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NOTE

from:	General Secretariat
to:	Working Party on Public Procurement
No Cion prop.:	18964/11 MAP 9 MI 685
Subject:	Proposal for a Directive of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors - Issues which are specific to the Utilities Directive

Delegations will find in the Annex a non-paper prepared by the Commission services (DG Internal Market) on issues specific to Utilities Directive.

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ANNEX

Issues which are specific to the Utilities Directive

Changes to the substance are highlighted in **bold**; minor modifications or purely linguistic adaptations are not highlighted. ***Please note that comments are set out as compared to the Commission's initial proposal of 20th of December 2011. Where changes proposed by the Presidency in subsequent documents concerning the Classic proposal would suggest that changes could be envisaged here as well to ensure coherence, these are indicated below.***

1. Special and exclusive rights

Article 4

Contracting entities

[Directive 2004/17/EC: Article 2(1)(b), Article 2(2(and (3), Recital 25]

1. A dominant influence within the meaning of point 5 of Article 2 on the part of the contracting authorities shall be presumed in any of the following cases in which those authorities, directly or indirectly:

   (a) hold the majority of the undertaking's subscribed capital;

   (b) control the majority of the votes attaching to shares issued by the undertaking,

   (c) can appoint more than half of the undertaking's administrative, management or supervisory body.

2. Rights which have been granted by means of a procedure in which adequate publicity has been ensured and where the granting of those rights was based on objective criteria shall not constitute "special or exclusive rights" within the meaning of point 6 of Article 2.

Point 6 of Article 2 defines special or exclusive rights as follows: *"special or exclusive rights" mean rights granted by a competent authority of a Member State by way of any legislative, regulatory or administrative provision the effect of which is to limit the exercise of activities defined in Articles 5 to 11 to one or more entities, and which substantially affects the ability of other entities to carry out such activity;".* It is unchanged as to substance compared to Article 2(3) of Directive 2004/17/EC and it is based on the provisions of Article 2(1)(f) and (g) of Directive 80/723/EEC.

The current Utilities Directive, 2004/17/EC, does not contain an explicit provision corresponding to Article 4(2) of the proposal. However, the basic concept – that rights which have been rendered accessible to everyone meeting the requirements through adequate publicity and which are granted on the basis of objective criteria – was already present as set out in the last sentence of its Recital 25 ("*Nor may rights granted by a Member State in any form, including by way of acts of concession, to a limited number of undertakings on the basis of objective, proportionate and non-discriminatory criteria that allow any interested party fulfilling those criteria to enjoy those rights be considered special or exclusive rights.*").

This notion is crucial for the definition of the Directive's scope since private companies (i. e. entities which are neither contracting authorities nor public undertakings) fall within the scope of the Directive only to the extent that they exercise one of the relevant activities on the basis of a special or exclusive right. See also Recital 8 of this proposal: "The notion of special or exclusive rights is central to the definition of the scope of this Directive, since entities which are neither contracting authorities nor public undertakings within the meaning of this Directive are subject to its provisions only to the extent that they exercise one of the activities covered on the basis of such rights. It is therefore appropriate to clarify that rights which have been granted by means of a procedure based on objective criteria, notably pursuant to Union legislation, and for which adequate publicity has been ensured do not constitute special or exclusive rights for the purposes of this Directive. …"

This includes:

(a) procurement procedures with a prior call for competition in conformity with Directive [2004/18/EC], [Directive … (concessions)] or this Directive;

(b) procedures pursuant to other legislative acts of the Union listed in Annex II, ensuring adequate prior transparency for granting authorisations on the basis of objective criteria.

Again, this provision is new as an explicit provision in the Directive itself, but the substance was, mutatis mutandis, explained in the comments to Directive 2004/17/EC that were set out in the explanatory note on the definition of special or exclusive rights[1].

Point a), which lays down the principle that rights that are granted through a procurement procedure with a prior call for competition (whether the procedure concerned is an open or a restricted procedure, a competitive dialogue, an innovation partnership or a competitive procedure with negotiation) in conformity with the Classical proposal or this proposal shall not constitute a special or exclusive right.

Examples might be, respectively, a contract, for instance awarded by a "Ministry for Infrastructure", for the construction and operation of a new maritime port or a contract, awarded by a regional transport company, for the provision of a bus transport service in a specific suburb. Similarly, a concessions contract – whether for a works or a service concession – which has been awarded following the publication of a concession notice shall not constitute a (special or) exclusive right with the result that a private concessionaire would itself become a contracting entity, for example where it has received a service concession to operate a drinking water distribution system in a given area.

[1] http://ec.europa.eu/internal_market/publicprocurement/docs/explan-notes/utilities-dir-rights_en.pdf. See in particular its point 6, p. 4.

On the other hand, where a contract (or a concessions contract) for the performance of one of the relevant activities has been awarded to a private company without a call for competition, for instance through a negotiated procedure without prior publication or because the contract has been given directly to an affiliated undertaking (cf. Article 22 of the Utilities proposal or Article 11 of the proposal on Concessions), then the company concerned would be deemed to have special or exclusive rights and would consequently itself be a contracting entity.
For point b, please see the comments to Annex II below.

3. This Directive shall apply to contracting entities:

(a) which are contracting authorities or public undertakings and which pursue one of the activities referred to in Articles 5 to 11;

(b) which, when they are not contracting authorities or public undertakings, have as one of their activities any of the activities referred to in Articles 5 to 11, or any combination thereof and operate on the basis of special or exclusive rights granted by a competent authority of a Member State.

4. The Commission shall be empowered to adopt delegated acts in accordance with Article 98 concerning the amendment~~modification~~ of the list of Union legislation set out in Annex II, when on the basis of the adoption of new legislation, repeal or modification of such legislation, such amendments prove necessary.

Paragraph 3 is unchanged as to substance, whereas paragraph 4 is new. The formatting error, due to a "track-change" problem, should of course be corrected.

It is necessary that there is a mechanism for ensuring that we can keep the list set out in Annex II up-to-date otherwise than through an ordinary legislative procedure.

ANNEX II

LIST OF UNION LEGISLATION REFERRED TO IN ARTICLE 4(2)

[New]

Rights which have been granted by means of a procedure in which adequate publicity has been ensured and where the granting of those rights was based on objective criteria shall not constitute "special or exclusive rights" within the meaning of this Directive. The following lists procedures, ensuring adequate prior transparency, for granting authorisations on the basis of other legislative acts of the European Union which do not constitute "special or exclusive rights" within the meaning of this Directive:

The first paragraph of Annex II simply recalls the substance of Article 4(2) of this proposal.

(a) granting authorisation to operate natural gas installations in accordance with the procedures laid down in Article 4 of Directive 98/30/EC;

(b) authorisation or an invitation to tender for the construction of new electricity production installations in accordance with Directive 96/92/EC;

(c) the granting in accordance with the procedures laid down in Article 9 of Directive 97/67/EC of authorisations in relation to a postal service which is not or shall not be reserved;

(d) a procedure for granting an authorisation to carry on an activity involving the exploitation of hydrocarbons in accordance with Directive 94/22/EC;

(e) public service contracts within the meaning of Regulation (EC) No 1370/2007 which have been awarded on the basis of a competitive tendering procedure in accordance with its Article 5(3).

The relationship between the proposals for new public procurement directives and the Regulation on public passenger transport services by rail and by road should be recalled. It is explained in Article 5(1) of the Regulation[2] that Directives 2004/17/EC and 2004/18/EC apply to (public) **service contracts** for the provision of **bus transport** or transport services by **tramways**, whereas the Regulation applies to service **concessions** for bus and tram transport. The Regulation furthermore applies to (public) **service contracts as well as** service **concessions** for **railway** transport (of passengers) and **metro**[3].

Point e of Annex II means, when read in connection with the provisions of Article 4(2) and 4(3)(b), that a private company which is granted a service concession for the provision of passenger transport by bus in a given city or a service contract to operate a metro system will not be a contracting entity under the Utilities Directive if the concession or the contract was granted under a "competitive tendering procedure" as provided for under Article 5(3) of the Regulation.

On the other hand, a private company which, for instance, is directly awarded a contract to perform a passenger transport service by rail pursuant to Article 5(6) of the Regulation will be a contracting entity for the purposes of the Utilities Directive. Such would also be the case for a small or medium sized private company operating no more than 23 vehicles which, pursuant to Article 5(4) of the Regulation, is directly awarded a concessions contract for the provision of bus services with an average annual value of less than 2 million euro.

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2 "Public service contracts shall be awarded in accordance with the rules laid down in this Regulation. However, service contracts or public service contracts as defined in Directives 2004/17/EC or 2004/18/EC for public passenger transport services by bus or tram shall be awarded in accordance with the procedures provided for under those Directives where such contracts do not take the form of service concessions contracts as defined in those Directives. Where contracts are to be awarded in accordance with Directives 2004/17/EC or 2004/18/EC, the provisions of paragraphs 2 to 6 of this Article shall not apply."
To be noted that "public service contracts, as defined in the Regulation, covers public service contracts under Directive 2004/18/EC, service contracts under Directive 2004/17/EC as well as service concessions under the proposal for a concessions directive.

3 **To avoid creating a conflict of norms, (public) service contracts concerning public passenger transport by railway and metro are excluded, cf. respectively Art. 10(f) of the Classic proposal and Article 19(e) of this proposal; service concessions for all public passenger transport services under the Regulation (bus, tram, railway and metro) are excluded from the concessions proposal pursuant to its Article 8(5)(g).**

2. Changes to the scope of the Directive:

Exclusion of exploration for oil and gas

Article 11

Extraction of oil and gas and exploration for, or extraction of, coal or other solid fuels

[Directive 2004/17/EC: Article 7(a)]

This Directive shall apply to activities relating to the exploitation of a geographical area for the purpose of:

(a) […] extracting oil or gas;

(b) exploring for or extracting coal or other solid fuels.

Article 7(a) of Directive 2004/17/EC provides that it applies to activities relating to the exploitation of a geographical area for the purpose of "**exploring for or extracting oil, gas**, coal or other solid fuels". The proposal would change the scope of the Directive by excluding the exploration for oil and (natural) gas, while continuing to be applicable to the subsequent stage of "extraction", i. e. production of oil or gas.

The competitive situation in this sector of activity has been examined in the context of four different requests for exemption under the current Article 30[4]. In all four cases, the relevant geographical market was consistently found to be worldwide, which is furthermore in accordance with well-established practice in merger cases[5]. The conclusions have consistently been that the exploration market is not highly concentrated. Apart from state owned companies, the market is characterised by the presence of three international vertically integrated private players named the super majors (BP, ExxonMobil and Shell) as well as a certain number of so-called 'majors' and the individual market share of even super majors is well below one percent. All of this has consistently been found to constitute indications of direct exposure to competition and access to the market is furthermore liberalised through the provisions of the Hydrocarbon Licensing Directive[6]. It is therefore considered that this sector is subject to such competitive pressure that the procurement discipline brought about by the Directive is no longer needed (cf. also Recital 10 of this proposal).

In case of procurements made both for the purpose of exploration and for that of exploitation, the applicability or not of the provisions of the Utilities Directive would be decided in accordance with the provisions of Article 3(2) and (4) of this proposal (mixed procurement and procurement covering several activities).

Article 11(b) is unchanged as to substance.

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4 European Commission Implementing Decision 2011/481/EU of 28 July 2011 (exploration for oil and gas and exploitation of oil in Denmark), OJ L 197 of 29.7.2011, p. 20; European Commission Implementing Decision 2011/372/EU of 24 June 2011 (exploration for oil and gas and exploitation of oil in Italy), OJ L 166 of 25.6.2011, p. 28; European Commission Decision 2010/192/EU of 29 March 2010 (exploration for and exploitation of oil and gas in England, Scotland and Wales); OJ L 84 of 31.03.2010, p. 52; European Commission Decision 2009/546/EC of 8 July 2009 (exploration for and exploitation of oil and gas in the Netherlands), OJ L 181 of 14.07.2009, p. 53.

5 See in particular European Commission Decision 2004/284/EC of 29 September 1999 declaring a concentration compatible with the common market and the EEA Agreement (Case No IV/M.1383 — Exxon/Mobil) and subsequent decisions, inter alia, European Commission Decision of 03/05/2007 declaring a concentration to be compatible with the common market (Case No COMP/M.4545 — STATOIL/HYDRO) according to Council Regulation (EEC) No 139/2004.

6 Directive 94/22/EEC of the European Parliament and of the Council of 30 May 1994 on the conditions for granting and using authorizations for the prospection, exploration and production of hydrocarbons, OJ L 79 of 29.3.1996, p. 30.

3. Changes to the scope of the Directive:

Deletion of Article 5(2) of Directive 2004/17/EC

Article 5(2) of Directive 2004/17/EC reads as follows:
"This Directive shall not apply to entities providing bus transport services to the public which were excluded from the scope of Directive 93/38/EEC pursuant to Article 2(4) thereof."

In turn, Article 2(4) of Directive 93/38/EEC provided that "[t]he provision of bus transport services to the public shall not be considered to be a relevant activity within the meaning of paragraph 2 (c) where other entities are free to provide those services, either in general or in a particular geographical area, under the same condition as the contracting entities."

In other words, if an entity providing a bus transport service to the public was already – on the 30th of April 2004 at the latest - excluded from the scope of Directive 93/38/EC because it operated under conditions ensuring, de jure and de facto, a sufficient degree of competition[7], then that entity would also be excluded from the scope of Directive 2004/17/EC. To be excluded from the scope of Directive 2004/17/EC, all other contracting entities operating in the bus transport sector would have to be excluded pursuant to Article 30 or because they would not (or no longer) meet the conditions for being qualified as a "contracting entity (for instance because a private operator would not operate on the basis of a special or exclusive right within the meaning of the Directive).

[7] See the Court's judgment of 26 March 1996 in Case C-392/93, The Queen v H. M. Treasury, ex parte British Telecommunications plc., ECR 1996 p. I-01631, concerning similar formulations in Article 8 of Directive 90/531/EEC..

The problem posed by Article 5(2) of the current Utilities Directive is first of all one of legal uncertainty since there are no legally binding acts[8] (or even a non-binding list published for information purposes only[9]) establishing or listing which entities or even geographical areas would be excluded pursuant to that provision. This is of course quite problematic, not least because economic operators would not know whether the procedural rules of Directive 2004/17/EC apply. Furthermore, if the rules have not been applied, then economic operators would be able to bring an action under Directive 92/13/EEC only where they would be able to prove that bus transport in the area concerned was not – de jure and de facto – exposed to competition already more than 8 years ago.

4. Activities directly exposed to competition

Subsection 4

Activities directly exposed to competition and procedural provisions relating thereto

The proposal builds on the experience obtained through the application of the Article 30 of Directive 2004/17/EC in connection with the 21 Decisions adopted so far[10] *and the 4 applications that were withdrawn by the applicants.*

The provisions of the current Article 30 have been split so that the material conditions for the exemption are set out in Article 27, whereas the procedural aspects are dealt with in Article 28 of the proposal. At the same time the provisions concerning the exemption of design contests have been integrated in Article 27, so that there is no longer any need for a separate provision such as Article 62(2) of Directive 2004/17/EC.

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8 As was the case under Article 27 of Directive 2004/17/EC, which corresponds substantially to Article 26 of the Utilities proposal.

9 As was the case under Article 8 of Directive 93/38/EC concerning the telecommunications sector

10 A further application is currently being examined, deadline: 2.10.2012.

Article 27

Activities directly exposed to competition

[Directive 2004/17/EC: Article 30(1),(2) and (3), Article 62(2), Commission Decision 2005/15/EC[11]]

1. Contracts intended to enable an activity mentioned in Articles 5 to 11 to be carried out shall not be subject to this Directive **if the Member State or the contracting entities having introduced the request pursuant to Article 28 can demonstrate that**, in the Member State in which it is performed, the activity is directly exposed to competition on markets to which access is not restricted; nor shall design contests that are organised for the pursuit of such an activity in that geographic area be subject to this Directive. **Such competition assessment, which will be made in the light of the information available to the Commission and for the purposes of this Directive, is without prejudice to the application of competition law.**

Under the current Article 30, two conditions need to be met in order to be exempted: there has to be "liberalisation", i. e. access to the activity must not be restricted **and** this free access must have resulted in the activity being directly exposed to competition. Both of these conditions remain unaltered. The proposal sets out explicitly that it is for the applicant, whether this is a Member State or a contracting entity, to demonstrate that the conditions are met. Compared to the current directive, this constitutes a change only in respect of requests as set out in the third subparagraph of Article 30(4).

[11] Commission Decision of 7 January 2005 on the detailed rules for the application of the procedure provided for in Article 30 of Directive 2004/17/EC

The third subparagraph of Article 30(4) concerns requests:

- coming from a Member State,

- accompanied by a finding by an independent national authority concluding to the applicability of the exemption, and
- in respect of an activity for which free access is legally presumed because of the implementation and application of EU liberalising legislation[12].

The acquired practice has shown that not quite infrequently the conditions for granting the exemption are not or not fully met, also in respect of applications made under the circumstances set out in the third subparagraph of Article 30(4)[13]. Furthermore, a (fully or partially) negative decision was also adopted (or, in two cases, would have been adopted if the requests had not been withdrawn) in a further 7 cases, all of which had (fully or partially) a presumption of free access. Technically, these decisions did not fall within the third subparagraph of Article 30(4) for one or more of the following reasons: 1) the request came from a contacting entity, not a Member State; 2) it also concerned activities for which there was no presumption of free access, or 3) the request was not accompanied by a finding by an independent national authority concluding to the applicability of the exemption.[14] The normal obligation for the applicant to show that the conditions for the requested exemption are met should therefore not be reversed in these situations.

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[12] Cf. the third subparagraph of Article 30(4) "contracts … shall no longer be subject to this Directive if the Commission has not established the inapplicability of paragraph 1…".

[13] Thus, the conditions were not met in the case of Commission Decision 2008/741/EC of 11 September 2008 (electricity in Poland). They would also not have been met (or not fully met) in respect of the request concerning production and sale of electricity in Spain and the request concerning exploration for and exploitation of oil and gas in Denmark if these requests had not been withdrawn by the applicants shortly before the scheduled adoption of a negative Decision.

[14] This was the case in respect of: Commission Decision 2009/46/EC of 19 December 2008 (the postal sector in Sweden); Commission Decision 2007/564/EC of 6 August 2007 (the postal sector in Finland); Commission Decision 2010/403/EC of 14 July 2010 (the Italian electricity sector/ Macro-zone North); Commission Implementing Decision 2012/218/EU of 24 April 2012 (production and wholesale of electricity in Germany); Commission Decision 2010/142/EU of 3 March 2010 (the postal sector in Austria). The same would also have been the case in respect of the request concerning gas storage in the Czech Republic and the request concerning exploration for and exploitation of oil and gas in Italy if these requests had not been withdrawn by the applicants shortly before the scheduled adoption of a negative Decision.

Finally, the last sentence of paragraph 1 clarifies first of all that the assessment of the competitive situation which is carried out for the purposes of Article 27 is without prejudice to the application of competition law. This is fully in line with Commission Decision 2005/15/EC, which requires such statement to be mentioned in every notice published in connection with an Article 30 procedure; it is also in line with the current practice according to which every one of the 21 adopted Article 30 Decisions contain a recital with a statement to that effect. Secondly, and this is also part of the reason why these Decisions are without prejudice to the application of competition law, it is clarified that these Decisions are taken on the basis of the information that is available to the Commission, either from other contexts (e. g. reports or the state of the internal market for energy) or through the information provided specifically for the purposes of the request by the applicants, the independent national authorities (competition authorities, regulators …) or others. What is also made clear is that it will not be possible to complete the information by means of for instance inquiries such as those conducted under competition law, public hearings of economic operators etc. See also Recital 22 of this proposal:

"*Direct exposure to competition should be assessed on the basis of objective criteria, taking account of the specific characteristics of the sector concerned. This assessment is, however, limited by the applicable short deadlines and by having to be based on the information available to the Commission – either from already available sources or from the information obtained in the context of the application pursuant to Article 28 - which can not be supplemented by more time consuming methods, including notably public inquiries of economic operators concerned. The assessment of direct exposure to competition that can be carried out in the context of this directive is consequently without prejudice to the full-fledged application of competition law.*"

2. For the purposes of paragraph 1, the question of whether an activity is directly exposed to competition shall be decided on the basis of criteria that are in conformity with the provisions on competition of the Treaty; those may include the characteristics of the goods or services concerned, the existence of alternative goods or services, the prices and the actual or potential presence of more than one supplier of the goods or provider of the services in question.

The geographical reference market, on the basis of which exposure to competition is assessed, shall consist of the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because, in particular, conditions of competition are appreciably different in those areas. This assessment shall take account in particular of the nature and characteristics of the products or services concerned, of the existence of entry barriers or of consumer preferences, of appreciable differences of the undertakings' market shares between the area concerned and neighbouring areas or of substantial price differences.

The new subparagraph clarifies how the concept of geographical market is defined for the purposes of these Decisions. This corresponds fully to the definition already used in section 3 of the above-mentioned Decision 2005/15/EC and in Article 9(7) of the EC-Merger Regulation[15].

3. For the purposes of paragraph 1, access to a market shall be deemed not to be restricted if the Member State has implemented and applied the Union legislation listed in **Annex III**.

If free access to a given market cannot be presumed on the basis of the first subparagraph, it must be demonstrated that access to the market in question is free de facto and de jure.

Please see the comments to the content of Annex III below.

[15] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004, p. 1.

ANNEX III

LIST OF UNION LEGISLATION REFERRED TO IN ARTICLE 27(3)

[Directive 2004/17/EC: Annex XI]

A. TRANSPORT OR DISTRIBUTION OF GAS OR HEAT

Directive 2009/73/EC

Updates and replaces the current reference to Directive 98/30/EC[16].

B. PRODUCTION, TRANSMISSION OR DISTRIBUTION OF ELECTRICITY

Directive 2009/72/EC

Updates and replaces the current references to Directive 96/92/EC[17]

C. PRODUCTION, TRANSPORT OR DISTRIBUTION OF DRINKING WATER

None

D. CONTRACTING ENTITIES IN THE FIELD OF RAIL SERVICES

Rail Freight transport

Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways[18]

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[16] Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas.

[17] Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity.

[18] OJ L 237, 24.8.1991, p. 25

This reference to Directive 91/440/EC is entirely new; this development was, however, foreshadowed in Recital 41 of Directive 2004/17/EC ("…When updating, the Commission takes in particular into account the possible adoption of measures entailing a genuine opening up to competition of sectors other than those for which a legislation is already mentioned in Annex XI, such as that of railway transports. …")

Rail passenger transport

None

On the other hand, the situation has been maintained unchanged – i. e. no presumption of free access – as far as rail passenger transport is concerned. Some liberalisation has indeed been introduced in that sector, but it only concerns the ***international*** passenger transport by rail, which makes up a very, very limited part of the total passenger transport by rail. At the same time, it should not be forgotten either, that the above-mentioned Regulation 1370/2007 explicitly allows the direct award of public service contracts for passenger transport by railway.

The consequence of this difference between passenger and freight transport by rail is that, in case of a request for exemption pursuant to Article 27 of this proposal, the applicant can rely on the presumption of free access in the case of freight transport, whereas he will need to prove that access to passenger transport is free, de jure and de facto. In both cases, the applicant will need to show that the activity is directly exposed to competition.

E. CONTRACTING ENTITIES IN THE FIELD OF URBAN RAILWAY, TRAMWAY, TROLLEYBUS OR MOTOR BUS SERVICES

None

F. CONTRACTING ENTITIES IN THE FIELD OF POSTAL SERVICES

Directive 97/67/EC

G. EXTRACTION OF OIL OR GAS

Directive 94/22/EC

H. EXPLORATION FOR AND EXTRACTION OF COAL OR OTHER SOLID FUELS

None

I. CONTRACTING ENTITIES IN THE FIELD OF SEAPORT OR INLAND PORT OR OTHER TERMINAL EQUIPMENT

None

J. CONTRACTING ENTITIES IN THE FIELD OF AIRPORT INSTALLATIONS

None

Article 28

Procedure for establishing whether Article 27 is applicable

[Directive 2004/17/EC: Article 30(4),(5)(6), Article 62(2, Commission Decision 2005/15/EC)]

The procedural aspects are dealt with in Article 28. For background, it is recalled that the procedural rules under Article 30 of Directive 2004/17/EC are as follows:

It is currently foreseen that the Commission may begin an Article 30 procedure on its own initiative. In the light of the experience acquired so far, that possibility seems to be superfluous and has consequently not been kept in this proposal.

Requests may be made by Member States, cf. Article 30(4), or by contracting entities, **if** provided for in the national implementing legislation, cf. Article 30(5). In both cases, an initial deadline of 3 months is applicable. However, of the 21 Decisions, only two[19] were adopted within the initial 3 months deadline, the remaining being adopted within deadlines that were extended to either 4 (7 cases) or 6 months (12 cases) in total[20]. The deadline may be extended to a maximum of all in all four months in the above-mentioned cases falling within the third subparagraph of Article 30(4); in all other cases a maximum deadline of 6 months is possible.

The exemption becomes applicable if the Commission has not adopted a Decision within the applicable deadline.

All requests for exemption must contain the information set out in Annex I to Commission Decision 2005/15/EC, whether they are introduced by a Member State or a contracting entity and they shall, **where appropriate**, be accompanied by the position adopted by an independent national authority. When the request comes from a contracting entity, then the Commission shall immediately inform the Member State concerned, which in turn shall inform the Commission of all relevant facts (including laws, regulations etc.), again where appropriate accompanied by the position adopted by an independent national authority.

Where an Article 30 procedure has already been started concerning a specific activity in a given Member State, then possible new requests that would be introduced before the initial deadline is expired will not be considered as new procedures, setting off new deadlines.

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[19] Both under quite exceptional circumstances: there had been a first request concerning exploration for and exploitation of both oil and gas, which had been examined, a draft decision prepared (including necessary consultations, translations, comitology …). The subsequent requests were introduced so quickly after the withdrawal of the first ones that the they required a minimal amount of adaptations and changes to the available translations etc. It was thus possible to have the "revised" Decision adopted within the three month deadline (in one case, however, with 14 *hours* to spare).

[20] Of these 19 decisions, 11 were adopted between 13 hours and 7 days before the deadline expired.

If the deadline has been prolonged once, then there is no way whatsoever for further prolongations or suspensions of the deadline, even where this would be in the interest of both the applicant and the Commission. In practice, this has led to problems in cases where the available information warrants the adoption of a (fully or partially) negative Decision, which must be adopted to avoid that the exemption would become applicable (in its entirety) by default if the deadline expires without any decision having been adopted. In a number of cases, a suspension of the deadline could have allowed the applicants to further underpin their application with additional information and analysis etc. Instead, the current impossibility to suspend or further prolong deadlines has led to the withdrawal of two requests followed – within days – by the introduction of a new request in which the "problematic" activities were excluded[21].

1. Where a Member State or, where the legislation of the Member State concerned provides for it, a contracting entity considers that, on the basis of the criteria set out in Article 27(2) and (3), a given activity is directly exposed to competition on markets to which access is not restricted, it may submit a request to establish that this Directive does not apply to the award of contracts or the organisation of ~~desing~~design contests for the pursuit of that activity.

   Requests **shall** be accompanied by a **reasoned and substantiated** position adopted by an independent national authority that is competent in relation to the activity concerned. **This position shall thoroughly analyse the conditions for the possible applicability of Article 27(1) to the activity concerned in accordance with its paragraphs 2 and 3**.

   The Member State **or contracting entity** concerned shall inform the Commission of all relevant facts, and in particular of any law, regulation, administrative provision or agreement concerning compliance with the conditions set out in Article 27(1).

[21] Significant changes to the activities and/or geographic areas for which the exemption is requested were considered to amount to a new request.

The main changes to Article 28(1) is, firstly, that it would be obligatory that all requests, whether made by a Member State or a contracting entity, must be accompanied by the position adopted by an independent national authority (typically, a competition authority or the competent regulator). In view of the experience gained so far it has been specified that what is required is a thorough analysis of the conditions, not just generic statements ("we do not oppose that the activity is exempted …"). Obviously, this position may be based on for instance a general inquiry into the competitive situation in a given sector, but it must then be accompanied by a (short) analysis drawing the consequences of the general findings in respect of the specific request for exemption.

Rendering it obligatory also in case of requests introduced by contracting entities will furthermore ensure that Member States are aware – beforehand – of such requests.

Under the current system it has happened that Member States were not aware of requests introduced by individual contracting entities before they were informed thereof by the Commission. This was then likely to render it difficult for the Member State concerned to meet its obligation to "inform the Commission of all relevant facts, and in particular of any law, regulation, administrative provision or agreement concerning compliance with the conditions set out in paragraph 1, where appropriate together with the position adopted by an independent national authority that is competent in the activity concerned", the more so that the short deadlines available to the Commission made it necessary to also impose short deadlines on Member States.

2. Upon request submitted in accordance with paragraph 1 of this Article, the Commission may, by way of an implementing decision adopted within the periods set out in paragraph 4 of this Article, establish whether an activity referred to in Articles 5 to 11 is directly exposed to competition on the basis of the criteria set out in Article 27. Those implementing decisions shall be adopted in accordance with the advisory procedure referred to in Article 100(2).

Contracts intended to enable the activity concerned to be carried out and design contests that are organised for the pursuit of such an activity shall cease to be subject to this Directive in any of the following cases:

(a) The Commission has adopted the implementing decision referred to in the first subparagraph of this paragraph establishing the applicability of Article 27(1) within the period provided for in paragraph 3 of this Article;

(b) has not adopted the implementing decision referred to in the first subparagraph of this paragraph within the period provided for in paragraph 3 of this Article.

3. The implementing decisions referred to in paragraph 2 shall be adopted within the following periods:

(a) **90 working days** where free access to a given market is presumed on the basis of the first subparagraph of Article 27(3);

(b) **130 working days** in cases other than those referred to in point (a).

The provisions on deadlines have been streamlined in several ways:

- they no longer differentiate between requests coming from Member States or from contracting entities;

- there is just one deadline, applicable from the outset, rather than an initial deadline which must subsequently be prolonged in all but quite exceptional cases, cf. the general introduction above;

- the conditions under which the shorter deadline has to be applied have been simplified and will apply whenever free access must be presumed because of the implementation and application of one of the liberalising acts that are listed – exhaustively – in Annex III.

The length of the deadlines has been changed, first of all by calculating them in working days instead of calendar days (which is also the case for the various deadlines provided for in the above-mentioned Merger Regulation[22]). Secondly, setting the shorter deadline to 90 working days – a deadline also used in the merger regulation – slightly prolongs the deadline compared to the current 4 month deadline. Depending on the year and date on which the request was introduced[23] this would have meant a prolongation of between 2 and 11 working days compared to the current 4 month deadline.

The proposed deadline of 130 working days would have implied a prolongation of between 0 and 10 working days.

The above-mentioned merger regulation operates with a deadline of 105 working days. However, when compared to the current 6 months deadline, this would – again depending on the year and date on which the request was introduced – have led to a shortening of the deadline by between 12 and 25 working days; furthermore, in 4 cases, this would have meant that the Decision would not have been adopted within the deadline in 4 cases, 2 of which were partially negative. In other words, setting the shorter deadline would have meant that the exemption would have become applicable to certain activities for which the conditions were **not** met, simply for procedural reasons.

Those deadlines shall commence on the first working day following the date on which the Commission receives the request referred to in paragraph 1 **or, where the information to be supplied with the request is incomplete, on the working day following the receipt of the complete information.**

The periods set out in the first subparagraph may be extended by the Commission with the agreement of the Member State or contracting entity which has presented the request.

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22 As is the case under the current Utilities Directive, the new proposed deadlines are calculated in accordance with Council Regulation (EEC, Euratom) No 1182/71 of 3 June 1971 determining the rules applicable to periods, dates and time limits, OJ L 124, 8.6.1971, p. 1, as recalled by Recital 52 of this proposal.

23 The effects of the proposed changes to deadlines have been checked on a sample of 10 requests, introduced between 2008 and 2011.

The Commission may require the Member State or the contracting entity concerned or the independent national authority referred to under paragraph 1 of this Article or any other competent national authority, including the oversight body referred to in Article 93, to provide all necessary information or to supplement or clarify information given **within an appropriate time limit. In the event of late or incomplete answers, the periods set out in the first subparagraph shall be suspended for the period between the expiry of the time limit set in the request for information, and the receipt of the complete and correct information.**

The main changes to the second, third and fourth subparagraphs are all based on provisions in the above-mentioned Merger Regulation and/or Commission Regulation (EC) No 802/2004[24]. See, e. g., Article 10(1) and the 2nd subparagraph of Article 10(3), both of the Merger Regulation, and Article 9(3) of the Implementing Regulation.

4. Where an activity in a given Member State is already the subject of a procedure under paragraphs 1, 2 and 3, further requests concerning the same activity in the same Member State before the expiry of the period opened in respect of the first request shall not be considered as new procedures and shall be treated in the context of the first request.

5. The Commission shall adopt an implementing act establishing detailed rules for the application of paragraphs 1 to 4. That implementing act shall include at least:

(a) The publication in the *Official Journal of the European Union*, for information, of the date on which the period set out in the first subparagraph of paragraph 3 begins and ends, including prolongations **or suspensions of those periods, if any**, as provided for in paragraph 3 of this Article;

(b) publication of the possible applicability of Article 27(1) in accordance with point b of the second subparagraph of paragraph 2 of this Article;

[24] Commission Regulation (EC) No 802/2004 of 21 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2004R0802:20081023:EN:PDF

(c) implementing provisions concerning the form, content and other details of requests pursuant to paragraph 1 of this Article;

(d) rules concerning the periods set out in paragraph 3 of this Article.

Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 100(2).

5. Alignment of provisions on framework agreements on those of the Classic Proposal

Article 45

Framework agreements

[Directive 2004/17/EC: Article 1(4), Article 14, Article 40(3)(i)]

Under Directive 2004/17/EC, the use of framework agreements is regulated in Article 14 and in Article 40(3)(i). The latter provides that contracting entities may use a procedure without a call for competition "for contracts to be awarded on the basis of a framework agreement, provided that the condition referred to in Article 14(2) is fulfilled". The condition referred to in Article 14(2) is that the framework agreement itself has been concluded in accordance with the provisions of the Utilities Directive.

In other words, once that condition is met, there is no transparency whatsoever as to how – and more importantly – to whom the individual contracts based on the framework agreement are awarded. There are thus no specific safeguards against completely arbitrary decisions when a framework agreement is used (other than the general principle of equal treatment, which may, however, be quite difficult to rely on in a possible review in the absence of all procedural rules as to just how these contracts should be awarded). The proposal therefore modifies these provisions by aligning the provisions on those of the Classic proposal.

In the words of Recital 29 of this proposal:

"*The instrument of framework agreements can be an efficient procurement technique throughout Europe; however, there is a need to enhance competition by improving transparency of and access to procurement carried out by means of framework agreements. It is therefore appropriate to revise the provisions applicable to those agreements, notably by providing for mini-competitions for the award of specific contracts based on the agreement and by limiting the duration of framework agreements.*"

The text will have to be changed in accordance with the text that will be agreed in the context of the discussions on the Classic Directive, cf. in particular document 9184/12 of 26.4.2012. Since that text may still need further adaptations, the original text of the proposal for a new Utilities Directives has – for the time being – been left as is.

1. Contracting entities may conclude framework agreements, provided that they apply the procedures provided for in this Directive.

   A framework agreement means an agreement between one or more contracting entities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantities envisaged.

   The term of a framework agreement shall not exceed four years, save in exceptional cases duly justified, in particular by the subject of the framework agreement.

2. Contracts based on a framework agreement shall be awarded in accordance with the procedures laid down in this paragraph and paragraphs 3 and 4.

   Those procedures may be applied only between those contracting entities clearly identified for this purpose in the call for competition, in the invitation to confirm interest or, where a notice on the existence of a qualification system is used as a means of calling for competition, in the invitation to tender and those economic operators originally party to the framework agreement.

Contracts based on a framework agreement may under no circumstances make substantial modifications to the terms laid down in that framework agreement, in particular in the case referred to in paragraph 3.

Contracting entities shall not use framework agreements improperly or in such a way as to prevent, restrict or distort competition.

3. Where a framework agreement is concluded with a single economic operator, contracts based on that agreement shall be awarded within the limits of the terms laid down in the framework agreement.
For the award of those contracts, contracting entities may consult the operator party to the framework agreement in writing, requesting it to supplement its tender as necessary.

4. Where a framework agreement is concluded with more than one economic operator, it may be performed in one of the two following ways:

(a) following the terms and conditions of the framework agreement, without reopening competition, where it sets out all the terms governing the provision of the works, services and supplies concerned and the objective conditions for determining which of the economic operators, party to the framework agreement, shall perform them; the latter conditions shall be indicated in the procurement documents;

(b) where not all the terms governing the provision of the works, services and supplies are laid down in the framework agreement, through reopening competition amongst the economic operators parties to the framework agreement.

5. The competition referred to in paragraph (4)(b) shall be based on the same terms as applied for the award of the framework agreement and, where necessary, more precisely formulated terms, and, where appropriate, other terms referred to in the specifications of the framework agreement, in accordance with the following procedure:

(a) for every contract to be awarded, contracting entities shall consult in writing the economic operators capable of performing the contract;

(b) contracting entities shall fix a time limit which is sufficiently long to allow tenders for each specific contract to be submitted, taking into account factors such as the complexity of the subject-matter of the contract and the time needed to send in tenders;

(c) tenders shall be submitted in writing, and their content shall not be opened until the stipulated time limit for reply has expired;

(d) contracting entities shall award each contract to the tenderer that has submitted the best tender on the basis of the award criteria set out in the specifications of the framework agreement.