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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  
- Presidency compromise text

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On behalf of the Presidency, in view of the Council meeting (Competitiveness) on 10 and 11 December 2012, delegations will find in the Annex a revised version of the compromise text on the above proposal.

Changes endorsed at the meeting of Permanent Representatives Committee on 28 November 2012 concern: Recital 39j, Recital 49a, Article 3, Article 3a, Article 10 and Articles 79a and 79b.

Delegations that still have scrutiny reservations on the text are invited to contact the Presidency ([ppcypresidency@treasury.gov.cy](mailto:ppcypresidency@treasury.gov.cy)) and the Council Secretariat ([dgg3b@consilium.europa.eu](mailto:dgg3b@consilium.europa.eu)) in order to lift them by Tuesday, 4 December 2012, 10 a.m.

2011/0439 (COD)

**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

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 53(1) and Article 62 and Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments<sup>1</sup>,

Having regard to the opinion of the European Economic and Social Committee<sup>2</sup>,

Having regard to the opinion of the Committee of the Regions<sup>3</sup>,

Acting in accordance with the ordinary legislative procedure,

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1 OJ C

2 OJ C 191, 29.6.2012, p.84.

3 OJ C

Whereas:

- (1) In the light of the results of the Evaluation on the Impact and Effectiveness of EU Public Procurement Legislation<sup>4</sup> it appears appropriate to maintain rules on procurement by entities operating in the water, energy, transport and postal services sectors, since national authorities continue to be able to influence the behaviour of those entities, including participation in their capital and representation in the entities' administrative, managerial or supervisory bodies.

Another reason to continue to regulate procurement in those sectors is the closed nature of the markets in which they operate, due to the existence of special or exclusive rights granted by the Member States concerning the supply to, provision or operation of networks for providing the service concerned.

- (2) In order to guarantee the opening up to competition of procurement by entities operating in the water, energy, transport and postal services sectors, provisions should be drawn up coordinating procurement procedures in respect of contracts above a certain value. Such coordination is needed to ensure the effect of the principles of the Treaty on the Functioning of the European Union and in particular the free movement of goods, the freedom of establishment and the freedom to provide services as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. In view of the nature of the sectors affected by such coordination, the latter should, while safeguarding the application of those principles, establish a framework for sound commercial practice and should allow maximum flexibility.
- (3) For procurement the value of which is lower than the thresholds triggering the application of the provisions of Union coordination, it is advisable to recall the case-law developed by the Court of Justice according to which the rules and principles of the Treaty apply.

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<sup>4</sup> SEC(2011) 853 Final of 27.6.2011

- (4) Public procurement plays a key role in the Europe 2020 strategy<sup>5</sup> as one of the market-based instruments to be used to achieve a smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. For that purpose, the current public procurement rules adopted pursuant to Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors<sup>6</sup> and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts<sup>7</sup> have to be revised and modernised in order to increase the efficiency of public spending, facilitating in particular the participation of small and medium-sized enterprises in public procurement and to enable procurers to make better use of public procurement in support of common societal goals. There is also a need to clarify basic notions and concepts to ensure better legal certainty and to incorporate certain aspects of related well-established case-law of the Court of Justice of the European Union.
- (6) *It is appropriate that the notion of procurement is as close as possible to that applied pursuant to Directive of the European Parliament and of the Council of ...on public procurement]*<sup>8</sup>, having due regard for the specificities of the sectors covered by this Directive.

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<sup>5</sup> COM(2010) 2020 final, 3.3-2010.

<sup>6</sup> OJ L 134, 30.4.2004, p. 1.

<sup>7</sup> OJ L 134, 30.4.2004, p. 114.

<sup>8</sup> See p. [ ] of this Official Journal.

(6a) It should be recalled that nothing in this Directive obliges Member States to contract out or externalise the provision of services that they wish to provide themselves or to organise by means other than procurement within the meaning of Article 1(2). The provision of services based on law or regulations, or employment contracts, should not be covered. In some Member States, this might for example be the case for the provision of certain services to the community, such as the supply of drinking water.

*(6aa) It is also appropriate to recall that this Directive should not affect the social security legislation of the Member States nor should it deal with the liberalisation of services of general economic interest, reserved to public or private entities, nor with the privatisation of public entities providing services. Articles 1(2) and 1(6) of Directive 2006/123/EC.*

*It should equally be recalled that Member States are free to organise the provision of compulsory social services or of other services such as postal services either as services of general economic interest or as non-economic services of general interest or as a mixture thereof. It is appropriate to clarify that non-economic services of general interest should not fall within the scope of this Directive.*

*(6b) A contract shall be deemed to be a works contract only if its subject matter specifically covers the execution of activities listed in Annex I, even if the contract covers the provision of other services necessary for the execution of such activities. Service contracts, in particular in the sphere of property management services, may, in certain circumstances, include works. However, insofar as such works are incidental to the principal subject-matter of the contract, and are a possible consequence thereof or a complement thereto, the fact that such works are included in the contract does not justify the qualification of the service contract as a works contract.*

*However, in view of the diversity of works contracts, contracting entities should be able to make provision for contracts for the design and execution of work to be awarded either separately or jointly. It is not the intention of this Directive to prescribe either joint or separate contract awards.*

- (6c) *The realisation of a work corresponding to the requirements specified by a contracting authority requires that the authority in question must have taken measures to define the type of the work or, at the very least, have had a decisive influence on its design.*
- (6d) *The notion of "contracting authorities" and in particular that of "bodies governed by public law" have been examined repeatedly in the jurisprudence of the Court of Justice of the European Union. To clarify that the scope of the Directive *ratione personae* should remain unaltered, it is appropriate to maintain the definition on which the Court based itself and to incorporate a certain number of clarifications given by that jurisprudence as a key to the understanding of the definition itself without the intention to alter the understanding of the concept as elaborated by the jurisprudence.*

*For that purpose, it should be clarified that a body which operates in normal market conditions, aims to make a profit, and bears the losses resulting from the exercise of its activity should not be considered as being a "body governed by public law" since the needs in the general interest, that it has been set up to meet or been given the task of meeting, can be deemed to have an industrial or commercial character. Similarly, the condition relating to the origin of the funding of the body considered, has also been examined by jurisprudence, which has clarified i. a. that financed for "the most part" means for more than half and that such financing may include payments from users which are imposed, calculated and collected according to rules of public law.*

- (6e) *In the case of mixed contracts, the applicable rules should be determined in function of the main subject of the contract where the different parts which constitute the contract are objectively not separable. It should therefore be clarified how contracting entities should determine whether the different parts are separable or not. Such clarification should be based on the relevant jurisprudence of the Court of Justice of the European Union. The determination should be carried out on a case-by-case basis, in which the expressed or presumed intentions of the contracting entity to regard the various aspects making up a mixed contract as indivisible should not be sufficient, but should be supported by objective evidence capable of justifying them and of establishing the need to conclude a single contract. Such a justified need to conclude a single contract could for instance be present in case of the construction of one single building, a part of which to be used directly by the contracting entity concerned and another part to be operated on a concessions basis, for instance to provide parking facilities to the public.*
- (6f) *In the case of mixed contracts, which can be separated, contracting entities are, of course, always free to award separate contracts for the separate parts of the mixed contract, in which case the provisions applicable to the each separate part should be determined exclusively in function of the characteristics of that specific contract. On the other hand, where contracting entities choose to include other elements in the procurement, whatever their value and whatever the legal regime the added elements would otherwise have been subject to, the main principle should be that where a contract should be awarded pursuant to the provisions of this Directive, if awarded on its own, then this Directive should continue to apply to the entire mixed contract.*
- (6g) *However, special provisions should be foreseen for mixed contracts involving defence or security aspects or parts not falling within the scope of the Treaty. In such cases, non-application of this Directive should be possible provided that the award of a single contract is justified for objective reasons and that the decision to award a single contract is not taken for the purpose of excluding contracts from the application of this Directive or Directive 2009/81/EC.*

- (6h) Furthermore, contracts may be awarded for the purpose of meeting the requirements of several activities, possibly subject to different legal regimes. It should be clarified that the legal regime applicable to a single contract intended to cover several activities should be subject to the rules applicable to the activity for which it is principally intended.

Determination of the activity for which the contract is principally intended may be based on an analysis of the requirements which the specific contract must meet, carried out by the contracting entity for the purposes of estimating the contract value and drawing up the procurement documents. In certain cases, such as the purchase of a single piece of equipment for the pursuit of activities for which information allowing an estimation of the respective rates of use would be unavailable, it might be objectively impossible to determine for which activity the contract is principally intended. The rules applicable to such cases should be indicated.

- (6i) *It should be clarified that the notion of "economic operators" should be interpreted in a broad manner so as to include any persons and/or entities which offers the execution of works and/or a work, the supply of products or the provision of services on the market, irrespective of the legal form they have chosen to operate under. Thus, firms, branches, subsidiaries, partnerships, cooperative societies, limited companies, universities, public or private, and other forms of entities than natural persons should all fall within the notion of economic operator, whether or not they are "legal persons" in any and all relations.*

- (7) To ensure a real opening up of the market and a fair balance in the application of procurement rules in the water, energy, transport and postal services sectors it is necessary for the entities covered to be identified on a basis other than their legal status. It should be ensured, therefore, that the equal treatment of contracting entities operating in the public sector and those operating in the private sector is not prejudiced. It is also necessary to ensure, in keeping with Article 345 of the Treaty on the Functioning of the European Union, that the rules governing the system of property ownership in Member States are not prejudiced.



- (8) 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 legislation should include Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC<sup>9</sup>, Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC<sup>10</sup>, Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service<sup>11</sup>, Directive 94/22/EC of the European Parliament and of the Council of 20 May 1994 on the conditions for granting and using authorisations for the prospection, exploration and production of hydrocarbons<sup>12</sup> and Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70<sup>13</sup>.

It should also be clarified that this list of legislation is not exhaustive and that rights in any form, including by way of acts of concession, which have been granted by means of other procedures based on objective criteria and for which adequate publicity has been ensured do not constitute special or exclusive rights for the purposes of defining the scope of this Directive *rationae personae*. The concept of exclusive rights should also be used in the

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<sup>9</sup> OJ L 211, 14.8.2009, p. 94

<sup>10</sup> OJ L 211, 14.8.2009, p. 55

<sup>11</sup> OJ L 15, 21.1.1998, p. 14.

<sup>12</sup> OJ L 164, 30.6.1994, p. 3.

<sup>13</sup> OJ L 315, 3.12.2007, p. 1.

context of determining whether use of a negotiated procedure without prior call for competition would be justified because the works, supplies or services can be supplied only by a particular economic operator because of the protection of certain exclusive rights.

However, bearing in mind the different *ratio legis* behind these provisions, it should be clarified that the notion of exclusive rights does not need to have the same meaning in the two contexts. It should thus be clarified that an entity, which has won the exclusive right to provide a given service in a given geographic area following a procedure based on objective criteria for which adequate transparency has been ensured would not, if a private body, be a contracting entity itself, but would, nevertheless, be the only entity that could provide the service concerned in that area.

- (8a) Without in any way extending the scope of the Directive, it should be clarified that production and wholesale of electricity are covered when the Directive refers to the supply of electricity.
- (9) Contracting entities that operate in the drinking water sector may also deal with other activities relating to water, such as projects in the field of hydraulic engineering, irrigation, land drainage or the disposal and treatment of sewage. In such case, contracting entities should be able to apply the procurement procedures provided for in this Directive in respect of all their activities relating to water, whichever part of the "water cycle" is concerned. However, procurement rules of the type proposed for supplies of goods are inappropriate for purchases of water, given the need to procure water from sources near the area in which it will be used.
- (10) It is appropriate to exclude procurement made for the purpose of exploring for oil and gas as that sector has consistently been found to be subject to such competitive pressure that the procurement discipline brought about by the EU procurement rules is no longer needed. As extraction of oil and gas continues to fall within the scope of this Directive, there might be a need to distinguish between exploration and extraction. In doing so, "exploration" should be considered to include the activities that are undertaken in order to verify whether

(commercially exploitable) oil and gas is present in a given zone, whereas "extraction" should be considered as the "production" of oil and gas. In line with established practice in merger cases, "production" should be taken to include also 'development', i.e. the setting up of adequate infrastructure for future production (oil platforms, pipelines, terminals, etc.).

- (14) *Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the Agreements reached in the Uruguay Round multilateral negotiations (1986 to 1994)<sup>14</sup>, approved in particular the World Trade Organisation Agreement on Government Procurement, hereinafter referred to as the "Agreement". The aim of the Agreement is to establish a multilateral framework of balanced rights and obligations relating to public contracts with a view to achieving the liberalisation and expansion of world trade. For contracts covered by Annexes I, II, IV and V and the General Notes to the European Union's Appendix 1 to the Agreement, as well as by other relevant international agreements by which the Union is bound, contracting entities should fulfil the obligations under those agreements by applying this Directive to economic operators of third countries that are signatories to the agreements.*

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<sup>14</sup> OJ L 336, 23.12.1994, p. 1.

(15) The Agreement applies to contracts above certain thresholds, set in the Agreement and expressed as special drawing rights. The thresholds laid down by this Directive should be aligned to ensure that they correspond to the euro equivalents of the thresholds of the Agreement. Provision should also be made for periodic reviews of the thresholds expressed in euros so as to adjust them, by way of a purely mathematical operation, to possible variations in the value of the euro in relation to the special drawing right. To avoid a multiplication of thresholds it is furthermore appropriate, without prejudice to the international commitments of the Union, to continue to apply the same thresholds to all contracting entities, regardless of the sector in which they operate.

(15a) *It should be clarified that, for the estimation of the value of a contract, all revenues have to be taken into account, whether received from the contracting entity or from third parties.*

*It should also be clarified that, for the purpose of estimating the thresholds, the notion of similar supplies should be understood as products which are intended for identical or similar uses, e.g. supplies of a range of foods or of different items of office furniture. Typically, an economic operator being active in the field concerned would be likely to carry such supplies as part of his normal product range.*

(16) *The results of the Evaluation suggested that the exclusion of certain services from the full application of this directive should be reviewed. As a result, the full application of the Directive is extended to a number of services*

(17) *Certain categories of services continue by their very nature to have a limited cross-border dimension, namely what are known as services to the person such as certain social, health and educational services. Those services are provided within a particular context that varies widely amongst Member States, due to different cultural traditions. A specific regime should therefore be established for contracts for those services, with a higher threshold of EUR 1 000 000.*

In the particular context of procurement in those sectors, services to the person with values below this threshold will typically not be of interest to providers from other Member States unless there are concrete indications to the contrary, such as Union financing for transborder projects. Contracts for services to the person above this threshold should be subject to Union-wide transparency. Given the importance of the cultural context and the sensitivity of those services, Member States should be given wide discretion to organise the choice of the service providers in the way they consider most appropriate. The rules of this directive take account of that imperative, imposing only observance of basic principles of transparency and equal treatment and making sure that contracting entities are able to apply specific quality criteria for the choice of service providers, such as the criteria set out in the voluntary European Quality Framework for Social Services of the European Union's Social Protection Committee<sup>15</sup>.

Member States and/or contracting entities remain free to provide those services themselves or to organise social services in a way that does not entail the conclusion of public contracts, for example through the mere financing of such services or by granting licences or authorisations to all economic operators meeting the conditions established beforehand by the contracting entity, without any limits or quotas, provided such a system ensures sufficient advertising and complies with the principles of transparency and non-discrimination.

*(17a) Likewise, hotel and restaurant services are typically offered only by operators located in the specific place of delivery of these services and have therefore also a limited cross-border dimension. They should therefore only be covered by the particular regime set out for social and other specific services, as from a threshold of EUR 1 000 000. Large hotel and restaurant service contracts above this threshold may be of interest for various economic operators, such as travel agencies and other intermediaries, also on a cross-border basis.*

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<sup>15</sup> SPC/2010/10/8 Final of 6.10.2010.

*(17b) Similarly, certain legal services exclusively concern issues of purely national law and are therefore typically offered only by operators located in the Member State concerned and have consequently also a limited cross-border dimension. They should therefore only be covered by the particular regime set out for social and other specific services, as from a threshold of EUR 1 000 000. Large legal service contracts above this threshold may be of interest for various economic operators, such as international law firms, also on a cross-border basis, in particular where they involve legal issues arising from or having as its background EU or other international law or implicating more than one country.*

*(17c) Experience has shown that a series of other services, such as rescue services, firefighting services and prison services normally only present a certain cross-border interest as of the moment where they acquire sufficient critical mass through their relatively high value. They should therefore only be included under the particular regime set out for social and other specific services. To the extent that their provision is actually based on contracts, other categories of services, such as investigation and security services, would normally only be likely to present a cross-border interest as of a threshold of EUR 1 000 000 and should consequently only be subject to the particular regime set out for social and other specific services.*

*(17d) It is appropriate to identify these services by reference to specific positions of the 'Common Procurement Vocabulary (CPV)' as adopted by Regulation (EC) No 2195/2002, which is a hierarchically structured nomenclature, divided into divisions, groups, classes, categories and subcategories. To avoid legal uncertainty, it should be clarified that reference to a division does not implicitly entail a reference to subordinate subdivisions. Such comprehensive coverage should instead be set out explicitly by mentioning all the relevant positions, where appropriate as a range of codes.*

- (18) Being addressed to Member States, this directive does not apply to procurement carried out by international organisations on their own behalf and for their own account. There is, however, a need to clarify to what extent this directive should be applied to procurement governed by specific international rules.
- (18a) *A certain number of legal services are rendered by service providers that are designated by a court or tribunal of a Member State, involve representation of clients in judicial proceedings by lawyers, must be provided by notaries or are connected with the exercise of official authority. Such legal services are usually provided by bodies or individuals designated or selected in a manner which cannot be governed by procurement rules, such may for instance be the case for the designation of State Attorneys in certain Member States; they should consequently be excluded from the scope of this Directive.*
- (18b) *It is appropriate to specify that the notion of financial instruments as referred to in this Directive is given the same meaning as in other Internal Market legislation and, in view of the recent creation of the European Financial Stability Facility, it should be stipulated that operations conducted with that facility should be excluded from the scope of this Directive. It should finally be clarified that loans, whether or not these are in connection with the issue or other operations concerning securities or other financial instruments, should be excluded from the scope of the Directive.*

- (18c) *It should be recalled that Article 5(1) of Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70<sup>16</sup> explicitly provides that Directives 2004/17/EC and 2004/18/EC apply to (public) service contracts for public passenger transport services by bus or tram, whereas the Regulation applies to service concessions for public passenger transport by bus or tram. It should furthermore be recalled that the Regulation continues to apply to (public) service contracts as well as service concessions for public passenger transport by railway or metro. To clarify the relations between this Directive and the Regulation, it should be provided explicitly that the provisions of this Directive should not be applicable to service contracts for the provision of public passenger transport services by rail or metro, the award of which should continue to be subject to the provisions of the Regulation. Insofar as the Regulation leaves it to national law to depart from the rules laid down by it, Member States may continue to provide in their national law that service contracts for public passenger transport services by rail or metro have to be awarded by a contract award procedure following their general public procurement rules.*
- (18d) *In certain cases, a given contracting authority or a given association thereof may be the sole source for a given service, for the provision of which it enjoys an exclusive right pursuant to published laws, regulations or administrative provisions which are compatible with the Treaty. It should be clarified that a service contract may be awarded to that contracting authority or association thereof without the Directive being applied.*

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<sup>16</sup> OJ L 315, 3.12.2007, p. 1



- (19) *There is considerable legal uncertainty as to how far contracts concluded between contracting authorities should be covered by public procurement rules. The relevant case-law of the Court of Justice of the European Union is interpreted differently between Member States and even between contracting authorities. As this jurisprudence would be equally applicable to public authorities when operating in the sectors covered by this directive, it is appropriate to ensure that the same rules apply and are interpreted in the same way in both this directive and Directive .../.../EU on public procurement.*
- (20) It is appropriate to exclude certain service, supply and works contracts awarded to an affiliated undertaking having as its principal activity the provision of such services, supply or works to the group of which it is part, rather than offering them on the market. It is also appropriate to exclude certain service, supply and works contracts awarded by a contracting entity to a joint venture which is formed by a number of contracting entities for the purpose of carrying out activities covered by this Directive and of which that entity is part. However, it is appropriate to ensure that this exclusion does not give rise to distortions of competition to the benefit of the undertakings or joint ventures that are affiliated with the contracting entities; it is appropriate to provide a suitable set of rules, in particular as regards the maximum limits within which the undertakings may obtain a part of their turnover from the market and above which they would lose the possibility of being awarded contracts without calls for competition, the composition of joint ventures and the stability of links between those joint ventures and the contracting entities of which they are composed.
- (21) It is also appropriate to clarify the relations between the provisions on cooperation between public authorities and the provisions on the award of contracts to affiliated undertakings or in the context of joint ventures.

*(21a) The co-financing of research and development (R&D) programmes by industry sources should be encouraged; it should consequently be clarified that this Directive only applies where there is no such co-financing and where the outcome of the R&D activities go to the contracting entity concerned; this should not exclude that the service provider having carried out these activities could publish an account thereof as long as the contracting entity retains the exclusive right to use the outcome of the R&D in the conduct of its own affairs. However any fictitious sharing of the results of the R&D or any symbolic participation in the remuneration of the service provider will not prevent the application of this Directive.*

(22) This Directive should apply neither to contracts intended to permit the performance of an activity that is subject to this Directive nor to design contests organised for the pursuit of such an activity if, in the Member State in which this activity is carried out, it is directly exposed to competition on markets to which access is not limited. It is therefore appropriate to maintain the procedure, applicable to all sectors, or parts thereof, covered by this Directive that will enable the effects of current or future opening up to competition to be taken into account. Such a procedure should provide legal certainty for the entities concerned, as well as an appropriate decision-making process, ensuring, within short time limits, uniform application of Union law in this area. For the sake of legal certainty it should be clarified that all Decisions adopted prior to the entry into force of this Directive concerning the applicability of the corresponding provisions set out in Article 30 of Directive 2004/[...]17/EC continue to be applicable.

- (23) Direct exposure to competition should be assessed on the basis of objective criteria, taking account of the specific characteristics of the sector concerned or of the concerned parts thereof. 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.
- (23a) Assessing whether a given sector, or parts thereof, are directly exposed to competition should be examined in respect of the specific area in which the activity, or the parts thereof concerned, are carried out by the relevant economic operators, the so-called relevant geographical market. As this notion is crucial for the assessment, it should be given an appropriate definition, based on existing notions in Union law. It should also be clarified that the relevant geographical market might not coincide with the territory of the Member State concerned; consequently, decisions concerning the applicability of the exemption could be limited to parts of the territory of the Member State concerned.
- (24) The implementation and application of appropriate Union legislation opening a given sector, or a part of it, will be considered to provide sufficient grounds for assuming that there is free access to the market in question. Such appropriate legislation should be identified in an annex which can be updated by the Commission.

- (24a) Where free access to a given market is not presumed on the basis of the implementation of appropriate Union legislation, it should be demonstrated that, de jure and de facto, such access is free. Where a Member State extends the application of a Union legal act opening up a given sector to competition to situations falling outside the scope of that legal act, for instance by applying Directive 94/22/EC to the coal sector or Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways to passenger service at the national level, this circumstance should be taken into account when assessing whether access to the sector concerned is free, de jure and de facto.
- (24b) Independent national authorities, such as sectoral regulators or competition authorities, normally possess specialised know-how, information and knowledge that would be pertinent when assessing whether a given activity or parts thereof are directly exposed to competition on markets to which access is not limited. Requests for exemption should therefore where appropriate be accompanied by, or incorporate, a recent position on the competitive situation in the sector concerned, adopted by an independent national authority that is competent in relation to the activity concerned.

In the absence of a reasoned and substantiated position adopted by an independent national authority that is competent in relation to the activity concerned, more time would be needed for the assessment of a request for exemption. The periods of which the Commission dispose for its assessments of such requests should therefore be modulated accordingly.

- (24c) The Commission should always be obliged to examine requests, which are in conformity with the detailed rules for the application of the procedures for establishing whether a given activity, or parts thereof, are directly exposed to competition on markets to which access is not restricted. It should, however, also be clarified that the complexity of such requests may be such that it might not always be possible to ensure the adoption within the applicable deadlines of implementing acts establishing whether a given activity or parts thereof are directly exposed to competition on markets to which access is not restricted.

- (24d) It should be clarified that the Commission should have the possibility to require Member States or contracting entities to provide or to supplement or clarify information. The Commission should set an appropriate time limit for so doing which, having due regard also to the need to meet the deadlines set for the Commission's adoption of its implementing act, should take into account factors such as the complexity of the information requested and whether the information is readily accessible.
- (24e) *Employment and occupation contribute to integration in society and are key elements in guaranteeing equal opportunities for all. In this context, sheltered workshops can play a significant role. The same is true for other social businesses whose main aim is to support the social and professional integration or reintegration of disabled and disadvantaged persons, such as unemployed, members of disadvantaged minorities or otherwise socially marginalised groups and for employee-led organisations aiming at the integration of former public sector employees into the private sector. However, such workshops or businesses might not be able to obtain contracts under normal conditions of competition. Consequently, it is appropriate to provide that Member States should be able to reserve the right to participate in award procedures for public contracts or for certain lots thereof to such workshops or businesses or reserve performance of contracts to the context of sheltered employment programmes.*
- (25) Research and innovation, including eco-innovation and social innovation, are among the main drivers of future growth and have been put at the centre of the Europe 2020 strategy for smart, sustainable and inclusive growth. Contracting entities should make the best strategic use of public procurement to spur innovation. Buying innovative goods, *works* and services plays a key role in improving the efficiency and quality of public services while addressing major societal challenges. It contributes to achieving best value for money as well as wider economic, environmental and societal benefits in terms of generating new ideas, translating them into innovative products and services and thus promoting sustainable economic growth.

*It should be recalled that a series of procurement models have been outlined in the Commission's communication of 14.12.2007 on pre-commercial procurement<sup>17</sup>, which deal with the procurement of those research and development services not falling within the scope of this Directive. Those models would continue to be available as hitherto, but this directive should also contribute to facilitating procurement of innovation and help Member States in achieving the Innovation Union targets.*

- (25a) Because of the importance of innovation, contracting entities should be encouraged to allow variants as often as possible; their attention should consequently be drawn to the need of defining the minimum requirements to be met by variants before indicating that variants may be submitted.*

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<sup>17</sup> COM(2007) 799 final: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Pre-commercial Procurement: driving innovation to ensure sustainable high quality public services in Europe.

- (25b) *Where a need for the development of an innovative product or service or innovative works and the subsequent purchase of the resulting supplies, services or works cannot be met by solutions already available on the market, contracting entities should have access to a specific procurement procedure in respect of contracts falling within the scope of this Directive. This specific procedure should allow contracting entities to establish a long-term innovation partnership for the development and subsequent purchase of a new, innovative product, service or works provided that such innovative product or service or innovative works can be delivered to agreed performance levels and costs, without the need for a separate procurement procedure for the purchase. The Innovation partnership should be based on the procedural rules that apply to negotiated procedures with prior call for competition and contracts should be awarded on the sole basis of the most economically advantageous tender, which is most suitable for comparing tenders for innovative solutions. Whether in respect of very large projects or smaller innovative projects, the innovation partnership should be structured in such a way that it can provide the necessary “market-pull” incentivising the development of an innovative solution without foreclosing the market. Contracting entities should consequently not use innovation partnerships in such a way as to prevent, restrict or distort competition; in certain cases, setting up innovation partnerships with several partners could contribute to avoiding such effects.*
- (25c) *Experience has shown that the competitive dialogue, which is provided for under Directive 2004/18/EC, has been of use in cases where contracting authorities are unable to define the means of satisfying their needs or of assessing what the market can offer in terms of technical, financial or legal solutions. This situation may arise in particular with innovative projects, the implementation of major integrated transport infrastructure projects, large computer networks or projects involving complex and structured financing. Member States should therefore be allowed to place this tool at the disposal of contracting entities.*

(26) *In view of the detrimental effects on competition, negotiated procedures without a call for competition should only be used in very exceptional circumstances. This exception should be limited to cases where publication is either not possible, for reasons of extreme urgency brought about by events unforeseeable for and not attributable to the contracting entity, or where it is clear from the outset that publication would not trigger more competition or better procurement outcomes, not least because there is objectively only one economic operator that can perform the contract. This is the case for works of art, where the identity of the artist intrinsically determines the unique character and value of the art object itself. Exclusivity can also arise from other reasons, but only situations of objective exclusivity can justify the use of the negotiated procedure without a call for competition, where the situation of exclusivity has not been created by the contracting entity itself with a view to the future procurement procedure .*

*Contracting entities relying on this exception should provide reasons why there are no reasonable alternatives or substitutes such as using alternative distribution channels including outside the Member State of the contracting entity or considering functionally comparable works, supplies and services.*

*Where the situation of exclusivity is due to technical reasons, these should be rigorously defined and justified on a case-by-case basis. They could include, for instance, near technical impossibility for another economic operator to achieve the required performance or the necessity to use specific know-how, tools or means which only one economic operator has at its disposal. Technical reasons may also derive from specific interoperability requirements which must be fulfilled in order to ensure the functioning of the works, supplies or services to be procured.*



*Finally, a procurement procedure is not useful where supplies are purchased directly on a commodity market, including trading platforms for commodities such as agricultural goods, raw materials and energy exchanges, where the regulated and supervised multilateral trading structure naturally guarantees market prices.*

- (27) *Electronic means of information and communication can greatly simplify the publication of contracts and increase the efficiency and transparency of procurement processes. They should become the standard means of communication and information exchange in procurement procedures , as they greatly enhance the possibilities of economic operators to participate in procurement procedures across the Internal Market. For that purpose, transmission of notices in electronic form, electronic availability of the procurement documents and – after a transition period of thirty months – fully electronic communication, meaning communication by electronic means at all stages of the procedure, including the transmission of requests for participation and, in particular, the transmission of the tenders (e-submission) should be made mandatory. Member States and contracting entities should remain free to go further if they so wish. It should also be clarified that mandatory use of electronic means of communications pursuant to this Directive should not, however, oblige contracting entities to carry out electronic processing of tenders, nor should it mandate electronic evaluation or automatic processing. Furthermore, pursuant to this Directive, no elements of the public procurement process after the award of the contract should be covered by the obligation to use electronic means of communication nor should internal communication within the contracting entity.*

(27a) *The obligation to use electronic means at all stages of the procurement procedure would not be appropriate where the use of electronic means would require specialised tools or file formats that are not generally available nor where the communications concerned could only be handled using specialised office equipment. Contracting entities should therefore not be obliged to require the use of electronic means of communication in the submission process in certain cases. The Directive should stipulate that such cases should include situations which would require the use of specialised office equipment not generally available to the contracting entities such as wide-format printers. In some procurement procedures the procurement documents may require the submission of a physical or scale model which cannot be submitted to the contracting entities using electronic means.*

*In such situations, the model should be transmitted to the contracting entities by post. It should however be clarified that the use of other means of communication should be limited to those elements of the tender for which electronic means of communications are not required.*

*It is appropriate to clarify that, where necessary for technical reasons, contracting entities should be able to set a maximum limit to the size of the files that may be submitted.*

(27b) *Differing technical formats or processes and messaging standards could potentially create obstacles to interoperability, not only within each Member State but also and especially between the Member States. For example, in order to participate in a procurement procedure in which use of electronic catalogues, which is a format for the presentation and organisation of information in a manner that is common to all the participating bidders and which lends itself to electronic treatment, is permitted or required, economic operators would, in the absence of standardisation, be required to customise their own catalogues to each procurement procedure, which would entail providing very similar information in different formats depending on the specifications of the contracting entities concerned. Standardising the catalogue formats would thus improve the level of interoperability, enhance efficiency and would also - and perhaps above all - reduce the effort required of economic operators.*

*(27c) When considering whether there is a need to ensure or enhance interoperability between differing technical formats or process and messaging standards by rendering the use of specific standards mandatory, and if so which standards to impose, the Commission should take the utmost account of the opinions of the stakeholders concerned. It should also consider the extent to which a given standard has already been used in practice by economic operators and contracting entities and how well it has worked; before making use of any technical standard mandatory, the Commission should also carefully consider the costs that this may entail, in particular in terms of adaptations to existing e-procurement solutions, including infrastructure, processes or software.*

*Where the standards concerned are not developed by an international, European or national standardisation organisation, they should meet the requirements applicable to ICT standards as set out in Regulation (EU) .../2012 on European standardisation.*

*(27d) Before specifying the level of security required for the electronic means of communications to be used at the various stages of the award procedure, Member States and contracting entities should evaluate the proportionality between on the one hand the requirements aimed at ensuring correct and reliable identification of the senders of the communication concerned as well as the integrity of its content and on the other hand the risk of problems e. g. in situations where messages are sent by a different sender than the one indicated. All other things being equal, this would mean that the level of security required of, for instance, an email requesting confirmation of the exact address at which an information meeting will be held would not need to be set at the same level as for the tender itself which constitutes a binding offer for the economic operator. Similarly, the evaluation of proportionality could result in lower levels of security being required in connection with the resubmission of electronic catalogues or the submission of tenders in the context of mini-competitions under a framework agreement or the access to procurement documents.*

- (27e) *While essential elements of a procurement procedure such as the procurement documents, requests for participation, confirmation of interest and tenders should always be made in writing, oral communication with economic operators should otherwise continue to be possible, provided that its content is documented to a sufficient degree. This is necessary to ensure an adequate level of transparency that allows for a verification of whether the principle of equal treatment has been adhered to. In particular, it is essential that oral communications with tenderers which could have an impact on the content and assessment of the tenders be documented to a sufficient extent and by appropriate means, such as written or audio records or summaries of the main elements of the communication.*
- (28) There is a strong trend emerging across Union public procurement markets towards the aggregation of demand by public purchasers, with a view to obtaining economies of scale, including lower prices and transaction costs, and to improving and professionalising procurement management. This can be achieved by concentrating purchases either by the number of contracting entities involved or by volume and value over time. However, the aggregation and centralisation of purchases should be carefully monitored in order to avoid excessive concentration of purchasing power and collusion, and to preserve transparency and competition, as well as market access opportunities for small and medium-sized enterprises.
- (29) 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 the award of specific contracts based on the agreement to be awarded on the basis of objective rules and criteria, for instance following a mini-competition, and by limiting the duration of framework agreements.

In this context, it should be clarified that contracts based on a framework agreement are to be awarded before the end of the term of the framework agreement itself. Consequently, the duration of the individual contracts based on the framework agreement does not need to coincide with the duration of that framework agreement.

- (30) *In view of the experience acquired, there is also a need to adjust the rules governing dynamic purchasing systems to enable contracting entities to take full advantage of the possibilities afforded by that instrument. The systems need to be simplified, in particular they should be operated in the form of a restricted procedure, hence eliminating the need for indicative tenders, which have been identified as one of the major burdens associated with dynamic purchasing systems. Thus any economic operator who submits a request to participate and meets the selection criteria should be allowed to take part in procurement procedures carried out through the dynamic purchasing system over its period of validity.*

*This purchasing technique allows the contracting entity to have a particularly broad range of tenders and hence to ensure optimum use of funds through broad competition in respect of commonly used or off-the-shelf goods, works or services which are generally available on the market.*

- (30a) *The examination of these requests to participate should normally be performed within a maximum of 10 working days, given that the evaluation of the selection criteria will take place on the basis of the requirements for documentation set out by the contracting entities, where applicable in accordance with the simplified provisions of Directive 2004/18/EC. However, when a dynamic purchasing system is first set up, contracting entities may, in response to the first publication of the contract notice or the invitation to confirm interest, be faced with such a large number of requests for participation that they may need more time to examine the requests. This should be admissible, provided that no specific procurement is launched as long as all the requests have not been examined.*

*Contracting entities should be free to organise the way in which they intend to examine the requests for participation, for instance by deciding to conduct such examinations only once a week, provided the deadlines for the examination of each request of admission are observed. Contracting entities using the exclusion or selection criteria provided for under Directive 2004/18/EC in the context of a dynamic purchasing system, should apply the relevant provisions of that Directive in the same way as contracting authorities operating a dynamic purchasing system pursuant to Directive 2004/18/EC.*

- (30b) In order to further the possibilities of SMEs to participate in a large-scale dynamic purchasing system, for instance one that is operated by a central purchasing body, the contracting authority or entity concerned should be able to articulate the system in objectively defined categories of products, works or services. Such categories should be defined by reference to objective factors which may for instance include the maximum allowable size of specific contracts to be awarded within the category concerned or a specific geographic area in which subsequent specific contracts are to be performed.*

*Where a dynamic purchasing system is divided into categories, the contracting authority or entity should apply selection criteria that are proportional to the characteristics of the category concerned.*

- (30c) It should be clarified that electronic auctions are typically not suitable for certain works contracts and certain service contracts having as their subject-matter intellectual performances, such as the design of works, because only the elements suitable for automatic evaluation by electronic means, without any intervention and/or appreciation by the contracting entity, namely elements which are quantifiable so that they can be expressed in figures or percentages, may be the object of electronic auctions.*

*It should, however, also be clarified that electronic auctions may be used in a procurement procedure for the purchase of a specific intellectual property right. It is also appropriate to recall that while contracting entities to apply selection criteria enabling them to reduce the number of candidates or tenderers as long as the auction has not yet started, no further reduction of the number of tenderers participating in the electronic auction should be allowed after the auction has started.*

- (31) *In addition, new electronic purchasing techniques are constantly being developed, such as electronic catalogues. Electronic catalogues are a format for the presentation and organisation of information in a manner that is common to all the participating bidders and which lends itself to electronic treatment; an example could be tenders presented in the form of a spreadsheet. Contracting authorities may require electronic catalogues in all available procedures where the use of electronic means of communication is required. Electronic catalogues help to increase competition and streamline public purchasing, particularly in terms of savings in time and money. Certain rules should however be laid down to ensure that such use complies with the rules of this Directive and the principles of equal treatment, non-discrimination and transparency.*

*Thus, use of electronic catalogues for the presentation of tenders should not entail that economic operators may limit themselves to the transmission of their general catalogue. Economic operators should still have to adapt their general catalogues in view of the specific procurement procedure. Such adaptation will ensure that the catalogue that is transmitted in response to a given procurement procedure only contains products, works or services that the economic operators estimated - after an active examination - correspond to the requirements of the contracting entity. In so doing, economic operators should be allowed to copy information contained in their general catalogue, but they should not be allowed to submit the general catalogue as such. Furthermore, where sufficient guarantees are offered in respect of ensuring traceability, equal treatment and predictability, contracting entities should be allowed to generate tenders in relation to specific purchases on the basis of previously transmitted electronic catalogues, in particular where competition*

*has been reopened under a framework agreement or where a dynamic purchasing system is being used.*

*Where tenders have been generated by the contracting entity, the economic operator concerned should be given the possibility to verify that the tender thus constituted by the contracting entity does not contain any material errors. Where material errors are present, the economic operator should not be bound by the tender generated by the contracting entity unless the error is corrected.*

*In line with the requirements of the rules for electronic means of communication, contracting entities should avoid unjustified obstacles to economic operators' access to procurement procedures in which tenders are to be presented in the form of electronic catalogues and which guarantee compliance with the general principles of non-discrimination and equal treatment.*

- (32) *Centralised purchasing techniques are increasingly used in most Member States. Central purchasing bodies are responsible for making acquisitions, managing dynamic purchasing systems or awarding contracts/framework agreements for other contracting authorities or contracting entities, with or without remuneration. The contracting authorities for whom a framework agreement is concluded should be able to use it for individual or repetitive purchases. In view of the large volumes purchased, such techniques may help increase competition and professionalise public purchasing. Provision should therefore be made for a Union definition of central purchasing bodies dedicated to contracting entities and it should be clarified that central purchasing bodies operate in two different manners.*

*Firstly, they should be able to act as wholesalers by buying, stocking and reselling or, secondly, as intermediaries by awarding contracts, operating dynamic purchasing systems or concluding framework agreements to be used by contracting authorities.*



*Such intermediary role might in some cases be carried out by conducting the relevant award procedures autonomously, without detailed instructions from the contracting entities concerned; in other cases, by conducting the relevant award procedures under the instructions of the contracting entities concerned, on their behalf and for their account.*

*Furthermore, rules should be laid down for allocating responsibility for the observance of the obligations pursuant to this Directive, also in the case of remedies, among the central purchasing body and the contracting entities procuring from or through the central purchasing body. Where the latter has sole responsibility for the conduct of the procurement procedures, it should also be solely and directly responsible for the legality of the procedures. Where a contracting entity conducts certain parts of the procedure, for instance the reopening of competition under a framework agreement or the award of individual contracts based on a dynamic purchasing system, it should continue to be responsible for the stages it conducts.*

- (32a) Contracting entities should be allowed to award a service contract for the provision of centralised purchasing activities to a central purchasing body without applying the procedures provided for in this Directive; it should also be permitted that such service contracts include the provision of ancillary purchasing activities. Such service contracts for the provision of ancillary purchasing activities should, when performed otherwise than by a central purchasing body in connection with its provision of central purchasing activities to the contracting entity concerned, be awarded in accordance with the provisions of this Directive. It should also be recalled that this Directive should not apply where centralised or ancillary purchasing activities are provided other than through a contract for pecuniary interest which constitutes procurement within the meaning of this Directive.*

(32b) *Strengthening the provisions concerning central purchasing bodies should in no way prevent the current practices of occasional joint procurement, i. e. less institutionalised and systematic common purchasing or the established practice of having recourse to service providers that prepare and manage procurement procedures on behalf and for the account of a contracting entity and under its instructions. On the contrary, certain features of joint procurement should be clarified because of the important role joint procurement may play, not least in connection with innovative projects.*

*Joint procurement may take many different forms, ranging from coordinated procurement through the preparation of common technical specifications for works, supplies or services that will be procured by a number of contracting entities, each conducting a separate procurement procedure, to situations where the contracting entities concerned jointly conduct one procurement procedure either by acting together or by entrusting one contracting entities with the management of the procurement procedure on behalf of all contracting entities.*

*Where different contracting entities are jointly conducting a procurement procedure, they should be jointly responsible for fulfilling their obligations under this Directive. However, where only parts of the procurement procedure are jointly conducted by the contracting entities, joint responsibility should only apply to those parts of the procedure that have been carried out together.*

*Each contracting entity should be solely responsible in respect of procedures or parts of procedures it conducts on its own, such as the awarding of a contract, the conclusion of a framework agreement, the operation of a dynamic purchasing system or the reopening of competition under a framework agreement.*

- (33) *Electronic means of communication are particularly well suited to support centralised purchasing practices and tools because of the possibility they offer to re-use and automatically process data and to minimise information and transaction costs. The use of such electronic means of communication should therefore, as a first step, be rendered compulsory for central purchasing bodies, while also facilitating converging practices across the Union. This should be followed by a general obligation to use electronic means of communication in all procurement procedures after a transition period of thirty months.*
- (34) *Joint awarding of contracts by contracting entities from different Member States currently encounters specific legal difficulties concerning conflicts of national laws. Despite the fact that Directive 2004/17/EC implicitly allowed for cross-border joint public procurement, contracting entities are still facing considerable legal and practical difficulties in purchasing from central purchasing bodies in other Member States or jointly awarding contracts. In order to allow contracting entities to derive maximum benefit from the potential of the internal market in terms of economies of scale and risk-benefit sharing, not least for innovative projects involving a greater amount of risk than reasonably bearable by a single contracting entity, these difficulties should be remedied. Therefore new rules on cross-border joint procurement should be established in order to facilitate cooperation between contracting entities and enhancing the benefits from the internal market by creating cross-border business opportunities for suppliers and service providers. Those rules should determine the conditions for cross-border utilisation of central purchasing bodies and designate the applicable public procurement legislation, including the applicable legislation on remedies, in cases of cross-border joint procedures, complementing the conflict of law rules of Regulation (EC) No 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I). In addition, contracting entities from different Member States may set up joint legal bodies established under national or Union law. Specific rules should be established for such form of joint procurement.*

*However, contracting entities should not make use of the possibilities for cross-border joint procurement for the purpose of circumventing mandatory public law rules, in conformity with Union law, which are applicable to them in the Member State where they are located. Such rules may include, for example, provisions on transparency and access to documents or specific requirements for the traceability of sensitive supplies.*

- (35) *It is necessary that the technical specifications drawn up by purchasers allow for public procurement to be opened up to competition. To that end, it should be possible to submit tenders that reflect the diversity of technical solutions so as to obtain a sufficient level of competition. Consequently, technical specifications should be drafted in such a way to avoid artificially narrowing down competition through requirements that favour a specific economic operator by mirroring key characteristics of the supplies, services or works habitually offered by that economic operator.*

*Drawing up the technical specifications in terms of functional and performance requirements generally allows this objective to be achieved in the best way possible . Functional and performance related requirements are also appropriate means to favour innovation in public procurement and should be used as widely as possible. Where reference is made to a European standard or, in the absence thereof, to a national standard, tenders based on other equivalent arrangements which meet the requirements of the contracting entities and are equivalent in terms of safety should be considered by the contracting entities. To demonstrate equivalence, tenderers can be required to provide third-party verified evidence; however, other appropriate means of proof such as a technical dossier of the manufacturer should also be allowed where the economic operator concerned has no access to such certificates or test reports, or no possibility of obtaining them within the relevant time limits.*

- (35a) *For all procurement intended for use by persons, whether general public or staff of the contracting entity, it is necessary that contracting entities lay down technical specifications so as to take into account accessibility criteria for people with disabilities or design for all users, except in duly justified cases.*
- (36) Contracting entities that wish to purchase works, supplies or services with specific environmental, social or other characteristics should be able to refer to particular labels, such as the European Eco-label, (multi-) national eco-labels or any other label provided that the requirements for the label are linked to the subject-matter of the contract, such as the description of the product and its presentation, including packaging requirements. It is furthermore essential that those requirements are drawn up and adopted on the basis of objectively verifiable criteria, using a procedure in which stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations can participate, and that the label is accessible and available to all interested parties. *It should be avoided that references to labels would have the effect of restricting innovation.*
- (38) *In order to encourage the involvement of small and medium-sized enterprises (SMEs) in the procurement market, it should be provided explicitly that contracts may be divided into lots . Such division could be done on a quantitative basis, making the size of the individual contracts better correspond to the capacity of SMEs, or on a qualitative basis, in accordance with the different trades and specialisations involved, to adapt the content of the individual contracts more closely to the specialised sectors of SMEs and/or in accordance with different subsequent project phases. The size and subject-matter of the lots should be determined freely by the contracting entity, which, in accordance with the relevant rules on the calculation of the estimated value of procurement, should also be allowed to award some of the lots without applying the procedures of this Directive.*

*Member States should remain free to go further in their efforts to facilitate the involvement of SMEs in the public procurement market, by introducing an obligation to consider the appropriateness of dividing contracts into lots to smaller contracts, by requiring contracting entities to provide a justification for a decision not to divide contracts into lots or by rendering a division into lots obligatory under certain conditions.*

*With the same purpose, Member States should also be free to provide mechanisms for direct payments to subcontractors.*

- (38a) Where contracts are divided into lots, contracting entities should, for instance in order to preserve competition or to ensure reliability of supply, be allowed to limit the number of lots for which an economic operator may tender; they may also limit the number of lots that may be awarded to any one tenderer.*

*Furthermore, contracting entities should be able to require that all contractors coordinate their performance of the contract under the direction of the economic operator to whom a lot involving the coordination of the entire project or its relevant parts has been awarded.*

- (38b) In order to make procedures faster and more efficient, time limits for participation in procurement procedures should be kept as short as possible without creating undue barriers to access for economic operators from across the Internal Market and in particular SMEs. It should therefore be kept in mind that, when fixing the time limits for the receipt of tenders and requests to participate, contracting entities should take account in particular of the complexity of the contract and the time required for drawing up tenders, even if this entails setting time limits that are longer than the minima provided for under this Directive. Use of electronic means of information and communication, in particular full electronic availability to economic operators, tenderers and candidates of procurement documents and electronic transmission of communications does on the other hand lead to increased transparency and time savings. Therefore, provision should be made for reducing the minimum time limits applicable to open procedures in line with the rules set by the Agreement and subject to the condition that they are compatible with the specific mode of transmission*

*envisaged at Union level. Furthermore, contracting entities should have the opportunity to further shorten the time limits for receipt of tenders in open procedures in cases where a state of urgency renders the regular time limit in open procedures impracticable, but does not make an open procedure with shortened deadline impossible.*

*Only in exceptional situations where extreme urgency brought about by events unforeseeable by the contracting entity concerned that are not attributable to that contracting entity makes it impossible to conduct a regular procedure even with shortened time limits, contracting entities should, insofar as strictly necessary, have the possibility to award contracts by negotiated procedure without prior call for competition. This may be case where natural catastrophes require immediate action.*

*(38c) It should be clarified that the information concerning certain decisions taken during a procurement procedure, including the decision not to award a contract or conclude a framework agreement should be sent by the contracting entities, without candidates or tenderer having to request such information. It should also be recalled that Directive 92/13/EEC provides for an obligation for contracting entities, again without candidates or tenderer having to request it, to provide the concerned candidates and tenderers with a summary of the relevant reasons for some of the central decisions that are taken in the course of a procurement procedure. It should finally be clarified that candidates and tenderers should be enabled to request more detailed information concerning these reasons, which contracting entities should be required to give except where there would be serious grounds for not doing so. These grounds should be set out in the Directive. To ensure the necessary transparency in the context of procurement procedures involving negotiations and dialogues with tenderers, tenderers having made an admissible tender should, within the same limits, also be enabled to request information on the conduct and progress of the procedure.*

- (39) Insofar as compatible with the need to ensure the objective of sound commercial practice while allowing for maximum flexibility, it is appropriate to provide for the application of Directive 2004/18/EC on public procurement in respect of requirements concerning economic and financial capacity and documentary evidence. It is therefore foreseen that contracting entities may apply the selection criteria provided for in Directive 2004/18/EC and that, where they do, they are then obliged to apply the provisions concerning notably the ceiling to requirements on minimum turnover as well as on self-certification.
- (39a) *Contracting entities may require that environmental management measures or schemes are to be applied during the performance of a contract. Environmental management schemes, whether or not they are registered under Union instruments such as Regulation (EC) No 1221/2009 of the European Parliament and of the Council of 25 November 2009 on the voluntary participation by organisations in a Community eco-management and audit scheme (EMAS)<sup>18</sup>, can demonstrate that the economic operator has the technical capability to perform the contract. A description of the measures implemented by the economic operator to ensure the same level of environmental protection should be accepted as an alternative to environmental management registration schemes as a form of evidence, where the economic operator concerned has no access to such environmental management registration schemes or no possibility of obtaining them within the relevant time limits.*

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<sup>18</sup> OJ L 342, 22.12.2009, p. 1.



- (39b) *Contracts should be awarded on the basis of objective criteria that ensure compliance with the principles of transparency, non-discrimination and equal treatment, with a view to ensuring an objective comparison of the relative value of the tenders in order to determine, in conditions of effective competition, which tender offers the best value for money. For this purpose, contracting entities should be allowed to adopt as award criteria either "the most economically advantageous tender" or "the lowest cost", taking into account that in the latter case they are free to set adequate quality standards by using technical specifications or contract performance conditions. In order to encourage a greater quality orientation of public procurement, Member States should be permitted to require the assessment of tenders on the basis of the criterion of the "most economically advantageous tender" where they deem this appropriate.*

*To ensure compliance with the principle of equal treatment in the award of contracts, contracting entities should be obliged to create the necessary transparency to enable all tenderers to be reasonably informed of the criteria and arrangements which will be applied in the contract award decision.*

*Contracting entities should therefore be obliged to indicate the contract award criteria and the relative weighting given to each of those criteria. Contracting entities should, however, be permitted to derogate from that obligation to indicate the weighting of the criteria in duly justified cases for which they must be able to give reasons, where the weighting cannot be established in advance, in particular because of the complexity of the contract. In such cases, they should indicate the criteria in decreasing order of importance.*

- (39c) *Under Article 11 of the Treaty on the Functioning of the European Union, environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development. This Directive clarifies how the contracting entities may contribute to the protection of the environment and the promotion of sustainable development, whilst ensuring that they can obtain the best value for money for their contracts.*

(39d) *Where contracting entities award a contract to the most economically advantageous tender, they should determine the economic and qualitative award criteria linked to the subject-matter of the contract on the basis of which they will assess tenders in order to identify the most economically advantageous tender from the view of the contracting entity. These criteria should thus allow for a comparative assessment of the level of performance offered by each tender to be assessed in the light of the subject-matter of the contract, as defined in the technical specifications . In the context of the most economically advantageous tender, a non-exhaustive list of possible award criteria is set out in this Directive. Contracting entities should be encouraged to choose award criteria that allow them to obtain high-quality works, supplies and services that are optimally suited to their needs.*

*The chosen award criteria should not confer an unrestricted freedom of choice on the contracting entity and 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 ensure best value for money, the contract award decision should not be based on non-cost criteria only. The qualitative criteria should therefore be accompanied by a cost criterion that could, at the choice of the contracting entity, be either the price or a cost-effectiveness approach such as life-cycle costing. However, the award criteria should not affect the application of national provisions determining the remuneration of certain services or setting out fixed prices for certain supplies.*

(39e) *Wherever the quality of the staff employed is relevant to the level of performance of the contract, contracting entities should also be allowed to use as an award criterion the organisation, qualification and experience of the staff assigned to performing the contract in question, as this may affect the quality of contract performance and, as a result, the economic value of the tender. This may be the case, for example, in*

*contracts for intellectual services such as consultancy or architectural services. Contracting entities which make use of this possibility should ensure, by appropriate means of contractual law, that the staff assigned to contract performance effectively fulfil the specified quality standards and that such staff may only be replaced with the consent of the contracting entity which verifies that the replacement staff affords an equivalent level of quality.*

- (39f) Contract performance conditions are for laying down specific requirements relating to the performance of the contract. Unlike contract award criteria which are the basis for a comparative assessment of the quality of tenders, contract performance conditions constitute fixed objective requirements that have no impact on the assessment of tenders. Contract performance conditions are compatible with this Directive provided that they are not directly or indirectly discriminatory and are linked to the subject matter of the contract, which comprises all factors involved in the specific process of production, provision or commercialisation. This includes conditions concerning the process of performance of the contract, but excludes requirements referring to a general corporate policy.*

*The contract performance conditions should be indicated in the contract notice, the periodic indicative notice used as a means of calling for competition or the procurement documents. They may include an obligation for economic operators to foresee compensation mechanisms for risks occurring during the contract performance which could substantially impact the performance, such as price fluctuations. Such compensation mechanisms, which should be established within the parameters specified to that effect in the procurement documents, are potentially beneficial for the contracting entity which would be protected against additional costs triggered by the realisation of the hedged risks.*

(39g) *It is of utmost importance to fully exploit the potential of public procurement to achieve the objectives of the Europe 2020 Strategy for sustainable growth. In view of the important differences between individual sectors and markets, it would however not be appropriate to set general mandatory requirements for environmental, social and innovation procurement. The Union legislature has already set mandatory procurement requirements for obtaining specific goals in the sectors of road transport vehicles (Directive 2009/33/EC of the European Parliament and the Council of 23 April 2009 on the promotion of clean and energy-efficient road transport vehicles<sup>19</sup>) and office equipment (Regulation (EC) No 106/2008 of the European Parliament and the Council of 15 January 2008 on a Community energy-efficiency labelling programme for office equipment<sup>20</sup>). In addition, the definition of common methodologies for life cycle costing has significantly advanced.*

*It therefore appears appropriate to continue on that path, leaving it to sector-specific legislation to set mandatory objectives and targets in function of the particular policies and conditions prevailing in the relevant sector and to promote the development and use of European approaches to life-cycle costing as a further underpinning for the use of public procurement in support of sustainable growth.*

(39h) *Those sector-specific measures should be complemented by an adaptation of the public procurement Directives empowering contracting entities to pursue the objectives of the Europe 2020 Strategy in their purchasing strategies. It should hence be made clear that contracting entities can determine the most economically advantageous tender and the lowest cost using a life-cycle costing approach. The notion of life-cycle costing includes all costs over the life-cycle of a works, supplies or*

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<sup>19</sup> OJ L 120, 15.5.2009, p. 5.

<sup>20</sup> OJ L 39, 13.2.2008, p. 1.

*services. This means internal costs such as development, production, use, maintenance and end-of-life disposal costs but can also include costs imputed to environmental externalities, such as pollution caused by extraction of the raw materials used in the product or caused by the product itself or its manufacturing, provided they can be monetised and monitored. The methods which contracting entities use for assessing costs imputed to environmental externalities should be established in advance in an objective and non-discriminatory manner and be accessible to all interested parties. Such methods can be established at national, regional or local level, but they should, to avoid distortions of competition through tailor-made methodologies, remain general in the sense that they should not be set up specifically for a particular public procurement procedure. Common methodologies should be developed at the level of the Union for the calculation of life-cycle costs for specific categories of supplies or services .*

- (39i) Furthermore, in view of a better integration of social and environmental considerations in the procurement procedures, contracting entities should be allowed to use award criteria or contract performance conditions relating to the works, supplies or services to be provided under the public contract in any respect and at any stage of their life cycles from extraction of raw materials for the product to the stage of disposal of the product, including factors involved in the specific process of production, provision or commercialisation of those works, supplies or services or a specific process during a later stage of their life cycle, even where such factors do not form part of their material substance. Criteria and conditions referring to such a production or provision process are for example that the manufacturing of the purchased goods did not involve toxic chemicals, or that the purchased services are provided using energy-efficient machines.*

*In accordance with the case-law of the Court of Justice of the European Union, this includes also award criteria or contract performance conditions relating to the supply or utilisation of fair trade products in the course of the performance of the contract to be awarded.*

*Contract performance conditions pertaining to environmental considerations may include, for example, the delivery, package and disposal of products, and in respect of works and services contracts, waste minimisation or resource efficiency.*

*However, the condition of a link with the subject-matter of the contract excludes criteria and conditions relating to general corporate policy, which cannot be considered as a factor characterising the specific process of production or provision of the purchased works, supplies or services. Contracting entities should hence not be allowed to require tenderers to have a certain corporate social or environmental responsibility policy in place.*

- (39j) *It is essential that award criteria or contract performance conditions concerning social aspects of the production process relate to the works, supplies or services to be provided under the contract. In addition, 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 services<sup>21</sup>, as interpreted by the European Court of Justice and should not be chosen or applied in a way that discriminates 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. Thus, requirements concerning the basic working conditions regulated in Directive 96/71/EC, such as minimum rates of pay, should remain at the level set by national legislation or by collective agreements applied in accordance with Union law in the context of that Directive. The laws, regulations and collective agreements, at both national and Union level, that are in force in the areas of employment conditions and safety at work should apply during the performance of a public contract, provided that such rules, and their application, comply with Union law.*

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<sup>21</sup> OJ L 18, 21.1.1997, p.1.

*These obligations could hence be mirrored in contract performance clauses. It should also be possible to include clauses ensuring compliance with collective agreements in compliance with Union law in public contracts. Non-compliance with such obligations set by national legislation or collective agreements may be considered to be grave misconduct on the part of the economic operator concerned, liable to exclusion of that economic operator from the procedure for the award of a public contract. Contract performance conditions may also be intended to favour the protection of the environment or animal welfare and, to comply in substance with fundamental International Labour Organization (ILO) Conventions, and to recruit more disadvantaged persons than are required under national legislation transferred from 47.*

*(39k) Measures aiming at the protection of health of the staff involved in the production process, the favouring of social integration of disadvantaged persons or members of vulnerable groups amongst the persons assigned to performing the contract or training in the skills needed for the contract in question can also be the subject of award criteria or contract performance conditions provided that they relate to the works, supplies or services to be provided under the contract. For instance, such criteria or conditions may refer, amongst other things, to the employment of long-term job-seekers, the implementation of training measures for the unemployed or young persons in the course of the performance of the contract to be awarded. In technical specifications contracting entities can provide such social requirements which directly characterise the product or service in question, such as accessibility for persons with disabilities or design for all users.*

*(39l) Nothing in this Directive should prevent the imposition or enforcement of measures necessary to protect public policy, public morality, public security, health, human and animal life, the preservation of plant life or other environmental measures, in particular with a view to sustainable development, provided that these measures are in conformity with the Treaty.*

- (40) *Public contracts 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, terrorist offences, money laundering or terrorist financing. Non-payment of taxes or social security contributions should also be sanctioned by mandatory exclusion at the level of the Union. Member States should, however, be able to provide for a derogation from these mandatory exclusions in exceptional situations where overriding requirements in the general interest make a contract award indispensable. This might, for example, be the case where urgently needed vaccines or emergency equipment can only be purchased from an economic operator to whom one of the mandatory grounds for exclusion applies.*

*Given that contracting entities, which are not contracting authorities, might not have access to indisputable proof on the matter, it is appropriate to leave the choice of whether or not to apply the exclusion criteria listed in Directive 2004/18 to such contracting entities. The obligation to apply Article 55(1) and (2) of Directive 2004/18 should therefore be limited to contracting entities that are contracting authorities.*

- (40a) *Contracting entities should further be given the possibility to exclude economic operators which have proven unreliable, for instance because of violations of environmental or social obligations, including rules on accessibility for disabled persons or other forms of grave professional misconduct, such as violations of competition rules or of intellectual property rights. Bearing in mind that the contracting entity will be responsible for the consequences of its possible erroneous decision, contracting entities should also remain free to consider that there has been grave professional misconduct, where, before a final and binding decision on the presence of mandatory exclusion grounds has been rendered, they can demonstrate by any means that the economic operator has violated its obligations, including obligations relating to the payment of taxes or social security contributions, unless otherwise provided by the applicable national law.*



*They should also be able to exclude candidates or tenderers whose performance in earlier public contracts or contracts with other contracting entities has shown major deficiencies with regard to substantive requirements, for instance failure to deliver or perform, significant shortcomings of the product or service delivered, making it unusable for the intended purpose, or misbehaviour that casts serious doubts as to the reliability of the economic operator. National law should provide for a maximum duration for such exclusions.*

- (41) Where contracting entities are obliged or choose to apply the just mentioned exclusion criteria, they should apply Directive 2004/18 concerning the possibility that economic operators adopt compliance measures aimed at remedying the consequences of any criminal offences or misconduct and at effectively preventing further occurrences of the misbehaviour.
- (49) *Tenders that appear abnormally low in relation to the works, supplies or services might be based on technically, economically or legally unsound assumptions or practices. Where the tenderer cannot provide a sufficient explanation, the contracting entity should be entitled to reject the tender. Rejection should be mandatory in cases where the contracting entity has established that the abnormally low price or costs proposed results from non-compliance with mandatory Union legislation or national law compatible with it in the fields of social, labour or environmental law or international labour law provisions.*

- (49a) It is appropriate to ensure that no legal vacuum is created as regards the provisions governing relations with third countries in the particular context of procurement in the special sectors covered by this Directive. Consequently, the regime which is currently applicable pursuant to Articles 58 and 59 of Directive 2004/17/EC should be kept until it will be repealed when the Regulation of the European Parliament and of the Council on the access of third-country goods and services to the Union's internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries<sup>22</sup> ("Third country instrument") is adopted.

Consequently and in order not to prejudge the outcome of the examination of the third country instrument, it is appropriate to keep the current provisions unchanged. This should include provisions on the procedure for adoption of decisions and measures to be adopted in case Union undertakings have difficulties in accessing third country markets. It is therefore appropriate that these decisions continue to be taken by the Council.

- (52) It should be recalled that Council Regulation (EEC, Euratom) No 1182/71 of 3 June 1971 determining the rules applicable to periods, dates and time limits<sup>23</sup> applies to the calculation of the time limits contained in this Directive.

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<sup>22</sup> COM(2012)/124 final

<sup>23</sup> OJ L 124, 8.6.1971, p. 1.

- (53) *It is necessary to clarify the conditions under which modifications of a contract during its performance require a new procurement procedure, taking into account the relevant case-law of the Court of Justice of the European Union. A new procurement procedure is required in case of material changes to the initial contract, in particular to the scope and content of the mutual rights and obligations of the parties, including the distribution of intellectual property rights. Such changes demonstrate the parties' intention to renegotiate essential terms or conditions of that contract. This is the case in particular if the amended conditions would have had an influence on the outcome of the procedure, had they been part of the initial procedure.*

*Modifications of the contract resulting in a minor change of the contract value up to a certain level should always be possible without the need to carry out a new procurement procedure.*

- (54) *Contracting entities can be faced with external circumstances that they could not foresee when they awarded the contract, in particular when the performance of the contract covers a longer period of time. In this case, a certain degree of flexibility is needed to adapt the contract to those circumstances without a new procurement procedure. The notion of unforeseeable circumstances refers to circumstances that could not have been predicted despite reasonably diligent preparation of the initial award by the contracting entity, taking into account its available means, the nature and characteristics of the specific project, good practice in the field in question and the need to ensure an appropriate relationship between the resources spent in preparing the award and its foreseeable value.*

*However, this cannot apply in cases where a modification results in an alteration of the nature of the overall procurement, for instance by replacing the works, supplies or services to be procured by something different or by fundamentally changing the type of procurement since, in such a situation, a hypothetical influence on the outcome may be assumed.*

- (55) *In line with the principles of equal treatment and transparency, the successful tenderer should not, for instance where a contract is terminated because of deficiencies in the performance, be replaced by another economic operator without reopening the contract to competition. However, the successful tenderer performing the contract may, in particular where the contract has been awarded to more than one undertaking, undergo certain structural changes during the performance of the contract, such as purely internal reorganisations, takeovers, mergers and acquisitions or insolvency. Such structural changes should not automatically require new procurement procedures for all contracts performed by that tenderer.*
- (56) Contracting entities should, in the individual contracts themselves, have the possibility to provide for modifications by way of review clauses, but such clauses should not give them unlimited discretion. This directive should therefore set out to what extent modifications may be provided for in the initial contract.

- (61a) *Contracting entities are sometimes faced with circumstances that require the early termination of public contracts in order to comply with obligations stemming from EU law in the field of public procurement. Member States should therefore ensure that contracting authorities have the possibility, under the conditions determined by the applicable national law, to terminate a public contract during its term if so required by Union law.*
- (61b) *Design contests have traditionally mostly been used in the fields of town and country planning, architecture and engineering or data processing. It should, however, be recalled that these flexible instruments could be used also for other purposes and that it may be stipulated that the subsequent service contracts would be awarded to the winner or one of the winners of the design contest by a negotiated procedure without publication.*
- (61c) *The evaluation has shown that there is still considerable room for improvement in the application of the Union public procurement rules. In view of a more efficient and consistent application of the rules, it is essential to get a good overview on possible structural problems and general patterns in national procurement policies, in order to address possible problems in a more targeted way. This overview should be gained through appropriate monitoring, the results of which should be regularly published, in order to allow an informed debate on possible improvements of procurement rules and practice. Member States should remain free to decide how and by whom this monitoring should be carried out in practice; in so doing, they should also remain free to decide whether the monitoring should be based on a sample-based ex-post control or on a systematic, ex-ante control of public procurement procedures covered by this Directive. It should be possible to bring potential problems to the attention of the proper instances; this should not necessarily require that those having performed the monitoring are given an independent standing before courts and tribunals.*

*Better guidance and assistance to contracting entities and economic operators could also greatly contribute to enhancing the efficiency of public procurement, through better knowledge, increased legal certainty and professionalisation of procurement practices; such guidance should be made available to contracting entities and economic operators wherever it appears necessary to improve correct application of the rules. The guidance to be provided could cover all matters relevant to public procurement, such as acquisition planning, organisation of procedures, choice of techniques and instruments and good practices in the conduct of the procedures.*

*With regard to legal questions, guidance should not necessarily amount to a complete legal analysis of the issues concerned; it could be limited to a general indication of the elements that should be taken into consideration for the subsequent detailed analysis of the questions, for instance by pointing to jurisprudence that could be relevant or to guidance notes or other sources having examined the specific question concerned.*

- (61d) Council Directive 92/13/EEC provides for certain review procedures to be available at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement of Union law in the field of public procurement or national rules transposing that law. These review procedures should not be affected by this Directive. However, citizens, concerned stakeholders, organised or not, and other persons or bodies which do not have access to review procedures pursuant to Council Directive 92/13/EEC do nevertheless have a legitimate interest as taxpayers in sound procurement procedures.*

*They should therefore be given a possibility, otherwise than through the review system pursuant to Directive 92/13/EEC and without it necessarily involving them being given standing before courts and tribunals, to indicate possible violations of this Directive to a competent authority or structure. So as not to duplicate existing authorities or structures, Member States should be able to provide for recourse to general monitoring authorities or structures, sectoral oversight bodies, municipal oversight authorities, competition authorities, the ombudsman or national auditing authorities.*

- (61e) In order to fully exploit the potential of public procurement to achieve the objectives of the Europe 2020 Strategy for sustainable growth, environmental, social and innovation procurement will also have to play its part. It is therefore important to obtain an overview of the developments in the field of strategic procurement so as to take an informed view on the general trends at the overall (macro) level in this area. Any already prepared, appropriate reports can of course be used in this context also.*
- (61f) Given the potential of SMEs for job creation, growth and innovation it is important to encourage their participation in public procurement, both through appropriate provisions in this Directive as well as through initiatives at the national level. The new provisions provided for in this Directive should contribute towards an improvement of the level of success, by which is understood the share of SMEs in the total value of contracts awarded. It is not appropriate to impose obligatory shares of success, however, the national initiatives to enhance SME participation should be closely monitored given its importance.*
- (61g) A series of procedures and working methods have already been established in respect of the Commission's communications and contacts with Member States, such as communications and contacts relating to the procedures provided for under Articles 258 and 260 TFEU, SOLVIT and EU Pilot, which are obviously not modified by this Directive. They should, however, be complemented by the designation of one single contact point in each Member*

*States for the cooperation with the Commission, which would function as sole entry point for matters concerning public procurement in the Member State concerned. This function may be performed by persons or structures which are already regularly in contact with the Commission on issues relating to public procurement, such as members of the Advisory Committee on Public Procurement, Members of the Procurement Network or national coordinating instances.*

*(61h) Traceability and transparency of decision-making in procurement procedures is essential for ensuring sound procedures, including efficiently fighting corruption and fraud.*

*Contracting authorities should hence keep copies of concluded high-value contracts, in order to be able to provide access to these documents to interested parties in accordance with applicable rules on access to documents. Furthermore, the essential elements and decisions of individual procurement procedures should be documented by contracting entities in a procurement report. To avoid administrative burden wherever possible, it should be permitted that the procurement report refer to information already contained in the relevant contract award notice.*

*The electronic systems for publication of these notices, managed by the Commission, should also be improved with a view of facilitating the entry of data while making it easier to extract global reports and exchange data between systems.*

*(61i) In the interests of administrative simplification and in order to lessen the burden on Member States, the Commission should periodically examine whether the quality and completeness of the information contained in the notices which are published in connection with public procurement procedures is sufficient to allow the Commission to extract the statistical information that would otherwise have to be transmitted by the Member States.*



- (61j) *Effective administrative cooperation is necessary for the exchange of information needed for conducting award procedures in cross-border situations, in particular with regard to the verification of the grounds for exclusion and the selection criteria and the application of quality and environmental standards. The Internal Market Information System (IMI) established by Regulation (EU) No 1024/2012 of the European Parliament and of the Council of 25 October 2012 on administrative cooperation through the Internal Market Information System and repealing Commission Decision 2008/49/EC ('the IMI Regulation')<sup>24</sup> could provide a useful electronic means to facilitate and enhance administrative cooperation managing the exchange of information on the basis of simple and unified procedures overcoming language barriers. It should therefore be envisaged to launch a pilot project to test the suitability of an expansion of IMI to cover the exchange of information under this Directive.*
- (62) *In order to adapt to rapid technical, economic and regulatory developments, the power to adopt acts in accordance with Article 290 of the Treaty on the Functioning of the European Union should be delegated to the Commission in respect of a number of non-essential elements of this Directive. In fact, due to the need to comply with international agreements, the Commission should be empowered to modify the technical procedures for the calculation methods concerning thresholds as well as to periodically revise the thresholds themselves;*

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<sup>24</sup> OJ L 316 of 14.11.2012, p. 1.

*references to the CPV nomenclature may undergo regulatory changes at EU level and it is necessary to reflect those changes into the text of this Directive; the technical details and characteristics of the devices for electronic receipt should be kept up to date with technological developments ; it is also necessary to empower the Commission to make mandatory certain technical standards for electronic communication to ensure the interoperability of technical formats, processes and messaging in procurement procedures conducted using electronic means of communication taking into account technological developments ; the Commission should also be empowered to adapt the list of legislative acts of the Union establishing common methodologies for the calculation of life-cycle costs, referred to in article 77(3); the list of International Social and Environmental Conventions referred to in Articles 70 And 79 and the list of Union legislation referred to in article 27(3) whose implementation creates a presumption of free access to a given market as well as Annex II, referred to in Article 4(4), setting out a list of legislative acts to be taken into account when assessing the existence of special or exclusive rights should be quickly adapted to incorporate the measures adopted on a sectoral basis. In order to satisfy this need, the Commission should be empowered to keep the lists up-to date.*

- (63) It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level. When preparing and drawing up delegated acts, the Commission should ensure simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and the Council.
- (63a) *In the application of the Directive the Commission should consult the Commission Expert Group on E-Tendering.*

(64) *In order to ensure uniform conditions for the implementation of this Directive, as for the procedure for sending and publishing data referred to in Annex IX and the procedures for drawing up and transmitting notices, the standard forms for the publication of notices , implementing powers should be conferred on the Commission. Those powers should be exercised in accordance with Regulation (EU) No. 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by the Member States of the Commission's exercise of implementing powers<sup>25</sup>. The advisory procedure should be used for the adoption of those implementing acts, which do not have any impact either from the financial point of views or on the nature and scope of obligations stemming from this Directive. On the contrary, those acts are characterised by a mere administrative purpose and serve to facilitate the application of the rules set by this Directive.*

Furthermore, decisions to establish whether a given activity is directly exposed to competition on markets to which access is free should be adopted under conditions ensuring uniform conditions for implementing that provision. Implementing powers should therefore be conferred on the Commission also in respect of the detailed provisions for the implementation of the procedure, provided for under Article 28, for establishing whether Article 27 is applicable as well as the implementing acts themselves. Those powers should be exercised in accordance with Regulation (EU) 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by the Member States of the Commission's exercise of implementing powers<sup>26</sup>.

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<sup>25</sup> OJ L 55, 28.2.2011, p. 13.

<sup>26</sup> OJ L 55, 28.2.2011, p. 13.

The advisory procedure should be used for the adoption of those implementing acts.

- (64a) *The Commission should review the effects on the internal market resulting from the application of the thresholds and report thereon to the European Parliament and the Council at the latest three years after the entry into force of this Directive. In so doing, it should take into account factors such as the level of cross-border procurement, SME participation, transaction costs and the cost-benefit trade-off.*

*According to its Article XXII(7), the Agreement shall be the subject of further negotiations three years after its entry into force and periodically thereafter. In that context, the appropriateness of the level of thresholds could also be examined, bearing in mind the impact of inflation; in case the level of thresholds should change as a consequence, the Commission should, where appropriate, adopt a legislative proposal amending the thresholds set out in this Directive.*

- (65) Since the objective of this Directive, namely the coordination of laws, regulations and administrative provisions of the Member States applying to certain public procurement procedures, cannot be sufficiently achieved by the Member States and can therefore be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.
- (66) Directive 2004/17/EC should therefore be repealed.
- (67) In accordance with the Joint Political Declaration of Member States and the Commission on explanatory documents of [date], Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified,

HAVE ADOPTED THIS DIRECTIVE:

*[To be updated when the text is stable]*

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TITLE I  
SCOPE, DEFINITIONS AND GENERAL PRINCIPLES

CHAPTER I

*Subject-matter and definitions*

*Article 1*

*Subject-matter and scope*

1. This Directive establishes rules on the procedures for procurement by contracting entities as defined in Article 4 with respect to contracts as well as design contests, whose value is estimated to be not less than the thresholds defined in Article 12.
2. *Procurement within the meaning of this Directive is the purchase or other forms of acquisition by means of a supply, works and service contract as defined in Article 2(7) of works, supplies or services by one or more contracting entities from economic operators chosen by those contracting entities, provided that the works, supplies or services are intended for the pursuit of one of the activities referred to in Articles 5 to 11.*
3. *The application of this Directive is subject to Articles 36, 51, 52, 62 and 346 of the Treaty on the Functioning of the European Union.*
4. *This Directive does not affect the freedom of Member States to define, in conformity with Union law, what they consider to be services of general economic interest, how those services should be organised and financed, in compliance with the State aid rules, and what specific obligations they should be subject to. Equally, this Directive does not affect the way in which the Member States organise their social security legislation.*
5. *The scope of this Directive shall not include non-economic services of general interest.*

## *Article 2*

### *Definitions*

Directive 2004/17/EC: Art. 1

For the purposes of this Directive, the following definitions shall apply:

- (1) *"contracting authorities" means State, regional or local authorities, bodies governed by public law, associations formed by one or more such authorities or one or more such bodies governed by public law. "Regional authorities" are listed non-exhaustively in NUTS 1 and 2, as referred to by Regulation (EC) No. 1059/2003 of the European Parliament and of the Council<sup>27</sup> while "local authorities" include all authorities of the administrative units falling under NUTS 3 and smaller administrative units, as referred to by Regulation (EC) No. 1059/2003;*
- (2)
- (3)
- (4) *a "body governed by public law" means any body that has all of the following characteristics:*
  - (a) *It is established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;*
  - (b) *it has legal personality; and*

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<sup>27</sup> OJ L 154, 21.6.2003, p. 1

- (c) *it is financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or has an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law;*
- (5) a "public undertaking" means any undertaking over which the contracting authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it;
- (6) transferred to Art. 4(2)
- (7) "supply, works and service contracts" means contracts for pecuniary interest concluded in writing between one or more of the contracting entities referred to in Article 4(1), and one or more economic operators and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive;
- (8) "works contracts" means contracts having as their object one of the following:
- (a) *the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex I;*
- (b) *the execution, or both the design and execution, of a work;*
- (c) *the realisation by whatever means of a work corresponding to the requirements specified by the contracting entity exercising a decisive influence on the type or design of the work;*



- (9) "a work" means the outcome of building or civil engineering works taken as a whole which is sufficient in itself to fulfil an economic or technical function;
- (10) "supply contracts" means contracts having as their object the purchase, lease, rental or hire-purchase, with or without an option to buy, of products. A supply contract may include, as an incidental matter, siting and installation operations;
- (11) *"service contracts" means contracts having as their object the provision of services other than the execution of works referred to in point 8;*
- (12) "economic operator" means any natural or legal person, or a contracting entity, or a group of such persons and/or entities which offers the execution of works and/or a work, the supply of products or the provision of services on the market;
- (13) "tenderer" means an economic operator that has submitted a tender;
- (14) "candidate" means an economic operator that has sought an invitation or has been invited to take part in a restricted or negotiated procedure, *in a competitive dialogue* or in an innovation partnership;
- (15) *'procurement document means any document produced or referred to by the contracting entity to describe or determine elements of the procurement or the procedure, including the contract notice, the periodic indicative notice or the notices on the existence of a qualification system where they are used as a means of calling for competition, the technical specifications, the descriptive document, proposed conditions of contract, formats for the presentation of documents by candidates and tenderers, information on generally applicable obligations and any additional documents;*

- (16) *"centralised purchasing activities" means activities conducted on a permanent basis, in one of the following forms:*
- (a) the purchase or other forms of acquisition of supplies and/or services intended for contracting entities,*
  - (b) the award of contracts or the conclusion of framework agreements for works, supplies or services intended for contracting entities;*
- (17) "ancillary purchasing activities" means activities consisting in the provision of support to purchasing activities, in particular in the following forms:
- (a) technical infrastructure enabling contracting entities to award public contracts or to conclude framework agreements for works, supplies or services;
  - (b) advice on the conduct or design of procurement procedures;
  - (c) preparation and management of procurement procedures on behalf and for the account of the contracting entity concerned;
- (18) "central purchasing body" means a contracting entity within the meaning of Article 4 (1) or a contracting authority within the meaning of point 1 of Article 2 of Directive 2004/18/EC providing centralised purchasing activities and, possibly, ancillary purchasing activities.

Procurement carried out by a central purchasing body in order to perform centralised purchasing activities shall be deemed to be procurement for the pursuit of an activity as described in Articles 5 to 11. Article 15 shall not apply to procurement carried out by a central purchasing body in order to perform centralised purchasing activities;

- (19) "procurement service provider" means a public or private body, which offers ancillary purchasing activities on the market;
- (20) "written" or "in writing" means any expression consisting of words or figures which can be read, reproduced and subsequently communicated, including information transmitted and stored by electronic means;
- (21) "electronic means" means electronic equipment for the processing (including digital compression) and storage of data which is transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means;
- (22) *'life cycle' means all consecutive and/or interlinked stages, including production, commercialisation, transport, use and maintenance, throughout the existence of a product or a works or the provision of a service, from raw material acquisition or generation of resources to disposal, clearance and end of life cycle;*
- (23) "Design contests" means those procedures which enable the contracting entity to acquire, mainly in the fields of town and country planning, architecture, engineering or data processing, a plan or design selected by a jury after being put out to competition with or without the award of prizes.
- (24) *'Government Procurement Agreement' means the World Trade Organisation Agreement on Government Procurement; it may also be referred to to as the 'Agreement*

### *Article 3*

#### *Mixed procurement covering the same activity*

1. *Contracts which have as their subject two or more types of procurement (works, services or supplies) shall be awarded in accordance with the provisions applicable to the type of procurement that characterises the main subject of the contract in question.*

*In the case of mixed contracts consisting of services within the meaning of Chapter I of Title III and other services or of services and supplies, the main subject shall be determined according to which of the estimated values of the respective services or supplies is the highest.*

2. *In the case of contracts which have as their subject procurement covered by this Directive as well as procurement not covered by this Directive, contracting entities may choose to award separate contracts for the separate parts. If so, the decision of which rules apply to any one of such separate contracts shall be taken on the basis of the characteristics of the separate part concerned.*

*Contracting entities may add other elements to the procurement of a contract which must be awarded pursuant to the provisions of this Directive. If so, this Directive shall, unless otherwise provided in paragraphs 3, 4 or 4a, apply to the ensuing mixed contract, irrespective of the value of the added elements and irrespective of the legal regime these added elements would otherwise have been subject to.*

*Thus, in the case of mixed contracts containing elements of supply, works and service contracts and of concessions, the mixed contract shall be awarded in accordance with the provisions of this Directive, provided that the estimated value of the part of the contract which constitutes a contract covered by this Directive, calculated in accordance with the provisions Article 13, is equal to or greater than the relevant threshold set out in Article 12.*

3. In the case of contracts which have as their subject procurement covered by this Directive as well as procurement covered by Directive 2009/81/EC, the contract shall, paragraph 2 notwithstanding, be awarded in accordance with the provisions of Directive 2009/81/EC, provided that the award of a single contract is justified for objective reasons.
- This sub-paragraph is without prejudice to the thresholds and exclusions for which Directive 2009/81/EC provides.

*The decision to award a single contract may not, however, be taken for the purpose of excluding contracts from the application of this Directive or Directive 2009/81/EC.*

4. *In the case of contracts which have as their subject:*

- (a) procurement covered by this Directive;*
- (b) procurement covered by Directive 2009/81/EC; and*
- (c) procurement or other elements not subject to either Directive,*  
*then the contract shall not be subject to this Directive, paragraph 2 notwithstanding,*  
*provided that the award of a single contract is justified for objective reasons.*

*The decision to award a single contract may not, however, be taken for the purpose of excluding contracts from the application of this Directive or Directive 2009/81/EC.*

- 4a. *In the case of contracts which have as their subject procurement covered by this Directive as well as procurement or other elements which are covered by Article 346 of the Treaty on the Functioning of the European Union, the contract shall not be subject to this Directive provided that the award of a single contract is justified for objective reasons.*

*The decision to award a single contract may not, however, be taken for the purpose of excluding contracts from the application of this Directive or Directive 2009/81/EC.*

5. Subject to the preceding paragraphs of this Article, where the different parts of a given contract are objectively not separable, the application of this Directive shall be determined on the basis of the main subject of that contract.

### *Article 3a*

#### *Procurement covering several activities*

1. In the case of contracts intended to cover several activities, contracting entities may choose to award separate contracts for the purposes of each separate activity. If so, the decision of which rules apply to any one of such separate contracts shall be taken on the basis of the characteristics of the separate activity concerned.

Where contracting entities decide not to award separate contracts, paragraphs 2 and 3 shall apply, Article 3 notwithstanding. However, where one of the activities concerned is subject to Directive 2009/81/EC of the European Parliament and of the Council<sup>28</sup>, paragraphs 4 and 5 shall apply.

The choice between awarding a single contract and awarding a number of separate contracts shall not be made with the objective of excluding it from the scope of this Directive or, where applicable, 2004/18/EC or Directive on Concessions.

2. A contract which is intended to cover several activities shall be subject to the rules applicable to the activity for which it is principally intended.
3. In the case of contracts for which it is objectively impossible to determine for which activity the contract is principally intended, the applicable rules shall be determined in accordance with points a to d:

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<sup>28</sup> OJ L 217, 20.8.2009, p. 76.

- (a) the contract shall be awarded in accordance with the abovementioned Directive 2004/18, if one of the activities for which the contract is intended is subject to this Directive and the other to the abovementioned 2004/18;
- (b) the contract shall be awarded in accordance with this Directive, if one of the activities for which the contract is intended is subject to this Directive and the other to the Directive on Concessions;
- (d) the contract shall be awarded in accordance with this Directive, if one of the activities for which the contract is intended is subject to this Directive and the other is not subject to either this Directive, Directive 2004/18 or Directive on Concessions. However, the contract shall not be subject to this Directive, where the activity which is not subject to this Directive, is covered by Article 346 of the Treaty on the Functioning of the European Union provided that the award of a single contract is justified for objective reasons and the decision to award a single contract is not taken for the purpose of excluding contracts from the application of this Directive.

4. In the case of contracts intended to cover an activity which is subject to this Directive and another which is subject to Directive 2009/81/EC, the contract shall be awarded in accordance with the provisions of Directive 2009/81/EC, provided that the award of a single contract is justified for objective reasons.

This sub-paragraph is without prejudice to the thresholds and exclusions for which Directive 2009/81/EC provides.

The decision to award a single contract may not, however, be taken for the purpose of excluding contracts from the application of this Directive or Directive 2009/81/EC.

5. In the case of contracts intended to cover an activity which is subject to this Directive and another which is subject to Directive 2009/81/EC, which in addition include procurement or other elements which are covered by Article 346 of the Treaty on the Functioning of the European Union, the contract shall not be subject to this Directive provided that the award of a single contract is justified for objective reasons.

The decision to award a single contract may not, however, be taken for the purpose of excluding contracts from the application of this Directive or Directive 2009/81/EC.



## CHAPTER II

Personal scope: *definition of the activities and entities covered*

### SECTION 1

#### ENTITIES

##### *Article 4*

##### *Contracting entities*

1. 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 within the meaning of paragraph 3 granted by a competent authority of a Member State.
2. 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.

3. For the purposes of this Article, "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.

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 the first subparagraph.

Such procedures include:

- (a) procurement procedures with a prior call for competition in conformity with Directive 2004/18/EC, Directive 2009/81/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.
4. The Commission shall be empowered to adopt delegated acts in accordance with Article 98 concerning the 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.

SECTION 2  
ACTIVITIES

*Article 5*  
*Gas and heat*

1. As far as gas and heat are concerned, this Directive shall apply to the following activities:
  - (a) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of gas or heat;
  - (b) the supply of gas or heat to such networks.

For the purposes of this Directive, supply of gas or heat includes generation (production) and wholesale of gas or heat; however, production of gas in the form of extraction falls within the scope of Article 11.

2. The supply of gas or heat to networks which provide a service to the public by a contracting entity other than a contracting authority shall not be considered a relevant activity within the meaning of paragraph 1 where all of the following conditions are met:
  - (a) the production of gas or heat by the entity concerned is the unavoidable consequence of carrying out an activity other than those referred to in paragraph 1 or in Articles 6 to 8;
  - (b) the supply to the public network is aimed only at the economic exploitation of such production and amounts to not more than 20 % of the entity's turnover on the basis of the average for the preceding three years, including the current year.

*Article 6*  
*Electricity*

1. As far as electricity is concerned, this Directive shall apply to the following activities:
  - (a) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of electricity;
  - (b) the supply of electricity to such networks.

For the purposes of this Directive, supply of electricity includes generation (production) and wholesale of electricity.

2. The supply of electricity to networks which provide a service to the public by a contracting entity other than a contracting authority shall not be considered a relevant activity within the meaning of paragraph 1 where all of the following conditions are met:
  - (a) the production of electricity by the entity concerned takes place because its consumption is necessary for carrying out an activity other than those referred to in paragraph 1 or in Articles 5 and 7 to 8;
  - (b) supply to the public network depends only on the entity's own consumption and has not exceeded 30% of the entity's total production of energy, on the basis of the average for the preceding three years, including the current year.

## *Article 7*

### *Water*

1. This Directive shall apply to the following activities:
  - (a) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of drinking water;
  - (b) the supply of drinking water to such networks.

For the purposes of this Directive, supply of drinking water includes production and wholesale of drinking water.

2. This Directive shall also apply to contracts or design contests awarded or organised by entities which pursue an activity referred to in paragraph 1 and which are connected with one of the following:
  - (a) hydraulic engineering projects, irrigation or land drainage, provided that the volume of water to be used for the supply of drinking water represents more than 20 % of the total volume of water made available by such projects or irrigation or drainage installations,
  - (b) the disposal or treatment of sewage.
3. The supply of drinking water to networks which provide a service to the public by a contracting entity other than a contracting authority shall not be considered a relevant activity within the meaning of paragraph 1 where all of the following conditions are met:
  - (a) the production of drinking water by the entity concerned takes place because its consumption is necessary for carrying out an activity other than those referred to in Articles 5 to 8;

- (b) the supply to the public network depends only on the entity's own consumption and has not exceeded 30 % of the entity's total production of drinking water, on the basis of the average for the preceding three years, including the current year.

*Article 8*

*Transport services*

1. This Directive shall apply to activities relating to the provision or operation of networks providing a service to the public in the field of transport by railway, automated systems, tramway, trolley bus, bus or cable.

As regards transport services, a network shall be considered to exist where the service is provided under operating conditions laid down by a competent authority of a Member State, such as conditions on the routes to be served, the capacity to be made available or the frequency of the service.

2. 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. An exhaustive list of such entities and the geographical areas concerned is set out in Annex IIA. Member States shall notify the Commission of changes to the list where the names of the entities concerned change or they cease their activity.

The Commission shall be empowered to adopt delegated acts in accordance with Article 98 to update Annex IIA following such notifications.

*Article 9*  
*Ports and airports*

This Directive shall apply to activities relating to the exploitation of a geographical area for the purpose of the provision of airports and maritime or inland ports or other terminal facilities to carriers by air, sea or inland waterway.

*Article 10*  
*Postal services*

1. This Directive shall apply to activities relating to the provision of:
  - (a) postal services;
  - (b) other services than postal services, on condition that such services are provided by an entity which also provides postal services within the meaning of point (b) of paragraph 2 and provided that the conditions set out in Article 27(1) are not satisfied in respect of the services falling within point (b) of paragraph 2.
2. For the purpose of this Directive and without prejudice to Directive 97/67/EC:
  - (a) "postal item": means an item addressed in the final form in which it is to be carried, irrespective of weight. In addition to items of correspondence, such items also include for instance books, catalogues, newspapers, periodicals and postal packages containing merchandise with or without commercial value, irrespective of weight;

- (b) "postal services": means services consisting of the clearance, sorting, routing and delivery of postal items. This shall include both services falling within as well as services falling outside the scope of the universal service set up in conformity with Directive 97/67/EC;
- (c) "other services than postal services": means services provided in the following areas:
  - (i) mail service management services (services both preceding and subsequent to despatch, including "mailroom management services");
  - (iii) services concerning postal items not included in point (a), such as direct mail bearing no address;
  - (iv) - (vi)

### *Article 11*

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

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.



## Chapter III: Material scope

### SECTION 1

#### THRESHOLDS

##### *Article 12*

##### *Thresholds*

Save where they are ruled out by the exclusions in Articles 15 to 20 or pursuant to Article 27, concerning the pursuit of the activity in question, this Directive shall apply to procurements with a value exclusive of value-added tax (VAT) estimated to be no less than the following thresholds:

- (a) EUR 400 000 for supply and service contracts as well as for design contests;
- (b) EUR 5 000 000 for works contracts;
- (c) EUR 1 000 000 for contracts for social and other specific services listed in Annex XVII.

##### *Article 13*

##### *Methods for calculating the estimated value of procurement*

##### *Directive 2004/17/EC: Article 17*

1. *The calculation of the estimated value of a procurement shall be based on the total amount payable, net of VAT, as estimated by the contracting entity, including any form of option and any renewals of the contracts as explicitly set out in the procurement documents.*

*Where the contracting entity provides for prizes or payments to candidates or tenderers it shall take them into account when calculating the estimated value of the contract.*

- 1a. Where a contracting entity is comprised of separate operational units, values may be estimated at the level of the individual operational unit in respect of its procurement or certain categories thereof for which the unit is independently responsible.*

*Whether a unit is independently responsible for its procurement or certain categories thereof shall be determined according to a global analysis taking into account whether:*

- procurement responsibilities have been devolved to the effect that the unit in question can independently run the procurement procedures and, ultimately, make the buying decision independently of any other part of the contracting entity;*
- such delegation of procurement responsibility is also reflected in the separation of budgets or, at least, whether the unit concerned disposes of a separate budget line for the procurements concerned;*
- such delegation encompasses the actual conclusion of a contract by the individual unit and its financing from a budget over which it disposes;*
- the procurement is intended to satisfy a demand of that individual unit or whether such procurement is rather intended to satisfy a demand of more units or of the contracting entity as a whole, the procurement of which is merely organised in a decentralised way; and*
- the contracting entity, while delegating the procurement responsibility to an individual unit, is in fact still aiming at using its overall position as a major purchaser with a view to obtaining more favourable terms.*

2. *The choice of the method used to calculate the estimated value of a procurement shall not be made with the intention of excluding it from the scope of this Directive. A procurement shall not be subdivided with the effect of preventing it from falling within the scope of this Directive, unless justified by objective reasons.*

*Where a separate operational unit as referred to in paragraph 1a carries out separate procurement for which the unit is independently responsible this shall not be considered as a subdivision of procurement for the purposes of the first subparagraph.*

3. *This estimate shall be valid at the moment at which the call for competition is sent or, in cases where such call for competition is not foreseen, at the moment at which the contracting entity commences the contract procurement procedure, for instance by contacting economic operators in relation to the procurement.*
4. With regard to framework agreements and dynamic purchasing systems, the value to be taken into consideration shall be the maximum estimated value net of VAT of all the contracts envisaged for the total term of the agreement or system.
5. In the case of innovation partnerships, the value to be taken into consideration shall be the maximum estimated value net of VAT of the research and development activities to take place during all the stages of the envisaged partnership as well as of the supplies, services or works to be developed and procured at the end of the envisaged partnership.
6. For the purposes of Article 12, contracting entities shall include in the estimated value of a works contract both the cost of the works and the total estimated value of any supplies or services that are made available to the contractor by the contracting entities provided that they are necessary for the execution of the works.

7. Where a proposed work or a proposed provision of services may result in contracts being awarded in the form of separate lots, account shall be taken of the total estimated value of all such lots.

*Where the aggregate value of the lots is equal to or exceeds the threshold laid down in Article 12, this Directive shall apply to the awarding of each lot.*

8. *Where a proposal for the acquisition of similar supplies may result in contracts being awarded in the form of separate lots, account shall be taken of the total estimated value of all such lots when applying Article 12.*

*Where the aggregate value of the lots is equal to or exceeds the threshold laid down in Article 12, this Directive shall apply to the awarding of each lot.*

9. *Paragraphs 7 and 8 notwithstanding, contracting entities may award contracts for individual lots without applying the procedures provided for under this Directive, provided that the estimated value net of VAT of the lot concerned is less than EUR 80 000 for supplies or services or EUR 1 million for works. However, the aggregate value of the lots thus awarded without applying this Directive shall not exceed 20 % of the aggregate value of all the lots into which the proposed work, the proposed acquisition of similar supplies or the proposed provision of services has been divided.*

10. In the case of supply or service contracts which are regular in nature or which are intended to be renewed within a given period, the calculation of the estimated contract value shall be based on the following:

- (a) either the total actual value of the successive contracts of the same type awarded during the preceding 12 months or financial year adjusted, if possible, to take account of the changes in quantity or value which would occur in the course of the 12 months following the initial contract;
  - (b) or the total estimated value of the successive contracts awarded during the 12 months following the first delivery, or during the financial year where that is longer than 12 months.
- 11. With regard to supply contracts relating to the leasing, hire, rental or hire purchase of products, the value to be taken as a basis for calculating the estimated contract value shall be as follows:
  - (a) in the case of fixed-term contracts, if that term is less than or equal to 12 months, the total estimated value for the term of the contract or, where the term of the contract is greater than 12 months, the total value including the estimated residual value;
  - (b) in the case of contracts without a fixed term or the term of which cannot be defined, the monthly value multiplied by 48.
- 12. With regard to service contracts, the basis for calculating the estimated contract value shall, where appropriate, be the following:
  - (a) insurance services: the premium payable, and other forms of remuneration;
  - (b) banking and other financial services: the fees, commissions, interest and other forms of remuneration;
  - (c) design contracts: fees, commission payable and other forms of remuneration.

13. With regard to service contracts which do not indicate a total price, the basis for calculating the estimated contract value shall be the following:
- (a) in the case of fixed-term contracts, where that term is less than or equal to 48 months: the total value for their full term;
  - (b) in the case of contracts without a fixed term or with a term greater than 48 months: the monthly value multiplied by 48.

*Article 14*

*Revision of the thresholds*

*Directive 2004/17/EC: Article 69, 70(2)(g)*

1. *Every two years from 30 June 2013, the Commission shall verify that the thresholds set out in points (a) and (b) of Article 12 correspond to the thresholds established in the Government Procurement Agreement, and shall, where necessary, revise them.*

*In accordance with the calculation method set out in the Government Procurement Agreement, the Commission shall calculate the value of those thresholds on the basis of the average daily value of the euro in terms of the special drawing rights (SDRs), over a period of 24 months terminating on the last day of August preceding the revision with effect from 1 January. The value of the thresholds thus revised shall, where necessary, be rounded down to the nearest thousand euros so as to ensure that the thresholds in force provided for by the Agreement, expressed in SDR, are observed.*

2. *Every two years from 1 January 2014, the Commission shall determine the values, in the national currencies of Member States not participating in Monetary Union, of the thresholds referred to in points (a) and (b) of Article 12, revised pursuant to paragraph 1 of this Article.*

*At the same time, the Commission shall determine the value, in the national currencies of the Member States which are not participating in monetary union, of the threshold referred to in point (c) of Article 12.*

*In accordance with the calculation method set out in the Government Procurement Agreement, the determination of such values shall be based on the average daily values of those currencies, corresponding to the applicable threshold expressed in euros over the 24 months terminating on the last day of August preceding the revision with effect from 1 January.*

3. *The revised thresholds referred to in paragraph 1, their values in national currencies the first subparagraph of paragraph 2, and the value determined in accordance with the second subparagraph of paragraph 2, shall be published by the Commission in the Official Journal of the European Union at the beginning of the month of November following their revision.*
4. *The Commission shall be empowered to adopt delegated acts in accordance with Article 98 to adapt the methodology set out in the second subparagraph of paragraph 1 to any change in the methodology provided in the Government Procurement Agreement for the revision of the thresholds referred to in points (a) and (b) of Article 12 and for the determination of the thresholds in the national currencies of the Member States not participating in monetary union, as referred to in paragraph 2 of this Article.*

*It shall also be empowered to adopt delegated acts in accordance with Article 98 to revise the thresholds referred to in points (a) and (b) of Article 12 when necessary.*

5. *Where it is necessary to revise the thresholds referred to in points (a) and (b) of Article 12 and time constraints prevent the use of the procedure set in article 98 and therefore imperative grounds of urgency so require, the procedure provided for in Article 99 shall apply to delegated acts adopted pursuant to the second subparagraph of paragraph 4 of this Article.*

## SECTION 2

### EXCLUDED CONTRACTS AND DESIGN CONTESTS

#### *Subsection 1*

*Exclusions applicable to all contracting entities and special exclusions for the water and energy sectors*

#### *Article 15*

*Contracts awarded for purposes of resale or lease to third parties*

1. This Directive shall not apply to contracts awarded for purposes of resale or lease to third parties, provided that the contracting entity enjoys no special or exclusive right to sell or lease the subject of such contracts, and other entities are free to sell or lease it under the same conditions as the contracting entity.
2. The contracting entities shall notify the Commission at its request of all the categories of products or activities which they regard as excluded under paragraph 1. The Commission may periodically publish in the Official Journal of the European Union, for information purposes, lists of the categories of products and activities which it considers to be covered by this exclusion. In so doing, the Commission shall respect any sensitive commercial aspects that the contracting entities may point out when forwarding information.



## Article 16

*Contracts and design contests awarded or organised for purposes other than the pursuit of a covered activity or for the pursuit of such an activity in a third country*

1. This Directive shall not apply to contracts which the contracting entities award for purposes other than the pursuit of their activities as described in Articles 5 to 11 or for the pursuit of such activities in a third country, in conditions not involving the physical use of a network or geographical area within the Union nor shall it apply to design contests organised for such purposes.
2. The contracting entities shall notify the Commission at its request of any activities which they regard as excluded under paragraph 1. The Commission may periodically publish in the *Official Journal of the European Union* for information purposes, lists of the categories of activities which it considers to be covered by this exclusion. In so doing, the Commission shall respect any sensitive commercial aspects that the contracting entities may point out when forwarding this information.

## Article 17

### Defence and security

1. In respect of contracts awarded and design contests organised in the fields of defence and security, this Directive shall not apply to:
  - (a) contracts falling within the scope of Directive 2009/81/EC;
  - (b) contracts to which Directive 2009/81/EC does not apply pursuant to Articles 8, 12 and 13 thereof.

2. *This Directive shall not apply to contracts and design contests not otherwise exempted under paragraph 1 to the extent that:*

- (a) the protection of the essential security interests of a Member State cannot be guaranteed by less intrusive measures, for instance by imposing requirements aimed at protecting the confidential nature of information which the contracting entities make available throughout the procurement procedure in a procurement procedure as provided for in this Directive;*
- (b) the application of this Directive would oblige a Member State to supply information the disclosure of which it considers contrary to the essential interests of its security; or*
- (c) the procurement and performance of the contract or contest are declared to be secret or must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in a Member State where the Member State has determined that the essential interests concerned cannot be guaranteed by less intrusive measures, for instance such as referred to in point (a).*

#### *Article 18*

*Contracts awarded and design contests organised pursuant to international rules*

*Directive 2004/17/EC: Articles 22, 62(1)*

1. *This Directive shall not apply to contracts or design contests which the contracting entity is obliged to award or organise in accordance with procurement procedures different from those of this Directive established by any of the following:*

- (a) *an international agreement or arrangement concluded in accordance with the Treaty between a Member State and one or more third countries or subdivisions thereof and covering works, supplies or services intended for the joint implementation or exploitation of a project by their signatories;*
- (b) *an international agreement or arrangement relating to the stationing of troops and concerning the undertakings of a Member State or a third country;*
- (c) *an international organisation.*

All agreements referred to in point (a) of the first subparagraph shall be communicated to the Commission, which may consult the Advisory Committee for Public Contracts referred to in Article 100.

2. *This Directive shall not apply to public contracts and design contests which the contracting entity awards in accordance with procurement rules provided by an international organisation or international financing institution, where the contracts or design contests concerned are fully financed by this organisation or institution; in the case of contracts or design contests co-financed the most part by an international organisation or international financing institution the parties shall agree on applicable procurement procedures .*

#### *Article 19*

##### *Specific exclusions for service contracts*

##### *Directive 2004/17/EC, Article 24*

This Directive shall not apply to service contracts for:

- (a) *the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property or concerning rights thereon;*
- (b) arbitration and conciliation services;
- (ba) *any of the following legal services:*
  - (i) *legal representation of a client in an arbitration or conciliation held in a Member State or in judicial proceedings before the national courts, tribunals or public authorities of a Member State by a lawyer within the meaning of Article 1 of Directive 77/249/EEC;*
  - (i aa) *legal representation of a client in an arbitration or conciliation held in a third country or in judicial proceedings before the national courts, tribunals or public authorities of a third country by a lawyer within the meaning of Article 1 of Directive 77/249/EEC;*
  - (ia) *legal representation of a client in an arbitration or conciliation held before an international arbitration or conciliation instance or in judicial proceedings before the international courts, tribunals or institutions by a lawyer within the meaning of Article 1 of Directive 77/249/EEC;*
  - (i b) *legal advice given in anticipation or preparation of any of the proceedings referred to in points (i), (i aa) or (i a) or where there is a concrete likelihood that the matter to which the advice relates will become the subject of such proceedings, provided that the advice is given by a lawyer within the meaning of Article 1 of Directive 77/249/EEC;*

- (ii) document certification services which must be provided by notaries;
- (iii) *legal services provided by trustees, appointed guardians or other legal services the providers of which are designated by a court or tribunal in the Member State concerned;*
- (iv) *other legal services which in the Member State concerned are connected, even occasionally, with the exercise of official authority;*
- (c) financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments within the meaning of Directive 2004/39/EC of the European Parliament and of the Council<sup>29</sup> and operations conducted with the European Financial Stability Facility;
- (c a) *loans, whether or not in connection with the issue, sale, purchase or transfer of securities or other financial instruments;*
- (d) employment contracts;
- (e) public passenger transport services by rail or metro;
- (f) *contracts for broadcasting time or programme provision that are awarded to audiovisual or radio media service providers.*

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<sup>29</sup> OJ L 145, 30.04.2004, p. 1.

*For the purposes of this Article, "media service providers" shall have the same meaning as pursuant to Article 1(1)(d) of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive)<sup>30</sup>. "Programme" shall have the same meaning as pursuant to Article 1(1)(b) of Directive 2010/13/EU, but shall also include radio programmes and radio programme materials. Furthermore, for the purposes of this provision, "programme material" shall have the same meaning as "programme".*

#### *Article 19a*

*Service contracts awarded on the basis of an exclusive right*

*Directive 2004/17/EC: Article 25*

*This Directive shall not apply to service contracts awarded to an entity which is itself a contracting authority within the meaning of Article 2(1) or to an association of contracting authorities on the basis of an exclusive right which they enjoy pursuant to a published law, regulation or administrative provision which is compatible with the Treaty.*

#### *Article 20*

*Contracts awarded by certain contracting entities for the purchase of water and for the supply of energy or of fuels for the production of energy*

*Directive 2004/17/EC: Article 26*

This Directive shall not apply:

- (a) to contracts for the purchase of water if awarded by contracting entities engaged in one or both of the activities relating to drinking water referred to in Article 7(1).

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<sup>30</sup> OJ L 95, 15.4.2010, p. 1.

- (b) to contracts awarded by contracting entities themselves being active in the energy sector by being engaged in an activity referred to in Article 5(1), Article 6(1) or Article 11 for the supply:
  - (i) of energy;
  - (ii) of fuels for the production of energy.

### *Subsection 2*

*Special relations (cooperation, affiliated undertakings and joint ventures)*

### *Article 21*

*Contracts between contracting authorities*

- I. A contract awarded by a contracting authority to another legal entity governed by private or public law shall fall outside the scope of this Directive where the following cumulative conditions are fulfilled:*
  - (a) the contracting authority exercises over the legal entity concerned a control which is similar to that which it exercises over its own departments;
  - (b) *more than 80% of the activities of that legal entity are carried out in the performance of tasks entrusted to it by the controlling contracting authority or by other legal entities controlled by that contracting authority;*
  - (c) *there is no private capital participation in the controlled legal person.*

*A contracting authority shall be deemed to exercise over a legal entity a control similar to that which it exercises over its own departments within the meaning of point (a) of the first subparagraph where it exercises a decisive influence over both strategic objectives and significant decisions of the controlled legal entity. The control may also be exercised by another entity, which is itself controlled in the same way by the contracting authority.*

*For the determination of the percentage of activities referred to in point (b) of the first subparagraph the average total turnover of the controlled legal entity with respect to services, supplies and works for the three years preceding the contract award shall be taken into consideration. When, because of the date that legal entity was created or commenced activities or because of a reorganisation of its activities, the turnover is either not available for the preceding three years or no longer relevant, it will be sufficient to show that the turnover is credible, particularly by means of business projections.*

2. *Paragraph 1 also applies where a controlled entity which is a contracting authority awards a contract to its controlling entity, or to another legal entity controlled by the same contracting authority, provided that there is no private capital participation in the legal entity being awarded the public contract.*
3. *A contracting authority, which does not exercise over a legal entity governed by private or public law control within the meaning of paragraph 1, may nevertheless award a contract without applying this Directive to that legal , where the following cumulative conditions are fulfilled:*
  - (a) *the contracting authority exercises jointly with other contracting authorities over that legal entity a control which is similar to that which they exercise over their own departments.*



- (b) *more than 80% of the activities of that legal entity are carried out in the performance of tasks entrusted to it by the controlling contracting authorities or by other legal entities controlled by the same contracting authorities;*
- (c) *there is no private capital participation in the controlled legal entity.*

*For the purposes of point (a) of the first subparagraph, contracting authorities shall be deemed to exercise joint control over a legal entity where the following cumulative conditions are fulfilled:*

- (a) *the decision-making bodies of the controlled legal entity are composed of representatives of all participating contracting authorities. Individual representatives may represent several or all of the participating contracting authorities;*
- (b) *those contracting authorities are able to jointly exert decisive influence over the strategic objectives and significant decisions of the controlled legal entity;*
- (c) *the controlled legal entity does not pursue any interests which are distinct from those of the controlling contracting authorities ;*
- (d) *the controlled legal entity does not receive from its activities for the controlling authorities or for other legal entities controlled by the same contracting authorities any revenues other than the reimbursement or re-allocation of funds for the performance of the activities concerned.*

*For the determination of the percentage of activities referred to in point (b) of the first subparagraph the average total turnover of the controlled legal entity with respect to services, supplies and works for the three years preceding the contract award shall be taken into consideration. When, because of the date that legal entity was created or commenced activities or because of a reorganisation of its activities, the turnover is either not available for the preceding three years or no more relevant, it will be sufficient to show that the turnover is credible, particularly by means of business projections.*

4. *A contract concluded between two or more contracting authorities shall not be deemed to be a “works, supply or service contract” within the meaning of point 7 of Article 2 of this Directive, where the following cumulative conditions are met:*
- (a) the contract is concluded in a framework of genuine co-operation between the participating contracting authorities aimed at carrying out jointly their public service tasks and involving mutual rights and obligations of the parties;*
  - (b) the implementation of that cooperation is governed solely by considerations relating to the public interest;*
  - (c) the participating contracting authorities perform on the market less than 20% in terms of turnover of the activities concerned by the cooperation;*
  - (d) the contract does not involve financial transfers between the participating contracting authorities, other than those corresponding to the reimbursement or re-allocation of funds for the works, services or supplies concerned;*
  - (e) there is no private capital participation in any of the contracting authorities involved.*

*For the determination of the percentage of activities referred to in point (c) of the first subparagraph the average total turnover of the contracting authority concerned with respect to services, supplies and works for the three years preceding the conclusion of the contract shall be taken into consideration. When, because of the date that contracting authority was created or commenced activities or because of a reorganisation of its activities, the turnover is either not available for the preceding three years or no more relevant, it will be sufficient to show that the turnover is credible, particularly by means of business projections.*

5. *The absence of private capital participation referred to in paragraphs 1 to 4 shall be verified at the time of the award of the contract or of the conclusion of the agreement.*

*The exclusions provided for in paragraphs 1 to 4 shall cease to apply from the moment any private participation takes place, with the effect that ongoing contracts need to be opened to competition through procurement procedures.*

## *Article 22*

### *Contracts awarded to an affiliated undertaking*

1. For the purposes of this Article, "affiliated undertaking" means any undertaking the annual accounts of which are consolidated with those of the contracting entity in accordance with the requirements of the Seventh Council Directive 83/349/EEC<sup>31</sup>.
2. In the case of entities not subject to that Directive, "affiliated undertaking" shall mean any undertaking that:

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<sup>31</sup> OJ L 193, 18.7.1983, p. 1. Directive as last amended by Directive 2001/65/EC of the European Parliament and of the Council (OJ L 283, 27.10.2001, p. 28).

- (a) may be, directly or indirectly, subject to a dominant influence by the contracting entity within the meaning of point (5) of Article 2 and Article 4(2) of this Directive;
- (b) may exercise a dominant influence over the contracting entity;
- (c) in common with the contracting entity, is subject to the dominant influence of another undertaking by virtue of ownership, financial participation, or the rules which govern it.

3. Article 21 notwithstanding and provided that the conditions in paragraph 4 are met, this Directive shall not apply to contracts awarded:

- (a) by a contracting entity to an affiliated undertaking, or
- (b) by a joint venture, formed exclusively by a number of contracting entities for the purpose of carrying out activities within the meaning of Articles 5 to 11, to an undertaking which is affiliated with one of those contracting entities.

4. Paragraph 3 shall apply:

- (a) to service contracts provided that at least 80 % of the average total turnover of the affiliated undertaking with respect to services in general for the preceding three years derives from the provision of services to undertakings with which it is affiliated;
- (b) to supply contracts provided that at least 80 % of the average total turnover of the affiliated undertaking with respect to supplies in general for the preceding three years derives from the provision of supplies to undertakings with which it is affiliated;

- (c) to works contracts provided that at least 80 % of the average total turnover of the affiliated undertaking with respect to works in general for the preceding three years derives from the provision of works to undertakings with which it is affiliated.

5. When, because of the date on which an affiliated undertaking was created or commenced activities, the turnover is not available for the preceding three years, it will be sufficient for that undertaking to show that the turnover referred to in points (a), (b) or (c) of paragraph 4 is credible, particularly by means of business projections.

Where more than one undertaking affiliated with the contracting entity provides the same or similar services, supplies or works, the above percentages shall be calculated taking into account the total turnover deriving respectively from the provision of services, supplies or works by those affiliated undertakings.

#### *Article 23*

##### *Contracts awarded to a joint venture or to a contracting entity forming part of a joint venture*

Article 21 notwithstanding and provided that the joint venture has been set up in order to carry out the activity concerned over a period of at least three years and that the instrument setting up the joint venture stipulates that the contracting entities, which form it, will be part thereof for at least the same period, this Directive shall not apply to contracts awarded by any of the following:

- (a) by a joint venture, formed exclusively by a number of contracting entities for the purpose of carrying out activities within the meaning of Articles 5 to 11, to one of those contracting entities, or
- (b) by a contracting entity to such a joint venture of which it forms part.

*Article 24*  
*Notification of information*

Contracting entities shall notify to the Commission , at its request, the following information regarding the application of Article 22, paragraphs 2, 3 and Article 23:

- (a) the names of the undertakings or joint ventures concerned,
- (b) the nature and value of the contracts involved,
- (c) proof deemed necessary by the Commission that the relationship between the undertaking or joint venture to which the contracts are awarded and the contracting entity complies with the requirements of Articles 22 or 23.

*Subsection 3*  
*Specific situations*

*Article 25*  
*Research and development services*

1. *This Directive shall apply to service contracts for research and development services with CPV reference numbers 73000000-2 to 73436000-7, (except 73200000-4, 73210000-7, 73220000-0, 73400000-6, 73410000-9, 73421000-9, 73422000-6, 73423000-3, 73424000-0, 73425000-7, 73426000-4, 73431000-2 Test and evaluation of security equipment 73432000-9, 73433000-6, 73434000-3, 73435000-0 or 73436000-7), provided that the following conditions are both fulfilled:*
- (a) *the benefits accrue exclusively to the contracting entity for its use in the conduct of its own affairs,*
  - (b) *the service provided is wholly remunerated by the contracting entity.*

2. *The Commission shall be empowered to adopt delegated acts in accordance with Article 98 to amend the CPV reference numbers referred to in paragraph 1 to reflect changes in the CPV nomenclature provided that such amendments do not imply a modification of the scope of this Directive.*

## *Article 26*

### *Contracts subject to special arrangements*

1. Without prejudice to Article 27 the Republic of Austria and the Federal Republic of Germany shall ensure, by way of the conditions of authorisation or other appropriate measures, that any entity operating in the sectors mentioned in Decisions 2002/205/EC and 2004/73/EC:
  - (a) observes the principles of non-discrimination and competitive procurement in respect of the award of supplies, works and service contracts, in particular as regards the information which the entity makes available to economic operators concerning its procurement intentions;
  - (b) communicates to the Commission, under the conditions defined in Commission Decision 93/327/EEC<sup>32</sup>, information relating to the contracts they award.
2. Without prejudice to Article 27, the United Kingdom shall ensure, by way of the conditions of authorisation or other appropriate measures, that any entity operating in the sectors mentioned in Decision 97/367/EEC applies points (a) and (b) of paragraph 1 in respect of contracts awarded for the pursuit of said activity in Northern Ireland.

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<sup>32</sup> European Commission Decision of 13 May 1993 defining the conditions under which contracting entities exploiting geographical areas for the purpose of exploring for or extracting oil, gas, coal or other solid fuels must communicate to the European Commission information relating to the contracts they award, OJ L 129, 27.5.1993, p. 25.

3. Paragraphs 1 and 2 shall not apply to contracts awarded for the purpose of exploring for oil or gas.

#### *Subsection 4*

*Activities directly exposed to competition and procedural provisions relating thereto*

#### *Article 27*

*Activities directly exposed to competition*

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. Such assessment shall be made having regard to the market for the activities in question and the geographical reference market within the meaning of paragraph 2.
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.

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.

#### *Article 28*

##### *Procedure for establishing whether Article 27 is applicable*

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 the Commission to establish that this Directive does not apply to the award of contracts or the organisation of design contests for the pursuit of that activity, where appropriate together with the position adopted by an independent national authority that is competent in relation to the activity concerned.

In the request, 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).

- 1a. In the case of requests coming from a contracting entity, the Commission shall immediately inform the Member State concerned.

Except where the request is accompanied by a reasoned and substantiated position, adopted by an independent national authority that is competent in relation to the activity concerned, which thoroughly analyses 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 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).

2. Upon request submitted in accordance with paragraph 1 of this Article, the Commission may, by way of an implementing acts adopted within the periods set out in paragraph 3 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 acts 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 act 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 act referred to in the first subparagraph of this paragraph within the period provided for in paragraph 3 of this Article.

3. The implementing acts 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 periods set out in points a and b of this paragraph shall be prolonged by 15 working days where the request is not accompanied by a reasoned and substantiated position, adopted by an independent national authority that is competent in relation to the activity concerned, which thoroughly analyses the conditions for the possible applicability of Article 27(1) to the activity concerned in accordance with its paragraphs 2 and 3.

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.

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 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.

- 3a. After the submission of a request, the Member State or the contracting entity concerned may, with the Commission's agreement, substantially modify its request, in particular as regards the activities or the geographical areas concerned. If so, a new period for the adoption of the implementing act shall apply, which shall be calculated in accordance with the first and second subparagraph of paragraph 3, unless a shorter period is agreed on by the Commission and the Member State or contracting entity which has presented the request.
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 rules and provisions relating to:
- (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;
  - (c) implementing provisions concerning the form, content and other details of requests pursuant to paragraph 1 of this Article.;

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

## CHAPTER IV

### *General principles*

#### *Article 29*

##### *Principles of procurement*

*Contracting entities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.*

*The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of unduly favouring or disadvantaging certain economic operators or certain works, supplies or services.*

#### *Article 30*

##### *Economic operators*

1. Economic operators that, under the law of the Member State in which they are established, are entitled to provide the relevant service, shall not be rejected solely on the ground that, under the law of the Member State in which the contract is awarded, they would be required to be either natural or legal persons.

However, in the case of service and works contracts as well as supply contracts covering in addition services or siting and installation operations, legal persons may be required to indicate, in the tender or the request to participate, the names and relevant professional qualifications of the staff responsible for the performance of the contract in question.

2. Groups of economic operators may participate in procurement procedures. Specific conditions relating to economic and financial standing or to criteria relating to technical and professional ability, which contracting entities establish for the participation of such groups which are not imposed on individual participants, shall be justified by objective reasons and proportionate. Such specific conditions or criteria may be established by the Member States instead of the individual contracting entities.

*Conditions for the performance of a contract by such groups, which are not imposed on individual participants, shall also be justified by objective reasons and proportionate.*

*Requiring those groups to appoint a joint representation or a lead partner for the purposes of the procurement procedure or to require information on their constitution shall be deemed to be justified and proportionate.*

*In order to submit a tender or a request to participate, groups of economic operators shall not be required by the contracting entities to have a specific legal form. They may, however, be required to assume a specific legal form once they have been awarded the contract, to the extent that this change is necessary for the satisfactory performance of the contract.*

#### *Article 31*

##### *Reserved contracts*

*Directive 2004/17/EC: Art. 28*

1. *Member States may reserve the right to participate in procurement procedures to sheltered workshops and economic operators whose main aim is the social and professional integration of disabled and disadvantaged persons or provide for such contracts to be performed in the context of sheltered employment programmes, provided that at least 30% of the employees of those workshops, economic operators or programmes are disabled or disadvantaged workers.*

2. *Member States may also reserve the right to participate in procedures for the award of public service contracts to organisations whose main aim is the integration of former employees of public authorities into the private sector, provided that the following cumulative conditions are fulfilled:*
- (a) at least 75% of the employees of these organisations are, or will be at the relevant time, individuals who have left their position of employment within a contracting authority in order to deliver public services by way of that organisation;*
  - (b) the organisation provides its services exclusively for contracting authorities;*
  - (c) employee ownership or engagement has, or will have at the relevant time, a significant impact on the governance of the organisation.*

*This provision only applies where the contract awarded is fully performed within the period of three years beginning from the date on which the organisation first begins to supply any services.*

*For the purposes of this paragraph, ‘relevant time’ means the date on which the organisation would be required to begin the supply of services under a contract awarded pursuant to this provision.*

3. The call for competition shall make reference to this Article.

## Article 32

### Confidentiality

Directive 2004/17/EC: Article 13

1. Contracting entities may impose on economic operators requirements aimed at protecting the confidential nature of information which the contracting entities make available throughout the procurement procedure, including information made available in connection with the operation of a qualification system, whether or not this has been the subject of a notice on the existence of a qualification system used as a means of calling for competition.

2. *Unless otherwise provided in this Directive or in the national law to which the contracting entity is subject, in particular legislation concerning access to information, and without prejudice to the obligations relating to the advertising of awarded contracts and to the information to candidates and tenderers set out in Articles 64 and 69 of this directive the contracting entity shall not disclose information forwarded to it by economic operators which they have designated as confidential, including, but not limited to, technical or trade secrets and the confidential aspects of tenders.*

### *Article 33*

#### *Rules applicable to communication*

*Directive 2004/17/EC: Articles 48, 64, 70(2)(f)*

1. *Member States shall ensure that all communication and information exchange under this Directive, in particular e-submission, are performed using electronic means of communication in accordance with the requirements of this Article. The tools and devices to be used for communicating by electronic means, as well as their technical characteristics, shall be non-discriminatory, generally available and interoperable with the information and communication technology products in general use and shall not restrict economic operators' access to the procurement procedure. Incorporates provisions from Art. 34, 1<sup>st</sup> subparagraph.*

Notwithstanding the first subparagraph, contracting entities are not obliged to require electronic means of communication in the e-submission process where physical objects, such as models, are involved which cannot be transmitted electronically or where the communication can only be handled by specialised office equipment, not generally available to contracting authorities, or where the use of electronic means would require specialised tools or file formats that are not generally available. That is in particular the case where:

- (a) *the description of the tenders, due to the specialised nature of the procurement, cannot be rendered using file formats that are generally supported by generally available applications;*



- (b) *the applications supporting file formats that are suitable for the description of the tenders are under a proprietary licensing scheme and cannot be made available for downloading or remote use by the contracting authority;*
- (c) *the applications supporting file formats that are suitable for the description of the tenders use file formats that cannot be handled by any other open or downloadable applications;*
- (d) *the procurement documents require the submission of physical or scale models which cannot be submitted using electronic means. Incorporates provisions from Art. 34, 2<sup>nd</sup> and 3<sup>rd</sup> subparagraphs.*

*Notwithstanding the first subparagraph, contracting entities are not obliged to require electronic means of communication in the e-submission process where use of means of communication other than electronic means is necessary as part of the requirements that contracting entities impose pursuant to Article 32(1) in order to protect the confidential nature of information which the contracting entities make available throughout the procurement procedure.*

*In respect of communications for which electronic means of communication are not used pursuant to subparagraph 2, communication shall be done by post or by a combination of post and electronic means.*

*It is the responsibility of the contracting entities using means of communication other than electronic means for the e-submission to indicate in the individual report referred to in Article 94 the reasons why the use of electronic means, due to the particular nature of the information to be exchanged with the economic operators, would require use of specialised tools or file formats that are not generally available or that the communication concerned can be handled only through specialised office equipment. Where applicable, contracting entities shall indicate in the individual report the reasons why use of means of communication other than electronic means is necessary to protect confidentiality.*

- 1a. Paragraph 1 notwithstanding, oral communication may be used in respect of communications other than the essential elements of a procurement procedure such as the procurement documents, requests for participation, confirmations of interest and tenders, provided that the content of the oral communication be documented to a sufficient degree. In particular, oral communications with tenderers which could have a substantial impact on the content and assessment of the tenders shall be documented to a sufficient extent and by appropriate means, such as written or audio records or summaries of the main elements of the communication.
2. *In all communication, exchange and storage of information, contracting entities shall ensure that the integrity of data and the confidentiality of tenders and requests to participate are preserved. They shall examine the content of tenders and requests to participate only after the time limit set for submitting them has expired.*
3. *Contracting entities may, where necessary, require the use of tools which are not generally available, provided that the contracting entities offer alternative means of access.*

*Contracting entities shall be deemed to offer suitable alternative means of access in any of the following situations, where they:*

- (a) *offer unrestricted and full direct access by electronic means to those tools and devices from the date of publication of the notice in accordance with Annex IX or from the date on which the invitation to confirm interest is sent. The text of the notice or the invitation to confirm interest shall specify the internet address at which these tools and devices are accessible;*

- (b) *ensure that tenderers having no access to the tools and devices concerned, or no possibility of obtaining them within the relevant time limits, provided that the lack of access is not attributable to the tenderer concerned, may access the procurement procedure through the use of provisional tokens made available online at no extra cost; or*
- (c) *support an alternative channel for electronic submission of tenders.*

5. *In addition to the requirements set out in Annex IV, the following rules shall apply to tools and devices for the electronic transmission and receipt of tenders and for the electronic receipt of requests to participate:*

- (a) *information on specifications for the electronic submission of tenders and requests to participate, including encryption and time-stamping, shall be available to interested parties;*
- (b)
- (c) *Member States, or contracting entities acting within an overall framework established by the Member State concerned, shall specify the level of security required for the electronic means of communication to be used in the various stages of the specific procurement procedure; the level shall be proportionate to the risks attached;*

- (d) *where Member States, or contracting authorities acting within an overall framework established by the Member State concerned, conclude that the level of risks, assessed in conformity with point c, is such that advanced Electronic Signatures as defined by Directive 1999/93/EC<sup>33</sup> are required, contracting entities shall accept signatures supported by a qualified electronic certificate referred to in the Trusted List as provided for in the Commission Decision 2009/767/EC<sup>34</sup>, created with or without a secure signature creation device, subject to compliance with the following conditions:*
- (i) *they must establish the required advanced signature format on the basis of formats established in Commission Decision 2011/130/EU<sup>35</sup> and shall put in place necessary measures to be able to process those formats technically;*
  - (ii) *where a tender is signed with the support of a qualified certificate that is included in the Trusted list, they must not apply additional requirements that may hinder the use of those signatures by tenderers.*

*In respect of documents used in the context of a procurement procedure that are signed by a competent authority of a Member State, the competent issuing authority may establish the required advanced signature format according to the requirements set out in Article 1(2) of Decision 2011/130/EU; they shall put in place necessary measures to be able to process these formats technically by including the information required for the purpose of processing the signature in the document concerned. Such documents must contain in the electronic signature or in the electronic document carrier information on existing validation possibilities that allow to validate the received electronic signature online, free of charge and in a way that is understandable for non-native speakers.*

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<sup>33</sup> Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures, OJ L 13, 19.1.2000, p. 12.

<sup>34</sup> OJ L 274, 20.10.2009, p. 36.

<sup>35</sup> OJ L 53, 26.2.2011, p. 66.

*Contracting entities may indicate in the procurement documents that other advanced Electronic Signatures as defined by Directive 1999/93/EC will be accepted, provided that the electronic signature or the electronic document carrier contain information on existing validation possibilities that allow to validate the received electronic signature online, free of charge and in a way that is understandable for non-native speakers.*

- 7a. *The Commission shall be empowered to adopt delegated acts in accordance with Article 98 to amend the technical details and characteristics set out in Annex IV due to technical developments.*

*To ensure the interoperability of technical formats as well as of process and messaging standards, especially in a cross-border context, the Commission shall be empowered to adopt delegated acts in accordance with Article 98 to establish the mandatory use of such specific technical standards, in particular with regard to the use of e-submission, electronic catalogues and means for electronic authentication, only where technical standards have been thoroughly tested and proved their usefulness in practice. Before making use of any technical standard mandatory, the Commission shall also carefully consider the costs that this may entail, in particular in terms of adaptations to existing e-procurement solutions, including infrastructure, processes or software.*

#### *Article 35*

#### *Nomenclatures*

*Directive 2004/17/EC, Article 1(13)*

1. Any references to nomenclatures in the context of public procurement shall be made using the "Common Procurement Vocabulary (CPV)" as adopted by Regulation (EC) No 2195/2002<sup>36</sup>.
2. The Commission shall be empowered to adopt delegated acts in accordance with Article 98 to adapt the reference numbers used in Annex II and XVI, whenever changes in the CPV nomenclature have to be reflected in this Directive and they do not imply a modification of the scope of this Directive.

### *Article 36*

#### *Conflicts of interests*

1. *Member States shall, in respect of contracting authorities within the meaning of point 1 of Article 2, ensure that contracting authorities take appropriate measures to effectively prevent, identify and remedy conflicts of interests arising in the conduct of procurement procedures so as to avoid any distortion of competition and ensure equal treatment of all economic operators.*

*The concept of conflicts of interest shall at least cover any situation where staff members of the contracting authority or of a procurement service provider acting on behalf of the contracting authority who are involved in the conduct of the procurement procedure or may influence the outcome of that procedure have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure.*

(b)

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<sup>36</sup> OJ L 340, 16.12.2002, p. 1.

*TITLE II*  
*RULES APPLICABLE TO CONTRACTS*  
*CHAPTER I*  
*Procedures*

*Article 38*

*Conditions relating to the Government Procurement Agreement and other international agreements*

*As far as covered by Annexes III, IV and V and the General Notes to the European Union's Appendix I to the Government Procurement Agreement and by the other international agreements by which the Union is bound, contracting entities within the meaning of Article 4(1)(a) shall accord to the works, supplies, services and economic operators of the signatories to those agreements treatment no less favourable than the treatment accorded to the works, supplies, services and economic operators of the Union.*

*Article 39*

*Choice of procedures*

*Directive 2004/17/EC: Art. 40*

1. When awarding supply, works or service contracts, contracting entities shall apply the procedures adjusted to be in conformity with this Directive, provided that, without prejudice to Article 42, a call for competition has been published in accordance with this Directive.

Member States shall provide that contracting entities may apply open or restricted procedures or negotiated procedures with prior call for competition as regulated in this Directive.

Member States may provide that contracting entities may apply innovation partnerships or competitive dialogues as regulated in this Directive. Member States may decide not to transpose into their national law innovation partnerships or competitive dialogues or to restrict their use to certain types of procurement.

2. The call for competition may be made by one of the following means:

- (a) *a periodic indicative notice pursuant to Article 61 where the contract is awarded by restricted or negotiated procedure;*
- (b) *a notice on the existence of a qualification system pursuant to Article 62 where the contract is awarded by restricted or negotiated procedure or by a competitive dialogue or an innovation partnership,*
- (c) *by means of a contract notice pursuant to Article 63.*

In the case referred to in point (a), economic operators having expressed their interest following the publication of the periodic indicative notice shall subsequently be invited to confirm their interest in writing by means of an ‘invitation to confirm interest’ in conformity with Article 68.

3. *In the specific cases and circumstances referred to expressly in Article 44, Member States may provide that contracting entities may apply a negotiated procedure without prior call for competition . Member States shall not allow the use of this procedure in any other cases than those referred to in Article 44.*



*Article 40*

*Open procedure*

*Directive 2004/17/EC: Art. 45(2)(4)(7); Art. 1(9)(a)*

1. In open procedures any interested economic operator may submit a tender in response to a call for competition.

*The minimum time limit for the receipt of tenders shall be 35 days from the date on which the contract notice was sent.*

*The tender shall be accompanied by the information for qualitative selection that is requested by the contracting entity.*

2. *Where contracting entities have published a periodic indicative notice which was not itself used as a means of calling for competition, the minimum time limit for the receipt of tenders, as laid down in the second subparagraph of paragraph 1 of this Article, may be shortened to 15 days, provided that all of the following conditions are fulfilled:*

*(a) the periodic indicative notice included, in addition to the information required by Section I of Part A of Annex VI, all the information required by Section II of Part A of Annex VI, insofar as the latter information was available at the time the periodic indicative notice was published;*

*(b) the periodic indicative notice was sent for publication between 35 days and 12 months before the date on which the contract notice was sent.*

3. *Where a state of urgency duly substantiated by the contracting entities renders impracticable the time limit laid down in the second subparagraph of paragraph 1, they may fix a time limit which shall be not less than 15 days from the date on which the contract notice was sent.*

4. *The contracting entity may reduce by five days the time limit for receipt of tenders set out in the second subparagraph of paragraph 1 of this Article where it accepts that tenders may be submitted by electronic means in accordance with first subparagraph of Article 33(3) and Article 33,(4) and (5).*

#### *Article 41*

##### *Restricted procedure*

Directive 2004/17/EC: Art. 45(3)(8); Art. 1(9)(b)

1. *In restricted procedures, any economic operator may submit a request to participate in response to a call for competition by providing the information for qualitative selection that is requested by the contracting entity.*

The minimum time limit for the receipt of requests to participate shall, as a general rule, be fixed at no less than 30 days from the date on which the contract notice or the invitation to confirm interest is sent and may in no case be less than 15 days.

2. *Only those economic operators invited by the contracting entity following its assessment of the information provided may submit a tender. Contracting entities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with Article 72(2).*

*The time limit for the receipt of tenders may be set by mutual agreement between the contracting entity and the selected candidates, provided that all selected candidates have the same time to prepare and submit their tenders;*

*In the absence of agreement on the time limit for the receipt of tenders, the time limit shall be at least 10 days from the date on which the invitation to tender was sent.*

## *Article 42*

### *Negotiated procedure with prior call for competition*

1. *In negotiated procedures with prior call for competition, any economic operator may submit a request to participate in response to a call for competition by providing the information for qualitative selection that is requested by the contracting entity.*

The minimum time limit for the receipt of requests to participate shall, as a general rule, be fixed at no less than 30 days from the date on which the contract notice or, where a periodic indicative notice is used as a means of calling for competition, the invitation to confirm interest is sent and may in no case be less than 15 days.

2. *Only those economic operators invited by the contracting entity following their assessment of the information provided may participate in the negotiations. Contracting entities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with Article 72(2).*

The time limit for the receipt of tenders may be set by mutual agreement between the contracting entity and the selected candidates, provided that all candidates have the same time to prepare and submit their tenders;

*In the absence of agreement on the time limit for the receipt of tenders, the time limit shall be at least 10 days from the date on which the invitation to tender is sent.*

## *Article 42a*

### *Competitive dialogue*

1. *In competitive dialogues, any economic operator may submit a request to participate in response to a call for competition in accordance with points (b) and (c) of Article 39(2) by providing the information for qualitative selection that is requested by the contracting entity.*

*The minimum time limit for receipt of requests to participate shall, as a general rule, be fixed at no less than 30 days from the date on which the contract notice or, where a periodic indicative notice is used as a means of calling for competition, the invitation to confirm interest is sent and may in no case be less than 15 days.*

*Only those economic operators invited by the contracting entity following the assessment of the information provided may participate in the dialogue. Contracting entities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with Article 72(2). The contract shall be awarded on the sole basis of the award criterion of the most economically advantageous tender in accordance with Article 76(1)(a).*

2. *Contracting entities shall set out and define their needs and requirements in the call for competition and/or in a descriptive document. At the same time and in the same documents, they shall also set out and define the chosen award criteria.*
3. *Contracting entities shall open, with the participants selected in accordance with the relevant provisions of Articles 70 to 75, a dialogue the aim of which shall be to identify and define the means best suited to satisfying their needs. They may discuss all aspects of the procurement with the chosen participants during this dialogue.*

*During the dialogue, contracting entities shall ensure equality of treatment among all participants. To that end, they shall not provide information in a discriminatory manner which may give some participants an advantage over others.*

*In accordance with Article 32, contracting entities shall not reveal to the other participants solutions proposed or other confidential information communicated by a participating candidate or tenderer in the dialogue without its agreement. Such agreement shall not take the form of a general waiver but shall be given with reference to the intended communication of specific information.*

4. *Competitive dialogues may take place in successive stages in order to reduce the number of solutions to be discussed during the dialogue stage by applying the award criteria defined in the call for competition or in the descriptive document. In the call for competition or the descriptive document, the contracting entity shall indicate whether it will use this option.*
5. *The contracting entity shall continue the dialogue until it can identify the solution or solutions which are capable of meeting its needs.*
6. *Having declared that the dialogue is concluded and having so informed the remaining participants, contracting entities shall ask them to submit their final tenders on the basis of the solution or solutions presented and specified during the dialogue. Those tenders shall contain all the elements required and necessary for the performance of the project.*

*These tenders may be clarified, specified and fine-tuned at the request of the contracting entity. However, such clarification, specification, fine-tuning or additional information may not involve changes to the essential aspects of the tender or of the procurement, including the needs and requirements set out in the call for competition or in the descriptive document, where variations to those aspects, needs and requirements are likely to distort competition or have a discriminatory effect.*

7. *Contracting entities shall assess the tenders received on the basis of the award criteria laid down in the call for competition or in the descriptive document.*  
*Where necessary, in order to finalise financial commitments or other terms of the contract, the contracting entity may negotiate the final terms of the contract with the tenderer identified as having submitted the most economically advantageous tender in accordance with Article 76(1)(a) provided such negotiations do not have the effect of materially modifying essential aspects of the tender or of the procurement, including the needs and requirements set out in the call for competition or in the descriptive document and does not risk distorting competition or causing discrimination.*

8. The contracting entities may specify prizes or payments to the participants in the dialogue.

### *Article 43*

#### *Innovation partnership*

*In innovation partnerships, any economic operator may submit a request to participate in response to a call for competition in accordance with points (b) and (c) of Article 39(2) by providing the information for qualitative selection that is requested by the contracting entity.*

*In the procurement documents, the contracting entity shall identify the need for an innovative product, service or works that cannot be met by purchasing products, services or works already available on the market. The indications shall be sufficiently precise to enable economic operators to identify the nature and scope of the required solution and decide whether to request to participate in the procedure.*

*The contracting entity may decide to set up the innovation partnership with one partner or with several partners conducting separate research and development activities.*

*The minimum time limit for receipt of requests to participate shall, as a general rule, be fixed at no less than 30 days from the date on which the contract notice is sent and may in no case be less than 15 days.. Only those economic operators invited by the contracting entity following the assessment of the information provided may participate in the procedure. Contracting entities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with Article 72(2).The contracts shall be awarded on the sole basis of the award criterion of the most economically advantageous tender in accordance with Article 76(1)(a).*

2. *The innovation partnership shall aim at the development of an innovative product, service or works and the subsequent purchase of the resulting supplies, services or works, provided that they correspond to the agreed performance levels and maximum costs.*

*The innovation partnership shall be structured in successive stages following the sequence of steps in the research and innovation process, which may include the manufacturing of the supply, the provision of the services or the completion of the works. The innovation partnership shall set intermediate targets to be attained by the partners and provide for payment of the remuneration in appropriate instalments. Based on those targets, the contracting entity can decide after each stage to terminate innovation partnership or, in the case of an innovation partnership with several partners, to reduce the number of partners by terminating individual contracts, provided that the contracting entity has indicated in the procurement documents that and the conditions under which it may make use of these possibilities.*

3. *The second and third subparagraphs of Article 42(3) and Article 76(6) shall apply.*

*In selecting candidates, contracting entities shall in particular apply to criteria concerning the candidates' capacity and experience in the field of research and development or of developing and implementing innovative solutions.*

*Only those economic operators invited by the contracting entity following its assessment of the information provided may submit research and innovation projects, aimed at meeting the needs identified by the contracting entity .*

*In the procurement documents, the contracting entity shall indicate the regime applicable to intellectual property rights. In the case of an innovation partnership with several partners, the contracting entity shall not reveal to the other partners solutions proposed or other confidential information communicated by a partner in the framework of the partnership without its agreement. Such agreement shall not take the form of a general waiver but shall be given with reference to the intended communication of specific information.*

4. *The contracting entity shall ensure that the structure of the partnership and, in particular the duration and value of the different phases reflect the degree of innovation of the proposed solution and the sequence of the research and innovation activities required for the development of an innovative solution not yet available on the market. The estimated value of the supplies, services or works purchased shall not be disproportionate in relation to the investment for their development .*

#### *Article 44*

##### *Use of a negotiated procedure without prior call for competition*

*Directive 2004/17/EC: Art. 40(3)*

Contracting entities may use a negotiated procedure without prior call for competition in the following cases:

- (a) where no tenders or no suitable tenders or no requests to participate or no suitable requests for participation have been submitted in response to a procedure with a prior call for competition, provided that the initial conditions of the contract are not substantially altered;

A tender shall be considered not to be suitable where it is irrelevant to the contract, being incapable, without substantial changes, of meeting the contracting entity's needs and requirements as specified in the procurement documents. A request for participation shall be considered not to be suitable where the economic operator concerned shall or may be excluded pursuant to Articles 72(1) or 74(1), does not meet the selection criteria set out by the contracting entity pursuant to Articles 72 or 74;

- (b) where a contract is purely for the purpose of research, experiment, study or development, and not for the purpose of securing a profit or of recovering research and development costs, and insofar as the award of such contract does not prejudice the competitive award of subsequent contracts which do seek, in particular, those ends;



(d) *where the works, supplies or services can be supplied only by a particular economic operator for any of the following reasons:*

(i) *the aim of the procurement is the creation or acquisition of a unique work of art or artistic performance;*

(ia) *competition is absent for technical reasons;*

(iii) *the protection of exclusive rights, including intellectual property rights;*

*The exceptions set out in points (ia) and (iii) only apply when no reasonable alternative or substitute exists and the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement;*

(e) *insofar as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable for the contracting entity, the time limits laid down for open procedures, restricted procedures and negotiated procedures with prior call for competition cannot be complied with. The circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting entity;*

(f) *in the case of supply contracts for additional deliveries by the original supplier which are intended either as a partial replacement of supplies or installations or as the extension of existing supplies or installations, where a change of supplier would oblige the contracting entity to acquire supplies having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance;*

- (g) *for new works or services consisting in the repetition of similar works or services assigned to the contractor to which the same contracting entities awarded an earlier contract, provided that such works or services conform to a basic project for which a first contract was awarded according to a procedure in accordance with Article 39(1).*

*The basic project shall indicate the extent of possible additional works or services and the conditions under which they will be awarded. As soon as the first project is put up for tender, notice shall be given that this procedure might be adopted and the total estimated cost of subsequent works or services shall be taken into consideration by the contracting entities when they apply Articles 12 and 13.*

- (h) *for supplies quoted and purchased on a commodity market ;*
- (i) *for bargain purchases, where it is possible to procure supplies by taking advantage of a particularly advantageous opportunity available for a very short time at a price considerably lower than normal market prices;*
- (j) *for purchases of supplies or services under particularly advantageous conditions from either a supplier definitively winding up its business activities or the liquidators in an insolvency procedure, an arrangement with creditors or a similar procedure under national laws or regulations;*
- (k) *where the service contract concerned follows a design contest organised in accordance with this Directive and is to be awarded, under the rules foreseen in the design contest, be awarded to the winner or to one of the winners of that contest; in the latter case, all the winners shall be invited to participate in the negotiations.*

## CHAPTER II

### Techniques and instruments for electronic and aggregated procurement

*Article 45*

*Framework agreements*

*Directive 2004/17/EC: Articles 1(4), 14 and 40(3)(i)*

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 eight 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 on the basis of objective rules and criteria, which may include reopening the competition among those economic operators party to the framework agreement as concluded. These rules and criteria shall be set out in the procurement documents for the framework agreement.

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

*Article 46*

*Dynamic purchasing systems*

*Directive 2004/17/EC: Articles 1(5), 15*

1. *For commonly used purchases, the characteristics of which, as generally available on the market, meet the requirements of the contracting entities, they may use a dynamic purchasing system. The dynamic purchasing system shall be operated as a completely electronic process and shall be open throughout the validity of the purchasing system to any economic operator that satisfies the selection criteria. It may be divided into categories of products, works or services that are objectively defined on the basis of characteristics of the procurement to be undertaken under the category concerned. Such characteristics may include reference to the maximum allowable size of the subsequent specific contracts or to a specific geographic area in which subsequent specific contracts will be performed.*

*Article 41 notwithstanding, the following time limits shall apply:*

- (a) *A minimum time limit for receipt of requests to participate shall, as a general rule, be fixed at no less than 30 days from the date on which the contract notice or, where a periodic indicative notice is used as a means of calling for competition, the invitation to confirm interest is sent and may in no case be less than 15 days. No further time limits for receipt of requests to participate shall apply once the invitation to tender for the first specific procurement under the dynamic purchasing system has been sent.*
- (b) *The minimum time limit for receipt of tenders shall be at least 10 days from the date on which the invitation to tender is sent. The second and third subparagraphs of Article 41(2) shall apply.*

2. *In order to procure under a dynamic purchasing system, contracting entities shall follow the rules of the restricted procedure. All the candidates who satisfy the selection criteria shall be admitted to the system; the number of candidates to be admitted to the system shall not be limited in accordance with Article 72 (2). Where contracting entities have divided the system into categories of products or services in accordance with paragraph 1 of this Article, they shall specify the applicable selection criteria for each category.*
- (2a) *All communications in the context of a dynamic purchasing system shall only be made with electronic means in accordance with Article 33(1), (3), (4) and (5).*
3. *For the purposes of awarding contracts under a dynamic purchasing system, contracting entities shall:*
- (a) *publish a call for competition making it clear that a dynamic purchasing system is involved;*
  - (b) *indicate in the procurement documents, at least the nature and estimated quantity of the purchases envisaged, as well as all the necessary information concerning the purchasing system, the electronic equipment used and the technical connection arrangements and specifications;*
  - (ba) *indicate any division into categories of products or services and the characteristics defining them;*
  - (c) *offer unrestricted and full direct access, as long as the system is valid, to the procurement documents in accordance with Article 67.*

4. *Contracting entities shall give any economic operator, throughout the entire period of validity of the dynamic purchasing system, the possibility of requesting to participate in the system under the conditions referred to in paragraph 2. Contracting entities shall finalise their assessment of such requests according to the selection criteria within 10 working days following their receipt. This deadline may be prolonged to 15 working days in individual cases where justified, in particular because of the need to examine additional documentation or to otherwise verify whether the selection criteria are met.*

*Notwithstanding the first subparagraph, as long as the invitation to tender for the first specific procurement under the dynamic purchasing system has not been sent, contracting entities may extend the evaluation period provided that no invitation to tender is issued during the extended evaluation period. In the procurement documents they shall indicate the length of the extended period that they intend to apply.*

*Contracting entities shall inform the economic operator concerned at the earliest possible opportunity of whether or not it has been admitted to the dynamic purchasing system.*

5. *Contracting entities shall invite all admitted participants to submit a tender for each specific procurement under the dynamic purchasing system, in accordance with Article 68. Where the dynamic purchasing system has been divided into categories of works, products or services, contracting entities shall invite all participants having been admitted to the category corresponding to the specific procurement concerned to submit a tender.*

*They shall award the contract to the tenderer that submitted the best tender on the basis of the award criteria set out in the contract notice for the dynamic purchasing system, in the invitation to confirm interest, or, where the means of calling for competition is a notice on the existence of a qualification system, in the invitation to tender. Those criteria may, where appropriate, be formulated more precisely in the invitation to tender.*

- 5a. Contracting entities who, pursuant to Article 74 apply exclusion grounds and selection criteria provided for under Directive 2004/18, may, at any time during the period of validity of the dynamic purchasing system, require admitted participants to submit a renewed and updated self-declaration as provided for in Article 57(1) of Directive 2004/18, within five working days from the date on which that request is transmitted. Paragraphs (2) to (4) of said Article 57 shall apply throughout the entire period of validity of the dynamic purchasing system.
6. Contracting entities shall indicate the period of validity of the dynamic purchasing system in the call for competition. They shall notify the Commission of any change in period of validity, using the following standard forms:
- (a) where the period of validity is changed without terminating the system, the form used initially for the call for competition for the dynamic purchasing system;
  - (b) where the system is terminated, a contract award notice referred to in Article 64.
7. No charges may be billed to the economic operator interested in or party to the dynamic purchasing system.

#### Article 47

##### Electronic auctions

Directive 2004/17/EC: Art. 1(6), Art. 56

1. Contracting entities may use electronic auctions in which new prices, revised downwards, and/or new values concerning certain elements of tenders are presented.
- For this purpose, contracting entities shall structure the electronic auction as a repetitive electronic process, which occurs after an initial full evaluation of the tenders, enabling them to be ranked using automatic evaluation methods.

As certain service contracts and certain works contracts having as their subject-matter intellectual performances, such as the design of works, cannot be ranked using automatic evaluation methods, such contracts shall not be the object of electronic auctions.

2. *In open, restricted or negotiated procedures with a prior call for competition, the contracting entities may decide that the award of a contract shall be preceded by an electronic auction when the procurement documents, in particular the technical specifications, can be established with precision.*

*In the same circumstances, an electronic auction may be held on the reopening of competition among the parties to a framework agreement as provided for in Article 45(2) and on the opening for competition of contracts to be awarded under the dynamic purchasing system referred to in Article 46.*

3. *The electronic auction shall be based on one of the following elements of the tenders:*

- (a) solely on prices where the contract is awarded on the basis of price only under the award criterion of the lowest cost,*
- (b) on prices and/or on the new values of the features of the tenders indicated in the procurement documents, where the contract is awarded to the most economically advantageous tender or to the tender with the lowest cost using a cost-effectiveness approach.*

4. *Contracting entities which decide to hold an electronic auction shall state that fact in the contract notice, 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. The procurement documents shall include at least the information set out in Annex VII.*
5. *Before proceeding with the electronic auction, contracting entities shall make a full initial evaluation of the tenders in accordance with the award criterion or criteria and with the weighting fixed for them.*



*A tender shall be considered admissible where it has been submitted by a tenderer, who has not been excluded pursuant to Article 72(1) or 74(1) and who meets the selection criteria laid down pursuant to Articles 72 and 74, and whose tender is in conformity with the technical specifications without being unsuitable.*

*All tenderers that have submitted admissible tenders shall be invited simultaneously by electronic means to participate in the electronic auction using, as of the specified date and time, the connections in accordance with the instructions set out in the invitation. The electronic auction may take place in a number of successive phases. The electronic auction shall not start sooner than two working days after the date on which invitations are sent out.*

6. *Where the contract is to be awarded on the basis of the most economically advantageous tender, the invitation shall be accompanied by the outcome of a full evaluation of the relevant tender carried out in accordance with the weighting provided for in the first subparagraph of Article 76(5).*

*The invitation shall also state the mathematical formula to be used in the electronic auction to determine automatic re-rankings on the basis of the new prices and/or new values submitted. That formula shall incorporate the weighting of all the criteria established to determine the most economically advantageous tender, as indicated in the notice used as a means of calling for competition or in other procurement documents. For that purpose, any ranges shall, however, be reduced beforehand to a specified value.*

*Where variants are authorised, a separate formula shall be provided for each variant.*

7. *Throughout each phase of an electronic auction the contracting entities shall instantaneously communicate to all tenderers sufficient information to enable them to ascertain their relative rankings at any moment. They may also communicate other information concerning other prices or values submitted, provided that that is stated in the specifications. They may also at any time announce the number of participants in that phase of the auction. In no case, however, may they disclose the identities of the tenderers during any phase of an electronic auction.*

8. *Contracting entities shall close an electronic auction in one or more of the following manners:*

- (a) at the previously indicated date and time;
- (b) when they receive no more new prices or new values which meet the requirements concerning minimum differences, provided that they have previously stated the time which they will allow to elapse after receiving the last submission before they close the electronic auction; *or*
- (c) when the previously indicated number of phases in the auction has been completed.

Where the contracting entities intend to close an electronic auction in accordance with point (c), possibly in combination with the arrangements laid down in point (b), the invitation to take part in the auction shall indicate the timetable for each phase of the auction.

9. After closing an electronic auction the contracting entities shall award the contract in accordance with Article 76 on the basis of the results of the electronic auction.

#### Article 48

#### Electronic catalogues

1. Where use of electronic means of communication is required, contracting entities may require tenders to be presented in the format of an electronic catalogue or to include an electronic catalogue.

Member States may render the use of electronic catalogues mandatory in connection with certain types of procurement.

Tenders presented in the form of an electronic catalogue may be accompanied by other documents, completing the tender.

2. *Electronic catalogues shall be established by the candidates or tenderers with a view to participating in a given procurement procedure in accordance with the technical specifications and format established by the contracting entity.*

*Furthermore, electronic catalogues shall comply with the requirements for electronic communication tools as well as with any additional requirements set by the contracting entity in accordance with Article 33.*

3. *Where the presentation of tenders in the form of electronic catalogues is accepted or required, contracting entities shall:*
  - (a) *state so in the contract notice, in the invitation to confirm interest, or, where the means of calling for competition is a notice on the existence of a qualification system, in the invitation to tender or to negotiate;*
  - (b) *indicate in the procurement documents all the necessary information pursuant to Article 33(5) concerning the format, the electronic equipment used and the technical connection arrangements and specifications for the catalogue.*
4. *Where a framework agreement has been concluded with more than one economic operator following the submission of tenders in the form of electronic catalogues, contracting entities may provide that the reopening of competition for specific contracts takes place on the basis of updated catalogues. In such case, contracting entities shall use one of the following alternative methods:*
  - (a) *invite tenderers to resubmit their electronic catalogues, adapted to the requirements of the specific contract in question;*

*(b) notify tenderers that they intend to collect from the electronic catalogues which have already been submitted the information needed to constitute tenders adapted to the requirements of the specific contract in question , provided that the use of this method has been announced in the procurement documents for the framework agreement.*

5. *Where contracting entities reopen competition for specific contracts in accordance with point (b) of paragraph (4), they shall specify the date and time at which they intend to collect the information needed to constitute tenders adapted to the requirements of the specific contract in question and shall give tenderers the possibility to refuse such collection of information.*

*Contracting entities shall allow for an adequate period between the notification and the actual collection of information.*

*Before awarding the contract, contracting entities shall present the collected information to the tenderer concerned so as to give it the opportunity to contest or confirm that the tender thus constituted does not contain any material errors.*

6. *Contracting entities may award contracts based on a dynamic purchasing system by requiring that offers for specific contract shall be presented in the format of an electronic catalogue.*

*Contracting entities may also award contracts based on a dynamic purchasing system in accordance with point (b) of paragraph 4 and paragraph 5 provided that the request for participation in the dynamic purchasing system is accompanied by an electronic catalogue in accordance with the technical specifications and format established by the contracting entity. This catalogue shall be completed subsequently by the candidates, when they are informed of the contracting entity's intention to constitute tenders by means of the procedure in point (b) of paragraph 4.*

*Article 49*

*Centralised purchasing activities and central purchasing bodies*

*Directive 2004/17/EC: Articles 1(8), 29*

1. *Member States may provide that contracting entities may acquire works, supplies and/or services from a central purchasing body offering the centralised purchasing activity referred to in point a of Article 2(16).*

*Member States may also provide that contracting entities may acquire works, supplies and services by using contracts awarded by a central purchasing body, by using dynamic purchasing systems operated by a central purchasing body or by using a framework agreement concluded by a central purchasing body offering the centralised purchasing activity referred to in point b of Article 2(16). Where a dynamic purchasing system which is operated by a central purchasing body may be used by other contracting entities, this shall be mentioned in the call for competition setting up the system.*

*In relation to subparagraphs 1 and 2, Member States may provide that certain procurements shall be made by having recourse to central purchasing bodies or to one or more specific central purchasing bodies.*

- 2.
3. *A contracting entity fulfills its obligations pursuant to this Directive when it purchases supplies or services from a central purchasing body offering the centralised purchasing activity referred to in point a of Article 2(16).*

*Furthermore, a contracting entity also fulfils its obligations pursuant to this Directive where it purchases works, supplies and services by using contracts awarded by the central purchasing body, by using dynamic purchasing systems operated by the central purchasing body or by using a framework agreement concluded by the central purchasing body offering the centralised purchasing activity referred to in point b of Article 2(16).*

*However, the contracting entity concerned shall be responsible for fulfilling the obligations pursuant to this Directive in respect of the parts it conducts itself, such as:*

*(a) awarding a contract under a dynamic purchasing system, which is operated by a central purchasing body; or*

*(b) conducting a reopening of competition under a framework agreement that has been concluded by a central purchasing body.*

4. *All procurement procedures conducted by a central purchasing body shall be performed using electronic means of communication, in accordance with the requirements set out in Article 33.*

5. Contracting entities may, without applying the procedures provided for in this Directive, award a service contract for the provision of centralised purchasing activities to a central purchasing body. Such service contracts may also include the provision of ancillary purchasing activities.

## Article 51

### Occasional joint procurement

1. Member States may provide that two or more contracting entities may agree to perform certain specific procurements jointly.

2. Where the conduct of a procurement procedure in its entirety is carried out jointly in the name and on behalf of all the contracting entities concerned, they shall be jointly responsible for fulfilling their obligations pursuant to this Directive. This applies also in cases where one contracting entity alone manages the procurement procedure, acting on its own behalf and on the behalf of the other contracting entities concerned.

Where the conduct of a procurement procedure is not in its entirety carried out in the name and on behalf of the contracting entities concerned, they shall be jointly responsible only for those parts carried out jointly. Each contracting entity shall have sole responsibility for fulfilling its obligations pursuant to this Directive in respect of the parts it conducts in its own name and on its own behalf.

## Article 52

### Procurement implicating contracting entities from different Member States

1. Without prejudice to Title I, Chapter III, Section 2, Subsection 2: Special relations, contracting entities from different Member States may act jointly in the award of contracts by using one of the means provided in this Article.

Contracting entities shall not use the means provided in this Article for the purpose of avoiding the application of mandatory public law provisions in conformity with Union law to which they are subject in the Member State where they are located.

2. A Member State shall not prohibit its contracting authorities from using centralised purchasing activities offered by central purchasing bodies established in another Member State.

In respect of centralised purchasing activities offered by a central purchasing body established in another Member State than the contracting entity, Member States may, however, choose to specify that their contracting entities may only use the centralised purchasing activities as defined in either point a or in point b of Article 2(16).

- 2a. *The provision of the centralised purchasing activities as defined in point a and b of Article 2(16) by a central purchasing body located in another Member State shall be conducted in accordance with the national provisions of the Member State where the central purchasing body is located.*

*The national provisions of the Member State where the central purchasing body is located shall also apply to the following:*

- (a) the award of a contract under a dynamic purchasing system;*
- (b) the conduct of a reopening of competition under a framework agreement.*

3. *Several contracting entities from different Member States may jointly award a contract, conclude a framework agreement or operate a dynamic purchasing system. They may also award contracts based on the framework agreement or on the dynamic purchasing system. Unless the necessary provisions have been regulated by an international agreement concluded between the Member States concerned, the participating contracting entities shall conclude an agreement that determines:*

- (a) the responsibilities of the parties and the ensuing applicable national provisions;*
- (b) the internal organisation of the procurement procedure, including the management of the procedure , the distribution of the works, supplies or services to be procured, and the conclusion of contracts.*



*A participating contracting entity fulfils its obligations pursuant to this Directive when it purchases works, supplies or services from a contracting entity which is responsible for the procurement procedure. When determining the responsibilities and the applicable national law in accordance with point (a), contracting entities may choose to allocate responsibilities to one or more of the participating contracting authorities and the ensuing applicable national provisions of any Member State in which at least one of the participating entities is located. The allocation of responsibilities and the ensuing applicable national law shall be mentioned in the procurement documents for jointly awarded contracts.*

4. *Where several contracting entities from different Member States have set up a joint legal entity, including European Groupings of territorial cooperation under Regulation (EC) No<sup>o</sup> 1082/2006 of the European Parliament and of the Council<sup>37</sup> or other entities established under Union law, the participating contracting entities shall, by a decision of the competent body of the joint legal entity, agree on the applicable national procurement rules of one of the following Member States:*

- (a) the national provisions of the Member State where the joint legal entity has its registered office;*
- (b) the national provisions of the Member State where the joint legal entity is carrying out its activities.*

*The agreement referred to in the first subparagraph may either apply for an undetermined period, when fixed in the constitutive act of the joint legal entity, or may be limited to a certain period of time, certain types of contracts or to one or more individual contract awards.*

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<sup>37</sup> OJ L 210 of 31.7.2006, p. 19

- 6.
- 7.
8. Decisions on the award of contracts in cross-border public procurement shall be subject to the ordinary review mechanisms available under the national law which applies to the award procedure pursuant to paragraphs 2a, 3 or 4.

### CHAPTER III

#### *Conduct of the procedure*

#### SECTION 1 PREPARATION

##### *Article 53*

##### *Preliminary market consultations*

*Before launching a procurement procedure, contracting entities may conduct market consultations with a view to the preparation of the procurement and to inform economic operators of their procurement plans and requirements.*

*For this purpose, contracting entities may for example seek or accept advice from independent experts or authorities or from market participants which may be used in the planning and conduct of the procurement procedure, provided that such advice does not have the effect of distorting competition and does not result in a violation of the principles of non-discrimination and transparency.*

## *Article 53a*

### *Prior involvement of candidates or tenderers*

*Where a candidate or tenderer or an undertaking related to a candidate or tenderer has advised the contracting entity, whether in the context of Article 53 or not, or has otherwise been involved in the preparation of the procurement procedure, the contracting entity shall take appropriate measures to ensure that competition is not distorted by the participation of that candidate or tenderer.*

*Such measures shall include the communication to the other candidates and tenderers of relevant information exchanged in the context of or resulting from the involvement of the candidate or tenderer in the preparation of the procurement procedure and the fixing of adequate time limits for the receipt of tenders. The candidate or tenderer concerned shall only be excluded from the procedure where there are no other means to ensure compliance with the duty to observe the principle of equal treatment.*

*Prior to any such exclusion, candidates or tenderers shall be given the opportunity to prove that their involvement in preparing the procurement procedure is not capable of distorting competition. The measures taken shall be documented in the individual report required by to Article 94.*

## *Article 54*

### *Technical specifications*

- 1. The technical specifications as defined in point 1 of Annex VIII shall be set out in the procurement documents. They shall define the characteristics required of a works, service or supply.*

*These characteristics may also refer to the specific process or method of production or provision of the requested works, supplies or services or to a specific process for another stage of its life cycle even where such factors do not form part of their material substance.*

*For all procurement, which is intended for use by natural persons, whether general public or staff of the contracting entity, those technical specifications shall, except in duly justified cases, be drawn up so as to take into account accessibility criteria for persons with disabilities or design for all users.*

*Where mandatory accessibility standards are adopted by a legislative act of the Union, technical specifications shall, as far as accessibility criteria for persons with disabilities or design for all users are concerned, be defined by reference thereto.*

2. *Technical specifications shall afford equal access of economic operators to the procurement procedure and shall not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.*
3. *Without prejudice to mandatory national technical rules, to the extent that they are compatible with Union law, the technical specifications shall be formulated in one of the following ways:*
  - (a) *in terms of performance or functional requirements, including environmental characteristics, provided that the parameters are sufficiently precise to allow tenderers to determine the subject-matter of the contract and to allow contracting entities to award the contract;*
  - (b) *by reference to technical specifications and, in order of preference, to national standards transposing European standards, European Technical Assessments, common technical specifications, international standards, other technical reference systems established by the European standardisation bodies or when any of those do not exist national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the supplies; each reference shall be accompanied by the words "or equivalent";*

- (c) *in terms of performance or functional requirements referred to in point (a), with reference to the technical specifications referred to in point (b) as a means of presuming conformity with such performance or functional requirements;*
- (d) *by reference to the technical specifications referred to in point (b) for certain characteristics, and by reference to the performance or functional requirements referred to in point (a) for other characteristics.*

- 4. *Unless justified by the subject-matter of the contract, technical specifications shall not refer to a specific make or source, or to a particular process which characterises the products or services provided by a specific economic operator, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products. Such reference shall be permitted, on an exceptional basis, where a sufficiently precise and intelligible description of the subject-matter of the contract pursuant to paragraph 3 is not possible. Such reference shall be accompanied by the words "or equivalent".*
- 5. *Where a contracting entity uses the option of referring to the technical specifications referred to in point (b) of paragraph 3, it shall not reject a tender on the ground that the works, supplies or services tendered for do not comply with the technical specifications to which it has referred, once the tenderer proves in its tender, by any appropriate means, including the means of proof referred to in Article 56, that the solutions proposed satisfy in an equivalent manner the requirements defined by the technical specifications.*
- 6. *Where a contracting entity uses the option provided for in point (a) of paragraph 3 to formulate technical specifications in terms of performance or functional requirements, it shall not reject a tender for supplies, services or works which comply with a national standard transposing a European standard, with a European technical approval, a common technical specification, an international standard, or a technical reference system established by a European standardisation body, where those specifications address the performance or functional requirements which it has laid down.*

*In its tender, the tenderer shall prove by any appropriate means including those referred to in Article 56, that the supplies, service or work in compliance with the standard meets the performance or functional requirements of the contracting entity.*

*Article 55*

*Labels*

Directive 2004/17/EC, Article 34(6)

1. Where contracting entities intend to purchase works, supplies or services with specific environmental, social or other characteristics they may, in the technical specifications, the award criteria or the contract performance clauses, require and refer to a specific label as means of proof that the works, supplies or services correspond to such requirements or criteria, provided that all of the following conditions are fulfilled:
  - (a) the requirements to be met in order to obtain the label only concern criteria which are linked to the subject-matter of the contract and are appropriate to define the characteristics of the works, supplies or services that are the subject-matter of the contract;
  - (b) the requirements to be met in order to obtain the label are on objectively verifiable and non-discriminatory criteria;
  - (c) the labels are established in an open and transparent procedure in which all relevant stakeholders, including government bodies, consumers, manufacturers, distributors and non-governmental organisations may participate;
  - (d) the labels are accessible to all interested parties;

- (e) the requirements to be met in order to obtain the label are set by a third party which is independent from the economic operator applying for the label.

Contracting entities requiring a specific label shall accept all equivalent labels that use the requirements of the specific label indicated by the contracting entities. Contracting entities shall accept other appropriate means of proving such requirements, which may include a technical dossier of the manufacturer where the economic operator concerned has no possibility of obtaining the label within the relevant time limits, provided that the lack of access is not attributable to the economic operator concerned.

- 2. Where a label fulfils the conditions of provided in points (b), (c), (d) and (e) of paragraph 1 but also sets out requirements not linked to the subject-matter of the contract, contracting entities shall not require the label as such but may define the technical specification by reference to those of the detailed specifications of that label, or, if necessary, parts thereof, that are linked to the subject-matter of the contract and are appropriate to define characteristics of this subject-matter.

#### Article 56

Test reports, certification and other means of proof  
Directive 2004/17/EC, Article 34(4),(5),(6)&(7)

- 1. Contracting entities may require that economic operators provide a test report from a conformity assessment body or a certificate issued by such a body as means of proof of conformity with requirements or criteria set out in the technical specifications, the award criteria or the contract performance clauses.

Where contracting entities require the submission of certificates drawn up by a specific conformity assessment body, certificates from equivalent other conformity assessment bodies shall also be accepted by the contracting entities.

*For the purpose of this paragraph, a conformity assessment body shall be a body that performs conformity assessment activities including calibration, testing, certification and inspection accredited in accordance with Regulation (EC) No 765/2008 of the European Parliament and of the Council .*

2. *Contracting entities shall accept other appropriate means of proof than those referred to in paragraph 1, such as a technical dossier of the manufacturer where the economic operator concerned has no access to such certificates or test reports referred to in paragraph 1, or no possibility of obtaining them within the relevant time limits, provided that the lack of access is not attributable to the economic operator concerned.*
3. *Member States shall make available to other Member States, upon request, any information related to the evidence and documents submitted in accordance with Article 54(6), Article 55 and paragraphs 1 and 2 of this Article . The competent authorities of the Member State of establishment of the economic operator shall provide this information in accordance with Article 96.*

#### *Article 57*

#### *Communication of technical specifications*

#### *Directive 2004/17/EC, Article 35*

1. On request from economic operators interested in obtaining a contract, contracting entities shall make available the technical specifications regularly referred to in their supply, works or service contracts, or the technical specifications which they intend to apply to contracts for which the call for competition is a periodic indicative notice. Those specifications shall be made available by electronic means through unrestricted and full direct access free of charge.



However, the technical specifications shall be transmitted by other means than electronically where unrestricted and full direct access free of charge by electronic means to certain procurement documents cannot be offered for one of the reasons set out in the second subparagraph of Article 33(1) or where unrestricted and full direct access free of charge by electronic means to certain procurement documents cannot be offered because contracting entities intend to apply Article 32(1).

2. Where the technical specifications are based on documents available by electronic means through unrestricted and full direct access free of charge to interested economic operators, the inclusion of a reference to those documents shall be sufficient.

#### *Article 58*

##### *Variants*

##### *Directive 2004/17/EC: Article 36*

1. Contracting entities may take account of variants which are submitted by a tenderer and meet the minimum requirements specified by the contracting entities.

Contracting entities shall indicate in the procurement documents whether or not they authorise or require variants and, if so, the minimum requirements to be met by the variants and any specific requirements for their presentation, in particular whether variants may be submitted only where a tender, which is not a variant, has also been submitted. Where variants are authorised or required, they shall also ensure that the chosen award criteria can be applied to variants meeting those minimum requirements as well as to conforming tenders which are not variants.

2. In procedures for awarding supply or service contracts, contracting entities that have authorised variants shall not reject a variant on the sole ground that it would, where successful, lead either to a service contract rather than a supply contract or to a supply contract rather than a service contract.

## Article 59

### Division of contracts into lots

1. Contracting entities may decide to award a contract in the form of separate lots and may determine the size and subject-matter of such lots. Article 13(7) applies.

Contracting entities shall indicate, in the contract notice, in the invitation to confirm interest, or, where the means of calling for competition is a notice on the existence of a qualification system, in the invitation to tender or to negotiate, whether tenders may be submitted for one, for several or for all of the lots.

2. Contracting entities may, even where tenders may be submitted for several or all lots, limit the number of lots that may be awarded to one tenderer provided that the maximum number of lots per tenderer is stated in the contract notice or in the invitation to confirm interest, to tender or to negotiate. Contracting entities shall indicate in the procurement documents the objective and non-discriminatory criteria or rules they intend to apply for determining which lots will be awarded where the application of the award criteria would result in one tenderer being awarded more lots than the maximum number.
3. Member States may provide that, where more than one lot may be awarded to the same tenderer, contracting entities may award a contract combining several or all lots where they have specified in the contract notice or in the invitation to confirm interest, to tender or to negotiate that they reserve the possibility to do so and indicated the lots or groups of lots that may be combined.

For this purpose contracting entities shall first determine which tenders best fulfil the award criteria set out pursuant to Article 76 for each individual lot. Where a comparative assessment establishes that the tenders submitted by a particular tenderer for a specific combination of lots would, taken as whole, better fulfil the award criteria set out pursuant to Article 76 with regard to these lots, the contracting entity may award a contract combining

the lots in question to that tenderer. Contracting entities shall specify the methods and criteria they intend to use for such a comparative assessment in the procurement documents. Such methods and criteria shall be transparent, objective and non-discriminatory.

4. Member States may render it obligatory to award contracts in the form of separate lots under conditions to be specified in accordance with their national law and having regard for Union law. The second subparagraph of paragraph 1 and, where appropriate, paragraph 3 of this Article shall apply.

#### Article 60

##### Setting time limits

Directive 2004/17/EC: Article 45(1) and (9)

1. When fixing the time limits for requests to participate and the receipt of tenders, contracting entities shall take particular account of the complexity of the contract and the time required for drawing up tenders, without prejudice to the minimum time limits set out in Articles 40 to 43.
2. Where tenders can be made only after a visit to the site or after on-the-spot inspection of the documents supporting the procurement documents, the time limits for the receipt of tenders, which shall be longer than the minimum time limits set out in Articles 40 to 43, shall be fixed, so that all economic operators concerned may be aware of all the information needed to produce tenders.

3. Where, for whatever reason, additional information, although requested in good time, is not supplied within the time limits set out in Article 67(2) or where significant changes are made to the procurement documents, the contracting entity shall extend the time limits for the receipt of tenders so that all economic operators concerned may be aware of all the information needed to produce tenders. The length of the extension shall be proportionate to the importance of the information or change.

## Section 2

### Publication and transparency

#### Article 61

##### Periodic indicative notices

Directive 2004/17/EC: Article 41(1), 42(3), 44(1)

1. Contracting entities may make known their intentions of planned procurement through the publication of a periodic indicative notice . Those notices shall contain the information set out in part A, section I of Annex VI. They shall be published either by the Commission or by the contracting entities on their buyer profiles in accordance with point 2(b) of Annex IX. Where the notice is published by the contracting entities on their buyer profile, they shall send a notice of the publication of the periodic indicative notice on a buyer profile in accordance with point 3 of Annex IX. Those notices shall contain the information set out in Annex VI Part B.
2. When a call for competition is made by means of a periodic indicative notice in respect of restricted procedures and negotiated procedures with prior call for competition, the notice shall meet all the following requirements:
  - (a) it refers specifically to the supplies, works or services that will be the subject of the contract to be awarded;

- (b) it indicates that the contract will be awarded by restricted or negotiated procedure without further publication of a call for competition and invite interested economic operators to express their interest in writing;
- (c) it contains, in addition to the information set out in part A, section I of Annex VI, the information set out in part A, section II of Annex VI;
- (d) it has been for publication between 35 days and 12 months prior to the date on which the invitation to confirm interest is sent.

*Such notices shall not be published on a buyer profile.; however, the additional publication at national level pursuant to Article 66, if any, may be made on a buyer profile.*

*The period covered by the periodic indicative notice shall at the most be a 12-month period from the date the notice is transmitted for publication. However, in the case of contracts for social and other specific services, the periodic indicative notice referred to in point b of Article 85(1) may cover a period which is longer than 12 months.*

#### *Article 62*

##### *Notices on the existence of a qualification system*

1. Where contracting entities choose to set up a qualification system in accordance with Article 71, the system shall be the subject of a notice as referred to in Annex X, indicating the purpose of the qualification system and how to have access to the rules concerning its operation.
2. Contracting entities shall indicate the period of validity of the qualification system in the notice on the existence of the system. They shall notify the Commission of any change in period of validity, using the following standard forms:

- (a) where the period of validity is changed without terminating the system, the form for notices on the existence of qualification systems;
- (b) where the system is terminated, a contract award notice referred to in Article 64.

### *Article 63*

#### *Contract notices*

*Directive 2004/17/EC: Articles 42(1)(c), 44(1)*

Contract notices may be used as a means of calling for competition in respect of all procedures. They shall contain the information set out in the relevant part of Annex XI and shall be published in accordance with Article 65.

### *Article 64*

#### *Contract award notices*

*Directive 2004/17/EC: Article 43, 44(1)*

1. *Within two months of the conclusion of a contract or of a framework agreement following the decision to award or conclude it, contracting entities shall send a contract award notice on the results of the procurement procedure.*

*Such notice shall contain the information set out in Annex XII and shall be published in accordance with Article 65.*

2. *Where the call for competition for the contract concerned has been made in the form of a periodic indicative notice and the contracting entity has decided that it will not award further contracts during the period covered by the periodic indicative notice, the contract award notice shall contain a specific indication to that effect.*

In the case of framework agreements concluded in accordance with Article 45, contracting entities shall not be bound to send a notice of the results of the procurement procedure for

each contract based on that agreement. Member States may provide that contracting entities shall group notices of the results of the procurement procedure for contracts based on the framework agreement on a quarterly basis. In that case, contracting entities shall send the grouped notices within two months of the end of each quarter.

*Contracting entities shall send a contract award notice within two months after the award of each contract based on a dynamic purchasing system. They may, however, group such notices on a quarterly basis. In that case, they shall send the grouped notices within two months of the end of each quarter.*

3. The information provided in accordance with Annex XII and intended for publication shall be published in accordance with Annex IX. Certain information on the contract award or the conclusion of the framework agreement may be withheld from publication where its release would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of a particular economic operator, public or private, including the interests of the economic operator to whom the contract has been awarded, or might prejudice fair competition between economic operators.

In the case of contracts for research-and-development services ("R&D services"), the information concerning the nature and quantity of the services may be respectively limited to:

- (a) *the indication "R&D services" where the contract has been awarded by a negotiated procedure without a call for competition in accordance with Article 44(b);*
- (b) *at least as detailed information as was indicated in the notice that was used as a means of calling for competition.*

4. Information provided in accordance with Annex XII and marked as not being intended for publication shall be published only in simplified form and in accordance with Annex IX for statistical purposes.

*Article 65*

*Form and manner of publication of notices*

*Directive 2004/17/EC: Articles 44, 70(1)(b)*

1. Notices referred to in Articles 61 to 64 shall include the information set out in Annexes XI, X, VI A, VI B and XII and in the format of standard forms, including standard forms for corrigenda.

*The Commission shall establish those standard forms by means of implementing acts. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 100.*

2. Notices referred to in Articles 61 to 64 shall be drawn up, transmitted by electronic means to the Commission and published in accordance with Annex IX. Notices shall be published not later than five days after they are sent. The costs of publication of the notices by the Commission shall be borne by the Union.
3. *Notices referred to in Articles 61 to 64 shall be published in full in the official language(s) of the Union as chosen by the contracting entity. That language version or those language versions shall constitute the sole authentic text(s). A summary of the important elements of each notice shall be published in the other official languages.*
4. The Commission shall ensure that the full text and the summary of periodic indicative notices referred to in Article 61(2), calls for competition setting up a dynamic purchasing system as referred to in Article 46(3)(a) and notices on the existence of a qualification system used as a means of calling for competition in accordance with Article 39(2)(b) continue to be published:



- (a) *in the case of periodic indicative notices for 12 months or until receipt of a contract award notice as provided for in Article 64 (2) indicating that no further contracts will be awarded during the 12 month period covered by the call for competition. However, in the case of contracts for social and other specific services, the periodic indicative notice referred to in point b of Article 85(1) shall continue to be published until the end of its originally indicated period of validity or until receipt of a contract award notice as provided for in Article 64 indicating that no further contracts will be awarded during the period covered by the call for competition;*
- (b) *in the case of calls for competition setting up a dynamic purchasing system for the period of validity of the dynamic purchasing system;*
- (c) *in the case of notices on the existence of a qualification system for its period of validity.*

5. Contracting entities must be able to supply proof of the dates on which notices are dispatched.

The Commission shall give the contracting entity confirmation of the receipt of the notice and of the publication of the information sent, indicating the date of that publication. Such confirmation shall constitute proof of publication.

6. Contracting entities may publish notices for works, supply or service contracts that are not subject to the publication requirements laid down in this Directive provided that those notices are sent to the Commission by electronic means in accordance with the format and procedures for transmission indicated in Annex IX.

#### *Article 66*

##### *Publication at national level*

*Directive 2004/17/EC: Article 44(5)*

1. *Notices referred to in Articles 61 to 64 and the information contained therein shall not be published at national level before the date on which they are sent to the Commission.*
2. *Notices published at national level shall not contain information other than that contained in the notices dispatched to the Commission or published on a buyer profile, but shall indicate the date of dispatch of the notice to the Commission or its publication on the buyer profile.*
3. *Periodic indicative notices shall not be published on a buyer profile before the dispatch to the Commission of the notice of their publication in that form; they shall indicate the date of that dispatch.*

#### *Article 67*

##### *Electronic availability of procurement documents*

*Directive 2004/17/EC: Art. 45(6), 46(2)*

1. *Contracting entities shall by electronic means offer unrestricted and full direct access free of charge the procurement documents from the date of publication of the notice in accordance with Article 65 or the date on which the invitation to confirm interest is sent. Where the means of calling for competition is a notice on the existence of a qualification system, such access shall be offered as soon as possible and at the latest when the invitation to tender or to negotiate is sent. The text of the notice or of those invitations shall specify the internet address at which this documentation is accessible.*

*Where unrestricted and full direct access free of charge by electronic means to certain procurement documents cannot be offered for one of the reasons set out in the second subparagraph of Article 33(1), contracting entities may indicate in the notice or the invitation to confirm interest that the procurement documents concerned will be transmitted by other means than electronically in accordance with paragraph 2 of this Article. In such*

*case, the time limit for the submission of tenders shall be prolonged by five days, except in the cases of duly substantiated urgency referred to in Article 40(3) and where the time limit is set by mutual agreement pursuant to the 2<sup>nd</sup> subparagraph of Article 41(2) or the 2<sup>nd</sup> subparagraph of Article 42(2).*

*Where unrestricted and full direct access free of charge by electronic means to certain procurement documents cannot be offered because contracting entities intend to apply Article 32(1), they shall indicate in the notice or the invitation to confirm interest or or, where the means of calling for competition is a notice on the existence of a qualification system, in the procurement documents which measures aimed at protecting the confidential nature of the information they require and how access can be obtained to the documents concerned. In such case, the time limit for the submission of tenders shall be prolonged by five days, except in the cases of duly substantiated urgency referred to in Article 40(3) and where the time limit is set by mutual agreement pursuant to the 2<sup>nd</sup> subparagraph of Article 41(2) or the 2<sup>nd</sup> subparagraph of Article 42(2).*

2. *Provided that it has been requested in good time, the contracting entities shall supply additional information relating to the specifications and any supporting documents not later than six days before the time limit fixed for the receipt of tenders. In the event of an accelerated open procedure as referred to in Article 40(3), that period shall be four days.*

#### *Article 68*

*Invitations to submit a tender or to negotiate; invitations to confirm interest*

Directive 2004/17/EC: Article 47

1. In restricted procedures, *competitive dialogues* innovation partnerships and negotiated procedures with prior call for competition, contracting entities shall simultaneously and in writing invite the selected candidates to submit their tenders, *to take part in the dialogue* or to negotiate.

*Where a periodic indicative notice is used as a call for competition pursuant to point (a) of Article 39(2), contracting entities shall simultaneously and in writing invite the economic operators which have expressed their interest to confirm their continuing interest.*

2. *The invitations referred to in paragraph 1 shall include a reference to the electronic address on which the procurement documents have been made directly available by electronic means. The invitations shall be accompanied by the procurement documents, where these documents have not been the subject of unrestricted and full direct access, free of charge, for the reasons set out in the second and third subparagraph of Article 67(1) and have not already been made otherwise available. In addition, the invitations referred to in paragraph 1 shall include the information set out in Annex XIII.*

#### *Article 69*

*Informing applicants for qualification, candidates and tenderers*

*Directive 2004/17/EC: Article 49*

1. Contracting entities shall as soon as possible inform each candidate and tenderer of decisions reached concerning the conclusion of a framework agreement, the award of the contract, or admission to a dynamic purchasing system, including the grounds for any decision not to conclude a framework agreement or award a contract for which there has been a call for competition or to recommence the procedure, or not to implement a dynamic purchasing system.
2. On request from the party concerned, contracting entities shall, as soon as possible, and in any case within 15 days from receipt of a written request, inform:
  - (a) any unsuccessful candidate of the reasons for the rejection of its request to participate;

- (b) any unsuccessful tenderer of the reasons for the rejection of its tender, including, for the cases referred to in Article 54(5) and (6), the reasons for their decision of non-equivalence or their decision that the works, supplies or services do not meet the performance or functional requirements;
  - (c) any tenderer that has 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 tenderer that has made an admissible tender of the conduct and progress of negotiations and dialogue with tenderers.
3. Contracting entities may decide that certain information on the contract award or the conclusion of the framework agreement or the admission to a dynamic purchasing system, referred to in *paragraphs 1 and 2*, is to be withheld where its release would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of a particular economic operator, public or private, including the interests of the economic operator to whom the contract has been awarded, or might prejudice fair competition between economic operators.
4. Contracting entities which establish and operate a system of qualification shall inform applicants of their decision as to qualification within a period of six months.

If the decision will take longer than four months from the presentation of an application, the contracting entity shall inform the applicant, within two months of the application, of the reasons justifying the longer period and of the date by which his application will be accepted or refused.

5. Applicants whose qualification is refused shall be informed of this decision and the reasons for refusal as soon as possible and under no circumstances more than 15 days later than the date of the decision. The reasons shall be based on the criteria for qualification referred to in Article 71(2).
6. Contracting entities which establish and operate a system of qualification may bring the qualification of an economic operator to an end only for reasons based on the criteria for qualification referred to in Article 71(2). Any intention to bring qualification to an end shall be notified in writing to the economic operator beforehand, at least 15 days before the date on which qualification is due to end, together with the reason or reasons justifying the proposed action.

### SECTION 3

#### CHOICE OF PARTICIPANTS AND AWARD OF CONTRACTS

##### *Article 70*

##### *General principles*

##### *Directive 2004/17/EC: Art. 51(1) and (2)*

1. For the purpose of selecting participants in their procurement procedures, the following cumulative rules apply:
  - (a) contracting entities having provided rules and criteria for the exclusion of tenderers or candidates in accordance with Article 72(1) or Article 74(1) shall exclude economic operators identified in accordance with such rules and fulfilling such criteria;
  - (b) they shall select tenderers and candidates in accordance with the objective rules and criteria laid down pursuant to Articles 72 and 74;

- (c) in restricted procedures, in negotiated procedures with a call for competition, *in competitive dialogues* and in innovation partnerships, they shall where appropriate reduce in accordance with Article 72(2) the number of candidates selected pursuant to points (a) and (b) of this paragraph.
2. When a call for competition is made by means of a notice on the existence of a qualification system and for the purpose of selecting participants in procurement procedures for the specific contracts which are the subject of the call for competition, contracting entities shall:
- (a) qualify economic operators in accordance with Article 71;
  - (b) apply to such qualified economic operators those provisions of paragraph 1 that are relevant to restricted or negotiated procedures, *to competitive dialogues* or to innovation partnerships.
3. When selecting participants for a restricted or negotiated procedure, a competitive dialogue or an innovation partnership, in reaching their decision as to qualification or when the criteria and rules are being updated, contracting entities shall not:
- (a) impose administrative, technical or financial conditions on certain economic operators which would not be imposed on others;
  - (b) require tests or evidence which would duplicate objective evidence already available.
- 3a. *Where information or documentation to be submitted by economic operators is or appears to be incomplete or erroneous or where specific documents are missing, contracting entities may, unless otherwise provided by the applicable national law implementing this Directive; request the economic operators concerned to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit, provided that such requests are made in full compliance with the principles of equal treatment and transparency.*

4. Contracting entities shall verify that the tenders submitted by the selected tenderers comply with the rules and requirements applicable to tenders and award the contract on the basis of the criteria laid down in Articles 76 and 79, taking into account Article 58.
5. *Contracting entities may decide not to award a contract to the tenderer submitting the best tender where they have established that the tender does not comply with applicable obligations established by Union law or national law compatible with it in the field of social and labour law or environmental law or of the international social and environmental law provisions listed in Annex XIV. For the purpose of this paragraph, 'best tender' means any tender which is better than that submitted by the tenderer to whom the contract is awarded.*
6. In open procedures, contracting entities may decide to examine tenders before verifying the suitability of tenderers, provided that the relevant provisions of Articles 70 to 79 are observed, including the rule that the contract shall not be awarded to a tenderer who should have been excluded pursuant to Article 74 or who does not meet the selection criteria set out by the contracting entity in accordance with Article 72(1) and Article 74.

*Member States may exclude the use of the procedure in the first subparagraph for or restrict it to certain types of procurement or specific circumstances.*

7. *The Commission shall be empowered to adopt delegated acts in accordance with Article 98 to amend the list in Annex XIV, where necessary, to add new international agreements that have been ratified by all Member States or where the existing international agreements referred to are no longer ratified by all Member States or they are otherwise changed, for instance in respect of their scope, content or denomination.*



SUBSECTION 1  
QUALIFICATION AND QUALITATIVE SELECTION

*Article 71*  
*Qualification systems*

1. Contracting entities which so wish may establish and operate a system of qualification of economic operators.

Contracting entities which establish or operate a system of qualification shall ensure that economic operators are at all times able to request qualification.

2. The system under paragraph 1 may involve different qualification stages.

Contracting entities shall establish objective rules and criteria for the exclusion and selection of economic operators requesting qualification and objective criteria and rules for the operation of the qualification system, covering matters such as inscription in the system, periodic updating of the qualifications, if any, and the duration of the system.

Where those criteria and rules include technical specifications, Articles 54 to 56 shall apply. The criteria and rules may be updated as required.

3. The criteria and rules referred to in paragraph 2 shall be made available to economic operators on request. Those updated criteria and rules shall be communicated to interested economic operators.

Where a contracting entity considers that the qualification system of certain other entities or bodies meets its requirements, it shall communicate to interested economic operators the names of such other entities or bodies.

4. A written record of qualified economic operators shall be kept; it may be divided into categories according to the type of contract for which the qualification is valid.
5. When a call for competition is made by means of a notice on the existence of a qualification system, specific contracts for the works, supplies or services covered by the qualification system shall be awarded by restricted procedures or negotiated procedures, in which all tenderers and participants are selected among the candidates already qualified in accordance with such a system.
6. Any charges that are billed in connection with requests for qualification or with updating or conserving an already obtained qualification pursuant to the system shall be proportionate to the generated costs.

## *Article 72*

### *Criteria for qualitative selection*

1. Contracting entities may establish objective rules and criteria for the exclusion and selection of tenderers or candidates; those rules and criteria shall be available to interested economic operators.
2. Where contracting entities need to ensure an appropriate balance between the particular characteristics of the procurement procedure and the resources required to conduct it, they may, in restricted or negotiated procedures, *in competitive dialogues* or in innovation partnerships, establish objective rules and criteria that reflect this need and enable the contracting entity to reduce the number of candidates that will be invited to tender or to negotiate. The number of candidates selected shall, however, take account of the need to ensure adequate competition.

## Article 73

### Reliance on the capacities of other entities

Directive 2004/17/EC: Art. 53(4), 53(5), 54(5), 54(6)

1. *Where the objective rules and criteria for the exclusion and selection of economic operators requesting qualification in a qualification system include requirements relating to the economic and financial capacity of the economic operator, or to its technical and professional abilities, the economic operator may where necessary rely on the capacity of other entities, whatever the legal nature of the link between itself and those entities. With regard to criteria relating to the educational and professional qualifications of the service provider or contractor or those of the undertaking's managerial staff or to the relevant professional experience, economic operators may however only rely on the capacities of other entities where the latter will perform the works or services for which these capacities are required. Where an economic operator wants to rely on the capacities of other entities, it shall prove to the contracting entity that those resources will be available to it throughout the period of the validity of the qualification system, for example by producing a commitment by those entities to that effect.*

*Where, pursuant to Article 74, contracting entities have referred to exclusion or selection criteria provided for under Directive 2004/18/EC, contracting entities shall verify in accordance with Article 74(3) whether the other entities on whose capacity the economic operator intends to rely fulfil the relevant selection criteria or whether there are grounds for exclusion, to which the contracting entities have referred, pursuant to Article 55 of Directive 2004/18/EC. An entity which does not meet a relevant selection criterion, or in respect of which there are grounds for exclusion may be excluded.*

*Where an economic operator relies on the capacities of other entities with regard to criteria relating to economic and financial standing, contracting entities may require that the economic operator and those entities be jointly liable for the execution of the contract.*

*Under the same conditions, a group of economic operators as referred to in Article 30 may rely on the capacity of participants in the group or of other entities.*

2. *Where the objective rules and criteria for the exclusion and selection of candidates and tenderers in open, restricted or negotiated procedures, in competitive dialogues or in innovation partnerships include requirements relating to the economic and financial capacity of the economic operator, or to its technical and professional abilities the economic operator may where necessary and for a particular contract rely on the capacity of other entities, whatever the legal nature of the link between itself and those entities. With regard to criteria relating to the educational and professional qualifications of the service provider or contractor or those of the undertaking's managerial staff or to the relevant professional experience, economic operators may however only rely on the capacities of other entities where the latter will perform the works or services for which these capacities are required. Where an economic operator wants to rely on the capacities of other entities, it shall prove to the contracting entity that the necessary resources will be available to it, for example by delivering a commitment by those entities to that effect.*

*Where, pursuant to Article 74, contracting entities have referred to exclusion or selection criteria provided for under Directive 2004/18/EC, contracting entities shall verify in accordance with Article 74(3) whether the other entities on whose capacity the economic operator intends to rely fulfil the relevant selection criteria and the exclusion grounds.*

*Where an economic operator relies on the capacities of other entities with regard to criteria relating to economic and financial standing, contracting entities may require that the economic operator and those entities be jointly liable for the execution of the contract.*

*Under the same conditions, a group of economic operators as referred to in Article 30 may rely on the capacities of participants in the group or of other entities.*

3. *Member States may provide that in the case of works contracts, service contracts and siting or installation operations in the context of a supply contract, contracting entities may require that certain critical tasks be performed directly by the tenderer itself or, where the tender is submitted by a group of economic operators as referred to in Article 30, a participant in that group.*

#### *Article 74*

##### *Use of exclusion grounds and selection criteria provided for under Directive 2004/18*

1. The objective rules and criteria for the exclusion and selection of economic operators requesting qualification in a qualification system and the objective rules and criteria for the exclusion and selection of candidates and tenderers in open, restricted or negotiated procedures, *in competitive dialogues* or in innovation partnerships may include the exclusion grounds listed in Article 55 of Directive 2004/18 on the terms and conditions set out therein.

Where the contracting entity is a contracting authority, those criteria and rules shall include the exclusion grounds listed in Article 55(1) and (2) of Directive 2004/18 on the terms and conditions set out in that Article.

*If so required by Member States, those criteria and rules shall, in addition, include the exclusion grounds listed in Article 55(3) of Directive 2004/18/EC on the terms and conditions set out in that Article.*

2. The criteria and rules referred to in paragraph 1 may include the selection criteria set out in Article 56 of Directive 2004/18/EC on the terms and conditions set out therein, notably as regards the limits to requirements concerning yearly turnovers, as provided for under the *third* subparagraph of paragraph 3 of that Article.
3. *For the purpose of applying paragraphs 1 and 2 of this Article, Articles 56a to 58 of Directive 2004/18/EC shall apply.*

Article 75

*Quality assurance standards and environmental management standards*

*Directive 2004/17/EC: Art. 52(2) and (3)*

1. *Contracting entities shall, where they require the production of certificates drawn up by independent bodies attesting that the economic operator complies with certain quality assurance standards, including on accessibility for disabled persons, refer to quality assurance systems based on the relevant European standards series certified by bodies conforming to the European standards series concerning certification.*

*Contracting entities shall recognise equivalent certificates from bodies established in other Member States. They shall also accept other evidence of equivalent quality assurance measures where economic operator concerned has no possibility of obtaining such certificates within the relevant time limits for reasons that are not attributable to that economic operator.*

2. *Where contracting entities require the production of certificates drawn up by independent bodies attesting that the economic operator complies with certain environmental management systems or standards, they shall refer to the European Union Eco-Management and Audit Scheme (EMAS) or to other environmental management systems as recognized in accordance with Article 45 of Regulation (EC) No 1221/2009 of the European Parliament and of the Council<sup>38</sup> or other environmental management standards based on the relevant European or international standards by accredited bodies.*

*Contracting entities shall recognise equivalent certificates from bodies established in other Member States. They shall also accept other evidence of equivalent environmental management measures where the economic operator concerned has no possibility of obtaining such certificates within the relevant time limits for reasons that are not attributable to that economic operator.*

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<sup>38</sup> OJ L 342, 22.12.2009, p. 1.

3. *Upon request, Member States shall make available to other Member States any information relating to the documents produced as evidence of compliance with quality and environmental standards referred to in paragraphs 1 and 2 of this Article.*

## SUBSECTION 2

### AWARD OF THE CONTRACT

#### *Article 76*

##### *Contract award criteria*

*Directive 2004/17/EC: Art. 55*

1. *Without prejudice to national laws, regulations or administrative provisions on the price of certain supplies or the remuneration of certain services, contracting entities shall base the award of contracts on one of the following criteria:*

(a) *the most economically advantageous tender;*

(b) *the lowest cost.*

*Cost may be assessed, at the choice of the contracting entity, on the basis of the price only or using a cost-effectiveness approach, such as life-cycle costing , under the conditions set out in Article 77.*

*Member States may provide that all or certain types of contracts shall be awarded by means of the criterion of the most economically advantageous tender as referred to in point (a) of paragraph 1 and in paragraph 2.*

2. *The most economically advantageous tender referred to in point (a) of paragraph 1 shall be identified by an assessment on the basis of award criteria affecting the value of the tender from the point of view of the contracting entity.*

*Those criteria shall include in addition to the price or cost, other criteria linked to the subject-matter of the contract in question, for instance quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, environmental and social characteristics innovative aspects, conditions of commercialisation, after-sales service and technical assistance, delivery conditions such as delivery date, delivery process and delivery period or period of completion, commitments with regard to parts and security of supply. Where the quality of the staff employed can significantly impact the level of performance of the contract, the organisation, qualification and experience of the staff assigned to performing the contract in question may be taken into consideration.*

*The cost element may also take the form of a fixed price or cost on the basis of which economic operators will compete on quality criteria only.*

3. *Award criteria shall be considered to be linked to the subject-matter of the contract where they relate to the works, supplies or services to be provided under that contract in any respect and at any stage of their life cycle, including factors involved:*

- *in the specific process of production, provision or commercialisation of those works, supplies or services, or*
- *in a specific process for another stage of their life cycle,*

*even where such factors do not form part of their material substance.*



4. *Award criteria shall not have the effect of conferring an unrestricted freedom of choice on the contracting entity. They shall ensure the possibility of effective competition and shall be accompanied by specifications which allow the information provided by the tenderers to be effectively verified in order to assess how well the tenders meet the award criteria. In case of doubt, contracting entities shall verify effectively the accuracy of the information and proof provided by the tenderer.*
5. *In the case referred to in point (a) of paragraph 1, the contracting entity shall specify in the procurement 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 entity shall indicate the criteria in descending order of importance.*

*The relative weighting or order of importance shall be specified, as appropriate, in the notice used as a means of calling for competition, in the invitation to confirm interest, in the invitation to tender or to negotiate, or in the specifications.*

6. *When the legislation of the Member State concerned provides for it, contracting entities may, after the time limit for the submission of tenders has expired and before having accessed their content, specify the weighting attached to the subheadings of an award criterion as defined in advance in accordance with paragraph 5, provided that*
- a) *doing so does not alter the criteria for the award of the contract set out in the procurement documents or the call for competition;*

- b) *the weighting does not contain elements which, if they had been known to the tenderers at the time of the preparation of the tenders, could have affected that preparation;*
- c) *the weighting was not adopted on the basis of matters likely to give rise to discrimination against one of the tenderers.*

*Article 77*

*Life-cycle costing*

1. *Life-cycle costing shall to the extent relevant cover parts or all of the following costs over the life cycle of a product, service or works*
  - (a) costs, borne by the contracting entity or other users, such as:
    - (i) costs relating to acquisition,
    - (ii) costs of use, such as consumption of energy and other resources,
    - (iii) maintenance costs,
    - (iv) end of life costs, such as collection and recycling costs;
  - (b) cost imputed to environmental externalities linked to the product, service or works during its life cycle, provided their monetary value can be determined and verified; these costs may include the cost of emissions of greenhouse gases and of other pollutant emissions and other climate change mitigation costs.

2. *Where contracting entities assess the costs using a life-cycle costing approach, they shall indicate in the procurement documents the data to be provided by the tenderers and the method which the contracting entity will use to determine the life-cycle costs on the basis of these data..*

*The method used for the assessment of costs imputed to environmental externalities shall fulfil all of the following conditions:*

- (a) it is based on objectively verifiable and non-discriminatory criteria;*
- (b) it has been established for repeated or continuous application;*
- (c) it is accessible to all interested parties*  
*;*
- (d) the data required can be provided with reasonable effort by normally diligent economic operators, including operators from third countries party to the Agreement or other international agreements by which the Union is bound.*

3. *Whenever a common method for the calculation of life-cycle costs has been made mandatory by a legislative act of the Union that common method shall be applied for the assessment of costs imputed to environmental externalities.*

A list of such legislative acts, and where necessary the delegated acts supplementing them, is set out in Annex XV.

*The Commission, shall be empowered to adopt delegated acts in accordance with Article 98 concerning the update of that list, when an update of the list is necessary due to the adoption of new legislation making a common method mandatory or the repeal or modification of existing legislation.*

*Article 79*  
*Abnormally low tenders*

1. Where tenders appear to be abnormally low in relation to the works, supplies or services, the contracting entity may require, or be obliged by a Member State to require economic operators to explain the price or costs proposed in the tender.
- 2.
3. *The explanations referred to in paragraph 1 may in particular relate to:*
  - (a) the economics of the manufacturing process, of the services provided and of the construction method;
  - (b) the technical solutions chosen or any exceptionally favourable conditions available to the tenderer for the supply of the goods or services or for the execution of the work;
  - (c) the originality of the supplies, services or work proposed by the tenderer;
  - (d) compliance, with obligations established by Union legislation in the field of social and labour law or environmental law or of the international social and environmental law provisions listed in Annex XIV or, where not applicable, with other provisions ensuring an equivalent level of protection;
  - (e) the possibility of the tenderer obtaining State aid.

4. *The contracting entity shall assess the information provided by consulting the tenderer.*

*It may only reject the tender where the evidence supplied does not satisfactorily account for the low level of price or costs proposed, taking into account the elements referred to in paragraph 2.*

*Contracting entities shall reject the tender, where they have established that the tender is abnormally low because it does not comply with applicable obligations established by Union law or national law compatible with it in the field of social and labour law or environmental law or by the international social and environmental law provisions listed in Annex XIV.*

5. *Where a contracting entity establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender may be rejected on that ground alone only after consultation with the tenderer where the latter is unable to prove, within a sufficient time limit fixed by the contracting entity, that the aid in question was compatible with the internal market within the meaning of Article 107 of the Treaty. Where the contracting entity rejects a tender in those circumstances, it shall inform the Commission thereof.*
6. *Upon request, Member States shall make available to other Member States by way of administrative cooperation any information at its disposal, such as laws, regulations, universally applicable collective agreements or national technical standards, relating to the evidence and documents produced in relation to details listed in paragraph 2.*

Tenders comprising products originating in third countries and relations with those countries

*Article 79a*

*Tenders comprising products originating in third countries*

1. This Article shall apply to tenders covering products originating in third countries with which the Community has not concluded, whether multilaterally or bilaterally, an agreement ensuring comparable and effective access for Community undertakings to the markets of those third countries. It shall be without prejudice to the obligations of the Community or its Member States in respect of third countries.
2. Any tender submitted for the award of a supply contract may be rejected where the proportion of the products originating in third countries, as determined in accordance with Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code<sup>39</sup>, exceeds 50 % of the total value of the products constituting the tender.

For the purposes of this Article, software used in telecommunications network equipment shall be regarded as products.

3. Subject to the second subparagraph, where two or more tenders are equivalent in the light of the contract award criteria defined in Article 76, preference shall be given to those tenders which may not be rejected pursuant to paragraph 2. The prices of those tenders shall be considered equivalent for the purposes of this Article, if the price difference does not exceed 3 %.

However, a tender shall not be preferred to another pursuant to the first subparagraph where its acceptance would oblige the contracting entity to acquire equipment having technical characteristics different from those of existing equipment, resulting in incompatibility, technical difficulties in operation and maintenance, or disproportionate costs.

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<sup>39</sup> OJ L 302, 19.10.1992, p. 1.

4. For the purposes of this Article, those third countries to which the benefit of the provisions of this Directive has been extended by a Council Decision in accordance with paragraph 1 shall not be taken into account for determining the proportion, referred to in paragraph 2, of products originating in third countries.
5. The Commission shall submit an annual report to the Council, commencing in the second half of the first year following the entry into force of this Directive, on progress made in multilateral or bilateral negotiations regarding access for Community undertakings to the markets of third countries in the fields covered by this Directive, on any result which such negotiations may have achieved, and on the implementation in practice of all the agreements which have been concluded.

The provisions of this Article may be amended in the light of such developments.

#### *Article 79b*

##### *Relations with third countries as regards works, supplies and service contracts*

1. Member States shall inform the Commission of any general difficulties, in law or in fact, encountered and reported by their undertakings in securing the award of service contracts in third countries.
2. The Commission shall report to the Council 3 years after the date provided for in Article 101(1), and periodically thereafter, on the opening up of service contracts in third countries and on progress in negotiations with these countries on this subject, particularly within the framework of the WTO.

3. The Commission shall endeavour, by approaching the third country concerned, to remedy any situation whereby it finds, on the basis either of the reports referred to in paragraph 2 or of other information, that, in the context of the award of service contracts, a third country:
- (a) does not grant Community undertakings effective access comparable to that granted by the Community to undertakings from that country; or
  - (b) does not grant Community undertakings national treatment or the same competitive opportunities as are available to national undertakings; or
  - (c) grants undertakings from other third countries more favourable treatment than Community undertakings.
4. Member States shall inform the Commission of any difficulties, in law or in fact, encountered and reported by their undertakings and which are due to the non-observance of the international labour law provisions listed in Annex XIV when these undertakings have tried to secure the award of contracts in third countries.
5. In the circumstances referred to in paragraphs 3 and 4, the Commission may at any time propose that the Council adopt an implementing act to suspend or restrict, over a period to be laid down in the decision, the award of service contracts to:
- (a) undertakings governed by the law of the third country in question;
  - (b) undertakings affiliated to the undertakings specified in point (a) and having their registered office in the Community but having no direct and effective link with the economy of a Member State;



- (c) undertakings submitting tenders which have as their subject-matter services originating in the third country in question.

The Council shall act, by qualified majority, as soon as possible.

The Commission may propose these measures on its own initiative or at the request of a Member State.

6. This Article shall be without prejudice to the commitments of the Community in relation to third countries ensuing from international agreements on public procurement, particularly within the framework of the WTO.

#### Chapter IV Contract performance

##### *Article 80* *Conditions for performance of contracts*

*Contracting entities may lay down special conditions relating to the performance of a contract, provided that they are linked to the subject-matter of the contract within the meaning of Article 76(3) and indicated in the call for competition or in the procurement documents. Those conditions may, in particular, concern social and environmental considerations.*

##### *Article 81* *Subcontracting* *Directive 2004/17/EC: Article 37*

In the procurement documents, the 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. Such an indication shall be without prejudice to the question of the principal economic operator's liability.

## *Article 82*

### *Modification of contracts during their term*

- 1. A substantial modification of the provisions of a works, supply or service contract or a framework agreement during its term shall be considered as a new award for the purposes of this Directive and shall require a new procurement procedure in accordance with this Directive. In the cases referred to in paragraphs 3, 4 or 5, modifications shall not be considered as substantial.*
- 2. A modification of a contract or a framework agreement during its term shall be considered substantial within the meaning of paragraph 1, where it renders the contract or the framework agreement materially different in character from the one initially concluded. In any case, without prejudice to paragraphs 3, 4 or 5, a modification shall be considered substantial where one of the following conditions is met:*
  - (a) the modification introduces conditions which, had they been part of the initial procurement procedure, would have allowed for the admission of other candidates than those initially selected or for the acceptance of an offer other than that originally accepted or would have attracted additional participants in the procurement procedure;*
  - (b) the modification changes the economic balance of the contract or the framework agreement in favour of the contractor in a manner which was not provided for in the initial contract or framework agreement;*
  - (c) the modification extends the scope of the contract or framework agreement considerably*

3. *Modifications shall not be considered substantial within the meaning of paragraph 1 where they have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses or options. Such clauses shall state the scope and nature of possible modifications or options as well as the conditions under which they may be used. They shall not provide for modifications or options that would alter the overall nature of the contract or framework agreement.*
4. *Where the value of a modification can be expressed in monetary terms, the modification shall not be considered to be substantial within the meaning of paragraph 1, where its value does not exceed the thresholds set out in Article 12 and where, it is below 10% of the initial contract value for service and supply contracts and below 15% of the initial contract value for works contracts, provided that the modification does not alter the overall nature of the contract or framework agreement. Where several successive modifications are made, the value shall be assessed on the basis of the cumulative value of the successive modifications.*
5. *A modification shall not be considered to be substantial within the meaning of paragraph 1 where the following cumulative conditions are fulfilled:*
  - (a) *the need for modification has been brought about by circumstances which a diligent contracting entity could not foresee;*
  - (b) *the modification does not alter the overall nature of the contract.*

*Contracting entities shall publish in the Official Journal of the European Union a notice on such modifications. Such notices shall contain the information set out in Annex XVI and be published in accordance with Article 65.*

6. *Without prejudice to paragraph 3, the substitution of a new contractor for the one to which the contracting authority had initially awarded the contract shall be considered a substantial modification within the meaning of paragraph 1.*

*However, the first subparagraph shall not apply in the event of universal or partial succession into the position of the initial contractor, following corporate restructuring, including takeover, merger, acquisition or insolvency, of another economic operator that fulfils the criteria for qualitative selection initially established provided that this does not entail other substantial modifications to the contract and is not aimed at circumventing the application of this Directive.*

### *Article 83*

#### *Termination of contracts*

*Member States shall ensure that contracting entities have the possibility, at least under the following circumstances and under the conditions determined by the applicable national law, to terminate a works, supply or service contract during its term, where it turns out that :*

- (a) the exceptions provided for in Article 21 cease to apply following a participation by private undertakings in the legal person awarded the contract pursuant to Article 21 (5);*
- (b) the contract has been subject to a substantial modification that constitutes a new award within the meaning of Article 82;*
- (b a) the contractor has been, at the time of contract award, in one of the situations referred to in Article 55(1) of Directive 2004/18/EC and should therefore have been excluded from the procurement procedure pursuant to the second subparagraph of Article 74(1) of this Directive;*

- (c) the contract should not have been awarded to the contractor in view of a serious infringement of the obligations under the Treaties and this Directive that has been declared by the Court of Justice of the European Union in a procedure under Article 258 of the Treaty.

TITLE III  
PARTICULAR PROCUREMENT REGIMES  
CHAPTER I  
*Social and other specific services*

*Article 84*  
*Award of contracts for social and other specific services*

*Contracts for social and other specific services, such as hotel and restaurant services or certain legal, rescue or administrative services, listed in Annex XVII shall be awarded in accordance with this Chapter where the value of the contracts is equal to or greater than the threshold indicated in Article 12(c).*

*Article 85*  
*Publication of notices*

- I. Contracting entities intending to award a contract for the services referred to in Article 84 shall make known their intention by any of the following means:*
  - (a) by means of a contract notice;*
  - (b) by means of a periodic indicative notice, which shall be published continuously. The periodic indicative notice shall refer specifically to the types of services that will be the subject of the contracts to be awarded. It shall indicate that the contracts will be awarded without further publication and invite interested economic operators to express their interest in writing;*
  - (c) By means of a notice on the existence of a qualification system, which shall be published continuously.*

*The first subparagraph shall, however, not apply where a negotiated procedure without prior call for competition could have been used in conformity with the provisions of Article 44 for the award of a service contract.*

- 2. Contracting entities that have awarded a contract for the services referred to in Article 84 shall make known the results by means of contract award notice. They may, however, group such notices on a quarterly basis. In that case, they shall send the grouped notices within 2 months of the end of each quarter.*
- 3. The notices referred to in paragraphs 1 and 2 shall contain the information referred to in Annex XVIII, respectively in parts A, B, C or D, in accordance with the standard model notices. The Commission shall establish the standard forms by means of implementing acts. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 100.*
- 4. The notices referred to in this article shall be published in accordance with Article 65.*

#### *Article 86*

##### *Principles of awarding contracts*

- 1. Member States shall put in place national rules for the award of contracts subject to this Chapter, in order to ensure contracting entities comply with the principles of transparency and equal treatment of economic operators. Member States are free to determine the procedural rules applicable as long as such rules allow contracting entities to take into account the specificities of the services in question.*
- 2. Member States shall ensure that contracting entities may take into account the need to ensure quality, continuity, accessibility, availability and comprehensiveness of the services, the specific needs of different categories of users, the involvement and empowerment of users and innovation. Member States may also provide that the choice of the service provider shall not be made solely on the basis of the price for the provision of the service.*

## CHAPTER II

### RULES GOVERNING DESIGN CONTESTS

#### *Article 88*

##### *Scope*

*Directive 2004/17/EC: Article 61*

1. This Chapter shall apply to design contests organised as part of a procurement procedure for a service contract, provided that the estimated value of the contract, net of VAT, and including any possible prizes or payments to participants, is equal to or greater than the amount set out in point (a) of Article 12.
2. This Chapter shall apply to all design contests where the total amount of contest prizes and payments to participants, including the estimated value net of VAT of the service contract which might subsequently be concluded under point (k) of Article 44 if the contracting entity does not exclude such an award in the contest notice, is equal to or greater than the amount set out in point (a) of Article 12.

#### *Article 89*

##### *Notices*

*Directive 2004/17/EC: Article 63*

1. Contracting entities that intend to organise a design contest shall call for competition by means of a contest notice. Where they intend to award a subsequent service contract pursuant to point (k) of Article 44, this shall be indicated in the design contest notice.  
Contracting entities that have held a design contest shall make the results known by means of a notice.



2. *The call for competition shall include the information set out in Annex XIX and the notice of the results of a design contest shall include the information set out in Annex XX in the format of standard forms by means of implementing acts. The Commission shall establish the standard forms. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 100.*

The notice of the results of a design contest shall be forwarded to the Commission within two months of the closure of the design contest.

Where release of information on the outcome of the contest would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of a particular economic operator, public or private, including the interests of the economic operator to whom the contract has been awarded, or might prejudice fair competition between economic operators, such information may be withheld from publication.

3. Paragraphs (2) to (6) of Article 65 shall also apply to notices relating to design contests.

#### *Article 90*

*Rules on the organisation of design contests, the selection of participants and the jury*

*Directive 2004/17/EC: Articles 60,65*

1. *When organising design contests, contracting entities shall apply procedures which are adapted to Title I and this Chapter.*

1a. *The admission of participants to design contests shall not be limited:*

- (a) by reference to the territory or part of the territory of a Member State;

- (b) on the grounds that, under the law of the Member State in which the contest is organised, they would be required to be either natural or legal persons.
2. Where design contests are restricted to a limited number of participants, contracting entities shall establish clear and non-discriminatory selection criteria. In any event, the number of candidates invited to participate shall be sufficient to ensure genuine competition.
  3. The jury shall be composed exclusively of natural persons who are independent of participants in the contest. Where a particular professional qualification is required of participants in a contest, at least a third of the jury members shall have the same qualification or an equivalent qualification.

*Article 91*

*Decisions of the jury*

*Directive 2004/17/EC: Articles 66*

1. The jury shall be autonomous in its decisions or opinions.
2. The jury shall examine the plans and projects submitted by the candidates anonymously and solely on the basis of the criteria indicated in the contest notice.
3. The jury shall record its ranking of projects in a report, signed by its members, made according to the merits of each project, together with its remarks and any points that may need clarification.
4. Anonymity shall be observed until the jury has reached its opinion or decision.
5. Candidates may be invited, if need be, to answer questions that the jury has recorded in the minutes to clarify any aspects of the projects.
6. Complete minutes shall be drawn up of the dialogue between jury members and candidates.

## TITLE IV GOVERNANCE

### *Article 92*

#### *Enforcement*

#### *Article 72 Directive 2004/17/EC*

1. *In order to effectively ensure correct and efficient implementation, Member States shall make sure that at least the tasks set out in this Article are performed by one or more authorities, bodies or structures. They shall indicate to the Commission all authorities or structures competent for these tasks.*
2. *Member States shall ensure that the application of public procurement rules is monitored.*

*Where monitoring authorities or structures identify by their own initiative or upon the receipt of information specific violations or systemic problems, they shall be empowered to indicate those problems to national auditing authorities, courts or tribunals or other appropriate authorities or structures, such as the ombudsman, national Parliaments or committees thereof.*

3. *The results of the monitoring activities pursuant to paragraph 2 shall be made available to the public through appropriate means of information.*

*Member States shall transmit to the Commission every three years, a monitoring report covering, where applicable, information on the most frequent sources of wrong application or of legal uncertainty, including possible structural or recurring problems in the application of the rules.*

*On the basis of the data received, the Commission shall regularly issue a report on the implementation and best practices of such policies in the Internal Market.*

*The Commission may, at most every three years, request Member States to provide information on the practical implementation of national strategic procurement policies, on the level of SME participation in public procurement and about prevention, detection and adequate reporting of cases of procurement fraud, corruption, conflict of interest and other serious irregularities.*

*For the purposes of this paragraph, SME shall be understood as defined in Commission Recommendation 2003/361/EC<sup>40</sup>.*

- 4. Member States shall ensure that guidance on the interpretation and application of the Union public procurement law is available to assist contracting authorities and economic operators in correctly applying the Union public procurement rules.*
- 5. Member States shall, without prejudice to the general procedures and working methods established by the Commission for its communications and contacts with Member States, designate a point of reference for cooperation with the Commission as regards the application of public procurement legislation.*
- 6. Contracting authorities shall, at least for the duration of the contract, keep copies of all concluded contracts with a value equal to or greater than*
  - (a) 1 000 000 EUR in the case of supply contracts or service contracts;*
  - (b) 10 000 000 EUR in the case of works contracts.*

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<sup>40</sup> Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, OJ L 124 of 20.5.2003, p. 36.

*They shall grant access to these contracts; however, access to specific documents or items of information may be denied to the extent and on the conditions provided for in the applicable Union or national rules on access to documents and data protection.*

*Article 94*

*Individual reports on procedures for the award of contracts*

*Article 50 Directive 2004/17/EC*

- 1. Contracting entities shall keep appropriate information on each contract or framework agreement covered by this Directive and each time a dynamic purchasing system is established. This information shall be sufficient to permit them at a later date to justify decisions taken in connection with:*
  - (a) the qualification and selection of economic operators and the award of contracts;*
  - (b) the use of negotiated procedures without a call for competition by virtue of Article 44;*
  - (c) the non-application of Chapters II to IV of Title II by virtue of the derogations provided for in Chapters II and III of Title I*
  - (d) where necessary, the reasons why other means of communication than electronic means for the e-submission have been used.*

*To the extent that the contract award notice drawn up pursuant to Articles 64 or 85(2) contains the information required in this paragraph, contracting entities may refer to that notice.*

2. *Contracting entities shall document the progress of all procurement procedures, whether or not the procedures are conducted by electronic means. To that end, they shall ensure that they keep sufficient documentation to justify decisions taken in all stages of the procurement procedure, such as documentation on communications with economic operators and internal deliberations, preparation of the procurement documents, dialogue or negotiation if any, selection and award of the contract. The documentation shall be kept for at least three years from the date of award of the contract.*
3. *The information or documentation, or the main elements thereof, shall be communicated to the Commission or the national authorities, bodies or structures referred to in Article 92 where they so request.*

#### *Article 95*

#### *Statistical information*

#### *Directive 2004/17/EC: Article 67*

1. *The Commission shall review the quality and completeness of data that can be extracted from the notices, referred to in Articles 61 to 65, 85 and 89, which are published in accordance with Annex IX.*

*Where the quality and completeness of the data referred to in the first subparagraph of this Article is not compliant with the obligations stipulated in Articles 61(1), 62(1), 63 and 64(1), 85(3) and 89(2), the Commission shall request complementary information from the Member State concerned. Within a reasonable time, the Member State concerned shall supply the missing statistical information requested by the Commission.*

2. *Every three years, Member States shall forward to the Commission a statistical report for procurement which would have been covered by this Directive if its value had exceeded the relevant threshold laid down in Article 12 of this Directive, indicating an estimation of the aggregated total value of such procurement during the period concerned. This estimation may in particular be based on data available under national publication requirements or on sample-based estimates.*

*This report may be integrated in the report referred to in Article 92 paragraph 3.*

#### *Article 97*

##### *Administrative cooperation*

1. Member States shall provide mutual assistance to each other, and shall put in place measures for effective cooperation with one another, in order to ensure exchange of information on issues referred to in Articles 56, 75 and 79. They shall ensure the confidentiality of the information which they exchange.
2. The competent authorities of all Member States concerned shall exchange information in compliance with personal data protection legislation provided for in Directives 95/46/EC of the European Parliament and of the Council<sup>41</sup> and 2002/58/EC of the European Parliament and of the Council<sup>42</sup>.

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<sup>41</sup> OJ L 281, 23.11.1995, p. 31.

<sup>42</sup> OJ L 201, 31.7.2002, p. 37.

TITLE V  
DELEGATED POWERS, IMPLEMENTING POWERS AND FINAL PROVISIONS

*Article 98*

*Exercise of the delegation*

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.
2. The delegation of power referred to in Articles 4, 8, 14, 25, 33, 35, 38, 70 and 77 shall be conferred on the Commission for an indeterminate period of time from the [date of entry into force of this Directive].
3. The delegation of power referred to in Articles 4, 8, 14, 25, 33, 35, 38, 70 and 77 may be revoked at any time by the European Parliament or by the Council. A revocation decision shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the *Official Journal of the European Union* or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.
4. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.
5. A delegated act adopted pursuant to Article 98 shall enter into force only if no objection has been expressed either by the European Parliament or by the Council within a period of 2 months of notification of the act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by 2 months at the initiative of the European Parliament or the Council.



*Article 99*  
*Urgency procedure*

1. Delegated acts adopted under this Article shall enter into force without delay and shall apply as long as no objection is expressed in accordance with paragraph 2. The notification of a delegated act to the European Parliament and to the Council shall state the reasons for the use of the urgency procedure.
2. Either the European Parliament or the Council may object to a delegated act in accordance with the procedure referred to in Article 98(5). In such a case, the Commission shall repeal the act without delay following the notification of the decision to object by the European Parliament or the Council.

*Article 100*  
*Committee procedure*

1. The Commission shall be assisted by the Advisory Committee for Public Procurement established by Council Decision 71/306/EEC<sup>43</sup>. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.
2. Where reference is made to this paragraph, Article 4 of Regulation (EU) No 182/2011 shall apply.
3. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply.

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<sup>43</sup> OJ L 185, 16.8.1971, p. 15

## *Article 101*

### *Transposition and transitional provisions*

- 1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 24 months following the entry into force pursuant to Article 104. They shall forthwith communicate to the Commission the text of those provisions.*
- 2. Notwithstanding paragraph 1, Member States may postpone the application of Article 33(1) until 54 months after the entry into force of this Directive , except where use of electronic means is mandatory pursuant to Articles 46, 47, 48, Articles 49(4) or 65(2) or Article 67.*

*Notwithstanding paragraph 1, the application of Article 33(1) for central purchasing bodies pursuant to Article 49(4) may be postponed by Member States until 36 months after the entry into force of this Directive.*

*Where a Member State chooses to postpone the application of Article 33(1), that Member State shall provide that contracting authorities may choose between the following means of communication for all communication and information exchange:*

- (a) electronic means in accordance with Article 33;*
- (b) post;*
- (c) fax;*
- (d) a combination of those means.*

3. *When Member States adopt the measures referred to in paragraphs 1 and 2, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.*

*Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.*

#### *Article 102*

##### *Repeal*

*Directive 2004/17/EC is hereby repealed with effect from 24 months following the entry into force pursuant to Article 104.*

References to the repealed Directive shall be construed as being made to this Directive and shall be read in accordance with the correlation table in Annex XXI.

#### *Article 103*

##### *Review*

*The Commission shall review the economic effects on the internal market, in particular in terms of factors such as cross-border award of contracts and transaction costs, resulting from the application of the thresholds set in Article 12 and report thereon to the European Parliament and the Council by 3 years later than the date provided for in Article 101(1).*

In the event of any change to the threshold amounts applicable under the Agreement, the report shall, if appropriate, be followed by a legislative proposal amending the thresholds set out in this Directive.

*Article 104*  
*Entry into force*

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

*Article 105*  
*Addressees*

This Directive is addressed to the Member States.

Done at Brussels,

*For the European Parliament*  
*The President*

*For the Council*  
*The President*

ANNEX I  
LIST OF ACTIVITIES AS SET OUT IN POINT 8(a) OF ARTICLE 2

In the event of any difference of interpretation between the CPV and the NACE, the CPV nomenclature will apply.

NACE <sup>(1)</sup>					CPV code
SECTION F			CONSTRUCTION		
Division	Group	Class	Subject	Notes	
45			Construction	This division includes:  construction of new buildings and works, restoring and common repairs.	45000000
	45.1		Site preparation		45100000
		45.11	Demolition and wrecking of buildings; earth moving	<p>This class includes:</p> <ul style="list-style-type: none"><li>— demolition of buildings and other structures,</li><li>— clearing of building sites,</li><li>— earth moving: excavation, landfill, levelling and grading of construction sites, trench digging, rock removal, blasting, etc.</li><li>— site preparation for mining:</li><li>— overburden removal and other development and preparation of mineral properties and sites.</li></ul> <p>This class also includes:</p> <ul style="list-style-type: none"><li>— building site drainage.</li><li>— drainage of agricultural or forestry land.</li></ul>	45110000
		45.12	Test drilling and boring	<p>This class includes:</p> <ul style="list-style-type: none"><li>— test drilling, test boring and core sampling for construction, geophysical, geological or similar purposes.</li></ul> <p>This class excludes:</p> <ul style="list-style-type: none"><li>— drilling of production oil or gas wells, see 11.20.</li><li>— water well drilling, see 45.25,</li><li>— shaft sinking, see 45.25,</li><li>— oil and gas field exploration, geophysical, geological and seismic surveying, see 74.20.</li></ul>	45120000

	45.2		Building of complete constructions or parts thereof; civil engineering		45200000
		45.21	General construction of buildings and civil engineering works	<p>This class includes:</p> <ul style="list-style-type: none"> <li>— construction of all types of buildings construction of civil engineering constructions,</li> <li>— bridges, including those for elevated highways, viaducts, tunnels and subways,</li> <li>— long-distance pipelines, communication and power lines,</li> <li>— urban pipelines, urban communication and power lines,</li> <li>— ancillary urban works,</li> <li>— assembly and erection of prefabricated constructions on the site.</li> </ul> <p>This class excludes:</p> <ul style="list-style-type: none"> <li>— service activities incidental to oil and gas extraction, see 11.20,</li> <li>— erection of complete prefabricated constructions from self-manufactured parts not of concrete, see divisions 20, 26 and 28,</li> <li>— construction work, other than buildings, for stadiums, swimming pools, gymnasiums, tennis courts, golf courses and other sports installations, see 45.23,</li> <li>— building installation, see 45.3,</li> <li>— building completion, see 45.4,</li> <li>— architectural and engineering activities, see 74.20,</li> <li>— project management for construction, see 74.20.</li> </ul>	<p>45210000</p> <p>Except:</p> <ul style="list-style-type: none"> <li>- 45213316</li> <li>45220000</li> <li>45231000</li> <li>45232000</li> </ul>
		45.22	Erection of roof covering and frames	<p>This class includes:</p> <ul style="list-style-type: none"> <li>— erection of roofs,</li> <li>— roof covering,</li> <li>— waterproofing.</li> </ul>	45261000

		45.23	Construction of highways, roads, airfields and sport facilities	<p>This class includes:</p> <ul style="list-style-type: none"> <li>— construction of highways, streets, roads, other vehicular and pedestrian ways,</li> <li>— construction of railways,</li> <li>— construction of airfield runways,</li> <li>— construction work, other than buildings, for stadiums, swimming pools, gymnasiums, tennis courts, golf courses and other sports installations,</li> <li>— painting of markings on road surfaces and car parks.</li> </ul> <p>This class excludes:</p> <ul style="list-style-type: none"> <li>— preliminary earth moving, see 45.11.</li> </ul>	<p>45212212 and DA03</p> <p>45230000</p> <p>except:</p> <p>-</p> <p>45231000</p> <p>-</p> <p>45232000</p> <p>-</p> <p>45234115</p>
		45.24	Construction of water projects	<p>This class includes</p> <ul style="list-style-type: none"> <li>— construction of:</li> <li>— waterways, harbour and river works, pleasure ports (marinas), locks, etc.,</li> <li>— dams and dykes,</li> <li>— dredging,</li> <li>— subsurface work.</li> </ul>	45240000
		45.25	Other construction work involving special trades	<p>This class includes:</p> <ul style="list-style-type: none"> <li>— construction activities specialising in one aspect common to different kinds of structures, requiring specialised skill or equipment,</li> <li>— construction of foundations, including pile driving,</li> <li>— water well drilling and construction, shaft sinking,</li> <li>— erection of non-self-manufactured steel elements,</li> <li>— steel bending,</li> <li>— bricklaying and stone setting,</li> <li>— scaffolds and work platform erecting and dismantling, including renting of scaffolds and work platforms,</li> <li>— erection of chimneys and industrial ovens.</li> </ul> <p>This class excludes:</p> <ul style="list-style-type: none"> <li>— renting of scaffolds without erection and dismantling, see 71.32</li> </ul>	<p>45250000</p> <p>45262000</p>

	45.3		Building installation		45300000
		45.31	Installation of electrical wiring and fittings	<p>This class includes:</p> <p>installation in buildings or other construction projects of:</p> <ul style="list-style-type: none"> <li>— electrical wiring and fittings,</li> <li>— telecommunications systems,</li> <li>— electrical heating systems,</li> <li>— residential antennas and aerials,</li> <li>— fire alarms,</li> <li>— burglar alarm systems,</li> <li>— lifts and escalators,</li> <li>— lightning conductors, etc.</li> </ul>	<p>45213316</p> <p>45310000</p> <p>Except:</p> <p>-</p> <p>45316000</p>
		45.32	Insulation work activities	<p>This class includes:</p> <ul style="list-style-type: none"> <li>— installation in buildings or other construction projects of thermal, sound or vibration insulation.</li> </ul> <p>This class excludes:</p> <ul style="list-style-type: none"> <li>— waterproofing, see 45.22.</li> </ul>	45320000
		45.33	Plumbing	<p>This class includes:</p> <ul style="list-style-type: none"> <li>— installation in buildings or other construction projects of:</li> <li>— plumbing and sanitary equipment,</li> <li>— gas fittings,</li> <li>— heating, ventilation, refrigeration or air-conditioning equipment and ducts,</li> <li>— sprinkler systems.</li> </ul> <p>This class excludes:</p> <ul style="list-style-type: none"> <li>— installation of electrical heating systems, see 45.31.</li> </ul>	45330000
		45.34	Other building installation	<p>This class includes:</p> <ul style="list-style-type: none"> <li>— installation of illumination and signalling systems for roads, railways, airports and harbours,</li> <li>— installation in buildings or other construction projects of fittings and fixtures n.e.c.</li> </ul>	<p>45234115</p> <p>45316000</p> <p>45340000</p>



	45.4		Building completion		45400000
		45.41	Plastering	<p>This class includes:</p> <ul style="list-style-type: none"> <li>— application in buildings or other construction projects of interior and exterior plaster or stucco, including related lathing materials.</li> </ul>	45410000
		45.42	Joinery installation	<p>This class includes:</p> <ul style="list-style-type: none"> <li>— installation of not self-manufactured doors, windows, door and window frames, fitted kitchens, staircases, shop fittings and the like, of wood or other materials,</li> <li>— interior completion such as ceilings, wooden wall coverings, movable partitions, etc.</li> </ul> <p>This class excludes:</p> <ul style="list-style-type: none"> <li>— laying of parquet and other wood floor coverings, see 45.43.</li> </ul>	45420000
		45.43	Floor and wall covering	<p>This class includes:</p> <ul style="list-style-type: none"> <li>— laying, tiling, hanging or fitting in buildings or other construction projects of:</li> <li>—</li> <li>— ceramic, concrete or cut stone wall or floor tiles,</li> <li>— parquet and other wood floor coverings carpets and linoleum floor coverings,</li> <li>— including of rubber or plastic,</li> <li>— terrazzo, marble, granite or slate floor or wall coverings,</li> <li>— wallpaper.</li> </ul>	45430000
		45.44	Painting and glazing	<p>This class includes:</p> <ul style="list-style-type: none"> <li>— interior and exterior painting of buildings,</li> <li>— painting of civil engineering structures,</li> <li>— installation of glass, mirrors, etc.</li> </ul> <p>This class excludes:</p> <ul style="list-style-type: none"> <li>— installation of windows, see 45.42,</li> </ul>	45440000

		45.45	Other building completion	<p>This class includes:</p> <ul style="list-style-type: none"> <li>— installation of private swimming pools,</li> <li>— steam cleaning, sand blasting and similar activities for building exteriors,</li> <li>— other building completion and finishing work n.e.c.</li> </ul> <p>This class excludes:</p> <ul style="list-style-type: none"> <li>— interior cleaning of buildings and other structures, see 74.70.</li> </ul>	<p>45212212 and DA04</p> <p>45450000</p>
	45.5		Renting of construction or demolition equipment with operator		45500000
		45.50	Renting of construction or demolition equipment with operator	<p>This class excludes:</p> <ul style="list-style-type: none"> <li>— renting of construction or demolition machinery and equipment without operators, see 71.32.</li> </ul>	45500000
(1) Council Regulation (EEC) No 3037/90 of 9 October 1990 (OJ L 293, 24.10.1990, p. 1), Regulation as amended by Commission Regulation (EEC) No 761/93 (OJ L 83, 3.4.1993, p. 1).					

## ANNEX II

### LIST OF UNION LEGISLATION REFERRED TO IN ARTICLE 4(3)

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 Article 4 of this Directive:

- (a) granting authorisation to operate natural gas installations in accordance with the procedures laid down in Article 4 of Directive 2009/73/EC;
- (b) authorisation or an invitation to tender for the construction of new electricity production installations in accordance with Directive 2009/72/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 for the provision of public passenger transport services by bus, tramway, rail or metro which have been awarded on the basis of a competitive tendering procedure in accordance with its Article 5(3), provided that its length is in conformity with Article 4(3) or 4(4) of the Regulation.

*ANNEX IIA*  
*Exhaustive list of entities referred to in Article 8(2)*

Information to be notified by Member States before adoption of the Directive:

Belgium

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Bulgaria

None

Czech Republic

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Denmark

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Germany

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Estonia

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Ireland

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Greece

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Spain

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France

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Italy

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Cyprus

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Latvia

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Lithuania

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Luxembourg

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Hungary

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Malta

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Netherlands

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Austria

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Poland

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Portugal

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Romania

None

Slovenia

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Finland

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Sweden

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United Kingdom

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### ANNEX III

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

##### A. TRANSPORT OR DISTRIBUTION OF GAS OR HEAT

Directive 2009/73/EC

##### B. PRODUCTION, TRANSMISSION OR DISTRIBUTION OF ELECTRICITY

Directive 2009/72/EC

##### 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<sup>44</sup>

Rail passenger transport

None

##### 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

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<sup>44</sup> OJ L 237, 24.8.1991, p. 25

## 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



## ANNEX IV

### *REQUIREMENTS RELATING TO TOOLS AND DEVICES FOR THE ELECTRONIC RECEIPT OF TENDERS, REQUESTS TO PARTICIPATE, APPLICATIONS FOR QUALIFICATION AS WELL AS PLANS AND PROJECTS IN CONTESTS*

*Directive 2004/17/EC: Annex XXIV*

*Tools and devices for the electronic receipt of tenders, requests to participate, applications for qualification as well as plans and projects in contests must guarantee, through technical means and appropriate procedures, at least that:*

- (a) the exact time and date of the receipt of tenders, requests to participate, applications for qualification as well as the submission of plans and projects can be determined precisely;*
- (b) it may be reasonably ensured that, before the time limits laid down, no-one can have access to data transmitted under those requirements;*
- (c)*
- (d) only authorised persons may set or change the dates for opening data received;*
- (e) during the various stages of the qualification procedure, the procurement procedure or contest, access to all data submitted, or to part thereof, must be possible only for authorised persons;*
- (f) only authorised persons must give access to data transmitted and only after the prescribed date;*

- (g) *data received and opened in accordance with those requirements must remain accessible only to persons authorised to acquaint themselves therewith,*
- (h)
- (i) *where the access prohibitions or conditions referred to under points b, d, e, f and g are infringed or there is an attempt to do so, it may be reasonably ensured that the infringements or attempts are clearly detectable.*

ANNEX VI  
PART A  
INFORMATION TO BE INCLUDED IN THE PERIODIC INDICATIVE NOTICE  
(as referred to in Article 61)

I. INFORMATION TO BE INCLUDED IN ALL CASES

1. Name, identification number (where provided for in national legislation), address including NUTS code, telephone, fax number, email and internet address of the contracting entity and, where different, of the service from which additional information may be obtained.
2. Main activity exercised.
3.
  - (a) For supply contracts: nature and quantity or value of the services or products to be supplied (nomenclature reference No(s)).
  - (b) For works contracts: nature and extent of the services to be provided, the general characteristics of the work or of the lots by reference to the work (nomenclature reference No(s)).
  - (c) For service contracts: intended total procurement in each of the service categories envisaged (nomenclature reference No(s)).
4. Date of dispatch of the notice or of dispatch of the notice of the publication of this notice on the buyer profile.
5. Any other relevant information.

II. ADDITIONAL INFORMATION TO BE SUPPLIED WHERE THE NOTICE IS USED AS A MEANS OF CALLING FOR COMPETITION OR PERMITS THE REDUCTION OF THE TIME LIMITS FOR THE RECEIPT OF TENDERS (Article 61(2))

6. A reference to the fact that interested economic operators shall advise the entity of their interest in the contract or contracts.
7. *Email or internet address at which the specifications procurement documents will be available for unrestricted and full direct access, free of charge.*  
*Where unrestricted and full direct access, free of charge, is not available for the reasons set out in the second and third subparagraph of Article 67(1), an indication of how the procurement documents can be accessed.*
8. Where appropriate, state whether the contract is reserved for sheltered workshops or whether its performance is reserved in the context of sheltered employment programmes.
9. Time limit for the receipt of applications for an invitation to tender or to negotiate.
10. Nature and quantity of the goods to be supplied or general nature of the work or category of service and description, stating if framework agreement(s) are envisaged, including any options for further procurement and the estimated time available for exercising those options as well as the number of renewals, if any. In the case of recurring contracts, also, an estimate of the timing of the subsequent calls for competition. State whether purchase, lease, rental or hire-purchase or any combination of those is involved.
11. NUTS code for the main location of works in case of works or NUTS code for the main place of delivery or performance in supplies and service ; if the contract is divided into lots, this information shall be provided for each lot.
12. Time limits for delivery or completion or duration of service contract and, as far as possible, for starting.
13. Address to which interested undertakings shall send their expressions of interest in writing.

14. Time limit for receipt of expressions of interest.
15. Language or languages authorised for the presentation of candidatures or tenders.
16. Economic and technical conditions, and financial and technical guarantees required of suppliers.
17.
  - (a) Estimated date for initiating the procurement procedures in respect of the contract or contracts (if known);
  - (b) *Type of procurement procedure (restricted procedures, whether or not involving a dynamic purchasing system, or negotiated procedures).*
  - (c)
18. Where appropriate, particular conditions to which the performance of the contract is subject.
19. Where appropriate, indication whether:
  - (a) *E-submission of tenders or requests to participate will be required/accepted,*
  - (b) *E-ordering will be used,*
  - (c) *E-invoicing will be used,*
  - (d) *E-payment will be accepted.*
20. Name and address of the body responsible for appeal and, where appropriate, mediation procedures. Precise information concerning time limits for lodging appeals, or, if need be, the name, address, telephone number, fax number and e-mail address of the service from which this information may be obtained.

21. Where known, criteria referred to in Article 76 to be used for award of the contract: "lowest cost" or "most economically advantageous tender". Criteria representing the most economically advantageous tender as well as their weighting or, where appropriate, the order of importance of those criteria shall be mentioned, where they do not appear in the specifications, or will not be indicated in the invitation to confirm interest referred to in Article 61(2)(b) or in the invitation tender or to negotiate.

## PART B

### INFORMATION TO BE INCLUDED IN NOTICES OF PUBLICATION OF A PERIODIC INDICATIVE NOTICE ON A BUYER PROFILE NOT USED AS A MEANS OF CALLING FOR COMPETITION (as referred to in Article 61(1))

1. Name, identification number (where provided for in national legislation), address including NUTS code, telephone, fax number, email and internet address of the contracting entity and, where different, of the service from which additional information may be obtained.
2. Main activity exercised.
3. CPV Nomenclature reference No(s).
4. Internet address of the "buyer profile" (URL).
5. Date of dispatch of the notice of the publication of the prior information notice on the buyer profile

ANNEX VII  
INFORMATION TO BE INCLUDED IN THE SPECIFICATIONS IN ELECTRONIC  
AUCTIONS (ARTICLE 47(4))

Where contracting entities have decided to hold an electronic auction, the procurement documents shall include at least the following details:

- (a) the features whose values will be the subject of electronic auction, provided that such features are quantifiable and can be expressed in figures or percentages;*
- (b) any limits on the values which may be submitted, as they result from the specifications relating to the subject of the contract;*
- (c) the information which will be made available to tenderers in the course of the electronic auction and, where appropriate, when it will be made available to them;*
- (d) the relevant information concerning the electronic auction process;*
- (e) the conditions under which the tenderers will be able to bid and, in particular, the minimum differences which will, where appropriate, be required when bidding;*
- (f) the relevant information concerning the electronic equipment used and the arrangements and technical specifications for connection.*

## ANNEX VIII

### DEFINITION OF CERTAIN TECHNICAL SPECIFICATIONS

For the purposes of this Directive,

- (1) "technical specification" means one of the following:
- (a) *in the case of service or supply contracts a specification in a document defining the required characteristics of a product or a service, such as quality levels, environmental and climate performance levels, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, use of the product, safety or dimensions, including requirements relevant to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions, production processes and methods at any stage of the life cycle of the supply or service and conformity assessment procedures;*
  - (b) in the case of works contracts, the totality of the technical prescriptions contained in particular in the procurement documents, defining the characteristics required of a material, product or supply, which permits a material, a product or a supply to be described in a manner such that it fulfils the use for which it is intended by the contracting entity; those characteristics include levels of environmental and climate performance, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, safety or dimensions, including the procedures concerning quality assurance, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions, and production processes and methods at any stage of the life cycle of the works; those characteristics also include rules relating to design and costing, the test, inspection and acceptance conditions for works and methods or techniques of construction and all other technical conditions which the contracting entity is in a position to prescribe, under general or specific regulations, in relation to the finished works and to the materials or parts which they involve;



Point 2 to 5 to be aligned on Annex VIII of the proposal replacing Directive 2004/18/EC, also in function of the adoption of Parliament and Council Regulation [XXX] on European standardisation.

- (2) "Standard" means a technical specification approved by a recognised standardisation body for repeated or continuous application, compliance with which is not compulsory and which falls into one of the following categories:
- (a) "international standard": a standard adopted by an international standards organisation and made available to the general public;
  - (b) "European standard": a standard adopted by a European standards organisation and made available to the general public;
  - (c) "national standard": a standard adopted by a national standards organisation and made available to the general public;

- (3) *"European Technical Assessment technical approval" means a favourable technical assessment of the fitness for use of a product, based on the fulfilment of the essential requirements for building works, by means of the inherent characteristics of the product and the defined conditions of application and use. European technical approvals are issued by an approval body designated for this purpose by the Member State;*
- (4) "Common technical specifications" means a technical specification laid down in accordance with a procedure recognised by the Member States or in accordance with Articles 9 and 10 of Parliament and Council Regulation [XXX] on European standardisation and amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/105/EC and 2009/23/EC of the European Parliament and the Council] which has been published in the *Official Journal of the European Union*;

- (5) "Technical reference" means any deliverable produced by European standardisation bodies, other than official standards, according to procedures adapted to developments in market needs.

ANNEX IX  
FEATURES CONCERNING PUBLICATION

1. Publication of notices

The notices referred to in Articles 61, 62, 63, 64, 85 and 89 must be sent by the contracting entities to the Publications Office of the European Union and published in accordance with the following rules:

- (a) *Notices referred to in Articles 61, 62, 63, 64, 85 and 89 shall be published by the Publications Office of the European Union or by the contracting entities in the event of a periodic indicative notice published on a buyer profile in accordance with Article 61 (1).*

*In addition, contracting entities may publish this information on the Internet on a "buyer profile" as referred to in point 2(b) below;*

- (b) *The Publications Office of the European Union will give the contracting entity the confirmation referred to in the second subparagraph of Article 65 (5).*

2. Publication of complementary or additional information

- (a) *Except where otherwise provided for in the second and third subparagraph of Article 67(1), contracting entities shall publish the procurement documents in their entirety on the Internet;*

- (b) *The buyer profile may include periodic indicative notices as referred to in Article 61 (1), information on ongoing invitations to tender, scheduled purchases, contracts concluded, procedures cancelled and any useful general information, such as a contact point, a telephone and a fax number, a postal address and an e-mail address. The buyer profile may also include periodic indicative notices used as a means of calling for competition, which are published at national level pursuant to Article 66.*

### 3. Format and procedures for the electronic transmission of notices

The format and procedure for sending notices electronically as established by the Commission are made accessible at the Internet address "<http://simap.eu.int>".

ANNEX X

INFORMATION TO BE INCLUDED IN THE NOTICE ON THE EXISTENCE OF A  
QUALIFICATION SYSTEM

(as referred to in point (b) of Article 39(2) and in Article 62)

1. Name, identification number (where provided for in national legislation), address including NUTS code, telephone, fax number, email and internet address of the contracting entity and, where different, of the service from which additional information may be obtained.
2. Main activity exercised.
3. Where appropriate, state whether the contract is reserved for sheltered workshops or whether its performance is reserved in the context of sheltered employment programmes.
4. Purpose of the qualification system (description of the goods, services or works or categories thereof to be procured through the system - nomenclature reference No(s)).  
NUTS code for the main location of works in case of works or NUTS code for the main place of delivery or performance in supplies and service.
5. Conditions to be fulfilled by the economic operators in view of their qualification pursuant to the system and the methods according to which each of those conditions will be verified.  
Where the description of such conditions and verification methods is voluminous and based on documents available to interested economic operators, a summary of the main conditions and methods and a reference to those documents shall be sufficient.
6. Period of validity of the qualification system and the formalities for its renewal.
7. Reference to the fact that the notice acts as the call for competition.
8. Address where further information and documentation concerning the qualification system can be obtained (where different from the addresses mentioned under 1).

9. Name and address of the body responsible for appeal and, where appropriate, mediation procedures. Precise information concerning time-limits for lodging appeals, or, if need be, the name, address, telephone number, fax number and e-mail address of the service from which this information may be obtained.
10. Where known, criteria referred to in Article 76 to be used for award of the contract: "lowest cost" or "most economically advantageous tender". Criteria representing the most economically advantageous tender as well as their weighting or, where appropriate, the order of importance of those criteria, shall be mentioned where they do not appear in the specifications or will not be indicated in the invitation to tender or to negotiate.
11. Where appropriate, indication whether:
  - (a) E-submission of tenders or requests to participate will be required/accepted,
  - (b) E-ordering will be used,
  - (c) E-invoicing will be used,
  - (d) E-payment will be accepted.
12. Any other relevant information.

ANNEX XI  
INFORMATION TO BE INCLUDED IN CONTRACT NOTICES  
(as referred to in Article 63)

A. OPEN PROCEDURES

1. Name, identification number (where provided for in national legislation), address including NUTS code, telephone, fax number, email and internet address of the contracting entity and, where different, of the service from which additional information may be obtained.
2. Main activity exercised.
3. Where appropriate, state whether the contract is reserved for sheltered workshops or whether its performance is reserved in the context of sheltered employment programmes.
4. Nature of the contract (supply, works or service, where appropriate, state if it is a framework agreement or a dynamic purchasing system), description (nomenclature reference No(s)). Where appropriate, state whether tenders are requested for purchase, lease, rental or hire purchase or any combination of those.
5. NUTS code for the main location of works in case of works or NUTS code for the main place of delivery or performance in supplies and service.
6. For supplies and works:
  - (a) Nature and quantity of the goods to be supplied (nomenclature reference No(s)), including any options for further procurement and, if possible, the estimated time available for exercising those options as well as the number of renewals, if any. In the case of recurring contracts, also, if possible, an estimate of the timing of the subsequent calls for competition for the goods to be procured or the nature and extent of the services to be provided and general nature of the work (nomenclature reference No(s));

- (b) Indication of whether the suppliers may tender for some and/or all the goods required.

If, for works contracts, the work or the contract is subdivided into several lots, the order of size of the different lots and the possibility of tendering for one, for several or for all the lots;

- (c) For works contracts: information concerning the purpose of the work or the contract where the latter also involves the drawing-up of projects.

7. For services:

- (a) The nature and quantity of the goods to be supplied, including any options for further procurement and, if possible, the estimated time available for exercising those options as well as the number of renewals, if any. In the case of recurring contracts, also, if possible, an estimate of the timing of the subsequent calls for competition for the services to be procured;
- (b) Indication of whether the performance of the service is reserved by law, regulation or administrative provision to a particular profession;
- (c) Reference of the law, regulation or administrative provision;
- (d) Indication of whether legal persons shall indicate the names and professional qualifications of the staff to be responsible for the performance of the service;
- (e) Indication of whether service providers may tender for a part of the services concerned.

8. Where known, indication of whether authorisation to submit variants exists or not.

9. Time limits for delivery or completion or duration of service contract and, as far as possible, the starting date.



10. Email or internet address at which the procurement documents will be available for unrestricted and full direct access, free of charge

Where unrestricted and full direct access, free of charge, is not available for the reasons set out in the second and third subparagraph of Article 67(1), an indication of how the procurement documents can be accessed.

11.
  - (a) Final date for receipt of tenders or indicative tenders where a dynamic purchasing system is introduced;
  - (b) Address to which they shall be sent;
  - (c) Language or languages in which they shall be drawn up.
12.
  - (a) Where applicable, the persons authorised to be present at the opening of tenders;
  - (b) Date, time and place of such opening.
13. Where applicable, any deposits and guarantees required.
14. Main terms concerning financing and payment and/or references to the provisions in which those are contained.
15. Where appropriate, the legal form to be taken by the grouping of economic operators to whom the contract is awarded.
16. Minimum economic and technical conditions required of the economic operator to whom the contract is awarded.
17. Period during which the tenderer is bound to keep open his tender.
18. Where appropriate, particular conditions to which the performance of the contract is subject.

19. Criteria referred to in Article 76 to be used for award of the contract: "lowest cost" or "most economically advantageous tender". Criteria representing the most economically advantageous tender as well as their weighting or, where appropriate, the order of importance of those criteria shall be indicated where they do not appear in the specifications.
20. Where appropriate, date(s) and the reference(s) to publication in the *Official Journal of the European Union* of the periodic information notice or of the notice of the publication of this notice on the buyer profile to which the contract refers.
21. Name and address of the body responsible for appeal and, where appropriate, mediation procedures. Precise information concerning time limits for lodging appeals, or, if need be, the name, address, telephone number, fax number and e-mail address of the department from which this information may be obtained.
22. Date of dispatch of the notice by the contracting entity.
23. Any other relevant information.

## B. RESTRICTED PROCEDURES

1. Name, identification number (where provided for in national legislation), address including NUTS code, telephone, fax number, email and internet address of the contracting entity and, where different, of the service from which additional information may be obtained.
2. Main activity exercised.
3. Where appropriate, state whether the contract is reserved for sheltered workshops or whether its performance is reserved in the context of sheltered employment programmes.

4. Nature of the contract (supplies, works or services; where appropriate, state if it is a framework agreement); description (nomenclature reference No(s)). Where appropriate, state whether tenders are requested for purchase, lease, rental or hire purchase or any combination of those.
5. NUTS code for the main location of works in case of works or NUTS code for the main place of delivery or performance in supplies and service.
6. For supplies and works:
  - (a) The nature and quantity of the goods to be supplied (nomenclature reference No(s)), including any options for further procurement and, if possible, the estimated time available for exercising those options as well as the number of renewals, if any. In the case of recurring contracts, also, if possible, an estimate of the timing of the subsequent calls for competition for the goods to be procured or the nature and extent of the services to be provided and general nature of the work (nomenclature reference No(s));
  - (b) Indication of whether the suppliers may tender for some and/or all the goods required.

If, for works contracts, the work or the contract is subdivided into several lots, the order of size of the different lots and the possibility of tendering for one, for several or for all the lots;
  - (c) Information concerning the purpose of the work or the contract where the latter also involves the drawing-up of projects.

7. For services:
  - (a) The nature and quantity of the goods to be supplied, including any options for further procurement and, if possible, the estimated time available for exercising those options as well as the number of renewals, if any. In the case of recurring contracts, also, if possible, an estimate of the timing of the subsequent calls for competition for the services to be procured;

- (b) Indication of whether the performance of the service is reserved by law, regulation or administrative provision to a particular profession;
  - (c) Reference to the law, regulation or administrative provision;
  - (d) Indication of whether legal persons shall indicate the names and professional qualifications of the staff to be responsible for the performance of the service;
  - (e) Indication of whether service providers may tender for a part of the services concerned.
8. Where known, indication of whether authorisation to submit variants exists or not.
9. Time limits for delivery or completion or duration of the contract and, as far as possible, for starting.
10. Where appropriate, the legal form to be taken by the grouping of economic operators to whom the contract is awarded.
11. (a) Final date for receipt of requests to participate;
- (b) Address to which they shall be sent;
- (c) Language or languages in which they shall be drawn up.
12. Final date for dispatch of invitations to tender.
13. Where applicable, any deposits and guarantees required.
14. Main terms concerning financing and payment and/or references to the provisions in which those are contained.
15. Information concerning the economic operator's position and the minimum economic and technical conditions required of him.

16. Criteria referred to in Article 76 to be used for award of the contract: "lowest cost" or "most economically advantageous tender". Criteria representing the most economically advantageous tender as well as their weighting or, where appropriate, the order of importance of those criteria shall be indicated where they do not appear in the specifications or will not be indicated in the invitation to tender.
17. Where appropriate, particular conditions to which the performance of the contract is subject.
18. Where appropriate, the date(s) and reference(s) to publication in the *Official Journal of the European Union* of the periodic information notice or of the notice of the publication of this notice on the buyer profile to which the contract refers.
19. Name and address of the body responsible for appeal and, where appropriate, mediation procedures. Precise information concerning time limits for lodging appeals, or, if need be, the name, address, telephone number, fax number and e-mail address of the service from which this information may be obtained.
20. Date of dispatch of the notice by the contracting entities.
21. Any other relevant information.

#### C. NEGOTIATED PROCEDURES

1. Name, identification number (where provided for in national legislation), address including NUTS code, telephone, fax number, email and internet address of the contracting entity and, where different, of the service from which additional information may be obtained.
2. Main activity exercised.
3. Where appropriate, state whether the contract is reserved for sheltered workshops or whether its performance is reserved in the context of sheltered employment programmes.

4. Nature of the contract (supplies, works or services; where appropriate, state if it is a framework agreement); description (nomenclature reference No(s)). Where appropriate, state whether tenders are requested for purchase, lease, rental or hire purchase or any combination of those.
5. NUTS code for the main location of works in case of works or NUTS code for the main place of delivery or performance in supplies and service.
6. For supplies and works:
  - (a) The nature and quantity of the goods to be supplied (nomenclature reference No(s)), including any options for further procurement and, if possible, the estimated time available for exercising those options as well as the number of renewals, if any. In the case of recurring contracts, also, if possible, an estimate of the timing of the subsequent calls for competition for the goods to be procured or the nature and extent of the services to be provided and general nature of the work (nomenclature reference No(s));
  - (b) Indication of whether the suppliers may tender for some and/or all the goods required.

If, for works contracts, the work or the contract is subdivided into several lots, the order of size of the different lots and the possibility of tendering for one, for several or for all the lots;

- (c) For works contracts: information concerning the purpose of the work or the contract where the latter also involves the drawing-up of projects.

7. For services:
  - (a) The nature and quantity of the services to be supplied, including any options for further procurement and, if possible, the estimated time available for exercising those options as well as the number of renewals, if any. In the case of recurring contracts, also, if possible, an estimate of the timing of the subsequent calls for competition for the services to be procured;

- (b) Indication of whether the performance of the service is reserved by law, regulation or administrative provision to a particular profession;
  - (c) Reference of the law, regulation or administrative provision;
  - (d) Indication of whether legal persons shall indicate the names and professional qualifications of the staff to be responsible for the performance of the service;
  - (e) Indication of whether service providers may tender for a part of the services concerned.
8. Where known, indication of whether authorisation to submit variants exists or not.
9. Time limits for delivery or completion or duration of the contract and, as far as possible, for starting.
10. Where appropriate, the legal form to be taken by the grouping of economic operators to whom the contract is awarded.
11.
  - (a) Final date for receipt of requests to participate;
  - (b) Address to which they shall be sent;
  - (c) Language or languages in which they shall be drawn up.
12. Where appropriate, any deposits and guarantees required.
13. Main terms concerning financing and payment and/or references to the provisions in which those are contained.
14. Information concerning the economic operator's position and the minimum economic and technical conditions required of him.

15. Criteria referred to in Article 76 to be used for award of the contract: "lowest cost" or "most economically advantageous tender". Criteria representing the most economically advantageous tender as well as their weighting or, where appropriate, the order of importance of those criteria shall be indicated where they do not appear in the specifications or will not be indicated in the invitation to negotiate.
16. Where appropriate, the names and addresses of the economic operators already selected by the contracting entity.
17. Where appropriate, particular conditions to which the performance of the contract is subject.
18. Where appropriate, the dates and reference(s) of publication in the *Official Journal of the European Union* of the periodic information notice or of the notice of the publication of this notice on the buyer profile to which the contract refers.
19. Name and address of the body responsible for appeal and, where appropriate, mediation procedures. Precise information concerning time limits for lodging appeals, or, if need be, the name, address, telephone number, fax number and e-mail address of the service from which this information may be obtained.
20. Date of dispatch of the notice by the contracting entity.
21. Any other relevant information.



ANNEX XII  
INFORMATION TO BE INCLUDED IN THE CONTRACT AWARD NOTICE  
(as referred to in Article 64)

I. Information for publication in the *Official Journal of the European Union*<sup>45</sup>

1. Name, identification number (where provided for in national legislation), address including NUTS code, telephone, fax number, email and internet address of the contracting entity and, where different, of the service from which additional information may be obtained.
2. Main activity exercised.
3. Nature of the contract (supplies, works or services and Nomenclature reference No(s); where appropriate state if it is a framework agreement).
4. At least a summary indication of the nature and quantity of the products, works or services provided.
5.
  - (a) Form of the call for competition (notice on the existence of a system of qualification; periodic notice; call for tenders);
  - (b) Date(s) and reference(s) of publication of the notice in the *Official Journal of the European Union*;
  - (c) In the case of contracts awarded without a prior call for competition, indication of the relevant provision of Article 44.
6. Procurement procedure (open, restricted or negotiated).
7. Number of tenders received, specifying
  - (a) number of tenders received from economic operators which are small and medium-sized enterprises,

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<sup>45</sup> Information in headings 6, 9 and 11 is deemed information not intended for publication where the awarding entity considers that publication thereof might be detrimental to a sensitive commercial interest.

- (b) number of tenders received from abroad,
- (c) number of tenders received electronically.

In the case of multiple awards (lots, multiple framework agreements), this information shall be given for each award.

8. *Date of the conclusion of the contract(s) or of the framework agreement(s) following the decision to award or conclude it/them.*
9. Price paid for bargain purchases pursuant to Article 44(i).
10. For each award, name, address including NUTS code, telephone, fax number, email address and internet address of the successful tenderer(s) including:
  - (a) information whether the successful tenderer is small and medium-sized enterprise,
  - (b) information whether the contract was awarded to a consortium.
11. State, where appropriate, whether the contract has been, or may be, subcontracted.
12. Price paid or the prices of the highest and lowest tenders taken into account in the award of the contract.
13. Name and address of the body responsible for the appeal and, where appropriate, mediation procedures. Precise information concerning the time limit for lodging appeals, or, if need be, the name, address, telephone number, fax number and e-mail address of the service from which this information may be obtained.
14. Optional information:
  - value and share of the contract which has been or may be subcontracted to third parties,
  - award criteria.

## II. Information not intended for publication

15. Number of contracts awarded (where an award has been split between several suppliers).
16. Value of each contract awarded.
17. Country of origin of the product or service (Community origin or non-Community origin; if the latter, broken down by third country).
18. Which award criteria were used (most economically advantageous; lowest cost)?
19. Was the contract awarded to a tenderer who submitted a variant, in accordance with Article 58(1)?
20. Were any tenders excluded on the grounds that they were abnormally low, in accordance with Article 79?
21. Date of transmission of the notice by the contracting entity.

ANNEX XIII

CONTENTS OF THE INVITATIONS TO SUBMIT A TENDER, *PARTICIPATE IN THE DIALOGUE*, TO NEGOTIATE OR TO CONFIRM INTEREST PROVIDED FOR UNDER ARTICLE 68

1. The invitation to submit a tender, *to participate in the dialogue* or to negotiate provided for under Article 68 must contain at least:

- (a) the final date for receipt of tenders, the address to which they are to be sent, and the language or languages in which they are to be drawn up;

However, in the case of contracts awarded through *a competitive dialogue* or an innovation partnership, this information shall not appear in the invitation to negotiate but it shall appear in the invitation to submit a tender.

- (aa) *in the case of competitive dialogue the date and the address set for the start of consultation and the language or languages used;*

- (b) a reference to any published call for competition;
- (c) an indication of any documents to be attached;
- (d) the criteria for the award of the contract, where they are not indicated in the notice on the existence of a qualification system used as a means of calling for competition;
- (e) the relative weighting of the contract award criteria or, where appropriate, the order of importance of such criteria, if this information is not given in the contract notice, the notice on the existence of a qualification system or the specifications.

2. When a call for competition is made by means of a periodic indicative notice, contracting entities shall subsequently invite all candidates to confirm their interest on the basis of detailed information on the contract concerned before beginning the selection of tenderers or participants in negotiations.

This invitation shall include at least the following information:

- (a) *nature and quantity, including all options concerning complementary contracts and, if possible, the estimated time available for exercising those options for renewable contracts, the nature and quantity and, if possible, the estimated publication dates of future notices of competition for works, supplies or services to be put out to tender;*
- (b) *type of procedure: restricted or negotiated;*
- (c) *where appropriate, the date on which the delivery of supplies or the execution of works or services is to commence or terminate;*
- (d) *where electronic access cannot be offered, the address and closing date for the submission of requests for procurement documents and the language or languages in which they are to be drawn up;*
- (e) *the address of the contracting entity;*
- (f) *economic and technical conditions, financial guarantees and information required from economic operators;*
- (g) *the form of the contract which is the subject of the invitation to tender: purchase, lease, hire or hire-purchase, or any combination of those; and*
- (h) *the contract award criteria and their weighting or, where appropriate, the order of importance of such criteria, if this information is not given in the indicative notice or the specifications or in the invitation to tender or to negotiate.*

## ANNEX XIV

### LIST OF INTERNATIONAL SOCIAL AND ENVIRONMENTAL CONVENTIONS REFERRED TO IN ARTICLES 70 AND 79

- Convention 87 on Freedom of Association and the Protection of the Right to Organise;
- Convention 98 on the Right to Organise and Collective Bargaining;
- Convention 29 on Forced Labour;
- Convention 105 on the Abolition of Forced Labour;
- Convention 138 on Minimum Age;
- Convention 111 on Discrimination (Employment and Occupation);
- Convention 100 on Equal Remuneration;
- Convention 182 on Worst Forms of Child Labour;
- Vienna Convention for the protection of the Ozone Layer and its Montreal Protocol on substances that deplete the Ozone Layer;
- Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention);
- Stockholm Convention on Persistent Organic Pollutants (Stockholm POPs Convention);
- Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (UNEP/FAO) (The PIC Convention) Rotterdam, 10/09/1998 and its 3 regional Protocols.

ANNEX XV

LIST OF EU LEGISLATION REFERRED TO IN ARTICLE 77(3)

- (a) Directive 2009/33/EC.

ANNEX XVI  
INFORMATION TO BE INCLUDED IN NOTICES OF MODIFICATIONS OF A CONTRACT  
DURING ITS TERM  
(as referred to in Article 82(6))

1. Name, identification number (where provided for in national legislation), address including NUTS code, telephone, fax number, email and internet address of the contracting entity and, where different, of the service from which additional information may be obtained.
2. Main activity exercised.
3. CPV Nomenclature reference No(s);
4. NUTS code for the main location of works in case of works or NUTS code for the main place of delivery or performance in supplies and service;
5. Description of the procurement before and after the modification: nature and extent of the works, nature and quantity or value of supplies, nature and extent of services.
6. Where applicable, increase in price caused by the modification.
7. Description of the circumstances which have rendered necessary the modification.
8. Date of contract award decision.
9. Where applicable, the name, address including NUTS code, telephone, fax number, email address and internet address of the new economic operator or operators.
10. Information whether the contract is related to a project and /or programme financed by European Union funds.
11. Name and address of the body responsible for review and, where appropriate, mediation procedures. Precise information concerning the deadline for review procedures, or if need be the name, address, telephone number, fax number and email address of the service from which this information may be obtained.



ANNEX XVII  
SERVICES REFERRED TO IN ARTICLE 84

CPV Code	Description
<p>75200000-8; 75231200-6; 75231240-8;</p> <p>79611000-0; 79622000-0 <i>[Supply services of domestic help personnel]</i>; 79624000-4 <i>[Supply services of nursing personnel]</i> and 79625000-1 <i>[Supply services of medical personnel]</i></p> <p>from 85000000-9 to 85323000-9;</p> <p>98133100-5, 98133000-4; 98200000-5 and ; 98500000-8 <i>[Private households with employed persons]</i> and 98513000-2 to 98514000-9 <i>[Manpower services for households, Agency staff services for households, Clerical staff services for households, Temporary staff for households, Home-help services and Domestic services]</i></p>	Health and social <i>and related</i> services
<p>85321000-5 and 85322000-2, 75000000-6 <i>[Administration, defence and social security services]</i>, 75121000-0, 75122000-7, 75124000-1; from 79995000-5 to 79995200-7; from 80000000-4 <i>Education and training services</i> to 80660000-8; from 92000000-1 to 92700000-8</p> <p>79950000-8 <i>[Exhibition, fair and congress organisation services]</i>, 79951000-5 <i>[Seminar organisation services]</i>, 79952000-2 <i>[Event services]</i>, 79952100-3 <i>[Cultural event organisation services]</i>, 79953000-9 <i>[Festival organisation services]</i>, 79954000-6 <i>[Party organisation services]</i>, 79955000-3 <i>[Fashion shows organisation services]</i>, 79956000-0 <i>[Fair and exhibition organisation services]</i></p>	Administrative social, educational, healthcare and cultural services
75300000-9	Compulsory social security services <sup>46</sup>

<sup>46</sup> These services are not covered by the present Directive where they are organised as non-economic services of general interest. Member States are free to organise the provision of compulsory social services or of other services as services of general interest or as non-economic services of general interest.

75310000-2, 75311000-9, 75312000-6, 75313000-3, 75313100-4, 75314000-0, 75320000-5, 75330000-8, 75340000-1	Benefit services
98000000-3, 98120000-0; 98132000-7; 98133110-8 and 98130000-3	Other community, social and personal services <i>including services furnished by trade unions, political organisations, youth associations and other membership organisation services</i>

98131000-0	Religious services
55100000-1 to 55410000-7; 55521000-8 to 55521200-0 [55521000-8 Catering services for private households, 55521100-9 Meals- on-wheels services, 55521200-0 Meal delivery service]  55510000-8 [Canteen services], 55511000-5 [Canteen and other restricted-clientele cafeteria services], 55512000-2 [Canteen management services], 55523100-3 [School- meal services],  55520000-1[Catering services], 55522000-5 [Catering services for transport enterprises], 55523000-2 [Catering services for other enterprises or other institutions], 55524000-9 [School catering services]	<i>Hotel and restaurant services</i>
79100000-5 to 79140000-7; 75231100-5;	<i>Legal services, to the extent not excluded pursuant to Article 10(ca)</i>
75100000-7 to 75120000-3; 75123000-4; 75125000-8 to 75131000-3	<i>Other administrative services and government services</i>
75200000-8 to 75231000-4	<i>Provision of services to the community</i>
75231210-9 to 75231230-5; 75240000-0 to 75252000-7; 794300000-7; 98113100-9	<i>Prison related services, public security and rescue services</i>
79700000-1 to 79721000-4 [Investigation and security services, Security services, Alarm-monitoring services, Guard services, Surveillance services, Tracing system services, Absconder-tracing services, Patrol services, Identification badge release services, Investigation services and Detective	<i>Investigation and security services</i>

<i>agency services]</i>  79722000-1[ <i>Graphology services</i> ], 79723000-8 [ <i>Waste analysis services</i> ]	
98900000-2 [ <i>Services provided by extra-territorial organisations and bodies</i> ] and 98910000-5 [ <i>Services specific to international organisations and bodies</i> ]	<i>International services</i>
64000000-6 [ <i>Postal and telecommunications services</i> ], 64100000-7 [ <i>Post and courier services</i> ], 64110000-0 [ <i>Postal services</i> ], 64111000-7 [ <i>Postal services related to newspapers and periodicals</i> ], 64112000-4 [ <i>Postal services related to letters</i> ], 64113000-1 [ <i>Postal services related to parcels</i> ], 64114000-8 [ <i>Post office counter services</i> ], 64115000-5 [ <i>Mailbox rental</i> ], 64116000-2 [ <i>Post-restante services</i> ], 64122000-7 [ <i>Internal office mail and messenger services</i> ]	<i>Postal Services</i>
50116510-9 [ <i>Tyre-remoulding services</i> ], 71550000-8 [ <i>Blacksmith services</i> ]	<i>Miscellaneous services</i>

## ANNEX XVIII

Information to be included in notices concerning contracts for social and other specific services  
(as referred to in Article 85)

### Part A Contract notice

1. Name, identification number (where provided for in national legislation), address including NUTS code, telephone, fax number, email and internet address of the contracting entity and, where different, of the service from which additional information may be obtained.
2. Main activity exercised.
3. Description of the services or categories thereof and where applicable, incidental works and supplies to be procured, including an indication of the quantities or values involved, nomenclature reference No(s).
4. NUTS code for the main place of performance of the services.
5. Where appropriate, state whether the contract is reserved for sheltered workshops or whether its performance is reserved in the context of sheltered employment programmes.
6. Main conditions to be fulfilled by the economic operators in view of their participation, or, where appropriate, the electronic address where detailed information may be obtained.
7. Time limit(s) for contacting the contracting entity in view of participation.
8. Any other relevant information.

### Part B Periodic indicative notice

1. Name, identification number (where provided for in national legislation), address including NUTS code, email and internet address of the contracting entity.

2. Brief description of the contract in question including CPV Nomenclature reference No(s).
3. As far as already known:
  - a) NUTS code for the main location of works in case of works or NUTS code for the main place of delivery or performance in case of supplies and services
  - b) time-frame for delivery or provision of goods, works or services and duration of the contract.
  - c) conditions for participation, including:

where appropriate, indication whether the contract is restricted to sheltered workshops, or whether its execution is restricted to the framework of protected job programmes, where appropriate, indication whether the execution of the service is reserved by law, regulation or administrative provision to a particular profession,
  - d) brief description of the main features of the award procedure to be applied.
4. A reference to the fact that interested economic operators shall advise the contracting entity of their interest in the contract or contracts and time limits for receipt of expressions of interest and location as to where expressions of interest shall be transmitted.

Part C Notice on the existence of a qualification system

1. Name, identification number (where provided for in national legislation), address including NUTS code, email and internet address of the contracting entity.
2. Brief description of the contract in question including CPV Nomenclature reference No(s).

3. As far as already known:
  - a) NUTS code for the main location of works in case of works or NUTS code for the main place of delivery or performance in case of supplies and services
  - b) time-frame for delivery or provision of goods, works or services and duration of the contract.
  - c) conditions for participation, including:

where appropriate, indication whether the contract is restricted to sheltered workshops, or whether its execution is restricted to the framework of protected job programmes,

where appropriate, indication whether the execution of the service is reserved by law, regulation or administrative provision to a particular profession,
  - d) brief description of the main features of the award procedure to be applied.
4. A reference to the fact that interested economic operators shall advise the contracting entity of their interest in the contract or contracts and time limits for receipt of expressions of interest and location as to where expressions of interest shall be transmitted.
5. Period of validity of the qualification system and the formalities for its renewal.

#### Part D Contract award notice

1. Name, identification number (where provided for in national legislation), address including NUTS code, telephone, fax number, email and internet address of the contracting entity and, where different, of the service from which additional information may be obtained.
2. Main activity exercised.

3. At least a summary indication of the nature and quantity of the services and where applicable, incidental works and supplies provided.
4. Reference of publication of the notice in the *Official Journal of the European Union*
5. Number of tenders received.
6. Name and address of the chosen economic operator(s).
7. Any other relevant information.

#### ANNEX XIX

##### INFORMATION TO BE INCLUDED IN THE DESIGN CONTEST NOTICE (as referred to in Article 89(1))

1. Name, identification number (where provided for in national legislation), address including NUTS code, telephone, fax number, email and internet address of the contracting entity and, where different, of the service from which additional information may be obtained.
2. Main activity exercised.
3. Project description (nomenclature reference No(s)).
4. Nature of the contest: open or restricted.
5. In the case of open contests: final date for receipt of projects.
6. In the case of restricted contests:
  - (a) the number of participants envisaged, or range;
  - (b) where applicable, names of participants already selected;
  - (c) criteria for the selection of participants;
  - (d) final date for receipt of requests to participate.

7. Where applicable, indication of whether participation is reserved to a particular profession.
8. Criteria to be applied in the evaluation of projects.
9. Where applicable, names of the selected members of the jury.
10. Indication of whether the decision of the jury is binding on the authority.
11. Where applicable, number and value of prizes.
12. Where applicable, details of payments to all participants.
13. Indication of whether the prize-winners are permitted any follow-up contracts.
14. Name and address of the body responsible for the appeal and, where appropriate, mediation procedures. Precise information concerning the time limit for lodging appeals, or, if need be, the name, address, telephone number, fax number and e-mail address of the service from which this information may be obtained.
15. Date of dispatch of the notice.
16. Any other relevant information



## ANNEX XX

### INFORMATION TO BE INCLUDED IN THE RESULTS OF DESIGN CONTEST NOTICES

(as referred to in Article 89(1))

1. Name, identification number (where provided for in national legislation), address including NUTS code, telephone, fax number, email and internet address of the contracting entity and, where different, of the service from which additional information may be obtained.
2. Main activity exercised.
3. Project description (nomenclature reference No(s)).
4. Total number of participants.
5. Number of foreign participants.
6. Winner(s) of the contest.
7. Where applicable, the prize(s).
8. Other information.
9. Reference of the design contest notice.
10. Name and address of the body responsible for the appeal and, where appropriate, mediation procedures. Precise information concerning the time limit for lodging appeals, or, if need be, the name, address, telephone number, fax number and e-mail address of the service from which this information may be obtained.
11. Date of dispatch of the notice.

ANNEX XXI  
CORRELATION TABLE<sup>47</sup>

[To be updated when the text is stable]

This Directive	Directive 2004/17/EC	
Art. 1	-	New
Art. 2, 1 <sup>st</sup> sentence	Art. 1, par. 1	=
Art. 2, point 1	Art. 2, par. 1, point (a), 1 <sup>st</sup> subpar.	=
Art. 2, points 2 and 3	-	New
Art. 2, point 4, (a), 1 <sup>st</sup> part	Art. 2, par. 1, point (a), 2 <sup>nd</sup> subpar., 1 <sup>st</sup> indent	=
Art. 2, point 4, (a), 2 <sup>nd</sup> part		New
Art. 2, point 4, (b)	Art. 2, par. 1, point (a), 2 <sup>nd</sup> subpar., 2 <sup>nd</sup> indent	=
Art. 2, point 4, (c)	Art. 2, par. 1, point (a), 2 <sup>nd</sup> subpar., 3 <sup>rd</sup> indent	=
Art. 2, point 5	Art. 2, par. 1, point (b), 1 <sup>st</sup> subpar.	=
Art. 2, point 6	Art. 2, par. 3	Adapted
Art. 2, point 7	Art. 1, par. 2, point (a)	Adapted
Art. 2, point 8	Art. 1, par. 2, point (b), 1 <sup>st</sup> sentence	Adapted
Art. 2, point 9	Art. 1, par. 2, point (b), 2 <sup>nd</sup> sentence	=
Art. 2, point 10	Art. 1, par. 2, point (c)	Adapted

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<sup>47</sup> "Adapted" means that the wording of the text was changed, while the meaning of the repealed directive was preserved. Changes to the meaning of the provisions of the repealed directive are indicated by the term "Amended".

Art. 2, point 11	Art. 1, par. 2, point (d), 1 <sup>st</sup> subpar.	Amended
Art. 2, point 12	Art. 1, par. 7, 1 <sup>st</sup> & 2 <sup>nd</sup> subpar.	Adapted
Art. 2, point 13	Art. 1, par. 7, 3 <sup>rd</sup> subpar.	=
Art. 2, point 14	Art. 1, par. 7, 3 <sup>rd</sup> subpar.	Amended
Art. 2, point 15	Art. 34, par. 1	Amended
Art. 2, point 16	Art. 1, par. 8	Amended
Art. 2, point 17		New
Art. 2, point 18	Art. 1, par. 8	Amended
Art. 2, point 19		New
Art. 2, point 20	Art. 1, par. 11	=
Art. 2, point 21	Art. 1, par. 12	=
Art. 2, point 22		New
Art. 2, point 23	Art. 1, par. 10	=
Art. 3, par. 1, 1 <sup>st</sup> subparagraph		New
Art. 3, par. 1, 2 <sup>nd</sup> subparagraph	Art. 1, par. 2, point (d), 2 <sup>nd</sup> & 3 <sup>rd</sup> subpar.	Amended
Art. 3, par. 1, 3 <sup>rd</sup> subparagraph		New
Art. 3, par. 2	Art. 9, par. 1	=
Art. 3, par. 3	Art. 9, par. 2	=
Art. 3, par. 4	Art. 9, par. 3	Amended
Art. 4, par. 1	Art. 2, par. 1, point (b) 2 <sup>nd</sup> subpar.	=
Art. 4, par. 2, 1 <sup>st</sup> subparagraph	Art. 2, par. 3; Recital 25	Adapted

Art. 4, par. 2, 2 <sup>nd</sup> subparagraph		New
Art. 4, par. 3	Art. 2, par. 2	=
Art. 4, par. 4		New
Art. 5	Art. 3, par. 1 & 2	=
Art. 6, par. 1	Art. 3, par. 3	Adapted
Art. 6, par. 2	Art. 3, par. 4	=
Art. 7	Art. 4	=
Art. 8	Art. 5, par. 1	=
	Art. 5, par. 2	Deleted
Art. 9	Art. 7, point (b)	=
Art. 10, par. 1	Art. 6, par. 1	adapted
Art. 10, par. 2, point (a)	Art. 6, par. 2, point (a)	=
Art. 10, par. 2, point (b)	Art. 6, par. 2, point (b)	Amended
Art. 10, par. 2, point (c)	Art. 6, par. 2, point (c)	Adapted
Art. 11, point (a)	Art. 7, point (a)	Amended
Art. 11, point (b)	Art. 7, point (a)	=
	Art. 8	Deleted
	Annex I - X	Deleted
Art. 12	Art. 16 & 61	Amended
Art. 13, par. 1	Art. 17, par. 1; Art. 17, par. 8	Amended
Art. 13, par. 2	Art. 17, par. 2; Art. 17, par. 8	Amended
Art. 13, par. 3		New
Art. 13, par. 4	Art. 17, par. 3	=
Art. 13, par. 5		New

Art. 13, par. 6	Art. 17, par. 4 & 5	Adapted
Art. 13, par. 7	Art. 17, par. 6(a), 1 <sup>st</sup> & 2 <sup>nd</sup> subpar.	=
Art. 13, par. 8	Art. 17, par. 6(b), 1 <sup>st</sup> & 2 <sup>nd</sup> subpar.	=
Art. 13, par. 9	Art. 17, par. 6(a), 3 <sup>rd</sup> subpar. & par. 6(b), 3 <sup>rd</sup> subpar.	Adapted
Art. 13, par. 10	Art. 17, par. 7	=
Art. 13, par. 11	Art. 17, par. 9	=
Art. 13, par. 12	Art. 17, par. 10	=
Art. 13, par. 13	Art. 17, par. 11	=
Art. 14	Art. 69	Adapted
Art. 15, par. 1	Art. 19, par. 1	=
Art. 15, par. 2	Art. 19, par. 1	Amended
Art. 16, par. 1	Art. 20, par. 1; Art. 62, point 1	Adapted
Art. 16, par. 2	Art. 20, par. 2	Amended
Art. 17, par. 1	Art. 22a	Adapted
Art. 17, par. 2	Art. 21; Art. 62, point 1	Amended
Art. 18	Art. 22; Art. 62, point 1	Amended
Art. 19, point (a) and (b)	Art. 24, point (a) and (b)	=
Art. 19, point (c)	Art. 24, point (c)	Amended
Art. 19, point (d)	Art. 24, point (d)	=
Art. 19, point (e)		New
Art. 19, point (f) and 2 <sup>nd</sup> subparagraph.		New
Art. 20	Art. 26	Adapted

Art. 21		New
Art. 22, par. 1	Art. 23, par. 1	Adapted
Art. 22, par. 2	Art. 23, par. 1	Adapted
Art. 22, par. 3	Art. 23, par. 2	Adapted
Art. 22, par. 4	Art. 23, par. 3, points (a) to (c)	Adapted
Art. 22, par. 5	Art. 23, par. 3, 2 <sup>nd</sup> & 3 <sup>rd</sup> subpar.	Adapted
Art. 23	Art. 23, par. 4	Adapted
Art. 24	Art. 23, par. 5	Amended
Art. 25, par. 1	Art. 24, point (e)	Amended
Art. 25, par. 2		New
Art. 26, par. 1 and 2	Art. 27	Amended
Art. 26, par. 3		New
Art. 27, par. 1, 1 <sup>st</sup> sentence	Art. 30, par. 1; Art. 62, point (2)	Adapted
Art. 27, par. 1, 2 <sup>nd</sup> sentence		New
Art. 27, par. 2, 1 <sup>st</sup> subparagraph	Art. 30, par. 2	=
Art. 27, par. 2, 2 <sup>nd</sup> subparagraph		New
Art. 27, par. 3	Art. 30, par. 3	=
Art. 28, par. 1	Art. 30, par. 4, 1 <sup>st</sup> subpar.; par. 5, 1 <sup>st</sup> & 2 <sup>nd</sup> subpar.	Amended
Art. 28, par. 2	Art. 30, par. 4, 2 <sup>nd</sup> subpar.; par. 5, 4 <sup>th</sup> subpar.; Art. 62, point (2)	Adapted
	Art. 30, par. 4, 3 <sup>rd</sup> subpar.	Deleted
Art. 28, par. 3, 1 <sup>st</sup> & 2 <sup>nd</sup> subparagraph	Art. 30, par. 6, 1 <sup>st</sup> subpar.	Amended

Art. 28, par. 3, 3 <sup>rd</sup> subparagraph		New
Art. 28, par. 3, 4 <sup>th</sup> subparagraph	Art. 30, par. 6, 1 <sup>st</sup> subpar., 2 <sup>nd</sup> sentence	Amended
Art. 28, par. 4	Art. 30, par. 6, 2 <sup>nd</sup> subpar.	=
Art. 28, par. 5	Art. 30, par. 6, 4 <sup>th</sup> subpar.	Amended
Art. 29	Art. 10	Amended
Art. 30, par. 1	Art. 11, par. 1	Adapted
Art. 30, par. 2	Art. 11, par. 2	Amended
Art. 31	Art. 28	Amended
Art. 32	Art. 13	Amended
Art. 33, par. 1	Art. 48, par. 1; Art. 64, par. 1	Amended
Art. 33, par. 2	Art. 48, par. 2 & 3; Art. 64, par. 1 & 2	Adapted
Art. 33, par 3, 1 <sup>st</sup> subparagraph	Art. 48, par. 4; Art. 64, par. 1	Amended
Art. 33, par 3, 2 <sup>nd</sup> subparagraph	Art. 70, par 2, point (f)	=
Art. 33, par. 3 3 <sup>rd</sup> subparagraph		New
Art, 33, par. 4		New
Art. 33, par. 5	Art. 48, par. 5; Art. 64, par. 3	Amended
Art. 33, par. 6	Art. 48, par. 6	Adapted
Art. 33, par. 7		New
Art. 34		New
Art. 35, par. 1	Art. 1, par. 13	Amended
Art. 35, par 2	Art. 70, par. 2, points (c) & (d)	Adapted

Art. 36		New
Art. 37		New
Art. 38, par. 1	Art. 12	Amended
Art. 38, par. 2		New
Art. 39, par. 1	Art. 40, par. 1 & 2	Amended
Art. 39, par. 2	Art. 42	=
Art. 39, par. 3		New
Art. 40, par. 1	Art. 1, par. 9, point (a); Art. 45, par. 2	Amended
Art. 40, par. 2	Art. 45, par. 4	Amended
Art. 40, par. 3		New
Art. 40, par. 4		New
Art. 41	Art. 1, par. 9, point (b); Art. 45, par. 3	Amended
Art. 42	Art. 1, par. 9, point (c); Art. 45, par. 3	Amended
Art. 43		New
Art. 44, point (a)	Art. 40, par. 3, point (a)	=
Art. 44, point (b)	Art. 40, par. 3, point (b)	=
Art. 44, point (c)	Art. 40, par. 3, point (c)	Amended
Art. 44, point (d)	Art. 40, par. 3, point (c)	Amended
Art. 44, point (e)	Art. 40, par. 3, point (d)	Amended
Art. 44, point (f)	Art. 40, par. 3, point (e)	=
Art. 44, point (g)	Art. 40, par. 3, point (g)	Amended
Art. 44, point (h)	Art. 40, par. 3, point (h)	Amended
Art. 44, point (i)	Art. 40, par. 3, point (j)	=



Art. 44, point (j)	Art. 40, par. 3, point (k)	Adapted
Art. 44, point (k)	Art. 40, par. 3, point (l)	Adapted
Art. 44, 2 <sup>nd</sup> and 3 <sup>rd</sup> subparagraphs		New
Art. 44, 4 <sup>th</sup> subparagraph	Art. 40, par. 3, point (g) in fine	Adapted
Art. 45, par. 1, 1 <sup>st</sup> & 2 <sup>nd</sup> subparagraph	Art. 14, par. 1; Art. 1, par. 4	Adapted
Art. 45, par. 1, 3 <sup>rd</sup> subparagraph		New
Art. 45, par. 2 to 5	Art. 14, par. 2 - 4; Art. 40, par. 3, point (i)	Amended
Art. 46, par. 1	Art. 1, par. 5; Art. 15, par. 1	Amended
Art. 46, par. 2	Art. 15, par. 2	Amended
Art. 46, par. 3	Art. 15, par. 3	Adapted
Art. 46, par. 4	Art. 15, par. 4	Amended
Art. 46, par. 5	Art. 15, par. 6	Amended
Art. 46, par. 6		New
Art. 46, par. 7	Art. 15, par. 7, 3 <sup>rd</sup> subpar.	=
Art. 47, par. 1	Art. 1, par. 6; Art. 56, par. 1	Amended
Art. 47, par. 2, 1 <sup>st</sup> subparagraph	Art. 56, par. 2, 1 <sup>st</sup> subpar.	=
Art. 47, par. 2, 2 <sup>nd</sup> subparagraph	Art. 56, par. 2, 2 <sup>nd</sup> subpar.	Adapted
Art. 47, par. 3	Art. 56, par. 2, 3 <sup>rd</sup> subpar.	Adapted
Art. 47, par. 4	Art. 56, par. 3	Adapted
Art. 47, par. 5	Art. 56, par. 4	Adapted
Art. 47, par. 6	Art. 56, par. 5	Adapted

Art. 47, par. 7	Art. 56, par. 6	=
Art. 47, par. 8	Art. 56, par. 7	Adapted
Art. 47, par. 9	Art. 56, par. 8, 1 <sup>st</sup> subpar.	=
Art. 48		New
Art. 49, par. 1	Art. 29, par. 1	Amended
Art. 49, par. 2		New
Art. 49, par. 3	Art. 29, par. 2	Amended
Art. 49, par. 4		New
Art. 49, par. 5	Art. 29, par. 2	Amended
Art. 49, par. 6		New
Art. 50		New
Art. 51		New
Art. 52		New
Art. 53, par. 1	Recital 15	Amended
Art. 53, par. 2		New
Art. 54, par. 1	Art. 34, par. 1	Amended
Art. 54, par. 2	Art. 34, par. 2	Adapted
Art. 54, par. 3	Art. 34, par. 3	Adapted
Art. 54, par. 4	Art. 34, par. 8	=
Art. 54, par. 5	Art. 34, par. 4	Adapted
Art. 54, par. 6	Art. 34, par. 5	Amended
Art. 55, par. 1	Art. 34, par. 6	Amended
Art. 55, par. 2	Art. 34, par. 6	Adapted
Art. 56, par. 1	Art. 34, par. 4, 5, 6, & 7	Amended

Art. 56, par. 2	Art. 34, par. 4, 5 & 6	Amended
Art. 56, par. 3	Art. 34, par. 7	Adapted
Art. 56, par. 4		New
Art. 57	Art. 35	Amended
Art. 58, par. 1	Art. 36, par. 1	Amended
Art. 58, par. 2	Art. 36, par. 2	Adapted
Art. 59		New
Art. 60, par. 1	Art. 45, par. 1	Adapted
Art. 60, par. 2	Art. 45, par. 9	Amended
	Art. 45, par. 10	Deleted
Art. 61, par. 1	Art. 41, par. 1 & 2	Adapted
Art. 61, par. 2	Art. 42, par. 3; Art. 44, par. 1	Adapted
Art. 62	Art. 41, par. 3	Adapted
Art. 63	Art. 42, par. 1, point (c); Art. 44, par. 1	Adapted
Art. 64, par. 1	Art. 43, par. 1, 1 <sup>st</sup> subpar.; Art. 44, par. 1	Adapted
Art. 64, par. 2	Art. 43, par. 1, 2 <sup>nd</sup> & 3 <sup>rd</sup> subpar.	Amended
Art. 64, par. 3	Art. 43, par 2 & 3	Amended
Art. 64, par. 4	Art. 43, par. 5	Adapted
Art. 65, par. 1	Art. 44, par. 1; Art. 70, par. 1, point (b)	Amended
Art. 65, par. 2	Art. 44, par. 2, 3 & par. 4, 2 <sup>nd</sup> subpar.	Amended
Art. 65, par 3	Art. 44, par. 4, 1 <sup>st</sup> subpar.	Adapted
Art. 65, par. 4		New

Art. 65, par. 5	Art. 44, par. 6 & 7	Amended
Art. 65, par. 6	Art. 44, par. 8	Amended
Art. 66, par. 1	Art. 44, par. 5, 1 <sup>st</sup> subpar.	Amended
Art. 66, par. 2 and 3	Art. 44, par. 5, 2 <sup>nd</sup> & 3 <sup>rd</sup> subpar.	Adapted
Art. 67, par. 1	Art. 45, par. 6	Amended
Art. 67, par. 2	Art. 46, par. 2	Amended
Art. 68, par. 1	Art. 47, par. 1, 1 <sup>st</sup> sentence	Adapted
Art. 68, par. 2	Art. 47, par. 1, 2 <sup>nd</sup> sentence	Adapted
Art. 69, par. 1	Art. 49, par. 1	Adapted
Art. 69, par. 2	Art. 49, par. 2, 1 <sup>st</sup> & 2 <sup>nd</sup> subpar.	Adapted
Art. 69, par. 3	Art. 49, par. 2, 3 <sup>rd</sup> subpar.	=
Art. 69, par. 4, 5 and 6	Art. 49, par. 3, 4 & 5	=
Art. 70, par. 1	Art. 51, par. 1	Adapted
Art. 70, par. 2	Art. 51, par. 2	=
Art. 70, par. 3	Art. 52, par. 1	=
Art. 70, par. 4	Art. 51, par. 3	Adapted
Art. 70, par. 5		New
Art. 70, par. 6		New
Art. 70, par. 7		New
Art. 71, par. 1	Art. 53, par. 1	=
Art. 71, par. 2	Art. 53, par. 2	Adapted
Art. 71, par. 3	Art. 53, par. 6	=
Art. 71, par. 4	Art. 53, par. 7	=
Art. 71, par. 5	Art. 53, par. 9	Adapted

Art. 71, par. 6		New
Art. 72, par. 1	Art. 54, par. 1 & 2	Adapted
Art. 72, par. 2	Art. 54, par. 3	Adapted
Art. 73, par. 1	Art. 53, par. 4 & 5	Amended
Art. 73, par. 2	Art. 54, par. 5 & 6	Amended
Art. 73, par. 3		New
Art. 74, par. 1	Art. 53, par. 3; Art. 54, par. 4	Adapted
Art. 74, par. 2		New
Art. 74, par. 3	Art. 53, par. 3; Art. 54, par. 4	Amended
Art. 75, par. 1	Art. 52, par. 2	Amended
Art. 75, par. 2	Art. 52, par. 3	Amended
Art. 75, par. 3		New
Art. 76, par. 1	Art. 55, par. 1	Amended
Art. 76, par. 2	Art. 55, par. 1, point (a)	Amended
Art. 76, par. 3		New
Art. 76, par. 4	Recital 1; Recital 55, 3 <sup>rd</sup> par.	Amended
Art. 76, par. 5		Amended
Art. 77		New
Art. 78		New
Art. 79, par. 1	Art. 57, par. 1	Amended
Art. 79, par. 2	Art. 57, par. 1	Adapted
Art. 79, par. 3, point (a)	Art. 57, par. 1, 2 <sup>nd</sup> subpar., point (a)	=
Art. 79, par. 3, point (b)	Art. 57, par. 1, 2 <sup>nd</sup> subpar., point (b)	=

Art. 79, par. 3, point (c)	Art. 57, par. 1, 2 <sup>nd</sup> subpar., point (c)	=
Art. 79, par. 3, point (d)	Art. 57, par. 1, 2 <sup>nd</sup> subpar., point (d)	Amended
Art. 79, par. 3, point (e)	Art. 57, par. 1, 2 <sup>nd</sup> subpar., point (e)	=
Art. 79, par. 4, 1 <sup>st</sup> & 2 <sup>nd</sup> subparagraph	Art. 57, par. 2	Amended
Art. 79, par. 4, 3 <sup>rd</sup> subparagraph		New
Art. 79, par. 5	Art. 57, par. 3	Adapted
Art. 79, par. 6		New
	Art. 58; Art. 59	Deleted
Art. 80	Art. 38	Amended
Art. 81, par. 1	Art. 37, 1 <sup>st</sup> sentence	=
Art. 81, par. 2		New
Art. 81, par. 3	Art. 37, 2 <sup>nd</sup> sentence	Adapted
Art. 82, par. 1 – 5, par. 7		New
Art. 82, par. 6	Art. 40, par. 3, point (f)	Amended
Art. 83		New
Art. 84		New
Art. 85		New
Art. 86		New
Art. 87	Art. 60	=
Art. 88	Art. 61	Adapted
Art. 89, par. 1	Art. 63, par. 1, 1 <sup>st</sup> subpar.	Adapted

Art. 89, par. 2, 1 <sup>st</sup> and 2 <sup>nd</sup> subparagraphs	Art. 63, par. 1, 1 <sup>st</sup> subpar; 2 <sup>nd</sup> subpar., 1 <sup>st</sup> sentence	Adapted
Art. 89, par. 2, 3 <sup>rd</sup> subparagraph	Art. 63, par. 1, 2 <sup>nd</sup> subpar., 2 <sup>nd</sup> sentence	Amended
Art. 89, par. 3	Art. 63, par. 2	Adapted
Art. 90	Art. 65	=
Art. 91	Art. 66	=
Art. 92	Art. 72, 1 <sup>st</sup> subpar.	Adapted
Art. 93, par. 1	Art. 72, 2 <sup>nd</sup> subpar.	Amended
Art. 93, par. 2 - 8		New
Art. 94	Art. 50	Amended
Art. 95, par. 1 - 3	Art. 67	Amended
Art. 95, par. 4		New
Art. 95, par. 5	Art. 70, par. 1, point (c)	Adapted
Art. 95, par. 6	Art. 67, par. 3	Amended
Art. 96		New
Art. 97		New
Art. 98	Art. 68, par. 3 & 4	Amended
Art. 99	Art. 68, par. 5	Amended
Art. 100, par. 1	Art. 68, par. 1	Adapted
Art. 100, par. 2	Art. 68, par. 3	Adapted
Art. 101, par. 1	Art. 71, par. 1	Adapted
Art. 101, par. 2	Art. 71, par. 2	=
Art. 102	Art. 73	Adapted
Art. 103		New

Art. 104 and 105	Art. 74; Art. 75	=
	Annex I to X	Deleted
Annex I (except 1 <sup>st</sup> sentence)	Annex XII (except footnote 1)	=
1 <sup>st</sup> sentence of Annex I	Footnote 1 to Annex XII	Amended
Annex II		New
Annex III, points A, B, C, E, F, G, H, I and J	Annex XI	Adapted
Annex III, point D		New
Annex IV, (a) – (g)	Annex XXIV, (b) – (h)	=
Annex IV, (h)		New
Annex V		New
Annex VI	Annex XV	Amended
Annex VII	Art. 56, par. 3, points (a) – (f)	=
Annex VIII, except for point 4	Annex XXI	Adapted
Annex VIII, point 4	Annex XXI	Amended
Annex IX	Annex XX	Amended
Annex X	Annex XIV	Amended
Annex XI	Annex XIII	Amended
Annex XII	Annex XVI	Amended
Annex XIII, 1.	Art. 47, par. 4	Adapted
Annex XIII, 2.	Art. 47, par. 5	Adapted
Annex XIV	Annex XXIII	Amended
Annex XV		New
Annex XVI	Annex XVI	Amended



Annex XVII	Annex XVII	Amended
Annex XVIII		New
Annex XIX	Annex XVIII	Amended
Annex XX	Annex XIX	Amended
Annex XI	Annex XXVI	Amended
	Annex XXII	Deleted
	Annex XXV	Deleted

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