



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 26 March 2012

8075/12

**Interinstitutional File:
2011/0437 (COD)**

**MAP 32
MI 200
CODEC 788**

NOTE

from: General Secretariat
to: Working Party o Public Procurement
on: 4 April 2012
No. Cion prop.: 18960/11 MAP2 MI 684
Subject: Proposal for a Directive of the European Parliament and of the Council on the
award of concession contracts
- Non-paper from the Commission services

In view of Working Party on Public Procurement on 4 April 2012, delegations will find in the Annex a non-paper with articles 34, 35, 36, 37, 38, 39, 41, 44 and 45 of the above proposal prepared by the Commission services (DG Internal Market).

New articles and provisions in articles referring specifically to concession contracts and thus either not figuring or substantially different from the corresponding articles of Public procurement Directives, are highlighted in **bold**. Articles which are common with the text of the proposal for Directive on Public procurement are not included in the document.

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Art. 34 sets out the general principles for the award of concessions

Article 34

General principles

Concessions shall be awarded on the basis of the criteria set out by the contracting authority or contracting entity in accordance with Article 39 provided that the following cumulative conditions are fulfilled:

- (a) the tender complies with the requirements, conditions and criteria set out in the concession notice or in the invitation to confirm interest and in the concession award documents;
- (b) the tender comes from a tenderer who
 - (i) is not excluded from participating in the award procedure in accordance with paragraphs 4 to 8 of Article 36 and
 - (ii) meets the selection criteria set out by the contracting authority or contracting entity in accordance with paragraphs 1 to 3 of Article 36.

Art. 34 is very similar to the corresponding provision of Directive replacing Directive 2004/18/EC (Art. 54) and sets basic principles of the award process. However, Art. 34 does not include provisions of paragraphs 2-4 of Art. 54 of Directive replacing Directive 2004/18/EC. Rules on concessions are conceived as more flexible and contracting authorities and entities awarding concessions are not obliged to follow any procedures pre-established in the Directive. Thus, there is no need to include provisions on chronological order in which various criteria should be applied.

Recital 27 defines the approach to the award procedures. It explains the reasons for flexibility given to contracting authorities and entities to structure the award process as well as the rationale and necessity for certain procedural guarantees.

Art. 35 establishes minimal standards of transparency and equal treatment to be observed during the award procedure. Member States and contracting authorities and entities are free to establish or use procedures for awarding concession contracts which they find the most appropriate subject to compliance with the procedural guarantees laid down in this provision.

(27) Concessions are usually long term, complex arrangements where the contractor assumes responsibilities and risks traditionally born by the contracting authorities and contracting entities and normally falling within their remit. For this reason, contracting authorities or entities should maintain a margin of flexibility in organising the awarding process, involving also a possibility to negotiate the content of the contract with the candidates. However, in order to ensure equal treatment and transparency throughout the awarding procedure, it is appropriate to provide for certain requirements as to the structure of the awarding process, including negotiations, the dissemination of information and the availability of written records. It is also necessary to provide that the initial terms of the concession notice should not be deviated from, in order to prevent unfair treatment of any potential candidates.

Article 35

Procedural guarantees

- 1. Contracting authorities and contracting entities shall indicate in the contract notice, in the invitation to submit tenders or in the concession documents a description of the concession, the award criteria and the minimum requirements to be met. This information must allow to identify the nature and scope of the concession, enabling economic operators to decide whether they request to participate in the concession award procedure. The description, award criteria and minimum requirements shall not be changed in the course of the negotiations.**

- 2. During the concession award, contracting authorities and contracting entities shall ensure the equal treatment of all tenderers. In particular, they shall not provide information in a discriminatory manner which may give some tenderers an advantage over others.**
- 3. Whenever the contracting authority or contracting entity limits the number of applicants to an appropriate level, this shall be done in a transparent manner and on the basis of objective criteria which are available to all interested economic operators.**
- 4. The rules on the organisation of the concession award procedure, including rules on communication, on the stages of the procedure and on timing, shall be established in advance and communicated to all participants**
- 5. Where the concession award involves negotiation, contracting authorities or contracting entities shall comply with the following rules:**
 - (a) where the negotiation takes place after the submission of tenders they shall negotiate with tenderers the tenders submitted by them in order to adapt them to the criteria and requirements indicated in accordance with paragraph 1.**
 - (b) they shall not reveal to the other participants solutions proposed or other confidential information communicated by a candidate participating in the negotiations without its agreement. This agreement shall not take the form of a general waiver but must be given with reference to the intended communication of specific solutions or other confidential information;**
 - (c) they may conduct the negotiation in successive stages in order to reduce the number of tenders to be negotiated by applying the award criteria in the contract notice, in the invitation to submit tenders or in the concession documents. In the contract notice, the invitation to submit tenders or the concession documents, the contracting authority shall indicate whether it has had recourse to this option.**
 - (d) they shall assess the tenders as negotiated on the basis of the initially indicated award criteria;**

- (e) **they shall establish a written record of formal deliberations and any other steps and events relevant for the concession award procedure. In particular, it shall ensure, by all appropriate means, the traceability of the negotiations.**
6. Contracting authorities and contracting entities shall as soon as possible inform each candidate and tenderer of decisions reached concerning the award of a concession including the grounds for any decision not to award a contract for which there has been publication of a concession notice or to recommence the procedure.
7. On request from the party concerned, the contracting authority shall as quickly as possible, and in any case within 15 days from receipt of a written request, inform:
- (a) any unsuccessful candidates of the reasons for the rejection of their application,
 - (b) any unsuccessful tenderers of the reasons for the rejection of their tender, including, for the cases referred to in Article 32 (5) and (6), the reasons for its decision of non-equivalence or its decision that the works, supplies or services do not meet the performance or functional requirements,
 - (c) any tenderers that have made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer or the parties to the framework agreement,
 - (d) any tenderers that have made an admissible tender of the conduct and progress of negotiations and dialogue with tenderers.
8. However, contracting authorities may decide to withhold certain information referred to in paragraph 6, regarding the contract where the release of such information would impede law enforcement, would otherwise be contrary to the public interest, would prejudice the legitimate commercial interests of economic operators, whether public or private, or might prejudice fair competition between them.

Recital 27 explains that the specificity of concessions justify a more flexible approach regarding the manner they are awarded. The proposal, contrary to Directives 2004/17/EC and 2004/18/EC and proposals for amendments of these Directives, does not provide for any fixed catalogue of award procedures. Therefore, Member States are free to keep or impose procedures followed for the award of concession contracts in their national legislation or to leave the choice of the appropriate procedure to contracting authorities or entities. However, these procedures must comply with the minimal procedural requirements listed in Art. 35, as well as with other relevant provisions of the Directive on concessions.

Paragraph 1 specifies the kind of information to be provided in the concession notice or in any other concession document and cannot be changed, in particular during negotiations. Annex IV specifies the kind of information which must be provided in the concession notice. As to the minimum requirements, this notion should be understood in the same manner as in the PP Directives (see Article 27 of the Directive replacing Directive 2004/18/EC)

Paragraph 2 lays down a corollary of the principle of equal treatment requiring fair dissemination of the information. This requirement is of great importance in practice. The actual fairness of the procedure would be compromised if, e.g. responses to questions asked by one tenderer were not dispatched in parallel to other tenderers or if a contracting authority entered into a dialogue with one tenderer, revealing its specific preferences, without providing the same information to the other participants.

Paragraph 3 provides for a rule similar to the rule of Art. 64 paragraph 1 subparagraph 2 of the Directive replacing Directive 2004/18/EC, in order to make sure that the reduction of the number of candidates will be conducted fairly. The requirement of transparency and of the availability of the criteria to all interested operators should be understood as requiring that these criteria are made available in the concession notice (see Annex IV point 11). The criteria shall comply with the general principles of Article 34 and in particular shall be non-discriminatory and shall not be aimed at artificially narrowing competition for the concession.

Paragraph 4 requires the rules on the organisation of the procedure to be communicated in advance to all participants. This provision should be read together with Annex IV point 11 which specifies the type of information to be provided already at the moment of publication (thus communicated to the public). In case of procedures to be conducted in several stages,

other elements, such as time limits for the submission of tenders or rules on communication, must be communicated to all participants.

Paragraph 5, lists the requirements applicable to negotiations which are similar to those on the use of the competitive procedure with negotiations provided for public contracts.

Point (a) makes clear that if a contracting authority chooses to negotiate on the basis of submitted tenders (which is not required), the purpose of the negotiations shall be the adjustment of those tenders to the contracting authority's needs with the exception for the non-negotiable elements of the concessions as previously established by the contracting authority itself (i.e. minimum requirements).

Point (b) aims at ensuring appropriate protection of intellectual property and prevents "cherry picking" (it has already been discussed in the context of the PP Directives).

Points (c) and (d) aim at ensuring that the assessment of the tenders will take place on the basis of the original award criteria and their announced relative weighting or descending order of importance. This shall also apply to the progressive reduction of the number of participants to the negotiations (the participants must be previously informed that the contracting authority will reduce the number of candidates during the procedure). The transparency and fairness of the procedure arising from the obligation of setting the award criteria in advance would be seriously compromised if a contracting authority could eliminate tenders during the negotiation phase or award the contract on the basis of award criteria other than those initially established or if it could manipulate their order of importance.

Point (e), sets out an obligation for the contracting authority to keep a track record of the formal deliberations and any other steps and events relevant for the concession award procedure: this measure is meant to contribute to the effectiveness of the use of remedies as it permits to check the transparency and the fairness of all the procedural steps undertaken during the negotiations and makes it possible to enforce all the aforementioned guarantees also before the court.

Paragraphs 6-8 foresees obligations to inform the tenderers about the outcome of the procedure which are identical to those set out in Art. 53 of the Directive replacing Directive 2004/18/EC. These provisions are necessary so as to enable the effective application of the Remedies Directives to concessions.

Recitals 24 and 33 explain the reasons for including in the Directive provisions on selection and exclusion criteria.

Art. 36 refers to the regulation of access of candidates to the concession award procedures. It contains provisions on the selection criteria, permissible and required exclusion criteria and on prevention of conflict of interests.

- (24) The choice and application of proportional, non-discriminatory and fair selection criteria to economic operators is crucial for their effective access to the economic opportunities related to concessions. In particular, the possibility for a candidate to rely on the capacities of other entities can be decisive to enable the participation of small and medium sized enterprises. Therefore, it is appropriate to provide that the selection criteria should relate exclusively to the technical, financial and economic capacity of operators, should be announced in the concession notice and cannot preclude an economic operator from relying on the capacities of other entities, regardless of the legal nature of its links with those entities, if the latter proves to the contracting authority or entity that it will have at its disposal the necessary resources.
- (33) Concessions should not be awarded to economic operators that have participated in a criminal organisation or have been found guilty of corruption, fraud to the detriment of the Union's financial interests or money laundering. Non-payment of taxes or social security contributions should also be sanctioned by mandatory exclusion at the level of the Union. Furthermore, contracting authorities and contracting entities should be given the possibility to exclude candidates or tenderers for serious violations of Union or national law aimed at the protection of public interests compatible with the Treaty or where the economic operator has shown significant or persistent deficiencies in the performance of a prior concession or concessions of a similar nature with the same contracting authority or contracting entity.

Article 36
Selection of and qualitative assessment of candidates

1. Contracting authorities shall specify, in the concession notice the conditions for participation relating to:

- (a) suitability to pursue the professional activity;**
- (b) economic and financial standing;**
- (c) technical and professional ability.**

Contracting authorities shall limit any conditions for participation to those that are appropriate to ensure that a candidate or tenderer has the legal and financial capacities and the commercial and technical abilities to perform the concession to be awarded. All requirements shall be related and strictly proportionate to the subject-matter of the contract, taking into account the need to ensure genuine competition.

Contracting authorities and contracting entities shall also indicate in the concession notice the reference or references to be submitted as proof of the economic operators' capacities. The requirements in respect of those references shall be non-discriminatory and proportionate to the subject-matter of the concession.

2. With regard to the criteria referred to in paragraph 1, an economic operator may, where appropriate and for a particular concession, rely on the capacities of other entities, regardless of the legal nature of its links with them. It shall, in that case, prove to the contracting authority or the contracting entity that it will have at its disposal, throughout the period of the concession, the necessary resources, for example, by producing an undertaking by those entities to that effect. With regard to economic and financial standing, contracting authorities and contracting entities may require that the economic operator and those entities are jointly liable for the execution of the contract.
3. Under the same conditions, a group of economic operators as referred to in Article 22 may rely on the capacities of participants in the group or of other entities.

4. **Member States shall adopt rules combating favouritism, corruption and preventing conflicts of interest, aimed at ensuring the transparency of the award procedure and the equal treatment of all tenderers.**

With regard to conflicts of interest the measures adopted shall not go beyond what is strictly necessary to prevent or eliminate the conflict identified. In particular, they shall allow for the exclusion of a tenderer or candidate from the procedure only where the conflict of interests cannot be effectively remedied by other means.

5. Any candidate or tenderer that has been the subject of a conviction by a final judgment for one of the reasons listed below shall be excluded from participation in a concession:
- (a) participation in a criminal organisation, as defined in Article 2(1) of Council Framework Decision 2008/841/JHA¹;
 - (b) corruption, as defined in Article 3 of the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union and Article 2 of Council Framework Decision 2003/568/JHA² as well as corruption as defined in the national law of the contracting authority or the economic operator;
 - (c) fraud within the meaning of Article 1 of the Convention on the protection of the financial interests of the European Communities³;
 - (d) terrorist offences or offences linked to terrorist activities, as defined in Articles 1 and 3 of Framework Decision 2002/475/JHA⁴ respectively, or inciting, aiding or abetting or attempting to commit an offence, as referred to in Article 4 of that Framework Decision;
 - (e) money laundering, as defined in Article 1 of Council Directive 91/308/EEC⁵.

¹ OJ L 300, 11.11.2008, p. 42.

² OJ L 192, 31.7.2003, p. 54.

³ OJ C 316, 27.11.1995, p. 48.

⁴ OJ L 164, 22.6.2002, p. 3.

⁵ OJ L 166, 28.6.1991, p. 77.

The obligation to exclude a candidate or a tenderer from participation in a concession shall also apply where the conviction by final judgment has condemned company directors or any other any person having powers of representation, decision or control in respect of the candidate or tenderer.

6. Any economic operator shall be excluded from participation in a concession where the contracting authority or contracting entity is aware of a decision having the force of *res judicata* establishing that it has not fulfilled obligations relating to the payment of taxes or social security contributions in accordance with the legal provisions of the country in which it is established or with those of the Member State of the contracting authority or entity.
7. Member States may provide that contracting authorities or contracting entities exclude from participation in a concession award any economic operator if one of the following conditions is fulfilled:
 - (a) **where it is aware of any other serious violation of provisions of European Union or of national law aimed at the protection of public interests compatible with the Treaty;**
 - (b) where the economic operator is the subject of insolvency or winding-up proceedings, where its assets are being administered by a liquidator or by the court, where it has entered into an arrangement with creditors, where it has suspended business activities or is in any analogous situation arising from a similar procedure under national laws and regulations;
 - (c) where the economic operator has shown significant or persistent deficiencies in the performance of any substantive requirement under a prior concession or concessions of a similar nature with the same contracting authority or contracting entity.

In order to apply the ground for exclusion referred to in point (c) of the first subparagraph, contracting authorities and contracting entities shall provide a method for the assessment of contractual performance that is based on objective and measurable criteria and applied in a systematic, consistent and transparent way. Any performance assessment has to be communicated to the economic operator in question, which must be given the opportunity to object to the findings and to obtain judicial protection.

8. Any candidate or tenderer that is in one of the situations referred to in paragraphs 5 to 7 may provide the contracting authority or contracting entity with evidence demonstrating its reliability despite the existence of the relevant ground for exclusion.
9. Member States shall specify the implementing conditions for this article. They shall make available to other Member States, upon request, any information related to the exclusion grounds listed in this Article. The competent authorities of the Member State of establishment shall provide this information in accordance with the provisions of Article 88 of Directive [replacing Directive 2004/18/EC].

Recital 27 and 33 refer to the need for introducing provisions on selection and exclusion criteria. As it is explained, the provisions ensuring the right to rely on capacities of third parties are especially relevant for small and medium enterprises, as they guarantee that SMEs will be able to bid for concessions in the form of consortium meeting the selection criteria jointly. As to the compulsory exclusion criteria, provisions preventing economic undertakings that have committed particularly serious crimes or have been found guilty of fraud or corruption, as applicable to public contracts should apply to concessions.

Selection criteria included in **Art. 36 paragraph 1** are standard criteria for the selection of candidates as foreseen in the current Directive 2004/18/EC applicable to public contracts. These criteria can only refer to the suitability of candidates to pursue the professional activity, their economic and financial standing and their technical and professional ability. Requirements related to the participation of candidates or tenderers must be related and strictly proportionate to the subject-matter of the contract and ensure a genuine competition.

Under the proposal on concessions, contracting authorities/entities have more flexibility in requiring the means of evidence of the candidates' capacities. Member States may regulate on this issue by limiting the means of acceptable evidence in a proportionate and non-discriminatory manner.

The proposal foresees more flexibility for Member States in establishing rules for combating favouritism, corruption and preventing conflict of interest and exclusion causes than is the case of public contracts. **paragraph 4**, instead of providing for specific obligations for the

contracting authorities imposes only general obligations on the Member State to adopt measures in this respect. In order to prevent abusive implementation, it provides that such measures must be proportionate to the objective sought and cannot justify the exclusion of candidates, unless the conflict of interest cannot be remedied by other means.

Similarly, on the basis of **paragraph 7 (a)**, Member States may provide for the exclusion of economic operators on the basis of any serious violations of provisions of EU or of national law aimed at the protection of public interests compatible with the Treaty. This provision leaves more room to Member States than the corresponding provision on exclusions foreseen in Art. 55 paragraph 3 of the Directive replacing Directive 2004/18/EC. The reason for this flexibility is related to the duration and complexity of concessions, but most importantly to the fact that concessions often involve the delegation of important competences and public responsibilities. Hence, Member States should be able to establish causes for exclusion which would ensure security and sustainability of the concessionaire's mission. .

Recital 23 explains the *rationale* of provisions establishing minimal time limits.

Art. 37 is identical to the provision included in the proposal for a Directive replacing Directive 2004/18/EC. It is mentioned below as it foresees general rules applicable to setting the time limits: rules of Art 38 concerning specific minimum time limits must be read and interpreted in this context.

Art. 38 sets the minimal time limits for the submission of applications (either containing tenders or not, depending on how the award procedure is structured).

- (23) In order to make it possible for all interested operators to submit applications and tenders, contracting authorities and contracting entities should be obliged to respect a minimum time limit for the receipt of such applications.

Article 37
Setting time limits

1. When fixing the time limits for the submission of applications for the concession and submission of tenders, contracting authorities or contracting entities shall take account in particular of the complexity of the concession and the time required for drawing up tenders, without prejudice to the minimum time limits set out in Article 37.
2. Where applications or tenders can be made only after a visit to the site or after on-the-spot inspection of the documents supporting the concession award documents, the time limits for the submission of applications for the concession shall be extended so that all economic operators concerned may be aware of all the information needed to produce applications or tenders.

Article 38
Time limits for submission of applications for the concession

1. **Where contracting authorities and contracting entities resort to a concession, the time limit for the submission of applications for the concession shall be not less than 52 days from the date on which the concession notice was sent.**
2. **The time limit for receipt of tenders may be reduced by five days where the contracting entity accepts that tenders may be submitted by electronic means in conformity with Article 25.**

As it is explained in the recital, operators must be given a real opportunity to prepare and submit the applications and tenders. This opportunity would be illusory if the contracting authorities or entities disposed of unlimited discretion as to the length of the time limits. Lack of legislation on this issue facilitates cases of favouritism, where extremely short time limits make it impossible to bid for any operator except for, *e.g.* the incumbent operator.

The time limit for the submission of applications is set for a minimum of 52 days (**Art. 38 paragraph 1**) as it is presently the case in Art. 59 of Directive 2004/18/EC. This time limit shall be extended where applications or tenders can be made only after a visit to the site or after on-the-spot inspection of the documents supporting the concession award documents and, in any case, it is without prejudice to the general rule that the time limit must be set while

taking into account the complexity of the concession at stake (see. **Art. 37 paragraph 2**). It can also be shortened where electronic means are accepted by the contracting authority or entity (**Art. 38 paragraph 2**). However, the proposed rules do not provide for other cases of shortening of the time limit.

The above approach is justified by the nature of concession contracts, which are usually complex and long. Applying for such contracts must be preceded by a sufficiently thorough analysis of all factual, financial and legal circumstances of the advertised concession contract. For reasons of equal treatment but also in order to guarantee the quality of applications and to prevent the need for subsequent modifications, it was considered that a possibility of shortening this time limit in case of publication of a prior information notice (PIN) would not be purposeful. Given the nature of concessions (as defined above), such contracts are not awarded in a situation of urgency. Extraordinary shortening of a time limit would not appear justified, as a contracting authority can always award a short-term public contract (possibly with reduced time-limits) to remedy the urgent need. There is no reason to allow for such a far-reaching restriction of competition and transparency in the case of concessions.

Art. 39 and corresponding recitals 25, 26 and 29 concern the award criteria which contracting authorities and entities may use to award concessions.

- (25) In order to ensure transparency and equal treatment, criteria for the award of concessions should always comply with some general standards. These should be disclosed in advance to all potential tenderers, be related to the subject matter of the contract and should not offer to the contracting authority or contracting entity an unrestricted freedom of choice. They should ensure the possibility of effective competition and be accompanied by requirements that allow the information provided by the tenderers to be effectively verified. In order to comply with these standards while improving legal certainty, Member States may provide for the use of the criterion of the most economically advantageous tender.
- (26) Where contracting authorities and contracting entities choose to award a concession to the most economically advantageous tender, they should determine the economic and quality criteria on the basis of which they assess the tenders in order to identify which one offers the best value for money. The determination of those criteria depends on the object of the concession since they should allow the level of performance offered by each tender to be

assessed in the light of the subject-matter of the concession, as defined in the technical specifications and the value for money of each tender to be measured.

- (29) In technical specifications and in award criteria, contracting authorities and contracting entities should be allowed to refer to a specific production process, a specific mode of provision of services, or a specific process for any other stage of the life cycle of a product or service, provided that they are linked to the subject-matter of the concession. In order to better integrate social considerations in the award of concessions, procurers may also be allowed to include, in the award criteria, characteristics related to the working conditions. However, where the contracting authorities or contracting entities use the most economically advantageous tender, such criteria may only relate to the working conditions of the persons directly participating in the process of production or provision in question. Those characteristics may only concern the protection of health of the staff involved in the production process or the favouring of social integration of disadvantaged persons or members of vulnerable groups amongst the persons assigned to performing the contract, including accessibility for persons with disabilities. In this case, any award criteria which include those characteristics should in any event remain limited to characteristics that have immediate consequences on staff members in their working environment. They should be applied in accordance with Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services¹⁰ and in a way that does not discriminate directly or indirectly against economic operators from other Member States or from third countries parties to the Agreement or to Free Trade Agreements to which the Union is party. Contracting authorities and contracting entities should, also where they use the criterion of the most economically advantageous tender, be allowed to use as an award criterion the organisation, qualification and experience of the staff assigned to performing the concession in question, as this may affect the quality of concession performance and, as a result, the economic value of the tender.

Article 39
Concession award criteria

- 1. Concessions shall be awarded on the basis of objective criteria which ensure compliance with the principles of transparency, non-discrimination and equal treatment and which ensure that tenders are assessed in conditions of effective competition permitting to**

identify an overall economic advantage for the contracting authority or the contracting entity.

- 2. The award criteria shall be linked to the subject matter of the concession, and shall not confer an unrestricted freedom of choice on the contracting authority or the contracting entity.**

Those criteria shall ensure effective competition and shall be accompanied by requirements which allow the information provided by the tenderers to be effectively verified. Contracting authorities and contracting entities shall verify effectively on the basis of the information and proof provided by the tenderers, whether the tenders meet the award criteria.

- 3. The contracting authority or the contracting entity shall indicate in the concession notice or documents the relative weighting which it gives to each of the criteria set out in paragraph 1 or list those criteria in descending order of importance.**
4. Member States may provide that contracting authorities and contracting entities shall base the award of concessions on the criterion of the most economically advantageous tender, in compliance with paragraph 2. Those criteria may include, in addition to price or costs, any of the following criteria
 - (a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, environmental characteristics and innovative character.
 - (b) for service concessions and concessions involving the design of works, the organisation, qualification and experience of the staff assigned to performing the concession in question may be taken into consideration, with the consequence that, following the award of the concession, such staff may only be replaced with the consent of the contracting authority or the contracting entity, which must verify that replacements ensure equivalent organisation and quality;
 - (c) after-sales service and technical assistance, delivery date and delivery period or period of completion;

- (d) the specific process of production or provision of the requested works, supplies or services or of any other stage of its life cycle as referred to in point 14 of paragraph 1 of Article 2, to the extent that those criteria concern factors directly involved in these processes and characterise the specific process of production or provision of the requested works, supplies or services.
5. In the case referred to in paragraph 4, the contracting authority or entity shall specify in the contract notice, in the invitation to submit a tender, or in the concession documents, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender.

Those weightings may be expressed by providing for a range with an appropriate maximum spread.

Where weighting is not possible for objective reasons, the contracting authority or entity shall indicate the criteria in decreasing order of importance.

Recital 25 explains the general approach to the award criteria. It refers to the general requirements that all award criteria should meet and explains that one way of meeting these requirements is to provide for use of most economically advantageous tender.

Recitals 26 and 29 are similar to corresponding recitals in the proposal for amended Directive 2004/18/EC and explain the content and rationale of the provision concerning MEAT (thus paragraph 4 of Art. 39). The restrictions of use of social criteria referred to in recital 29 do not directly apply to criteria other than those corresponding to MEAT. Obviously, such criteria should still comply with the EU primary and secondary legislation, as well as with case law interpreting these provisions.

Provision of **Art 39** is one of the major exemplifications of a more flexible approach chosen for concessions as compared to public contracts, Member States are given the option between general **requirements** for the award of concessions (as provided for under **paragraphs 1 – 3**), or the criterion of the most advantageous tender (as set in **paragraph 4** applicable together with paragraphs 1-3). Such choice stems from the necessity of giving contracting authorities larger degree of flexibility in defining the criteria for the award of

concessions, given their specific character (length, duration, transfer of responsibility)

If Member States opt for MEAT, this shall apply in a similar manner as to public contracts, including life-cycle costing (see Art. 40).

Although price is not explicitly mentioned, the provision on MEAT for concessions is formulated in a manner which admits purely financial aspects of a concession, such as the overall cost for the contracting authority and users or the level of fees as a sole criterion: "Those criteria **may** [instead of **shall**] include, in addition to price or costs (...)"

However, this is likely to be the case only in exceptional situations, where all qualitative aspects are fixed in the mandatory requirements). If a concession includes compensation for public service obligations, the use of MEAT (by including a sub-criterion related to the level of compensation) to award the contract is likely to increase the probability that the compensation will not exceed the cost incurred in the discharge of the public service and thus it will not fall under the EU legal regime applicable to State Aid.

However, contracting authorities or entities may wish to have more freedom in the application of *i.a.* social or environmental criteria or yet to re-use, at the stage of award, criteria relating to certain characteristics of the bidders.

The most important differences between the application of MEAT or "general requirements" criteria are the following:

- MEAT does not encompass criteria related to the capacities of a bidder, e.g. their experience, managerial ability, policies in the fields of research, personnel and environment or financial solidity. The case law of the Court interpreting the concept of MEAT prohibits this kind of criteria.

However, such criteria would be allowed under the "general requirements", as long as they are related to the subject matter of the concession (thus, relate only to those capacities which are relevant for the concession at stake). Given the long duration of concessions and their complexity, certain strictly tender-related criteria may not be sufficient to ensure that the organisation and quality of the performance of a concession will meet a required level for the whole duration of the concession. This makes it necessary to account for a number of characteristics of bidders (i.a. financial soundness, experience,).

- In addition to other criteria, MEAT must encompass criteria related to the price or cost. There is no such requirement under the general requirements. All financial terms may be fixed in the concession documents and the bidders may compete only on quality or e.g. environmental or social aspects.

- Contrary to the general requirements where there is just an obligation to indicate the decreasing order of importance of the criteria, under MEAT, there is an obligation to specify their relative weighting, typically by providing for a range with an appropriate maximum spread. Only where weighting is not possible for objective reasons can the contracting authority indicate the criteria in decreasing order of importance.

Art. 41 is identical with a corresponding provision of Directive replacing Directive 2004/18/EC (Art. 71). It is evoked due to suppression of provisions on subcontracting quotas and contracts awarded by concessionaires.

*Article 41
Subcontracting*

1. In the concession documents, the contracting authority or contracting entity may ask or may be required by a Member State to ask the tenderer to indicate in its tender any share of the contract it may intend to subcontract to third parties and any proposed subcontractors.
2. Paragraph 1 shall be without prejudice to the question of the principal economic operator's liability.

The existing possibility for contracting authorities/entities to establish a quota of up to 30% of the total value of the work for subcontracting has been suppressed as has been the obligation for the concessionaire which is not a contracting authority/entity to publish a contract notice. The latter obligation did not seem to be necessary given the fact that the concessionaire takes the substantial risk for operating the concession and therefore has a direct interest in finding the most competitive subcontractors.

Both provisions have been considered as too intrusive in the way concessionaires organize the performance of the concession for which they are ultimately responsible.

Art. 44 and 45 together with corresponding recital 39 render the Remedies Directive applicable to services concessions.

(39) In order to ensure adequate judicial protection of candidates and tenderers in the concession award procedures, as well as to make effective the enforcement of the rules of this Directive and of the Treaty principles, Council Directive 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts¹² and Council Directive 92/13/EEC coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors¹³ should also apply to services concessions and to works concessions awarded by both contracting authorities and contracting entities. Directives 89/665/EEC and 92/13/EEC should, therefore, be amended accordingly.

Article 44

Amendments to Directive 89/665/EEC

Directive 89/665/EEC shall be amended as follows:

1. Article 1 is amended as follows:

(a) paragraph 1 is replaced by the following:

‘1. This Directive applies to contracts referred to in Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts unless such contracts are excluded in accordance with Articles 10 to 18 of that Directive.

This Directive also applies to concessions awarded by contracting authorities, referred to in Directive [on the award of concessions] unless such concessions are excluded in accordance with Articles 8, 9, 15 and 21 of that Directive.

Contracts within the meaning of this Directive include public contracts, framework agreements, public works concessions, **services concessions** and dynamic purchasing systems.’

(b) Article 1 first paragraph, 3 subparagraph is replaced by the following:

‘ Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2004/18/EC **or Directive [on Concessions]**, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Community law in the field of public procurement or national rules transposing that law’.

2. Article 2a(2) is amended as follows:

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

‘A contract may not be concluded following the decision to award a contract falling within the scope of Directive 2004/18/EC **or Directive [on Concessions]** before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned if fax or electronic means are used or, if other means of communication are used, before the expiry of a period of either at least 15 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned or at least 10 calendar days with effect from the day following the date of the receipt of the contract award decision.’;

(b) in the fourth subparagraph, first indent is replaced by the following:

‘ – a summary of the relevant reasons as set out in Article 41(2) of Directive 2004/18/EC, subject to the provisions of Article 41(3) of that Directive, **or in Article 35 (7) of Directive [on Concessions], subject to the provisions of Article 35 (8) of that Directive and,**’

3. In Article 2b, point (a) is replaced by the following:

‘**(a)** if Directive 2004/18/EC **or Directive [on Concessions]** does not require prior publication of a contract notice in *the Official Journal of the European Union*;’;

4. Article 2d is amended as follows:

(a) in paragraph 1, point (a) is replaced by the following:

‘(a) if the contracting authority has awarded a contract without prior publication of a contract notice in the *Official Journal of the European Union* without this being permissible in accordance with Directive 2004/18/EC **or Directive [on Concessions]**;’;

(b) in paragraph 4, the first indent is replaced by the following:

‘ - the contracting authority considers that the award of a contract without prior publication of a contract notice in the *Official Journal of the European Union* is permissible in accordance with Directive 2004/18/EC **or Directive [on Concessions]**,’;

5. Article 2f (1)(a) is amended as follows:

(a) the first indent is replaced by the following:

‘

- the contracting authority published a contract award notice in accordance with Articles 35(4), 36 and 37 of Directive 2004/18/EC **or with Articles 26 and 27 of Directive [on Concessions]**, provided that this notice includes justification of the decision of the

contracting authority to award the contract without prior publication of a contract notice in the *Official Journal of the European Union*, or’;

(b) after the first indent, the following indent is inserted:

‘- the contracting authority informed the tenderers and candidates concerned of the conclusion of the contract, provided that this information contains a summary of the relevant reasons as set out in Article 41(2) of Directive 2004/18/EC, subject to the provisions of Article 41(3) of that Directive **or in in Article 35 (7) of Directive [on Concessions], subject to the provisions of Article 35 (8) of that Directive.** This option also applies to the cases referred to in Article 2b(c) of this Directive;’;

6. In Article 3, paragraph 1 is replaced by the following:

‘1. The Commission may invoke the procedure provided for in paragraphs 2 to 5 when, prior to a contract being concluded, it considers that a serious infringement of Community law in the field of public procurement has been committed during a contract award procedure falling within the scope of Directive 2004/18/EC **or Directive [on Concessions].’.**

Article 45

Amendments to Directive 92/13/EEC

Directive 92/13/EEC shall be amended as follows:

1. Article 1(1) is amended as follows:

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

‘This Directive applies to contracts referred to in Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (1) unless such contracts are excluded in accordance with Article 5 (2), Articles

19 to 26, Articles 29 and 30 or Article 62 of that Directive.

This Directive also applies to concessions awarded by contracting entities, referred to in Directive [on Concessions] unless such contracts are excluded in accordance with Articles 8, 10, 11, 12, 14, 15 and 21 of that Directive.’ ;

(b) the third subparagraph is replaced by the following:

‘Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2004/17/EC **or Directive [on Concessions]**, decisions taken by contracting entities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Community law in the field of procurement or national rules transposing that law.’;

2. Article 2a(2) is amended as follows:

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

‘A contract may not be concluded following the decision to award a contract falling within the scope of Directive 2004/17/EC **or Directive [on Concessions]** before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned if fax or electronic means are used or, if other means of communication are used, before the expiry of a period of either at least 15 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned or at least 10 calendar days with effect from the day following the date of the receipt of the contract award decision.’;

(b) in the fourth subparagraph, the first indent is replaced by the following:

‘— a summary of the relevant reasons as set out in Article 49(2) of Directive 2004/17/EC **or in Article 35 (7) of Directive [on Concessions]**, **subject to the provisions of Article 35 (8) of that Directive, and’;**

3. In Article 2b, point (a) is replaced by the following:

‘(a) if Directive 2004/17/EC or Directive [on Concessions] does not require prior publication of a notice in the Official Journal of the European Union; ‘

4. Article 2c is replaced by the following:

‘Article 2c

Where a Member State provides that any application for review of a contracting entity's decision taken in the context of, or in relation to, a contract award procedure falling within the scope of Directive 2004/17/EC or Directive [on Concessions] must be made before the expiry of a specified period, this period shall be at least 10 calendar days with effect from the day following the date on which the contracting entity's decision is sent to the tenderer or candidate if fax or electronic means are used or, if other means of communication are used, this period shall be either at least 15 calendar days with effect from the day following the date on which the contracting entity's decision is sent to the tenderer or candidate or at least 10 calendar days with effect from the day following the date of receipt of the contracting entity's decision. The communication of the contracting entity's decision to each tenderer or candidate shall be accompanied by a summary of the relevant reasons. In the case of an application for a review concerning decisions referred to in Article 2(1)(b) of this Directive that are not subject to a specific notification, the time period shall be at least 10 calendar days from the date of the publication of the decision concerned.’

5. Article 2d is amended as follows:

(a) paragraph 1, point (a) is replaced by the following:

‘(a) if the contracting entity has awarded a contract without prior publication of a notice in the Official Journal of the European Union without this being permissible in accordance with Directive 2004/17/EC or Directive [on Concessions]’;

(b) in paragraph 4, the first indent shall be replaced by the following:

‘— the contracting entity considers that the award of a contract without prior publication of a notice in the Official Journal of the European Union is permissible in accordance with Directive 2004/17/EC **or Directive [on Concessions]**,’;

6. In Article 2f(1), point (a) is replaced by the following:

‘— the contracting entity published a contract award notice in accordance with Articles 43 and 44 of Directive 2004/17/EC **or with Articles 26 and 27 of Directive [on Concessions]**, provided that this notice includes the justification of the decision of the contracting entity to award the contract without prior publication of a notice in the Official Journal of the European Union, or

— the contracting entity informed the tenderers and candidates concerned of the conclusion of the contract, provided that this information contains a summary of the relevant reasons as set out in Article 49(2) of Directive 2004/17/EC **or in Article 35 (7) of Directive [on Concessions]**, **subject to the provisions of Article 35 (8) of that Directive**. This option also applies to the cases referred to in Article 2b(c) of this Directive;’;

7. In Article 8, paragraph 1 is replaced by the following:

‘1. The Commission may invoke the procedure provided for in paragraphs 2 to 5 when, prior to a contract being concluded, it considers that a serious infringement of Community law in the field of procurement has been committed during a contract award procedure falling within the scope of Directive 2004/17/EC **or Directive [on Concessions]**, or in relation to Article 27(a) of Directive 2004/17/EC in the case of contracting entities to which that provision applies’.

The extension of the Remedies Directive is a natural consequence of the strengthening of the procedural guarantees applicable to the award of (services) concessions. For such guarantees to have true added value, it is necessary to ensure that bidders or other interested or potentially aggrieved persons will be able to make their rights enforced, especially at the stage where it is still useful, thus before the conclusion of a concession contract.

The Remedies Directives, both in the "classic" and in the "utilities" sectors will be extended to cover both works and services concessions. Paragraph 1 of both Art. 44 and Art. 45 provides for the necessary modification of the scope of application of the Remedies Directives. It also exempts from the scope of application, concessions which are exempted from the procedural rules on the same grounds as those applicable to excluded public contracts. The following paragraphs extend to concessions the guarantees provided for in the Remedies Directives, most importantly: the obligation to respect the "standstill" period before the conclusion of a concession, a minimum 10-days time limit for challenging the contracting authority's or entity's decisions throughout the procedure or provisions conceived to combat direct awards – which are particularly relevant in case of services concessions which are reported to be often awarded without publication.

