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#### **INFORMATION NOTE**

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from:	General Secretariat
to:	Permanent Representatives Committee/Council
Subject:	Proposal for a Directive of the European Parliament and of the Council on the award of concession contracts – Outcome of the European Parliament's first reading (Strasbourg, 13 to 16 January 2014)

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#### **I. INTRODUCTION**

In accordance with the provisions of Article 294 of the TFEU and the joint declaration on practical arrangements for the codecision procedure <sup>1</sup>, a number of informal contacts have taken place between the Council, the European Parliament and the Commission with a view to reaching an agreement on this dossier at first reading, thereby avoiding the need for second reading and conciliation.

In this context, the rapporteur, Mr Philippe JUVIN (EPP - FR) presented one compromise amendment (amendment 282) to the proposal for Directive, on behalf of the Committee on Internal Market and Consumer Protection. This amendment had been agreed during the informal contacts referred to above.

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<sup>1</sup> OJ C 145, 30.6.2007, p.5

## II. VOTE

When it voted on 15 January 2014, the plenary adopted the compromise amendment (amendment 282) to the proposal for a Directive. The Commission's proposal as thus amended and the legislative resolution constitute the Parliament's first-reading position<sup>1</sup>, it reflects what had been previously agreed between the institutions. The Council should therefore be in a position to approve the Parliament's position.

The act would then be adopted in the wording which corresponds to the Parliament's position.

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<sup>1</sup> The text of the amendment adopted and the European Parliament's legislative resolution are set out in the Annex. The amendment is presented in the form of a consolidated text, where changes to the Commission's proposal are highlighted in *bold and italics*. The symbol "■" indicates deleted text.

## Award of concession contracts \*\*\*I

**European Parliament legislative resolution of 15 January 2014 on the proposal for a directive of the European Parliament and of the Council on the award of concession contracts (COM(2011)0897 – C7-0004/2012 – 2011/0437(COD))**

**(Ordinary legislative procedure: first reading)**

*The European Parliament,*

- having regard to the Commission proposal to Parliament and the Council (COM(2011)0897),
  - having regard to Article 294(2) and Articles 53(1), 62 and 114 of the Treaty on the Functioning of the European Union, pursuant to which the Commission submitted the proposal to Parliament (C7-0004/2012),
  - having regard to Article 294(3) of the Treaty on the Functioning of the European Union,
  - having regard to the reasoned opinions submitted, within the framework of Protocol No 2 on the application of the principles of subsidiarity and proportionality, by the German Bundesrat, the Spanish Congress of Deputies and the Austrian Federal Council, asserting that the draft legislative act does not comply with the principle of subsidiarity,
  - having regard to the opinion of the European Economic and Social Committee of 26 April 2012<sup>1</sup>,
  - having regard to the opinion of the Committee of the Regions of 19 July 2012<sup>2</sup>,
  - having regard to the undertaking given by the Council representative by letter of 17 July 2013 to approve Parliament's position, in accordance with Article 294(4) of the Treaty on the Functioning of the European Union,
  - having regard to Rule 55 of its Rules of Procedure,
  - having regard to the report of the Committee on the Internal Market and Consumer Protection and the opinions of the Committee on International Trade, the Committee on Employment and Social Affairs, the Committee on Industry, Research and Energy, the Committee on Transport and Tourism, the Committee on Regional Development and Committee on Legal Affairs (A7-0030/2013),
1. Adopts its position at first reading hereinafter set out;
  2. Calls on the Commission to refer the matter to Parliament again if it intends to amend its proposal substantially or replace it with another text;

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<sup>1</sup> OJ C 191, 29.6.2012, p. 84.

<sup>2</sup> OJ C 277, 13.9.2012, p. 74.

3. Instructs its President to forward its position to the Council, the Commission and the national parliaments.

**P7\_TC1-COD(2011)0437**

**Position of the European Parliament adopted at first reading on 15 January 2014 with a view to the adoption of Directive 2014/.../EU of the European Parliament and of the Council on the award of concession contracts**

(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), 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,

Having regard to the opinion of the European Economic and Social Committee<sup>1</sup>,

Having regard to the opinion of the Committee of the Regions<sup>2</sup>,

Acting in accordance with the ordinary legislative procedure<sup>3</sup>,

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<sup>1</sup> OJ C 191, 29.6.2012, p. 84.

<sup>2</sup> OJ C 391, 18.12.2012, p. 49.

<sup>3</sup> Position of the European Parliament of 15 January 2014.

Whereas:

- (1) The absence of clear rules at Union level governing the award of concession contracts gives rise to legal uncertainty and to obstacles to the free provision of services and causes distortions in the functioning of the internal market. As a result, economic operators, in particular small and medium-sized enterprises (SMEs), are being deprived of their rights within the internal market and miss out on important business opportunities, while public authorities may not find the best use of public money so that Union citizens benefit from quality services at best prices. An adequate, ***balanced and flexible*** legal framework for the award of concessions would ensure effective and non-discriminatory access to the market to all Union economic operators and legal certainty, favouring public investments in infrastructures and strategic services to the citizen. ***Such a legal framework would also afford greater legal certainty to economic operators and could be a basis for and means of further opening up international public procurement markets and boosting world trade. Particular importance should be given to improving the access opportunities of SMEs throughout the Union concession markets.***
  
- (2) ***The rules of the legislative framework applicable to the award of concessions should be clear and simple. They should duly reflect the specificity of concessions as compared to public contracts and should not create an excessive amount of bureaucracy.***

- (3) Public procurement plays a key role in the Europe 2020 strategy, set out in the Commission Communication of 3 March 2010 entitled "Europe 2020, a strategy for smart, sustainable and inclusive growth" (the "Europe 2020 strategy"), as one of the market-based instruments to be used to achieve smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. ***In this context, concession contracts represent important instruments in the long-term structural development of infrastructure and strategic services, contributing to the progress of competition within the internal market, making it possible to benefit from private sector expertise and helping to achieve efficiency and innovation.***
- (4) The award of **public** works concessions is presently subject to the basic rules of Directive 2004/18/EC of the European Parliament and of the Council<sup>1</sup>; while the award of services concessions with a cross-border interest is subject to the principles of the Treaty ***on the Functioning of the European Union (TFEU)***, and in particular the principles of free movement of goods, freedom of establishment and freedom to provide services, as well as to the principles deriving therefrom such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. There is a risk of legal uncertainty related to divergent interpretations of the principles of the Treaty by national legislators and of wide disparities among the legislations of various Member States. Such risk has been confirmed by the extensive case law of the Court of Justice of the European Union ■ which has, ***nevertheless***, only partially addressed certain aspects of the award of concession contracts.

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<sup>1</sup> 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 (OJ L 134, 30.4.2004, p. 114).

A uniform **application** of the principles of the TFEU across all Member States and the elimination of discrepancies in **the understanding of those principles** is necessary at the Union level in order to eliminate persisting distortions of the internal market. **That would also favour the efficiency of public spending, facilitate equal access and fair participation of SMEs in the award of concession contracts, both at local and Union level, and support the achievement of sustainable public policy objectives.**

- (5) This Directive **recognises and reaffirms the right of Member States and public authorities to decide the means of administration they judge to be most appropriate for performing works and providing services. In particular, this Directive** should not in any way affect the freedom of Member States **and public authorities to perform works or provide services directly to the public or to outsource such provision by delegating it** to third parties. Member States or public authorities should remain free to define **and specify** the characteristics of the **services** to be provided, including any conditions regarding the quality or price of the services, in **accordance with Union law, in** order to pursue their public policy objectives.



- (6) *It should be recalled that Member States are free to decide, in compliance with the principles of the TFEU on equal treatment, non-discrimination, transparency and the free movement of persons to organise the provision of services either as services of general economic interest or as non-economic services of general interest or as a mixture thereof. It should also be recalled that this Directive is without prejudice to the freedom of national, regional and local authorities to define, in conformity with Union law, services of general economic interest, their scope and the characteristics of the service to be provided, including any conditions regarding the quality of the service, in order to pursue their public policy objectives. It should also be without prejudice to the power of national, regional and local authorities to provide, commission and finance services of general economic interest in accordance with Article 14 TFEU and Protocol No 26 annexed to the TFEU and to the Treaty on European Union (TEU). In addition, this Directive does not deal with the funding of services of general economic interest or with systems of aid granted by Member States, in particular in the social field, in accordance with Union rules on competition. It is appropriate to clarify that non-economic services of general interest should not fall within the scope of this Directive.*
- (7) *It is also appropriate to recall that this Directive should not affect the social security legislation of the Member States. Nor should it entail the liberalisation of services of general economic interest, reserved to public or private entities, or the privatisation of public entities providing services.*

- (8) For concessions *equal to or* above a certain value, it is appropriate to provide for a minimum coordination of national procedures for the award of such contracts based on principles of the TFEU so as to guarantee the opening-up of concessions to competition and adequate legal certainty. Those coordinating provisions should not go beyond what is necessary in order to achieve the aforementioned objectives *and to ensure a certain degree of flexibility*. ■ Member States should be allowed to complete and develop further those provisions if they find it appropriate, in particular to better ensure compliance with the principles set out above.
- (9) *It should be clarified that groups of economic operators, including where they have come together in the form of a temporary association, may participate in award procedures without it being necessary for them to take on a specific legal form. To the extent that that is necessary, for instance where joint and several liability is required, a specific form may be required when such groups are awarded the concession. It should also be clarified that contracting authorities or contracting entities should be able to set out explicitly how groups of economic operators are to meet the requirements concerning economic and financial standing, or the criteria relating to technical and professional ability which are required of economic operators participating on their own. The performance of concession contracts by groups of economic operators may necessitate setting conditions which are not imposed on individual participants. Such conditions, which should be justified by objective reasons and be proportionate, could for instance include requiring the appointment of a joint representation or a lead partner for the purposes of the concession award procedure or requiring information on their constitution.*

- (10) Certain coordination provisions should also be introduced for the award of works and services concessions ■ in the ■ energy, transport and postal services sectors, given that national authorities may influence the behaviour of entities operating in those sectors, and taking into account 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 services concerned.
- (11) Concessions are contracts for pecuniary interest *by means of which* one or more contracting authorities or contracting entities *entrusts the execution of works, or the provision and the management of services, to one or more economic operators. The object of such contracts is the procurement of works or services by means of a concession, the consideration of which consists* in the right to exploit the works or services *or in that right together with payment. Such contracts may, but do not necessarily, involve a transfer of ownership to contracting authorities or contracting entities, but contracting authorities or contracting entities always obtain the benefits of the works or services in question.*
- (12) *For the purpose of this Directive, it should be clarified that the mere financing, in particular through grants, of an activity, which is frequently linked to the obligation to reimburse the amounts received where they are not used for the purposes intended, does not fall under the scope of this Directive.*

- (13) *Furthermore, arrangements where all operators fulfilling certain conditions are entitled to perform a given task, without any selectivity, such as customer choice and service voucher systems, should not qualify as concessions, including those based on legal agreements between the public authority and the economic operators. Such systems are typically based on a decision by a public authority defining the transparent and non-discriminatory conditions on the continuous access of economic operators to the provision of specific services, such as social services, allowing customers to choose between such operators.*
- (14) *In addition, certain Member State acts such as authorisations or licences, whereby the Member State or a public authority thereof establishes the conditions for the exercise of an economic activity, including a condition to carry out a given operation, granted, normally, on request of the economic operator and not on the initiative of the contracting authority or the contracting entity and where the economic operator remains free to withdraw from the provision of works or services, should not qualify as concessions. In the case of those Member State acts, the specific provisions of Directive 2006/123/EC of the European Parliament and of the Council <sup>1</sup> apply. In contrast to those Member State acts, concession contracts provide for mutually binding obligations where the execution of the works or services are subject to specific requirements defined by the contracting authority or the contracting entity, which are legally enforceable.*

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<sup>1</sup> *Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ L 376, 27.12.2006, p. 36).*

- (15) *In addition, certain agreements having as their object the right of an economic operator to exploit certain public domains or resources **under private or public law, such as land or any public property, in particular in the maritime, inland ports or airports sector, whereby the State or contracting authority or contracting entity establishes only general conditions for their use without procuring specific works or services, should not qualify as concessions within the meaning of this Directive. This is normally the case with public domain or land lease contracts which generally contain terms concerning entry into possession by the tenant, the use to which the property is to be put, the obligations of the landlord and tenant regarding the maintenance of the property, the duration of the lease and the giving up of possession to the landlord, the rent and the incidental charges to be paid by the tenant.***
- (16) *In addition, agreements that grant rights of way covering the utilisation of public immovable property for the provision or operation of fixed lines or networks intended to provide a service to the public should also not be considered to be concessions within the meaning of this Directive, in so far as those agreements neither impose an obligation of supply nor involve any acquisition of services by a contracting authority or contracting entity to itself or to end users.*

- (17) *Contracts not involving payments to the contractor and where the contractor is remunerated on the basis of the regulated tariffs, calculated so as to cover all costs and investments borne by the contractor for providing the service, should not be covered by this Directive.*
- (18) Difficulties related to the interpretation of the concepts of concession and public contract have **generated** continued legal uncertainty among stakeholders and have given rise to numerous judgments of the Court of Justice of the European Union. Therefore, the definition of concession should be clarified, in particular by referring to the concept of **operating risk**. The main feature of a concession, the right to exploit the works or services, always implies the transfer to the concessionaire of an **operating risk of economic nature** involving the possibility that it will not recoup the investments made and the costs incurred in operating the works or services awarded **under normal operating conditions even if a part of the risk remains with the contracting authority or contracting entity**. The application of specific rules governing the award of concessions would not be justified if the contracting authority or **contracting** entity relieved the **economic operator** of any potential loss, by guaranteeing a minimal revenue, equal or higher to the **investments made and the** costs that the economic operator has to incur in relation with the performance of the contract. At the same time it should be made clear that certain arrangements which are **exclusively remunerated** by a contracting authority or a contracting entity should qualify as concessions where the **recoupment** of the **investments** and costs incurred by the operator for **executing** the work or **providing** the service depends on the actual demand for or the **supply** of the service or asset.

- (19) Where sector-specific regulation *eliminates the risk by providing* for a guarantee to the concessionaire on breaking even on investments and costs incurred for operating the contract, such contract should not qualify as a concession within the meaning of this Directive. *The fact that the risk is limited from the outset should not preclude the qualification of the contract as a concession. This can be the case for instance in sectors with regulated tariffs or where the operating risk is limited by means of contractual arrangements providing for partial compensation including compensation in the event of early termination of the concession for reasons attributable to the contracting authority or contracting entity or for reasons of force majeure.*
- (20) *An operating risk should stem from factors which are outside the control of the parties. Risks such as those linked to bad management, contractual defaults by the economic operator or to instances of force majeure are not decisive for the purpose of classification as a concession, since those risks are inherent in every contract, whether it be a public procurement contract or a concession. An operating risk should be understood as the risk of exposure to the vagaries of the market, which may consist of either a demand risk or a supply risk, or both a demand and supply risk. Demand risk is to be understood as the risk on actual demand for the works or services which are the object of the contract. Supply risk is to be understood as the risk on the provision of the works or services which are the object of the contract, in particular the risk that the provision of the services will not match demand. For the purpose of assessment of the operating risk the net present value of all the investment, costs and revenues of the concessionaire should be taken into account in a consistent and uniform manner.*

(21) *The notion of "bodies governed by public law" has been examined repeatedly in the case-law of the Court of Justice of the European Union. A number of clarifications are key to the full understanding of this concept. It should therefore 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 to be 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 the Court, which has clarified 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 in accordance with rules of public law.*



(22) *It is appropriate to define ‘exclusive rights’ and ‘special rights’ as these notions are crucial to the scope of this Directive and the notion of contracting entities. It should be clarified that entities which are neither contracting entities pursuant to point (a) of Article 7(1) nor public undertakings are subject to its provisions only to the extent that they exercise one of the activities covered on the basis of such rights. However, they will not be considered to be contracting entities if such rights have been granted by means of a procedure based on objective criteria, in particular pursuant to Union legislation, and for which adequate publicity has been ensured* ■ . That legislation should include Directive 2009/73/EC of the European Parliament and of the Council<sup>1</sup>, Directive 2009/72/EC of the European Parliament and of the Council<sup>2</sup>, Directive 97/67/EC of the European Parliament and of the Council<sup>3</sup>, Directive 94/22/EC of the European Parliament and of the Council<sup>4</sup> and Regulation (EC) No 1370/2007 of the European Parliament and of the Council<sup>5</sup>. *It should also be clarified that that listing of legislation is not exhaustive and that rights in any form, which have been granted by means of other procedures based on objective criteria and for which adequate publicity has been ensured are not relevant for the purposes of determining the contracting entities covered by this Directive.*

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<sup>1</sup> 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 (OJ L 211, 14.8.2009, p. 94).

<sup>2</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 (OJ L 211, 14.8.2009, p. 55).

<sup>3</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 (OJ L 15, 21.1.1998, p. 14).

<sup>4</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 (OJ L 164, 30.6.1994, p. 3).

<sup>5</sup> 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 (OJ L 315, 3.12.2007, p. 1).

- (23) *This Directive should apply only to concession contracts whose value is equal to or greater than a certain threshold, which should reflect the clear cross-border interest of concessions to economic operators located in Member States other than that of the contracting authority or contracting entity. Consequently, the method of calculating the estimated value of a concession needs to be set out, and should be identical for works and services concessions, as both contracts often cover elements of works and services. The calculation should refer to the total turnover of the concessionaire in consideration of the works and services being the object of the concession, as estimated by the contracting authority or the contracting entity, excluding VAT, over the duration of the contract.*

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- (24) To ensure a real opening up of the market and a fair balance in the application of concession award rules in the 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 jeopardised. It is also necessary to ensure, in keeping with Article 345 *TFEU*, that the rules governing the system of property ownership in Member States are not prejudiced. ***For this reason, specific and uniform rules should apply to concessions awarded by entities exercising one of the abovementioned activities for purposes of pursuing such activities, independently of whether they are state, local or regional authorities, bodies governed by public law, public undertakings or other entities enjoying special or exclusive rights. Entities which are responsible, under national law, for the provision of services related to one of the activities referred to in Annex II, should be presumed to pursue such activities.***

- (25) *It should be clarified that the relevant activity in the field of airports also covers services provided to passengers which contribute to the smooth functioning of the airport facilities and which are expected of a well-functioning modern airport, such as retailing, public catering and car parking.*
- (26) *Certain entities are active in the fields of production, transmission or distribution of both heat and cooling. There may be some uncertainty as to which rules apply to respectively heat and cooling related activities. It should therefore be clarified that the transmission and/or distribution of heat is an activity covered by Annex II and thus entities which are active in the heating sector are subject to the rules of this Directive applicable to contracting entities in so far as they qualify as such. On the other hand, entities operating in the cooling field are subject to the rules of this Directive applicable to contracting authorities in so far as they qualify as such. It should finally be clarified that concessions awarded for the pursuit of both heating and cooling contracts should be examined under the provisions on contracts for the pursuit of several activities to determine which procurement rules, if any, will govern their award.*

- (27) *Before envisaging any change to the scope of this Directive for the cooling sector, the situation of that sector should be examined in order to obtain sufficient information, in particular in respect of the competitive situation, the degree of cross-border procurement and the views of stakeholders. Given that the application of this Directive to the sector could have a substantial impact in terms of market-opening, that examination should be conducted when assessing the impact of this Directive.*
- (28) *It should be clarified that for the purposes of paragraphs 1 and 2 of Annex II, “supply” includes generation/production, wholesale and retail sale. However, production of gas in the form of extraction falls within the scope of paragraph 6 of that Annex.*

(29) *In the case of mixed contracts, the applicable rules should be determined with respect to the main subject of the contract, if the different parts which constitute the contract are objectively not separable. It should therefore be clarified how contracting authorities and contracting entities should determine whether the different parts are separable or not. Such clarification should be based on the relevant case-law 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 authority or a 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 the case of the construction of one single building, a part of which is to be used directly by the contracting authority concerned and another part to be operated on a concession basis, for instance to provide parking facilities to the public. It should be clarified that the need to conclude a single contract may be due to reasons both of a technical nature and of an economic nature.*

- (30) *In the case of mixed contracts which can be separated, contracting authorities and contracting entities are always free to award separate contracts for the separate parts of the mixed contract, in which case the provisions applicable to each separate part should be determined exclusively with respect to the characteristics of that specific contract. On the other hand, where contracting authorities and contracting entities choose to award a contract including both elements of a concession and other elements, whatever their value and whatever the legal regime these elements would otherwise have been subject to, the rules applicable to such cases should be indicated. Special provision should be made for mixed contracts involving defence or security aspects or certain parts not falling within the scope of the TFEU.*
- (31) Concessions might be awarded by contracting entities 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 concession 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 concession is principally intended can be based on an analysis of the requirements which the specific concession must meet, carried out by the contracting entity for the purposes of estimating the concession value and drawing up the concession award documents. In certain cases, it might be objectively impossible to determine for which activity the concession is principally intended. The rules applicable to such cases should be indicated.

- (32) *In certain cases, a given contracting authority or contracting entity which is a State, regional or local authority or body governed by public law or a given association thereof might be the sole source for a given service, for the provision of which it enjoys an exclusive right pursuant to national laws, regulations or published administrative provisions which are compatible with the TFEU. It should be clarified that in those situations a contracting authority or contracting entity as referred to in this recital or association thereof may award concessions to such bodies without this Directive being applied.*
- (33) It is *also* appropriate to exclude from the scope of this Directive certain services concessions awarded to *economic operators, where they are awarded* on the basis of an exclusive right which that operator enjoys under national laws, regulations or published administrative provisions and which has been granted in accordance with the TFEU and Union *acts laying down common rules on access to the market applicable to* activities referred to in *Annex II*, since such exclusive right makes it impossible to follow a competitive procedure for the award. By way of derogation and without prejudice to the legal consequences of the general exclusion from the scope of this Directive, concessions as *referred to* in the second subparagraph of Article 10(1) should be subject to the obligation to publish a concession award notice in view of ensuring basic transparency unless the conditions of such transparency are provided for *in sectoral legislation. In order to reinforce transparency, where a Member State grants an exclusive right to an economic operator for the exercise of one of the activities referred to in Annex II, it should inform the Commission thereof.*



- (34) *For the purposes of this Directive, the notions of essential security interests, military equipment, sensitive equipment, sensitive works and sensitive services should be understood within the meaning of Directive 2009/81/EC of the European Parliament and of the Council<sup>1</sup>.*
- (35) *This Directive should not affect the freedom of Member States to choose, in accordance with Union law, methods for organising and controlling the operation of gambling and betting, including by means of authorisations. It is appropriate to exclude from the scope of this Directive concessions relating to the operation of lotteries awarded by a Member State to an economic operator on the basis of an exclusive right granted by means of a procedure without publicity pursuant to applicable national laws, regulations or administrative provisions in accordance with the TFEU. That exclusion is justified by the granting of an exclusive right to an economic operator, making a competitive procedure inapplicable, as well as by the need to retain the possibility for Member States to regulate the gambling sector at national level in view of their obligations in terms of protecting public and social order.*

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<sup>1</sup> *Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (OJ L 216, 20.8.2009, p. 76).*

*(36) This Directive should not apply to certain emergency services where they are performed by non-profit organisations or associations, since the particular nature of those organisations would be difficult to preserve if the service providers had to be chosen in accordance with the procedures set out in this Directive. However, the exclusion should not be extended beyond that strictly necessary. It should therefore be set out explicitly that patient transport ambulance services should not be excluded. In that context it is furthermore necessary to clarify that CPV Group 601 “Land Transport Services” does not cover ambulance services, to be found in CPV class 8514. It should therefore be clarified that services which are covered by CPV code 85143000-3, consisting exclusively of patient transport ambulance services should be subject to the special regime set out for social and other specific services (the "light regime"). Consequently, mixed concession contracts for the provision of ambulance services in general would also be subject to the light regime if the value of the patient transport ambulance services were greater than the value of other ambulance services.*

(37) *It is appropriate to recall that this Directive applies only to contracting authorities and contracting entities of Member States. Consequently, political parties, not being contracting authorities or contracting entities are not subject to its provisions. However, political parties in some Member States might fall within the notion of bodies governed by public law. However, certain services (such as propaganda film production and propaganda video-tape production) are so inextricably connected to the political views of the service provider when provided in the context of an election campaign, that the service providers are normally selected in a manner which cannot be governed by concession rules. Finally it should be recalled that the statute and funding of European political parties and European Political foundations are subject to rules other than those laid down in this Directive.*

(38) *Many contracting entities are organised as an economic group which may comprise a series of separate undertakings; often each of those undertakings has a specialised role in the overall context of the economic group. It is therefore* appropriate to exclude certain service and works concessions awarded to an affiliated **undertaking** having as its principal activity the provision of such services 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 and works concessions 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 also 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 concessions 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.

(39) *Undertakings should be considered to be affiliated where a direct or indirect dominant influence exists between the contracting entity and the undertaking concerned or where both are subject to the dominant influence of another undertaking; in this context, private participation should, per se, not be relevant. The verification of whether an undertaking is affiliated to a given contracting entity should be as easy to perform as possible. Consequently, and given that the possible existence of such direct or indirect dominant influence would already have had to be verified for the purposes of deciding whether the annual accounts of the undertakings and entities concerned should be consolidated, undertakings should be considered to be affiliated where their annual accounts are consolidated. However, Union rules on consolidated accounts are not applicable in a certain number of cases, for instance because of the size of the undertakings involved or because certain conditions relating to their legal form are not met. In such cases, where Directive 2013/34/EU of the European Parliament and of the Council<sup>1</sup> is not applicable, it will be necessary to examine whether a direct or indirect dominant influence is present taking into account ownership, financial participation or the rules governing the undertakings.*

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<sup>1</sup> *Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (OJ L 182, 29.6.2013, p. 19).*

- (40) *Concessions in the water sector are often subject to specific and complex arrangements which require a particular consideration given the importance of water as a public good of fundamental value to all Union citizens. The special features of those arrangements justify exclusions in the field of water from the scope of this Directive. The exclusion covers works and services concessions to provide or operate fixed networks intended to provide a service to the public in connection with the production, transport or distribution of drinking water or the supply of drinking water to such networks. Concessions for the disposal or treatment of sewage and for 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) should also be excluded in so far as they are connected with an excluded activity.*
- (41) This Directive should not apply to concessions awarded by contracting entities and intended to permit the performance of an activity referred to in Annex II if, in the Member State in which that activity is carried out, it is directly exposed to competition on markets to which access is not limited, as established following a procedure provided for to this purpose in Directive ... of the European Parliament and of the Council<sup>1\*</sup>. *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, the 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 adopted on the basis of Article 30 of Directive 2004/17/EC will continue to apply.*
- (42) *Being addressed to Member States, this* Directive does not apply to the award of concessions by international organisations on their own behalf and for their own account.

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<sup>1</sup> Directive ... of the European Parliament and of the Council of ... on procurement by entities operating in the water, energy, transport and postal services sectors (OJ L ...).

\* OJ: Please insert the number of the Directive contained in doc. PE-CONS 75/13, and complete the footnote with number, date and OJ reference).

There is, however, a need to clarify to *what* extent this Directive *should be applied* to concession awards governed by specific international rules.

- (43) *The awarding of concessions for certain audiovisual and radio media services by media providers should allow aspects of cultural or social significance to be taken into account, which renders the application of rules on the award of concessions inappropriate. For those reasons, an exception should therefore be made for service concessions, awarded by the media service providers themselves, for the purchase, development, production or co-production of off-the-shelf programmes and other preparatory services, such as those relating to scripts or artistic performances necessary for the production of the programme. It should also be clarified that that exclusion should apply equally to broadcast media services and on-demand services (non-linear services). However, that exclusion should not apply to the supply of technical equipment necessary for the production, co-production and broadcasting of such programmes.*

- (44) *This Directive is without prejudice to the Member States' competence to provide for the funding of public service broadcasting in so far as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State in accordance with Protocol No 29 on the system of public broadcasting in Member States annexed to the TFEU and the TEU.*
- (45) There is considerable legal uncertainty as to how far *contracts concluded* between *entities within the public sector* should be covered by *the rules on concessions*. The relevant case-law of the Court of Justice of the European Union is interpreted differently between Member States and even between contracting authorities or contracting entities. It is therefore necessary to clarify in *which* cases *contracts concluded within the public sector* are not subject to the application of *the rules laid down in this Directive*. Such clarification should be guided by the principles set out in the relevant case-law of the Court of Justice of the European Union. The sole fact that both parties to an agreement are themselves *public* authorities does not as such rule out the application of *the rules laid down in this Directive*. However, the application of *the rules laid down in this Directive* should not interfere with the freedom of public authorities to *perform the public service tasks conferred on them by using their own resources, which includes the possibility of cooperation with other public authorities*. *It should be ensured* that any exempted public-public cooperation does not *result in* a distortion of competition in relation to private economic operators *in so far as it places a private provider of services in a position of advantage vis-à-vis its competitors*.

(46) *Concessions awarded to controlled legal persons should not be subject to the application of the procedures provided for by this Directive if the contracting authority or contracting entity as referred to point (a) of Article 7(1) exercises a control over the legal person concerned which is similar to that which it exercises over its own departments provided that the controlled legal person carries out more than 80 % of its activities in the performance of tasks entrusted to it by the controlling contracting authority or contracting entity or by other legal persons controlled by that contracting authority or contracting entity, regardless of the beneficiary of the contract performance. The exemption should not extend to situations where there is direct participation by a private economic operator in the capital of the controlled legal person since, in such circumstances, the award of a concession without a competitive procedure would provide the private economic operator with a capital participation in the controlled legal person an undue advantage over its competitors. However, in view of the particular characteristics of public bodies with compulsory membership, such as organisations responsible for the management or exercise of certain public services, this should not apply in cases where the participation of specific private economic operators in the capital of the controlled legal person is made compulsory by a national legislative provision in conformity with the Treaties, provided that such participation is non-controlling and non-blocking and does not confer a decisive influence on the decisions of the controlled legal person. It should further be clarified that the decisive element is only the direct private participation in the controlled legal person.*



*Therefore, where there is private capital participation in the controlling contracting authority or contracting entity or in the controlling contracting authorities or contracting entities, this does not preclude the award of public contracts to the controlled legal person, without applying the procedures provided for by this Directive, as such participations do not adversely affect competition between private economic operators. It should also be clarified that contracting authorities or contracting entities such as bodies governed by public law, that may have private capital participation, should be in a position to avail themselves of the exemption for horizontal cooperation. Consequently, where all other conditions in relation to horizontal cooperation are met, the horizontal cooperation exemption should extend to such contracting authorities or contracting entities where the contract is concluded exclusively between contracting authorities or contracting entities.*

(47) *Contracting authorities or contracting entities as referred to in point (a) of Article 7(1) should be able to choose to provide their public services jointly by way of cooperation without being obliged to use any particular legal form. Such a cooperation might cover all types of activities related to the performance of services and responsibilities assigned to or assumed by the participating authorities, such as mandatory or voluntary tasks of local or regional authorities or services conferred upon specific bodies by public law. The services provided by the various participating authorities or entities need not necessarily be identical; they might also be complementary. Contracts for the joint provision of public services should not be subject to this Directive provided that they are concluded exclusively between contracting authorities or contracting entities, that the implementation of that cooperation is governed solely by considerations relating to the public interest and that no private service provider is placed in a position of advantage vis-à-vis its competitors.*

*In order to fulfil those conditions, the cooperation should be based on a cooperative concept. Such cooperation does not require all participating authorities to assume the performance of main contractual obligations, provided there are commitments to contribute towards the cooperative performance of the public service in question. In addition, the implementation of the cooperation, including any financial transfers between the participating contracting authorities, should be governed solely by considerations relating to the public interest.*

- (48) *Certain cases exist where a legal entity acts, under the relevant provisions of national law, as an instrument or technical service to determined contracting authorities or contracting entities, and is obliged to carry out orders given to it by those contracting authorities or contracting entities and has no influence on the remuneration for its performance. In view of its non-contractual nature, such a purely administrative relationship should not fall within the scope of concession award procedures.*
- (49) *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 offer the execution of works, the supply of products or the provision of services on the market, irrespective of the legal form under which they have chosen to operate. Thus, firms, branches, subsidiaries, partnerships, cooperative societies, limited companies, universities, public or private, and other forms of entities should all fall within the notion of economic operator, whether or not they are "legal persons" in all circumstances.*
- (50) In order to ensure adequate advertising of works and services concessions *equal to or* above a certain *threshold* awarded by contracting entities and by the *contracting authorities* the award of such *concessions* should be preceded by the compulsory publication of a concession notice in the *Official Journal of the European Union*. ■

(51) In view of the detrimental effects on competition, the award of concessions without prior publication should only be permitted in very exceptional circumstances. This exception should be limited to cases in which it is clear from the outset that a publication would not trigger more competition, in particular because there is objectively only one economic operator who can perform the concession. *The impossibility of awarding the concession to any other economic operator should not have* been created by the contracting authority or contracting entity itself in view of the future award procedure. *Furthermore*, the availability of *adequate substitutes* should be assessed thoroughly.

(52) *The duration of a concession should be limited in order to avoid market foreclosure and restriction of competition. In addition, concessions of a very long duration are likely to result in the foreclosure of the market, and may thereby hinder the free movement of services and the freedom of establishment. However, such a duration may be justified if it is indispensable to enable the concessionaire to recoup investments planned to perform the concession, as well as to obtain a return on the invested capital. Consequently, for concessions with a duration greater than five years the duration should be limited to the period in which the concessionaire could reasonably be expected to recoup the investment made for operating the works and services together with a return on invested capital under normal operating conditions, taking into account specific contractual objectives undertaken by the concessionaire in order to deliver requirements relating to, for example, quality or price for users. The estimation should be valid at the moment of the award of the concession. It should be possible to include initial and further investments deemed necessary for the operating of the concession in particular expenditure on infrastructure, copyrights, patents, equipment, logistics, hiring, training of personnel and initial expenses. The maximum duration of the concession should be indicated in the concession documents unless duration is used as an award criterion of the contract. Contracting authorities and contracting entities should always be able to award a concession for a period shorter than the time necessary to recoup the investments, provided that the related compensation does not eliminate the operating risk.*

(53) ■ It is appropriate to exclude from the full application of this Directive only those services which have a limited cross-border dimension, ■ such as certain social, health, or

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 concessions for these services, which takes into account the fact that they are newly regulated. An obligation to publish a prior information notice and a concession award notice of any concession with a value equal to or greater than *the threshold* established in this Directive is an adequate way to provide information to potential tenderers on business opportunities, as well as to provide information to all interested parties on the number and type of contracts awarded. Furthermore, Member States should put in place appropriate measures with reference to the award of concession contracts for those services, aimed at ensuring compliance with the principles of transparency and equal treatment of economic operators, while allowing contracting authorities and contracting entities to take into account the specificities of the services in question. Member States should ensure that contracting authorities and contracting entities are allowed to take into account the need to ensure innovation *and, in accordance with Article 14 TFEU and Protocol No 26, a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of users' rights.*

(54) 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. This Directive does not prevent Member States from applying 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. Member States and/or public authorities remain free to provide these services themselves or to organise social services in a way that does not entail the conclusion of concessions, 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 authority or contracting entity, without any limits or quotas, provided such systems ensure sufficient advertising and complies with the principles of transparency and non-discrimination.

(55) *With a view to the appropriate integration of environmental, social and labour requirements into concession award procedures, it is of particular importance that Member States and contracting authorities or contracting entities take relevant measures to ensure compliance with obligations in the fields of environmental, social and labour law that apply at the place where the works are executed or the services provided and result from laws, regulations or administrative provisions, at national and Union level, as well as from collective agreements, provided that such rules, and their application, comply with Union law. Equally, obligations stemming from international agreements ratified by all Member States and listed in this Directive should apply during concession performance. However, this should in no way prevent the application of terms and conditions of employment which are more favourable to workers. The relevant measures should be applied in conformity with the basic principles of Union law, in particular with a view to ensuring equal treatment. Such relevant measures should be applied in accordance with Directive 96/71/EC of the European Parliament and of the Council<sup>1</sup>, and in a way that ensures equal treatment and does not discriminate directly or indirectly against economic operators and workers from other Member States.*

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<sup>1</sup> *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 (OJ L 18, 21.1.1997, p. 1).*



- (56) *Services should be considered to be provided at the place where the characteristic performances are executed. When services are provided at a distance, for example services provided by call centres, those services should be considered to be provided at the place where the services are executed, irrespective of the places and Member States to which the services are directed.*
- (57) *The relevant obligations could be mirrored in concession clauses. It should also be possible to include clauses ensuring compliance with collective agreements in compliance with Union law in concessions. Non-compliance with the relevant obligations could 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 concession.*
- (58) *Control of the observance of the environmental, social and labour law provisions should be performed at the relevant stages of the concession award procedure, when applying the general principles governing the choice of participants and the award of contracts, and when applying the exclusion criteria.*

- (59) *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 those measures are in conformity with the TFEU.*
- (60) *In order to ensure confidentiality during the procedure, contracting authorities and contracting entities, as well as economic operators should not disclose information that has been designated as confidential. Non-compliance with this obligation should trigger the application of adequate sanctions, as and where provided for under the civil or administrative law of the Member States.*
- (61) *In order to combat fraud, favouritism and corruption and prevent conflicts of interest, Member States should take appropriate measures to ensure the transparency of the award procedure and the equal treatment of all candidates and tenderers. Such measures should in particular aim at eliminating conflicts of interest and other serious irregularities.*
- (62) In order to make it possible for all interested operators to submit applications and tenders, contracting authorities and contracting entities should be obliged to respect a minimum time limit for the receipt of such applications *and tenders*.

- (63) The choice of proportionate, non-discriminatory and fair selection criteria, and their application to economic operators is crucial for the operators' effective access to the economic opportunities related to concessions. In particular, the possibility for a candidate to rely on the capacities of other entities can be decisive to enable the participation of SMEs. Therefore, it is appropriate to provide that the selection criteria should relate exclusively to the **professional and technical ability and the financial and economic standing** of operators, **and be linked to the subject-matter of the contract**, should be announced in the concession notice and cannot preclude an economic operator, **save in exceptional circumstances**, from relying on the capacities of other entities, regardless of the legal nature of its links with those entities, if the latter proves to the contracting authority or contracting entity that it will have at its disposal the necessary resources.
- (64) *Furthermore, with a view to the better integration of social and environmental considerations in the concession award procedures, contracting authorities or contracting entities should be allowed to use award criteria or concession performance conditions relating to the works or services to be provided under the concession 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 trading of those works 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 services being the object of the concession are provided using energy-efficient machines. In accordance with the case-law of the Court of Justice of the European Union, this also includes award criteria or concession performance conditions relating to the utilisation of fair trade products in the course of the performance of the concession to be awarded. Criteria and conditions relating to trading and its conditions can for instance refer the requirement to pay a minimum price and price premium to subcontractors. Concession performance conditions pertaining to environmental considerations might include, for example, waste minimisation or resource efficiency.*

- (65) *Award criteria or concession performance conditions concerning social aspects of the production process should be applied in accordance with Directive 96/71/EC, as interpreted by the Court of Justice of the European Union, 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 World Trade Organisation Agreement on Government Procurement (the "GPA") 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. Concession performance conditions might also be intended to favour the implementation of measures for the promotion of equality of women and men at work, the increased participation of women in the labour market and the reconciliation of work and private life, the protection of the environment or animal welfare and, to comply in substance with fundamental International Labour Organisation (ILO) Conventions, and to recruit more disadvantaged persons than are required under national legislation.*
- (66) *Measures aiming at the protection of health of the staff involved in the process of performance of the concession, the favouring of social integration of disadvantaged persons or members of vulnerable groups amongst the persons assigned to performing the concession or training in the skills needed for the concession in question can also be the subject of award criteria or concession performance conditions provided that they relate to the works or services to be provided under the concession. For instance, such criteria or conditions might 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 concession to be awarded. In technical specifications contracting authorities 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.*

(67) *The technical and functional requirements drawn up by contracting authorities and contracting entities need to allow concession award to be opened up to competition. Those requirements should define the characteristics required of works and/or services covered by the concession, and might refer to the specific process of production or provision of the requested works or services, provided that they are linked to the subject-matter of the concession and proportionate to its value and objectives. The specific process of production might include requirements concerning accessibility for people with disabilities, or environmental performance levels. Those technical and functional requirements should be included in the concession documents and should comply with the principles of equal treatment and transparency. They should be drafted such as to avoid artificially narrowing down competition, in particular through requirements that favour a specific economic operator by mirroring key characteristics of the supplies, services or works habitually offered by that economic operator. In any case, tenders comprising works and/or services, including supplies which are incidental to such works and services, complying in an equivalent manner with the characteristics required should be considered by contracting authorities or contracting entities.*

- (68) Concessions are usually long-term, complex arrangements where the *concessionaire* assumes responsibilities and risks traditionally *borne* by the contracting authorities and contracting entities and normally falling within their remit. For that reason, *subject to compliance with this Directive and with the principles* of transparency and equal treatment, *contracting authorities and contracting entities should be allowed considerable flexibility to define and organise the procedure leading to the choice of concessionaire*. However, in order to ensure equal treatment and transparency throughout the awarding *process*, it is appropriate to provide for *basic guarantees* as to the awarding process, including *information on the nature and scope of the concession, limitation of the number of candidates*, the dissemination of information *to candidates and tenderers* and the availability of *appropriate* records. It is also necessary to provide that the initial terms of the concession notice should not be deviated from, in order to prevent unfair treatment of any potential candidates.
- (69) *Concessions should not be awarded to economic operators that have participated in a criminal organisation or have been found guilty of corruption, fraud to the detriment of the Union's financial interests, terrorist offences, money laundering, terrorist financing or trafficking in human beings. 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. Non-payment of taxes or social security contributions should also be sanctioned by mandatory exclusion at the level of the Union.*

(70) *Furthermore, contracting authorities and contracting entities should be given the possibility to exclude economic operators which have proven unreliable, for instance because of serious or repeated 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. It should be clarified that grave professional misconduct can render an economic operator's integrity questionable and thus render the economic operator unsuitable to receive the award of a concession contract irrespective of whether the economic operator would otherwise have the technical and economical capacity to perform the contract. Bearing in mind that the contracting authority or contracting entity is responsible for the consequences of possible erroneous decisions, contracting authorities and 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 appropriate means that an economic operator has violated its obligations, including obligations relating to the payment of taxes or social security contributions, unless otherwise provided by national law. Contracting authorities and contracting entities should also be able to exclude candidates or tenderers whose performance in earlier concessions or other contracts with contracting authorities or 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.*

(71) *Allowance should, however, be made for the possibility that economic operators can adopt compliance measures aimed at remedying the consequences of any criminal offences or misconduct and at effectively preventing further occurrences of the misbehaviour. Those measures might consist in particular of personnel and organisational measures such as the severance of all links with persons or organisations involved in the misbehaviour, appropriate staff reorganisation measures, the implementation of reporting and control systems, the creation of an internal audit structure to monitor compliance and the adoption of internal liability and compensation rules. Where such measures offer sufficient guarantees, the economic operator in question should no longer be excluded on those grounds alone. Economic operators should have the possibility to request that compliance measures taken with a view to possible admission to the concession award procedure be examined. However, it should be left to Member States to determine the exact procedural and substantive conditions applicable in such cases. They should, in particular, be free to decide whether to allow the individual contracting authorities or contracting entities to carry out the relevant assessments or to entrust other authorities on a central or decentralised level with that task.*



(72) *It is important that the observance by subcontractors of applicable obligations in the fields of environmental, social and labour law, established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in this Directive provided that such rules, and their application, comply with Union law, be ensured through appropriate actions by the competent national authorities within the scope of their responsibilities and remit, such as labour inspection agencies or environmental protection agencies. It is also necessary to ensure some transparency in the subcontracting chain, as this gives contracting authorities and contracting entities information on who is present at building sites on which works are being performed for them, or on which undertakings are providing services in or at buildings, infrastructures or areas, such as town halls, municipal schools, sports facilities, ports or motorways, for which the contracting authorities are responsible or over which they have an oversight. It should be clarified that the obligation to deliver the required information is in any case incumbent upon the concessionaire, either on the basis of specific clauses, that each contracting authority or contracting entity would have to include in all award procedures, or on the basis of obligations which Member States would impose on the concessionaire by means of generally applicable provisions.*

*It should also be clarified that the conditions relating to the enforcement of observance of applicable obligations in the fields of environmental, social and labour law, established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in this Directive, provided that such rules and their application comply with Union law, should be applied whenever the national law of a Member State provides for a mechanism of joint liability between subcontractors and the concessionaire. Furthermore, it should be stated explicitly that Member States should be able to go further, for instance by extending the transparency obligations or by enabling or requiring contracting authorities or contracting entities to verify that subcontractors are not in any of the situations in which exclusion of economic operators would be warranted. Where such measures are applied to subcontractors, coherence with the provisions applicable to the concessionaire should be ensured so that existence of compulsory exclusion grounds would be followed by a requirement that the concessionaire replace the subcontractor concerned. Where such verification shows the presence of non-compulsory grounds for exclusion, it should be clarified that contracting authorities or contracting entities are able to require the replacement. It should, however, also be set out explicitly that contracting authorities or contracting entities may be obliged to require the replacement of the subcontractor concerned where exclusion of the concessionaire would be obligatory in such cases. It should also be set out explicitly that Member States remain free to provide for more stringent liability rules under national law.*

(73) *Contracting authorities or contracting entities should assess tenders on the basis of one or several award criteria. In order to ensure transparency and equal treatment, criteria for the award of concessions should always comply with some general standards. Those standards may refer to factors which are not purely economic, but influence the value of a tender from the point of view of the contracting authority or contracting entity and permit it to identify an overall economic advantage to the contracting authority or the contracting entity. The criteria should be disclosed in advance to all potential candidates or tenderers, be related to the subject-matter of the contract and should not offer to the contracting authority or contracting entity an unrestricted freedom of choice. They should permit effective competition and be accompanied by requirements that allow the information provided by the tenderers to be effectively verified. It should be possible to include in award criteria inter alia environmental, social or innovation-related criteria. Contracting authorities or contracting entities should also indicate award criteria in descending order of importance so as to ensure the equal treatment of potential tenderers by allowing them to be aware of all the elements to be taken into account when they prepare their tenders.*

*In exceptional cases where the contracting authority or contracting entity receives a tender which proposes an innovative solution with an exceptional level of functional performance which could not have foreseen by a diligent contracting authority or contracting entity, the contracting authority or contracting entity should, exceptionally, be able to modify the order of the award criteria to take into account the new possibilities brought about by that innovative solution, provided such a modification ensures equal treatment of all actual or potential tenderers by issuing a new invitation to tender or, where appropriate, publishing a new concession notice.*

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- (74) Electronic means of information and communication can greatly simplify the publication of concessions and increase the efficiency, *speed* and transparency of *concession award processes*. They *could* become the standard means of communication and information exchange in concession award procedures, *as they greatly enhance the possibilities of economic operators to participate in concession award procedures across the internal market*.

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(75) *Concession contracts typically involve long-term and complex technical and financial arrangements which are often subject to changing circumstances. It is therefore necessary to clarify the conditions under which modifications of a concession during its performance require a new concession award procedure, taking into account the relevant case-law of the Court of Justice of the European Union. A new concession procedure is required in the case of material changes to the initial concession, 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 concession. 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 concession resulting in a minor change of the contract value up to a certain level value should always be possible without the need to carry out a new concession procedure. To that effect and in order to ensure legal certainty, this Directive should provide for "de minimis" thresholds, below which a new award procedure is not required. Modifications of the concession above those thresholds should be possible without the need to carry out a new award procedure, to the extent that such modifications comply with certain conditions. That might be, for instance, the case of modifications which have become necessary following the need to accommodate requests from contracting authorities or contracting entities, with regard to security requirements and taking into account specificities of such activities as, for instance, operation of mountain sport and touristic facilities, where legislation might evolve to address the related hazards, to the extent such modifications comply with the relevant conditions laid down in this Directive.*

- (76) Contracting authorities and contracting entities can be faced with external circumstances that they could not foresee when they awarded the concession, *in particular when the performance of the concession covers a long period*. In those cases, a certain degree of flexibility is needed to adapt the concession to the circumstances without a new award 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 authority or contracting entity, taking into account its available means, the nature and characteristics of the specific project, good practices 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 *concession*, for instance by replacing the works *to be executed* or *the* services to be *provided* by something different or by fundamentally changing the type of *concession* since, in such a situation, a hypothetical influence on the outcome may be assumed. *For concessions awarded for purposes of pursuing an activity other than those referred to in Annex II, any increase in value not requiring a new award procedure should not be higher than 50 % of the value of the original concession. Where several successive modifications are made, that limitation should apply to the value of each modification. Such consecutive modifications should not be aimed at circumventing this Directive.*

- (77) In line with the principles of equal treatment and transparency, the successful tenderer should not, *for instance where a concession is terminated because of deficiencies in the performance*, be replaced by another economic operator without reopening the concession to competition. However, the successful tenderer performing the concession should be able, *in particular where the concession has been awarded to a group of economic operators*, to undergo certain structural changes during the performance of the concession, such as purely internal reorganisations, *takeovers*, mergers and acquisitions or insolvency. Such structural changes should not automatically require new award procedures for *the concession* performed by that *tenderer*.
- (78) Contracting authorities *and* contracting entities should have the possibility to provide for modifications to a concession by way of review *or option* 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 concession. *It should consequently be clarified that sufficiently clearly drafted review or option clauses may for instance provide for price indexations or ensure that, for example, communication equipment to be delivered over a given period continues to be suitable, also in the case of changing communications protocols or other technological changes. It should also be possible under sufficiently clear clauses to provide for adaptations of the concession which are rendered necessary by technical difficulties which have appeared during operation or maintenance. It should also be recalled that concessions could, for instance, include both ordinary maintenance as well as provide for extraordinary maintenance interventions that might become necessary in order to ensure continuation of a public service.*

- (79) *Contracting authorities and contracting entities might be faced with situations where additional works or services become necessary. In such cases, provided that the conditions set out in this Directive are fulfilled, a modification of the initial concession without a new concession award procedure should be considered to be justified.*
- (80) *Contracting authorities and contracting entities are sometimes faced with circumstances that require the early termination of the concession in order to comply with obligations under Union law in the field of concessions. Member States should therefore ensure that contracting authorities and contracting entities have the possibility, under the conditions determined by national law, to terminate a concession during its term if so required by Union law.*



- (81) In order to ensure adequate judicial protection of candidates and tenderers in the concession award procedures, as well as to make effective the enforcement of this Directive and of the principles of the TFEU, Council Directive 89/665/EEC<sup>1</sup> and Council Directive 92/13/EEC<sup>2</sup> should also apply to services concessions and to works concessions awarded by both contracting authorities and contracting entities. Directives 89/665/EEC and 92/13/EEC should, therefore, be amended accordingly.
- (82) The processing of personal data pursuant to this Directive should be governed by Directive 95/46/EC of the European Parliament and of the Council<sup>3</sup>.
- (83) Member States **are required** to consistently and systematically monitor the implementation and functioning of rules **on the award of concession contracts** in order to ensure the efficient and uniform application of Union law.

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<sup>1</sup> Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ L 395, 30.12.1989, p. 33).

<sup>2</sup> Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ L 76, 23.3.1992, p. 14).

<sup>3</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 31).

**(84) *The Commission should assess the economic effects on the internal market, in particular in terms of factors such as the cross-border award of contracts, SME participation and transaction costs, resulting from the application of the thresholds set out in this Directive, and from the exclusion set out in Article 12 taking into account the specific structures of the water sector. The Commission should report thereon to the European Parliament and the Council by ...\* . In accordance with Article XXIV(7) of the GPA, the GPA will 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 should be examined in the context of negotiations under the GPA bearing in mind the impact of inflation and transaction costs. The Commission should, where possible and appropriate, consider suggesting an increase of the thresholds applicable under the GPA during the next round of negotiations. In the event of any change to those thresholds, the report made by the Commission should, where appropriate, be followed by a legislative proposal modifying the threshold set out in this Directive.***

(85) In order to adapt to rapid technical, economic and regulatory developments, the power to adopt acts in accordance with Article 290 TFEU should be delegated to the Commission in respect of reviewing the list of acts set out in Annex III, reviewing the technical procedures for the calculation methods concerning the threshold as well as to periodically revise the threshold itself, amending references to the CPV nomenclature and adapting the list of acts set out in Annex X. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level. The Commission, when preparing and drawing- up delegated acts, should ensure a simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and to the Council.

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\* OJ: Please insert the date 60 month after the entry into force of this Directive.

- (86) In order to ensure uniform conditions concerning the procedure for drawing up and transmission of notices and for sending and publishing data referred to in Annexes V, VII and VIII, 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<sup>1</sup>. The advisory procedure should be used for the adoption of implementing acts, which have an impact neither on the financial situation nor on the nature and scope of the obligations stemming from this Directive. On the contrary, those acts are characterised by a mere administrative purpose and serve to facilitate the application of this Directive.
- (87) Since the objective of this Directive, namely the coordination of laws, regulations and administrative provisions of the Member States applying to certain concession procedures cannot be sufficiently achieved by the Member States but can rather, by reason of its scale and effects, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 TEU. 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.

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<sup>1</sup> 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 (OJ L 55, 28.2.2011, p. 13).

(88) In accordance with the Joint Political Declaration of Member States and the Commission on explanatory documents of 28 September 2011, 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:

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# TITLE I

## ***SUBJECT-MATTER, SCOPE, PRINCIPLES AND DEFINITIONS***

### CHAPTER I

#### ***Scope, general principles and definitions***

##### SECTION I

###### ***SUBJECT-MATTER, SCOPE, GENERAL PRINCIPLES, DEFINITIONS AND THRESHOLD***

###### *Article 1*

###### *Subject-matter and scope*

1. This Directive establishes rules on the procedures for procurement by contracting authorities and contracting entities ***by means of a concession***, whose value is estimated to be not less than the threshold laid down in Article 8.
2. This Directive applies to the ***award*** of works or services ***concessions, to*** economic operators by:
  - (a) Contracting authorities; ***or***
  - (b) Contracting entities, provided that the works or services **■** are intended for the pursuit of one of the activities referred to in Annex II.

3. *The application of this Directive is subject to Article 346 TFEU.*
4. *Agreements, decisions or other legal instruments that organise the transfer of powers and responsibilities for the performance of public tasks between contracting authorities or contracting entities or groupings of contracting authorities or contracting entities, and which do not provide for remuneration to be given for contractual performance, are considered to be a matter of internal organisation of the Member State concerned and, as such, are not affected in any way by this Directive.*

## *Article 2*

### *Principle of free administration by public authorities*

1. *This Directive recognises the principle of free administration by national, regional and local authorities in conformity with national and Union law. Those authorities are free to decide how best to manage the execution of works or the provision of services, to ensure in particular a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights in public services.*

*Those authorities may choose to perform their public interest tasks with their own resources, or in cooperation with other authorities or to confer them upon economic operators.*

2. *This Directive does not affect Member States' systems of property ownership. In particular it does not require the privatisation of public enterprises providing services to the public.*

### *Article 3*

#### *Principle of equal treatment, non-discrimination and transparency*

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

*The design of the concession award procedure, including the estimate of the value, 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.*

2. *Contracting authorities and contracting entities shall aim at ensuring the transparency of the award procedure and of the performance of the contract, while complying with Article 28.*

#### *Article 4*

##### *Freedom to define services of general economic interest*

1. *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 systems.*
2. *Non-economic services of general interest shall fall outside the scope of this Directive.*

#### *Article 5*

##### *Definitions*

For the purposes of this Directive the following definitions apply:

- (1) ‘concessions’ means *works* or services concessions, *as defined in points (a) and (b)*:

■

- (a) 'works concession' means a contract for pecuniary interest concluded in writing *by means of which* one or more contracting authorities *or contracting entities entrust* the execution of works *to one or more economic operators* the consideration for *which* consists either solely in the right to exploit the works that are the subject of the contract or in that right together with payment;
- (b) '*services concession*' means a contract for pecuniary interest concluded in writing *by means of which* one or more contracting authorities *or contracting entities entrust* the provision and the management of services other than the execution of works referred to in point (a) *to one or more economic operators*, the consideration of which consists either solely in the right to exploit the services that are the subject of the contract or in that right together with payment.

*The award of a works or services concession shall involve the transfer to the concessionaire of an operating risk in exploiting those works or services encompassing demand or supply risk or both. The concessionaire shall be deemed to assume operating risk where, under normal operating conditions, it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services which are the subject-matter of the concession. The part of the risk transferred to the concessionaire shall involve real exposure to the vagaries of the market, such that any potential estimated loss incurred by the concessionaire shall not be merely nominal or negligible;*

- (2) *‘economic operator’ means any natural or legal person, or public entity, or a group of such persons or entities, including temporary associations of undertakings, which offers the execution of works and/or a work, the supply of products or the provision of services on the market;*
- (3) *‘candidate’ means an economic operator that has sought an invitation or has been invited to take part in a concession award procedure;*
- (4) *‘tenderer’ means an economic operator which has submitted a tender;*
- (5) *‘concessionaire’ means an economic operator which has been awarded a concession;*
- (6) *‘written’ or ‘in writing’ means any expression consisting of words or figures which can be read, reproduced and subsequently communicated, including information which is transmitted and stored by electronic means;*

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- (7) 'execution of works' means the execution, or both the design and execution, of works related to one of the activities referred to in Annex I or of a work, or the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority *or contracting entity* exercising a decisive influence on the type or design of the work;
- (8) "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;

(9) '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;

(10) *'exclusive right' means a right granted by a competent authority of a Member State by means of any law, regulation or published administrative provision which is compatible with the Treaties the effect of which is to limit the exercise of an activity to a single economic operator and which substantially affects the ability of other economic operators to carry out such an activity;*

(11) *"special right" means a right granted by a competent authority of a Member State by means of any law, regulation or published administrative provision which is compatible with the Treaties the effect of which is to limit the exercise of an activity to two or more economic operators and which substantially affects the ability of other economic operators to carry out such an activity*



- (12) 'concession *document*' means *any document* produced or referred to by the contracting authority or contracting entity to describe or determine elements of the *concession* or the procedure, including the *concession* notice, the technical *and functional requirements*, proposed conditions of *concession*, formats for the presentation of documents by candidates and tenderers, information on generally applicable obligations and any additional documents;
- (13) '*innovation*' means *the implementation of a new or significantly improved product, service or process, including but not limited to production, building or construction processes a new marketing method, or a new organisational method in business practices, workplace organisation or external relations inter alia with the purpose of helping to solve societal challenges or to support the Europe 2020 strategy.*

#### Article 6

##### *Contracting authorities*

1. For the purposes of this Directive, 'contracting authorities' *means* State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law **■** other than those authorities, bodies or associations *which pursue one of the activities referred to in Annex II and award a concession for the pursuit of one of those activities.*

2. 'Regional authorities' includes all authorities of the administrative units *listed non-exhaustively in* NUTS 1 and 2, as referred to in Regulation (EC) No 1059/2003 of the European Parliament and of the Council<sup>1</sup>.
3. 'Local authorities' includes all authorities of the administrative units falling under NUTS 3 and smaller administrative units, as referred to in Regulation (EC) No 1059/2003.
4. 'Bodies governed by public law' means bodies that have all of the following characteristics:
  - (a) they are established for ■ the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;
  - (b) they have legal personality; *and*
  - (c) they are financed, for the most part, by the State, regional or local authorities, or by other bodies governed by public law; or are subject to management supervision by those bodies or authorities; or have 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.

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<sup>1</sup> Regulation (EC) No 1059/2003 of the European Parliament and of the Council of 26 May 2003 on the establishment of a common classification of territorial units for statistics (NUTS) (OJ L 154, 21.6.2003, p. 1).

*Article 7*  
*Contracting entities*

1. For the purposes of this Directive, ***‘contracting entities’ means entities which pursue one of the activities referred to in Annex II and award a concession for the pursuit of one of those activities, and which*** are one of the following:
  - (a) State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law.
  - (b) public undertakings as defined in paragraph 4 of this Article;
  - (c) entities ***other than those referred to in points (a) and (b) of this paragraph, but which operate*** on the basis of special or exclusive rights, granted ***for the exercise of one of the activities referred to in Annex II.***
  
2. ***Entities*** which have been granted ***special or exclusive rights*** 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 ***“contracting entities”*** within the meaning of ***point (c) of paragraph 1.*** Such ***procedures shall include:***

- (a) procurement procedures with a prior call for competition in conformity with Directive .../.../EU of the European Parliament and of the Council<sup>1\*</sup> and Directive.../.../EU of the European Parliament and of the Council<sup>2\*</sup>, **Directive 2009/81/EC** or this Directive;
- (b) procedures pursuant to other legal acts of the Union listed in Annex III, ensuring adequate prior transparency for granting authorisations on the basis of objective criteria.
3. The Commission shall be empowered to adopt delegated acts in accordance with Article 48 **concerning amendments to** the list of the Union legal acts set out in Annex III where necessary because of the repeal or amendment of those acts, or because of the adoption of new acts.
4. ***"Public undertaking" means any undertaking over which the contracting authorities may exercise, directly or indirectly, a dominant influence by virtue of their ownership thereof, their financial participation therein, or the rules which govern it.***

***A dominant influence 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;***

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<sup>1</sup> Directive .../.../EU of the European Parliament and of the Council of ... on public procurement (OJ L ...)

\* OJ: Please insert the number of the Directive contained in PE-CONS 74/13 and complete the footnote with number, date and publication reference.

<sup>2</sup> Directive .../.../EU of the European Parliament and of the Council of ... on procurement by entities operating in the water, energy, transport and postal services sectors (OJ L ...).

\* OJ: Please insert the number of the Directive contained in PE-CONS 75/13 and complete the footnote with number, date and publication reference.

- (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.*

#### *Article 8*

##### *Threshold and methods for calculating the estimated value of concessions*

1. This Directive shall apply to **■** concessions the value of which is equal to or greater than EUR 5 186 000.

**■**

2. **■** The value of a concession shall be the total *turnover of the concessionaire generated over the duration of the contract*, net of VAT, as estimated by the contracting authority or the contracting entity, *in consideration for the works and services being the object of the concession, as well as for the supplies incidental to such works and services.*

*That estimate shall be valid at the moment at which the concession notice is sent or, in cases where such notice is not provided for, at the moment at which the contracting authority or the contracting entity commences the concession award procedure, for instance by contacting economic operators in relation to the concessions.*

*For the purpose of paragraph 1, if the value of the concession at the time of the award is more than 20 % higher than its estimated value, the valid estimate shall be the value of the concession at the time of the award.*

3. *The estimated value of the concession shall be calculated using an objective method specified in the concession documents. When calculating the estimated value of the concession, contracting authorities and contracting entities shall, where applicable, take into account in particular:*
- (a) *the value of any form of option and any extension of the duration of the concession;*
  - (b) *revenue from the payment of fees and fines by the users of the works or services other than those collected on behalf of the contracting authority or contracting entity;*
  - (c) *payments or any financial advantage in any form whatsoever made by the contracting authority or contracting entity or any other public authority to the concessionaire, including compensation for compliance with a public service obligation and public investment subsidies;*
  - (d) *the value of grants or any other financial advantages, in any form, from third parties for the performance of the concession;*

- (e) *revenue from sales of any assets which are part of the concession;*
- (f) *the value of all the supplies and services that are made available to the concessionaire by the contracting authorities or contracting entities, provided that they are necessary for executing the works or providing the services;*
- (g) *any prizes or payments to candidates or tenderers* ■ .

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

5. *Where a proposed work or service may result in concessions being awarded in the form of separate lots, account shall be taken of the total estimated value of all such lots.*

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

■

## *Article 9*

### *Revision of the threshold*

- 1. Every two years from 30 June 2013, the Commission shall verify that the threshold set out in Article 8(1) corresponds to the threshold established in the World Trade Organisation Agreement on Government Procurement (the "GPA") for works concessions and shall, where necessary, revise that threshold in accordance with this Article.*

*In accordance with the calculation method set out in the GPA, the Commission shall calculate the value of the threshold 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 31 August preceding the revision with effect from 1 January. The value of the threshold thus revised shall, where necessary, be rounded down to the nearest thousand euro so as to ensure that the threshold in force provided for by the GPA, expressed in SDRs, is observed.*

- 2. Every two years from 1 January 2014, the Commission shall determine the values, in the national currencies of the Member States whose currency is not the euro, of the threshold referred to in Article 8(1), revised pursuant to paragraph 1 of this Article.*



*In accordance with the calculation method set out in the GPA, the determination of such values shall be based on the average daily values of those currencies corresponding to the applicable threshold expressed in euro over the 24 months terminating on 31 August preceding the revision with effect from 1 January.*

- 3. The Commission shall publish the revised threshold referred to in paragraph 1, its corresponding value in the national currencies referred to in the first subparagraph of paragraph 2, and the value determined in accordance with the second subparagraph of paragraph 2, 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 48 to adapt the methodology set out in the second subparagraph of paragraph 1 of this Article to any change in the methodology provided in the GPA for the revision of the threshold referred to in Article 8(1) and for the determination of the corresponding values in the national currencies of the Member States whose currency is not the euro, as referred to in paragraph 2 of this Article.*

*The Commission shall also be empowered to adopt delegated acts in accordance with Article 48 to revise the threshold referred to in Article 8(1) pursuant to paragraph 1 of this Article.*

5. *Where it is necessary to revise that threshold and time constraints prevent use of the procedure set out in Article 48 and therefore imperative grounds of urgency so require, the procedure provided for in Article 49 shall apply to delegated acts adopted pursuant to the second subparagraph of paragraph 4 of this Article.*

## SECTION II EXCLUSIONS

### *Article 10*

*Exclusions applicable to concessions awarded by contracting authorities and contracting entities*

1. This Directive shall not apply to services concessions awarded *to* a contracting authority or *to a contracting entity as referred to in point (a) of Article 7(1) or to an association thereof on the basis of an exclusive right.*

*This Directive shall not apply to services concessions awarded to an economic operator on the basis of an exclusive right which has been granted in accordance with the TFEU and Union legal acts laying down common rules on access to the market applicable to activities referred to in Annex II.*

2. By way of derogation from *the second subparagraph of paragraph 1 of this Article*, where *Union* sectoral legislation referred to in *that subparagraph* does not provide for sector-specific transparency obligations, Article 32 ■ shall apply.

*Where a Member State grants an exclusive right to an economic operator for the exercise of one of the activities referred to in Annex II, it shall inform the Commission thereof within one month after the award of that exclusive right.*

3. *This Directive shall not apply to concessions for air transport services based on the granting of an operating licence within the meaning of Regulation (EC) No 1008/2008 of the European Parliament and of the Council<sup>1</sup> or to concessions for public passenger transport services within the meaning of Regulation (EC) No 1370/2007.*
4. This Directive shall not apply to concessions which the contracting authority or contracting entity is obliged to award or organise in accordance with procedures *different from those laid down in this Directive established by any of the following:*
  - (a) *a legal instrument creating international law obligations, such as an international agreement concluded in conformity with the TFEU 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;*

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<sup>1</sup> *Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (Recast) (OJ L 293, 31.10.2008, p. 3).*

(b) ■ an international organisation.

*This Directive shall not apply to concessions which the contracting authority or contracting entity awards in accordance with procurement rules provided by an international organisation or international financing institution, where the concessions concerned are fully financed by that organisation or institution. In the case of concessions co-financed for the most part by an international organisation or international financing institution, the parties shall agree on applicable procurement procedures.*

*The Member States shall communicate all legal instruments referred to in point (a) of the first subparagraph of this paragraph to the Commission, which may consult the Advisory Committee on Public Procurement referred to in Article 50.*

This paragraph shall not apply to concessions in the fields of defence and security as referred to in Directive 2009/81/EC. ■

5. *This Directive shall not apply to concessions in the fields of defence and security as referred to in Directive 2009/81/EC, which are governed by:*

- (a) *specific procedural rules pursuant to an international agreement or arrangement concluded between one or more Member States and one or more third countries;*
  - (b) *specific procedural rules pursuant to a concluded international agreement or arrangement relating to the stationing of troops and concerning the undertakings of a Member State or a third country;*
  - (c) *specific procedural rules of an international organisation purchasing for its purposes, or to concessions which must be awarded by a Member State in accordance with those rules.*
6. This Directive shall apply to the awarding of concessions in the fields of defence and security *as referred to in Directive 2009/81/EC with the exception of the following:*

- (a) concessions for which 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 where the procurement and performance of the concession 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 provided that the Member State has determined that the essential interests concerned cannot be guaranteed by less intrusive measures, such as those referred to in paragraph 7;*
- (b) concessions awarded in the framework of a cooperative programme referred to in point (c) of Article 13 of Directive 2009/81/EC;*
- (c) concessions awarded by a government to another government relating to works and services directly linked to military equipment or sensitive equipment, or works and services specifically for military purposes, or sensitive works and sensitive services;*
- (d) concessions awarded in a third country, carried out when forces are deployed outside the territory of the Union where operational needs require those concessions to be concluded with economic operators located in the area of operations; and*

(e) *concessions otherwise exempted under this Directive.*

7. *This Directive shall not apply to concessions not otherwise exempted under paragraph 6 to the extent that 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 authority or contracting entity makes available in a concession award procedure as provided for in this Directive.*
8. This Directive shall not apply to service concessions for:
- (a) the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property or concerning rights thereon; ■

- (b) the acquisition, development, production or co-production of programme material intended for *audiovisual media services or radio media services*, that are awarded by *audiovisual or radio media service providers, or* concessions for broadcasting time *or programme provision*, that are awarded to *audiovisual or radio media service providers*. For the purposes of this point, "*audiovisual media services*" and "*media service providers*" shall, respectively, have the same meaning as pursuant to points (a) and (d) of Article 1(1) of Directive 2010/13/EU of the European Parliament and of the Council<sup>1</sup>. "*Programme*" shall have the same meaning as pursuant to point (b) Article 1(1) of that Directive, 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".

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<sup>1</sup> *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) (OJ L 95, 15.4.2010, p. 1).*



(c) arbitration and conciliation services;

(d) *any of the following legal services:*

(i) *legal representation of a client by a lawyer within the meaning of Article 1 of Council Directive 77/249/EEC<sup>1</sup> in:*

- *an arbitration or conciliation held in a Member State, a third country or before an international arbitration or conciliation instance, or*
- *judicial proceedings before the courts, tribunals or public authorities of a Member State or a third country or before international courts, tribunals or institutions;*

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<sup>1</sup> Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services (OJ L 78, 26.3.1977, p. 17).

- (ii) *legal advice given in preparation of any of the proceedings referred to in point (i) of this point or where there is a tangible indication and high probability 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;*
- (iii) *document certification and authentication services which must be provided by notaries;*

- (iv) legal services provided by trustees or appointed guardians or other legal services the providers of which are designated by a court or tribunal in the Member State concerned or are designated by law to carry out specific tasks under the supervision of such tribunals or courts;*
- (v) other legal services which in the Member State concerned are connected, even occasionally, with the exercise of official authority;*
- (e) 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>1</sup>, central bank services and operations conducted with the European Financial Stability Facility and the European Stability Mechanism ;*
- (f) loans, whether or not in connection with the issue, sale, purchase or transfer of securities or other financial instruments;*
- (g) civil defence, civil protection, and danger prevention services that are provided by non-profit organisations or associations, and which are covered by CPV codes: 75250000-3, 75251000-0, 75251100-1, 75251110-4, 75251120-7, 75252000-7, 75222000-8, 98113100-9 and 85143000-3 except patient transport ambulance services;*
- (h) political campaign services, which are covered by CPV codes 79341400-0, 92111230-3 and 92111240-6, when awarded by a political party in the context of an election campaign;*

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<sup>1</sup> *Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ L 145, 30.4.2004, p. 1).*

9. *This Directive shall not apply to service concessions for lottery services, which are covered by CPV code 92351100-7, awarded by a Member State to an economic operator on the basis of an exclusive right. For the purpose of this paragraph, the notion of exclusive right does not cover exclusive rights as referred to in Article 7(2).*

*The grant of such an exclusive right shall be subject to publication in the Official Journal of the European Union.*

10. *This Directive shall not apply to concessions awarded by contracting entities for the pursuit of their activities in a third country, in conditions not involving the physical use of a network or geographical area within the Union.*

## *Article 11*

### *Specific exclusions in the field of electronic communications*

This Directive shall not apply to concessions for the principal purpose of permitting the contracting authorities to provide or exploit public communications networks, or to provide to the public one or more electronic communications services.

For the purposes of this Article, ‘public communications network’ and ‘electronic communications service’ **shall have the same meaning as in** Directive 2002/21/EC of the European Parliament and of the Council<sup>1</sup>.

## *Article 12*

### *Specific exclusions in the field of water*

- 1. This Directive shall not apply to concessions awarded to:**
  - (a) provide or operate fixed networks intended to provide a service to the public in connection with the production, transport or distribution of drinking water;**
  - (b) supply drinking water to such networks.**
- 2. This Directive shall also not apply to concessions with one, or both of the following subject-matters when they are connected with an activity referred to in paragraph 1:**

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<sup>1</sup> Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ L 108, 24.4.2002, p. 33).

- (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; or*
- (b) *the disposal or treatment of sewage.*

*Article 13*

*Concessions 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 Directive [2013/34/EU](#).
2. In the case of entities, ***which are*** not subject to Directive [2013/34/EU](#), "affiliated undertaking" shall mean any undertaking that:
  - (a) may be, directly or indirectly, subject to a dominant influence by the contracting entity;
  - (b) may exercise a dominant influence over the contracting entity; ***or***
  - (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.

*For the purposes of this paragraph, ‘dominant influence’ shall have the same meaning as in the second subparagraph of Article 7(4).*

3. Notwithstanding Article 17 and provided that the conditions in paragraph 4 of this Article are met, this Directive shall not apply to ■ concessions **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 referred to in Annex II, to an undertaking which is affiliated with one of those contracting entities.
  
4. Paragraph 3 shall apply to:
  - (a) service concessions provided that at least 80 % of the average total turnover of the affiliated undertaking **over** the preceding three years, **taking into account all services provided by that undertaking**, derives from the provision of services to **the contracting entity or other** undertakings with which it is affiliated;

- (b) works concessions provided that at least 80 % of the average total turnover of the affiliated undertaking **over** the preceding three years **taking into account all works provided by that undertaking**, derives from the provision of works to **the contracting entity or other** undertakings with which it is affiliated.
5. Where, 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 shall be sufficient for that undertaking to show that the turnover referred to in points (a) or (b) of paragraph 4 is credible, in particular by means of business projections.
6. Where more than one undertaking affiliated with the contracting entity **with which they form an economic group** provides the same or similar services ■ or works, the percentages referred to in paragraph 4 shall be calculated taking into account the total turnover deriving respectively from the provision of services ■ or works by those affiliated undertakings.

#### *Article 14*

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

Notwithstanding Article 17, 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 concessions awarded by any of the following:



- (a) a joint venture, formed exclusively by a number of contracting entities for the purpose of carrying out activities referred to in Annex II, to one of these contracting entities, or
- (b) a contracting entity to such a joint venture of which it forms part.

*Article 15*

*Notification of information by contracting entities*

Contracting entities shall notify to the Commission, *if so requested*, the following information regarding the application of Article 13(2) and (3) *and* Article 14:

- (a) the names of the undertakings or joint ventures concerned;
- (b) the nature and value of the concessions involved;
- (c) proof, deemed necessary by the Commission, that the relationship between the undertaking or joint venture to which the concessions are awarded and the contracting entity complies with the requirements of Article 13 or Article 14.

## Article 16

### *Exclusion of activities which are directly exposed to competition*

This Directive shall not apply to concessions awarded by contracting entities where, *for* the Member State in which such concessions are *to be performed, it has been established pursuant to Article 35 of Directive .../.../EU\** that the activity is directly exposed to competition in accordance with Article 34 of that Directive.

## Article 17

### *Concessions between entities within the public sector*

1. A concession awarded by a contracting authority or a contracting entity as referred to in *point (a)* of Article 7(1) to a legal person *governed by private or public law* shall fall outside the scope of this Directive where all of the following conditions are fulfilled:
  - (a) *the contracting* authority or *contracting* entity exercises over the legal person concerned a control which is similar to that which it exercises over its own departments;
  - (b) *more than 80 %* of the activities of the controlled legal person are carried out *in the performance of tasks entrusted to it by* the controlling contracting authority or *contracting* entity or *by* other legal persons controlled by that contracting authority or *contracting* entity; *and*

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\* OJ: Please insert the number of the Directive contained in PE-CONS 75/13.

- (c) there is no *direct* private *capital* participation in the controlled legal person *with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.*

A contracting authority or contracting entity as referred to in *point (a)* of Article 7(1) shall be deemed to exercise over a legal person a control similar to that which it exercises over its own departments within the meaning of point (a) of the first subparagraph of this paragraph, where it exercises a decisive influence over both strategic objectives and significant decisions of the controlled legal person. That *control may also be exercised by another legal person, which is itself controlled in the same way by the contracting authority or contracting entity.*

2. Paragraph 1 also applies where a controlled *legal person* which is a contracting authority or contracting entity as referred to in *point (a)* of Article 7(1) awards a concession to its controlling *contracting authority or contracting* entity, or to another legal person controlled by the same contracting authority *or contracting entity*, provided that there is no *direct* private *capital* participation in the legal person being awarded the **■** concession *with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.*

3. A contracting authority or a contracting entity as referred to in *point (a)* of Article 7(1), which does not exercise over a legal person *governed by private or public law* control within the meaning of paragraph 1 of this Article, may nevertheless award a concession to *that* legal person without applying *this* Directive where all of the following conditions are fulfilled:
- (a) the contracting *authority or contracting entity* as referred to in *point (a)* of Article 7(1) *exercises jointly with other contracting authorities or contracting entities a control over that* legal person which is similar to that which *they exercise* over *their* own departments;
  - (b) *more than 80 %* of the activities of that legal person are carried out *in the performance of tasks entrusted to it by* the controlling contracting authorities or *contracting* entities **■** or *by* other legal persons controlled by the same contracting *authorities or contracting entities*; and
  - (c) there is no *direct* private *capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on* the controlled legal person.

For the purposes of point (a) *of the first subparagraph of this paragraph*, contracting authorities or **contracting** entities as referred to in *point (a)* of Article 7(1) **exercise joint control over** a legal person where all of the following conditions are fulfilled:

- (i) the decision-making bodies of the controlled legal person are composed of representatives of all participating contracting authorities or contracting entities ■ .  
**Individual representatives may represent several or all of the participating contracting authorities or contracting entities;**
- (ii) those contracting authorities or contracting entities ■ are able to jointly exert decisive influence over the strategic objectives and significant decisions of the controlled legal person; and
- (iii) the controlled legal person does not pursue any interests which are **contrary to those of the controlling** contracting authorities **or contracting entities**.

4. **A contract** concluded **exclusively** between two or more contracting authorities or contracting entities as referred to in *point (a)* of Article 7(1) shall **fall outside the scope** of this Directive where all of the following conditions are fulfilled:

- (a) the *contract* establishes *or implements a cooperation* between the participating contracting authorities or *contracting* entities *with the aim of ensuring that public services they have to perform are provided with a view to achieving objectives they have in common*;
- (b) the *implementation of that cooperation* is governed *solely* by considerations relating to the public interest; and
- (c) the participating contracting authorities or *contracting* entities perform on the open market *less than 20 %* of the activities *concerned by the cooperation*;

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5. *For the determination of the percentage of activities referred to in point (b) of the first subparagraph of paragraph 1, point (b) of the first subparagraph of paragraph 3 and point (c) of paragraph 4, the average total turnover or an appropriate alternative activity based measure such as costs incurred by the relevant legal person, contracting authority or contracting entity as referred to point (a) of Article 7(1) with respect to services, supplies and works for the three years preceding the concession award shall be taken into consideration.*

*Where, because of the date on which the relevant legal person, contracting authority or contracting entity was created or commenced activities or because of a reorganisation of its activities, the turnover, or alternative activity based measure such as costs, are either not available for the preceding three years or no longer relevant, it shall be sufficient to show that the measurement of activity is credible, particularly by means of business projections.*

### SECTION III

#### GENERAL PROVISIONS

##### *Article 18*

##### *Duration of the concession*

- 1. The duration of concessions shall be limited. The contracting authority or contracting entity shall estimate the duration on the basis of the works or services requested.*
- 2. For concessions lasting more than five years, the maximum duration of the concession shall not exceed the time that a concessionaire could reasonably be expected to take to recoup the investments made in operating the works or services together with a return on invested capital taking into account the investments required to achieve the specific contractual objectives.*

*The investments taken into account for the purposes of the calculation shall include both initial investments and investments during the life of the concession.*

## *Article 19*

### *Social and other specific services*

Concessions for social and other specific services listed in Annex IV falling within the scope of this Directive shall be subject *only to* the obligations *arising from* Article 31(3) *and Articles 32, 46 and 47*.

## *Article 20*

### *Mixed contracts*

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1. Concessions which have as their *subject-matter both works and* services shall be awarded in accordance with the provisions applicable to the type of *concession* that characterises the main *subject-matter* of the contract in question.

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In the case of mixed *concessions consisting partly of* social and other specific services listed in Annex IV *and partly of other services, the main subject-matter shall be determined according to which of the estimated values of the respective services is the higher*.



2. *Where the different parts of a given contract are objectively separable, paragraphs 3 and 4 shall apply. Where the different parts of a given contract are objectively not separable, paragraph 5 shall apply.*

*Where part of a given contract is covered by Article 346 TFEU or Directive 2009/81/EC, Article 21 of this Directive shall apply.*

*In the case of contracts intended to cover several activities, one of them being subject either to Annex II of this Directive or to Directive .../.../EU\*, the applicable provisions shall be established in accordance with Article 22 of this Directive and Article 6 of Directive .../.../EU\*, respectively.*

3. *In the case of contracts which have as their subject-matter elements covered by this Directive as well as other elements, contracting authorities and contracting entities may choose to award separate contracts for the separate parts. Where contracting authorities or contracting entities choose to award separate contracts for separate parts, the decision as to which legal regime applies to any one of such separate contracts shall be taken on the basis of the characteristics of the separate part concerned.*

*Where contracting authorities or contracting entities choose to award a single contract, this Directive shall, unless otherwise provided in paragraph 4 of this Article or in Article 21, apply to the ensuing mixed contract, irrespective of the value of the parts that would otherwise fall under a different legal regime and irrespective of which legal regime those parts would otherwise have been subject to.*

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\* OJ: Please insert the number of the Directive contained in PE-CONS 75/13.

4. *In the case of mixed contracts containing elements of concessions as well as elements of public contracts covered by Directive .../.../EU\* or contracts covered by Directive .../.../EU\*\*, the mixed contract shall be awarded in accordance with Directive .../.../EU\* or Directive .../.../EU\*\*, respectively.*
5. *Where the different parts of a given contract are objectively not separable, the applicable legal regime shall be determined on the basis of the main subject-matter of that contract.*

*In the event such contracts involve both elements of a services concession and of a supply contract, the main subject-matter shall be determined according to which of the estimated values of the respective services or supplies is the higher.*

#### *Article 21*

##### *Mixed procurement contracts involving defence or security aspects*

1. *In the case of mixed contracts which have as their subject-matter elements of a concession covered by this Directive and procurement or other elements covered by Article 346 TFEU or Directive 2009/81/EC this Article shall apply.*

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\* OJ: Please insert the number of the Directive contained in PE-CONS 74/13.

\*\* OJ: Please insert the number of the Directive contained in PE-CONS 75/13.

*In the case of contracts intended to cover several activities, one of them being subject either to Annex II of this Directive or to Directive .../.../EU\* , and another being covered by Article 346 TFEU or Directive 2009/81/EC , the applicable provisions shall be established in accordance with, Article 23 of this Directive and Article 26 of .../.../EU\* , respectively.*

2. *Where the different parts of a given contract are objectively separable, contracting authorities or contracting entities may choose to award separate contracts for the separate parts or to award a single contract.*

*Where contracting authorities or contracting entities choose to award separate contracts for separate parts, the decision of the legal regime applicable to any one of such separate contracts shall be taken on the basis of the characteristics of the separate part concerned.*

*Where contracting authorities or contracting entities choose to award a single contract, the following criteria shall apply to determine the applicable legal regime:*

- (a) *where part of a given contract is covered by Article 346 TFEU, or different parts are covered by Article 346 TFEU and Directive 2009/81/EC respectively, the contract may be awarded without applying this Directive, provided that the award of a single contract is justified for objective reasons;*

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\* OJ: Please insert the number of the Directive contained in PE-CONS 75/13.

- (b) *where part of a given contract is covered by Directive 2009/81/EC, the contract may be awarded in accordance with this Directive or in accordance with Directive 2009/81/EC, provided that the award of a single contract is justified for objective reasons.*

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

3. *Where the different parts of a given contract are objectively not separable, the contract may be awarded without applying this Directive where it includes elements to which Article 346 TFEU applies. Otherwise the contracting authority or contracting entity may choose to award a contract in accordance with this Directive or in accordance with this Directive or in accordance with Directive 2009/81/EC.*

## *Article 22*

### *Contracts covering both activities referred to in Annex II and other activities*

1. *By way of derogation from Article 20, 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 or to award a single contract. Where contracting entities choose to award a separate contract, 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.*

*Notwithstanding Article 20, where contracting entities choose to award a single contract, paragraphs 2 and 3 of this Article shall apply. However, where one of the activities concerned is covered by Article 346 TFEU or Directive 2009/81/EC, Article 23 of this Directive shall apply.*

*The choice between awarding a single contract or awarding a number of separate contracts shall not be made with the objective of excluding the contract or contracts from the scope of this Directive or, where applicable, from the scope of Directives .../.../EU\* or .../.../EU\*\*.*

- 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 the following:*
  - (a) the concession shall be awarded in accordance with the provisions of this Directive applicable to concessions awarded by contracting authorities, if one of the activities for which the contract is intended is subject to the provisions of this Directive applicable to concessions awarded by contracting authorities and the other is subject to the provisions of this Directive applicable to concessions awarded by contracting entities;*

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\* OJ: Please insert the number of the Directive contained in PE-CONS 74/13.

\*\* OJ: Please insert the number of the Directive contained in PE-CONS 75/13.

- (b) *the contract shall be awarded in accordance with Directive .../.../EU\**, if one of the activities for which the contract is intended is subject to this Directive and the other to Directive .../.../EU\*;
- (c) *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 .../.../EU\* or Directive .../.../EU\*\*.*

### *Article 23*

#### *Concessions covering both activities referred to in Annex II and activities involving defence or security aspects*

- 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 or to award a single contract. Where contracting entities choose to award separate contracts for separate parts, the decision of which legal regime applies to any one of such separate contracts shall be taken on the basis of the characteristics of the separate activity concerned.*

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\* OJ: Please insert the number of the Directive contained in PE-CONS 74/13.

\*\* OJ: Please insert the number of the Directive contained in PE-CONS 75/13.

*Notwithstanding Article 21, where contracting entities choose to award a single contract, paragraph 2 of this Article shall apply.*

*The choice between awarding a single contract or awarding a number of separate contracts shall not, however, be made with the objective of excluding the contract or contracts from the scope of application either of this Directive or Directive 2009/81/EC.*

2. *In the case of contracts intended to cover an activity which is subject to this Directive and another which is:*

*(a) covered by Article 346 TFEU; or*

*(b) subject to Directive 2009/81/EC*

*the contracting entity may:*

*(i) award a contract without applying this Directive in the cases set out under point (a); or*

*(ii) award a contract either in accordance with this Directive or in accordance with Directive 2009/81/EC, in the cases set out under point (b). The first subparagraph of this paragraph is without prejudice to the thresholds and exclusions provided for by Directive 2009/81/EC.*

*Contracts referred to in point (b), which also include procurement or other elements which are covered by Article 346 TFEU, may be awarded without applying this Directive.*

*However, it shall be a condition for the application of this paragraph 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.*

## SECTION IV

### SPECIFIC SITUATIONS

#### *Article 24*

#### *Reserved concessions*

Member States may reserve the right to participate in concession award procedures to sheltered workshops and economic operators whose main aim is the social and professional integration of disabled or disadvantaged *persons* or may provide for such concessions 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. The ***concession notice or, in the case of services concessions as defined in Article 19, prior information*** notice shall make reference to this Article.



*Article 25*

*Research and development services*

1. This Directive shall only apply to service concessions for research and development services which are covered by CPV codes 73000000-2 to **73120000-9, 73300000-5, 73420000-2 and 73430000-5** provided that both the following conditions are fulfilled:
  - (a) the benefits accrue exclusively to the contracting authority or contracting entity for *its* use in the conduct of its own affairs; and
  - (b) the service provided is wholly remunerated by the contracting authority or contracting entity .

## CHAPTER II

### Principles

#### *Article 26*

#### *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.

*Legal* persons may be required to indicate, in the tender or *in* the application, the names and relevant professional qualifications of the staff to be responsible for the performance of the *contract* in question.

2. Groups of economic operators, *including temporary associations, may participate* in concession award procedures. They shall not be required by contracting authorities or contracting entities to *have a specific legal form in order to submit a tender or a request to participate*.

*Where necessary, contracting authorities or contracting entities may clarify in the concession documents how groups of economic operators shall meet the requirements as to economic and financial standing or technical and professional ability referred to in Article 38 provided that this is justified by objective reasons and is proportionate. Member States may establish standard terms for how groups of economic operators are to meet those requirements*

*Any conditions for the performance of a concession by such groups of economic operators, which are different from those imposed on individual participants, shall also be justified by objective reasons and shall be proportionate.*

3. *Notwithstanding paragraphs 1 and 2, contracting authorities or contracting entities may require groups of economic operators to assume a specific legal form once **they have** been awarded the contract, to the extent that that change is necessary for the satisfactory performance of the **contract**.*

#### *Article 27*

##### *Nomenclatures*

1. Any references to nomenclatures in the context of the award of concessions shall be made using the ‘Common Procurement Vocabulary (CPV)’ as adopted by Regulation (EC) No 2195/2002 of the European Parliament and of the Council<sup>1</sup>.
2. The Commission shall be empowered to adopt delegated acts in accordance with Article 48 to adapt the CPV codes referred to in this Directive, where changes in the CPV nomenclature must be reflected in this Directive and they do not imply a modification of the scope of this Directive.

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<sup>1</sup> Regulation (EC) No 2195/2002 of the European Parliament and of the Council of 5 November 2002 on the Common Procurement Vocabulary (CPV) (OJ L 340, 16.12.2002, p. 1).

*Article 28*  
*Confidentiality*

1. Unless otherwise provided in this Directive or in the national law **to which the contracting authority is subject, in particular legislation** concerning access to information, and without prejudice to the obligations relating to the advertising of awarded **concession** contracts and to the information to candidates and tenderers set out in Articles 32 and 40, the contracting authority **or 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.

***This Article shall not prevent public disclosure of non-confidential parts of concluded contracts, including any subsequent changes.***

2. ***The contracting authority*** or contracting ***entity*** may impose on economic operators requirements aimed at protecting the confidential nature of information which ***it makes*** available throughout the concession award procedure.

*Article 29*  
*Rules applicable to communication*

1. Except where use of electronic means is mandatory pursuant to Article 33(2) and Article 34, ***Member States or*** contracting authorities and contracting entities may choose ***one or more of*** the following means of communication for all communication and information exchange:

- (a) electronic means ;
- (b) post or fax;
- (c) *oral communication, including telephone, in respect of communications other than the essential elements of a concession award procedure, and provided that the content of the oral communication is documented to a sufficient degree on a durable medium;*
- (d) *hand delivery certified by an acknowledgement of receipt.*

Member States may make mandatory the use of electronic means of communication for concessions, going beyond the obligations established in Article 33(2) and Article 34.

2. The means of communication chosen *shall* be generally available and *non-discriminatory, and shall* not restrict economic operators' access to the concession award procedure. *The tools and devices to be used for communicating by electronic means, as well as their technical characteristics shall be interoperable with the information and communication technology products in general use.*

In all communication, exchange and storage of information, contracting authorities and contracting entities shall ensure that the integrity of data and the confidentiality of applications *and tenders* are preserved. They shall examine the content of applications *and tenders* only after the time limit set for submitting them has expired.

**TITLE II**  
**RULES ON THE AWARD OF CONCESSIONS: GENERAL**  
**PRINCIPLES, AND PROCEDURAL GUARANTEES**

**CHAPTER I**  
**General principles**

*Article 30*  
*General principles*

1. *The contracting authority or contracting entity shall have the freedom to organise the procedure leading to the choice of concessionaire subject to compliance with this Directive.*
2. *The design of the concession award procedure shall respect the principles laid down in Article 3. In particular during the concession award procedure, the contracting authority or contracting entity shall not provide information in a discriminatory manner which may give some candidates or tenderers an advantage over others.*
3. *Member States shall take appropriate measures to ensure that in the performance of concession contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X.*

4. *The Commission shall be empowered to adopt delegated acts in accordance with Article 48 to amend the list in Annex X, 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.*

#### *Article 31*

##### *Concession notices*

1. Contracting authorities and contracting entities wishing to award a concession shall make known their intention by means of a concession notice.
2. Concession notices shall contain the information referred to in Annex V and, where appropriate, any other information deemed useful by the contracting authority or entity, in accordance with the format of standard forms.
3. Contracting authorities and contracting entities wishing to award a concession for social and other specific services *listed in Annex IV* shall make known their intention of planned concession award through the publication of a prior information notice . Those notices shall contain the information set out in Annex VI.

4. By way of derogation from paragraph 1, contracting authorities or contracting *entities* shall not be required to publish a concession notice where the works or services can be supplied only by a particular economic operator *for any of the following reasons*:

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

(b) the absence of competition for technical reasons;

(c) *the existence of an exclusive right;*

(d) *the protection of intellectual property rights and exclusive rights other than those defined in point (10) of Article 5.*

*The exceptions set out in points (b), (c) and (d) of the first subparagraph 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 concession award .*



5. *By way of derogation from paragraph 1, the contracting authority or contracting entity shall not be required to publish a new concession notice where no applications, no tenders, no suitable tenders or no suitable applications have been submitted in response to a prior concession procedure, provided that the initial conditions of the concession contract are not substantially altered and that a report is sent to the Commission, where it so requests;*

For the purposes of **■** the first subparagraph, a tender shall be considered not to be suitable where it is irrelevant to the concession, being *manifestly* incapable, *without substantial changes*, of meeting the contracting authority or contracting entity's needs *and requirements* as specified in the concession documents.

*For the purposes of the first subparagraph, an application shall be considered not to be suitable:*

- (a) *where the applicant concerned shall or may be excluded pursuant to Article 38(5) to (9) or does not meet the selection criteria set out by the contracting authority or the contracting entity pursuant to Article 38(1);*
- (b) *where applications include tenders which are not suitable within the meaning of the second subparagraph.*

## Article 32

### Concession award notices

1. Not later than 48 days after the award of a concession, **the** contracting authorities and contracting entities shall, **in accordance with the procedures laid down in Article 33**, send a concession award notice on the results of the concession award procedure. **For social and other specific services listed in Annex IV, such notices may however be grouped on a quarterly basis. In that case they shall send the grouped notices within 48 days of the end of each quarter.**

2. **Concession award** notices shall contain the information set out in Annex VII, or in relation to concessions for social **■** and other specific services **listed in Annex IV, the information set out in Annex VIII**, and shall be published in accordance with Article 33.

## Article 33

### Form and manner of publication of notices

1. **Concession** notices, **concession award notices and the notice** referred to in the second subparagraph of Article 43(1) shall include the information set out **in Annexes V, VII and VIII** 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 50.

2. The notices ***referred to in paragraph 1*** shall be drawn up, transmitted by electronic means to the Publications Office of the European Union and published in accordance with Annex IX. ***The Publications Office of the European Union shall give the contracting authority or contracting entity confirmation of the receipt of the notice and of the publication of the information sent, indicating the date of publication which shall constitute proof of publication.*** Notices shall be published not later than five days after they are sent. The costs of publication of the notices by the Publications Office of the European Union shall be borne by the Union.
3. ***Concession*** notices **■** shall be published in full in one or more of the official languages of the institutions of the Union as chosen by the contracting authority or contracting entity. That language version ***or those language versions*** shall constitute the sole authentic text or texts. A summary of the important elements of each notice shall be published in the other official languages of the institutions of the Union.
4. ***Concession notices and concession award notices shall not be published at national level before publication by the Publications Office of the European Union unless publication at Union level does not take place 48 hours after the Publications Office of the European Union confirms receipt by the contracting authority or the contracting entity of the notice as referred to in paragraph 2. Concession notices and concession award notices*** published at national level shall not contain information other than that contained in the notices dispatched to the ***Publications Office of the European Union*** but shall indicate the date of dispatch of the notice to the ***Publications Office of the European Union***.

Article 34

*Electronic availability of concession documents*

1. Contracting authorities and contracting entities shall offer by electronic means unrestricted and full direct access free of charge to the concession documents from the date of publication of a **concession notice or, where the concession notice does not include the invitation to submit tenders, from** the date on which an invitation to submit tenders was sent. The text of the **concession** notice or of these invitations shall specify the internet address at which the concession documents are accessible.
2. **Where, in duly justified circumstances, due to exceptional security, or technical reasons or due to the particularly sensitive nature of commercial information requiring a very high level of protection, unrestricted and full direct access free of charge by electronic means to certain concession documents cannot be offered, contracting authorities or contracting entities shall indicate in the notice or the invitation to submit a tender that the concession documents concerned will be transmitted by other means than electronic means and the time limit for the receipt of tenders shall be prolonged.**
3. Provided that it has been requested in good time, the contracting authorities and contracting entities or competent departments shall supply **to all applicants or tenderers taking part in the concession award procedure** additional information relating to the concession documents not later than six days before the deadline fixed for the receipt of tenders.

## Article 35

### *Combating corruption and preventing conflicts of interest*

*Member States shall require contracting authorities and contracting entities to take appropriate measures to combat fraud, favouritism and corruption and to effectively prevent, identify and remedy conflicts of interest arising in the conduct of concession award procedures, so as to avoid any distortion of competition and to ensure the transparency of the award procedure and the equal treatment of all candidates and tenderers.*

*The concept of conflicts of interest shall at least cover any situation where staff members of the contracting authority or entity who are involved in the conduct of the concession award 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 concession award procedure.*

*With regard to conflicts of interest, the measures adopted shall not go beyond what is strictly necessary to prevent a potential conflict of interest or eliminate a conflict of interest that has been identified.*

## CHAPTER II

### *Procedural guarantees*

#### I

##### *Article 36*

##### *Technical and functional requirements*

1. *Technical and functional requirements* shall define the characteristics required of *the works or services that are the subject-matter of the concession. They shall be set out in the concession documents.*

Those characteristics may also refer to the specific process of production or provision of the requested works *or services provided that they are linked to the subject-matter of the contract and proportionate to its value and its objectives. The characteristics may for instance include quality levels, environmental and climate performance levels, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, safety or dimensions, terminology, symbols, testing and test methods, marking and labelling, or user instructions.*

#### I

2. Unless justified by the subject-matter of the contract, technical *and functional requirements* shall not refer to a specific make or source, or a particular process *which characterises the products or services provided by a specific economic operator*, or to trade marks, patents, types or a specific **█** production with the effect of favouring or eliminating certain undertakings or certain products. Such *a* reference shall be permitted, on an exceptional basis, where a sufficiently precise and intelligible description of the subject- **█** matter of the contract **█** is not possible. *Such* reference shall be accompanied by the words "or equivalent".

3. A contracting authority or contracting entity ■ shall not reject a tender on the grounds that the works ■ and services tendered for do not comply with the *technical and functional requirements* to which it has referred, once the tenderer proves in its tender, by *any* appropriate means, ■ that the solutions it has *proposed* satisfied in an equivalent manner the *technical and functional requirements*.

### *Article 37*

#### *Procedural guarantees*

1. *Concessions shall be awarded on the basis of the award criteria set out by the contracting authority or contracting entity in accordance with Article 41, provided that all of the following conditions are fulfilled:*
- (a) *the tender complies with the minimum requirements set, where applicable, by the contracting authority or contracting entity;*
  - (b) *the tenderer complies with the conditions for participation as referred to in Article 38(1); and*
  - (c) *the tenderer is not excluded from participating in the award procedure in accordance with Article 38(4) to (7), and subject to Article 38(9).*

*The minimum requirements referred to in point (a) shall contain conditions and characteristics (particularly technical, physical, functional and legal) that any tender should meet or possess.*

2. *The contracting authority or contracting entity shall provide:*
  - (a) *in the concession notice, a description of the concession and of the conditions of participation;*
  - (b) *in the concession notice, in the invitation to submit a tender or in other concession documents, a description of the award criteria and, where applicable, the minimum requirements to be met.*
3. *The contracting authority or contracting entity may limit the number of candidates or tenderers to an appropriate level, on condition that this is done in a transparent manner and on the basis of objective criteria. The number of candidates or tenderers invited shall be sufficient to ensure genuine competition.*
4. *The contracting authority or contracting entity shall communicate the description of the envisaged organisation of the procedure and an indicative completion deadline to all participants. Any modification shall be communicated to all participants and, to the extent that they concern elements disclosed in the concession notice, advertised to all economic operators.*



5. *The contracting authority or contracting entity shall provide for appropriate recording of the stages of the procedure using the means it judges appropriate, subject to compliance with Article 28(1).*
6. *The contracting authority or contracting entity may hold negotiations with candidates and tenderers. The subject-matter of the concession, the award criteria and the minimum requirements shall not be changed during the course of the negotiations.*

*Article 38*

*Selection and qualitative assessment of candidates*

1. Contracting authorities *and contracting entities shall verify* the conditions for participation relating to **■** *the professional and technical ability and the financial and economic standing of the candidates or tenderers, on the basis of self-declarations, reference or references to be submitted as proof in accordance with the requirements specified in the concession notice that shall be non-discriminatory and proportionate to the subject-matter of the concession. The conditions for participation shall be related and proportionate to the need to ensure the ability of the concessionaire to perform the concession, taking into account the subject-matter of the concession and the purpose of ensuring* genuine competition.

**■**

2. With *a view to meeting the conditions for participation laid down* in paragraph 1, an economic operator may, where appropriate and for a particular concession, rely on the capacities of other entities, regardless of the legal nature of its links with them. ***Where an economic operator wants to rely on the capacities of other entities, it shall*** prove to the contracting authority or the contracting entity that it will have at its disposal, throughout the period of the concession, the necessary resources, for example, by producing ***a commitment*** by those entities to that effect. With regard to ■ financial standing, ***the*** contracting ***authority or the*** contracting ***entity*** may require that the economic operator and those entities are jointly liable for the execution of the contract.
3. Under the same conditions, a group of economic operators as referred to in Article 26 may rely on the capacities of participants in the group or of other entities.

■

4. ***Contracting authorities and contacting entities as referred to in point (a) of Article 7(1) shall exclude an economic operator from participation in a concession award procedure where they have established that that economic operator*** has been the subject of a conviction by final judgment for one of the ***following*** reasons:

- (a) participation in a criminal organisation, as defined in Article 2 of Council Framework Decision 2008/841/JHA<sup>1</sup>;
- (b) corruption, as defined in Article 3 of the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union<sup>2</sup> and Article 2(1) of Council Framework Decision 2003/568/JHA<sup>3</sup>, as well as corruption as defined in the national law of the contracting authority or *entity or* the economic operator;
- (c) fraud within the meaning of Article 1 of the Convention on the protection of the European Communities' *financial interests*<sup>4</sup>;
- (d) terrorist offences or offences linked to terrorist activities, as defined in Articles 1 and 3 of Council Framework Decision 2002/475/JHA<sup>5</sup> respectively, or inciting, aiding or abetting or attempting to commit an offence, as referred to in Article 4 of that Framework Decision;
- (e) money laundering *or terrorist financing*, as defined in Article 1 of Directive 2005/60/EC of the European Parliament and of the Council<sup>6</sup>.

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<sup>1</sup> Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime (OJ L 300, 11.11.2008, p. 42).

<sup>2</sup> OJ C 195, 25.6.1997, p. 1.

<sup>3</sup> Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector (OJ L 192, 31.7.2003, p. 54).

<sup>4</sup> OJ C 316, 27.11.1995, p. 48.

<sup>5</sup> Council Framework Decision of 13 June 2002 on combating terrorism (OJ L 164, 22.6.2002, p. 3).

<sup>6</sup> Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (OJ L 309, 25.11.2005, p. 15).

- (f) *child labour and other forms of trafficking in human beings as defined in Article 2 of Directive 2011/36/EU of the European Parliament and of the Council*<sup>1</sup>.

The obligation to exclude *an economic operator* shall also apply where the *person convicted* by final judgment *is a member of the administrative, management or supervisory body of that economic operator or has* powers of representation, decision or control *therein*.

*Contracting entities other than those referred to in point (a) of Article 7(1) may exclude an economic operator from participation in a concession award procedure where they are aware that that economic operator has been the subject of a conviction by a final judgment for any of the reasons listed in the first subparagraph of this paragraph.*

5. *Contracting authorities and contracting entities as referred to in point (a) of Article 7(1) shall exclude the economic operator from participation in a concession award procedure where it is aware that the economic operator is in breach of its obligations relating to the payment of taxes or social security contributions and where this has been established by a judicial or administrative decision having final and binding effect* in accordance with the legal provisions of the country in which it is established or with those of the Member State of the contracting authority or contracting entity.

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<sup>1</sup> *Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (OJ L 101, 15.4.2011, p. 1).*

*Furthermore, contracting authorities and contracting entities as referred to in point (a) of Article 7(1) may exclude or may be required by Member States to exclude from participation in a concession award procedure an economic operator where the contracting authority or entity can demonstrate by any appropriate means that the economic operator is in breach of its obligations relating to the payment of taxes or social security contributions.*

*This paragraph shall no longer apply when the economic operator has fulfilled its obligations by paying or entering into a binding arrangement with a view to paying the taxes or social security contributions due, including, where applicable, any interest accrued or fines.*

6. *Member States may provide for a derogation from the mandatory exclusion provided for in paragraphs 4 and 5, on an exceptional basis, for overriding reasons relating to the public interest such as public health or protection of the environment.*

*Member States may also provide for a derogation from the mandatory exclusion provided for in paragraph 5, where an exclusion would be clearly disproportionate, in particular where only minor amounts of taxes or social security contributions are unpaid or where the economic operator was informed of the exact amount due following its breach of its obligations relating to the payment of taxes or social security contributions at such time that it did not have the possibility to take measures as provided for in the third subparagraph of paragraph 5 before expiration of the deadline for submitting its application.*

7. *Contracting authorities or contracting entities may exclude or may be required by Member State to exclude from participation in a concession award any economic operator if one of the following conditions is fulfilled:*
- (a) *where it can demonstrate by any appropriate means any violation of applicable obligations referred to in Article 30(3)*
  - (b) *where the economic operator is **bankrupt or** is the subject of insolvency or winding-up proceedings, where its assets are being administered by a liquidator or by the court, where it is in an arrangement with creditors, where its business activities are suspended or it is in any analogous situation arising from a similar procedure under national laws and regulations; the contracting authority or the contracting entity may, however, decide not to exclude or be required by the Member State not to so exclude an economic operator which is in one of the above situations where it has established that the economic operator in question will be able to perform the concession, taking into account the applicable national rules and measures on the continuation of business in the case of those situations;*
  - (c) *where the contracting authority can demonstrate by any appropriate means that the economic operator is guilty of a grave professional misconduct, which renders its integrity questionable;*

- (d) *where a conflict of interest within the meaning of the second paragraph of Article 35, cannot be effectively remedied by any other less intrusive measure;*
- (e) *where the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition;*
- (f) *where the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior concession or a prior contract with a contracting authority or with a contracting entity as defined in this Directive or in Directive .../.../EU\* which led to early termination of that prior contract, damages or other comparable sanctions;*
- (g) *where the economic operator has been guilty of serious misrepresentation in supplying the information required for the verification of the absence of grounds for exclusion or the fulfilment of the selection criteria, has withheld such information or is unable to submit the required documents supporting such information;*
- (h) *where the economic operator has undertaken to unduly influence the decision-making process of the contracting authority or contracting entity, to obtain confidential information that may confer upon it undue advantages in the concession award procedure or to negligently provide misleading information that may have a material influence on decisions concerning exclusion, selection or award;*

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\* OJ: Please insert the number of the Directive contained in PE-CONS 75/13.

*(i) in the case of concessions in the fields of defence and security as referred to in Directive 2009/81/EC, where the economic operator has been found, on the basis of any means of evidence, including protected data sources, not to possess the reliability necessary to exclude risks to the security of the Member State.*

*8. Contracting authorities and contacting entities as referred to in point (a) of Article 7(1) shall at any time during the procedure exclude an economic operator where it turns out that the economic operator in question is, in view of acts committed or omitted either before or during the procedure, in one of the situations referred to in paragraph 4 of this Article and the first subparagraph of paragraph 5 of this Article.*

*At any time during the procedure, contracting authorities and contacting entities may exclude or may be required by Member States to exclude an economic operator where it turns out that the economic operator in question is, in view of acts committed or omitted either before or during procedure, in one of the situations referred to in the second subparagraph of paragraph 5 and in paragraph 7.*

*9. Any economic operator that is in one of the situations referred to in paragraphs 4 and 7 may provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of the relevant ground for exclusion. If such evidence is considered to be sufficient, the economic operator concerned shall not be excluded from the procedure.*



*For this purpose, the economic operator shall prove that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct, clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct. The measures taken by the economic operators shall be evaluated taking into account the gravity and particular circumstances of the criminal offence or misconduct. Where the measures are considered to be insufficient, the economic operator concerned shall receive a statement of the reasons for that decision.*

*An economic operator which has been excluded by a final judgment from participating in procurement or concession award procedures shall not be entitled to make use of the possibility provided under this paragraph during the period of exclusion resulting from that judgment in the Member States where the judgment is effective.*

- 10. By law, regulation or administrative provision and having regard for Union law, Member States shall specify, the implementing conditions for this Article. They shall in particular, determine the maximum period of exclusion if no measures as specified in paragraph 9 are taken by the economic operator to demonstrate its reliability. Where the period of exclusion has not been set by final judgment, that period shall not exceed five years from the date of the conviction by final judgment in the cases referred to in paragraph 4 and three years from the date of the relevant event in the cases referred to in paragraph 7.*

*Article 39*

*Time limits for receipt of applications and tenders for the concession*

1. When fixing the time limits for the *receipt* of applications *or of tenders contracting* authorities or contracting entities shall take account in particular of the complexity of the concession and the time required for drawing up tenders *or applications* without prejudice to the minimum time limits set out in *this* Article.
2. Where applications or tenders can be made only after a visit to the site or after on-the-spot inspection of the documents supporting the concession award documents, the time limits for the *receipt* of applications for the concession *or for the receipt of tenders*, shall be *fixed* so that all economic operators concerned may be aware of all the information needed to produce applications or tenders *and, in any event, shall be longer than the minimum time limits set out in paragraphs 3 and 4.*
3. *The minimum* time limit for the *receipt* of applications *whether or not including tenders* for the concession shall be **30** days from the date on which the concession notice was sent.

4. *Where the procedure takes place in successive stages the minimum time limit for the receipt of initial tenders shall be 22 days from the date on which the invitation to tender is sent.*
5. The time limit for receipt of tenders may be reduced by five days where the contracting *authority or contracting* entity accepts that tenders may be submitted by electronic means in conformity with Article 29.

#### *Article 40*

##### *Provision of information to candidates and tenderers*

1. *The contracting authority or contracting entity shall as soon as possible inform each candidate and tenderer of decisions taken concerning the award of a concession, including the name of the successful tenderer, the grounds for any decision to reject his application or tender and the grounds for any decision not to award a contract for which there has been publication of a concession notice or to recommence the procedure.*

*Moreover, on request from the party concerned, the contracting authority or contracting entity shall as quickly as possible, and in any case within 15 days from receipt of a written request inform any tenderers that have made an admissible tender of the characteristics and relative advantages of the tender selected.*

2. *The contracting authority or contracting entity may decide to withhold certain information referred to in paragraph 1, regarding the contract, where the release of such information would impede law enforcement, would otherwise be contrary to the public interest, would prejudice the legitimate commercial interests of economic operators, whether public or private, or might prejudice fair competition between such operators.*

*Article 41*

*Award criteria*

1. Concessions shall be awarded on the basis of objective criteria which **comply** with the principles **set out in Article 3** and which ensure that tenders are assessed in conditions of effective competition **so as** to identify an overall economic advantage for the contracting authority or the contracting entity.
2. The award criteria shall be linked to the subject-matter of the concession, and shall not confer an unrestricted freedom of choice on the contracting authority or the contracting entity. **They may include, inter alia, environmental, social or innovation-related criteria.**

Those criteria shall be accompanied by requirements which allow the information provided by the tenderers to be effectively verified.

*The contracting authority or the contracting entity shall verify whether tenders properly meet the award criteria.*

3. The contracting authority or the contracting entity shall *list the* criteria in descending order of importance.

*Notwithstanding the first subparagraph, where the contracting authority or contracting entity receive a tender which proposes an innovative solution with an exceptional level of functional performance which could not have been foreseen by a diligent contracting authority or contracting entity, the contracting authority or contracting entity may, exceptionally, modify the ranking order of the award criteria to take into account that innovative solution. In that case, the contracting authority or the contracting entity shall inform all tenderers about the modification of the order of importance and shall issue a new invitation to submit tenders, in respect of the minimal time limits referred to in Article 39(4). Where the award criteria have been published at the moment of the publication of the concession notice, the contracting authority or entity shall publish a new concession notice, in respect of the minimum time limits referred to in Article 39(3).*

*The modification of the ranking order shall not result in discrimination.*

## TITLE III

### Rules on performance of concessions

#### *Article 42*

#### *Subcontracting*

- 1. Observance of the obligations referred to in Article 30(3) by subcontractors shall be ensured through appropriate action by the competent national authorities acting within the scope of their responsibility and remit.*
- 2. In the concession documents, the contracting authority or **the** contracting entity may ask or may be required by a Member State to ask the tenderer **or the applicant** to indicate in its tender any share of the **concession** it may intend to subcontract to third parties and any proposed subcontractors. **This paragraph** shall be without prejudice to the question of the **main concessionaire's** liability.*

3. *In the case of works concessions and in respect of services to be provided at the facility under the oversight of the contracting authority or the contracting entity, after the award of the concession and at the latest when the performance of the concession commences, the contracting authority or the contracting entity shall require the concessionaire to indicate to the contracting authority or the contracting entity the name, contact details and legal representatives of its subcontractors, involved in such works or services, insofar as known at that point in time. The contracting authority or the contracting entity shall require the concessionaire to notify it of any changes to that information during the course of the concession as well as of the required information for any new subcontractors which it subsequently involves in such works or services.*

*Notwithstanding the first subparagraph Member States may impose the obligation to deliver the required information directly on the concessionaire.*

*The first and second subparagraphs shall not apply to suppliers.*

*Contracting authorities and contracting entities may extend or may be required by Member States to extend the obligations provided for in the first subparagraph to for instance:*

- (a) services concessions other than those concerning services to be provided at the facilities under the oversight of the contracting authority or the contracting entity or to suppliers involved in works or services concessions;*
- (b) subcontractors of the concessionaire's subcontractors or further down the subcontracting chain.*

*4. With the aim of avoiding breaches of the obligations referred to in Article 30(3), appropriate measures may be taken, such as:*

- (a) Where the national law of a Member State provides for a mechanism of joint liability between subcontractors and the concessionaire, the Member State concerned shall ensure that the relevant rules are applied in compliance with the conditions set out in Article 30(3).*



*(b) Contracting authorities and contracting entities may verify or may be required by Member States to verify whether there are grounds for exclusion of subcontractors pursuant to Article 38(4) to (10). In such cases, the contracting authority or the contracting entity shall require the economic operator to replace a subcontractor in respect of which the verification has shown that there are compulsory grounds for exclusion. The contracting authority or the contracting entity may require or may be required by a Member State to require that the economic operator replaces a subcontractor in respect of which the verification has shown that there are non-compulsory grounds for exclusion.*

*5. Member States may provide for more stringent liability rules under national law.*

6. *Member States having chosen to provide for measures pursuant to paragraphs 1 and 3 shall, by law, regulation or administrative provisions and having regard to Union law, specify the implementing conditions for those measures. In so doing, Member States may limit their applicability, for instance in respect of certain types of contracts, certain categories of contracting authorities, contracting entities or economic operators or as of certain amounts.*

*Article 43*

Modification of *contracts* during their term

1. *Concessions may be modified without a new concession award procedure in accordance with this Directive in any of the following cases:*
- (a) *where the modifications, irrespective of their monetary value, have been provided for in the initial concession documents in clear, precise and unequivocal review clauses, which may include value revision 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 concession;*

*(b) for additional works or services by the original concessionaire that have become necessary and that were not included in the initial concession where a change of concessionaire:*

*(i) cannot be made for economic or technical reasons such as requirements of interchangeability or interoperability with existing equipment, services or installations procured under the initial concession; and*

*(ii) would cause significant inconvenience or substantial duplication of costs for the contracting authority or contracting entity.*

*However, in the case of concessions awarded by a contracting authority, for the purposes of pursuing an activity other than those referred to in Annex II, any increase in value shall not exceed 50 % of the value of the original concession. Where several successive modifications are made, that limitation shall apply to the value of each modification. Such consecutive modifications shall not be aimed at circumventing this Directive;*

*(c) where all of the following conditions are fulfilled:*

*(i) the need for modification has been brought about by circumstances which a diligent contracting authority or contracting entity could not foresee;*

- (ii) the modification does not alter the overall nature of the concession;*
- (iii) in the case of concessions awarded by contracting authority, for the purposes of pursuing an activity other than those referred to in Annex II, any increase in value is not higher than 50 % of the value of the initial concession. Where several successive modifications are made, this limitation shall apply to the value of each modification. Such consecutive modifications shall not be aimed at circumventing this Directive;*
- (d) where a new concessionaire replaces the one to which the contracting authority or the contracting entity had initially awarded the concession as a consequence of either:
  - (i) an unequivocal review clause or option in conformity with point (a);**

- (ii) universal or partial succession into the position of the initial concessionaire, 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; or*
  - (iii) in the event that the contracting authority or contracting entity itself assumes the main concessionaire's obligations towards its subcontractors where this possibility is provided for under national legislation;*
- (e) where the modifications, irrespective of their value, are not substantial within the meaning of paragraph 4.*

*Contracting authorities or contracting entities having modified a concession in the cases set out under points (b) and (c) of this paragraph shall publish a notice to that effect in the Official Journal of the European Union. Such notice shall contain the information set out in Annex XI and shall be published in accordance with Article 33.*

2. *Furthermore, and without any need to verify whether the conditions set out under points (a) to (d) of paragraph 4 are met, concessions may equally be modified without a new concession award procedure in accordance with this Directive being necessary where the value of the modification is below both of the following values:*

- (i) the threshold set out in Article 8; and*
- (ii) 10 % of the value of the initial concession.*

*However, the modification may not alter the overall nature of the concession. Where several successive modifications are made, the value shall be assessed on the basis of the net cumulative value of the successive modifications.*

3. *For the purpose of the calculation of the value referred to in paragraph 2 and points (b) and (c) of paragraph 1, the updated value shall be the reference value when the concession includes an indexation clause. If the concession does not include an indexation clause, the updated value shall be calculated taking into account the average inflation in the Member State of the contracting authority or of the contracting entity.*
4. *A modification of a concession during its term shall be considered to be substantial within the meaning of point (e) of paragraph 1, where it renders the concession materially different in character from the one initially concluded. In any event, without prejudice to paragraphs 1 and 2, a modification shall be considered to be substantial where one or more of the following conditions is met:*
  - (a) *the modification introduces conditions which, had they been part of the initial concession award procedure, would have allowed for the admission of applicants other than those initially selected or for the acceptance of a tender other than that originally accepted or would have attracted additional participants in the concession award procedure;*

- (b) *the modification changes the economic balance of the concession in favour of the concessionaire in a manner which was not provided for in the initial concession;*
  - (c) *the modification extends the scope of the concession considerably;*
  - (d) *where a new concessionaire replaces the one to which the contracting authority or contracting entity had initially awarded the concession in other cases than those provided for under point (d) of paragraph 1.*
5. *A new concession award procedure in accordance with this Directive shall be required for other modifications of the provisions of a concession during its term than those provided for under paragraphs 1 and 2.*

#### *Article 44*

##### *Termination of concessions*

Member States shall ensure that contracting authorities *and contracting entities have* the possibility, under the conditions determined by the applicable national law, to terminate a concession during its term, where one or more of the following conditions is fulfilled:

- (a) a modification of the concession has taken place, which would have required a new concession award procedure pursuant to toArticle 43;
- (b) the concessionaire *has been, at the time of concession award, in one of the situations referred to in Article 38(4) and should therefore have been excluded from the concession award procedure;*

- (c) the Court of Justice of the European Union finds, in a procedure pursuant to Article 258 *TFEU*, that a Member State has failed to fulfil its obligations under the Treaties by the fact that a contracting authority or contracting entity belonging to that Member State has awarded the concession in question without complying with its obligations under the Treaties and this Directive.

#### *Article 45*

##### *Monitoring and reporting*

- 1. In order to ensure correct and efficient implementation, Member States shall ensure that at least the tasks set out in this Article are performed by one or more authorities 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 rules for the award of concession contracts is monitored. Where monitoring authorities or structures identify specific violations, such as fraud, corruption, conflict of interest and other serious irregularities, or systemic problems, they shall be empowered to indicate those violations or 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.*

*The Commission may, at the most every three years, request that Member States transmit to the Commission a monitoring report covering an overview of the most frequent causes of incorrect application of the rules for the award of concession contracts, including possible structural or recurring problems in the application of the rules, including possible cases of fraud and other illegal behaviour.*

4. *Member States shall ensure that information and guidance on the interpretation and application of Union law for the award of concession contracts is available free of charge to assist contracting authorities and entities and economic operators in correctly applying the Union rules.*

# TITLE IV

## AMENDMENTS TO DIRECTIVES 89/665/EEC AND 92/13/EEC

### *Article 46*

#### *Amendments to Directive 89/665/EEC*

Directive 89/665/EEC is amended as follows:

- (1) In Article 1, paragraph 1 is replaced by the following:

"1. This Directive applies to contracts referred to in Directive .../.../EU of the European Parliament and of the Council<sup>+</sup>\* unless such contracts are excluded in accordance with Articles 7, 8, 9, 10, 11, 12, 15, 16, 17 and 37 of that Directive.

This Directive also applies to concessions awarded by contracting authorities, referred to in Directive .../.../EU of the European Parliament and of the Council<sup>++\*\*</sup> unless such concessions are excluded in accordance with Articles 10, 11, 12, 17 and 25 of that Directive.

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\* OJ: Please insert the number and date of Directive contained in PE-CONS 74/13, and complete the footnote +, to be inserted in the amended act.

\*\* OJ: Please insert the number and date of this Directive, and complete the footnote ++, to be inserted in the amended act.

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

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

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<sup>+</sup> Directive .../.../EU of the European Parliament and of the Council of ... on public procurement (OJ L...).

<sup>++</sup> Directive .../.../EU of the European Parliament and of the Council of ... on the award of concession contract (OJ L ...).";

(2) In Article 2a, paragraph 2 is amended as follows:

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

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

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

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\*\* OJ: Please insert the number of the Directive contained in PE-CONS 74/13.

\* OJ: Please insert the number of this Directive.

"— a summary of the relevant reasons as set out in Article 55(2) of Directive .../.../EU\*\*, subject to Article 55(3) of that Directive, or in the second subparagraph of Article 40(1) of Directive .../.../EU\*, subject to Article 40(2) of that Directive and,"

(3) Article 2b is amended as follows:

(a) in the first paragraph:

(i) point (a) is replaced by the following:

"(a) if Directive .../.../EU\*\* or, where relevant, Directive .../.../EU\* does not require prior publication of a contract notice in the *Official Journal of the European Union*;"`

(ii) point (c) is replaced by the following:

"(c) in the case of a contract based on a framework agreement as provided for in Article 33 of Directive .../.../EU\*\* and in the case of a specific contract based on a dynamic purchasing system as provided for in Article 34 of that Directive.";

(b) in the second paragraph, the first and the second indent are replaced by the following:

"— there is an infringement of point (c) of Article 33(4) or of Article 34(6) of Directive .../.../EU\*\*, and,

— the contract value is estimated to be equal to or to exceed the thresholds set out in Article 4 of Directive .../.../EU\*\*."

(4) In Article 2c, the words "Directive 2004/18/EC" are replaced by the words "Directive .../.../EU\*\* or Directive .../.../EU\*";

(5) Article 2d is amended as follows:

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\*\* OJ: Please insert the number of the Directive contained in PE-CONS 74/13.

\* OJ: Please insert the number of this Directive.

\*\* OJ: Please insert the number of the Directive contained in PE-CONS 74/13.

\* OJ: Please insert the number of this Directive.

(a) in paragraph 1:

(i) point (a) is replaced by the following:

"(a) if the contracting authority has awarded a contract without prior publication of a contract notice in *the Official Journal of the European Union* without this being permissible in accordance with Directive .../.../EU\*\* or Directive .../.../EU\*";

(ii) in point (b) the words "Directive 2004/18/EC" are replaced by the words "Directive .../.../EU\*\* or Directive .../.../EU\*";

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

"- the contracting authority considers that the award of a contract without prior publication of a contract notice in the *Official Journal of the European Union* is permissible in accordance with Directive .../.../EU\*\* or Directive .../.../EU\*";

(c) in paragraph 5, the first indent is replaced by the following:

"— the contracting authority considers that the award of a contract is in accordance with point (c) of Article 33(4) or with Article 34(6) of Directive .../.../EU\*\*,"

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\*\* OJ: Please insert the number of the Directive contained in PE-CONS 74/13.

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

"(a) before the expiry of at least 30 calendar days with effect from the day following the date on which:

- the contracting authority published a contract award notice in accordance with Articles 50 and 51 of Directive .../.../EU\*\* or with Articles 31 and 32 of Directive .../.../EU\*, provided that this notice includes justification of the decision of the contracting authority to award the contract without prior publication of a contract notice in the *Official Journal of the European Union*, or

- the contracting authority informed the tenderers and candidates concerned of the conclusion of the contract, provided that this information contains a summary of the relevant reasons as set out in Article 55(2) of Directive .../.../EU\*\*, subject to Article 55(3) of that Directive or in the second subparagraph of Article 40(1) of Directive .../.../EU\*, subject to Article 40(2) of that Directive. This option also applies to the cases referred to in point (c) of the first paragraph of Article 2b of this Directive";

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\*\* OJ: Please insert the number of the Directive contained in PE-CONS 74/13.

\* OJ: Please insert the number of this Directive.

(7) In Article 3, paragraph 1 is replaced by the following:

"1. The Commission may invoke the procedure provided for in paragraphs 2 to 5 when, prior to a contract being concluded, it considers that a serious infringement of Union law in the field of public procurement has been committed during a contract award procedure falling within the scope of Directive .../.../EU\*\* or Directive .../.../EU\*."

*Article 47*

*Amendments to Directive 92/13/EEC*

Directive 92/13/EEC is amended as follows:

(1) In Article 1, paragraph 1 is replaced by the following:

"1. This Directive applies to contracts referred to in Directive .../.../EU of the European Parliament and of the Council+\*\*\* unless such contracts are excluded in accordance with Articles 18 to 24, 27 to 30, 34 or 55 of that Directive.

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\*\* OJ: Please insert the number of the Directive contained in PE-CONS 74/13.

\* OJ: Please insert the number of this Directive.

\*\*\* OJ: Please insert the number and date of Directive contained in PE-CONS 75/13, and complete the footnote +, to be inserted in the amended act.



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

This Directive also applies to concessions awarded by contracting entities, referred to in Directive .../.../EU of the European Parliament and of the Council<sup>++\*</sup> unless such contracts are excluded in accordance with Articles 10, 12, 13, 14, 16, 17 and 25 of that Directive.

Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive .../.../EU<sup>\*\*\*</sup> or Directive .../.../EU<sup>\*\*</sup>, decisions taken by contracting entities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Union law in the field of procurement or national rules transposing that law.

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<sup>+</sup> Directive .../.../EU of the European Parliament and of the Council of ... on procurement by entities operating in the water, energy, transport and postal services sectors (OJ L...).

<sup>++</sup> Directive .../.../EU of the European Parliament and of the Council of ... on the award of concessions contract (OJ L ...).";

(2) In Article 2a, paragraph 2 is amended as follows:

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

"A contract may not be concluded following the decision to award a contract falling within the scope of Directive .../.../EU<sup>\*\*\*</sup> or Directive .../.../EU<sup>\*\*</sup> before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned if fax or

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\* OJ: Please insert the number and date of this Directive, and complete the footnote ++, to be inserted in the amended act.

\*\*\* OJ: Please insert the number of the Directive contained in [PE-CONS 75/13](#).

\*\* OJ: Please insert the number of this Directive.

electronic means are used or, if other means of communication are used, before the expiry of a period of either at least 15 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned or at least 10 calendar days with effect from the day following the date of the receipt of the contract award decision.";

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

"— a summary of the relevant reasons as set out in Article 75(2) of Directive .../.../EU<sup>\*\*</sup>, subject to the provisions of Article 75(3) of that Directive or in the second subparagraph of Article 40(1) of Directive .../.../EU<sup>\*</sup>, subject to the provisions of Article 40(2) of that Directive, and";

(3) Article 2b is amended as follows:

(a) in the first paragraph:

(i) point (a) is replaced by the following:

"(a) if Directive .../.../EU<sup>\*\*</sup> or, **where relevant**, Directive .../.../EU<sup>\*</sup> does not require prior publication of a notice in the *Official Journal of the European Union*";

(ii) point (c) is replaced by the following:

"(c) in the case of specific contracts based on a dynamic purchasing system as provided for in Article 52 of Directive .../.../EU<sup>\*\*</sup>."

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\* OJ: Please insert the number of this Directive.

\*\* OJ: Please insert the number of the Directive contained in PE-CONS 75/13.

(b) in the second paragraph, the first and the second indent are replaced by the following:

"— there is an infringement of Article 52(6) of Directive .../.../EU\*\* , and,

— the contract value is estimated to be equal to or to exceed the thresholds set out in Article 15 of Directive .../.../EU\*."

(4) In Article 2c, the words "Directive 2004/17/EC" are replaced by the words "Directive .../.../EU\*\* or Directive .../.../EU\*"

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\*\* OJ: Please insert the number of the Directive contained in PE-CONS 75/13.

\* OJ: Please insert the number of this Directive.

(5) Article 2d is amended as follows:

(a) in paragraph 1,

(i) point (a) is replaced by the following:

"(a) if the contracting entity has awarded a contract without prior publication of a notice in the *Official Journal of the European Union* without this being permissible in accordance with Directive .../.../EU\*\* or Directive .../.../EU\*";

(ii) in point (b), the words "Directive 2004/17/EC" are replaced by the words "Directive .../.../EU\*\* or Directive .../.../EU\*";

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

"— the contracting entity considers that the award of a contract without prior publication of a notice in the *Official Journal of the European Union* is permissible in accordance with Directive .../.../EU\*\* or Directive .../.../EU\*,";

(c) in paragraph 5, the first indent is replaced by the following:

"— the contracting entity considers that the award of a contract is in accordance with Article 52(6) of Directive .../.../EU\*\*,"

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\*\* OJ: Please insert the number of the Directive contained in PE-CONS 75/13.

\* OJ: Please insert the number of this Directive.

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

"(a) before the expiry of at least 30 calendar days with effect from the day following the date on which:

— the contracting entity published a contract award notice in accordance with Articles 70 and 71 of Directive .../.../EU\*\* or with Articles 31 and 32 of Directive .../.../EU\*, provided that this notice includes the justification of the decision of the contracting entity to award the contract without prior publication of a notice in the *Official Journal of the European Union*, or

— the contracting entity informed the tenderers and candidates concerned of the conclusion of the contract, provided that this information contains a summary of the relevant reasons as set out in Article 75(2) of .../.../EU\*\* subject to Article 75(3) of that Directive or in the second subparagraph of Article 40(1) of Directive .../.../EU\*, subject to Article 40(2) of that Directive. This option also applies to the cases referred to in point (c) of the first paragraph of Article 2b of this Directive;"

(7) in Article 8, paragraph 1 is replaced by the following:

"1. The Commission may invoke the procedure provided for in paragraphs 2 to 5 when, prior to a contract being concluded, it considers that a serious infringement of Union law in the field of procurement has been committed during a contract award procedure falling within the scope of Directive .../.../EU\*\* or Directive .../.../EU\*, or in relation to point (a) of Article 26(1) of Directive .../.../EU\*\* in the case of contracting entities to which that provision applies".

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\*\* OJ: Please insert the number of the Directive contained in PE-CONS 75/13.

\* OJ: Please insert the number of this Directive.

# TITLE V

## DELEGATED POWERS, IMPLEMENTING POWERS AND FINAL PROVISIONS

### *Article 48*

#### *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 power to adopt delegated acts referred to in Article 7(3), Article 9(4), Article 27(2) and Article 30(4) shall be conferred on the Commission for an indeterminate period of time from ... \*

3. The delegation of power referred to in Article 7(3), Article 9(4), Article 27(2) and Article 30(4) may be revoked at any time by the European Parliament or by the Council. A decision of to revoke 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.

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\* OJ: Please insert the date of entry into force of this Directive.

5. A delegated act adopted pursuant to Article 7(3), Article 9(4), Article 27(2) and Article 30(4) shall enter into force only where no objection has been expressed either by the European Parliament or by the Council within a period of two 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 two months at the initiative of the European Parliament or of the Council.

*Article 49*

*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 48(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 by the Council.

#### *Article 50*

##### *Committee Procedure*

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

#### *Article 51*

##### *Transposition*

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by ...<sup>\*</sup>. They shall forthwith communicate to the Commission the text thereof.

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<sup>1</sup> Council Decision 71/306/EEC of 26 July 1971 setting up an Advisory Committee for Public Works Contracts (OJ L 185, 16.8.1971, p. 15).

<sup>\*</sup> OJ: Please insert the date: 24 months after the entry into force of this Directive.



When Member States adopt those measures, 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.

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

#### *Article 52*

#### *Transitional provisions*

References to points (a) and (b) of Article 1(3) of Directive 2004/17/EC and to Article 1(3) and (4) and Title III of Directive 2004/18/EC Directive shall be construed as references to this Directive.

## Article 53

### Monitoring and reporting

*The Commission shall assess 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 out in Article 8, and report thereon to the European Parliament and the Council by ...\* . The appropriateness of the level of thresholds shall be examined in the context of negotiations under the GPA taking into account the impact of inflation and transaction costs. The Commission shall, where possible and appropriate, consider suggesting an increase of the threshold amounts applicable under the GPA during the next round of negotiations.*

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

*The Commission shall also assess the economic effects on the internal market of the exclusions set out in Article 12 taking into account the specific structures of the water sector, and report thereon to the European Parliament and the Council by ...\*.*

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\* OJ: Please insert the date: 60 months after the date of entry into force of this Directive.

*The Commission shall review the functioning of this Directive and shall report to the European Parliament and to the Council by ... \* , and every five years thereafter, based on information that Member States shall provide in accordance with Article 45(3).*

*The Commission shall make the results of the review carried out in accordance with the fourth paragraph publicly available.*

*Article 54*

*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*.

*This Directive shall not apply to the award of concessions tendered or awarded before ... \*\* ;*

*Article 55*

*Addressees*

This Directive is addressed to the Member States.

Done at ,

*For the European Parliament*

*For the Council*

*The President*

*The President*

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\* OJ: Please insert the date: 7 years after the date of entry into force of this Directive.

\*\* OJ: Please insert the date of entry into force of this Directive.

*Annex I*

LIST OF THE ACTIVITIES REFERRED TO IN POINT (7) OF ARTICLE 5<sup>1</sup>

<b>NACE Rev. 1 <sup>(1)</sup></b>		<b>CPV</b>	
<b>SECTION F CONSTRUCTION</b>		<b>code</b>	
<b>Division</b>	<b>Group Class Subject</b>	<b>Notes</b>	
45	Construction	<p>This division includes:</p> <p>construction of new buildings and works, restoring and common repairs.</p>	45000000
45.1	Site preparation		45100000
45.11	Demolition	<p>This class includes:</p> <p>and wrecking — demolition of buildings and other of buildings; structures, earth moving — clearing of building sites, — earth moving: excavation, landfill, levelling and grading of construction sites, trench digging, rock removal, blasting, etc., — site preparation for mining,— overburden removal and other development and preparation of mineral properties and sites.</p> <p>This class also includes:</p> <p>— building site drainage,</p>	45110000

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<sup>1</sup> In the event of any difference of interpretation between the CPV and the NACE, the CPV nomenclature will apply.

— drainage of agricultural or forestry land.

45.12 Test drilling This class includes: 45120000  
and boring

— test drilling, test boring and core sampling for construction, geophysical, geological or similar purposes.

This class excludes:

— drilling of production oil or gas wells, see 11.20,

— water well drilling, see 45.25,

— shaft sinking, see 45.25,

— oil and gas field exploration, geophysical, geological and seismic surveying, see 74.20.

45.2 Building of 45200000  
complete  
constructions  
or parts  
thereof; civil  
engineering

45.21 General	This class includes:	45210000
construction of buildings and civil engineering works	<ul style="list-style-type: none"> <li>— construction of all types of buildings Except: 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>	<ul style="list-style-type: none"> <li>45213316</li> <li>45220000</li> <li>45231000</li> <li>45232000</li> </ul>
	This class excludes:	
	<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,</li> </ul>	

see 74.20,

— project management for construction, see  
74.20.



45.22	Erection of roof covering and frames	This class includes: — erection of roofs, — roof covering, — waterproofing.	45261000
45.23	Construction of highways, roads, airfields and sport facilities	This class includes: — construction of highways, streets, roads, other vehicular and pedestrian ways, — construction of railways, — construction of airfield runways, — construction work, other than buildings, for stadiums, swimming pools, gymnasiums, tennis courts, golf courses and other sports - installations, — painting of markings on road surfaces and - car parks.	45212212 and DA03 45230000 except: - 45231000 - 45232000 - 45234115
		This class excludes:  — preliminary earth moving, see 45.11.	

45.24	Construction of water projects	This class includes — construction of:  — waterways, harbour and river works, pleasure ports (marinas), locks, etc.,  — dams and dykes,  — dredging,  — subsurface work.	45240000
45.25	Other construction work involving special trades	This class includes: — construction activities specialising in one aspect common to different kinds of structures, requiring specialised skill or equipment,  — construction of foundations, including pile driving,  — water well drilling and construction, shaft sinking,  — erection of non-self-manufactured steel elements,  — steel bending,  — bricklaying and stone setting,  — scaffolds and work platform erecting and dismantling, including renting of scaffolds and work platforms,  — erection of chimneys and industrial ovens.	45250000 45262000

This class excludes:

— renting of scaffolds without erection and dismantling, see 71.32

45.3	Building installation	45300000
45.31	Installation of electrical wiring and fittings	45213316 45310000
	This class includes: installation in buildings or other construction projects of:	Except:
	— electrical wiring and fittings,	-
	— telecommunications systems,	45316000
	— electrical heating systems,	
	— residential antennas and aerials,	
	— fire alarms,	
	— burglar alarm systems,	
	— lifts and escalators,	
	— lightning conductors, etc.	
45.32	Insulation work activities	45320000
	This class includes: — installation in buildings or other construction projects of thermal, sound or vibration insulation.	
	This class excludes:	
	— waterproofing, see 45.22.	

45.33 Plumbing	This class includes:	45330000
	— installation in buildings or other construction projects of:	
	— plumbing and sanitary equipment,	
	— gas fittings,	
	— heating, ventilation, refrigeration or air-conditioning equipment and ducts,	
	— sprinkler systems.	
	This class excludes:	
	— installation of electrical heating systems, see 45.31.	
45.34 Other	This class includes:	45234115
building	— installation of illumination and signalling	45316000
installation	systems for roads, railways, airports and harbours,	45340000
	— installation in buildings or other construction projects of fittings and fixtures n.e.c.	

45.4 Building completion 45400000

45.41 Plastering This class includes: 45410000

— application in buildings or other construction projects of interior and exterior plaster or stucco, including related lathing materials.

45.42 Joinery installation This class includes: 45420000

— installation of not self-manufactured doors, windows, door and window frames, fitted kitchens, staircases, shop fittings and the like, of wood or other materials,

— interior completion such as ceilings, wooden wall coverings, movable partitions, etc.

This class excludes:

— laying of parquet and other wood floor coverings, see 45.43.

45.43 Floor and This class includes: 45430000  
wall  
covering — laying, tiling, hanging or fitting in  
buildings or other construction projects of:  
  
— ceramic, concrete or cut stone wall or  
floor tiles,  
  
— parquet and other wood floor coverings  
carpets and linoleum floor coverings,  
  
— including of rubber or plastic,  
  
— terrazzo, marble, granite or slate floor or  
wall coverings,  
  
— wallpaper.

45.44 Painting and This class includes: 45440000  
glazing — interior and exterior painting of buildings,  
  
— painting of civil engineering structures,  
  
— installation of glass, mirrors, etc.  
  
This class excludes:  
  
— installation of windows, see 45.42.

45.45	Other building completion	This class includes: — installation of private swimming pools, — steam cleaning, sand blasting and similar activities for building exteriors, — other building completion and finishing work n.e.c.	45212212 and DA04 45450000
		This class excludes: — interior cleaning of buildings and other structures, see 74.70.	
45.5	Renting of construction or demolition equipment with operator		45500000
45.50	Renting of construction or demolition equipment with operator	This class excludes: — renting of construction or demolition machinery and equipment without operators, see 71.32.	45500000

(1) Council Regulation (EEC) No 3037/90 of 9 October 1990 on the statistical classification of economic activities in the European Community (OJ L 293, 24.10.1990, p. 1).



## *Annex II*

### **ACTIVITIES EXERCISED BY CONTRACTING ENTITIES AS REFERRED TO IN ARTICLE 7**

The provisions of this Directive governing concessions awarded by contracting entities shall apply to the following activities:

1. As far as gas and heat are concerned:
  - (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 fixed networks.

The supply by a contracting entity referred to in *points (b) and (c)* of Article 7(1) of gas or heat to fixed networks which provide a service to the public shall not be considered to be a relevant activity within the meaning of paragraph 1 where all of the following conditions are met:

- (i) the production of gas or heat by that contracting entity is the unavoidable consequence of carrying out an activity other than those referred to in this paragraph or in paragraphs 2 and 3 of this Annex;

- (ii) the supply to the public network is aimed only at the economic exploitation of such production and amounts to not more than 20 % of that contracting entity's turnover on the basis of the average for the preceding three years, including the current year.

*For the purposes of this Directive, “supply” includes the generation/production, wholesale and retail sale of gas. However, production of gas in the form of extraction falls within the scope of paragraph 4 of this Annex.*

- 2. As far as electricity is concerned:
  - (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 fixed networks.

For the purposes of this Directive, supply of electricity includes generation/production, wholesale *and retail sale* of electricity.

The supply by a contracting entity referred to in *points (b) and (c)* of Article 7(1) of electricity to networks which provide a service to the public shall not be considered to be a relevant activity within the meaning of paragraph 1 where all of the following conditions are met

- (a) the production of electricity by that contracting entity takes place because its consumption is necessary for carrying out an activity other than those referred to in this paragraph or in paragraphs 1 and 3 of this Annex;
- (b) supply to the public network depends only on that contracting entity's own consumption and has not exceeded 30 % of that contracting entity's total production of energy, on the basis of the average for the preceding three years, including the current year.

- I**
- 3. 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.

4. 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.
5. 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 (ii) of the second subparagraph of this paragraph and provided that the conditions set out in Article 34(1) of Directive .../.../EU\* are not satisfied in respect of the services falling within point (ii) of the second subparagraph.

For the purpose of this Directive and without prejudice to Directive 97/67/EC:

- (i) "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;

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\* OJ: Please insert the number of the Directive contained in PE-CONS 75/13.

(ii) "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;

(iii) "other services than postal services": means services provided in the following areas:

- mail service management services (services both preceding and subsequent to despatch, including "mailroom management services"),

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- services concerning postal items not included in point (a), such as direct mail bearing no address,

■

6. 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.

## Annex III

### LIST OF LEGAL ACTS OF THE UNION REFERRED TO IN POINT (B) OF ARTICLE 7(2)

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

Annex IV

SERVICES REFERRED TO IN ARTICLE 19

<i>Description</i>	<i>CPV Code</i>
<p><i>79611000-0; 75200000-8; 75231200-6; 75231240-8; 79622000-0 [Supply services of domestic help personnel]; 79624000-4 [Supply services of nursing personnel] and 79625000-1 [Supply services of medical personnel] from 85000000-9 to 85323000-9; 85143000-3, 98133100-5, 98133000-4 and 98200000-5 and 98500000-8 [Private households with employed persons] and 98513000-2 to 98514000-9 [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>	<p>Health, social <i>and related</i> services</p>



<p>85321000-5 and 85322000-2,  75000000-6 [Administration, defence  and social security services],  75121000-0, 75122000-7, 75124000-1;  from 79995000-5 to 79995200-7; from  80000000-4 Education and training  services to 80660000-8; from  92000000-1 to 92342200-2; from  92360000-2 to 92700000-8;  79950000-8 [Exhibition, fair and  congress organisation services],  79951000-5 [Seminar organisation  services], 79952000-2 [Event services],  79952100-3 [Cultural event  organisation services], 79953000-9  [Festival organisation services],  79954000-6 [Party organisation  services], 79955000-3[Fashion shows  organisation services], 79956000-0  [Fair and exhibition organisation  services]</p>	<p>Administrative, <i>social</i>, educational,  healthcare and cultural services</p>
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75300000-9	Compulsory social security services <sup>1</sup>
75310000-2, 75311000-9, 75312000-6, 75313000-3, 75313100-4, 75314000-0, 75320000-5, 75330000-8, 75340000-1	Benefit services
<b>98000000-3; 98120000-0; 98132000-7; 98133110-8 and 98130000-3</b>	<b><i>Other community, social and personal services including services</i></b> furnished by trade unions, <b><i>political organisations, youth associations and other membership organisation services.</i></b>
98131000-0	Religious services
<b><i>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]. 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 55510000-8 Canteen services, 55511000-5 Canteen and other restricted-clientele cafeteria services, 55512000-2 Canteen management services, 55523100-3 School-meal services</i></b>	<b><i>Hotel and restaurant services</i></b>

<sup>1</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.***

<i>79100000-5 to 79140000-7; 75231100-5;</i>	<i>Legal services, to the extent not excluded pursuant to Article 10(8)(d)</i>
<i>75100000-7 to 75120000-3; 75123000-4; 75125000-8 to 75131000-3</i>	<i>Other administrative services and government services</i>
<i>75200000-8 to 75231000-4</i>	<i>Provision of services to the community</i>
<i>75231210-9 to 75231230-5; 75240000-0 to 75252000-7; 794300000-7; 98113100-9</i>	<i>Prison related services, public security and rescue services, to the extent not excluded pursuant to point (g) of Article 10(8)</i>
<i>79700000-1 to 79721000-4</i> <i>[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 agency services]</i> <i>79722000-1 [Graphology services],</i> <i>79723000-8 [Waste analysis services]</i>	<i>Investigation and security services</i>

<p><i>64000000-6 [Postal and telecommunications services], 64100000-7 [Post and courier services], 64110000-0 [Postal services], 64111000-7 [Postal services related to newspapers and periodicals], 64112000-4 [Postal services related to letters], 64113000-1 [Postal services related to parcels], 64114000-8 [Post office counter services], 64115000-5 [Mailbox rental], 64116000-2 [Post-restante services], 64122000-7 [Internal office mail and messenger services]</i></p>	<p><i>Postal Services</i></p>
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<p><i>50116510-9 [Tyre-remoulding services], 71550000-8 [Blacksmith services]</i></p>	<p><i>Miscellaneous services</i></p>
<p><i>98900000-2 [Services provided by extra-territorial organisations and bodies] and 98910000-5 [Services specific to international organisations and bodies]</i></p>	<p><i>International services</i></p>

*Annex V*

**INFORMATION TO BE INCLUDED IN CONCESSION NOTICES REFERRED TO IN  
ARTICLE 31**

1. Name, identification number (where provided for in national legislation), address, including NUTS code, telephone, fax number, email and internet address of the contracting authority or entity and, where different, of the service from which additional information may be obtained.
2. Type of contracting authority or entity and main activity exercised.
3. If the applications are to contain tenders, email or internet address at which the *concession* 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 in the cases referred to in the second subparagraph of Article 34(1), an indication of how the procurement documents can be accessed.*
4. Description of the *concession*: nature and extent of works, nature and   extent of services, *order of magnitude or indicative value and, where possible, duration of the contract.* Where the concession is divided into lots, this information shall be provided for each lot. Where appropriate, description of any options.

5. CPV codes. Where the concession is divided into lots, this information shall be provided for each lot.
6. NUTS code for the main location of works in case of works concessions or NUTS code for the main place of performance service concessions; where the concession is divided into lots, this information shall be provided for each lot.



7. Conditions for participation, including:
  - (a) where appropriate, indication whether the concession is restricted to sheltered workshops, or whether its execution is restricted to the framework of protected job programmes,
  - (b) where appropriate, indication whether the provision of the service is reserved by law, regulation or administrative provision to a particular profession; reference to the relevant law, regulation or administrative provision,
  - (c) a list and brief description of selection criteria *where applicable*; minimum level(s) of standards possibly required; indication of required information (self-declarations, documentation).

8. ■ Time limit for the submission of applications *or receipt of tenders*.
9. Criteria which will be applied in the award of the concession *where they do not appear in other concession documents*.
10. Date of dispatch of the notice.
11. Name and address of the body responsible for appeal and, where appropriate, mediation procedures. Precise information concerning the deadline for lodging appeals or, if need be, the name, address, telephone number, fax number and email address of the service from which this information may be obtained.
12. Where appropriate, particular conditions to which performance of the concession is subject.
13. Address where applications or tenders shall be transmitted.
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14. Where appropriate, indication of requirements and conditions related to the use of electronic means of communication.
15. Information as to whether the concession is related to a project and /or programme financed by Union funds.
16. For works concessions, indication as to whether the concession is covered by the GPA.



## Annex VI

### INFORMATION TO BE INCLUDED IN PRIOR INFORMATION NOTICES CONCERNING CONCESSIONS FOR SOCIAL AND OTHER SPECIFIC SERVICES, AS REFERRED TO IN ARTICLE 31(3)

1. Name, identification number (where provided for in national legislation), address including NUTS code, telephone, fax number, email and internet address of the contracting authority or contracting entity and, where different, of the service from which additional information may be obtained.
2. Where appropriate, email or internet address at which the specifications and any supporting documents will be available.
3. Type of contracting authority or contracting entity and main activity exercised.
4. CPV codes; where the contract is divided into lots, this information shall be provided for each lot.
5. NUTS code for the main place of delivery or performance of service concessions.
6. Description of the services, *indicative order of magnitude or value*.

7. Conditions for participation.
8. Where applicable, time limit(s) for contacting the contracting authority or contracting entity in view of participation.
9. Where applicable, brief description of the main features of the award procedure to be applied.
10. Any other relevant information.

*Annex VII*

**INFORMATION TO BE INCLUDED IN CONCESSION AWARD NOTICES REFERRED  
TO IN ARTICLE 32**

1. Name, identification number (where provided for in national legislation), address including NUTS code *and, where appropriate*, telephone, fax number, email and internet address of the contracting authority or entity and, where different, of the service from which additional information may be obtained.
2. Type of contracting authority or entity and main activity exercised.
3. CPV codes.
4. NUTS code for the main location of works in case of works concessions or NUTS code for the main place of performance in case of service concessions;
5. Description of the *concession*: nature and extent of works, nature and extent of services, *duration of the contract*. Where the concession is divided into lots, this information shall be provided for each lot. Where appropriate, description of any options.
6. Description of award procedure used, in the case of award without prior publication, justification.

7. Criteria referred to in Article 41 which were used for award of the concession or concessions.
8. Date of concession award decision or decisions.
9. Number of tenders received with respect of each award, including:
  - (a) number of tenders received from economic operators which are small and medium enterprises;
  - (b) number of tenders received from abroad;
  - (c) number of tenders received electronically.
10. For each award, name, address including NUTS code *and, where applicable*, telephone, fax number, email address and internet address of the successful tenderer(s) including:
  - (a) information whether the successful tenderer is small and medium enterprise;
  - (b) information whether the concession was awarded to a consortium.

11. Value and main financial terms of the awarded concession, including:
  - (a) fees *prices* and *finances if any*;
  - (b) *prizes and payments if any*;
  - (c) *any other details relevant to the value* ■ *of the concession as laid down in Article 8(3)*.
12. Information whether the concession is related to a project and /or programme financed by Union funds.
13. 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.
14. Date(s) and reference(s) of previous publications in the *Official Journal of the European Union* relevant to the concession(s) advertised in this notice.

15. Date of dispatch of the notice.
16. *Method used to calculate* the estimated █ value of the concession, *if not specified in other concession documents* in accordance with Article 8.
17. Any other relevant information.  
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*Annex VIII*

**INFORMATION TO BE INCLUDED IN CONCESSION AWARD NOTICES  
CONCERNING CONCESSIONS FOR SOCIAL AND OTHER SPECIFIC SERVICES,  
AS REFERRED TO IN ARTICLE 32**

1. Name, identification number (where provided for in national legislation), address including NUTS code, *where applicable*, telephone, fax number, email and internet address of the contracting authority or entity and, where different, of the service from which additional information may be obtained.
2. Type of contracting authority or entity and main activity exercised.
3. CPV codes; where the contract is divided into lots, this information shall be provided for each lot.
4. *Summary* indication of the *subject of the concession*.
5. Number of tenders received.
6. Value ■ of the *successful tender*, including fees and prices.

7. Name and address including NUTS code, telephone, fax number, email address and internet address of the successful economic operator(s).
  
8. Any other relevant information.



## Annex IX

### FEATURES CONCERNING PUBLICATION

#### 1. Publication of notices

The notices referred to in Articles 31 and 32 shall be sent by the contracting authorities or contracting entities to the Publications Office of the European Union and published in accordance with the following rules:

Notices referred to in Articles 31 and 32 shall be published by the Publications Office of the European Union

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The Publications Office of the European Union shall give the contracting authority or entity the confirmation referred to in *Article 33(2)*.

#### 2. Format and procedures for sending notices electronically

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

*Annex X*

***LIST OF INTERNATIONAL SOCIAL AND ENVIRONMENTAL CONVENTIONS  
REFERRED TO IN ARTICLE 30(3)***

*ILO Convention 87 on Freedom of Association and the Protection of the Right to Organise;*

*ILO Convention 98 on the Right to Organise and Collective Bargaining;*

*ILO Convention 29 on Forced Labour;*

*ILO Convention 105 on the Abolition of Forced Labour;*

*ILO Convention 138 on Minimum Age;*

*ILO Convention 111 on Discrimination (Employment and Occupation);*

*ILO Convention 100 on Equal Remuneration;*

*ILO 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) (PIC Convention) and its 3 regional Protocols.*

## *Annex XI*

### **INFORMATION TO BE INCLUDED IN NOTICES OF MODIFICATIONS OF A CONCESSION DURING ITS TERM ACCORDING TO ARTICLE 43**

1. Name, identification number (where provided for in national legislation), address including NUTS code, telephone, fax number, email and internet address of the contracting authority or entity and, where different, of the service from which additional information may be obtained.
2. CPV codes.
3. NUTS code for the main location of works in case of  works concessions or NUTS code for the main place of  performance in service concessions.
4. Description of the concession before and after the modification: nature and extent of the works, nature and  extent of services.

5. Where applicable, modification of *value* of the concession, including increase in prices or fees caused by the modification.
6. Description of the circumstances which have rendered necessary the modification.
7. Date of concession award decision.
8. Where applicable, the name, address including NUTS code ■ telephone, fax number, email address and internet address of the new economic operator or operators.
9. Information whether the concession is related to a project and /or programme financed by Union funds.
10. 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.
11. Date(s) and reference(s) of previous publications in the *Official Journal of the European Union* relevant to the contract(s) concerned by this notice.
12. Date of dispatch of the notice.
13. Any other relevant information.

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