



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 30 November 2012**

**16731/12**

---

---

**Inte rinstitutional File:  
2011/0437 (COD)**

---

---

**MAP 75  
MI 777  
CODEC 2800**

**NOTE**

---

from:	General Secretariat
to:	Council

---

No. prev. doc.	16411/1/12 MAP 68 MAP 748 CODEC 2720 REV 1
No. Cion prop.:	18960/12 MAP 8 MI 684 + ADD 1 + ADD 2

---

Subject:	Proposal for a Directive of the European Parliament and of the Council on the award of concession contracts - Presidency compromise proposal
----------	--

---

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

Changes endorsed at the meeting of Permanent Representatives Committee on 28 November 2012  
concern: Recital 3aa, Recital 6c, Recital 7, Recital 9, Recital 16b, Recital 32, Recital 34, Recital 35,  
Article 8 (7)(h), Article 10, Article 18 (4), Article 35(5) and (6) with a corresponding technical  
change in Annex IV, Article 36 (7)(h), Annex III, point 3(b)(2) and Annex X, part concerning  
"Gambling and betting services".

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

=====

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,

Whereas:

---

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

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

- (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 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 legal framework for the award of concessions would ensure effective and non-discriminatory access to the market to all Union economic operators and legal certainty, favouring public investments in infrastructures and strategic services to the citizen.
- (2) Public procurement plays a key role in the Europe 2020 strategy<sup>3</sup> as one of the market-based instruments to be used to achieve a smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. 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, 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 but which has only partially addressed certain aspects of the award of concession contracts. Hence, a uniform concretisation of the Treaty principles across all Member States and the elimination of discrepancies in

---

<sup>3</sup> COM(2010) 2020 final, 3.3.2010.

their understanding following therefrom is necessary at the Union level in order to eliminate persisting distortions of the Internal Market.

- (3) This Directive should not in any way affect the freedom of Member States and public authorities to perform works or provide services directly to the public or to outsource such provision to third parties by means other than concessions within the meaning of Article 2(1). The provision of services based on law or regulations, or employment contracts, should not be covered. In some Member States, this might for example be the case for certain administrative and government services such as executive and legislative services or the provision of certain services to the community, such as foreign affairs services or justice services or compulsory social security services.
- (3a) Member States and public authorities should remain free to define and specify the characteristics of the service 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. It should equally 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, how to organize the provision of compulsory social services or of other services such as postal services either as services of general economic interest or as non-economic services of general interest or as a mixture thereof. It is appropriate to clarify that non-economic services of general interest should not fall within the scope of this Directive. The award of such services to a third party remains subject to Treaty principles..
- (3aa) 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<sup>4</sup>.

---

<sup>4</sup> To assure legal certainty, the wording of this recital has been amended, without changing the meaning of the recital.

- (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 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. However, 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.
- (5) Certain coordination provisions should also be introduced for the award of works and services concessions awarded in the water, 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 concluded between one or more economic operators and one or more contracting authorities or entities and having as their object the acquisition of works or services where the consideration consists in the right to exploit the works or services that are the subject of the contract or in that right together with payment. The notion of acquisition should be understood broadly in the sense of obtaining the benefits of the works or services in question, not necessarily requiring a transfer of ownership to contracting authorities or contracting entities. By contrast, 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 usually fall under this Directive.

- (6a) 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) 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 entity which are legally enforceable. By contrast, 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 entity and where the economic operator remains free to withdraw from the provision of works or services, should not qualify as concessions. In those cases the specific provisions of Directive 2006/123/EC of the European Parliament and of the Council on the internal market for services may apply.
- (6b) Certain agreements having as their object the right of an economic operator to exploit certain public domains or resources, such as land or any public property notably in the maritime, inland port or airport sector, whereby the State or contracting authority or entity establishes only general conditions for their use without acquiring specific works or services, should not qualify as concessions. 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.

The same applies to agreements on 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 entity to itself or to end users.

- (6c) Contracts not involving payments to the contractor and where he 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 been the source of continued legal uncertainty among stakeholders and have given rise to numerous judgments of the Court of Justice of the European Union on this subject. 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 all the investments made and the costs incurred in operating the works or services awarded.

The application of specific rules governing the award of concessions would not be justified if the contracting authority or entity relieved the contractor of any potential loss, by guaranteeing a 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 fully paid 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. This does not exclude the award of concessions in sectors, such as those with regulated tariffs, to the extent that an operating risk, however limited, can still be transferred to the concessionaire. This is also the case where 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 for reasons of force majeure.
- (9) Operating risk must be understood as the risk of exposure to the vagaries of the market. It may consist in either a demand or a supply risk or in both a demand and a 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. Risks such as those linked to bad management, contractual defaults by the economic operator or to a force majeure event are not decisive for the purposes of classification as a concession, since those risks are inherent in every contract, whether it be a public procurement contract or a concession. For the purpose of assessment of the operating risk the net present value of all the investments, costs and revenues of the concessionaire can be taken into account in a consistent and uniform manner.
- (9a) It should be clarified that a body which operates in normal market conditions, aims to make a profit, and bears the losses resulting from the exercise of its activity should not be considered as being a "body governed by public law" since the needs in the general interest, that it has been set up to meet or been given the task of meeting, can be deemed to have an industrial or commercial character. Similarly, the condition relating to the origin of the funding of the body considered, has also been examined by jurisprudence, which has clarified i. a. that financed for "the most part" means for more than half and that such financing may include payments from users which are imposed, calculated and collected according to rules of public law.



- (9b) Entities which are neither contracting entities pursuant to Article 4 paragraph 1 point (1) nor public undertakings are subject to the provisions of this Directive only to the extent that they exercise one of the activities covered on the basis of special or exclusive rights. It is therefore appropriate to clarify that rights which have been granted by means of a procedure based on objective criteria, notably pursuant to Union legislation, and for which adequate publicity has been ensured do not constitute special or exclusive rights for the purposes of this Directive. This legislation should include Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas<sup>5</sup>, Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity<sup>6</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>7</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>8</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>9</sup>.

It should also be clarified that this list of legislation is not exhaustive and that rights in any form, including by way of acts of concession, which have been granted by means of other procedures based on objective criteria and for which adequate publicity has been ensured do not constitute special or exclusive rights for the purposes of defining the scope of this Directive *rationae personae*. The concept of exclusive rights is also used in Article 8 and Article 26 with a wider meaning, referring to a right to exclusively provide a given service in a given geographic area.

---

<sup>5</sup> OJ L 204, 21.7.1998, p. 1

<sup>6</sup> OJ L 27, 30.1.1997, p. 20.

<sup>7</sup> OJ L 15, 21.1.1998, p. 14.

<sup>8</sup> OJ L 164, 30.6.1994, p. 3.

<sup>9</sup> OJ L 315, 3.12.2007, p. 1.

- (11) To ensure a real opening up of the market and a fair balance in the application of concession award rules in the water, energy, transport and postal services sectors it is necessary for the entities covered to be identified on a basis other than their legal status. It should be ensured, therefore, that the equal treatment of contracting entities operating in the public sector and those operating in the private sector is not prejudiced. It is also necessary to ensure, in keeping with Article 345 of the Treaty, 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.
- (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 Treaty. It should be clarified that in those situations a contracting authority or entity 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 other contracting entities 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 sectoral legislation concerning the management of networks infrastructure related to the 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.

- (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>10</sup>.
- (14) It is appropriate to exclude certain service and works concessions awarded to an undertakings affiliated to contracting entities, 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.
- (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

---

<sup>10</sup> OJ L 217, 20.8.2009, p. 76.

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]. This 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.

- (16) 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 which extent it is appropriate to apply this Directive 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).
- (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 cooperation between public authorities should be covered by concession award rules. The relevant case-law of the Court of Justice of the European Union is interpreted differently between Member States and even between contracting authorities or certain contracting entities. It is therefore necessary to clarify in what cases concessions concluded between such

authorities are not subject to the application of public concession award rules. 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 contracting authorities or contracting entities under Art. 4 (1) (1) does not as such rule out the application of concession award rules. However, the application of concession award rules should not interfere with the freedom of public authorities to decide how to organise the way they carry out their public service tasks. Concessions awarded to controlled entities or cooperation for the joint execution of the public service tasks of the participating contracting authorities or entities should therefore be exempted from the application of the rules if the conditions set out in this Directive are fulfilled. This Directive should aim to ensure that any exempted public-public cooperation does not cause a distortion of competition in relation to private economic operators. Neither should the participation of a contracting authority as a tenderer in a procedure for the award of a public contract cause any distortion of competition.

- (17a) 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.
- (17b) 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 thereof and do not provide for an exchange of contractual performances against remuneration, should be considered as a matter of internal organisation of the Member State concerned and, as such, not affected in any way by the present Directive.

- (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, natural persons, firms, branches, subsidiaries, partnerships, cooperative societies, limited companies, universities and other forms of entities should all fall within the notion of economic operator, whether or not they are "legal persons" and irrespective of their public or private nature.
- (18) In order to ensure adequate advertisement of works and services concessions above a certain value awarded by contracting entities and by the contracting authorities, the award of such contracts should be preceded by the compulsory publication of a concession notice in the Official Journal of the European Union. The threshold should reflect the clear cross-border interest of concessions to economic operators located in other Member States. To calculate the value of a concession, account must be taken of the estimated total revenue of the concessionaire, net of VAT, to be received from third parties and from the contracting authority or entity, including options, in consideration for the works and services estimated from the point of view of a potential tenderer.
- (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. Only situations of objective exclusivity can justify the award of a concession without publication to an economic operator, where the situation of exclusivity has not been created by the contracting authority or contracting entity itself in view of the future award procedure, and where there are no adequate substitutes, the availability of which should be assessed thoroughly.

- (19a) 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, which should correspond to a return expected under normal market conditions. The total value of investments should be valid at the moment of the award of the concession but may include prior investments deemed necessary for the operating of the concession. It can also include expenditure on infrastructure, copyrights, patents, equipment, logistics, hiring, training of personnel and initial expenses to operate a concession. The maximum duration of the concession should be indicated in the concession documents unless duration is used as an award criterion of the contract. In exceptional circumstances, the concession may be of a longer duration than the one defined on the basis of the above criteria, if the contracting authority or entity demonstrates that, for example, this duration is required by sector specific legislation in accordance with the Treaty and pursuant to the Union's secondary law .
- (21) In the light of the results of the evaluation conducted by the Commission on the reform of public procurement rules it is appropriate to exclude from the full application of this Directive only those services which have a limited cross-border dimension, namely the so-called services to the person such as certain social, health, educational services, rescue services, firefighting services and prison 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 thresholds 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 quality, continuity, accessibility, availability and comprehensiveness of the services, the specific needs of different categories of users, the involvement and empowerment of users and innovation.

- (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.
- (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 technical, financial and economic capacity of operators, 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.

- (27) Concessions are usually long term, complex arrangements where the contractor assumes responsibilities and risks traditionally borne by the contracting authorities and normally falling within their remit. For this reason, contracting authorities or entities should maintain a margin of flexibility in organising the awarding process, involving also the way the parties negotiate the content of the contract with the tenderers or candidates. 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, scope of negotiations, 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. Furthermore, it should be clarified that the minimum requirements to be set by the contracting authority or entities are those conditions and characteristics (particularly physical, functional and legal) that any tender should meet or possess.

- (28) The technical specifications drawn up by contracting authorities and contracting entities need to allow concession award to be opened up to competition. To that end, it must be possible to submit tenders that reflect the diversity of technical solutions so as to obtain a sufficient level of competition. Consequently, technical specifications should be drafted in such a way to avoid artificially narrowing down competition through requirements that favour a specific economic operator by mirroring key characteristics of the supplies, services or works habitually offered by that economic operator. Drawing up the technical specifications in terms of functional and performance requirements generally allows this objective to be achieved in the best way possible and favours innovation.
- (28a) In any case, tenders including works and services or supplies complying in an equivalent manner with the requirements defined in the technical specifications should be considered by contracting authorities or contracting entities. In technical specifications and in award criteria, contracting authorities and contracting entities should be allowed to refer to a specific production process, a specific mode of provision of services, or a specific process for any other stage of the life cycle of a product or service, provided that they are linked to the subject-matter of the concession. In order to better integrate social considerations in the award of concessions, procurers may also be allowed to include, in the award criteria, characteristics related to the working conditions.
- (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. Member States should, however, be able to provide for a derogation from these mandatory exclusions in exceptional situations where overriding requirements in the general interest make a contract award indispensable. This might, for example, be the case where urgently needed vaccines or emergency equipment can only be purchased from an economic operator to whom one of the mandatory grounds for exclusion applies. 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 violations of environmental or social obligations or other forms of grave professional misconduct, such as violation of competition rules or of intellectual property rights. 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 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.

- (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. 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.
- (32) The laws, regulations and collective agreements, at both national and European Union level, which are in force in the areas of employment conditions and safety at work should apply during performance of a concession, providing that such rules, and their application, comply with Union law. In cross-border situations, where workers from one Member State provide services in another Member State for the purpose of performing a concession, Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services<sup>11</sup> as interpreted by the European Court of Justice lays down the minimum conditions which must be observed by the host country in respect of such posted workers.

---

<sup>11</sup> OJ L 18, 21.1.1997, p. 1.

The applicable laws, regulations, administrative provisions and collective agreements, at both national and Union level, that are in force in the areas of employment conditions and safety at work should apply during the performance of a public contract, provided that such rules, and their application, comply with Union law. These obligations could hence be mirrored in concession performance clauses. It should also be possible to include clauses ensuring compliance with collective agreements in compliance with Union law in concessions.

Concession performance conditions may also be intended to favour the protection of the environment or animal welfare and, to comply in substance with fundamental ILO Conventions, and to recruit a higher number of disadvantaged persons than is required under national legislation. Non-compliance with obligations set by applicable national legislation or collective agreements may be considered to be grave misconduct on the part of the economic operator concerned, permitting the exclusion of that economic operator from the procedure for the award of a concession.

- (33) Concessions contracts typically involve long term and complex technical and financial arrangements which are often subject to changing circumstances. Thus it is necessary to clarify the conditions under which modifications of a concession during its execution does not require a new award procedure. This will be notably the case where circumstances which a diligent contracting authority or entity could not foresee justify an adaptation of the original terms of the award. However, in other cases and taking into account the relevant case-law of the Court of Justice of the European Union, a new award procedure is required where material changes to the initial concession, demonstrate the intention of the parties to renegotiate essential terms or conditions of the concession.

This concerns notably situations where the amended conditions would have had an influence on the outcome of the procedure, had they been part of the initial procedure. An exceptional and temporary extension of the term of the concession strictly aimed at ensuring the continuity of the provision of the service pending the award of a new concession should not normally qualify as a material change to the initial concession.

- (34) Modifications of the concession, resulting in a minor change of the concession value up to a certain value should not qualify as substantial and therefore always be possible without the need to carry out a new concession award 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. Modification of the concession above those thresholds should be possible to the extent they comply with conditions laid down in Article 42.
- (35) The notion of circumstances that a diligent contracting authority or contracting entity could not foresee refers to those circumstances which could not be 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, supplies or services to be procured 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. This would be notably the case where the modification substantially alters the initial sharing of the risk between the contracting authority or entity and the concessionaire.
- (36) In line with the principles of equal treatment and transparency, the successful tenderer should not be replaced by another economic operator without reopening the concession to competition, notably where a concession is terminated because of deficiencies in the performance; However, the successful tenderer performing the concession may, in particular where the contract has been awarded to more than one undertaking, undergo certain structural changes during the performance of the concession, such as purely internal reorganisations, mergers and acquisitions or insolvency or be substituted on the basis of a contractual clause known to all tenderers

and in line with the principles of equal treatment and transparency. Such structural changes should not automatically require new award procedures for all concessions performed by that concessionaire.

However, in other cases and in line with the principles of equal treatment and transparency, the successful tenderer should not be replaced by another economic operator without reopening the concession to competition.

- (37) Contracting authorities or contracting entities should have the possibility to provide for modifications to a concession in the concession contract itself, by way of review clauses which should not give them unlimited discretion. This Directive should therefore set out to what extent modifications may be provided for in the initial concession.
- (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<sup>12</sup> 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<sup>13</sup> should also apply to services concessions and to works concessions awarded by both contracting authorities and contracting entities. Directives 89/665/EEC and 92/13/EEC should, therefore, be amended accordingly.
- (39a) This Directive will not apply to concessions tendered or awarded before its entry into force.

---

<sup>12</sup> OJ L 395, 30.12.1989, p. 33.

<sup>13</sup> OJ L 76, 23.3.1992, p. 14.

- (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<sup>14</sup>.
- (41) The law of the Union on public procurement requires Member States to consistently and systematically monitor the implementation and functioning of those rules in order to ensure the efficient and uniform application of Union law.
- (42) It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level. The Commission, when preparing and drawing-up delegated acts, should ensure a simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and Council.
- (43) The Commission should review the effects on the internal market resulting from the application of the thresholds and report thereon to the European Parliament and the Council at the latest three years after the entry into force of this Directive. In so doing, it should take into account factors such as the level of cross-border concessions, SME participation, transaction costs and the cost-benefit trade-off.

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 could also be examined, bearing in mind the impact of inflation and transaction costs; in case the level of thresholds should change as a consequence, the Commission should, where appropriate, adopt a legislative proposal amending the thresholds set out in this Directive.

---

<sup>14</sup> OJ L 281, 23.11.1995, p. 31.



- (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>15</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 view 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.
- (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:

---

<sup>15</sup> OJ L 55, 28.2.2011, p. 13.

## Directive on concessions

### Table of contents

[To be completed when the text is stable]

#### TITLE I: DEFINITIONS, SCOPE, AND PRINCIPLES

##### CHAPTER I: Definitions, scope and general principles

###### SECTION 1: DEFINITIONS AND SCOPE

Article 1: Subject-matter and scope

Article 2: Definitions

Article 3: Contracting authorities

Article 4: Contracting entities

Article 5: Thresholds

Article 6: Methods for calculating the estimated value of concessions

Article 7: General Principles

###### SECTION II: EXCLUSIONS

Article 8: Exclusions applicable to concessions awarded by contracting authorities and contracting entities

Article 9: Specific exclusions in the field of telecommunications

Article 10: Exclusions applicable to concessions awarded by contracting entities

Article 11: Concessions awarded to an affiliated undertaking

Article 12: Concessions awarded to a joint venture or to a contracting entity forming part of a joint venture

Article 13: Notification of information by contracting entities

Article 14: Exclusion of activities which are directly exposed to competition

Article 15: Relations between public authorities

### SECTION III: GENERAL PROVISIONS

Article 16: Duration of the concession

Article 17: Social and other specific services

Article 18: Mixed concessions

Article 19: Concessions covering several activities

### SECTION IV: SPECIFIC SITUATIONS

Article 20: Reserved concessions

Article 21: Research and development services

### CHAPTER II: Principles

Article 22: Economic operators

Article 23: Nomenclatures

Article 24: Confidentiality

Article 25: Rules applicable to communication

### TITLE II: RULES ON CONCESSIONS

#### CHAPTER I: Publication and Transparency

Article 26: Concession notices

Article 27: Concession award notices

Article 28: Form and manner of publication of notices

Article 29: Publication at national level

Article 30: Electronic availability of concession documents

## CHAPTER II: Conduct of the procedure

### SECTION 1: TECHNICAL SPECIFICATIONS, CHOICE OF PARTICIPANTS, TIME LIMITS AND AWARD OF CONCESSIONS

Article 32: Technical specifications

Article 35: Procedural guarantees

Article 36: Selection of and qualitative assessment of candidates

Article 37: Setting time limits

Article 38: Time limits for submission of applications for the concession

Article 39: Concession award criteria

### TITLE III: RULES ON PERFORMANCE OF CONCESSIONS

Article 41: Subcontracting

Article 42: Modification of concessions during their term

Article 43: Termination of concessions

### TITLE IV: AMENDMENT OF DIRECTIVES 89/665/EEC AND 92/13/EEC

Article 44: Amendments to Directive 89/665/EEC

Article 45: Amendments to Directive 92/13/EEC

### TITLE V: DELEGATED POWERS, IMPLEMENTING POWERS AND FINAL PROVISIONS

Article 46: Exercise of the delegation of powers

Article 47: Urgency procedure

Article 48: Committee Procedure

Article 49: Transposition

Article 50: Transitional provisions

Article 51: Review

Article 52: Entry into force

Article 53: Addressees

## ANNEXES

ANNEX I: LIST OF THE ACTIVITIES REFERRED TO IN ARTICLE 2(5)

ANNEX III: ACTIVITIES EXERCISED BY CONTRACTING ENTITIES AS REFERRED TO IN ART. 4

ANNEX IV: INFORMATION TO BE INCLUDED IN CONCESSION NOTICES

ANNEX V: INFORMATION TO BE INCLUDED IN CONCESSION AWARD NOTICES

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

ANNEX VII: INFORMATION TO BE INCLUDED IN NOTICES OF MODIFICATIONS OF A CONCESSION DURING ITS TERM ACCORDING TO ARTICLE 42

ANNEX VIII: DEFINITION OF CERTAIN TECHNICAL SPECIFICATIONS

ANNEX IX: FEATURES CONCERNING PUBLICATION

ANNEX X: SERVICES REFERRED TO IN ARTICLE 17

ANNEX XI: LIST OF EUROPEAN UNION LEGISLATION REFERRED TO IN ARTICLE 4(4) (b)

ANNEX XIII: INFORMATION TO BE INCLUDED IN PRIOR INFORMATION NOTICES CONCERNING CONCESSIONS FOR SOCIAL AND OTHER SPECIFIC SERVICES

TITLE I  
SUBJECT-MATTER, SCOPE, Principles AND DEFINITIONS

1.1. CHAPTER I  
Scope, general principles and definitions

SECTION I  
SCOPE, GENERAL PRINCIPLES, DEFINITIONS AND THRESHOLDS

Article 1  
Subject-matter

1. This Directive establishes rules on the procedures for procurement by contracting authorities and by contracting entities with respect to concessions whose value is equal to or greater than the threshold laid down in Article 5.
2. The application of this Directive is subject to Articles 36, 51, 52, 62 and 346 of the Treaty on the Functioning of the European Union.
3. This Directive does not affect the discretion of national, regional and local authorities to decide on the most appropriate means of performing the works and providing the services falling within their competences.
4. This Directive does not affect the freedom of Member States to define, in conformity with Union law, what they consider to be services of general economic interest, how those services should be organised and financed, in compliance with the State aid rules, and what specific obligations they should be subject to. Equally, this Directive does not affect the way in which the Member States organise their social security legislation.
5. The scope of this Directive shall not include non-economic services of general interest.

## Article 1a

### Scope

This Directive applies to the acquisition of works or services, including supplies which are incidental to the subject matter of a concession, by means of a concession as defined in paragraphs 2 and 7 of Article 2 from economic operators chosen by either of the following:

- a) Contracting authorities whether or not the works or services including the supplies, are intended for a public purpose;
- b) Contracting entities provided that the works or services including the -supplies, are intended for the pursuit of one of the activities referred to in Annex III.

## Article 1b

### General Principles

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

## Article 2

### Definitions

1. For the purposes of this Directive the following definitions shall apply:
  - (1) 'concessions' means works concessions or services concessions.

- (2) 'works concession' means a contract for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities or entities and having as its object the execution of works, where the consideration for the works to be carried out consists either solely in the right to exploit the works that are the subject of the contract or in that right together with payment;
- (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.
- (7) 'services concession' means a contract for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities or contracting entities and having as its object the provision of services other than the execution of works referred to in point 2 where the consideration for the services to be provided consists either solely in the right to exploit the services that are subject of the contract or in that right together with payment.



- (8) 'candidate' means an economic operator that has sought an invitation or has been invited to take part in a concession award procedure;
- (9) 'concessionaire' means an economic operator which has been awarded a concession.
- (10) 'economic operator' means any natural or legal person, or public entity, or a group of such persons and/or entities which offers the execution of works and/or a work, the supply of products or the provision of services on the market.
- (11) 'tenderer' means an economic operator that has submitted a tender
- (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.
- (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 specifications, proposed conditions of concession, formats for the presentation of documents by candidates and tenderers, information on generally applicable obligations and any additional documents.

- 2. The consideration, for the works or services to be provided as referred to in points 2 and 7 of the first paragraph shall imply the transfer to the concessionaire of operating risk. The concessionaire shall be deemed to assume operating risk where 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.

### 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 awarding a concession for the purpose of pursuing an activity as referred to in Annex III.
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>16</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.

---

<sup>16</sup> OJ L 154, 21.6.2003, p. 1

## Article 4

### Contracting entities

1. For the purposes of this Directive, "Contracting entities" are one of the following:
  - (1) 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.
  - (2) public undertakings as defined in paragraph 2 of this Article
  - (3) entities other than those referred to in point (1), which are not public undertakings, operating on the basis of special or exclusive rights within the meaning of paragraph 3 of this Article granted by a competent authority of a Member State.

where they pursue one of the activities referred to in Annex III and award a concession for the purpose of pursuing such activity.

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, directly or indirectly:

- (a) hold the majority of the undertaking's subscribed capital;
- (b) control the majority of the votes attaching to shares issued by the undertaking;
- (c) can appoint more than half of the undertaking's administrative, management or supervisory body.

3. For the purposes of this Article ‘special or exclusive rights’ 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 activities defined in Annex III to one or more entities, and which substantially affects the ability of other entities to carry out such activity.
4. 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 paragraph 3 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.

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.

## Article 5

### Threshold

1. This Directive shall apply to the following concessions the value of which is equal to or greater than EUR 5 000 000:
  - (a) concessions concluded by contracting entities for the pursuit of one of the activities referred to in Annex III;
  - (b) concessions concluded by contracting authorities.

2. At the same time as the revision under Article 6 of Directive (replacing Directive 2004/18/EC), the Commission in accordance with the procedure under Article 48 shall align the threshold referred to in paragraph 1, on the revised thresholds applying to public works contracts under Directive (replacing Directive 2004/18/EC).

## Article 6

### Methods for calculating the estimated value of concessions

1. The value of a concession shall be the estimated total revenue of the concessionaire, net of VAT, to be received from third parties and from the contracting authority or the contracting entity, in consideration for the works and services, including supplies, to be provided in the execution of the concession.
2. 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 take into account, in particular, the:
  - a) Value of any form of option and any extension of the duration of the concession;
  - b) Revenue from the payment of fees and fines by the users of the works or services other than those collected on behalf of the contracting authority or entity;
  - c) 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;
  - d) Value of grants or any other financial advantages in any form whatsoever from third parties for the performance of the concession;
  - e) Revenue from sales of any assets which are part of the concession;

- f) 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) Prizes or payments to candidates or tenderers;
  - h) For insurance services: the premium payable and other forms of remuneration;
  - i) For banking and other financial services: fees, commissions, interest and other forms of remuneration;
  - j) For design services: fees, commission payable and other forms of remuneration.
3. The estimate shall be valid at the moment at which the concession notice is sent, or, in cases where a notice is not foreseen, at the moment at which the contracting authority or the contracting entity commences the concession award procedure.
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 Article 5, this Directive shall apply to the awarding of each lot.

## 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.
2. This Directive shall not apply to services concessions awarded to an economic operator which is a public undertaking as defined in paragraph 2 of Article 4 or an entity other than those as referred to in paragraph 1 point (1) of Article 4, operating on the basis of special or exclusive rights within the meaning of paragraph 3 of Article 4 granted by a competent authority of a Member State or an association thereof, if these concessions are awarded on the basis of an exclusive right that economic operator enjoys pursuant to applicable and published national law, regulation or administrative provision, and which has been granted in accordance with the Treaty and pursuant to Union sectoral legislation concerning the management of networks infrastructure related to the activities set out in annex III.
3. By way of derogation from paragraph 2 of this Article, where sectoral legislation referred to in paragraph 2 of this Article does not provide for sector specific transparency obligations, the requirements of Article 27 shall apply.
4. This Directive shall not apply to concessions which the contracting authority or a contracting entity is obliged to award or organise in accordance with procurement procedures different from those of this Directive established by any of the following:
  - (a) an international agreement or arrangement concluded in 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 agreement or arrangement relating to the stationing of troops and concerning the undertakings of a Member State or a third country;

- (c) an international organisation.
- (d) procurement rules provided by an international organisation or international financing institution, where the concessions 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 and where the parties agreed on their application.

All agreements or arrangements 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.

5. 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<sup>17</sup>, with the exception of the following contracts:

- (a) concessions for which the application of the rules 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,
- (b) concessions awarded in the framework of a cooperative programme referred to in Article 13 (c) of Directive 2009/81/EC,
- (c) contracts 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.

---

<sup>17</sup> OJ L 217, 20.8.2009, p. 76.



6. This Directive shall not apply to concessions not otherwise exempted under paragraph 5 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 the contracting entity makes available, in a concession award procedure as provided for in this Directive.

It shall also not apply to the award and performance of a concession declared to be secret or which 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 subparagraph (1).

7. This Directive shall not apply to 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>18</sup>, central bank services and operations conducted with the European Financial Stability Facility (EFSF);

---

<sup>18</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;
- (e) employment contracts;
- (f) air transport services based on the grant of an operating licence within the meaning of Regulation (EC) 1008/2008<sup>19</sup> of the European Parliament and of the Council<sup>20</sup>;
- (g) public passenger transport services within the meaning of Regulation (EC) 1370/2007 of the European Parliament and of the Council;<sup>21</sup>
- (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:
  - (i) legal representation of a client in an arbitration or conciliation held in a Member State or in judicial proceedings before the national courts, tribunals or public authorities of a Member State by a lawyer within the meaning of Article 1 of Directive 77/249/EEC;
  - (ia) legal representation of a client in an arbitration or conciliation held before an international arbitration or conciliation instance or in judicial proceedings before the international courts, tribunals or institutions by a lawyer within the meaning of Article 1 of Directive 77/249/EEC;

---

<sup>19</sup> Regulation of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community

<sup>20</sup> OJ L 293, 31.10.2008, p. 3.

<sup>21</sup> OJ L 315, 3.12.2007,

- (i aa) legal representation of a client in an arbitration or conciliation held in a third country or in judicial proceedings before the national courts, tribunals or public authorities of a third country by a lawyer within the meaning of Article 1 of Directive 77/249/EEC;
- (i b) legal advice given in anticipation or preparation of any of the proceedings referred to in points (i), (i aa) or (i a) or where there is a concrete likelihood that the matter to which the advice relates will become the subject of such proceedings, provided that the advice is given by a lawyer within the meaning of Article 1 of Directive 77/249/EEC;
- (ii) document certification services which must be provided by notaries;
- (iii) legal services provided by trustees, appointed guardians or other legal services the providers of which are designated by a court or tribunal in the Member State concerned;
- (iv) other legal services which in the Member State concerned are connected, even occasionally, with the exercise of official authority;

8. 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>22</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".

---

<sup>22</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 or to provide to the public one or more electronic communications services.

For the purposes of this Article:

- (a) 'public communications network' means an electronic communications network used wholly or mainly for the provision of electronic communications services available to the public which support the transfer of information between network termination points;
- (b) 'electronic communications network' means transmission systems and, where applicable, switching or routing equipment and other resources, including network elements which are not active, which permit the conveyance of signals by wire, radio, optical or other electromagnetic means, including satellite networks, fixed (circuit and packet-switched, including Internet) and mobile terrestrial networks, electricity cable systems, to the extent that they are used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed ;
- (c) a 'network termination point' (NTP) means the physical point at which a subscriber is provided with access to a public communications network; in the case of networks involving switching or routing, the NTP is identified by means of a specific network address, which may be linked to a subscriber number or name;

- (d) 'electronic communications services' means a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting, but exclude services providing, or exercising editorial control over, content transmitted using electronic communications networks and services; it does not include information society services, as defined in Article 1 of Directive 98/34/EC, which do not consist wholly or mainly in the conveyance of signals on electronic communications networks.

#### Article 10

##### Exclusions applicable to concessions awarded by contracting entities

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

#### Article 11

##### 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>23</sup>.
2. In the case of entities not subject to that Directive, "affiliated undertaking" shall mean any undertaking that :
  - (a) may be, directly or indirectly, subject to a dominant influence by the contracting entity within the meaning of the second paragraph of Article 4 of this Directive;

---

<sup>23</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).

- (b) may exercise a dominant influence over the contracting entity;
- (c) in common with the contracting entity, is subject to the dominant influence of another undertaking by virtue of ownership, financial participation, or the rules which govern it.

3. Article 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:

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

5. 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 provides the same or similar services, supplies 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, supplies 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

Contracting entities shall notify to the Commission, at its request, the following information regarding the application of paragraphs 2 and 3 of Article 11 and of 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 (1) of Article 4 to another legal entity governed by private or public law shall fall outside the scope of this Directive where the following cumulative conditions are fulfilled:
  - a) the authority or entity exercises over the legal entity concerned a control which is similar to that which it exercises over its own departments
  - b) more than 80% of the activities of that legal entity are carried out in the performance of tasks entrusted to it by the controlling contracting authority or entity or by other legal entities controlled by that contracting authority or entity
  - c) there is no private capital participation in the controlled legal entity

A contracting authority or a contracting entity as referred to in paragraph 1 subparagraph 1 of Article 4 shall be deemed to exercise over a legal entity a control similar to that which it exercises over its own departments within the meaning of point (a) of the first subparagraph where it exercises a decisive influence over both strategic objectives and significant decisions of the controlled legal entity. The control may also be exercised by another entity, which is itself controlled in the same way by the contracting authority or entity.



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

2. Paragraph 1 also applies where a controlled entity which is a contracting authority or contracting entity as referred to in paragraph 1, point (1) of Article 4 awards a concession to its controlling entity, or to another legal entity controlled by the same contracting authority, provided that there is no private capital participation in the legal entity being awarded the public concession.
3. A contracting authority or a contracting entity as referred to in paragraph 1 subparagraph 1 of Article 4, which does not exercise over a legal entity governed by private or public law control within the meaning of paragraph 1, may nevertheless award a concession without applying the provisions of the current Directive to that legal entity where the following cumulative conditions are fulfilled:
  - a) the contracting authority or entity as referred to in paragraph 1, point (1) of Article 4 exercise jointly with other contracting authorities or entities over the legal entity a control which is similar to that which it exercises over its own departments;
  - b) more than 80% of the activities of that legal entity are carried in the performance of tasks entrusted to it by the controlling contracting authorities or entities as referred to in paragraph 1, point (1) of Article 4 or by other legal entities controlled by the same contracting authority or entity;
  - c) there is no private capital participation in the controlled legal entity.

For the purposes of point (a), contracting authorities or entities as referred to in paragraph 1, point (1) of Article 4 shall be deemed to exercise joint control over a legal entity where the following cumulative conditions are fulfilled:

- (a) the decision-making bodies of the controlled legal entity are composed of representatives of all participating contracting authorities or contracting entities as referred to in paragraph 1 subparagraph 1 of Article 4. Individual representatives may represent several or all of the participating contracting authorities;
- (b) those contracting authorities or contracting entities as referred to in paragraph 1, point (1) of Article 4 are able to jointly exert decisive influence over the strategic objectives and significant decisions of the controlled legal entity;
- (c) the controlled legal entity does not pursue any interests which are distinct from those of the public authorities
- (d) the controlled legal entity does not receive from its activities for the controlling entities or for other legal entities controlled by the same contracting authorities or entities any revenues other than the reimbursement or reallocation of funds for the performance of the activities concerned.

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

4. A contract concluded between two or more contracting authorities or contracting entities as referred to in paragraph 1, point (1) of Article 4 shall not be deemed to be a concession within the meaning of point 1 of paragraph 1 of Article 2, where the following cumulative conditions are fulfilled:

- (a) the contract is concluded in a framework of genuine co-operation between the participating contracting authorities or entities aimed at carrying out jointly their public service tasks and involving mutual rights and obligations of the parties;
- (b) the implementation of that cooperation is governed solely by considerations relating to the public interest;
- (c) the participating contracting authorities or entities do not perform on the market less than 20% in terms of turnover of the activities concerned by the cooperation on the market;
- (d) the contract does not involve financial transfers between the participating contracting authorities or entities, other than those corresponding to the reimbursement or reallocation of funds for the works, services or supplies concerned;
- (e) there is no private capital participation in any of the contracting authorities or entities involved.

For the determination of the percentage of activities referred to in point (c) of the first subparagraph the average total turnover of the contracting authority or contracting entity as referred to in paragraph 1, point (1) of Article 4 concerned with respect to services, supplies and works for the three years preceding the conclusion of the contract shall be taken into consideration. When, because of the date that contracting authority or contracting entity as referred to in paragraph 1, point (1) of Article 4 was created or commenced activities or because of a reorganisation of its activities, the turnover is either not available for the preceding three years or no more relevant, it will be sufficient to show that the turnover is credible, particularly by means of business projections.

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

The exceptions provided for in this Article shall cease to apply from the moment any private participation takes place, with the effect that ongoing concessions need to be opened to competition through regular concession award procedures.

### SECTION III GENERAL PROVISIONS

#### Article 16

##### Duration of the concession

For concessions lasting more than 5 years, the maximum duration of the concession shall not, in principle, exceed the time estimated to be necessary for the concessionaire to recoup the investments made for operating the works or services together with a return on invested capital.

#### Article 17

##### Social and other specific services

Concessions for social and other specific services, such as hotel and restaurant services or certain legal, rescue, administrative services, listed in Annex X falling within the scope of this Directive shall be subject to the obligation of paragraph 3 of Art. 26 Article 27, and to Articles 44 and 45.

#### Article 18

##### Mixed contracts

1. Contracts which have as their object both services and supplies shall be awarded in accordance with this Directive where the main object of the contract in question is services and where they are concessions within the meaning of point (1) of the first paragraph of Article 2

2. Concessions which have as their object both services within the meaning of Article 17 and other services shall be awarded in accordance with the provisions applicable to the type of service that characterises the main object of the contract in question.
3. In the case of mixed contracts referred to in paragraphs 1 and 2, the main object shall be determined by a comparison of the values of the respective services or supplies.
4. Concessions which have as their object both services and works shall be awarded in accordance with the provisions of this Directive applicable to works concessions where the main object of the contract in question is the execution of works, as defined in Article 2(1)(4).
5. Unless otherwise provided for in this Directive, in case of contracts having as their object concessions covered by this Directive as well as procurement or other elements not covered by it nor by Directives [replacing 2004/17/EC and Directive 2004/18] or 2009/81/EC, where a contract must be awarded pursuant to the provisions of this Directive, if awarded on its own, then this Directive shall apply also to the award of a mixed contract where contracting authorities or contracting entities choose to include other elements in the procurement, irrespective of their value and irrespective of the legal regime these added elements would otherwise have been subject to.

However, when the different parts of the contract are objectively not separable, the application of this Directive shall be determined on the basis of the main subject of that contract.

6. In the case of concessions subject to this Directive and contracts subject to [Directive 2004/18/EC or 2004/17/EC] contracting authorities and contracting entities may choose to award separate contracts for the separate parts. If so, the decision of which rules apply to any one of such separate contracts shall be taken on the basis of the characteristics of the separate part concerned. However, if they chose to award a single contract or if the different parts of the contract are objectively not separable, the mixed contract shall be awarded in accordance with the provisions of [Directive 2004/18/EC or 2004/17/EC], provided that the estimated value of the part

of the contract which constitutes a public contract covered by [Directive 2004/18/EC or 2004/17/EC], calculated in accordance with the provisions of these Directives, is equal to or greater than the relevant threshold set out in these Directives.

- 6a. Where contracts have as their object concessions covered by this Directive as well as procurement or other elements covered by Directive 2009/81/EC<sup>24</sup> the contract shall be awarded in accordance with the provisions of this Directive, provided that the award of a single contract is justified for objective reasons.

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

- 6b. Where contracts have as their object both concessions covered by this Directive and procurement or other elements covered by Directive 2009/81/EC, as well as procurement or other elements not being subject to either Directive, the contract shall be subject to this Directive provided that the award of a single contract is justified for objective reasons.

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

- 6c. In the case of concessions which have as their subject procurement covered by this Directive, or this directive together with elements covered by Directive 2009/81/EC or by [Directive 2004/18/EC or 2004/17/EC], as well as procurement or other elements which are covered by Article 346 of the Treaty on the Functioning of the European Union, the concession shall not be subject to this Directive provided that the award of a single contract is justified for objective reasons.

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

---

<sup>24</sup> OJ L 217, 20.8.2009, p. 76.

## Article 19

### Concessions covering activities listed in Annex III and other activities

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

Where contracting entities or contracting authorities decide not to award separate contracts, paragraphs 1a and 2 shall apply, Article 18 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 the rules of this Directive applicable to concessions awarded by contracting entities or, where applicable, the rules of this Directive applicable to concessions awarded by contracting authorities, Directive [2004/18/EC], Directive [2004/17/EC] or Directive 2009/81/EC of the European Parliament and of the Council.

- 1a. A concession which is intended to cover several activities shall be subject to the rules applicable to the activity for which it is principally intended.
2. In the case of contracts for which it is objectively impossible to determine for which activity the contract is principally intended, the applicable rules shall be determined in accordance with points a to d:
  - (a) the concession shall be awarded in accordance with the rules applicable to concessions awarded by contracting authorities, if one of the activities for which the concession is intended is subject to these rules and the other to rules applicable to concessions awarded by contracting entities;
  - (b) the contract shall be awarded in accordance with [Directive 2004/17EC], if one of the activities for which the contract is intended is subject to this Directive and the other to the [Directive 2004/17EC];

- (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 to the Directive 2009/81/EC;
- d) the contract or the concession shall be awarded in accordance with this Directive, if one of the activities for which the contract or the concession is intended is subject to this Directive and the other is not subject to either this Directive or [Directive 2004/18/EC or 2004/17/EC] or 2009/81/EC<sup>25</sup>.

## 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 concession notice shall make reference to this provision.
2. Member States may also reserve the right to participate in procedures for the award of services concessions to organisations whose main aim is the integration of former employees of public authorities into the private sector, provided that the following cumulative conditions are fulfilled:

---

<sup>25</sup> OJ L 217, 20.8.2009, p. 76.



- (a) at least 75% of the employees of these organisations are, or will be at the relevant time, individuals who have left their position of employment within a contracting authority or contracting entity in order to deliver public services by way of that organisation;
- (b) the organisation provides its services exclusively for contracting authorities or contracting entities;
- (c) employee ownership or engagement has, or will have at the relevant time, a significant impact on the governance of the organisation.

This provision only applies where the concession awarded is fully performed within the period of three years beginning from the date on which the organisation first begins to supply any services. For the purposes of this paragraph, “relevant time” means the date on which the organisation would be required to begin the supply of services under a concession awarded pursuant to this provision.

- 3. The concession 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 73436000-7, except 73200000-4, 73210000-7, 73220000-0, 73400000-6, [R&D services on security and defence materials], 73410000-9[Military research and technology], 73421000-9[Development of security equipment], 73422000-6[Development of firearms and ammunition], 73423000-3[Development of military vehicles], 73424000-0, 73425000-7, 73426000-4[Development of military electronic systems], 73431000-2 [Test and evaluation of security equipment], 73432000-9[Test and evaluation of firearms and ammunition ], 73433000-6[Test and evaluation of military vehicles], 73434000-3, 73435000-0 or 73436000-7[Test and evaluation of military electronic systems] 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
- 3. 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 concession is awarded, they would be required to be either natural or legal persons.
- 2. However, legal persons may be required to indicate in the tender or the application, the names and relevant professional qualifications of the staff to be responsible for the performance of the concession in question.
- 3. Groups of economic operators may participate in concession award procedure.
- 4. Specific conditions relating to economic and financial standing or to criteria relating to technical and professional ability which contracting authority or entity establish for the participation of such groups which are not imposed on individual participants shall be justified by objective reasons and proportionate.

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

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

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

### 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>26</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, to reflect changes in the CPV nomenclature provided that such amendments do not imply a modification of the scope of this Directive.

### 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 between the following means of communication for all communication and information exchange:

---

<sup>26</sup> OJ L 340, 16.12.2002, p. 1.

- (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 be documented to a sufficient degree.

2. The means of communication chosen must be generally available and not restrict economic operators' access to the concession award procedure.

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

## TITLE II

### RULES ON THE AWARD OF CONCESSIONS

#### CHAPTER I

##### Publication and Transparency

##### 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 part of 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.
4. By way of derogation from paragraph 1, the contracting authorities and entities shall not be required to publish a concession notice in any of the following cases:
  - (a) where no tenders or no suitable tenders or no applications have been submitted in response to a prior concession procedure, provided that the initial conditions of the concession contract are not substantially altered and on condition that a report is sent to the Commission where it so requests;
  - (b) where the works or services can be supplied only by a particular economic operator for any of the following reasons:
    - (i) the aim of the concession is the creation or acquisition of a unique work of art or artistic performance;

- (ii) competition is absent for technical reasons;
- (iii) the protection of exclusive rights, including intellectual property rights.

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

For the purposes of point (a) of the first subparagraph of paragraph 4 (a), a tender shall be considered not to be suitable where it is irrelevant to the concession, being incapable, without substantial changes, of meeting the contracting authority or contracting entity's needs and requirements as specified in the concession documents. An application shall be considered not to be suitable where the economic operator concerned shall or may be excluded pursuant to paragraphs 5-7 of Article 36 or does not meet the selection criteria set out by the contracting authority or the contracting entity pursuant to paragraph 1 of Article 36. In cases where applications are to include tenders, it shall be considered not to be suitable where the tender is irrelevant to the concession as referred to above.

## Article 27

### Concession award notices

1. Not later than 48 days after the award of a concession, contracting authorities and contracting entities shall 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. Such 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. Notices referred to in Articles 26 and 27 and Article 2 (6) shall include the information set out Annexes IV to VI and XII 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. Notices referred to in Article 26 and 27 shall be drawn up, transmitted by electronic means to the Commission and published in accordance with Annex IX. Notices shall be published not later than five days after they are sent. The costs of publication of the notices by the Commission shall be borne by the Union.
3. Notices referred to in Article 26 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.
4. Contracting authorities and contracting entities must be able to supply proof of the dates on which notices are dispatched.

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 that publication. Such confirmation shall constitute proof of publication.

5. Contracting authorities and contracting entities may publish notices for concessions that are not subject to the publication requirements laid down in this Directive provided those notices are sent to the Commission by electronic means in accordance with the format and procedures for transmission indicated in Annex IX.

## Article 29

### Publication at national level

1. Notices referred to in Articles 26 and 27 and the information contained therein shall not be published at national level before the date on which they are sent to the Commission pursuant to Article 28.
2. 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 by electronic means offer unrestricted and full direct access free of charge by electronic means to the concession documents from the date of publication of the notice in accordance with Article 28 or, where the contract 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 notice or of these invitations shall specify the internet address at which this documentation is accessible.

Where, in duly justified circumstances, 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 confirm interest that the concession documents concerned will be transmitted by other means and the time limit for the submission of tenders shall be prolonged.



2. Provided that it has been requested in good time, the contracting authorities and contracting entities shall supply additional information relating to the concession documents not later than six days before the deadline fixed for the receipt of tenders.

## CHAPTER II

### Conduct of the procedure

## SECTION I

### Article 32

#### Technical specifications

1. The technical specifications as defined in point 1 of Annex VIII shall be set out in the concession documents. They shall define the characteristics required of a works, service or supply.  
  
These characteristics may also refer to the specific process of production or provision of the requested works, supplies or services or to a specific process for another stage of its life cycle even where such factors do not form part of their material substance.
2. Technical specifications shall afford equal access of economic operators to the concession award procedure and not have the effect of creating unjustified obstacles to the opening up of concession to competition.
3. Unless justified by the subject-matter of the contract, technical specifications 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 origin or production with the effect of favouring or eliminating certain undertakings or certain products. Such reference shall be permitted

on an exceptional basis, where a sufficiently precise and intelligible description of the subject-matter of the contract pursuant to paragraph 3 is not possible. Such reference shall be accompanied by the words "or equivalent".

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

## SECTION II

### CHOICE OF PARTICIPANTS AND AWARD OF CONCESSIONS

#### Article 35

##### Procedural guarantees

1. Member States, contracting authorities and contracting entities may decide on the most appropriate procedure to award a concession in compliance with the procedural guarantees provided for in this Article.
2. Contracting authorities and contracting entities shall indicate in the concession documents a description of the concession, the award criteria and, where appropriate, the minimum requirements to be met. This information must allow economic operators to identify the nature and scope of the concession, enabling economic operators to decide whether they request to participate in the concession award procedure.

Where the contracting authority or contracting entity limits the number of candidates to an appropriate level, this shall be done in a transparent manner and on the basis of objective criteria which are available to all interested economic operators. The number of candidates invited shall be sufficient to ensure genuine competition.

5. The description of the organisation of the concession award procedure, including rules on communication, on the planned stages of the procedure and on planned timing, shall be established in advance and communicated to all interested economic operators. Any modification shall be communicated to all interested economic operators.
- 5a. Contracting authorities and contracting entities shall establish a record which ensures, by all appropriate means, the traceability of the procedure, including negotiations, where applicable.
6. Where the concession award involves negotiation, contracting authorities or contracting entities shall comply with the following rules:
  - (a) wherever the contracting authority or entity indicates in the concession documents the minimum requirements as referred to in paragraph 2 these requirements shall not be subject to negotiation.
  - (b) where the negotiation takes place after the submission of tenders they shall negotiate with tenderers any elements of the tenders submitted by them not subject to minimum requirements in order to improve their overall content based on the criteria and requirements indicated in-paragraph 1.
  - (c) they shall not reveal to the other participants solutions proposed or other confidential information communicated by a candidate or a tenderer participating in the negotiations without its agreement. This agreement shall not take the form of a general waiver but must be given with reference to the intended communication of specific solutions or other confidential information;
  - (d) when they reduce the number of tenders, they shall assess the tenders as negotiated on the basis of the award criteria indicated in the concession documents.

7. Contracting authorities and contracting entities shall as soon as possible inform each candidate and tenderer of decisions reached concerning the award of a concession including the grounds for any decision not to award a contract for which there has been publication of a concession notice or to recommence the procedure.
8. 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:
  - (a) any unsuccessful candidates and tenderers of the reasons for the rejection of, respectively, their applications and tenders, including, for the cases referred to in Article 32(4), the reasons for its decision of non-equivalence;
  - (b) any tenderers that have made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer

However, Member States may choose to allow contracting authorities to withhold certain information referred to in paragraph 6, regarding the contract where the release of such information would impede law enforcement, would otherwise be contrary to the public interest, would prejudice the legitimate commercial interests of economic operators, whether public or private, or might prejudice fair competition between them.

## Article 36

### Selection of and qualitative assessment of candidates

1. The conditions for participation shall be specified, in the concession notice and shall be limited to those relating to:
  - economic and financial standing;
  - technical and professional ability.

All requirements 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 contract-and the purpose of guaranteeing genuine competition.

Contracting authorities and contracting entities shall also indicate in the concession notice the required information to be submitted as proof of the economic operator's capacities.

The requirements in respect of those references shall be non-discriminatory and proportionate to the subject-matter of the concession.

2. With regard to the criteria referred to in paragraph 1, an economic operator may, where appropriate, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. Where an economic operator wants to rely on the capacities of other entities, it shall prove to the contracting authority or the contracting entity that it will have at its disposal, throughout the period of the concession, the resources necessary, for example, by producing a commitment by those entities to that effect. Member States may provide that, in duly justified cases, contracting authorities and contracting entities may require that certain critical tasks be performed directly by the tenderer itself or, where the tender is submitted by a group of economic operators as referred to in Article 22, by a participant in that group.

The contracting authority or contracting entity as referred to in point (1) of paragraph 1 of Article 4 shall verify whether there are grounds for exclusion pursuant to paragraphs 5 and 6 with regard to entities on whose capacity the economic operator intends to rely. An entity in respect of which there are grounds for exclusion may be excluded.

3. Under the same conditions, a group of economic operators as referred to in Article 22 may rely on the capacities of participants in the group or of other entities.

4. Member States shall require contracting authorities and contracting entities to take appropriate measures to effectively prevent, identify and remedy conflicts of interests arising in the conduct of concession award procedures so as to avoid any distortion of competition and ensure equal treatment of all economic operators.

The concept of conflicts of interest shall at least cover any situation where staff members of the contracting authority or 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 or eliminate the conflict identified. In particular, they shall allow for the exclusion of a tenderer or candidate from the procedure only where the conflict of interests cannot be effectively remedied by other means.

5. Contracting authorities and contracting 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 are aware 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<sup>27</sup>;
- (b) corruption, as defined in Article 3 of the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union<sup>28</sup> and Article 2 (1) of Council Framework Decision 2003/568/JHA<sup>29</sup> as well as corruption as defined in the national law of the contracting authority or entity or the economic operator;

---

<sup>27</sup> OJ L 300, 11.11.2008, p. 42.

<sup>28</sup> OJ C 195, 25.6.1997, p. 1.

<sup>29</sup> OJ L 192, 31.7.2003, p. 54.

- (c) fraud within the meaning of Article 1 of the Convention on the protection of the European Communities' financial interests<sup>30</sup>;
- (d) terrorist offences or offences linked to terrorist activities, as defined in Articles 1 and 3 of Framework Decision 2002/475/JHA<sup>31</sup> respectively, or inciting, aiding or abetting or attempting to commit an offence, as referred to in Article 4 of that Framework Decision;
- (e) money laundering and terrorist financing, as defined in Article 1 of Directive 2005/60/EC<sup>32</sup>.

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

6. 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 jurisdictional 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 is aware that the economic operator is in breach of its obligations relating to the payment of taxes or social security contributions.

---

<sup>30</sup> OJ C 316, 27.11.1995, p. 48.

<sup>31</sup> OJ L 164, 22.6.2002, p. 3.

<sup>32</sup> OJ L 309, 25.11.2005, p.15.

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.

7. Contracting authorities or contracting entities may exclude or may be required by Member States exclude from participation in a concession award procedure any economic operator in any of the following situations:
- (a) where it is aware of any violation of applicable obligations established by Union law or national law compatible with it in the field of social and labour law or environmental law or of the international social and environmental law provisions listed in Annex II.
  - (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;
  - (c) where the contracting authority or contracting entity can demonstrate by any means that the economic operator is guilty of a grave professional misconduct;
  - (d) where the contracting authority or contracting entity can demonstrate the presence of plausible indicators showing 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 entity as defined in this Directive or in [replacing Directive 2004/17/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 supporting documents required pursuant to paragraphs 1 and 5 of Article 36;
- (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.

8. Any economic operator that is in one of the situations referred to in paragraphs 5 and 7 may provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of the relevant ground for exclusion. If such evidence is considered 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 faculty provided under the present paragraph during the period of exclusion resulting from that judgement.

9. 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 8 are taken by the economic operator to demonstrate its reliability. They shall also make available to other Member States, upon request, any information related to the exclusion grounds listed in this Article.

## Article 37

### Time limits for submission of applications and tenders for the concession

1. When fixing the time limits for the submission of applications for the concession and submission of tenders, contracting authorities or contracting entities shall take account in particular of the complexity of the concession and the time required for drawing up tenders, without prejudice to the minimum time limits set out in paragraphs 3 to 5.

2. Where applications or tenders can be made only after a visit to the site or after on-the-spot inspection of the documents supporting the concession award documents, the time limits for the submission of applications for the concession 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 3 or 4.
3. Where contracting authorities and contracting entities resort to a concession, the minimum time limit for the receipt of applications for the concession shall be 30 days from the date on which the concession notice was sent.
4. Where the procedure takes place in successive stages the minimum time limit for the receipt of initial tenders shall be 22 days from the date on which the invitation to tender is sent.
5. The minimum time limit for receipt of applications and 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.
6. Where, for whatever reason, additional information, although requested in good time, is not supplied within the time limits set out in Article 30 or where significant changes are made to the concession documents, the contracting authority or entity shall extend the time limits for the receipt of tenders so that all economic operators concerned may be aware of all the information needed to produce tenders. The length of the extension shall be proportionate to the importance of the information or change.

## Article 39

### Concession award criteria

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

Those criteria shall permit effective competition and 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 set out in paragraph 1 in descending order of importance.

TITLE III  
Rules on performance of concessions

Article 42  
Modification of concessions during their term

1. A substantial modification of the provisions of a concession during its term shall be considered as a new award for the purposes of this Directive and shall require a new concession award procedure in accordance with this Directive.
2. A modification of a concession during its term shall be considered substantial within the meaning of paragraph 1, where it renders the concession materially different in character from the one initially concluded. In any case, without prejudice to paragraph 3 and 4, 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 other applicants 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.
3. Without prejudice to paragraph 5, the substitution of a new concessionaire for the one to which the contracting authority or entity had initially awarded the contract shall be considered a substantial modification within the meaning of paragraph 1.

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

4. Where the value of a modification can be expressed in monetary terms, the modification shall not be considered to be substantial within the meaning of paragraph 1, where its value does not exceed the thresholds set out in Article 5 and where it is below 10 % for services concessions and below 15% for works concessions of the value of the initial contract, calculated according to the method provided for in Article 6, provided that the modification does not alter the overall nature of the contract. Where several successive modifications are made, the value shall be assessed on the basis of the cumulative value of the successive modifications.
5. Concession modifications shall not be considered substantial within the meaning of paragraph 1, where they have been provided for in the initial concession documents in clear, precise and unequivocal review clauses or options. Such clauses shall state the scope and nature of possible modifications or options as well as the conditions under which they may be used. They shall not provide for modifications or options that would alter the overall nature of the concession.
6. A modification shall not be considered to be substantial within the meaning of paragraph 1, where the following cumulative conditions are fulfilled:
  - the need for modification has been brought about by circumstances which a diligent contracting authority or entity could not foresee
  - the modification does not alter the overall nature of the concession

Contracting authorities or contracting entities shall publish in the Official Journal of the European Union a notice on such modifications. Such notices shall contain the information set out in Annex VII and be published in accordance with the provisions of Article 28.

7.

.

## 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 contract law, to terminate a concession during its term, where one of the following conditions is fulfilled:

- (a) the exceptions provided for in Article 15 cease to apply following a participation of private capital in the legal entity awarded the contract pursuant to Article 15 (4);
- (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 of the Treaty, 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.

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, 15 and 21 of that Directive.

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

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

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



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

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

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

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

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

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

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

4. Article 2d is amended as follows:

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

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

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

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

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

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

‘ - the contracting authority published a contract award notice in accordance with Articles 35(4), 36 and 37 of Directive 2004/18/EC or with Articles 26 and 27 of Directive [on Concessions], provided that this notice includes justification of the decision of the contracting authority to award the contract without prior publication of a contract notice in the Official Journal of the European Union, or’;

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

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

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

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

## Article 45

### Amendments to Directive 92/13/EEC

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. Article 2c is replaced by the following:

‘Article 2c

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

5. Article 2d is amended as follows:

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

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

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

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

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

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

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

This option also applies to the cases referred to in Article 2b(c) of this Directive;’;

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

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

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(4), 21(3) and 23(2) 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(4), 21(3) and 23(2) 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<sup>33</sup>. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.
2. Where reference is made to this Article, Article 4 of Regulation (EU) No 182/2011 shall apply.

Article 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.

---

<sup>33</sup> OJ L 185, 16.8.1971, p. 15.



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.

## 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

### Review

The Commission shall review the economic effects on the internal market, in particular in terms of factors such as cross-border award of contracts and transaction costs, resulting from the application of the thresholds set in Article 5 and report thereon to the European Parliament and the Council by [3 years later than the date provided for in Article 49(1)].

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

## 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>34</sup>

NACE Rev. 1 <sup>(1)</sup>					CPV code
SECTION F			CONSTRUCTION		
Division	Group	Class	Subject	Notes	
45			Construction	This division includes: — construction of new buildings and works, restoring and common repairs.	45000000
	45.1		Site preparation		45100000
		45.11	Demolition and wrecking of buildings; earth moving	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

<sup>34</sup> In the event of any difference of interpretation between the CPV and the NACE, the CPV nomenclature will apply.

		45.12	Test drilling and boring	<p>This class includes:</p> <ul style="list-style-type: none"> <li>— test drilling, test boring and core sampling for construction, geophysical, geological or similar purposes.</li> </ul> <p>This class excludes:</p> <ul style="list-style-type: none"> <li>— drilling of production oil or gas wells, see 11.20.</li> <li>— water well drilling, see 45.25,</li> <li>— shaft sinking, see 45.25,</li> <li>— oil and gas field exploration, geophysical, geological and seismic surveying, see 74.20.</li> </ul>	45120000
	45.2		Building of complete constructions or parts thereof; civil engineering		45200000

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

		45.22	Erection of roof covering and frames	This class includes: — erection of roofs, — roof covering, — waterproofing.	45261000
		45.23	Construction of highways, roads, airfields and sport facilities	This class includes: — construction of highways, streets, roads, other vehicular and pedestrian ways, — construction of railways, — construction of airfield runways, — construction work, other than buildings, for stadiums, swimming pools, gymnasiums, tennis courts, golf courses and other sports installations, — painting of markings on road surfaces and car parks. This class excludes: — preliminary earth moving, see 45.11.	45212212 and DA03 45230000 except: - 45231000 - 45232000 - 45234115
		45.24	Construction of water projects	This class includes — construction of: — — waterways, harbour and river works, pleasure ports (marinas), locks, etc., — dams and dykes, — dredging, — subsurface work.	45240000

		45.25	Other construction work involving special trades	<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> <li>— lightning conductors, etc.</li> </ul>	<p>45213316</p> <p>45310000</p> <p>Except:</p> <p>-</p> <p>45316000</p>
		45.32	Insulation work activities	<p>This class includes:</p> <ul style="list-style-type: none"> <li>— installation in buildings or other construction projects of thermal, sound or vibration insulation.</li> </ul> <p>This class excludes:</p> <ul style="list-style-type: none"> <li>— waterproofing, see 45.22.</li> </ul>	45320000
		45.33	Plumbing	<p>This class includes:</p> <ul style="list-style-type: none"> <li>— installation in buildings or other construction projects of:</li> <li>— plumbing and sanitary equipment,</li> <li>— gas fittings,</li> <li>— heating, ventilation, refrigeration or air-conditioning equipment and ducts,</li> <li>— sprinkler systems.</li> </ul> <p>This class excludes:</p> <ul style="list-style-type: none"> <li>— installation of electrical heating systems, see 45.31.</li> </ul>	45330000



		45.34	Other building installation	<p>This class includes:</p> <ul style="list-style-type: none"> <li>— installation of illumination and signalling systems for roads, railways, airports and harbours,</li> <li>— installation in buildings or other construction projects of fittings and fixtures n.e.c.</li> </ul>	45234115 45316000 45340000
	45.4		Building completion		45400000
		45.41	Plastering	<p>This class includes:</p> <ul style="list-style-type: none"> <li>— application in buildings or other construction projects of interior and exterior plaster or stucco, including related lathing materials.</li> </ul>	45410000
		45.42	Joinery installation	<p>This class includes:</p> <ul style="list-style-type: none"> <li>— installation of not self-manufactured doors, windows, door and window frames, fitted kitchens, staircases, shop fittings and the like, of wood or other materials,</li> <li>— interior completion such as ceilings, wooden wall coverings, movable partitions, etc.</li> </ul> <p>This class excludes:</p> <ul style="list-style-type: none"> <li>— laying of parquet and other wood floor coverings, see 45.43.</li> </ul>	45420000

		45.43	Floor and wall covering	<p>This class includes:</p> <ul style="list-style-type: none"> <li>— laying, tiling, hanging or fitting in buildings or other construction projects of:</li> <li>—</li> <li>— ceramic, concrete or cut stone wall or floor tiles,</li> <li>— parquet and other wood floor coverings</li> <li>carpets and linoleum floor coverings,</li> <li>— including of rubber or plastic,</li> <li>— terrazzo, marble, granite or slate floor or wall coverings,</li> <li>— wallpaper.</li> </ul>	45430000
		45.44	Painting and glazing	<p>This class includes:</p> <ul style="list-style-type: none"> <li>— interior and exterior painting of buildings,</li> <li>— painting of civil engineering structures,</li> <li>— installation of glass, mirrors, etc.</li> </ul> <p>This class excludes:</p> <ul style="list-style-type: none"> <li>— installation of windows, see 45.42,</li> </ul>	45440000
		45.45	Other building completion	<p>This class includes:</p> <ul style="list-style-type: none"> <li>— installation of private swimming pools,</li> <li>— steam cleaning, sand blasting and similar activities for building exteriors,</li> <li>— other building completion and finishing work n.e.c.</li> </ul> <p>This class excludes:</p> <ul style="list-style-type: none"> <li>— interior cleaning of buildings and other structures, see 74.70.</li> </ul>	45212212 and DA04 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

(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 amended by Commission Regulation (EEC) No 761/93 (OJ L 83, 3.4.1993, p. 1).

## 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 (2) and point (3) 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.

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) and wholesale 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 (2) and point (3) 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.

3. As far as water 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 drinking water;
- (b) the supply of drinking water to such networks.

This Directive shall also apply to concessions awarded or organised by entities which pursue an activity referred to above and which are connected with one of the following:

- (a) hydraulic engineering projects, irrigation or land drainage, provided that the volume of water to be used for the supply of drinking water represents more than 20 % of the total volume of water made available by such projects or irrigation or drainage installations, or
- (b) the disposal or treatment of sewage.

The supply of drinking water to networks which provide a service to the public by a contracting entity referred to in paragraph 1 point (2) and (3) of Article 4 shall not be considered a relevant activity within the meaning of subparagraph 1 where all of the following conditions are met:

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

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.

This Directive shall not apply to entities providing bus transport services to the public the exhaustive list of which, together with the geographical areas concerned is set out in Annex IIA of [Directive 2004/17/EC].

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.
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 procurement: nature and extent of works or services, nature and quantity of supplies, 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. Indication whether the procedure is to be conducted in stages and objective criteria to be used to choose the candidates in question.
  - (a) Time limit for the submission of applications
  - (b) Address to which they must be sent
  - (c) Language(s) in which they must be written
- 12. Criteria which will be applied in the award of the concession where they do not appear in the 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.

17. In case of one-stage procedures:
  - (a) Time limit for receipt of tenders, if different from the time limit the submission of applications
  - (b) date, time and place for the opening of tenders,
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, 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.
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 procurement: nature and extent of works or services, nature and quantity of supplies, nature and extent of services. 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 another Member State or from a third country,

- (c) number of tenders received electronically.
- 10. For each award, name, address including NUTS code 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 of the successful tender, including fees and prices.
- 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. Optionally, method used to calculate the estimated value of the concession, 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, 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.
3. CPV Nomenclature reference No(s); where the contract is divided into lots, this information shall be provided for each lot.
4. At least a summary indication of the nature and quantity of the services and if applicable, works and supplies provided.
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.
4. Description of the concession before and after the modification: nature and extent of the works, nature and quantity or value of supplies, 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 of the new economic operator or operators.
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 VIII

### DEFINITION OF CERTAIN TECHNICAL SPECIFICATIONS

For the purposes of this Directive:

"technical specification", " means one of the following:

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

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 Article 28 (5).

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

CPV Code	Description
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; 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],	Health, social and related services
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 92700000-8; <i>79950000-8 [Exhibition, fair and congress organisation services], 79951000-5 [Seminar organisation services], 79952000-2 [Event services], 79952100-3 [Cultural event organisation services], 79953000-9 [Festival organisation services], 79954000-6 [Party organisation services], 79955000-3 [Fashion shows organisation services], 79956000-0</i>	Administrative, social, educational, healthcare and cultural services

<i>[Fair and exhibition organisation services]</i>	
75300000-9	Compulsory social security services <sup>1</sup>
75310000-2, 75311000-9, 75312000-6, 75313000-3, 75313100-4, 75314000-0, 75320000-5, 75330000-8, 75340000-1	Benefit services
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, 55511000-5 Canteen and other restricted-clientele cafeteria services, 55512000-2 Canteen management services, 55523100-3 School-meal services	Hotel and restaurant services
79100000-5 to 79140000-7; 75231100-5;	Legal services, to the extent not excluded pursuant to Article 10(ca)

<sup>1</sup> These services are not covered by the present Directive where they are organised as non-economic services of general interest. Member States are free to organise the provision of compulsory social services or of other services as services of general interest or as non-economic services of general interest.

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
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] <i>79722000-1 [Graphology services],</i> <i>79723000-8 [Waste analysis services]</i>	Investigation and security services
<i>64000000-6 [Postal and telecommunications services], 64100000-7 [Post and courier services], 64110000-0 [Postal services], 64111000-7 [Postal services related to newspapers and periodicals], 64112000-4 [Postal services related to letters], 64113000-1 [Postal services related to parcels], 64114000-8 [Post office counter services], 64115000-5 [Mailbox rental], 64116000-2 [Post-restante services], 64122000-7 [Internal office mail and messenger services]</i>	<i>Postal Services</i>
<i>50116510-9 [Tyre-remoulding services],</i> <i>71550000-8 [Blacksmith services]</i>	<i>Miscellaneous services</i>

98900000-2 [Services provided by extra-territorial organisations and bodies] and 98910000-5 [Services specific to international organisations and bodies]	International services
--	------------------------

ANNEX XI  
LIST OF EUROPEAN UNION LEGISLATION REFERRED TO IN  
ARTICLE 4 (43) (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.
  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 and where applicable, incidental works and supplies to be procured
  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.
-