%  The correction can be decreased to 10% or 5% depending on the seriousness of the irregularity.
12.	Insufficient definition of the subject-matter of the contract	Article 2 of Directive 2004/18/EC Article 10 of Directive 2004/17/EC	The description in the contract notice and/or the tender specifications is insufficient for potential tenderers/candidates to determine the subject-matter of the contract.	10%  The correction can be decreased to 5% depending on the seriousness of the irregularity.

No	Type of irregularity	Applicable law / reference document	Description of the irregularity	Rate of correction
		Cases C-340/02 (Commission/France) and C-299/08 (Commission/France)		In case the implemented works were not published, the corresponding amount is subject to a correction of 100%

## 2.2. Evaluation of tenders

No	Type of irregularity	Legal basis / reference document	Description of irregularity	Rate of correction
13.	Modification of selection criteria after opening of tenders, resulting in incorrect acceptance of tenderers.	Article 2 and Article 44 (1) of Directive 2004/18/EC  Article 10 and Article 54(2) of Directive 2004/17/EC	The selection criteria were modified during the selection phase, resulting in acceptance of tenderers that should not have been accepted if the published selection criteria had been followed.	25%  The correction can be decreased to 10% or 5% depending on the seriousness of the irregularity.
14.	Modification of selection criteria after opening of tenders, resulting in incorrect rejection of tenderers	Articles 2 and 44 (1) of Directive 2004/18/EC  Articles 10 and 54(2) of	The selection criteria were modified during the selection phase, resulting in rejection of tenderers that should have been accepted if the published selection criteria had been followed.	25%  The correction can be decreased to 10% or 5% depending on the seriousness of the irregularity.

No	Type of irregularity	Legal basis / reference document	Description of irregularity	Rate of correction
		Directive 2004/17/EC		
15.	Evaluation of tenderers/candidates using unlawful selection or award criteria	Article 53 of Directive 2004/18/EC Article 55 of Directive 2004/17/EC	During the evaluation of tenderers/candidates, the selection criteria were used as award criteria, or the award criteria (or respective sub-criteria or weightings) stated in the contract notice or tender specifications were not followed, resulting in the application of unlawful selection or award criteria.  Example: Sub-criteria used for the award of the contract are not related to the award criteria in the contract notice/tender specifications.	25%  The correction can be decreased to 10% or 5% depending on the seriousness of the irregularity.
16.	Lack of transparency and/or equal treatment during evaluation	Articles 2 and 43 of Directive 2004/18/EC Articles 10 of Directive 2004/17/EC	The audit trail concerning in particular the scoring given to each bid is unclear/unjustified/lacks transparency or is non-existent.  And/or The evaluation report does not exist or does not contain all the elements required by the relevant provisions.	25%  The correction can be reduced to 10% or 5% depending on the seriousness of the irregularity.
17.	Modification of a tender during evaluation	Article 2 of Directive 2004/18/EC Article 10 of Directive	The contracting authority allows a tenderer/candidate to modify its tender during evaluation of offers	25%  The correction can be reduced to 10% or 5% depending on the seriousness of the

No	Type of irregularity	Legal basis / reference document	Description of irregularity	Rate of correction
		2004/17/EC		irregularity.
18.	Negotiation during the award procedure	Article 2 of Directive 2004/18/EC Article 10 of Directive 2004/17/EC	In the context of an open or restricted procedure, the contracting authority negotiates with the bidders during the evaluation stage, leading to a substantial modification of the initial conditions set out in the contract notice or tender specifications.	25%  The correction can be reduced to 10% or 5% depending on the seriousness of the irregularity.
19.	Negotiated procedure with prior publication of a contract notice with substantial modification of the conditions set out in the contract notice or tender specifications <sup>xii</sup>	Article 30 of Directive 2004/18/EC	In the context of a negotiation procedure with prior publication of a contract notice, the initial conditions of the contract were substantially altered, thus justifying the publication of a new tender.	25%  The correction can be reduced to 10% or 5% depending on the seriousness of the irregularity.
20.	Rejection of abnormally low tenders	Article 55 of Directive 2004/18/EC	Tenders appear to be abnormally low in relation to the goods, works or services but the contracting authority, before rejecting those tenders, does not request in writing details of the constituent elements of the tender which it	25%



No	Type of irregularity	Legal basis / reference document	Description of irregularity	Rate of correction
		Article 57 of Directive 2004/17/EC	considers relevant.	
21.	Conflict of interest	Article 2 of Directive 2004/18/EC  Article 10 of Directive 2004/17/EC	When a conflict of interest has been established by a competent judicial or administrative body, either from the part of the beneficiary of the contribution paid by the Union or the contracting authority.	100%

### 2.3. Contract implementation

No	Type of irregularity	Legal basis / reference document	Description of irregularity	Rate of correction
22.	Substantial modification of the contract elements set out in the contract notice or tender specifications <sup>xiii</sup>	Article 2 of Directive 2004/18/EC  Article 10 of Directive 2004/17/EC Case	The essential elements of the award of the contract include but are not limited to price <sup>xiv</sup> , nature of the works, the completion period, the terms of payment, and the materials used. It is always necessary to make an analysis on a case-by-case basis of what is an essential	25% of the amount of the contract  plus  the value of the additional amount of the contract resulting from the substantial

No	Type of irregularity	Legal basis / reference document	Description of irregularity	Rate of correction
		<p>law:</p> <p>Case C-496/99 P, CAS Succhi di Frutta SpA, [2004] ECR I-3801 paragraphs 116 and 118</p> <p>Case C-340/02, <i>Commission v. France</i> [2004] ECR I- 9845</p> <p>Case C-91/08, <i>Wall AG</i>, [2010] ECR I- 2815</p>	element.	modification of the contract elements.
23.	Reduction in the scope of the contract	<p>Article 2 of Directive 2004/18/EC</p> <p>Article 10 of Directive 2004/17/EC</p>	The contract was awarded in compliance with the Directives, but was followed by a reduction in the scope of the contract.	<p>Value of the reduction in the scope</p> <p>Plus</p> <p>25% of the value of the final scope (only when the reduction in the scope of the contract is substantial).</p>

<b>No</b>	<b>Type of irregularity</b>	<b>Legal basis / reference document</b>	<b>Description of irregularity</b>	<b>Rate of correction</b>
24.	Award of additional works/services/supplies contracts (if such award constitutes a substantial modification of the original terms of the contract <sup>xv</sup> ) without competition in the absence of one of the following conditions  - extreme urgency brought about by unforeseeable events;  - an unforeseen circumstance <sup>xvi</sup> for complementary works, services, supplies.	Point 1(c) and point 4(a) of Article 31 of Directive 2004/18/EC	The main contract was awarded in accordance with the relevant provisions, but was followed by one or more additional works/services/supplies contracts (whether or not formalised in writing) awarded without complying with the provisions of the Directives, i.e., the provisions related to the negotiated procedures without publication for reasons of extreme urgency brought about by unforeseeable events or for award of complementary supplies, works and services.	100% of the value of the supplementary contracts.  Where the total of additional works/services/supplies contracts (whether or not formalised in writing) awarded without complying with the provisions of the Directives does not exceed the thresholds of the Directives and 50% of the value of the original contract, the correction may be reduced to 25%.
25.	Additional works or services exceeding the limit laid down in the relevant provisions	Last subparagraph of §4(a) of Article 31 of Directive 2004/18/EC	The main contract was awarded in accordance with the provisions of the Directives, but was followed by one or more supplementary contracts exceeding the value of the original contract by more than 50% <sup>xvii</sup> .	100% of the amount exceeding 50% of the value of the original contract

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## ENDNOTES:

<sup>i</sup> Public contracts below the thresholds for application of the Directives and public contracts for services listed in Annex I B to Directive 92/50/EEC, Annex XVI B to Directive 93/38/EEC, Annex II B to Directive 2004/18/EC and Annex XVII B to Directive 2004/17/EC.

<sup>ii</sup> In the context of the Structural Funds and Cohesion Fund, the following is noted.

The “*Guidance document on management verifications to be carried out by Member States on operations co-financed by the Structural Funds and the Cohesion Fund for the 2007 – 2013 programming period*” (COCOF note 08/0020/04 of 5 June 2008), sets out the Commission’s view on how the management verifications should be organised in order to prevent and detect irregularities in the area of public procurement. As stated in this document, “*verifications should be carried out as soon as possible after the particular process has occurred as it is often difficult to take corrective action at a later date*”.

The Member State has the obligation to ensure that operations are selected for funding in accordance with applicable EU and national rules (Articles 60(a)-(b) and 61(b)ii of Council Regulation (EC) No 1083/2006), including those related to public procurement:

a) When the national ex-ante control detects that the tender procedure used for a public contract is in breach of public procurement rules and this **contract has not been signed yet**, the managing authority should recommend the beneficiary to launch a new tender procedure in full compliance with the mentioned rules if the launching of a new tender does not entail significant additional costs. In case no new tender is launched, the managing authority shall correct the irregularity, by applying these guidelines or stricter rules defined at national level.

b) If an irregularity is detected **after the contract has been signed and the operation has been approved for funding** (at any stage of the project's cycle), the managing authority shall correct the irregularity, by applying these guidelines or stricter rules defined at national level.

<sup>iii</sup> Depending on the date when the contract procedure was launched, the following Directives are relevant: 86/665/EEC, 92/50/EEC, 93/36/EEC, 93/37/EEC, 93/38/EEC, 92/13/EEC, 2001/78/EC, 2004/17/EC, 2004/18/EC. This is only an indicative list.

<sup>iv</sup> For the period 2000-2006, the “Guidelines on the principles, criteria and indicative scales to be applied by the Commission departments in determining financial corrections under Article 39(3) of Regulation (EC) No 1260/1999” were adopted by Commission Decision C/2001/476. A similar document was adopted for the Cohesion Fund (see Commission Decision C/2002/2871).

<sup>v</sup> Cases C-324/98 *Telaustria* [2000] ECR I-10745, paragraph 62, C-231/03 *Coname*, [2005] ECR I-7287, paragraphs 16 to 19 and C-458/03 *Parking Brixen*, [2005] ECR I-8585, paragraph 49.

<sup>vi</sup> The concept of “sufficient degree of advertising” implies, in particular, the following considerations:

a) The principles of equal treatment and non-discrimination imply an **obligation of transparency**, which consists in ensuring, for the benefit of any potential bidder, a **degree of advertising sufficient to enable the contract to be subject to competition**. The obligation of transparency requires that an **undertaking located in another**

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**Member State can have access to appropriate information regarding the contract before it is awarded**, so that, if it so wishes, it would be **in a position to express its interest** in obtaining the contract.

b) For individual cases where, because of particular circumstances such as a very modest economic interest at stake, a contract award would be of no interest to economic operators located in other Member States. In such a case the effects on the fundamental freedoms are to be regarded as too uncertain and indirect to warrant the application of standards derived from primary Community law and consequently there is no ground for application of financial corrections.

It is the responsibility of the individual contracting entities to decide whether an intended contract award might potentially be of interest to economic operators located in other Member States. In the view of the Commission, this decision has to be based on an evaluation of the individual circumstances of the case, such as the subject-matter of the contract, its estimated value, the specifics of the sector concerned (size and structure of the market, commercial practices, etc.) and the geographic location of the place of performance.

<sup>vii</sup> See the judgment in Case C-507/03, *Commission v. Ireland*, [2007] ECR I-9777, paragraph 32.

<sup>viii</sup> Case T-384/10, *Spain/Commission (GIASA)*, OJ C 225, 3.8.2013, p. 63–63.

<sup>ix</sup> For contracts not (or not fully) subject to the Directives, there is a need to determine the existence of a certain cross-border interest or a breach of national legislation on public procurement. On this matter, see section 1.2.2 of the present guidelines. If there is cross-border interest or a breach of national law, there is a need to determine what level of publicity should have been applied in that case. In this context, as stated in section 2.1.1 of the Commission interpretative communication n° 2006/C 179/02, the obligation of transparency requires that an undertaking located in another Member State has access to appropriate information regarding the contract before it is awarded, so that, if it so wishes, it would be in a position to submit a tender or to express its interest in obtaining that contract. In practice, this implies that either the contract notice was published at national level (following the national legislation or rules in that regard) or the basic standards for the advertising of contracts were respected. See more details on these standards on section 2.1 of the mentioned Commission interpretative communication.

<sup>x</sup> These time limits are applicable to restricted procedures and negotiated procedures with publication of a contract notice.

<sup>xi</sup> These time limits are applicable to restricted procedures and negotiated procedures with publication of a contract notice.

<sup>xii</sup> A limited degree of flexibility can be applied to the modifications of a contract after its award even where such possibility as well as for the relevant detailed rules for implementation are not provided for in a clear and precise manner in the tender notice or in the tender documents (see point 118 of ECJ Case C-496/99, *Succhi di frutta*). When this possibility is not foreseen in the tender documentation, contract modifications are admitted if they are not substantial. A modification is considered substantial if:

- (a) the contracting authority introduces conditions, which, had they been part of the initial tender procedure, would have allowed for the admission of tenderers other than those initially admitted;
- (b) the modification allows award of a tender to a tenderer other than the one initially accepted;

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- (c) the contracting authority extends the scope of the contract to encompass works/services/supplies not initially covered;
  - (d) the modification changes the economic balance in favour of the contractor in a manner not provided for in the initial contract.

<sup>xiii</sup> See endnote xii above.

<sup>xiv</sup> For the moment the only modification of the initial price not considered as substantial by the Court concerns the reduction of the price by 1,47 and 2,94% (see points 61 and 62 of the Case C-454/06, *Pressetext*). In cases T-540/10 and T-235/11, the General Court has accepted financial corrections for modifications of less than 2% of the initial price.

<sup>xv</sup> See endnote xii above.

<sup>xvi</sup> The concept of "unforeseen circumstances" should be interpreted having regard to what a diligent contracting authority should have foreseen (e.g. new requirements resulting from the adoption of new EU or national legislation or technical conditions, which could not have been foreseen despite technical investigations underlying the design, and carried out according to the state of the art). Additional works/services/supplies caused by insufficient preparation of the tender/project cannot be considered "unforeseen circumstances" See cases T-540/10 and T-235/11 (referred to above)

<sup>xvii</sup> There is no limit in the case of Directive 2004/17/EC. For the calculation of the 50% threshold, contracting authorities shall take into account the additional works/services. The value of these additional works/services cannot be compensated by the value of the cancelled works/services. The amount of cancelled works/services has no impact on the calculation of 50% threshold.