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Revised Guide to Enactment to accompany the UNCITRAL Model Law on Public Procurement*

Note by the Secretariat

This Note introduces a proposal for a draft revised Guide to Enactment of the UNCITRAL Model Law on Public Procurement, and sets out proposed general remarks, comprising an introduction and discussion of enactment policy considerations for the draft revised Guide to Enactment.

* This document was submitted less than ten weeks before the opening of the session because of the need to complete intersession informal consultations on the relevant provisions of the draft revised Guide to Enactment.

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I. Proposal for a draft Guide to Enactment to accompany the UNCITRAL Model Law on Public Procurement

1. The Commission at its forty-fourth session in 2011 adopted the UNCITRAL Model Law on Public Procurement, and requested that a Guide to Enactment to accompany this text be presented to it at its forty-fifth session (A/66/17, paras 180-184).

2. The proposals in this note and its addenda are presented to the Working Group to facilitate the production of such a Guide.

3. Issues to which the Working Group may wish to direct its particular attention are set out in footnotes to the text in these documents, including the following matters:

(a) The question of errors and omissions in tenders and other submissions, which are not addressed expressly in the Model Law The issues are raised in article 16 (see footnotes 1, 2, 3 and 4 on pages 8-9 of A/CN.9/WG.I/WP.79/Add.5) and in articles 39 and 40 (see footnotes 1 and 3 on pages 5 and 13 of A/CN.9/WG.I/WP.79/Add.8);

(b) Issues relating to tender securities as a general matter under article 17, which are raised in footnotes 6, 7 and 9 on pages 9-11 of A/CN.9/WG.I/WP.79/Add.5;

(c) Issues relating to tender securities in the context of electronic reverse auctions in the introduction to Chapter VI (see footnote 2 on page 4 of A/CN.9/WG.I/WP.79/Add.13) and regarding article 55 (see footnote 2 on page 4 of A/CN.9/WG.I/WP.79/Add.14);

(d) What explanation should be provided in the commentary to article 20(1) as to why an abnormally low submission may be rejected, rather than there being a positive obligation to do so, as raised in footnote 3 on page 3 of A/CN.9/WG.I/WP.79/Add.6;

(e) Issues relating to objectivity in the selection of suppliers in restricted tendering on the second ground under article 34(1) and in the use of direct solicitation in request-for-proposals procurement methods under article 35(2), also discussed in the introduction to Chapter IV procurement methods (see paragraphs 20, 30 and 59 of A/CN.9/WG.I/WP.79/Add.9);

(f) Whether a procuring entity may award a procurement contract on the basis of a pre-auction examination and evaluation under article 55, as raised in footnote 1 on page 4 of A/CN.9/WG.I/WP.79/Add14);

(g) Whether framework agreements should be permitted or discouraged within request-for-proposals procurement methods, and similar procurement methods, for example as raised regarding request-for-proposals with dialogue in the introduction to Chapter VII, in footnote 1 on page 2 of A/CN.9/WG.I/WP.79/Add.16;

(h) Whether there should be a discussion of the use of electronic catalogues, for example within open framework agreements under article 60, as raised in footnote 1 on page 2 of A/CN.9/WG.I/WP.79/Add.17;

(i) What explanation should be provided in the Guide regarding why there need be no standstill period in framework agreements without second-stage competition, as raised in footnote 5 on page 9 of A/CN.9/WG.I/WP.79/Add.17;

(j) What explanation should be provided in the introduction to Chapter VIII for the different approaches to the imposition of a suspension in challenge mechanisms (with reference in particular to a request for reconsideration before a procuring entity and a request for review before an independent body), as raised in footnote 1 on page 12 of A/CN.9/WG.I/WP.79/Add.18; and

(k) What explanation should be provided in the commentary to article 67(2)(b)(ii) on the option given to enacting States to confer competence on an independent body to consider challenges to decisions to cancel the procurement or to restrict such matters to challenges brought before a Court, as raised in footnote 3 on page 11 of A/CN.9/WG.I/WP.79/Add.19; and what explanation as to why the provisions allowing post-contract remedies to be granted to the independent body are optional under article 67, as raised in footnote 4 on page 15 of A/CN.9/WG.I/WP.79/Add.19.

II. Guide to Enactment of the UNCITRAL Model Law on Public Procurement

Part I. General remarks[1]

A. Introduction

4. This section of the Guide contains general remarks, separated into two parts. The first part discusses the main policy considerations in enacting the provisions and is primarily aimed at policymakers, in that it also focuses on the context of the Model Law, describes its main features and how the Model Law fits into a procurement system. The second part contains general commentary on implementation and use of the Model Law, and is primarily aimed at regulators and those providing guidance to users (e.g. a public procurement authority). The general remarks are followed by commentary on each Chapter of the Model Law and the articles within each such Chapter.

B. Purpose of the Guide

1. Introduction

5. The United Nations Commission on International Trade Law (UNCITRAL or the Commission) has prepared this Guide to the enactment of its 2011 Model Law on Public Procurement (the Model Law) to provide background and explanatory information on the policy considerations reflected in the Model Law.

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[1] Note to the Working Group: the headings and subheadings in the Guide will be revised in conjunction with the relevant departments within the United Nations so as to enhance the understanding of the reader.

6. The information presented in this Guide is intended to explain both the objectives of the Model Law (as set out in its Preamble) and how the provisions in the Model Law are designed to achieve those objectives. The Guide is thus intended to enhance the effectiveness of the Model Law as tool for modernizing and reforming procurement systems, particularly where there is limited familiarity with the type of procurement procedures the Model Law contains.

7. In addition, and in accordance with its general approach of intergovernmental consensus-building, UNCITRAL has drawn on the experiences of countries from around the world in regulating public procurement when drafting the Model Law and this Guide. This approach also serves to ensure that the texts reflect best practice, and that the provisions of the Model Law are universally applicable. Nonetheless, as there are wide variations among States in such matters as size of the State and its domestic economy, legal and administrative tradition, level of economic development and geographical factors, options are provided for in the Model Law to suit local circumstances, and the Guide explains the issues that may be taken into account in deciding how those options may be exercised. The information in this Guide is also intended to assist States in considering which, if any, of the provisions of the Model Law might have to be varied to take into account particular local circumstances.

8. Taking into account that the Model Law is a "framework" law and provides only essential principles and procedures (see further section [**] below [**hyperlink**]), this Guide discusses the need for regulations and additional guidance to support legislation based on the Model Law, identifies the main issues that should be addressed therein, and discusses the legal and other infrastructure that will be needed to support the effective implementation of the text.

2. Structure and intended readership of this Guide

9. This Guide is intended as a reference tool for policymakers and legislators, regulators and those providing guidance to users of a procurement system based on the Model Law. The primary focus of these readers will vary: for policymakers and legislators, it may be on whether to engage in procurement reform and, if so, the scope of the reform to be undertaken and which provisions to enact. Regulators and those providing guidance may wish to focus on the sections on implementation and use of the provisions themselves. For this reason, the Guide separates, to the extent possible, commentary on policy issues and on issues of implementation and use of the Model Law.

10. This Guide is also intended to assist users of the earlier UNCITRAL Model Law on Procurement of Goods, Construction and Services (the 1994 Model Law) in updating their legislation to reflect recent developments in public procurement. It therefore addresses the expanded scope of the Model Law as compared with its 1994 counterpart, and also explains, as necessary, the main recent developments in procurement policies and practice that underlie the revisions made to that 1994 Model Law.

11. The Guide has therefore been structured as follows:

(a) A General Remarks section in two parts: the first, addressing the main policy considerations underpinning the Model Law, its main features and those of the procurement system it envisages, and the second discussing the main issues

relating to its effective implementation and use. The second part also includes issues that may also be of interest to policymakers and legislators, as it discusses legal infrastructure to support the Model Law;

(b) Commentary on the objectives of the Model Law set out in its Preamble;

(c) Commentary to each Chapter, comprising:

i. An introduction to the Chapter concerned, setting out the main policy issues and suggested policy approaches to them, and a discussion of implementation and use of the provisions in the Chapter; and

ii. Commentary on each article within each Chapter; and

(d) Commentary on the revisions made to the 1994 Model Law when compiling the (2011) Model Law.

12. The commentary for each procurement method has also been consolidated so that the reader can consider each procurement method as a whole: that is, the detailed commentary on the conditions for use of each method, the relevant solicitation rules and procedures for each method are located together, with appropriate cross-references to general principles.

13. The commentary in the General Section, to the Preamble, and in the introduction to each Chapter can be read sequentially to provide a general statement of the policy considerations addressed in the Model Law. Each Chapter can also be read in full where the reader wishes to consider in more detail the policy issues and implementation and use considerations regarding the topics covered in that Chapter. The commentary on the revisions to the 1994 Model Law does not contain points of general application to users of the 2011 Model Law.

14. This Guide contains extensive cross-references, so that the manner in which the objectives and principles of the Model Law are implemented throughout the text can be followed. The Guide is published in electronic format, on the UNCITRAL website, so that those cross-references can be supported by hyperlinks, allowing easy navigation through the text. Hard copies are also available through United Nations Publications [**reference**].

15. This Guide cannot, and is not intended, to be exhaustive. It makes reference to the work of other international bodies active in procurement reform, so as to assist readers in considering issues in more detail than can be covered in the Guide. Finally, it is noted that practices and procedures in public procurement will develop and change to adapt to changing economic and other circumstances. For this reason, the Commission may update this Guide from time to time, to reflect new practices and procedures, and experience gained in the implementation and use of the Model Law in practice. The electronic version of this Guide available on the UNCITRAL website should therefore be considered to be the authoritative version.[2]

[2] Note to the Working Group: precise references to other texts will be inserted in due course.

C. Introduction to the 2011 UNCITRAL Model Law on Public Procurement[3]

1. History, purpose and mandate

16. At its twenty-seventh session (New York, 31 May-17 June 1994), UNCITRAL adopted a Model Law on Procurement of Goods, Construction and Services (the 1994 Model Law),[4] and an accompanying Guide to Enactment.[5] The decision by UNCITRAL to formulate model legislation on procurement was motivated by a wish to address inadequate or outdated legislation that had been observed in many countries, resulting in inefficiency and ineffectiveness in the procurement process, abuse, and the consequent failure of the public purchaser to obtain adequate value in return for the expenditure of public funds.

17. Inadequate procurement legislation at the national level also creates obstacles to international trade, the promotion of which is a major aspect of the mandate of UNCITRAL, and a significant amount of which is linked to procurement. Disparities among and uncertainty about national legal regimes governing procurement may impose a partial limitation on the extent to which Governments can access the competitive price and quality benefits available through international procurement. At the same time, the ability and willingness of suppliers and contractors to sell to foreign Governments is hampered by the inadequate or divergent state of national procurement legislation in many countries.

18. The 1994 Model Law served as a tool to reform and modernise procurement law in all regions. It proved to be widely used and successful. It formed the basis of procurement law in more than thirty countries across the world, and its general principles have been reflected to a greater or lesser degree in many more.

19. At its thirty-seventh session, in 2004, the Commission decided that the 1994 Model Law would benefit from being updated to reflect new practices, in particular those that resulted from the use of electronic public procurement [x-ref to update section and general policy discussions], and the experience gained in the use of the 1994 Model Law as a basis for law reform, without departing from its basic principles. The UNCITRAL Model Law on Public Procurement, adopted by the Commission at its forty-fourth session (Vienna, 27 June-8 July 2011) is the result of UNCITRAL's work to reform the 1994 Model Law.

20. The purpose of the Model Law is two-fold: first, to serve as a model for States for the evaluation and modernization of their procurement laws and practices, and

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[3] The text of the Model Law is found in annex I to the report of UNCITRAL on the work of its forty-fourth session (*Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17)), and is also available at www.uncitral.org.

[4] The text of the 1994 Model Law is found in annex I to the report of UNCITRAL on the work of its twenty-seventh session (*Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17* (A/49/17)), and is also available at www.uncitral.org.

[5] The first UNCITRAL text on public procurement was the UNCITRAL Model Law on Procurement of Goods and Construction, adopted in 1993 at the twenty-sixth session of the Commission (annex I to the report of UNCITRAL on the work of its twenty-sixth session (*Official Records of the General Assembly, Forty-eighth Session, Supplement No. 17* (A/48/17)). This text addressed the regulation of public procurement in the area of goods and construction but did not contain provisions on non-construction services.

the establishment of procurement legislation where none currently exists. The second purpose is to support the harmonization of procurement regulation internationally, and so to promote international trade. The potential of the Model Law as an instrument to fulfil these purposes will be fully realized to the extent that it is used by all types of States, further highlighting the importance of the fact that the text has not been designed with any particular groups of countries or particular state of development in mind, and that it does not promote the experience in or approach of any one region. In addition, and for economies in transition, the introduction of procurement legislation is part of a process of increasing the market orientation of the economy and, in this regard, the Model Law can serve as a tool to allow for effective coordination of the relationship between the public and private sectors in such economies.

21. The Model Law is primarily intended to be used in designing legislation at the national level. The Commission is aware, however, that other international texts and agreements addressing public procurement — notably the United Nations Convention Against Corruption. the Agreement on Government Procurement of the World Trade Organization, [**hyperlinks to these other texts**] and bilateral or regional free trade agreements — impose obligations that affect national procurement legislation in States that are parties to the texts concerned. Article 3 of the Model Law gives deference to the international obligations of the enacting State at the intergovernmental level. These obligations and the implications for enacting States are discussed in the section ** below, and in the commentary to article 3 [**hyperlinks**].

22. The Model Law includes provisions that are suitable for all types of procurement, and can accordingly be adapted to provide appropriate rules and procedures for procurement systems in other contexts, whether at the sub-sovereign level or within publicly-funded organizations. In addition, in developing countries and countries whose economies are in transition, many projects may be funded by multilateral donors or by foreign direct investment. The Model Law includes provisions suitable for procurement in large-scale and complex projects, and so can be used for the procurement aspects of privately-financed or donor-funded projects.

2. Objectives of the Model Law

23. The Model Law is predicated on six main objectives that should underpin legislation on public procurement, which are set out in its Preamble. The objectives are as follows:

(a) Achieving economy and efficiency;

(b) Wide participation by suppliers and contractors, with procurement open to international participation as a general rule;

(c) Maximising competition;

(d) Ensuring fair and equitable treatment;

(e) Assuring integrity, fairness and public confidence in the procurement process; and

(f) Promoting transparency.

24. These objectives are, to a large extent, mutually supporting and reinforcing. The procedures and safeguards in the Model Law are designed to promote objectivity in the procurement proceedings which, in turn, facilitate participation, competition, fair treatment and transparency. These notions are the key principles that facilitate achieving the overarching aims of the Model Law: value for money and avoidance of abuse in public procurement. They also underlie article 9(1) of the United Nations Convention against Corruption, which contains provisions on public procurement, and the World Trade Organization's Agreement on Government Procurement, and regional agreements addressing public procurement. [**hyperlinks **]. However, the relative emphasis on each of the objectives may vary among public procurement systems, notably as regards the degree of transparency required. The objectives and how they are implemented in the Model Law, including as regards its approach to the appropriate balance between them, are discussed in more detail in the commentary to the Preamble [**hyperlink**].

3. Balancing essential principles and procedures of the Model Law and other regulations, rules and guidance

25. It is intended that States should adapt the Model Law to local circumstances, including their legislative tradition, but without compromising the Model Law's essential principles and procedures. At a minimum, primary legislation on procurement should, therefore, include the following essential principles and procedures:

(a) That the applicable law, procurement regulations and other relevant information are to be made publicly available (article 5 [**hyperlink**]);

(b) The prior publication of announcements for each procurement procedure (with relevant details) (articles 33-35 [**hyperlinks**]) and ex post facto notice of the award of procurement contracts (article 23 [**hyperlink**]);

(c) Items to be procured are to be described in accordance with article 10 (that is, objectively, and without reference to specific brand names as a general rule, so as to allow submissions to be prepared and compared on a common and objective basis);

(d) That qualification procedures and permissible criteria to determine which suppliers will be able to participate are set out in the law, and the particular criteria that will determine whether or not suppliers are qualified in a particular procurement procedure are to be advised to all potential suppliers (articles 9 and 18 [**hyperlinks**]);

(e) That open tendering is the recommended procurement method and that the rules require the objective justification for the use of any other procurement method (article 28 [**hyperlink**]);

(f) That other procurement methods are available to cover the main circumstances likely to arise (simple or low-value procurement, urgent and emergency procurement, repeated procurement and the procurement of complex or specialised items or services). The law should set out conditions for use of these procurement methods (articles 29-31 [**hyperlinks**]);

(g) Standard procedures for the conduct of each procurement procedure are prescribed in the law (chapters III-VII [**hyperlinks**]);

(h) That communications with suppliers are to be in a form and manner that does not impede access to the procurement (article 7 [**hyperlink**]);

(i) A mandatory standstill period between the identification of the winning supplier and the award of the contract, in order to allow any non-compliance with the provisions of the Model Law to be addressed prior to any procurement contract entering into force (article 21(2) [**hyperlink**]); and

(j) Mandatory challenge and appeal procedures if rules or procedures are breached (chapter VIII [**hyperlink**]).

4. Balancing procurement policy and other public policies

26. The objectives of the Model Law relate to procurement as if it involved an independent system. UNCITRAL notes, however, that procurement policymaking and implementation are not undertaken in isolation, whether at the domestic level, or where international obligations are involved. This section of the Guide considers the impact of the pursuit and implementation of other government policies and objectives through the procurement system, which may have an impact on the performance of the procurement system itself. It also considers the impact of relaxation of the model Law's competition and transparency requirements, either to pursue such policies or as a necessary consequence of including defence and sensitive procurement within the public procurement system.

(a) Socio-economic policies

27. A significant part of procurement in an enacting State may arise in connection with projects that are part of the process of economic and social development, and procurement may also enhance such development and capacity-building, and/or the procurement system may be chosen as the vehicle to deliver government support to particular groups within the economy. Other objectives may be to support private enterprises from certain sectors of the economy that do not compete as suppliers or contractors in the procurement market, or that are not able to participate freely in the wider economy, so that they become able to compete and participate fully in the markets concerned. Other policies may aim at promoting local capacity development through providing support for SMEs and the use of community participation in procurement. Governments may also seek to place certain types of procurement contracts for strategic reasons. Such policies are usually of a social, economic or environmental nature and may be aimed at a specific sector or general development; environmental improvements; enhancement of the position of disadvantaged groups; and economic factors.

28. Examples of socio-economic policies that have been encountered in practice include allowing for, the extent of local content, including manufacture, labour and materials, the economic development potential offered by tenders, including domestic investment or other business activity, the encouragement of employment, the transfer of technology and the development of managerial, scientific and operational skills, the development of SMEs, minority enterprises, small social organizations, disadvantaged groups, persons with disabilities, regional and local development, and the improvement of the rights of women, the young and the elderly, and people who belong to indigenous and traditional groups.

29. The essence of such policies, defined in the Model Law as "socio-economic policies" [**hyperlink**], is that they are implemented through restrictions on competition for a particular procurement, and so the policies involve exceptions to the principle of full and open competition in the Model Law. As the Model Law's procedures are considered to guarantee optimum allocation of resources and value for money, the pursuit of socio-economic policies can bring additional costs to procurement and therefore their use should be carefully weighed against the costs that they may involve in both the short and long term. In particular, they may be considered to be appropriate as transitory measures, only for the purposes of granting market access to emergent suppliers, opening the national economy, such as through capacity-building, and should not be used as a form of protectionism. The policies should accommodate a progressive exposure to international competition.

30. In line with the mandate of UNCITRAL to promote international trade, and with the Model Law's objectives of maximizing participation regardless of nationality and promoting competition, the Model Law provides as a general rule that suppliers and contractors are to be permitted to participate in procurement proceedings without regard to nationality. This approach follows the principles underlying the WTO GPA and other international and regional texts on procurement.

31. However, article 8(1) of the Model Law permits procurement exceptionally to be limited to domestic suppliers to the extent the procurement regulations or other provisions of law in the enacting State so allow [**hyperlink**]. This general rule is meant to promote transparency and to prevent arbitrary and excessive resort to restriction of foreign participation, and is given effect by a number of procedures designed, for example, to ensure that invitations to participate in a procurement proceeding and invitations to pre-qualify are issued in such a manner that they will reach and be understood by an international audience of suppliers and contractors.

32. The procuring entity can, however, set minimum standards for qualification and responsiveness under articles 9 and 10 [**hyperlinks**], and can include evaluation criteria under article 11 [**hyperlink**], in order to promote environmental, industrial, social or other government policies. These policies may have the effect of discriminating against foreign suppliers and contractors, either because they are so intended or because they have such an effect (for example, where standards imposed are higher than those applying in other States).

33. In addition, the provisions of article 11 also permit the procuring entity to use the technique referred to as the "margin of preference" in favour of local suppliers and contractors. By way of this technique, the Model Law provides the enacting State with a mechanism for balancing the objectives of international participation in procurement proceedings and fostering local capacities, without resorting to purely domestic procurement. It allows the procuring entity to favour local suppliers and contractors that are capable of approaching internationally competitive prices, and it does so without simply excluding foreign competition. The margin of preference permits the procuring entity to select a submission from a local supplier as the successful supplier when the difference in price (or price when combined with quality scores) between that submission and the overall lowest-priced or most advantageous submission falls within the range of the margin of preference.

34. The use of all such criteria, including the margin of preference, is, as is explained in the commentary to the relevant articles [**hyperlinks**], subject to two major caveats. Otherwise, there are express prohibitions against discrimination through qualification requirements, or examination or evaluation criteria in articles 9-11: article (9)(6) [**hyperlink**]) states that, subject to article 8 [**hyperlink**], "the procuring entity shall establish no criterion, requirement or procedure with respect to the qualifications of suppliers or contractors that discriminates against or among suppliers or contractors or against categories thereof, or that is not objectively justifiable". The rules on description of the subject-matter of the procurement provide that, also subject to article 8, no description of the subject-matter of a procurement may be used that may restrict participation of suppliers or contractors in or their access to the procurement proceedings, including any restriction on the basis of nationality (article 10(2) [**hyperlink**]).

35. The first caveat is that as the use of such criteria reflecting these policies may be intended to restrict or prevent foreign participation, or they may have such an effect, they may be pursued only to the extent that the international obligations of the enacting State so permit. This notion is given effect in the Model Law through the provisions of article 3, which provide that the Model Law is expressly subject to any international agreements entered into by the enacting State [**hyperlink**]. In practice, the provisions of many trade agreements — which include requirements that suppliers in all signatory countries will be treated no less favourably than domestic suppliers, and prohibit offsets and similar measures — mean that some of the options discussed in the previous paragraph will not be available to enacting States that are parties to these trade agreements.

36. The provisions of article 3 also permit the Model Law to take account of cases in which the funds being used for procurement are derived from a bilateral tied-aid arrangement. Such an arrangement may require that procurement should be from the donor country's suppliers or contractors. Similarly, recognition can be given to restrictions on the basis of nationality that may result, for example, from regional economic integration groupings that accord national treatment to suppliers and contractors from other States members of the regional economic grouping, as well as to restrictions arising from sanctions imposed by the United Nations Security Council.

37. The second caveat is that such criteria may be used under the Model Law only to the extent that the policies concerned are set out in the law of the enacting State, or in the procurement: they cannot be policies of the procuring entity itself. The main provisions concerned are found in Articles 8-11 [**hyperlinks**]. They permit the procuring entity, in limited circumstances, and solely in order to promote the government's socio-economic policies, to restrict procurement to domestic suppliers (in article 8 [**hyperlink**]), to impose minimum qualification requirements relating to socio-economic policies (in article 9 [**hyperlink**]), and to define its minimum requirements regarding those policies, which will (among other criteria) determine whether a submission is responsive (in article 10 [**hyperlink**]). In addition, the evaluation criteria can be designed to give credit for compliance with socio-economic policies beyond any required minimum (in article 11 [**hyperlink**]). Finally, a need to pursue a particular socio-economic policy can operate to justify the use of single-source procurement under article 30

[**hyperlink**]. The commentary to those articles further discusses the manner in which the policies may be implemented [**hyperlinks**]. Thus, for example, the Model Law allows sustainability to be promoted through procurement via qualification criteria (article 9 [**hyperlink**], which expressly allows the procuring entity to impose environmental qualifications, and ethical and other standards that could include fair trade requirements).

38. Although the Model Law does not restrict the type of socio-economic policies that can be pursued through these provisions, it restricts the manner in which they can be applied. In addition to the safeguard that the policies must be set out as explained in the previous paragraph, it applies rigorous transparency requirements to ensure that the manner in which the policies will be applied in the procurement process is clear to all participants. The transparency requirements include that the full terms of participation are to be publicised in the solicitation documents (see the requirements in articles 8-11 [**hyperlink**] and articles 39, 47 and 49 on solicitation documents [**hyperlinks**]), which apply to the use of socio-economic criteria in exactly the same manner as other criteria in matters of qualification, description and responsiveness assessment, and evaluation.

39. Nonetheless, the impact of such policies on the objectives of the Model Law include that, in restricting competition, they may increase the ultimate price paid; and the cost of monitoring compliance with government policies may add to administrative or transaction costs, which may have a negative effect on efficiency. On the other hand, some such policies may open the procurement market to sectors that have traditionally been excluded from procurement contracts (such as SMEs) and may increase participation and competition, though in the longer term such benefits may not persist if suppliers choose artificially to remain SMEs.

40. There are indications that the results from the use of preference policies (such as the use of evaluation criteria to prefer a defined group) tends to be more positive than for set-aside policies (such as restricting qualification or requiring subcontracting to a defined group, or resorting to domestic participation alone). Total insulation from competition for an extended period of time or beyond the point that suppliers can compete freely can also frustrate the capacity development that such policies are designed to achieve.

41. The Model Law's above restrictions and the stringent transparency requirements are designed to ensure that the impact of the policies can be assessed by suppliers or contractors considering whether to participate in a procurement proceeding. They also enable the costs of the policies concerned to be calculated through comparison with established benchmarks (i.e. to calculate the premium paid for pursuing the policy concerned) and to balance it against the benefits derived. Enacting States are therefore able to consider whether pursuing socio-economic policies through procurement is both effective in balancing and implementing the various policy objectives and efficient in operation, and to assess their own performance by comparison with empirical evidence from other States. Other viable alternatives may include targeted technical assistance, simplifying procedures and red tape, ensuring that adequate financial resources are available to all sectors of the economy, requiring procuring entities to pay suppliers regularly and on time. Providing training and other information on the procurement system may address the disincentive to participate where procedures are unknown, uncertain or long and

complex, and so enhance the effectiveness of supporting particular groups within the economy.

42. At the domestic level, the general rule requiring international participation and the safeguards described are also designed to ensure transparency and to prevent arbitrary and excessive restriction of foreign participation. In addition, it prevents the procuring entity from discriminating against particular suppliers or categories of suppliers at its own instance. The rule is given effect in practice by a number of procedures designed, for example, to ensure that invitations to participate in a procurement proceeding and invitations to pre-qualify are issued in such a manner that they will reach and be understood by an international audience of suppliers and contractors. The rule is further supported by provisions prohibiting qualification criteria that discriminate against suppliers or contractors or categories of suppliers or contractors (article (9)(6) [**hyperlink**]), provisions prohibiting the description of the subject-matter of a procurement being used to restrict the participation of suppliers or contractors or access to the procurement proceedings (article 10 (2) [**hyperlink**]), and requirements that, in regulating what evaluation criteria may constitute, prevent discriminatory criteria from being applied (article 11 [**hyperlink**]).

(b) Protecting classified information

43. As noted above [**hyperlink**], the procurement system under the Model Law includes security-related procurement, recognizing that such procurement may require modifications to the Model Law's transparency provisions to accommodate classified information. The Commission has sought to ensure that the modifications do not go beyond what is necessary, through the requirement for case-by-case consideration and other restrictions, so as to prevent such a key principle of the Model Law from being compromised.

44. The Model Law permits such modifications, however, not because the procurement involves defence or other sensitive procurement per se, but because it involves classified information, which is defined in article 2(l) [**hyperlink**] and discussed in the commentary to that definition [**hyperlink**]. For this reason, article 35(2)(c) permits direct solicitation in request-for-proposals proceedings, as explained in the commentary to that article below [**hyperlink**]. In addition, article 7(3)(b) also permits the procuring entity to make special provision to protect classified information when setting out the means and form of communications in a particular procurement procedure [**hyperlink**], and as regards suppliers and contractors and subcontractors under article 24(4) [**hyperlink**]. Nonetheless, certain transparency mechanisms are imposed: the solicitation documents must set out where the law relating to classified information can be found (see, for example, articles 39(t), 47(4)(f) and other articles regulating the contents of the solicitation documents [**hyperlinks**]).

45. "Classified information" refers to information designated as classified by an enacting State under national law. It is often understood as information to which access is restricted by law or regulation to particular classes of persons. The term, and therefore the flexibility conferred as regards classified information, refers not only to procurement in the sectors where "classified information" is most commonly encountered, such as national security and defence, but also to procurement in any other sector in which protection is conferred (such as designing sensitive

construction facilities and certain medical issues). Importantly, and to avoid abuse, the provisions do not confer any discretion on the procuring entity to expand the definition of "classified information". Classified information should be contrasted with confidential information that is protected under article 24 [**hyperlink**].

46. The authorization granted to procuring entities to take special measures and impose special requirements for the protection of classified information, including granting public disclosure exemptions, applies only to the extent permitted by the procurement regulations or by other provisions of law in the enacting State. The requirement for a case-by-case consideration is applied by article 7 [**hyperlink**], which requires the procuring entity to specify, when first soliciting participation in a procurement procedure involving classified information, if any measures and requirements are needed to protect that information at the requisite level, and what those measures are. If it takes these steps, the procuring entity must provide reasons in the record article 25(1)(v): these safeguards are designed to ensure that the potential significance of the exemptions is appropriately considered, and that the procuring entity (which determines whether sufficient grounds exist to lift normal transparency requirements) can explain and justify its actions.

(c) Sustainable procurement

47. Sustainable procurement is included as a declared objective of some procurement systems. The Commission has noted that there is no agreed definition of sustainable procurement, but that it is generally considered to include on a long-term approach to procurement policy, reflected in the consideration of the full impact of procurement on society and the environment within the enacting State (for example through the promotion of life-cycle costing, disposal costs and environmental impact). In this regard, sustainability in procurement can be considered to a large extent as the application of best practice as envisaged in the Model Law. For this reason, sustainability is not listed as a separate objective in the Preamble, but addressed as an element of processes under the Model Law.

48. The term sustainable procurement can also be used as an umbrella term for pursuit of social, economic and environmental policies through procurement, such as "social" factors: employment conditions, social inclusion, anti-discrimination; "ethical" factors: human rights, child labour, forced labour; and environmental/green procurement. The Model Law's flexibility in allowing socio-economic policies to be implemented in this way are discussed in detail in section ** above [**hyperlink**].

(d) Community participation in procurement

49. The participation of the local community in the implementation phase of the procurement, such as through public scrutiny of public expenditure, may enhance delivery of the project. Experience has shown that community control can be effective if the community in question has sufficient knowledge of the subject-matter of the project, which is typically the case for small-scale projects. In case of larger and more complex projects, however, the need to ensure that appropriate information is given to the community on the essential elements of the project might not be feasible, and so community participation can be less fruitful.

50. It is generally the case that the authority to carry out projects with community participation is normally derived from rules and regulations governing public expenditure rather than the procurement law per se, and so the concept itself does not feature in the Model Law; it is an issue to be addressed in procurement planning (a topic discussed in Section ** below [**hyperlink**]. In addition, the ability to apply socio-economic criteria as explained above would allow the involvement of the local community (including through a requirement to employ local labour or materials) to be one of the qualification criteria under article 9 [**hyperlink**], to form part of the evaluation criteria under article 11 [**hyperlink**], or to justify the use of single-source procurement to ensure community participation (under article 30, [**hyperlink**]). An inherent feature of community participation is the imposition of restrictions on the participants in the delivery of the project, and so there is a potential to undermine transparency, to add costs or to reduce competition. The consideration of balancing policy objectives discussed in section ** above [**hyperlink**] will therefore be relevant when addressing the question of community participation in procurement.

5. The potential of electronic procurement (e-procurement) to promote public procurement policy objectives

51. E-procurement means the procurement of goods, works and services through Internet-based information technologies (ICT). Given the rapid pace of technological advance, and as new technologies may emerge, the term e-procurement is used in this Guide to refer to the use of e-communications involving the transfer of information using electronic or similar media and to the recording of information using electronic media. The policy issues arising in the introduction and use of e-procurement are of general application for all emerging information technologies that can be used to record and transfer information and documents, and to conduct procurement procedures.

52. The potential benefits of e-procurement in terms of promoting the achievement of the objectives of the Model Law have been widely noted at the academic and policymaking level.[6] Financial gains from such benefits can be up to 5 per cent of the value of public procurement, and it is indicated that the potential to reduce corruption and abuse is also significant.

53. In summary, e-procurement can enhance value for money of the procurement system overall and can contribute to better governance in this significant area of government activity, but there are risks and constraints, which may indicate, for example, a staged approach to implementation. These risks and constraints, and the safeguards and processes that the Model Law envisages be put in place to address them, are discussed in Section ** below [**hyperlink**]. The particular circumstances of each enacting State, its technical capacity, its governance capabilities and its capacity in public procurement and financial management as a whole will dictate how they are to be implemented. Additionally, the political will to engage in the significant reforms involved, and to open up public procurement to transparency and scrutiny by suppliers and civil society, are vital if e-procurement is to achieve its potential to enhance procurement system objectives.

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[6] Note to the Working Group: appropriate cross-references will be included at a later date.

6. Scope of the Model Law

(a) Application to all public procurement

54. The Model Law is designed to be applicable to all public procurement within an enacting State: the objectives of the Model Law are best served by the widest possible application of its provisions. Consequently, article 1 [**hyperlink**] of the text provides that the Model Law applies to all public procurement in the enacting State.[7]

55. For the same reason, and unlike in some other systems, there is no general threshold below which the Model Law's provisions do not apply, as explained in the commentary in the introduction to Chapter I [**hyperlink**], though there are some exemptions for low-value procurement as explained in the commentary to Chapter I [**hyperlink**].

56. The Model Law also includes procedures for other circumstances that may be expected to arise in public procurement: standard procurement, urgent and emergency procurement and the procurement of specialised or complex items or services. Each method is tailored to the circumstances for which it is intended to be used, as explained in the commentary to Chapter II, part I and to each procurement method concerned [**hyperlinks**].

57. As explained in section ** on e-procurement below [**hyperlink*], the Model Law applies to procurement conducted in any form, be it traditional paper-based procurement, e-procurement or through other emerging technologies. The same requirements of form and other standards apply to all such procurement.

(b) Defence and security-related procurement

58. Security-related procurement forms a significant sector of the domestic procurement market in many enacting States, including the procurement of arms, ammunition or war materials, procurement essential for national security or for national defence purposes and procurement involving other security-related items, such as might arise in the construction of prison facilities.

59. Traditionally (including in the 1994 Model Law), such procurement was exempted as a whole from legislation and supporting rules governing procurement. The present text brings national defence and national security sectors, where appropriate, into the general ambit of the Model Law, so as to promote a harmonized legal procurement regime across all sectors in enacting States, and to enable all procurement to benefit from the Model Law's provisions. However, the Commission is aware of the need for flexibility in such procurement and to allow for States to comply with relevant international obligations.

60. First, it is acknowledged that the Model Law's extensive transparency obligations might not be compatible with all such procurement: some steps in the procurement process will require modification to accommodate classified information, which by its nature may be sensitive or confidential (as discussed further in Section ** below [**hyperlink**]). The provisions in the Model Law therefore allow for exceptions to transparency mechanisms for the protection of

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[7] Note to the Working Group: a cross-reference to the Chapter on revisions to the 1994 text will be included.

essential security interests, such as the protection of certain parts of the record from disclosure under article 25(4) [**hyperlink**], and in publication obligations, also as explained in section ** on classified information, below.

61. Other issues that are of particular concern in defence procurement include the complexity of some procurement, and the need to ensure security of both information and supply. The Model Law's procedures for each procurement method, in chapters IV and V in particular, allow for these needs to be accommodated, as explained in the commentary to the procurement methods concerned [**hyperlinks**]. For example, the Model Law makes two procurement methods — competitive negotiations and single-source procurement — available for defence and sensitive procurement where the procuring entity determines that any other method is not appropriate (as is more fully explained in the commentary to article 30 [**hyperlink**]). Security of supply can also be addressed through the use of framework agreements under Chapter VII [**hyperlink**].

7. International context of the Model Law and promotion of international participation in procurement proceedings

62. A key concern of UNCITRAL is to allow the widest possible use of the Model Law. In this regard, it has sought to enhance its usefulness by harmonizing the text to the extent possible, with other international texts on procurement, so that it can be used by parties to them without major amendment.

63. The United Nations Convention against Corruption (New York, 31 October 2003)[8] (the Convention against Corruption) addresses the prevention of corruption by setting mandatory minimum standards for procurement in its article 9(1), which requires each State party to take the "necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption". UNCITRAL has taken the requirements of article 9(1) into account when drafting the Model Law (see the commentary on the Preamble [**hyperlink**]).

64. The Agreement on Government Procurement of the World Trade Organization (the WTO GPA)[9] is designed to open up as much of public procurement as possible to international competition, through national treatment and non-discrimination obligations and by following transparency and competition requirements. There are also regional trade agreements and procurement directives applicable in other economic or political groupings of States. The Commission has also taken these requirements into account in the Model Law.

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[8] United Nations, *Treaty Series*, vol. 2349. The Convention was adopted by the United Nations General Assembly by its resolution 58/4. In accordance with article 68 (1) of the Convention, the Convention entered into force on 14 December 2005. The text of the Convention is also available at www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf (accessed January 2011).

[9] Note to the Working Group: the correct reference to the new GPA text will be inserted in due course.