EUROPEAN COMMISSION

SECRETARIAT-GENERAL

PV(2012)1995 final

Brussels, 4 April 2012

MINUTES

of the 1995th meeting of the Commission

held in Brussels

(Berlaymont)

on Wednesday 21 March 2012

(morning)

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Single sitting: Wednesday 21 March 2012 (morning)

The sitting opened at 9.11 with Mr BARROSO, President, in the chair.

Present:

Mr BARROSO	President	
Baroness ASHTON	High Representative/ Vice-President	
Mr ALMUNIA	Vice-President	
Mr KALLAS	Vice-President	
Ms KROES	Vice-President	
Mr TAJANI	Vice-President	
Mr ŠEFČOVIČ	Vice-President	
Mr REHN	Vice-President	
Mr POTOČNIK	Member	
Mr PIEBALGS	Member	
Mr BARNIER	Member	
Ms VASSILIOU	Member	
Mr ŠEMETA	Member	
Mr DE GUCHT	Member	
Mr LEWANDOWSKI	Member	
Ms DAMANAKI	Member	
Ms GEORGIEVA	Member	
Mr OETTINGER	Member	Item 8 (in part)
Ms HEDEGAARD	Member	
Mr FÜLE	Member	
Mr ANDOR	Member	
Ms MALMSTRÖM	Member	Items 8 (in part) to 10
Mr CIOLOŞ	Member	

Absent:

Ms REDING	Vice-President
Mr DALLI	Member
Ms GEOGHEGAN-QUINN	Member
Mr HAHN	Member

<u>The following sat in to represent absent Members of the Commission</u>:

Ms HOFFMANN	Deputy Chef de cabinet to Ms REDING
Ms DARMANIN	Chef de cabinet to Mr DALLI
Mr BELL	Chef de cabinet to Ms GEOGHEGAN-QUINN
Mr GAMBS	Chef de cabinet to Mr HAHN

<u>The following also sat in</u>:

Mr LAITENBERGER	Chef de cabinet to the PRESIDENT	
Mr ROMERO REQUENA	Director-General, Legal Service	
Mr PAULGER	Director-General, DG Communication	
Mr DOENS	Head of the Commission Spokesperson Service	
Ms AHRENKILDE HANSEN	Commission Spokeswoman	Items 1 to 10 (in part)
Mr THEBAULT	Head of the Bureau of European Policy Advisers	
Ms MARTÍNEZ ALBEROLA	Adviser in the PRESIDENT's Office	Items 9 and 10
Ms DE RICHEMONT	Adviser in the PRESIDENT's Office	Item 8
Mr SOBRAL	Adviser in the PRESIDENT's Office	Items 8 (in part) to 10
Ms SUTTON	A member of the PRESIDENT's staff	Items 8 and 9/10 (in part)
Ms SCHREIBER	Deputy Chef de cabinet to Mr BARNIER	Items 1 to 8
Mr RIEKELES	A member of Mr BARNIER's staff	Items 1 to 8
Mr HOFFMEISTER	Deputy Chef de cabinet to Mr DE GUCHT	Items 1 to 8
Ms GAGO	Chef de cabinet to Mr ANDOR	Items 9 and 10
Mr MAES	A member of Mr ANDOR's staff	Items 9 and 10
Ms ÅSENIUS	Chef de cabinet to Ms MALMSTRÖM	Items 1 to 8 (in part)

Secretary: Ms DAY, Secretary-General, assisted by Mr AYET PUIGARNAU, Director in the Secretariat-General.

1. AGENDAS
(OJ(2012)1995/3; SEC(2012)181/2)

The Commission took note of that day's agenda and of the tentative agendas for forthcoming meetings.

2. WEEKLY MEETING OF CHEFS DE CABINET
(RCC(2012)1995)

The Commission considered the Secretary-General's report on the weekly meeting of Chefs de cabinet held on Monday 19 March.

3. MINUTES OF 1994TH MEETING (13 MARCH)
(PV(2012)1994)

The Commission approved the minutes of its 1994th meeting.

4. INTERINSTITUTIONAL RELATIONS

4.1. LEGISLATIVE MATTERS

i) Specific measures for agriculture in the outermost regions of the Union (Regulation) – MATO ADROVER report – 2010/0256 (COD)
(SI(2012)88 to /3)

The Commission approved the line set out in SI(2012)88 and /3.

ii) Energy efficiency – Repeal of Directives 2004/8/EC and 2006/32/EC (Directive) – TURMES report – 2011/0172 (COD)
(SI(2012)108 and /2)

The Commission approved the line set out in SI(2012)108/2.

iii) Over-the-counter derivatives, central counterparties and trade repositories (Regulation) – LANGEN report – 2010/0250 (COD)
(SI(2012)117)

The Commission approved the line set out in SI(2012)117.

4.2. RELATIONS WITH THE EUROPEAN COUNCIL AND THE COUNCIL

iv) Programming of Council business
(SI(2012)110)

The Commission took note of the information in SI(2012)110 on the Council meetings between 22 March and 4 April.

v) Strategy towards the International Plant Protection Convention (IPPC) – Statement of the Council and of the Governments of the Member States
(SI(2012)95)

The Commission approved the line set out in SI(2012)95.

4.3. RELATIONS WITH PARLIAMENT

vi) Results of Parliament's March I part-session
(SP(2012)199; SP(2012)200)

The Commission took note of the information in SP(2012)199 and SP(2012)200 on the proceedings of the part-session of Parliament held in Strasbourg from 12 to 15 March.

vii) Action to be taken on Parliament's legislative opinions and resolutions of a legal nature
(SP(2012)207)

The Commission decided to empower the Commission Members responsible for the sectors in question, in agreement with the PRESIDENT and Mr ŠEFČOVIČ and, if necessary, with the other Members concerned, to adopt the amended proposals for transmission to Parliament and the Council, as set out in SP(2012)207, drawn up following the March I part-session of Parliament.

4.4. RELATIONS WITH THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE, THE COMMITTEE OF THE REGIONS, THE EUROPEAN OMBUDSMAN AND NATIONAL PARLIAMENTS

viii) Attendance by Members of the European Economic and Social Committee at international conferences
(SC(2012)10/2)

– United Nations Conference on Sustainable Development (Rio+20) (Rio de Janeiro, 20 to 22 June)

The Commission agreed to the request to the PRESIDENT from Mr Staffan Nilsson, President of the European Economic and Social Committee, concerning the attendance of four Members of that Committee at the above-mentioned conference, with a reminder about the procedure to be followed.

4.5. EXTERNAL RELATIONS

ix) Adoption by the Commission of non-binding instruments at international level
(SI(2012)111)

– *Angola-European Union Joint Way Forward (JWF)*

The Commission approved the Memorandum of Understanding between the Republic of Angola and the European Union annexed to SI(2012)111.

5. MONITORING THE APPLICATION OF EUROPEAN UNION LAW

STATE AID – INDIVIDUAL CASES
(SEC(2012)197/2)

The Commission adopted the decisions in SEC(2012)197/2.

6. WRITTEN PROCEDURES, EMPOWERMENT AND DELEGATION OF POWERS

6.1. WRITTEN PROCEDURES APPROVED (SEC(2012)182 ET SEQ.)

The Commission took note of the Secretariat-General's memoranda recording decisions adopted between 12 and 16 March.

6.2. EMPOWERMENT (SEC(2012)183 ET SEQ.)

The Commission took note of the Secretariat-General's memoranda recording decisions adopted between 12 and 16 March.

6.3. DELEGATION AND SUBDELEGATION OF POWERS (SEC(2012)184 ET SEQ.)

The Commission took note of the Secretariat-General's memoranda recording decisions adopted under the delegation and subdelegation procedure between 12 and 16 March, as archived in e-Greffe.

6.4. SENSITIVE WRITTEN PROCEDURES (SEC(2012)185 AND /2)

The Commission took note of the sensitive written procedures for which the time limit expired between 19 and 23 March and of the 'finalisation' written procedures initiated following the weekly meeting of Chefs de cabinet on 12 and 19 March.

7. ADMINISTRATIVE AND BUDGETARY MATTERS (SEC(2012)186)

ADMINISTRATIVE MATTERS
(PERS(2012)37)

7.1. DG HUMAN RESOURCES AND SECURITY – SPECIAL ADVISERS TO COMMISSION MEMBERS – 1 APRIL 2012 TO 31 MARCH 2013 (PERS(2012)38)

The Commission took note of the information in point 1 of PERS(2012)37 and, on a proposal from Mr ŠEFČOVIČ, in agreement with the PRESIDENT, decided:

- to authorise Mr ŠEFČOVIČ to adopt the list of special advisers to Commission Members set out in PERS(2012)38;
- to authorise the Director-General for Human Resources and Security to implement that decision by signing contracts of employment on behalf of the authority empowered to conclude contracts of employment.

This decision would take effect immediately.

7.2. DG HUMAN RESOURCES AND SECURITY – ADDITIONAL PROVISIONS GOVERNING MISSIONS UNDERTAKEN BY SPECIAL ADVISERS

The Commission took note of the information in point 2 of PERS(2012)37 and, on a proposal from Mr ŠEFČOVIČ, in agreement with the PRESIDENT, decided to authorise special advisers to undertake missions to and from the place of performance of their contract, and, if their duties so required, to and from other places, in particular their place of residence.

This decision would take effect immediately.

7.3. *SECRETARIAT-GENERAL – TERMINATION OF THE SELECTION PROCEDURE FOR AN AD14/15 DIRECTOR POST (PERS(2012)4)*

On a proposal from Mr ŠEFČOVIČ, in agreement with the PRESIDENT, the Commission decided to terminate – without making any appointment – internal selection procedure COM/2011/2841 for the post of Director of the Policy Coordination Directorate in the Secretariat-General.

This decision would take effect immediately.

7.4. *DG INTERNAL MARKET AND SERVICES – AMENDMENT OF ORGANISATION CHART, APPOINTMENT OF AN AD15 PRINCIPAL ADVISER AND SECONDMENT IN THE INTEREST OF THE SERVICE OF AN AD15 OFFICIAL*

On a proposal from Mr ŠEFČOVIČ, in agreement with the PRESIDENT and Mr BARNIER, the Commission decided:

– to create a temporary AD15 principal adviser post in DG Internal Market and Services;

– to fill that post by transferring in the interest of the service under Article 7 of the Staff Regulations Ms Margot FROEHLINGER, an AD15 official and currently Director of the Intellectual Property Directorate in DG Internal Market and Services;

– to approve the secondment in the interest of the service under Articles 37 and 38 of the Staff Regulations of Ms Margot FROEHLINGER to the European Patent Office for a period of three years, which may be renewed;

– to abolish the post of temporary principal adviser after the departure of its holder.

This decision would take effect on 1 April 2012.

8. PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON THE ACCESS OF THIRD-COUNTRY GOODS AND SERVICES TO THE UNION'S INTERNAL MARKET IN PUBLIC PROCUREMENT AND PROCEDURES SUPPORTING NEGOTIATIONS ON ACCESS OF UNION GOODS AND SERVICES TO THE PUBLIC PROCUREMENT MARKETS OF THIRD COUNTRIES (COM(2012)124 TO /4; SWD(2012)57; SWD(2012)58; SEC(2012)191; RCC(2012)25)

Introducing the presentation of the proposal for a Regulation submitted to the Commission for adoption, the PRESIDENT reviewed the background to the debate on the opening up of public procurement. He started by pointing out that the European Union’s public procurement markets were in fact fully open to the rest of the world, whereas most of its main partners applied restrictive practices in this area. The proposal in no way conflicted with the ‘standstill clause’ agreed on at the G20, since it merely implemented existing commitments. He referred to the Government Procurement Agreement (GPA) concluded in the context of the World Trade Organisation (WTO), which authorised certain restrictions but had not been fully transposed by the Union. The aim of the proposal was to help open up public procurement to Europe’s main trading partners while safeguarding the basic principle of opening up the European market; the closing of European public procurement markets must be an exception.

The PRESIDENT thanked Mr BARNIER and Mr DE GUCHT for the proposal they were submitting jointly. He stressed that it was fully in line with the conclusions of the October 2011 European Council asking the European Commission to propose a European Union instrument to open up public procurement to third countries. The leverage effect of such an EU instrument should not be underestimated, since the European Union market was the largest in the world in terms of value, even in the current crisis. He therefore trusted that the discussion that day would focus on the content of the proposal before making any improvements that were still necessary. He referred more specifically to Article 6 of the proposal on the decentralised arrangements, which, because of its innovative nature with respect to more traditional commercial policy instruments, may have prompted certain questions upstream of the preparation of the proposal.

In conclusion, the PRESIDENT noted that the set of provisions contained in the proposal had been carefully combined and balanced in order to strengthen its leverage effect in the negotiations currently under way with the Union's trading partners. He then gave the floor to Mr BARNIER and Mr DE GUCHT so that they could present the proposal and make any constructive suggestions they thought necessary to develop it without altering its overall balance.

Mr BARNIER said that public procurement policy was a key instrument for achieving the European Union goal of encouraging growth, particularly given the current economic crisis.

He commented that the revision of the GPA in December 2011 had certainly led to some progress in the reciprocal opening up of public procurement in the fifteen signatory States, while drawing attention to the fact that several of the Union's major trading partners had adopted a large number of protectionist measures, thereby creating an asymmetry that penalised European enterprises. He mentioned, in particular, emerging countries such as India, China, Brazil and Russia, which, although they were key trading partners of the Union, were not parties to the Agreement. Their public procurement markets generally remained closed, particularly in the construction, transport and energy production sectors. The Union therefore needed a coherent common commercial policy in terms of public procurement, since the results secured in international negotiations had not been translated into internal Community law. For this reason, in the absence of a European framework, certain Member States had decided to go it alone.

Mr BARNIER cited figures and explained that because of the restrictions applied by Europe's trading partners, world public procurement markets represented only €10 billion of the European Union's total volume of exports (0.08% of its gross domestic product). The estimated annual loss of revenue was around €12 billion and the loss for the European employment market was 180 000 jobs. He therefore felt that it was justified for the common commercial policy to pursue three main aims: (i) to open up public procurement worldwide, and also within the Union; (ii) to increase the leverage effect for the Union in its negotiations with its trading partners; and (iii) to create a uniform framework for all Member States and, consequently, fairer competition conditions in the Union.

He emphasised that the proposal was in line with the general principle governing the Union's common commercial policy, namely opening up markets. He presented the two main mechanisms contained in the proposed instrument aimed at increasing access by European enterprises to public procurement worldwide, namely: (i) the procedure defined in Article 6 of the proposal, whereby the Commission could approve the exclusion, by the Union's contracting authorities, of tenders comprising a significant number of foreign goods and services not covered by international agreements, and (iii) the mechanism defined in Articles 8 to 10, whereby the Commission, after conducting an investigation and consulting a third country which applied protectionist measures, could adopt provisions to restrict the access of the goods and services of that country to the European public procurement market.

In relation to certain questions about the first of these mechanisms and the threshold presented in the current proposal for a Regulation that had been raised during the preparation of that day's discussion, Mr BARNIER explained that he and Mr DE GUCHT were now proposing an amendment to the proposal with a view to reaching a consensus on Article 6 and clarifying it, while maintaining the overall balance of the initiative. He expanded on this suggestion, which consisted of including a de minimis threshold of €5 million in Article 6 below which no contracting authority of a Member State could exclude a bidder from a third country. This would keep European public procurement markets fully open in cases where the value of the order in question was below that amount. He explained that for an individual public procurement contract of more than €5 million, the proposed system would make it possible to monitor reciprocity and apply restrictions negotiated by the European Union, leaving the Commission ex-ante decision-making powers concerning any exclusions proposed by a contracting authority.

Mr BARNIER said that in any case, these two tools were in response to a request made by the European Council and were essential for reinforcing leverage and avoiding fragmentation of the internal market. Winding up, he stressed that the proposed dual mechanism would reinforce the common commercial policy in the area of public procurement and give the Commission a key role.

Mr DE GUCHT concluded this presentation by emphasising very clearly the purpose of the proposal, which was not to introduce an instrument that would close the European market but rather to create an instrument that would help European enterprises by opening up public procurement markets in third countries that were still largely closed to them, thereby remedying a significant shortcoming for the European Union's economic health. He confirmed the difficulty of the current negotiations on bilateral free trade agreements and the multilateral negotiations being conducted in the context of the WTO in the area of public procurement.

He also mentioned the political justification for the decentralised approach set out in Article 6 of the proposal for a Regulation, under which the Commission was to be notified and to give its ex-ante approval. Since the Commission's areas of responsibility were constantly being extended, Mr DE GUCHT felt that it was logical for its decision-making, supervisory and investigatory powers to be adapted, without losing sight of the need to ensure close cooperation with the Member States in this field.

He highlighted the advantages of the amendment proposed during the meeting, in particular the removal of less favourable treatment for countries which had already signed an agreement with the EU on public procurement. He said that lowering the threshold for excluding certain tenders from award procedures from a contract value of €10 million to €5 million would have a limited impact in terms of the number of cases submitted to the Commission for approval, while allowing the institution to develop a methodology for dealing with these new cases.

Mr DE GUCHT felt that the power of investigation to be conferred on the Commission would be a particularly valuable asset in negotiations with emerging countries which had a federal structure, such as India or Brazil, where the administrative organisation and the demarcation between public and private contracts were still sometimes very complex.

During the discussion which followed, the Commission raised the following main points:

General aspects of the proposal for a Regulation

– the importance of stressing the twofold objective of the proposal, i.e. to create a Community instrument that would put the EU in a stronger position to obtain better access to public procurement in third countries and avoid piecemeal action by the Member States, and to set out conditions clarifying the position of European companies as tenderers in third countries;

– given a general economic climate in which there was a need to boost growth and create jobs, a reminder that it was in the EU's fundamental interest to restate its opposition on principle to any form of protectionism and to make a vigorous and unwavering contribution to opening up markets, given the imbalances with the rest of the world in relation to goods, services and investment;

– agreement with the need to put the Community method and the European Commission at the heart of the proposed system, but questions too as to whether these arrangements would be able to meet that need;

– endorsement of the approach followed in order to guarantee the most effective possible use of European funds, thereby defending the interests of European citizens and supporting employment in Europe, and of the political signal sent to third countries in the run-up to major trade negotiations in demonstrating that the Union wanted to develop an ambitious trade policy and that, if necessary, it was also prepared to apply the sanctions available under the proposed new system so that it could compete with these countries on a level playing field in public procurement matters;

– the need to strike a careful balance between the two elements of the proposed system – incentives and threats – in order to ensure that the desired leverage effect was fully effective and reduce the risk of the new system triggering retaliatory measures;

– support for the ideas behind the procedure laid down in Articles 10 to 12 of the proposal concerning the Commission's power to adopt restrictive measures;

– insistence on the need for continuing efforts to open up public procurement within the European Union, alongside the proposed system aimed at third countries;

– a call to keep to a minimum the tangible effects of the proposal in terms of administration and to avoid unnecessary red tape for businesses, contracting authorities and the Commission, including EU delegations;

– on the communications front, the need to put the changes made by the proposal into proportion, to place it in the context of the bilateral and multilateral negotiations under way and, finally, to avoid any misguided connection being made with upcoming elections in certain Member States;

Article 6 of the proposal for a Regulation

– majority support for the compromise proposed at the meeting concerning Article 6(1) of the proposal, in particular the key issue of the decision-making powers clearly entrusted to the Commission on whether or not to approve, on the basis of a notification from the national or local contracting authorities, the exclusion of tenders containing products or services from third countries if the value of these products and services exceeded 50% of the total value of the tender in the case of contracts with a value equal to or more than €5 million;

- requests for clarification that account would be taken of the risk of fragmentation of the EU internal market because of the extent of the powers delegated to national or local contracting authorities, and clarification on the question of determining the origin of certain products in the supply chain;

- a warning from some participants about certain potential risks: (i) given the Commission's purely reactive role, the risk that contracting authorities would have too much responsibility regarding the exclusion of certain tenders from award procedures, which could weaken the internal market and the common policies of the EU and distort competition; (ii) the risk that these contracting authorities would pass on to 'Brussels' difficult decisions on the exclusion of certain tenders; (iii) the risk of establishing a kind of 'inverted subsidiarity'; and, lastly, (iv) the risk of differences opening up between large and small Member States and between local contracting authorities;

- to mitigate these various risks, a specific request that the provisions of Article 6 of the proposal be removed or at least be specifically covered by the Union's common commercial policy; the suggestion that the Commission be informed of any intention to exclude tenders as soon as the contract notice were published by the contracting authorities so that it could act at an early stage; the suggestion that the notification procedure as proposed should simply be removed;

- a reminder of the need to take account of impact studies in order to safeguard the Commission's credibility.

Replying to these comments, Mr DE GUCHT placed the proposal in the context of world trade, stressing that the European Union was – and intended to remain – the most open market in the world. He briefed the Commission Members on the state of play in the trade negotiations between the EU and certain key partners, such as China and the United States, stressing their protectionist reflexes. He therefore felt that Europe must not be too accommodating and must take a firm line towards third countries.

Turning to the specific question of Article 6 of the proposal for a Regulation, he insisted that the intention was unequivocally to give the Commission a central role in the operation of the proposed mechanism. He stressed that it was up to the Commission to take decisions to ensure the consistency of European policy on public procurement. To clarify this point and to avoid any misunderstandings he proposed that the first sentence of Article 6(1) be amended to emphasise clearly the Commission's prerogatives.

He also explained that the purpose of lowering from €10 million to €5 million the threshold laid down in Article 6(1) for the value of contracts was to rule out any possibility of applying restrictive measures to tenders below the threshold in question.

On the subject of the trade surpluses referred to in the discussion, he reminded the meeting that countries like the United States and Japan were seeing a decline in their share of world trade, whereas the European Union's share was increasing, which was something to be proud of.

Mr BARNIER thanked the Members of the Commission for the high standard of the debate and reiterated his conviction that Europe needed to introduce a fair and effective system aimed unashamedly at opening up public procurement in third countries to its businesses, by highlighting the many obstacles which its partners placed in the way of trade. The system would also create a European framework and ensure the uniform application of the measures proposed within the internal market, to prevent fragmentation. Responsibility for overseeing the system would therefore have to be clearly entrusted to the Commission.

Regarding Article 6(1), he approved the additional proposal for amendment made by Mr DE GUCHT and explained the margin of flexibility which this provision allowed, particularly the fact that it did not impose an obligation to exclude certain tenders, but created the possibility of doing so.

He also said that reducing the threshold for the value of the contracts referred to in Article 6(1) from ten to five million euros was an acceptable compromise, but noted that to some extent this meant going back on the restrictive measures in the public procurement field negotiated by the European Union in the WTO framework.

As regards the administrative burden resulting from the proposal, estimates suggested that the Commission would have to deal with about 40 cases per year. He confirmed that the proposed system would put the Member States on an equal footing, regardless of their size.

The PRESIDENT reaffirmed the Commission's strong commitment to open markets and said that the restrictive measures introduced by third countries were a reality. The European Union needed effective trade policy instruments to ensure greater reciprocity in a completely new global geopolitical context, where many developing countries had now progressed to the stage of emerging economies. The European Union had good reason to take bold political initiatives and firm measures. It had no need to fear reprisals by certain third countries because it wielded considerable economic and trading power which made it a much sought-after partner and placed it in a strong negotiating position.

The PRESIDENT concluded by noting broad support by the Commission Members for the proposal presented jointly by Mr BARNIER and Mr DE GUCHT, and their agreement to the introduction of the following amendments to the English version of the document distributed as COM(2012)124/4:

– **on page 6, the first sentence of the fourth paragraph of Chapter 3 of the Explanatory Memorandum is amended as follows:**

'*The Commission may approve that Contracting authorities/entities exclude tenders where the value of non-covered goods and services exceeds 50% of the total value of goods and services included in the tender.*';

– **on pages 8 and 9, the first paragraph relating to Article 6 in Chapter 5 of the Explanatory Memorandum is amended as follows:**

'***Article 6*** *sets out the conditions under which the Commission may approve that individual contracting authorities/entities exclude tenders from tendering* *procedures, where the value of non-covered goods and services exceeds 50% of the total value of goods or services included in the tender for contracts with an estimated value equal or above EUR 5.000.000.*';

– **on page 9, the second sentence of the second paragraph relating to Article 6 in Chapter 5 of the Explanatory Memorandum is amended as follows:**

'*According to the publication of notices in the Official Journal (TED, Tenders European Daily) only 7% of all contracts published in the Official Journal have a value above EUR 5 million. However, those contracts represent 61% of the whole EU public procurement market. The Commission estimates that it would receive each year a maximum of 35-45 notices*.';

– **on page 9, the first sentence of the third paragraph relating to Article 6 in Chapter 5 of the Explanatory Memorandum is amended as follows:**

'*For contracts with an estimated value equal or above EUR 5.000.000 the Commission should take a decision on the exclusion*.';

– **on page 13, recital 12 is amended as follows:**

'*The Commission should assess whether to approve that contracting authorities/entities within the meaning of Directives [2004/17/EC, 2004/18/EC and Directive [….] of the European Parliament and the Council of [….]….on the award of concession contracts[1]] exclude, for contracts with an estimated value equal or above EUR 5.000.000 from procedures for the award of contracts goods and services not covered by the international commitments undertaken by the European Union.*';

– **on page 13, the first sentence of recital 15 is amended as follows:**

'*For contracts with an estimated value equal or above EUR 5.000.000 the*

[1] *OJ L…*

Commission should approve the intended exclusion if the international agreement concerning market access in the field of public procurement between the Union and the country where the goods and/or services originate contains, for the goods and/or services for which the exclusion is proposed, explicit market access reservations taken by the Union.';

– **on page 15, the beginning of the first sentence of recital 25 is amended as follows:**

'*In case of misapplication by contracting authorities/entities of exceptions to measures limiting access of non-covered goods and services, the Commission ...*';

– **on page 19, Article 5 is amended as follows:**

'*Non-covered goods and services may be subject to restrictive measures taken by the Commission :*

(a) upon request of individual contracting entities according to the rules set out in Article 6 ;

(b) according to the rules set out in Articles 10 and 11.';

– **on page 19, Article 6(1) is amended as follows:**

'*Upon request of contracting authorities/entities the Commission shall assess whether to approve, for contracts with an estimated value equal or above EUR 5.000.000 exclusive of value-added tax (VAT) the exclusion from procedures for the award of contracts tenders comprising goods or services originating outside the Union, if the value of the non-covered goods or services exceeds 50% of the total value of the goods or services constituting the tender, under the following conditions.*';

– **on page 19, the first sentence of Article 6(2) is amended as follows:**

'*Where contracting authorities/entities intend to request the exclusion from procedures for the award of contracts on the basis of paragraph 1 they shall indicate this in the contract notice they publish pursuant to Article 35 of Directive 2004/18/EC or pursuant to Article 42 of Directive 2004/17/EC or Article 26 of the*

Directive on the award of concession contracts.';

– **on page 20, the first sentence of the third subparagraph of Article 6(2) is amended as follows:**

'*Where contracting authorities/entities receive tenders that meet the conditions of paragraph 1 for which they intend to request the exclusion for that reason, they shall notify the Commission.*';

– **on page 20, the first sentence of Article 6(3) is amended as follows:**

'*For contracts referred to in paragraph 1, the Commission shall adopt an implementing act concerning the approval of the intended exclusion within a period of two months commencing on the first working day following the date on which it receives the notification.*';

– **on page 27, Article 16(1) is amended as follows:**

'*In case of misapplication by contracting authorities/entities of exceptions laid down in Article 13, the Commission may apply the corrective mechanism of Article 3 of Directive 89/665/EEC or Article 8 of Directive 92/13/EEC.*'.

Subject to inclusion of the above amendments and to a final linguistic revision of the text, the Commission adopted the proposal for a Regulation in COM(2012) 124/4 for transmission to Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions and, for information, to the national parliaments, together with the impact assessment and the summary thereof in the staff working documents distributed as SWD(2012)57 and SWD(2012)58 respectively, the contents of which were noted.

It also took note of the opinion of the Impact Assessment Board on the above proposal for a Regulation, as set out in SEC(2012)191.

9. PROPOSAL FOR A COUNCIL REGULATION ON THE EXERCISE OF THE RIGHT TO TAKE COLLECTIVE ACTION WITHIN THE CONTEXT OF THE FREEDOM OF ESTABLISHMENT AND THE FREEDOM TO PROVIDE SERVICES
(COM(2012)130 TO /3; SWD(2012)63; SWD(2012)64; SEC(2012)195; RCC(2012)26)

10. PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON THE ENFORCEMENT OF DIRECTIVE 96/71/EC CONCERNING THE POSTING OF WORKERS IN THE FRAMEWORK OF THE PROVISION OF SERVICES
(COM(2012)131 TO /3; SWD(2012)63; SWD(2012)64; SEC(2012)195; RCC(2012)26)

The PRESIDENT introduced the two proposals which Mr ANDOR was submitting to the Commission this day for adoption and which were aimed at clarifying, reinforcing and improving the implementation of Directive 96/71/EC on the posting of workers, underlining the fact that these proposals were an important part of this Commission's mandate since they were the outcome of a commitment made explicitly before Parliament in 2009.

With these proposals, the Commission was responding to the persistent, repeated calls by trade unions and political groups to find a legal solution to what amounted in certain cases to the exploitation of workers posted to another Member State and hence to an infringement of their rights. The aim was not to review the rules and principles governing the internal market; in fact the proposals fully respected the delicate, necessary balance required in this area.

The Proposal for a Council Regulation known as "Monti II" formed part of the Single Market Act and satisfied trade union concerns about the consequences of Court of Justice case law on the Directive on the posting of workers. While the content of the proposed text was limited, it clarified the Court's position and highlighted the vital balance that must be struck between the exercising of social rights to collective action and the freedom to provide services and freedom of establishment in another Member State, two objectives that must co-exist without restricting one another.

The Commission could not, from the legal point of view, go any further in its proposals since the room for manoeuvre was very tight given that this matter had been interpreted by the Court of Justice on the basis of the Treaties themselves. Lastly, he stressed the political importance of the proposal, which would fuel the discussion on the second proposal concerning the enforcement of the Directive on the posting of workers.

The PRESIDENT stated that this second proposal – discussed in point 10 of these minutes – did not affect or modify the content of the 1996 Directive, as interpreted by the Court of Justice, but simply reinforced the protection of posted workers, in particular as regards the exercise of their social rights. He pointed to the new provisions in Article 12 on joint and several liability giving workers an additional basis for legal solutions to defend their rights.

The wording used and the conditions laid down in this politically sensitive proposal were balanced, and the proposal itself did not unduly limit freedom to provide services or freedom of establishment in the internal market, and did not discriminate against employers in other Member States. He considered that the fact that the provisions in Article 12 were confined to a single sector (construction), that they applied only to the contractual relationship between contractors and their direct subcontractors and not to the entire subcontracting chain, and lastly that contractors who had taken normal precautions would be exempt from these provisions, were all essential elements of the proposal, clearly reflecting its balanced nature.

Mr ANDOR presented the two proposals, stating that they struck a balance between the need to protect workers and the no less necessary need to facilitate the provision of crossborder services and freedom of establishment, all in the context of fair competition in the internal market.

The proposal for a Directive (point 10 of these minutes) would considerably improve the enforcement of the 1996 Directive on the posting of workers without, however, reopening the discussion on this as requested by certain stakeholders, and would clarify how European rules in this area could be better implemented. The proposal was based on an exhaustive and proportionate examination of the actual implementation of the applicable rules and rights, in particular as regards more information for workers, administrative inspection and penalty mechanisms and, lastly, specific implementing mechanisms, for instance joint and several liability.

This new provision applied only to the construction sector where by far the greatest incidence of abuse had been detected. It would give posted workers a real chance at last of exercising their rights, and it would also make it more advantageous for them to cooperate with government bodies to prosecute companies not complying with the rules. At the same time, the proposal would mean that contractors who had taken the normal precautions could not be held liable, and the Member States that wished could apply stricter rules on liability or extend them to other sectors.

Lastly, Mr ANDOR pointed out that the provisions in Article 12(1)(b) were essential, since recent examples had shown that some employers would not hesitate to unduly withhold part of the salary of their employees on the false pretext of paying certain social security contributions. It was important to guarantee that the workers concerned were paid properly and that the companies directly involved in their posting were liable in this respect.

He concluded his remarks with a reminder of the political importance of these initiatives and the need for the various stakeholders and the social partners to view the Commission as a credible partner.

The ensuing discussion on the proposal for a Directive highlighted the following points:

- the difficulty of striking a fair balance between conflicting expectations, the challenge being to prevent abuses relating to the posting of workers and social dumping while at the same time making such posting easier;

- the importance of the joint and several liability laid down in Article 12 of the proposal and the need for it to be lifted if the contractor had exercised due diligence; the need for Member States with effective and more stringent rules to be allowed to keep them;

- the opportunity provided by this proposal to show that the Commission cared about guaranteeing social rights; regret that the provisions on joint and several liability applied only to the construction industry and were confined to the first subcontractor in the chain;

- in the same vein, a reminder of the extremely arduous working conditions faced by certain posted workers, who could find themselves confronted by conditions that were comparable to modern-day slavery and warranted the introduction of greater protection at European level;

- the commitments made in this respect before the European Parliament when the current Commission was approved, the high expectations on the part of Parliament and consequently the importance of taking into account the extreme political sensitivity of this question;

- the concern nevertheless expressed in some quarters regarding Article 12(1)(b), and the fear that this aspect of joint and several liability, which concerned taxes or social security contributions unduly withheld, would discourage companies, especially small and medium-sized undertakings, from subcontracting; the suggestion that this point might be moved to Article 11(5) to bring it within the framework of the mechanisms to be put in place by the Member States, or that it should be deleted;

- a reminder in this context that the contractor had a moral responsibility to ensure that the subcontractor with whom it established a contractual relationship, enabling it to benefit from the services of posted workers, was honest and respected the fundamental principle of human dignity; a reminder also that the request was entirely feasible, since joint and several liability was already practised in several countries where posting of workers was frequently used;

- given the precedents observed in a number of other Member States that did not at the present time apply such rules, and the problems encountered by the workers concerned in obtaining fair remuneration for their services, highlighting of the fact that it was morally impossible for the Commission to support such practices.

Mr ANDOR replied to these comments by pointing out that Article 12(1)(b) of the proposal for a Directive was intended only to combat existing abuses involving the undue withholding of taxes or social security contributions from the remuneration of the workers concerned. He also pointed out that it was sufficient for the contracting companies to provide proof that they had taken normal precautions under their national legislation when establishing the contractual relationship for them not to be held liable on their own account in the event of an abuse by the subcontractor. He felt that companies were better placed than workers to carry out such customary checks. He referred to the high expectations of the European Parliament and the social partners on this point and the importance of responding to these expectations by maintaining all the provisions in Article 12. Finally, he noted that, since the Member States most affected by the employment of posted workers on their territory already implemented measures of this type, there was no danger that such measures would stand in the way of the practice of posting workers.

The PRESIDENT then stressed that the amounts referred to in Article 12(1)(b) had to have been withheld unduly and that this provision appropriately complemented point (a) on remuneration. He too stressed the importance of guaranteeing fair remuneration for employees in a context in which some of the practices observed were not far removed from slavery. He acknowledged that the interinstitutional process in this matter would be difficult but he felt that, given the shocking practices observed in some places, the Commission had a duty to make a clear stand on the side of human dignity by encouraging contractors to exercise appropriate control over their subcontractors. He wished Mr ANDOR every encouragement in taking these sensitive proposals forward.

The Commission adopted the proposal for a Council Regulation and proposal for a Directive in COM(2012)130/3 and COM(2012)131/3 respectively, for transmission to Parliament, the Council, the Economic and Social Committee, the Committee of the Regions, the European Data Protection Supervisor and the national parliaments, together with the impact assessment and the summary thereof in staff working documents SWD(2012)63 and /2 and SWD(2012)64, the contents of which were noted.

It also took note of the opinion of the Impact Assessment Board on the above proposal for a Council Regulation and proposal for a Directive, as set out in SEC(2012)195.

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The Commission's other discussions on certain agenda items are recorded in the special minutes.

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The meeting closed at 12.13.