

2011/0437 (COD)

Proposal for a

**DIRECTIVE 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,

- (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 EU citizens benefit from quality services at best prices. An adequate, balanced and flexible legal framework for the award of

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<sup>1</sup> OJ C , , p. .

<sup>2</sup> OJ C , , p. .

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 regarding improving access opportunities of SMEs throughout the EU concession markets.

- (1a) 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.
- (2) Public procurement plays a key role in the Europe 2020 strategy as one of the market-based instruments to be used to achieve a smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. 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, permitting to benefit from private sector expertise and helping to achieve efficiency and deliver innovation.
- (2a) The award of public works concessions is presently subject to basic rules of 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 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 principle 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 different interpretations of the principles of the Treaty by national legislators and of wide disparities among the legislations of different 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.

An uniform application of the Treaty principles 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. It 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.

- 3) 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 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.
- (3a) It should be recalled that Member States are free to decide, in compliance with the Treaty principles of equal treatment, non-discrimination, transparency and the free movement of persons to organize 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 equally 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 its 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 Treaties. In addition, this Directive does not deal with the funding of services of general economic interest or with systems of aids 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.

- (3b) 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, nor the privatisation of public entities providing services. [Articles 1(2) and 1(6) of Directive 2006/123/EC]
- (4) 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 Treaty 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 notably to better ensure compliance with the principles above.
- (4h) 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 this is necessary, for instance where joint and several liability is required, a specific form may be required where they 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.
- 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 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.

- (5) 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.
- (6) Concessions are contracts for pecuniary interest by means of which one or more contracting authorities or entities entrusts the execution of works, or the provision and the management of services, to one or more economic operator. 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 entities always obtain the benefits of the works or services in question
- (6 ) 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.
- (6aa) In addition, 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, also when 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.

- (6a) In addition, Certain State acts such as authorisations or licences, whereby the State or a public authority 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 cases of those State acts, the specific provisions of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market<sup>3</sup> may apply. By contrast to those State acts, concession contracts provide for mutually binding obligations where the execution of these works or services are subject to specific requirements defined by the contracting authority or the contracting entity which are legally enforceable.
- (6b) 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 notably in the maritime, inland port or airport 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 of 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.
- (6ba) 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 insofar as these agreements do not impose an obligation of supply or involve any acquisition of services by a contracting authority or contracting entity to itself or to end users, should also not be considered as concessions within the meaning of this Directive.

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<sup>3</sup> OJ L 376, 27.12.2006, p. 36.

- (6c) 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, shall not be covered by this directive.
- (7) 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 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 contractor 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.
- (8) 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 entity or for reasons of force majeure.

(8a) An operating risk should stem from factors which are outside the control of the parties. Risk such as those linked to bad management, contractual defaults by the economic operator or to a force majeure event are not decisive for the purpose of classification as a concession, since those risks are inherent in every contract, whether it be public procurement contract or a concession. An operating risk is defined 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 can be taken into account in a consistent and uniform manner.

(8b) The notion of "bodies governed by public law" has been examined repeatedly by Court of Justice of the European Union a number of clarifications which are key to the full understanding of this definition. It should be therefore clarified that a body which operates in normal market conditions, aims to make a profit, and bears the losses resulting from the exercise of its activity should not be considered as being a "body governed by public law" since the needs in the general interest, that it has been set up to meet or been given the task of meeting, can be deemed to have an industrial or commercial character. Similarly, the condition relating to the origin of the funding of the body considered, has also been examined by the jurisprudence of the Court, which has clarified i. a. that financed for "the most part" means for more than half and that such financing may include payments from users which are imposed, calculated and collected according to rules of public law.

- (9) It is appropriate to define the notion of ‘exclusive or special rights’ as this notion is crucial to define the scope of the present directive and the notion of contracting entities.

With regard to the latter it should be clarified that entities which are neither contracting entities pursuant to Article 4 (1) (a) 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 as contracting entities if such rights have been granted by means of a procedure based on objective criteria, notably pursuant to Union legislation, and for which adequate publicity has been ensured. This legislation, should include Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC<sup>4</sup>, Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC<sup>5</sup>, Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service<sup>6</sup>, Directive 94/22/EC of the European Parliament and of the Council of 20 May 1994 on the conditions for granting and using authorisations for the prospection, exploration and production of hydrocarbons<sup>7</sup> and Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70<sup>8</sup>.

It should also be clarified that this list 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>4</sup> OJ L 211, 14.8.2009, p. 94

<sup>5</sup> OJ L 211, 14.8.2009, p. 55

<sup>6</sup> OJ L 15, 21.1.1998, p. 14.

<sup>7</sup> OJ L 164, 30.6.1994, p. 3.

<sup>8</sup> OJ L 315, 3.12.2007, p. 1.

- (10) This Directive should only apply 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 other Member States. Consequently, the method of calculating the estimated value of a concession needs to be defined, and should be identical for works and services concessions, as both contracts often cover elements of works and services. It 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.
- (11) 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 prejudiced. It is also necessary to ensure, in keeping with Article 345 of the 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 from 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 III, should be presumed to pursue such activities.
- (11a) 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.

(11aa) Certain entities are active in the fields of production, transmission and/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 in Annex III of this Directive and thus entities which are active in the heating sector are subject to the rules of this Directive applicable to contracting entities insofar 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 insofar 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.

(11aaa) Before envisaging any change to the scope of the Directive for the cooling sector, the situation of this 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 this sector could have a substantial impact in terms of market-opening, this examination should be conducted when assessing the impact of this Directive.

(11aaaa) It should be clarified that for the purposes of points 1 and 2 of Annex III, “supply” shall include generation (production), wholesale and retail sale. However, production of gas in the form of extraction falls within the scope of point 5.

(11b) In the case of mixed contracts, the applicable rules should be determined in function of the main subject of the contract where the different parts which constitute the contract are objectively not separable. It should therefore be clarified how contracting authorities and contracting entities should determine whether the different parts are separable or not. Such clarification should be based on the relevant jurisprudence of the Court of Justice of the European Union. The determination should be carried out on a case-by-case basis, in which the expressed or presumed intentions of the contracting 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 case of the construction of one single building, a part of which to be used directly by the contracting authority concerned and another part to be operated on a concessions 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 economical nature.

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 in function of 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 provisions should be foreseen for mixed contracts involving defence or security aspects or certain parts not falling within the scope of the Treaty.

11(ba) Concessions may 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 may 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.

- (12) In certain cases, a given contracting authority or contracting entity which is State, regional or local authority or body governed by public law or a given association thereof may be the sole source for a given service, for the provision of which it enjoys an exclusive right pursuant to published laws, regulations or administrative provisions which are compatible with the TFEU. It should be clarified that in those situations a contracting authority or entity as referred to above or association thereof may award concessions to such bodies without the Directive being applied.

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 published national law or administrative act and which has been granted in accordance with the Treaty and Union acts laying down common rules on access to the market applicable to activities set out in Annex III, 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 article 8 paragraph 2 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 set out in Annex III, it should inform the Commission thereof.

- (13) 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<sup>9</sup>.

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<sup>9</sup> OJ L 217, 20.8.2009, p. 76.

(13aa) 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 Treaty. 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, in compliance with the Union law, to regulate the gambling sector at national level in view of their obligations in terms of protecting public and social order.

(13b) This Directive should not apply to certain emergency services where these are performed by non-profit organisations or associations, since the particular nature of these organisations would be difficult to preserve in case the service providers would have to be chosen in accordance with the procedures set out in this Directive. However, the exclusion should not be extended beyond the strict 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 within CPV code 85143000-3 consisting exclusively of patient transport ambulance services should be subject to the light regime; consequently, 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;

(13cb) It is appropriate to recall that this Directive only applies to contracting authorities and contracting entities of Member States; consequently, political parties in general will not be subject to its provisions, not being contracting authorities nor contracting entities. However, there may be political parties in some Member States which would fall within the notion of bodies governed by public law.

Certain services (such as propaganda film and video-tape production) are however 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 other rules than those in this directive.

- (14) Many contracting entities are organised as an economic group which may comprise a series of separate undertakings; often each of these undertakings have 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 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.
- (14-a) Companies should be considered to be affiliated where a direct or indirect dominant influence exist 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. Verification of whether an undertaking is affiliated to a given contracting entity or not should be as easy to perform as possible. Consequently, and given that the possible existence of such direct or indirect dominant influence will already have 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 wherever 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 the Seventh Council Directive 83/349/EEC<sup>10</sup> is not applicable, it will be necessary to examine whether a direct or indirect dominant influence is present based on ownership, financial participation or the rules governing these undertakings.

- (14a) 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 EU citizens. The special features of those arrangements justify exclusion in the field of water from the scope of this Directive. The exclusion will cover 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 supply drinking water to such networks. Concession services for 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) shall also be excluded insofar as they are connected with an activity referred to above.
- (15) This Directive should not apply to concessions awarded by contracting entities and intended to permit the performance of an activity referred to in Annex III if, in the Member State in which this activity is carried out, it is directly exposed to competition on markets to which access is not limited, as established following a procedure provided for to this purpose in accordance with Art. 27 and 28 of Directive [current 2004/17/EC]. It is therefore appropriate to maintain the procedure, applicable to all sectors, or parts thereof, covered by this Directive that will enable the effects of current or future opening up to competition to be taken into account. such a procedure should provide legal certainty for the entities concerned, as well as an appropriate decision-making process, ensuring, within short time limits, uniform application of Union law in this area.

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<sup>10</sup> OJ L 193, 18.7.1983, p. 1. Directive as last amended by Directive 2001/65/EC of the European Parliament and of the Council (OJ L 283, 27.10.2001, p. 28).

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 apply.

- (16) Being addressed to Member States, this Directive does not apply to the concession award carried out by international organisations on their own behalf and for their own account. There is, however, a need to clarify to what extent this Directive should be applied to concession award governed by specific international rules.
- (16a) 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 render application of rules on the award of concessions inappropriate. For these reasons, an exception must 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 this exclusion should apply equally to broadcast media services as well as on-demand services (non-linear services). However, this exclusion should not apply to the supply of technical equipment necessary for the production, co-production and broadcasting of such programmes.
- (16b) This Directive is without prejudice to the Member States' competence to provide for the funding of public service broadcasting insofar 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 the Protocol to the Treaty of Amsterdam on the system of public broadcasting in Member States.
- (17) There is considerable legal uncertainty as to how far contracts concluded between entities within the public sector should be covered by the rules laid down in this Directive. 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. 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 insofar as it places a private provider of services in a position of advantage vis-à-vis competitors.

(17a) 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 in paragraph 1, point (a) of Article 4 exercises over the legal person concerned a control 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 a 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 presence 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 law 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.

(17b) Contracting authorities or contracting entities as referred to in paragraph 1, point (a) of Article 4 may choose to provide jointly their public services by way of cooperation without being obliged to use any particular legal form. Such a cooperation may 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 different participating authorities or entities do not necessarily have to be identical; they might also be complementary.

Contracts for the joint provision of public services should not be subject to the application of the rules set out in 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 competitors

In order to fulfil these conditions, the cooperation should be based on a cooperative. This does not require that all participating authorities assume the performance of main contractual obligations, as long as 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, has to be governed solely by considerations relating to the public interest.(17b) Contracting authorities or contracting entities as referred to in paragraph 1, point (a) of Article 4 may choose to provide jointly their public services by way of cooperation without being obliged to use any particular legal form. Such a cooperation may 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 different participating authorities or entities do not necessarily have to be identical; they might also be complementary.

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In addition, the implementation of the cooperation, including any financial transfers between the participating contracting authorities, has to be governed solely by considerations relating to the public interest.

- (17ba) 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 entities, and is obliged to carry out orders given to it by these contracting authorities or 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.
- (17c) It should be clarified that the notion of "economic operators" should be interpreted in a broad manner so as to include any persons and/or entities which offers the execution of works and/or a work, the supply of products or the provision of services on the market, irrespective of the legal form they have chosen to operate under. Thus, firms, branches, subsidiaries, partnerships, cooperative societies, limited companies, universities, public or private, and other forms of entities should all fall within the notion of economic operator, whether or not they are "legal persons" in any and all relations.
- (18) In order to ensure adequate advertisement 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.
- (19) In view of the detrimental effects on competition, awarding concessions without prior publication should only be permitted in very exceptional circumstances. This exception should be limited to cases where it is clear from the outset that a publication would not trigger more competition, notably because there is objectively only one economic operator who can perform the concession.

The impossibility to award 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.

- 19a) The duration of a concession should be limited in order to avoid market foreclosure and restriction of competition.

Also, 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 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 may 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 can always 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.

- (20) 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. These 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 concession 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 on business opportunities to potential tenderers as well as on the number and type of contracts awarded to all interested parties.

Furthermore, Member States should put in place appropriate measures with reference to the award of concession contracts for these 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 may take into account the need to ensure innovation and, in accordance with Article 14 TFEU and Protocol No 26 annexed to the Treaties, a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of users' rights.

- (22) Given the importance of the cultural context and the sensitivity of these services, Member States should be given wide discretion to organise the choice of the service providers in the way they consider most appropriate. The rules of this Directive do not prevent Member States to apply specific quality criteria for the choice of service providers, such as the criteria set out in the voluntary European Quality Framework for Social Services of the European Union's Social Protection Committee . 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 system ensures sufficient advertising and complies with the principles of transparency and non-discrimination.
- (22d) In view of an appropriate integration of environmental, social and labour requirements in 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, decrees and decisions, at both 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 Annex II 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 European Union law, notably with a view to ensure equal treatment. Such relevant measures should be applied in accordance with Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services and in a way that ensures equal treatment and does not discriminate directly or indirectly against economic operators and workers from other Member States.

- (22e) Services should be considered to be provided at the place at which the characteristic performances are executed; when services are provided at a distance, for example services provided by call centres, the services will 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.
- (22f) 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 may be considered to be grave misconduct on the part of the economic operator concerned, liable to exclusion of that economic operator from the procedure for the award of a concession.
- (22g) Control of the observance of these environmental, social and labour law provisions should be performed at the relevant stages of the concession award procedure, that is when applying the general principles governing the choice of participants and the award of contracts [Article 35 (1)], when applying the exclusion criteria [Article 36].
- (22h) Nothing in this Directive should prevent the imposition or enforcement of measures necessary to protect public policy, public morality, public security, health, human and animal life, the preservation of plant life or other environmental measures, in particular with a view to sustainable development, provided that these measures are in conformity with the Treaty.
- (22a) In order to ensure confidentiality during the procedure, contracting authorities and entities, as well as economic operators should not disclose information that has been designated as confidential. Non-compliance with these obligations should trigger the application of adequate sanctions, as and where provided for under civil or administrative law of the Member States.

- (22c) 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 notably aim at eliminating conflict of interest and other serious irregularities.
- (23) In order to make it possible for all interested operators to submit applications and tenders, contracting authorities and contracting entities should be obliged to respect a minimum time limit for the receipt of such applications and tenders.
- (24) The choice and application of proportional, non-discriminatory and fair selection criteria to economic operators is crucial for their effective access to the economic opportunities related to concessions. In particular, the possibility for a candidate to rely on the capacities of other entities can be decisive to enable the participation of small and medium sized enterprises.

Therefore, it is appropriate to provide that the selection criteria should relate exclusively to the 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 entity that it will have at its disposal the necessary resources.

- (25a) Furthermore, in view of a 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 commercialisation 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 includes also 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 (commercialisation) may for instance refer the requirement to pay a minimum price and price premium to subcontractors. Concession performance conditions pertaining to environmental considerations may include, for example, waste minimisation or resource efficiency.

(25aa) Award criteria or concession performance conditions concerning social aspects of the production process should be applied in accordance with Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, as interpreted by the European Court of Justice and should not be chosen or applied in a way that discriminates directly or indirectly against economic operators from other Member States or from third countries parties to the Agreement or to Free Trade Agreements to which the Union is party. Thus, requirements concerning the basic working conditions regulated in Directive 96/71/EC, such as minimum rates of pay, should remain at the level set by national legislation or by collective agreements applied in accordance with Union law in the context of that Directive.

Concession performance conditions may 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 Organization (ILO) Conventions, and to recruit more disadvantaged persons than are required under national legislation.

(25aaa) 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 may refer, amongst other things, to the employment of long-term job-seekers, the implementation of training measures for the unemployed or young persons in the course of the performance of the 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.

(25b) 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 may 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 may 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 in such a way, so as to avoid artificially narrowing down competition, notably 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.

(27) Concessions are usually long term, complex arrangements where the concessionaire assumes responsibilities and risks traditionally borne by the contracting authorities and normally falling within their remit. For this reason, subject to compliance with this Directive and with the principles of transparency and equal treatment, contracting authorities and 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.

(28b) 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 and terrorist financing and 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.

(28c) Contracting authorities and entities should further 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 may 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 possess the technical and economical capacity to perform the contract. Bearing in mind that the contracting authority or entity will be responsible for the consequences of its possible erroneous decision, contracting authorities and 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 the economic operator has violated its obligations, including obligations relating to the payment of taxes or social security contributions, unless otherwise provided by the applicable national law.

They should also be able to exclude candidates or tenderers whose performance in earlier concessions or other contracts with contracting authorities or 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.

(28ca) Allowance should, however, be made for the possibility that economic operators may adopt compliance measures aimed at remedying the consequences of any criminal offences or misconduct and at effectively preventing further occurrences of the misbehaviour. These measures may consist in particular in personnel and organisation 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 these grounds.

Economic operators should have the possibility to request that compliance measures taken with a view to possible admission to the concession award procedure are examined.

However, it should be left to Member States to determine the exact procedural and substantive conditions for the application of this possibility. They are, in particular, free to decide whether they want to leave it to the individual contracting authorities or contracting entities to do the relevant assessments or entrust other authorities on a central or subcentral level with this task.

(28caa) It is important that 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 Annex II provided that such rules, and their application, comply with Union law, is ensured through appropriate actions within the scope of their responsibilities and remit by the competent national authorities, such as for instance labour inspections or environmental protection agencies.

It is also necessary to ensure some transparency in the subcontracting chain, as this will give contracting authorities and contracting entities information on who are present at building sites on which works are being performed for them or 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 will in any case be incumbent on 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 Annex II, 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 may go further, for instance by extending the transparency obligations or by enabling or requiring contracting authorities or 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 substitute 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 may require the substitution; it should, however, also be set out explicitly that contracting authorities or contracting entities may be obliged to require the substitution of the subcontractor concerned where exclusion of the concessionaire has been rendered obligatory in the same cases.

It should finally be set out explicitly that Member States remain free to provide for more stringent liability rules under national law.

(28d) The contracting authority or entity shall assess the 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. These 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 and permit 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. Award criteria may include inter alia environmental, social or innovation-related criteria. Contracting authorities or 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 entity, the contracting authority or contracting entity may, exceptionally, modify the order of the award criteria to take into account the new possibilities brought about by this innovative solution, provided it ensures equal treatment of all actual or potential tenderers by issuing a new invitation to tender or, where appropriate, publishing a new concession notice.

(30) Electronic means of information and communication can greatly simplify the publication of concessions and increase the efficiency, speed and transparency of procurement 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.

(33) Concessions 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 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 this effect and in order to ensure legal certainty this directive should provide for "de minimis" thresholds, below which a new award procedure is not necessary. Modifications of the concession above those thresholds should be possible without the need to carry out a new award procedure to the extent such modifications comply with conditions laid down in Article 42. This 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 requirement 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 conditions laid down in Article 42.

(34) 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 longer period of time. In this case, a certain degree of flexibility is needed to adapt the concession to these 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 practice in the field in question and the need to ensure an appropriate relationship between the resources spent in preparing the award and its foreseeable value. However, this cannot apply in cases where a modification results in an alteration of the nature of the overall 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 listed in Annex III, any increase in value may not be higher than 50 % of the value of the original 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 the Directive.

(34a) 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 may, in particular where the concession has been awarded to a group of economic operators, 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.

- (34b) 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, e.g., communication equipment to be delivered over a given period continues to be suitable, also in 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 finally 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.
- (34c) Contracting authorities and contracting entities may be faced with situations where additional works or services become necessary. In such cases, provided that the conditions set out in Article 42 paragraph 1 (b) are fulfilled, a modification of the initial concession without a new concession award procedure should be considered justified.
- (35) Contracting authorities and contracting entities are sometimes faced with circumstances that require the early termination of the concession in order to comply with obligations stemming from EU 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 the applicable national law, to terminate a concession during its term if so required by EU law.

- (38) In order to adapt to rapid technical and economic developments, the power to adopt acts in accordance with Article 290 TFEU should be delegated to the Commission in order to update CPV reference numbers, including those in Annexes I and X, if this is necessitated by the changes in the CPV nomenclature. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level. The Commission should, when preparing and drawing up delegated acts, ensure the simultaneous, timely and appropriate transmission of all relevant documents to the European Parliament and to the Council.
- (39) In order to ensure adequate judicial protection of candidates and tenderers in the concession award procedures, as well as to make effective the enforcement of the rules of this Directive and of the Treaty principles, Council Directive 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts and Council Directive 92/13/EEC coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors 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.
- (40) 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 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.
- (41) 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.

- (43) The Commission should assess the economic effects on the internal market, in particular in terms of factors such as cross-border award of contracts, SME participation and transaction costs, resulting from the application of the thresholds set in this Directive, and of the exclusion set out in Article 9a taking into account the specific structures of the water sector. The Commission should report thereon to the European Parliament and the Council by [3 years later than the date provided for in Article 49(1)].

According to Article XXIV(7) of the World Trade Organisation Agreement on Government Procurement it shall be the subject to further negotiations three years after its entry into force and periodically thereafter.

In that context, the appropriateness of the level of thresholds shall be examined in the context of negotiations under the Agreement bearing in mind the impact of inflation and transaction costs. The Commission should, where possible and appropriate, consider suggesting an increase of the thresholds amounts applicable under the Agreement during the next round of negotiations. In the event of any change to those threshold amounts, the report made by the Commission should, where appropriate, be followed by a legislative proposal modifying the thresholds set out in this Directive.

- (43a) In order to ensure uniform conditions for the implementation of this Directive; the procedure for drawing up and transmission of notices and for sending and publishing data referred to in Annexes IV to VI, should be exercised by the Commission. Those powers should be exercised in accordance with Regulation (EU) 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by the Member States of the Commission's exercise of implementing powers<sup>11</sup>. The advisory procedure should be used for the adoption of implementing acts, which do not have any impact either from the financial point of views or on the nature and scope of obligations stemming from this Directive. On the contrary, these acts characterised by a mere administrative purpose and serve to facilitate the application of the rules set by this Directive.

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11 OJ L 55, 28.2.2011, p. 13.

(44) In accordance with the Joint Political Declaration of Member States and the Commission on explanatory documents of [date], Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a Directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified,

HAVE ADOPTED THIS DIRECTIVE:

# **TITLE I**

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

### **CHAPTER I**

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

#### **SECTION I**

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

*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, as defined in Article 2(1), point 1 whose value is estimated to be not less than the thresholds laid down in Article 6.
2. This Directive applies to the award of works or services concessions, to economic operators by one of the following actors:
  - a) Contracting authorities,
  - b) Contracting entities provided that the works or services are intended for the pursuit of one of the activities referred to in Annex III.
3. The application of this Directive is subject to Article 346 of the TFEU.
6. 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 and do not provide for remuneration to be given for contractual performance, are considered as a matter of internal organisation of the Member State concerned and, as such, not affected in any way by the present Directive.

*Article 1a*  
*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 can choose to perform their public interest tasks with their own resources or in cooperation with other authorities or to confer them to economic operators.

2. This Directive does not affect Member States systems of property ownership and in particular it does not require the privatization of public enterprises providing services to the public.

*Article 1aa*  
*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 in compliance with the provisions on confidentiality laid down in Article 24.

*Article 1c*  
*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. The scope of this Directive shall not include non-economic services of general interest.

*Article 2*  
*Definitions*

1. For the purposes of this Directive the following definitions shall 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 entities entrusts the execution of works to one or more economic operators the consideration of 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 entities entrusts 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 subject of the contract or in that right together with payment.

The award of a works or services concession shall imply the transfer to the concessionaire of an operating risk in exploiting these 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 a real exposure to the vagaries of the market implying that any potential estimated loss incurred by the concessionaire shall not be merely nominal or negligible.

- (2a) '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;
- (2c) 'candidate' means an economic operator that has sought an invitation or has been invited to take part in a concession award procedure.
- (2d) 'tenderer' means an economic operator which has submitted a tender.
- (2e) 'concessionaire' means an economic operator which has been awarded a concession.
- (3) "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.
- (5) '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.
- (6) '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.

- (12) ‘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.
- (12a) ‘exclusive or special rights’ means rights granted by a competent authority of a Member State by way of any legislative, regulatory or administrative provision the effect of which is to limit the exercise of an activity to a single economic operator or a number of economic operators respectively and which substantially affects the ability of other economic operators to carry out such activity.
- (13) ‘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.
- (14a) ‘innovation’ means the implementation of a new or significantly improved good, service or process, a new marketing method, or a new organisational method in business practices, workplace organisation or external relations inter alia with the purpose to help solving societal challenges or to support the Europe 2020 strategy for smart, sustainable and inclusive growth.

*Article 3*  
*Contracting authorities*

1. For the purposes of this Directive ‘Contracting authorities’ mean State, regional or local authorities, bodies governed by public law, associations formed by one or more such authorities or one or more such bodies governed by public law other than those which pursue one of the activities referred to in Annex III and award a concession for the pursuit of one of those activities.

2. 'Regional authorities' include all authorities of the administrative units, listed non-exhaustively in NUTS 1 and 2, as referred to by Regulation No. (EC) 1059/2003 of the European Parliament and of the Council<sup>12</sup>.
3. 'Local authorities' include all authorities of the administrative units falling under NUTS 3 and smaller administrative units, as referred to by Regulation 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 other bodies governed by public law; or subject to management supervision by those bodies; 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.

*Article 4*  
*Contracting entities*

1. For the purposes of this Directive, 'contracting entities' are entities which pursue one of the activities referred to in Annex III 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, associations formed by one or more such authorities or one or more such bodies governed by public law as referred to in Article 3.

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<sup>12</sup> OJ L 154, 21.6.2003, p. 1

- (b) public undertakings as defined in paragraph 2 of this Article;
  - (c) entities other than those referred to in points (a) and (b), but which operate on the basis of special or exclusive rights as defined in Article 2(12a), granted by a competent authority of a Member State for the exercise of one of the activities defined in Annex III.
- 1a. For the purposes of this Article, 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 of this Article. Such procedures include:
- (a) procurement procedures with a prior call for competition in conformity with Directive [2004/18/EC or 2004/17/EC], Directive 2009/81/EC, or this Directive;
  - (b) procedures pursuant to other legislative acts of the Union, listed in Annex XI, ensuring adequate prior transparency for granting authorisations on the basis of objective criteria.
- 1aa. The Commission shall be empowered to adopt delegated acts in accordance with Article 46 concerning the modification of the list of the Union legislative acts set out in Annex XI where, on the basis of the adoption of new legislation, repeal or modification of such legislation, such amendments prove necessary.
2. A ‘public undertaking’ is any undertaking over which the contracting authorities may exercise, directly or indirectly, a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it.

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;

- (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 6*  
*Thresholds 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 5 000 000.
1. 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 the purpose of paragraph -1, if the value of the concession at the moment of the award is more than 20% higher than its estimated value, the valid estimate shall be the value of the concession at the moment of the award.

2. The estimated value of the concession shall be calculated using an objective method. The method for calculating the estimated value of a concession shall be specified in the concession documents. When estimating the value of the concession, contracting authorities and contracting entities shall, where applicable, take into account, in particular, the:
  - a) the value of any form of option and any extension of the duration of the concession;
  - b) the 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 entity;

- c) the payments or any financial advantage in any form whatsoever made by the contracting authority or 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 whatsoever from third parties for the performance of the concession;
  - e) the 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 entities provided that they are necessary for executing the works or services;
  - g) the prizes or payments to candidates or tenderers;
3. 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.
4. 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.
5. 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 6a*  
*Revision of the threshold*

1. Every two years from 30 June 2013, the Commission shall verify that the threshold set out in paragraph 1 of Article 6 corresponds to the threshold established in the Government Procurement Agreement for works concessions and shall, where necessary, revise it.

In accordance with the calculation method set out in the Government Procurement Agreement, 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 the last day of 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 euros so as to ensure that the threshold in force provided for by the Agreement, 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 which are not participating in monetary union, of the thresholds referred to in paragraph 1 of Article 6, revised pursuant to paragraph 1 of this Article.

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

3. The revised 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, shall be published by the Commission in the Official Journal of the European Union at the beginning of the month of November following their revision.

4. The Commission shall be empowered to adopt delegated acts in accordance with Article 46 to adapt the methodology set out in the second subparagraph of paragraph 1 to any change in the methodology provided in the Government Procurement Agreement for the revision of the thresholds referred to in paragraph -1 of Article 6 and for the determination of the thresholds in the national currencies of the Member States not participating in monetary union, as referred to in paragraph 2 of this Article.

It shall also be empowered to adopt delegated acts in accordance with Article 46 to revise the thresholds referred to in paragraph -1 of Article 6 pursuant to paragraph 1 of this Article.

## **SECTION II EXCLUSIONS**

### *Article 8*

*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 paragraph 1 point (1) of Article 4 or to an association thereof on the basis of an exclusive right which they enjoy pursuant to a published law, regulation or administrative provision which is compatible with the Treaty.

This Directive shall not apply to services concessions awarded to an economic operator on the basis of an exclusive right that the latter enjoys pursuant to applicable national law, regulation or administrative provisions, and which has been granted in accordance with the Treaty and Union acts laying down common rules on access to the market applicable to activities set out in Annex III.

By way of derogation from the second subparagraph, where Union sectoral legislation referred to in the second subparagraph does not provide for sector-specific transparency obligations, Article 27 shall apply.

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

- 2a. 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 of 24 September 2008 on common rules for the operation of air services in the Community (Recast)<sup>13</sup> or for public passenger transport services within the meaning of Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road<sup>14</sup>.
3. 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 of 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 Treaty between a Member State and one or more third countries or subdivisions thereof and covering works, supplies or services intended for the joint implementation or exploitation of a project by their signatories;
  - (b) an international 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 this 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.

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<sup>13</sup> OJ L 293, 31.10.2008, p. 3

<sup>14</sup> OJ L 315, 3.12.2007, p. 1.

All legal instruments referred to in point (a) of the first subparagraph shall be communicated to the Commission, which may consult the Advisory Committee on Public Procurement referred to in Article 48.

- 3a. Paragraph 3 notwithstanding, this Directive shall not apply to concessions involving defence and security aspects as referred to in paragraph 4 below, 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.
4. Subject to Article 346 of the Treaty on the Functioning of the European Union, 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 the procurement and performance of the concession declared to be secret must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in a Member State where the Member State has determined that the essential interests concerned cannot be guaranteed by less intrusive measures, for instance such as referred to in paragraph 4a;
  - (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 them to be concluded with economic operators located in the area of operations;
  - (e) concessions otherwise exempted under this Directive.
- 4a. This Directive shall not apply to concessions not otherwise exempted under paragraph 4 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.
5. 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;
  - (c) arbitration and conciliation services;
  - (d) 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>15</sup>, central bank services and operations conducted with the European Financial Stability Facility;

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<sup>15</sup> OJ L 145, 30.4.2004, p. 1.

- (da) loans, whether or not in connection with the issue, sale, purchase or transfer of securities or other financial instruments;
  
- (ga) civil defence, civil protection, and danger prevention services that are provided by non-profit organisations or associations, and which fall under the following CPV codes: 75250000-3, 75251000-0, 75251100-1, 75251110-4, 75251120-7, 75252000-7, 75222000-8;, 98113100-9, 85143000-3 except patient transport ambulance services;
  
- (h) concessions for political campaign services, falling within CPV 79341400-0, 92111230-3 and 92111240-6, when awarded by a political party in the context of an election campaign;
  - (i) any of the following legal services:
    - (ia) legal representation of a client by a lawyer within the meaning of Article 1 of Directive 77/249/EEC in:
      - an arbitration or conciliation held in a Member State, a third country or before an international arbitration or conciliation instance; or
      - in judicial proceedings before the courts, tribunals or public authorities of a Member State, a third country or international courts, tribunals or institutions;
  
    - (ib) legal advice given in preparation of any of the proceedings referred to in point (ia) 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;
  
  - (ii) document certification and authentication services which must be provided by notaries;

- (iii) legal services provided by trustees, appointed guardians or other legal services the providers of which are designated by a court or tribunal in the Member State concerned or are designated by law to carry out specific tasks under the supervision of such tribunals or courts;
- (iv) other legal services which in the Member State concerned are connected, even occasionally, with the exercise of official authority.

For the purposes of this Article, "audiovisual media services" and "media service providers" shall, respectively, have the same meaning as pursuant to Articles 1(1)(a) and 1(1)(d) of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive)<sup>16</sup>. "Programme" shall have the same meaning as pursuant to Article 1(1) (b) of Directive 2010/13/EU, but shall also include radio programmes and radio programme materials. Furthermore, for the purposes of this provision, "programme material" shall have the same meaning as "programme".

- 5a. This Directive shall not apply to service concessions for lottery services falling under CPV code 92351100-7, awarded by a Member State to an economic operator on the basis of an exclusive right granted pursuant to applicable national laws, regulations or administrative provisions in accordance with the Treaty Treaties. For the purpose of this paragraph, the notion of exclusive right is understood within the meaning of article 2 paragraph 12a of this Directive and does not cover rights referred to in paragraph 1a of article 4 of this Directive.

The grant of the exclusive right shall be subject to publication in the Official Journal of the EU.

- 5b. 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.

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<sup>16</sup> OJ L 95, 15.4.2010, p. 1.

*Article 9*  
*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 as defined in points (a), (c), (da) and (d) of Article 2 of 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<sup>17</sup>, or to provide to the public one or more electronic communications services as defined in point (c) of Article 2 of that Directive.

*Article 9a*  
*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 a subject-matter listed below when they are connected with an activity referred to in paragraph 1:
  - (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.

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<sup>17</sup> OJ L 108, 24.4.2002, p. 33.

*Article 11*  
*Concessions awarded to an affiliated undertaking*

1. For the purposes of this Article, "affiliated undertaking" means any undertaking the annual account of which are consolidated with those of the contracting entity in accordance with the requirements of the Seventh Council Directive 83/349/EEC<sup>18</sup>.
2. In the case of entities, which are not subject to Directive 83/349/EEC pursuant to its provisions, "affiliated undertaking" shall mean any undertaking that :
  - (a) may be, directly or indirectly, subject to a dominant influence by the contracting entity  
or
  - (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 Directive, the notion of 'dominant influence' is defined in the second paragraph of Article 4 of this Directive.

3. Article 15 notwithstanding and provided that the conditions in paragraph 4 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 described in Annex III, to an undertaking which is affiliated with one of those contracting entities.
4. Paragraph 3 shall apply:

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<sup>18</sup> OJ L 193, 18.7.1983, p. 1. Directive as last amended by Directive 2001/65/EC of the European Parliament and of the Council (OJ L 283, 27.10.2001, p. 28).

- (a) to service concessions provided that at least 80 % of the average total turnover of the affiliated undertaking, taking into account all services provided by that undertaking, over the preceding three years 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 taking into account all provided by that undertaking, over the preceding three years 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, particularly 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 above 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 12*

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

Article 15 notwithstanding, and provided that the joint venture has been set up in order to carry out the activity concerned over a period of at least three years and that the instrument setting up the joint venture stipulates that the contracting entities, which form it, will be part thereof for at least the same period, this Directive shall not apply to concessions awarded by any of the following:

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

*Article 13*  
*Notification of information by contracting entities*

Contracting entities shall notify to the Commission, if so requested the following information regarding the application of Article 11(2) and (3) and Article 12:

- (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 Articles 11 or 12.

*Article 14*  
*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 28 of Directive [replacing Directive 2004/17/EC] that the activity is directly exposed to competition in accordance with Article 27 of Directive [replacing Directive 2004/17/EC].

*Article 15*  
*Concessions between entities within the public sector*

1. A concession awarded by a contracting authority or a contracting entity as referred to in paragraph 1, point (a) of Article 4 to another legal person governed by private or public law shall fall outside the scope of this Directive where the following cumulative conditions are fulfilled:
  - (a) the contracting authority 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 that 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;

- (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 applicable 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 paragraph 1, point (a) 1 of Article 4 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 where it exercises a decisive influence over both strategic objectives and significant decisions of the controlled legal person. The 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 paragraph 1, point (a) of Article 4 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 law, 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 paragraph 1, point (a) of Article 4, which does not exercise over a legal person governed by private or public law control within the meaning of paragraph 1, may nevertheless award a concession without applying this Directive to that legal person where the following cumulative conditions are fulfilled:
  - (a) the contracting authority or contracting entity as referred to in paragraph 1, point (a) of Article 4 exercises jointly with other contracting authorities or contracting entities over that legal person a control 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;
- (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 applicable 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, contracting authorities or contracting entities as referred to in paragraph 1, point (a) of Article 4 exercise joint control over a legal person where the following cumulative conditions are fulfilled:

- (a) 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;
- (b) 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;
- (c) 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 paragraph 1, point (a) of Article 4 shall fall outside the scope of this Directive where the following cumulative 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;
- (c) the participating contracting authorities or contracting entities perform on the open market less than 20% of the activities concerned by the cooperation;
6. For the determination of the percentage of activities referred to in 15 (1)(b), 15 (3)(b) and 15(4)(c) above, the average total turnover or an appropriate alternative activity based measure such as costs incurred by the relevant legal person with respect to services, supplies and works for the three years preceding the concession award shall be taken into consideration. When, because of the date the relevant legal person 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 will be sufficient to show that the measurement of activity is credible, particularly by means of business projections.

### **SECTION III GENERAL PROVISIONS**

#### *Article 16 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 5 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 for 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 and investments during the life of the concession.

*Article 17*  
*Social and other specific services*

Concessions for social and other specific services listed in Annex X falling within the scope of this Directive shall be subject only to the obligations arising from Article 26 paragraph 3, Article 27, and Articles 44 and 45.

*Article 18*  
*Mixed contracts*

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

In the case of mixed concessions consisting partly of services within the meaning of Article 17 and partly of other services, the main subject shall be determined according to which of the estimated values of the respective services is the highest.

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 Directive 2009/81/EC or Article 346 of the Treaty on the Functioning of the European Union, Article 18a shall apply.

In case of contracts intended to cover several activities, one of them being subject either to Annex III of this Directive or to Directive 2004/17/EC, the applicable provisions shall be established according to, respectively, Article 19 of this Directive and Article 3a of Directive 2004/17/EC.

3. In the case of contracts which have as their subject 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 of 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 paragraphs 4 or in Article 18a, 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 these parts would otherwise have been subject to.
4. In the case of mixed contracts containing elements of concessions as well as elements of public contracts covered by Directives 2004/18/EC or contracts covered by Directive 2004/17/EC, the mixed contract shall be awarded in accordance with the provisions of, respectively, Directive 2004/18/EC or Directive 2004/17/EC.
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 of that contract.

In case of such contracts involving both elements of a services concession and supply contracts, the main subject shall be determined according to which of the estimated values of the respective services or supplies is the highest.

#### *Article 18a*

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

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

In case of contracts intended to cover several activities, one of them being subject either to Annex III of this Directive or to Directive 2004/17/EC, and another being covered by Directive 2009/81/EC or Article 346 TFEU, the applicable provisions shall be established according to, respectively, Article 19a of this Directive and Article 20c of Directive 2004/17/EC.

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 respectively by Article 346 TFEU and by Directive 2009/81/EC, the contract may be awarded without applying this Directive, provided that the award of a single contract is justified for objective reasons;
- (b) where part of a given contract is covered by Directive 2009/81/EC, the contracting authority or contracting entity may choose to award a contract in accordance with this Directive or in accordance with the provisions of Directive 2009/81/EC, provided that the award of a single contract is justified for objective reasons.

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

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 the provisions of Directive 2009/81/EC.

## *Article 19*

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

1. By derogation to Article 18, 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.

Where contracting entities choose to award a single contract, paragraphs 2 and 3 shall apply, Article 18 notwithstanding. However, where one of the activities concerned is covered by Directive 2009/81/EC or Article 346 TFEU, Article 19a shall apply.

The choice between awarding a single contract and awarding a number of separate contracts shall not be made with the objective of excluding it from the scope of this Directive or, where applicable, 2004/18/EC or 2004/17/EC.

2. A contract which is intended to cover several activities shall be subject to the rules applicable to the activity for which it is principally intended.
3. In the case of contracts for which it is objectively impossible to determine for which activity the contract is principally intended, the applicable rules shall be determined in accordance with points a to c:
  - (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;
  - (b) the contract shall be awarded in accordance with Directive 2004/18, if one of the activities for which the contract is intended is subject to this Directive and the other to the Directive 2004/18;

- (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 2004/18 or Directive 2004/17.

*Article 19a*

*Concessions covering both activities referred to in Annex III and involving defence and 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.

Where contracting entities choose to award a single contract, paragraph 2 shall apply, Article 18a notwithstanding.

The choice between awarding a single contract and awarding a number of separate contracts shall not be made with the objective of excluding it from the scope of this Directive or 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) subject to Directive 2009/81/EC, or
  - (b) covered by Article 346 TFEU,

the contracting entity:

- may choose to award a contract either in accordance with the provisions of this Directive or in accordance with the provisions of Directive 2009/81/EC, in the cases set out under point (a) or
- may award a contract without applying this Directive in the cases set out under point (b).

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

Contracts as set out under point (a), which in addition include procurement or other elements which are covered by Article 346 TFEU may be awarded without applying this Directive.

However, it is a condition for the application of the first and third subparagraph 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 20 Reserved concessions*

1. 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 and disadvantaged persons or 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 concessions notice or in case of services concessions as defined in Article 17, prior information notice shall make reference to this provision.

### *Article 21 Research and development services*

1. This Directive shall apply to service concessions for research and development services with CPV reference numbers 73000000-2 to 73120000-9, 73300000-5, 73420000-2 and 73430000-5 provided that the following conditions are both fulfilled:
  - (a) the benefits accrue exclusively to the contracting authority or contracting entity for its use in the conduct of its own affairs,

- (b) the service provided is wholly remunerated by the contracting authority or contracting entity.
2. The Commission shall be empowered to adopt delegated acts in accordance with Article 46 to amend the CPV reference numbers referred to in paragraph 1 to reflect changes in the CPV nomenclature provided that such amendments do not imply a modification of the scope of this Directive.

## **CHAPTER II**

### **Principles**

#### *Article 22* *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 and may not be required by the 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 provided this is justified by objective reasons and proportionate. Member States may establish standard terms for so doing instead of the individual contracting authorities or entities.

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

Groups of economic operators may, however, be required to assume a specific legal form once they have been awarded the contract, to the extent that this change is necessary for the satisfactory performance of the contract.

#### *Article 23* *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<sup>19</sup>.
2. The Commission shall be empowered to adopt delegated acts in accordance with Article 46 to adapt the reference numbers used in Annex I and X, whenever changes in the CPV nomenclature must be reflected in this Directive and they do not imply a modification of the scope of this Directive.

#### *Article 24* *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 27 and 35 of this Directive, 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.

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<sup>19</sup> OJ L 340, 16.12.2002, p. 1.

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 25*  
*Rules applicable to communication*

1. Except where use of electronic means is mandatory pursuant to Articles 28 (2) and 30 of this Directive, Member States or contracting authorities and contracting entities may choose one or several of the following means of communication for all 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;
  - (ca) 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 Articles 28 (2) and 30 of this Directive.

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 -26 a*  
*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.
  
1. The design of the concession award procedure shall respect the principles laid down in Article 1aa. In particular during the concession award procedure, the contracting authority shall not provide information in a discriminatory manner which may give some candidates or tenderers an advantage over others.
  
2. 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 II.
  
3. The Commission shall be empowered to adopt delegated acts in accordance with Article 46 to amend the list in Annex II, 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 26*  
*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 IV 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 X 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 XIII.
5. By way of derogation from paragraph 1, the contracting authorities and entity 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 absence of competition for reasons of security or defence;
  - (d) the protection of other exclusive rights including patents, copyrights or other intellectual property rights.

The exceptions set out in points (b), (c) and (d) 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.

- 5a. 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 or no tenders or no suitable tenders or no suitable applications have been submitted in response to an 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 or the 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 36(5) to (7) or does not meet the selection criteria set out by the contracting authority or the contracting entity pursuant to Article 36(1);
- b) where applications include tenders which are not suitable as defined in subparagraph 2 above.

*Article 27*  
*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 28 send a concession award notice on the results of the concession award procedure.

For services referred to in Article 17 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 V or in relation to concessions for social and other specific services listed in Annex X the information set out in Annex VI and be published in accordance with the provisions of Article 28.

*Article 28*  
*Form and manner of publication of notices*

1. Concession notices, concession award notices and the notice referred to in the second subparagraph of Article 42(6) shall include the information set out in Annexes IV to VI and in the format of standard forms, including standard forms for corrigenda.

The Commission shall establish those standard forms by implementing acts. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 48.

2. The notices referred to in paragraph 1 shall be drawn up, transmitted by electronic means to the Commission and published in accordance with Annex IX. The Commission 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 Commission shall be borne by the Union.
3. Concession notices shall be published in full in an official language(s) 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(s). A summary of the important elements of each notice shall be published in the other official languages.
- 3a. Concession notices and concession award notices shall not be published at national level before publication by the Publications Office of the Union unless publication at the EU level does not take place 48 hours after the Publication Office of the Union confirms receipt by the contracting authority or the contracting entity of receipt of the notice as referred 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 Commission but shall indicate the date of dispatch of the notice to the Commission.

*Article 30*  
*Electronic availability of concession documents*

1. Contracting authorities and contracting entities shall offer unrestricted and full direct access free of charge by electronic means to the concession documents from the date of publication of the concession notice or, where the concession notice does not include the invitation to submit tenders, from the date on which the invitation to submit tenders is sent. The text of the concession notice or of these invitations shall specify the internet address at which this documentation is 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 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 30a*  
*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 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**

#### *Article 32* *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.

These 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. These 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.

3. 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".
4. 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 proposed satisfy in an equivalent manner the technical and functional requirements.

*Article 35*  
*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 39, provided that the following cumulative conditions are fulfilled:

- (a) the tender complies with the minimum requirements set, where applicable, by the contracting authority or contracting entity;

Such minimum requirements shall contain conditions and characteristics (particularly physical, functional and legal) that any tender should meet or possess.

- (b) the tenderer complies with the conditions for participation as referred to in Article 36(1);
- (c) the tenderer is not excluded from participating in the award procedure in accordance with Article 36(4) to (6), and subject to Article 36(7).

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 24(1) of this Directive.
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 36*  
*Selection of 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 guaranteeing 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 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 22 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 (1) of paragraph 1 of Article 4 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 a 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;

- (b) corruption, as defined in Article 3 of the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union and Article 2 (1) of Council Framework Decision 2003/568/JHA 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;
- (d) terrorist offences or offences linked to terrorist activities, as defined in Articles 1 and 3 of Framework Decision 2002/475/JHA 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.
- (ea) 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 of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims

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 (1) of paragraph 1 of Article 4 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.

5. Contracting authorities and contracting entities as referred to in paragraph 1 point 1 of Article 4 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 entity.

Furthermore, contracting authorities and contracting entities as referred to in point (1) of paragraph 1 of Article 4 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 due taxes or social security contributions, including, where applicable, any interest accrued or fines.

- 5a. 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 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.

6. 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 -26 (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 the above 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;
  - (cb) where a conflict of interest within the meaning of the second subparagraph of Article 30a, cannot be effectively remedied by any other less intrusive measure;
  - (d) 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;
  - (e) 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 an contracting entity as defined in this Directive or in [replacing Directive2004/17/EC] which led to early termination of that prior contract, damages or other comparable sanctions.

- (f) 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 not able to submit the required documents supporting such information
  - (g) 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.
  - (h) in 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.
- 6a. Contracting authorities and contacting entities as referred to in point (1) of paragraph 1 of Article 4 shall at any moment 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 procedure, in one of the situations referred to in paragraph 4 and the first subparagraph of paragraph 5.

At any moment 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 6.

7. Any economic operator that is in one of the situations referred to in paragraphs 4 and 6 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 as 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 judgement from participating in procurement or concession award procedures shall not be entitled to make use of the possibility provided under the present paragraph during the period of exclusion resulting from that judgement in the Member States where the judgment is effective.

8. 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 7 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 6.

#### *Article 37*

##### *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 case shall be longer than the minimum time limits set out in paragraphs 2a or 2aa.
- 2a. 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.
- 2aa. 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.
- 2b. 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 25.

*Article 38c*  
*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 reached 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 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 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 39*  
*Award criteria*

1. Concessions shall be awarded on the basis of objective criteria which comply with the principles set out in Article 1aa 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.

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

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

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 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 entity, the contracting authority or entity may, exceptionally, modify the ranking order of the award criteria to take into account this innovative solution. In this case, the contracting authority or

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 37 paragraph 2aa. 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 minimal time-limits referred to in Article 37 paragraph 2a.

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

## **TITLE III**

### **Rules on performance of concessions**

#### *Article 41* *Subcontracting*

1. Observance of the obligations referred to in Article -26 paragraph 3 by subcontractors is 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 facilities 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 this point in time. The contracting authority or the contracting entity shall require the concessionaire to notify it of any changes to this 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. Alternatively, Member States may impose the obligation to deliver the required information directly on the concessionaire.

The above subparagraph shall not apply to suppliers.

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

- (a) to 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) to 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 -26 paragraph 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 in out in Article -26 paragraph 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 paragraphs 4-8 of Article 36.

In such cases, the contracting authority or the contracting entity shall require that the economic operator substitutes 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 substitutes 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 2 and 3 shall, by law, regulation or administrative provisions and having regard for 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 42*  
*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 case of concessions awarded by contracting authority, for purposes of pursuing an activity other than those listed in Annex III, any increase in value may not be higher than 50 % of the value of the original 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 the Directive;

- (c) where the following cumulative 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 case of concessions awarded by contracting authority, for purposes of pursuing an activity other than those listed in Annex III, 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 the Directive;

Contracting authorities or contracting entities having modified a concession in the cases set out under points b and c shall publish in the Official Journal of the European Union a notice to that effect. Such notices shall contain the information set out in Annex VII and be published in accordance with Article 28.

- (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.

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 6 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 mentioned in paragraph 2 and points b) and c) of paragraph 1 of this Article, 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 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 case, without prejudice to paragraphs 1 and 2 a modification shall be considered substantial where one of the following conditions is met:
  - (a) the modification introduces conditions which, had they been part of the initial concession award procedure, would have allowed for the admission of applicants other than those initially selected or for the acceptance of an offer 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 c) 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 43*  
*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 of the following conditions is fulfilled:

- (b) a modification of the concession constitutes a new award within the meaning of Article 42;

- (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 entity belonging to that Member State has awarded the concession in question without complying with its obligations under the Treaties and this Directive.

*Article 43a*  
*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 concessions 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.
4. 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 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 concessions contracts, including possible structural or recurring problems in the application of the rules, including possible cases of fraud and other illegal behaviour.

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

# **TITLE V**

## **AMMENDEMENTS OF DIRECTIVES 89/665/EEC AND 92/13/EEC**

### *Article 44* *Amendments to Directive 89/665/EEC*

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

1. Article 1 is amended as follows:
  - (a) paragraph 1 is replaced by the following:

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

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

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

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

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

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

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

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

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

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

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

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

4. Article 2d is amended as follows:

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

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

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

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

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

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

- the contracting authority published a contract award notice in accordance with Articles 35(4), 36 and 37 of Directive 2004/18/EC or with Articles 27 and 28 of Directive [on Concessions], provided that this notice includes justification of the decision of the contracting authority to award the contract without prior publication of a contract notice in the Official Journal of the European Union, or’;

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

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

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

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

*Article 45*  
*Amendments to Directive 92/13/EEC*

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

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

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

‘This Directive applies to contracts referred to in Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (1) unless such contracts are excluded in accordance with Article 5 (2), Articles 19 to 26, Articles 29 and 30 or Article 62 of that Directive.

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

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

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

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

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

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

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

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

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

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

4. Article 2c is replaced by the following:

‘Article 2c

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

5. Article 2d is amended as follows:

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

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

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

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

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

‘— the contracting entity published a contract award notice in accordance with Articles 43 and 44 of Directive 2004/17/EC or with Articles 27 and 28 of Directive [on Concessions], provided that this notice includes the justification of the decision of the contracting entity to award the contract without prior publication of a notice in the Official Journal of the European Union, or

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

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

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

# **TITLE VI**

## **DELEGATED POWERS, IMPLEMENTING POWERS AND FINAL PROVISIONS**

### *Article 46* *Exercise of the delegation of powers*

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.
2. The delegation of power referred to in Articles 4, 6a, 21, 23, and -26a shall be conferred on the Commission for an indeterminate period of time from the [date of entry into force of the present Directive].
3. The delegation of power referred to in Articles 4, 6a, 21, 23, and -26a may be revoked at any time by the European Parliament or by the Council. A revocation decision shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the Official Journal of the European Union or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.
4. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.
5. A delegated act adopted pursuant to this Article 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 the Council.

*Article 47*  
*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 46(5). In such a case, the Commission shall repeal the act without delay following the notification of the decision to object by the European Parliament or the Council.

*Article 48*  
*Committee Procedure*

1. The Commission shall be assisted by the Advisory Committee for Public Procurement established by Council Decision 71/306/EEC. 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 49*  
*Transposition*

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 24 months following the entry into force pursuant to Article 52. They shall forthwith communicate to the Commission the text of those provisions.

When Member States adopt those provisions, 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 provisions of national law which they adopt in the field covered by this Directive.
- 2a. This Directive shall not apply to the award of concessions tendered or awarded before the entry into force of this Directive;

*Article 50*  
*Transitional provisions*

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

*Article 51*  
*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 in Article 6 and report thereon to the European Parliament and the Council by [3 years later than the date provided for in Article 49(1)]. The appropriateness of the level of thresholds shall be examined in the context of negotiations under the Agreement bearing in mind 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 Agreement during the next round of negotiations.

In the event of any change to the threshold amounts applicable to works concessions under the Agreement, 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 in Article 9a taking into account the specific structures of the water sector, and report thereon to the European Parliament and the Council by [3 years later than the date provided for in Article 49(1)].

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 43a(4).

The Commission shall make the results of the reviews carried out in accordance with the second paragraph publicly available.

*Article 52*  
*Entry into force*

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

*Article 53*  
*Addressees*

This Directive is addressed to the Member States.

Done at Brussels,

*For the European Parliament*  
*The President*

*For the Council*  
*The President*

Annex I

LIST OF THE ACTIVITIES REFERRED TO IN POINT (5) OF THE FIRST PARAGRAPH OF ARTICLE 2<sup>20</sup>

NACE Rev. 1 <a href="#">(1)</a>					CPV code
SECTION F			CONSTRUCTION		
Division	Group	Class	Subject	Notes	
45			Construction	This division includes:  construction of new buildings and works, restoring and common repairs.	45000000
	45.1		Site preparation		45100000
		45.11	Demolition and wrecking of buildings; earth moving	This class includes:  — demolition of buildings and other structures,  — 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.  This class also includes:  — building site drainage.  — drainage of agricultural or forestry land.	45110000
		45.12	Test drilling and boring	This class includes:  — test drilling, test boring and core sampling for construction, geophysical, geological or similar purposes.	45120000

<sup>20</sup>

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

			<p>This class excludes:</p> <ul style="list-style-type: none"> <li>— drilling of production oil or gas wells, see 11.20.</li> <li>— water well drilling, see 45.25,</li> <li>— shaft sinking, see 45.25,</li> <li>— oil and gas field exploration, geophysical, geological and seismic surveying, see 74.20.</li> </ul>	
45.2		Building of complete constructions or parts thereof; civil engineering		45200000
	45.21	General construction of buildings and civil engineering works	<p>This class includes:</p> <ul style="list-style-type: none"> <li>— construction of all types of buildings construction of civil engineering constructions,</li> <li>— bridges, including those for elevated highways, viaducts, tunnels and subways,</li> <li>— long-distance pipelines, communication and power lines,</li> <li>— urban pipelines, urban communication and power lines,</li> <li>— ancillary urban works,</li> <li>— assembly and erection of prefabricated constructions on the site.</li> </ul> <p>This class excludes:</p> <ul style="list-style-type: none"> <li>— service activities incidental to oil and gas extraction, see 11.20,</li> <li>— erection of complete prefabricated constructions from self-manufactured parts not of concrete, see divisions 20, 26 and 28,</li> <li>— construction work, other than buildings, for stadiums, swimming pools, gymnasiums, tennis courts, golf courses and other sports installations, see 45.23,</li> </ul>	<p>45210000</p> <p>Except:</p> <ul style="list-style-type: none"> <li>- 45213316</li> <li>45220000</li> <li>45231000</li> <li>45232000</li> </ul>

				<ul style="list-style-type: none"> <li>— building installation, see 45.3,</li> <li>— building completion, see 45.4,</li> <li>— architectural and engineering activities, see 74.20,</li> <li>— project management for construction, see 74.20.</li> </ul>	
		45.22	Erection of roof covering and frames	<p>This class includes:</p> <ul style="list-style-type: none"> <li>— erection of roofs,</li> <li>— roof covering,</li> <li>— waterproofing.</li> </ul>	45261000
		45.23	Construction of highways, roads, airfields and sport facilities	<p>This class includes:</p> <ul style="list-style-type: none"> <li>— construction of highways, streets, roads, other vehicular and pedestrian ways,</li> <li>— construction of railways,</li> <li>— construction of airfield runways,</li> <li>— construction work, other than buildings, for stadiums, swimming pools, gymnasiums, tennis courts, golf courses and other sports installations,</li> <li>— painting of markings on road surfaces and car parks.</li> </ul> <p>This class excludes:</p> <ul style="list-style-type: none"> <li>— preliminary earth moving, see 45.11.</li> </ul>	<p>45212212 and DA03</p> <p>45230000</p> <p>except:</p> <ul style="list-style-type: none"> <li>- 45231000</li> <li>- 45232000</li> <li>- 45234115</li> </ul>
		45.24	Construction of water projects	<p>This class includes</p> <ul style="list-style-type: none"> <li>— construction of:</li> <li>—</li> <li>— waterways, harbour and river works, pleasure ports (marinas), locks, etc.,</li> <li>— dams and dykes,</li> <li>— dredging,</li> <li>— subsurface work.</li> </ul>	45240000

	45.25	Other construction work involving special trades	<p>This class includes:</p> <ul style="list-style-type: none"> <li>— construction activities specialising in one aspect common to different kinds of structures, requiring specialised skill or equipment,</li> <li>— construction of foundations, including pile driving,</li> <li>— water well drilling and construction, shaft sinking,</li> <li>— erection of non-self-manufactured steel elements,</li> <li>— steel bending,</li> <li>— bricklaying and stone setting,</li> <li>— scaffolds and work platform erecting and dismantling, including renting of scaffolds and work platforms,</li> <li>— erection of chimneys and industrial ovens.</li> </ul> <p>This class excludes:</p> <ul style="list-style-type: none"> <li>— renting of scaffolds without erection and dismantling, see 71.32</li> </ul>	45250000 45262000
45.3		Building installation		45300000
	45.31	Installation of electrical wiring and fittings	<p>This class includes:</p> <p>installation in buildings or other construction projects of:</p> <ul style="list-style-type: none"> <li>— electrical wiring and fittings,</li> <li>— telecommunications systems,</li> <li>— electrical heating systems,</li> <li>— residential antennas and aerials,</li> <li>— fire alarms,</li> <li>— burglar alarm systems,</li> <li>— lifts and escalators,</li> </ul>	45213316 45310000 Except: - 45316000

				— lightning conductors, etc.	
		45.32	Insulation work activities	<p>This class includes:</p> <p>— installation in buildings or other construction projects of thermal, sound or vibration insulation.</p> <p>This class excludes:</p> <p>— waterproofing, see 45.22.</p>	45320000
		45.33	Plumbing	<p>This class includes:</p> <p>— installation in buildings or other construction projects of:</p> <p>—</p> <p>— plumbing and sanitary equipment,</p> <p>— gas fittings,</p> <p>— heating, ventilation, refrigeration or air-conditioning equipment and ducts,</p> <p>— sprinkler systems.</p> <p>This class excludes:</p> <p>— installation of electrical heating systems, see 45.31.</p>	45330000
		45.34	Other building installation	<p>This class includes:</p> <p>— installation of illumination and signalling systems for roads, railways, airports and harbours,</p> <p>— installation in buildings or other construction projects of fittings and fixtures n.e.c.</p>	45234115 45316000 45340000
	45.4		Building completion		45400000
		45.41	Plastering	<p>This class includes:</p> <p>— application in buildings or other construction projects of interior and exterior plaster or stucco, including related lathing materials.</p>	45410000

		45.42	Joinery installation	<p>This class includes:</p> <ul style="list-style-type: none"> <li>— installation of not self-manufactured doors, windows, door and window frames, fitted kitchens, staircases, shop fittings and the like, of wood or other materials,</li> <li>— interior completion such as ceilings, wooden wall coverings, movable partitions, etc.</li> </ul> <p>This class excludes:</p> <ul style="list-style-type: none"> <li>— laying of parquet and other wood floor coverings, see 45.43.</li> </ul>	45420000
		45.43	Floor and wall covering	<p>This class includes:</p> <ul style="list-style-type: none"> <li>— laying, tiling, hanging or fitting in buildings or other construction projects of: <ul style="list-style-type: none"> <li>—</li> <li>— ceramic, concrete or cut stone wall or floor tiles,</li> <li>— parquet and other wood floor coverings carpets and linoleum floor coverings,</li> <li>— including of rubber or plastic,</li> <li>— terrazzo, marble, granite or slate floor or wall coverings,</li> <li>— wallpaper.</li> </ul> </li> </ul>	45430000
		45.44	Painting and glazing	<p>This class includes:</p> <ul style="list-style-type: none"> <li>— interior and exterior painting of buildings,</li> <li>— painting of civil engineering structures,</li> <li>— installation of glass, mirrors, etc.</li> </ul> <p>This class excludes:</p> <ul style="list-style-type: none"> <li>— installation of windows, see 45.42,</li> </ul>	45440000
		45.45	Other building completion	<p>This class includes:</p> <ul style="list-style-type: none"> <li>— installation of private swimming pools,</li> <li>— steam cleaning, sand blasting and similar</li> </ul>	45212212 and DA04

				activities for building exteriors, — other building completion and finishing work n.e.c.  This class excludes:  — interior cleaning of buildings and other structures, see 74.70.	45450000
	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
<p>(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), regulation as last amended by Commission Regulation (EEC) No 761/93 (OJ L 83, 3.4.1993, p. 1).</p>					

## **Annex II**

### **LIST OF INTERNATIONAL SOCIAL AND ENVIRONMENTAL CONVENTIONS REFERRED TO IN ARTICLE 36 (7)**

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

Convention 98 on the Right to Organise and Collective Bargaining;

Convention 29 on Forced Labour;

Convention 105 on the Abolition of Forced Labour;

Convention 138 on Minimum Age;

Convention 111 on Discrimination (Employment and Occupation);

Convention 100 on Equal Remuneration;

Convention 182 on Worst Forms of Child Labour;

Vienna Convention for the protection of the Ozone Layer and its Montreal Protocol on substances that deplete the Ozone Layer;

Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention);

Stockholm Convention on Persistent Organic Pollutants (Stockholm POPs Convention);  
Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (UNEP/FAO) (The PIC Convention) Rotterdam, 10/09/1998 and its 3 regional Protocols.]

### Annex III

#### **ACTIVITIES EXERCISED BY CONTRACTING ENTITIES AS REFERRED TO IN ART. 4**

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 networks.

The supply of gas or heat to networks which provide a service to the public by a contracting entity referred to in paragraph 1, point (b) and point (c) of Article 4 shall not be considered a relevant activity within the meaning of paragraph 1 where all of the following conditions are met:

- (c) the production of gas or heat by the entity concerned is the unavoidable consequence of carrying out an activity other than those referred to in this paragraph or in paragraphs 2 to 4 of this Annex;
- (d) the supply to the public network is aimed only at the economic exploitation of such production and amounts to not more than 20 % of the entity's turnover on the basis of the average for the preceding three years, including the current year.

For the purposes of this Directive, “supply” shall include the (production) , wholesale and retail sale of gas. However, production of gas in the form of extraction falls within the scope of point 5 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 networks.

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

The supply of electricity to networks which provide a service to the public by a contracting entity referred to in paragraph 1 point (b) and point (c) of Article 4 shall not be considered a relevant activity within the meaning of paragraph 1 where all of the following conditions are met:

- (a) the production of electricity by the entity concerned takes place because its consumption is necessary for carrying out an activity other than those referred to in this paragraph or in paragraphs 1, 3 and 4 of this Annex
  - (b) supply to the public network depends only on the entity's own consumption and has not exceeded 30% of the entity's total production of energy, on the basis of the average for the preceding three years, including the current year.
4. 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.

5. 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.
6. Activities relating to the provision of :
  - (a) postal services; on the conditions set out in point (c),
  - (b) other services than postal services, on condition that such services are provided by an entity which also provides postal services within the meaning of point (b) of subparagraph 2 and provided that the conditions set out in Article 27(1) of Directive [replacing 2004/17/EC] are not satisfied in respect of the services falling within point (b) of subparagraph 2.

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

"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;

- (a) "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;
- (b) "other services than postal services": means services provided in the following areas:
  - (1) mail service management services (services both preceding and subsequent to despatch, including "mailroom management services"),
  - (3) services concerning postal items not included in point (a), such as direct mail bearing no address,

7. 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 IV

### INFORMATION TO BE INCLUDED IN CONCESSION NOTICES

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 cases referred to in the second subparagraph of Article 30 (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 Nomenclature reference No(s). 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.
10. 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).
11. Time limit for the submission of applications or receipt of tenders;
  12. Criteria which will be applied in the award of the concession where they do not appear in other concession documents
  13. Date of dispatch of the notice
  14. 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.
  15. Where appropriate, particular conditions to which performance of the concession is subject.
  16. Address where applications or tenders shall be transmitted.
  18. Where appropriate, indication of requirements and conditions related to the use of electronic means of communication.
  19. Information whether the concession is related to a project and /or programme financed by European Union funds.

## **Annex V**

### **INFORMATION TO BE INCLUDED IN CONCESSION AWARD NOTICES**

#### **INFORMATION TO BE INCLUDED IN CONCESSION AWARD NOTICES PUBLISHED IN ACCORDANCE WITH ARTICLE 27 (1)**

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 Nomenclature reference No(s).
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 39 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 fines if any
  - b) prizes and payments if any
  - c) any other details relevant to the value of the concession as laid down in Article 6 paragraph 2.
13. Information whether the concession is related to a project and /or programme financed by European Union funds.
14. 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
15. 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.

16. Date of dispatch of the notice.
17. Method used to calculate the estimated value of the concession, if not specified in other concession documents in accordance with Article 6.
18. Any other relevant information.

## **Annex VI**

### **INFORMATION TO BE INCLUDED IN CONCESSION AWARD NOTICES CONCERNING CONCESSIONS FOR SOCIAL AND OTHER SPECIFIC SERVICES (ARTICLE 27 (1))**

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 Nomenclature reference No(s); 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 VII**

### **INFORMATION TO BE INCLUDED IN NOTICES OF MODIFICATIONS OF A CONCESSION DURING ITS TERM ACCORDING TO ARTICLE 42**

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 Nomenclature reference No(s);
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 European 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.

## **Annex IX**

### **FEATURES CONCERNING PUBLICATION**

1. Publication of notices

The notices referred to in Articles 26 and 27 must be sent by the contracting authorities or entities to the Publications Office of the European Union and published in accordance with the following rules:

Notices referred to in Articles 26 and 27 shall be published by the Publications Office of the European Union

The Publications Office of the European Union will give the contracting authority or entity the confirmation referred to in paragraph 2 of Article 28.

3. 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

### SERVICES REFERRED TO IN ARTICLE 17

Description	CPV Code
<p>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 consisting exclusively of patient transport ambulance services 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],</p>	<p>Health, social and related 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],</p>	<p>Administrative, social, educational, healthcare and cultural services</p>

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]	
75300000-9	Compulsory social security services <sup>21</sup>
75310000-2, 75311000-9, 75312000-6, 75313000-3, 75313100-4, 75314000-0, 75320000-5, 75330000-8, 75340000-1	Benefit services
98000000-3; 98120000-0; 98132000-7; 98133110-8 and 98130000-3	Other community, social and personal services including services furnished by trade unions, political organisations, youth associations and other membership organisation services.
98131000-0	Religious services
55100000-1 to 55410000-7; 55521000-8 to 55521200-0 [55521000-8 Catering services for private households, 55521100-9 Meals-on-wheels services, 55521200-0 Meal delivery service]. 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,	Hotel and restaurant services

<sup>21</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.

55511000-5 Canteen and other restricted-clientele cafeteria services, 55512000-2 Canteen management services, 55523100-3 School-meal services	
79100000-5 to 79140000-7; 75231100-5;	Legal services, to the extent not excluded pursuant to Article 10(ca)
75100000-7 to 75120000-3; 75123000-4; 75125000-8 to 75131000-3	Other administrative services and government services
75200000-8 to 75231000-4	Provision of services to the community
75231210-9 to 75231230-5; 75240000-0 to 75252000-7; 794300000-7; 98113100-9	"Prison related services, public security and rescue services, to the extent not excluded pursuant to Article 8(ga)"
79700000-1 to 79721000-4 [Investigation and security services, Security services, Alarm-monitoring services, Guard services, Surveillance services, Tracing system services, Absconder-tracing services, Patrol services, Identification badge release services, Investigation services and Detective agency services] 79722000-1 [Graphology services], 79723000-8 [Waste analysis services]	Investigation and security services
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	Postal Services

<p>counter services], 64115000-5 [Mailbox rental], 64116000-2 [Post-restante services], 64122000-7 [Internal office mail and messenger services]</p>	
<p>50116510-9 [Tyre-remoulding services], 71550000-8 [Blacksmith services]</p>	<p>Miscellaneous services</p>
<p>98900000-2 [Services provided by extra-territorial organisations and bodies] and 98910000-5 [Services specific to international organisations and bodies]</p>	<p>International services</p>

## **Annex XI**

### **LIST OF EUROPEAN UNION LEGISLATION REFERRED TO IN ARTICLE 4 (1a ) (b)**

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

- (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 2009/73/EC.
- (c) The granting in accordance with the procedures laid down in Article 9 of Directive 97/67/EC of authorisations in relation to a postal service which is not or shall not be reserved.
- (d) A procedure for granting an authorisation to carry on an activity involving the exploitation of hydrocarbons in accordance with Directive 94/22/EC.
- (e) Public service contracts within the meaning of Regulation (EC) No 1370/2007 for the provision of public passenger transport services by bus, tramway, rail or metro, which have been awarded on the basis of a competitive tendering procedure in accordance with its Article 5(3), provided that its length is in conformity with Article 4(3) or 4(4) of the Regulation.

## Annex XIII

### **INFORMATION TO BE INCLUDED IN PRIOR INFORMATION NOTICES CONCERNING CONCESSIONS FOR SOCIAL AND OTHER SPECIFIC SERVICES (as referred to in Article 26(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 Nomenclature reference No(s); 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.
8. Conditions for participation.
9. Where applicable, time limit(s) for contacting the contracting authority or contracting entity in view of participation.
10. Where applicable, brief description of the main features of the award procedure to be applied.
11. Any other relevant information.

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