



EUROPEAN COMMISSION

Brussels, XXX  
[...](2011) XXX draft

Proposal for a

**DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**on the award of concession contracts**

(Text with EEA relevance)

## EXPLANATORY MEMORANDUM

### **1. CONTEXT OF THE PROPOSAL**

The award of works concessions is presently subject to a limited number of secondary law provisions, while service concessions are covered only by the general principles of the TFEU. This loophole gives rise to serious distortions of the Internal Market, notably the limited access of European undertakings, especially Small and Medium Enterprises, to the economic opportunities related to concession contracts. It is also at the origin of inefficiencies related to the lack of legal certainty.

The present initiative aims to ensure effective access to the market to all EU economic operators and to favour public investments in infrastructures and strategic services by creating an adequate legal framework for the award of concession contracts (thus also Public Private Partnerships).

In the context of severe budgetary constraints and economic difficulties in many EU Member States, the efficient allocation of public funds is subject to special concern. The potential of a legislative initiative on concession contracts for creating a supportive EU framework for PPPs was singled out in the Commission's 2009 Communication on «Mobilising private and public investment for recovery and long term structural change: developing Public Private Partnerships»

Moreover, the Commission announced the intention to adopt a legislative initiative on concessions in its Communication Single Market Act Twelve levers to boost growth and strengthen confidence "Working together to create new growth" of 13 April 2011.

The present draft is pursued in parallel to the revision of Public Procurement Directives<sup>1</sup>. It will result in the adoption of a separate legal instrument, regulating the award of concessions. The two proposals: the one resulting from the revision of the public procurement framework and a directive on concessions, will be submitted for adoption by the Commission in December 2011.

### **2. RESULTS OF CONSULTATIONS WITH THE INTERESTED PARTIES AND IMPACT ASSESSMENTS**

Between 12 May and 9 July 2010, the Commission services launched a public online consultation addressed to the general public.

Between 5 August and 30 September 2010 another public consultation targeting the business community, social partners and contracting entities was organised. The results of the above mentioned consultations confirmed the existence of problems related to the uncertainty of the present rules and demonstrated obstacles that companies face with regard to the access to market. They also pointed to the desirability of an adequate EU intervention.

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<sup>1</sup> COM(2010) 608 final, point 1.4, proposal n° 17.

The abovementioned conclusions have also been corroborated by a number of bilateral meetings with the representatives of Member States, local level as well as undertakings active in the sectors concerned and industry associations.

The results can be found at [http://ec.europa.eu/internal\\_market/consultations/2010/concessions\\_en.htm](http://ec.europa.eu/internal_market/consultations/2010/concessions_en.htm)

The information gathered during the aforementioned consultation fed into the Impact Assessment Report. This report has been accepted by the Impact Assessment Board on 21st March 2011.

The conclusions of the report confirmed the need for a legislative initiative. According to its findings, economic operators are faced with unlevel playing field, often translating into missed business opportunities. This situation gives rise to costs and proves prejudicial for competitors located in other Member States, contracting entities and consumers. Moreover, as the definition of concessions, as well as the precise content of the obligations of transparency and non-discrimination arising from the Treaty remain unclear, the resulting lack of legal certainty increases the risk of cancellation or early termination of illegally awarded contracts and ultimately discourages the authorities from using concessions where this type of contract can be a good solution.

Even if Member States took legislative action to establish a legal framework based on the Treaty principles, still at least two problems remain unresolved: risk of the legal uncertainty related to interpretations of those principles by national lawmakers and large disparities between the legislations in different Member States.

The optimal solution identified was legislation based on the provisions currently applicable to public works concessions, adequately adjusted and complemented with some additional provisions. A more restrictive approach, consisting in the extension of provisions applicable to public contracts, was considered counter-productive, as it would discourage contracting authorities from using concessions.

The selected option is expected to have beneficial impact on transparency, fairness and legal certainty, therefore contributing to a better realisation of a number of objectives of the present initiative, notably a better access to the market, improved investments opportunities and hence more and better quality services.

### **3. LEGAL ELEMENTS OF THE PROPOSAL**

The present Directive provides for a more precise definition of concession contracts, making reference to the notion of operational risk, explaining what types of risk are considered as operational and how to define the significant risk.

It submits services concessions to majority of the obligations which currently apply to the award of works concessions. Moreover, it extends their application to concession contracts in the utilities sector (the award of which is currently exempt from any secondary legislation).

Notably, in order to ensure transparency and equal treatment of all economic operators, the present Directive provides for compulsory publication of concession contracts above certain thresholds (applicable to the value of such contracts calculated following a methodology specified therein) and defines a minimum scope

of information to be communicated to the users. For the same reason, it establishes a minimum deadline for the submission of interest in any concession contract covered by its rules, amounting to 52 days, as this is currently the case for the public works concessions.

Last but not least, the present Directive provides for an extension of the scope of application of the Remedies Directives (Directives 89/665/EEC and 92/13/EC, as amended by Directive 2007/66/EC) to all concession contracts above the threshold. This text guarantees to all interested party an effective possibility to challenge the award decision before a court and provides for some minimal judicial standards which have to be observed by contracting entities.

In addition to the extension of the aforementioned rules, the present Directive provides for obligations related to the award and selection criteria to be applied by the contracting entities while awarding concessions. These rules are less restrictive than similar provisions currently applicable to public contracts. Their purpose is mostly to ensure that such criteria be published in advance, that they are objective and not discriminatory. The present Directive will also establish some basic rules regarding the transparency and fairness of the negotiation process between the parties, reiterating the case law of the Court of Justice of the European Union

The limited character of the proposed rules allows for a joint framework covering concessions in both classic and the utilities sector, preserving specificities of the utilities when absolutely necessary.

#### **4. BUDGETARY IMPLICATION [WHERE NECESSARY]**

[...]

#### **5. OPTIONAL ELEMENTS [WHERE NECESSARY]**

- (1) The absence of clear rules at EU 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, EU citizens do not benefit from quality services at best prices, economic operators, in particular SMEs, are being deprived of their rights within the Internal Market and miss out on important business opportunities while public authorities may fail to manage public resources on a sound financial basis. Therefore, there is a need to create an adequate legal framework for the award of concessions in order to ensure effective and non-discriminatory access to the market to all EU economic operators and legal certainty, favouring public investments in infrastructures and strategic services to the citizen
- (2) The award of award of works concessions is subject to basic rules of Directive 2004/18 while the award of service concessions with a cross-border interest in the Member States by contracting authorities and entities is subject to the principles of the Treaty, principle of freedom of movement of goods, the principle of establishment and the principle of freedom to provide services and to the principles deriving therefrom. However, 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.stemming from national legislation of Member States. Such risk has been confirmed by the extensive case law of the Court of Justice of the European Union which 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 their understanding following therefrom is necessary at the EU level in order to eliminate persisting distortions of the Internal Market.
- (3) 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 those principles so as to guarantee the opening-up of public procurement to competition and adequate legal certainty. Those coordinating provisions should not go beyond what is necessary in order to achieve the aforementioned objectives.
- (4) Minimal 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.
- (5) For procurement the value of which is lower than that triggering the application of provisions of European Union coordination, it is advisable to recall the case-law developed by the Court of Justice of the European Union according to which the rules and principles of the Treaty referred to above apply.
- (6) This Directive shall not in anyway affect the freedom of Member States and/or public authorities to decide on the direct provision of works or services to the public or on the externalisation of such provision to third parties. Member States and/or public authorities remain free to define the characteristics of the service to be provided,

including any conditions regarding the quality or price of the services, in order to pursue their public policy objectives.

- (7) Concessions are contracts whereby the State and /or a contracting authority transfers to a third party the performance of certain tasks falling normally within their own responsibility/competence, in accordance with specific mutually binding obligations which can be legally enforceable. By contrast, certain State acts such as authorisations or licences whereby the State and/or a public authority establishes the conditions for the exercise of an economic activity, or certain agreements such as land lease contracts whereby the State and /or contracting authority or entity establishes only general conditions of use of a geographical should not qualify as concessions.
- (8) Private entities are subject to this Directive only to the extent that they exercise one of the activities covered on the basis of special or exclusive rights. However, those entities should not be subject to this Directive if the rights on the basis of which they exercise these activities have been granted by means of a procedure in which adequate publicity has been ensured and where the granting of these rights was based on objective criteria, notably pursuant to Union legislation.
- (9) The increasingly diverse forms of public action have generated the need to define more clearly the notion of procurement itself. The Directive on concessions refers to the forms of disbursement of public money at the acquisition of works or services for a consideration consisting in exploitation of those works or services. The notion of acquisition should be understood in a broad way in the sense of obtaining the benefits of the works or services in question, not necessarily requiring a transfer of property to the contracting authorities or contracting entities. –
- (10) It has also proven necessary to clarify what should be understood as one single procurement, with the effect that the aggregate value of all concessions concluded for the purpose of this procurement has to be taken into account with regard to the thresholds of the Directive, and that the procurement should be advertised as a whole, possibly split into lots. The concept of one procurement encompasses all supplies, works and services needed for the realisation of a certain project. Indications for the existence of one single project can for instance consist in an overall prior planning and conception by the contracting authority, the fact that the different elements purchased fulfil a single economic and technical function or that they are otherwise logically interlinked and carried out in a narrow time frame.
- (11) Difficulties related to the interpretation of the concepts of concession and public contract have been 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 substantial 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 economic risk involving the possibility that it will not recoup the investments made and the costs incurred in operating the works or services awarded. The application of specific procurement rules governing the award of concessions would not be justified if the awarding entity relieved the contractor of any potential loss, by guaranteeing a minimal revenue, equal or higher to the costs that the contractor has to incur in relation with the performance of the contract. Similarly, where sector specific regulation provides for a guarantee to the concessionaire on breaking even on investments and costs incurred for operating the contract, such contract will not qualify as a concession within the meaning of this Directive.

- (12) To ensure a real opening up of the market and a fair balance in the application of procurement rules in the water, energy, transport and postal services sectors it is necessary for the entities covered to be identified on a basis other than their legal status. It should be ensured, therefore, that the equal treatment of contracting entities operating in the public sector and those operating in the private sector is not prejudiced. It is also necessary to ensure, in keeping with Article 345 of the Treaty on the Functioning of the European Union, that the rules governing the system of property ownership in Member States are not prejudiced.
- (13) Concessions may be awarded by contracting entities for the purpose of meeting the requirements of several activities, possibly subject to different legal regimes. It should be clarified that the legal regime applicable to a single concession intended to cover several activities should be subject to the rules applicable to the activity for which it is principally intended. Determination of the activity for which the concession is principally intended may be based on an analysis of the requirements which the specific concession must meet, carried out by the contracting entity for the purposes of estimating the concession value and drawing up the procurement documents. In certain cases, it might be objectively impossible to determine for which activity the concession is principally intended. The rules applicable to such cases should be indicated.
- (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 these joint ventures and the contracting entities of which they are composed.
- (15) In the light of the results of the evaluation conducted by the Commission services on Public Procurement it appears appropriate to exclude from the full application of the Directive only those services which, by their very nature, have a limited cross-border dimension, namely the so-called services to the person such as certain social, health and educational services. These services are provided within a particular context widely varying amongst the Member States, due to the different cultural traditions. It is therefore appropriate to establish a specific concession regime for these services. Given the importance of the cultural context and the sensitivity of these services, Member States should be given large discretion to organise the choice of the service providers in the way they consider most appropriate.
- (16) This Directive should not apply to concessions awarded by contracting entities and intended to permit the performance of an activity referred to in Annex III if, in the Member State in which this activity is carried out, it is directly exposed to competition on markets to which access is not limited, as established following a procedure provided for to this purpose in accordance with Art. 27 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.

- (17) Being addressed to Member States, the Directive does not apply to the procurement 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 the Directive to procurement governed by specific international rules.
- (18) The application of public procurement rules should not interfere with the freedom of public entities to decide how to organise the way that they carry out their public service tasks. There is however considerable legal uncertainty on how far cooperation between public authorities should be covered by public procurement rules. The relevant case-law of the Court of Justice of the European Union is interpreted divergently between Member States and even between contracting authorities. It is therefore necessary to clarify in which cases concessions concluded between contracting authorities are not subject to the application of public procurement rules. Concessions awarded to controlled entities or cooperation for the joint execution of the public service tasks of the participating contracting authorities and contracting entities referred to in Art. 4 paragraph 1 sub-paragraph 1 should hence be exempted from the application of the rules if the conditions set out in the Directive are met. The sole fact that both parties to an agreement are themselves contracting authorities does not as such exclude the application of procurement rules. The rules of the Directive aim at ensuring that any exempted public-public cooperation does not cause a distortion of competition in relation to private economic operators. Furthermore, the participation of a contracting authority as a tenderer in a procedure for the award of a concession should not cause any distortion of competition.
- (19) For procurement the value of which is lower than that triggering the application of provisions of European Union coordination, it is advisable to recall the case-law developed by the Court of Justice of the European Union according to which the rules and principles of the Treaty referred to above apply.
- (20) 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 thresholds should reflect the clear cross-border interest of concessions to economic operators located in other Member States. To calculate the value of a services concession, account must be taken of the estimated value of all services to be provided by the concessionnaire from the point of view of a potential tenderer.
- (21) 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 itself in view of the future award procedure, and where there are no adequate substitutes, the availability of which should be assessed thoroughly.



- (22) 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.
- (23) 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 relate exclusively to the technical, financial and economic capacity of operators, are announced in the concession notice and cannot preclude an economic operator 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.
- (24) A contracting authority or a contracting entity and a concessionaire, as well as the exercise of public prerogatives which concessions often involve, may justify that the award criteria refer to the capacity of a tenderer in a non discriminatory way. Moreover, contracting authorities or entities are free to set adequate quality standards by using technical specifications or concession performance conditions. Nevertheless, contracting authorities and contracting entities should avoid arbitrariness when choosing and applying the award criteria. They should also ensure that those criteria and their method of application are known in advance to all potential tenderers. It is therefore appropriate to require that such criteria should not offer to the contracting authority an unrestricted freedom of choice. They should be related to the subject matter of the contract and should be announced in the concession notice or documents. Without prejudice to the above Member States and/or contracting authorities or entities may decide to award concessions on the basis of the most economically advantageous criteria.
- (25) Where the contracting authorities and contracting entities choose to award a concession to the most economically advantageous tender, they shall determine the economic and quality criteria on the basis of which they assess the tenders in order to identify which one offers the best value for money. The determination of these criteria depends on the object of the concession since they must allow the level of performance offered by each tender to be assessed in the light of the subject-matter of the concession, as defined in the technical specifications and the value for money of each tender to be measured.
- (26) Concessions are usually long term, complex arrangements where the contractor assumes responsibilities and risks traditionally born by the contracting authorities and contracting entities. For this reason, the latter should maintain a margin of flexibility in organising the awarding process, involving also a possibility to negotiate the content of the contract with the candidates. However, in order to ensure equal treatment and transparency throughout the awarding procedure, it is appropriate to provide for certain requirements as to the structure of the awarding process, including negotiations, the dissemination of information and the availability of written 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.
- (27) The technical specifications drawn up by public purchasers need to allow public procurement to be opened up to competition. To this end, it must be possible to submit tenders which reflect the diversity of technical solutions so as obtain a sufficient level

of competition. Consequently, technical specifications should be drafted in a way as to avoid artificially narrowing down competition through requirements that favour specific economic operator by mirroring key characteristics of the products, services or works habitually offered by that economic operator. Contracting authorities and contracting entities that wish to define environmental requirements for the technical specifications of a given concession may lay down the environmental characteristics, such as a given production method, and/or specific environmental effects of product groups or services. They can use, but are not obliged to use appropriate specifications that are defined in eco-labels, such as the European Eco-label, (multi-)national eco-labels or any other eco-label providing the requirements for the label are drawn up and adopted on the basis of scientific information using a procedure in which stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations can participate, and providing the label is accessible and available to all interested parties.

- (28) It should be stressed that electronic means of information and communication can greatly simplify the publication of concessions and increase the efficiency and transparency of procurement processes. They should therefore to the greatest extent possible be given precedence over traditional means of communication and information exchange. The use of electronic means also leads to savings in time. As a result, provision should be made for reducing the minimum periods where electronic means are used, subject, however, to the condition that they are compatible with the specific mode of transmission envisaged at European Union level
- (29) Contracting authorities and contracting entities from different Member States may be interested in cooperating and in awarding jointly public concessions in order to take the best benefit of internal market potential in terms of economies of scale and risk-benefit sharing, notably for innovative projects involving a greater amount of risk than reasonably supportable by a single contracting authority or contracting entity. Therefore new rules on cross-border joint procurement designating the applicable law should be established in order to facilitate setting up cross-border joint public procurement.
- (30) Concession performance conditions are compatible with this Directive provided that they are not directly or indirectly discriminatory, linked to the subject-matter of the concession and are indicated in the concession notice or in the procurement documents.
- (31) 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 apply during performance of a concession, providing that such rules, and their application, comply with European 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>2</sup> lays down the minimum conditions which must be observed by the host country in respect of such posted workers.
- (32) It is necessary to clarify the conditions under which modifications of a concession during its execution require a new award procedure, taking into account the relevant case-law of the Court of Justice. A new award procedure is required in case of material

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<sup>2</sup> OJ L 18, 21.1.1997, p. 1.

changes to the initial concession, demonstrating the intention of the parties to renegotiate essential terms or conditions of that concession. This is notably the case if the amended conditions would have had an influence on the outcome of the procedure, had they been part of the initial procedure.

- (33) Contracting authorities and contracting entities can be confronted with external circumstances which they could not foresee at the moment of the award of the concession. In this case, a certain degree of flexibility is needed to adapt the concession to these circumstances without new award procedure. The notion of circumstances that a diligent contracting authority or contracting entity could not foresee refers to those circumstances which were unpredictable despite a reasonably diligent preparation of the initial tender by the contracting authority or contracting entity taking into account its available means, the nature and characteristics of the concrete project, good practices in the field in question and the need to ensure an adequate relationship between the resources spent in preparing the tender and its foreseeable value. However, this cannot apply in cases where a modification results in an alteration of the nature of the overall procurement, for instance by replacing the works, products or services to be procured by something different or by fundamentally changing the type of procurement since, in such a situation, a hypothetical influence on the outcome may be assumed.
- (34) The principles of equal treatment and transparency require that the successful tenderer is not replaced by another economic operator without reopening the concession to competition. However, the successful tenderer performing the concession may 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 changes should not automatically require new award procedures for all concessions performed by that undertaking.
- (35) Contracting authorities should have the possibility to foresee modifications to a concession in the concession contract itself, but such review clauses should not give them unlimited discretion. It is hence appropriate to set out to which extent modifications may be foreseen in the initial concession.
- (36) The persisting differences between Member States' national e-Procurement systems and solutions may create barriers for economic operators to participate in electronic procedures, especially from across the borders, making it necessary to adopt common standards and requirements for formats as well as processes and messaging in procurement procedures conducted using electronic means of communication.
- (37) In order to adapt to rapid technical and economic developments, the power to adopt acts in accordance with Article 290 of the Treaty on the Functioning of the European Union should be delegated to the Commission in respect of the technical procedures for the calculation methods concerning thresholds; the lists of central government authorities; references to "NUTS" and to CPV nomenclature; the technical details and characteristics of the devices for electronic receipt; and the exclusive use of electronic means of communication.
- (38) 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 the present 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>3</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>4</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.

- (39) 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>5</sup>.
- (40) 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.
- (41) 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 VII, the amendment of the thresholds implementing powers should be conferred on 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>6</sup>. The advisory procedure should be used for the adoption of implementing acts.
- (42) In view of the specificity of concessions as compared to public contracts, a mere amendment of Directives governing the award of public contracts would not be appropriate. In the interests of clarity of European Union legislation, Directives 2004/18/EC and 2004/17/EC should therefore be repealed and replaced by the present Directive.
- (43) In accordance with point 34 of the Interinstitutional agreement on better law-making<sup>7</sup>, Member States are encouraged to draw up, for themselves and in the interests of the Union, their own tables illustrating, as far as possible, the correlation between this Directive and the transposition measures, and to make them public.

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<sup>3</sup> OJ L 395, 30.12.1989, p. 33.

<sup>4</sup> OJ L 76, 23.3.1992, p. 14.

<sup>5</sup> OJ L 281, 23.11.1995, p. 31.

<sup>6</sup> OJ L 55, 28.2.2011, p. 13.

<sup>7</sup> OJ C 321, 31.12.2003, p. 1.

TITLE I  
DEFINITIONS, GENERAL PRINCIPLES AND SCOPE  
CHAPTER I

*Definitions, general principles and scope*

Section I

*Definitions and scope*

*Article 1*

*Subject-matter and scope*

1. This Directive establishes rules on the procedures for procurement by contracting authorities and by contracting entities giving rise to concessions and whose value is estimated to be not less than the thresholds laid down in Article 9.
2. Procurement within the meaning of this Directive is the purchase or other forms of acquisition of works, supplies or services by one or more contracting authorities or contracting entities from economic operators chosen by:
  - a) Contracting authorities whether or not the works, supplies or services are intended for a public purpose;
  - b) Contracting entities provided that the works supplies or services are intended for the pursuit of one of the activities referred to in Annex III.

An entirety of works, supplies and/or services, even if purchased through different contracts, constitutes a single procurement within the meaning of this Directive, if the contracts are part of one single project. Indications for the existence of one single project consist in overall prior planning and conception by the contracting authority, the fact that the different elements purchased fulfil a single economic and technical function or that they are otherwise logically interlinked and carried out in a narrow time frame.

*Article 2*

*Definitions*

1. For the purposes of this Directive, the definitions set out in paragraphs 2, 3, 4 and 5 shall apply.
2. 'Concessions' are public works concessions, works concessions or services concessions.

A 'public works concession' is a contract for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, where the consideration for the 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.

‘Written’ or ‘in writing’ means any expression consisting of words or figures which can be read, reproduced and subsequently communicated. It may include information which is transmitted and stored by electronic means.

A ‘works concession’ is a contract of the same type of a “public works concession” except for the fact that it is awarded by a contracting entity.

For the purposes of this Directive the execution of works shall mean the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex I or of a work, or the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority exercising a decisive influence on the type or design of the work.

A ‘work’ means the outcome of building or civil engineering works taken as a whole which is sufficient of itself to fulfil an economic or technical function.

A ‘services concession’ is 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 their object the provision of services other than those referred to in Annex I 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.

The right to exploit the works or services implies the transfer to the concessionaire of the substantial operating risk. The concessionaire shall be deemed to assume the substantial 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 of the concession.

That economic risk may consist in:

- i) the risk related to the use of the works or the demand for the provision of the service; or
- ii) the risk related to the availability of the infrastructure provided by the concessionaire or used for the provision of services to users.

The duration of the concession shall be limited to the time estimated to be necessary for the concessionaire to recoup the investments made and the costs incurred in operating the works or services together with a reasonable return on invested capital.

3. The term "economic operator" means any natural or legal person, or a contracting authority or entity, or a group of such persons and/or entities which offers on the market, respectively, the execution of works and/or a work, supplies or services.

An economic operator that has submitted a tender shall be designated a "tenderer". One An economic operator that has sought an invitation or has been invited to take part in a procurement procedure shall be designated a 'candidate'.

4. The term “concessionaire” means an economic operator having been awarded a concession.

5. ‘Electronic means’ means using 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.

*Article 3*  
*Contracting authorities*

1. All contracting authorities shall comply with the provisions set out in this Directive when awarding concessions covered by it. 'Contracting authorities' are State, regional or local authorities, bodies governed by public law, associations formed by one or several such authorities or one or several of such bodies governed by public law.

"Regional authorities" include all authorities of the administrative units falling under NUTS 1 and 2, as referred to by Regulation (EC) 1059/2003 of the European Parliament and of the Council of 26 May 2003 on the establishment of a common classification of territorial units for statistics (NUTS)<sup>8</sup>.

"Local authorities" include all authorities of the administrative units falling under NUTS 3 and smaller administrative units, as referred to by Regulation 1059/2003.

"A body governed by public law" is any body:

- (a) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;
- (b) having legal personality; and
- (c) 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 having 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.

Where a body is operating in normal market conditions, aims to make a profit, and bears the losses associated with the exercise of its activity, it does not have the purpose of meeting needs in the general interest, not having an industrial or commercial character within the meaning of point (a).

*Article 4*  
*Contracting entities*

1. This Directive shall apply to contracting entities which pursue one of the activities referred to in Annex III and:

- (1) are contracting authorities as defined in Article 3 or
- (2) public undertakings as defined in paragraph 2 or
- (3) when they are not contracting authorities or public undertakings, operate on the basis of special or exclusive rights granted by a competent authority of a Member State.

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<sup>8</sup> OJ L 154, 21.6.2003, p. 1

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 when these authorities, directly or indirectly, in relation to an undertaking:

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

For the purposes of this Directive, 'special or exclusive rights' mean rights granted by a competent authority of a Member State by way of any legislative, regulatory or administrative provision the effect of which is to limit the exercise of activities defined in Annex III to one or more entities, and which substantially affects the ability of other entities to carry out such activity.

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

Such is notably the case in respect of:

- (a) procurement procedures with a prior call for competition in conformity with Directive [2004/18/EC or 2004/17/EC] or this Directive, or
- (b) procedures pursuant to other legislative acts of the European Union, ensuring adequate prior transparency for granting authorisations on the basis of objective criteria. A non-exhaustive list of such legislative acts is identified in Annex XII.

#### *Article 5* *General Principles*

Contracting authorities and contracting entities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate way. The design of the procurement may not be made with the objective of excluding it from the scope of this Directive.



## Article 6

### *Social and other specific services*

Contracts for social and other specific services listed in Annex XI falling within the scope of this Directive shall be subject to the obligations of Article 26 (1)

## Article 7

### *Mixed procurement*

1. Contracts which have as their object services and supplies shall be awarded according to the provisions of the current directive if:

- a) The main object of the contract in question are services and
- b) They are concessions within the meaning of Article 2 subparagraph 5

2. Concessions which have as their object both services within the meaning of Article 6 and other services shall be awarded according to the provisions applicable to the main object of the contract in question

3. Concessions which have as their object both works and services shall be awarded according to the provisions applicable to the main object of the contract in question.

4. 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.

5. In case of contracts which have as their object procurement 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, the part of the contract which constitutes procurement covered by this Directive shall be awarded according to the provisions thereof. This obligation shall not apply when the different parts of the contract are objectively not separable.

6. If one of the activities for which the concession is intended is subject to the provisions applicable to concessions awarded by contracting authorities of this Directive and the other to provisions applicable to concessions awarded by contracting entities and if it is objectively impossible to determine for which activity the concession is principally intended, the concession shall be awarded in accordance with provisions applicable to concessions awarded by contracting authorities.

7. In the case of concessions subject to this Directive and contracts subject to [Directive 2004/18/EC or 2004/17/EC] or 2009/81/EC<sup>9</sup>, the part of the contract which constitutes a concession covered by this Directive shall be awarded in accordance with the provisions thereof. This obligation shall not apply when the different parts of the contract are objectively not separable.

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

## Article 8

### *Concessions covering several activities*

1. 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.

However, the choice between awarding a single concession and awarding a number of separate concessions may not be made with the objective of excluding it from the scope of this Directive.

2. 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>10</sup> and if it is objectively impossible to determine for which activity the contract or the concession is principally intended, the contract or the concession shall be awarded in accordance with this Directive.

## Article 9

### *Thresholds*

1. This Directive shall apply to:

- (a) concessions concluded by the contracting entities for the pursuit of one of the activities referred to in Annex III and to
- (b) concessions concluded by the contracting authorities,

where the value of the concession is equal to or greater than EUR 5 000 000.

However, concessions the value of which is equal to or greater than EUR 2 500 000 shall be subject to the obligation to publish a concession award notice as provided for in Article 26 (2)..

## Article 10

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

1. The calculation of the estimated value of a concession within the meaning of Article 2 shall be based on the total amount payable, net of VAT, as estimated by the contracting authority or the contracting entity, including any form of option and any extension of the duration of the concession.

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

2. The choice of the method used to calculate the estimated value of a concession may not be made with the intention of excluding it from the scope of this Directive. Thus, no works project or entirety of services may be subdivided with the effect of preventing its coming within the scope of this Directive, unless justified by objective reasons.

3. This estimate must be valid at the moment at which the concession notice is sent to the Commission, or, in cases where such notice is not foreseen, at the moment at which the

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

contracting authority or the contracting entity commences the concession procurement procedure, in particular by defining its essential characteristics.

4. With regard to public works concessions and works concessions, calculation of the estimated value shall take account of both the cost of the works and of the total estimated value of the supplies and services that are made available to the contractor by the contracting authorities or entities provided that they are necessary for executing the works.

- (a) Where a proposed work or purchase of services may result in concessions being awarded at the same time in the form of separate lots, account shall be taken of the total estimated value of all such lots.

Where the aggregate value of the lots is equal to or exceeds the threshold laid down in Article 9, this Directive shall apply to the awarding of each lot.

- (b) Contracting authorities or contracting entities may award concessions for individual lots without applying the procedures provided for under this Directive, provided that the estimated value net of VAT of the lot concerned is less than EUR 1 million.. However, the aggregate value of the lots thus awarded without applying this Directive shall not exceed 20% of the aggregate value of all the lots into which the proposed work or the proposed purchase of services has been divided.

5. The value of services concessions shall be the estimated total value of services to be provided by the concessionaire during the whole duration of the concession.

The basis for calculating the estimated concession value shall, where appropriate, be the following:

- (c) insurance services: the premium payable and other forms of remuneration;
- (d) banking and other financial services: the fees, commissions, interest and other forms of remuneration;
- (e) design: fees, commission payable and other forms of remuneration;

6. The value of concessions shall include both the estimated revenue to be received from third parties and the amounts to be paid by the contracting authority or the contracting entity.

## Section II

### *Exclusions*

#### *Article 11*

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

1. This Directive shall not apply to concessions awarded by a contracting authority or by a contracting entity to a contracting authority or to a contracting entity as referred to in paragraph 1 subparagraph 1 of Article 4 or to an association of 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 concessions which are subject to special legislation concerning the management of networks infrastructure by operators, enjoying an exclusive right, designated by a Member State, in compliance with general and specific provisions of European Union law, applicable at the time of entry into force of the present exclusion, and which are subject to regulatory constraints and comply with usage tariffs set by an administrative authority qualifying as a third party to the contract, aimed at ensuring equal access, transparency and good management of the network.

3. This Directive shall not apply to concessions which the contracting authority or a contracting entity is obliged to award in accordance with procedural rules:

- (a) pursuant to an international agreement concluded in conformity with the Treaty on the Functioning of the European Union between a Member State and one or more third countries and covering works, supplies or services intended for the joint implementation or exploitation of a project by the signatory States; all agreements shall be communicated to the Commission, which may consult the Advisory Committee for Public Contracts referred to in Article 51 (2) ;
- (b) pursuant to a concluded international agreement relating to the stationing of troops and concerning the undertakings of a Member State or a third country;
- (c) pursuant to the particular procedure of an international organisation.
- (d) concessions fully financed by an international organisation or international financing institution.

In case of concessions co-financed for a considerable part by an international organisation or international financing institution the parties decide on applicable procurement procedures which shall be in conformity with the provisions of the Treaty on the Functioning of the European Union.

4. This Directive shall not apply to service concessions for:

- (b) the acquisition, development, production or co-production of programme material intended for broadcasting, defined as transmission and distribution using any form of electronic network, that are awarded by broadcasters, nor to concessions for broadcasting time, that are awarded to broadcasters;
- (c) Public passenger transport services as defined in Regulation (EC) 1370/2007.

## *Article 12*

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

1. This Directive shall not apply to concessions which the contracting entities award for purposes other than the pursuit of their activities as described in Annex III or for the pursuit of such activities in a third country, in conditions not involving the physical use of a network or geographical area within the European Union.

The contracting entities shall notify the Commission or the national oversight body at their request of any activities which they regard as excluded. The Commission may periodically publish in the Official Journal of the European Union for information purposes, lists of the categories of activities which it considers to be covered by this exclusion. In so doing, the Commission shall respect any sensitive commercial aspects that the contracting entities may point out when forwarding this information.

### *Article 13*

#### *Exclusions applicable to concessions awarded by contracting authorities*

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

2. For the purposes of this Article:

(a) 'public telecommunications network' means the public telecommunications infrastructure which enables signals to be conveyed between defined network termination points by wire, by microwave, by optical means or by other electromagnetic means;

(b) a 'network termination point' means all physical connections and their technical access specifications which form part of the public telecommunications network and are necessary for access to, and efficient communication through, that public network;

(c) 'public telecommunications services' means telecommunications services the provision of which the Member States have specifically assigned, in particular, to one or more telecommunications entities;

(d) 'telecommunications services' means services the provision of which consists wholly or partly in the transmission and routing of signals on the public telecommunications network by means of telecommunications processes, with the exception of broadcasting and television.

### *Article 14*

#### *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 of 13 June 1983 based on the Article 44 (2) (g) of the Treaty on consolidated accounts<sup>11 12</sup>.

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<sup>11</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).

<sup>12</sup> Editorial Note: The title of the Directive has been adjusted to take account of the renumbering of the Articles of the Treaty in accordance with Article 12 of the Treaty of Amsterdam; the original reference was to Article 54(3)(g) of the Treaty.

In the case of entities not subject to that Directive, "affiliated undertaking" shall mean any undertaking over which:

- the contracting entity may exercise, directly or indirectly, a dominant influence within the meaning of Article 4 (2) of the present Directive or
- which may exercise a dominant influence over the contracting entity or
- which, 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.

2. Article 18 notwithstanding and provided that the conditions in paragraph 3 are met, this Directive shall not apply to concessions awarded:

- (a) by a contracting authority or a contracting entity to an affiliated undertaking, or
- (b) by a joint venture, formed exclusively by a number of contracting authorities or entities for the purpose of:
  - carrying out activities within the meaning of Annex III, to an undertaking which is affiliated with one of those contracting entities or
  - carrying out works or services to an undertaking which is affiliated with one of those contracting authorities

3. Paragraph 2 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) to public works concessions and 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.

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

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

#### *Article 15*

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

1. Article 18 notwithstanding, this Directive shall not apply to concessions awarded:

- (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,
- 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.

*Article 16*  
*Notification of information*

Contracting entities shall notify to the Commission or the national oversight body, at their request, the following information regarding the application of paragraphs 2 and 3 of Article 14 and Article 15.

- (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 or the national oversight body 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 14 or 15.

*Article 17*  
*Exclusion of activities which are directly exposed to competition*

Concessions awarded by contracting entities shall not be subject to this Directive, if in the Member State in which it is performed the activity has been found to be directly exposed to competition in accordance with Article 27 of Directive [replacing Directive 2004/17/EC].

*Article 18*  
*Relations between public authorities*

1. A concession awarded by a contracting authority or a contracting entity as referred to in paragraph 1 subparagraph 1 of Article 4 to another legal person falls outside the scope of this Directive when the following cumulative conditions are met:

- a) such an authority or entity exercises over the legal person concerned a control which is similar to that which it exercises over its own departments;
- b) at least 90% of the activities of that legal person are carried out for the controlling contracting authority or entity or other legal persons controlled by the same contracting authority or entity;
- c) there is no private participation in the controlled legal person;

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 person a control similar to that which it exercises over its own departments when it exercises a decisive influence over both strategic objectives and significant decisions of the controlled legal person. This implies that other stakeholders of the legal person cannot, on their side, exercise decisive influence over

strategic objectives or significant decisions of the legal person, for instance through significant shares in voting rights or veto rights;

2. Paragraph 1 also applies when a controlled entity which is a contracting authority or entity as referred to in paragraph 1 subparagraph 1 of Article 4 awards a concession to its parent, or to another legal person controlled by the same contracting authority, provided that there is no private participation in the legal person being awarded the public concession.

3. A contracting authority or a contracting entity as referred to in paragraph 1 subparagraph 1 of Article 4 can also award a concession without applying the provisions of the current Directive to a legal person which it controls together with other such contracting authorities or entities, under the following conditions:

a) the contracting authorities or entities as referred to in paragraph 1 subparagraph 1 of Article 4 exercise together over the legal person a control which is similar to that which it exercises over its own departments.

b) at least 90% of the activities of that legal person are carried out for the controlling contracting authorities or entities as referred to in paragraph 1 subparagraph 1 of Article 4 or other legal persons controlled by the same contracting authority or entity;

c) there is no private participation in the controlled legal person.

Joint control within the meaning of point (a) presupposes that the decision-making bodies of the controlled legal person are composed of representatives of all participating contracting authorities or entities as referred to in paragraph 1 subparagraph 1 of Article 4, which are thus able to jointly exert decisive influence over the strategic objectives and significant decisions of the controlled legal person, and that the controlled legal person does not pursue any interests which are distinct from that of the public authorities affiliated to it nor does it draw any gains other than the reimbursement of actual costs from the public contracts with the contracting authorities.

4. An agreement concluded between two or more contracting authorities or entities as referred to in paragraph 1 subparagraph 1 of Article 4 will not be deemed to be concession within the meaning of paragraph 2 of Article 2 of this Directive, when the following cumulative conditions are met:

a) the character of the agreement is that of genuine co-operation between the participating contracting authorities or entities as referred to in paragraph 1 subparagraph 1 of Article 4 aimed at carrying out jointly their public service tasks and involving mutual rights and obligations of the parties;

b) the agreement is governed only by considerations relating to the public interest;

c) the participating contracting authorities or entities as referred to in paragraph 1 subparagraph 1 of Article 4 shall not perform on the open market more than 10% in terms of turnover of the activities which are relevant in the context of the agreement. The agreement shall not involve financial transfers between the participating contracting authorities or entities as referred to in paragraph 1 subparagraph 1 of Article 4, other than those corresponding to the reimbursement of actual costs of the works, services or supplies;



d) there is no private participation in any of the contracting authorities or entities involved.

5. The absence of private participation shall be verified at the time of award of the concession or of the conclusion of the agreement.

The exceptions foreseen in this Article will cease to apply at the moment where private participation takes place, with the effect that ongoing concessions need to be opened to competition through regular procurement procedures.

### Section III

#### *Specific situations*

##### *Article 19*

##### *Reserved concessions*

Member States may reserve the right to participate in concession procurement procedures to sheltered workshops or provide for such concessions to be performed in the context of sheltered employment programmes where more than 50% of the employees concerned are persons with disabilities who, by reason of the nature or the seriousness of their impairments, cannot carry on occupations under normal conditions.

The notice used to make the call for competition shall make reference to this Article.

##### *Article 20*

##### *Research and development services*

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 or 73220000-0, provided that

- (a) the benefits accrue exclusively to the contracting authority or contracting entity for its use in the conduct of its own affairs, and
- (b) the service provided is wholly remunerated by the contracting authority or contracting entity

This Directive shall not apply to public service concessions for research and development services with CPV reference numbers 73000000-2 to 73436000-7, except 73200000-4, 73210000-7 or 73220000-0 if one of the above conditions is not met.

## CHAPTER II

### *Principles*

*Article 21*  
*Economic operators*

Candidates or tenderers 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.

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.

Groups of economic operators may submit tenders or put themselves forward as candidates. Contracting authorities and contracting entities shall not establish specific conditions for participation of such groups in procurement procedures which are not imposed on individual candidates. In order to submit an application or a tender, these groups may not be required by the contracting authorities or contracting entities to assume a specific legal form.

Any specific conditions for the performance of the concession by a group must be justified by objective reasons and proportionate. In particular, the group selected may be required to assume a specific legal form when it has been awarded the concession, to the extent that this change is necessary for the satisfactory performance of the concession.

*Article 22*  
*Nomenclatures*

1. Any references to nomenclatures in the context of public procurement shall be made using the 'Common Procurement Vocabulary (CPV)' as adopted by Regulation (EC) No 2195/2002<sup>13</sup>.

2. The Commission shall be empowered to adopt delegated acts in accordance with Article 49 concerning the reference numbers used in Annex I and XI, whenever changes in the CPV nomenclature must be reflected in this Directive and they do not imply a modification of the scope of this Directive.

*Article 23*  
*Confidentiality*

1. Without prejudice to the provisions of this Directive, in particular those concerning the obligations relating to the advertising of awarded concessions and to the information to candidates and tenderers set out in Articles 35 and in accordance with the national law to which the contracting authority or a contracting entity is subject, in particular legislation regarding access to information, the contracting authority or a contracting entity shall not disclose information forwarded to it by economic operators which they have designated as confidential; such information includes, in particular, technical or trade secrets and the confidential aspects of tenders.

2. Contracting authorities or contracting entities may impose on economic operators requirements aimed at protecting the confidential nature of information which the contracting authorities or contracting entities make available throughout the procurement procedure. Such

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<sup>13</sup> OJ L 340, 16.12.2002, p. 1.

requirements may notably be imposed by contracting entities with regard to information made available in connection with the operation of a qualification system, whether or not this has been the subject of a notice on the existence of a qualification system used as a means of calling for competition.

*Article 24*  
*Rules applicable to communication*

1. For all communication and information exchange, contracting authorities and contracting entities may choose between the following means of communication, except where use of electronic means is mandatory pursuant to Articles 27 (2) and 29 of this Directive:

- electronic means in accordance with paragraphs 4 and 5;
- post or fax;
- telephone in the cases and circumstances referred to in paragraph 6, or
- a combination of those means.

Member States may make mandatory the use of electronic means of communication for concessions, going beyond the obligations established in Articles 27 (2) and 29 of this Directive.

3. The means of communication chosen must be generally available and thus not restrict economic operators' access to the procurement 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.

4. The tools to be used for communicating by electronic means, as well as their technical characteristics, must be non-discriminatory, generally available and interoperable with the information and communication technology products in general use and shall not restrict economic operators' access to the procurement procedure. Contracting authorities and contracting entities may, where necessary, require use of tools which are not generally available, provided that they offer alternative means of access as specified in Annex XIII

5. The following rules are applicable to devices for the electronic transmission and receipt of tenders and for the electronic receipt of applications:

- a) information on specifications for the electronic submission of tenders and requests to participate, including encryption and time-stamping, shall be available to interested parties;
- b) devices, methods for authentication and electronic signatures shall comply with the requirements of Annex XIII;
- c) contracting authorities and contracting entities shall specify the level of security required for the electronic means of communication in the various stages of the procurement procedure followed. The level shall be proportionate to the risks attached.

d) Electronic Signatures as defined by Directive 1999/93/EC<sup>14</sup> are required, contracting authorities and contracting entities shall accept signatures supported by a qualified electronic certificate referred to in the Trusted List provided for in the European Commission Decision 2009/767/EC<sup>15</sup>, created with or without a secure signature creation device.

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<sup>14</sup> Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures, OJ L 13, 19.1.2000, p. 12.

<sup>15</sup> OJ L 274, 20.10.2009, p. 36.

TITLE II  
RULES ON CONCESSIONS

CHAPTER I  
*Publication and Transparency*

*Article 25*

*Publication of concession notices*

1. Contracting authorities and contracting entities wishing to award a concession shall make known their intention by means of a concession notice or a notice on the establishment of a qualification system.
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 standard forms adopted by the Commission in accordance with the procedure referred to in Article 51.
3. The obligation referred to in paragraph 1 shall not apply in the following cases:
  - (a) when no tenders or no suitable tenders or no applications have been submitted in response to an open procedure or a restricted procedure, provided that the initial conditions of the concession are not substantially altered and on condition that a report is sent to the Commission if it so requests;

For the purposes of this provision, a tender shall be considered not to be suitable where

- it is irregular or unacceptable, and
- it is completely irrelevant to the concession, being incapable of meeting the contracting authority or contracting entity's needs as specified in the procurement documents.

In particular, tenders shall be considered to be

- irregular, where they do not comply with the tender specifications or where the prices offered are sheltered from normal competitive forces, or
  - unacceptable, where they have been received late, submitted by tenderers who do not have the requisite qualifications or whose price either exceeds the contracting authority or contracting entity's budget as determined prior to the launching of the procurement procedure or have been found to be abnormally low. The prior determination of the budget must be documented in writing.
- (b) where the works or services can be supplied only by a particular economic operator for any of the following reasons:
    - (i) an absence of competition for technical reasons;

- (ii) the protection of patents, copyrights or other intellectual property rights;
- (iii) the protection of other exclusive rights.

This exception only applies when no reasonable alternative or substitute exists and the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement.

(c) for new works or services consisting in the repetition of similar works or services entrusted to the economic operator to which the same contracting authorities or contracting entities awarded an original concession, provided that such works or services are in conformity with a basic project for which the original concession was awarded.. The basic project shall mention the extent of possible additional works or services and the conditions under which they will be awarded.

As soon as the first project is put up for tender, the possible use of this procedure shall be disclosed and the total estimated cost of subsequent works or services shall be taken into consideration by the contracting authorities or contracting entities when they apply the provisions of Article 9

This exemption may be relied upon only during the original duration of the concession.

## *Article 26*

### *Publication of concession award notices*

1. Contracting authorities and contracting entities which have awarded a concession shall, within two months of the award of the concession, send a notice of the results of the procurement procedure.

Such notice shall contain the information set out in Annex VI and VII and be published in accordance with the provisions of Article 27

2. The obligation referred to in paragraph 1 shall also apply to those services concessions the estimated value of which, as calculated according to the method referred to in Article 10 (5), is equal to or higher than 2 500 000 EUR.

## *Article 27*

### *Form and manner of publication of notices*

1. Notices shall include the information mentioned in Annexes IV to VII and in the format of standard forms, including standard forms for corrigenda, adopted by the Commission in accordance with the procedure referred to in Article 51.

2. Notices shall be drawn up, transmitted by electronic means to the Commission and published in accordance with Annex X. Notices shall be published no later than five days after they are sent. The costs of publication of notices by the Commission shall be borne by the European Union.

3. Concession notices shall be published in full in an official language of the European Union as chosen by the contracting authority or contracting entity, this original language version constituting the sole authentic text. 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.

5. 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, mentioning the date of that publication. Such confirmation shall constitute proof of publication.

6. Contracting authorities and contracting entities may publish concession notices which are not subject to the publication requirements laid down in this Directive provided these notices are sent to the Commission by electronic means in accordance with the format and procedures for transmission indicated in [Annex X].

#### *Article 28*

##### *Publication at national level*

1. Notices and their contents may not be published at national level before the date on which they are sent to the Commission.

2. Notices published at national level shall not contain information other than that contained in the notices dispatched to the Commission but shall mention the date of dispatch of the notice to the Commission.

#### *Article 29*

##### *Electronic availability of procurement documents (specifications and additional documents)*

1. Contracting authorities and contracting entities shall offer unrestricted and full direct access free of charge by electronic means to the specifications and any supporting documents from the date of publication of the notice in accordance with Annex X or the invitation to confirm interest is sent. The text of the notice or of these invitations shall specify the internet address at which this documentation is accessible.

2. Provided that it has been requested in good time, additional information relating to the specifications and any supporting documents shall be supplied by the contracting authorities and contracting entities or competent departments not later than six days before the time limit fixed for the receipt of tenders.

#### *Article 30*

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

1. Where contracting authorities or entities choose to set up a qualification system in accordance with Article 40 the system shall be the subject of a notice as referred to in Annex V indicating the purpose of the qualification system and how to have access to the rules concerning its operation. Where the system is of a duration greater than three years, the notice shall be published annually. Where the system is of a shorter duration, an initial notice shall suffice.

2. Contracting authorities or entities shall offer unrestricted and full direct access free of charge by electronic means to the specifications and any supporting documents from the date of publication of the notice in accordance with shall be offered as soon as possible and at the latest when the invitation to tender or to negotiate is sent. The text of the notice or of these invitations shall specify the internet address at which this documentation is accessible.

3. The European Commission shall ensure that the publication of a notice on the qualification system shall be available to economic operators for the period of validity of the system.

## CHAPTER II *Conduct of the procedure*

### Section I *Joint concessions, time limits and technical specifications*

#### *Article 31* *Joint concessions t between contracting authorities or contracting entities from different Member States*

1. Without prejudice to the provisions of Article 18 contracting authorities or contracting entities from different Member States may jointly award concessions by using one of the means described in the present article.

2. One or more contracting authorities or contracting entities from different Member States may jointly award a concession. In that case, the participating contracting authorities or entities shall conclude an agreement that determines

- b) which national provisions shall apply to the concession procurement procedure. They may choose for that purpose the national provisions of any Member States in which at least one of the participating authorities or entities is located;
- (a) the internal organisation of the procurement procedure, in particular the management of the procedure, the sharing of responsibilities, the distribution of the works, supplies or services to be procured, the conclusion of concessions.

3. In the absence of an agreement determining the applicable public procurement law, the national legislation governing the concession award shall be determined following the rules set out below:.

- (a) Where the procedure is conducted or managed by one particular contracting authority or contracting entity, the national provisions of the Member State of that contracting authority or entity shall apply;.
- (b) Where the procedure is not conducted or managed by one particular contracting authority and
  - concerns a public works or works concession, contracting authorities or entities shall apply the national provisions of the Member State where most of the works are located;



- concerns a service concession, contracting authorities or entities shall apply the national provisions of the Member State where the major part of the services is provided.;

- (c) Where it is not possible to determine the applicable national law pursuant to points (a) or (b), contracting authorities or entities shall apply the national provisions of the Member State of the contracting authority which supports the biggest share of the costs.

4. Decisions on the award of public contracts in cross-border public procurement shall be subject to the ordinary review mechanisms available under the national law applicable.

5. In order to enable the effective performance of review mechanisms, Member States shall allow that the decisions of review bodies in the sense of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts<sup>16</sup> and Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors<sup>17</sup> located in other Member States are fully executed in their domestic legal order, if such decisions involve contracting authorities or contracting entities established on their territory participating in the relevant cross-border public procurement procedure.

### *Article 32* *Technical specifications*

1. The technical specifications as defined in point 1 of Annex IX shall be set out in the procurement documentation, such as concession notice, procurement documents or additional documents. They shall define the characteristics required of a works, service or supply. They shall furthermore specify whether the transfer of intellectual property rights will be required.

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

Where mandatory accessibility standards are adopted by a legislative act of the European Union, shall, as far as accessibility criteria are concerned, be defined by reference thereto.

2. Technical specifications shall afford equal access for tenderers and not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.

3. Without prejudice to mandatory national technical rules, to the extent that they are compatible with European Union law, the technical specifications shall be formulated in one of the following ways:

- (c) in terms of performance or functional requirements, including environmental characteristics, provided that the parameters are sufficiently precise to allow

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<sup>16</sup> OJ L 395, 30.12. 1989, p. 33.

<sup>17</sup> OJ L 76, 23.03.1992, p. 14.

tenderers to determine the subject-matter of the contract and to allow contracting authorities to award the contract;

- (d) by reference to technical specifications defined in Annex IX and, in order of preference, to national standards transposing European standards, European technical approvals, common technical specifications, international standards, other technical reference systems established by the European standardisation bodies or — when these do not exist — national standards, national technical approvals or national relating to the design, calculation and execution of the works and use of the supplies. Each reference shall be accompanied by the words ‘or equivalent’;
- (e) in terms of performance or functional requirements as mentioned in subparagraph (a), with reference to the specifications mentioned in subparagraph (b) as a means of presuming conformity with such performance or functional requirements;
- (f) by referring to the specifications mentioned in subparagraph (b) for certain characteristics, and by referring to the performance or functional requirements mentioned in subparagraph (a) for other characteristics.

4. Unless justified by the subject-matter of the contract, technical specifications shall not refer to a specific make or source, or a particular process, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products. Such reference shall be permitted on an exceptional basis, where a sufficiently precise and intelligible description of the subject-matter of the contract pursuant to paragraph 3 is not possible; such reference shall be accompanied by the words "or equivalent".

5. Where a contracting authority or contracting entity makes use of the option of referring to the specifications mentioned in paragraph 3(b), it cannot reject a tender on the grounds that the works, supplies and services tendered for do not comply with the specifications to which it has referred, once the tenderer proves in its tender by whatever appropriate means that the solutions it proposes satisfy in an equivalent manner the requirements defined by the technical specifications.

6. Where a contracting authority or contracting entity uses the option laid down in paragraph 3(a) to formulate in terms of performance or functional requirements, it shall not reject a tender for works, supplies or services which comply with a national standard transposing a European standard, a European technical approval, a common technical specification, an international standard or a technical reference system established by a European standardisation body, where these specifications address the performance or functional requirements which it has laid down.

In its tender, the tenderer must prove by any appropriate means that the work, supply or service in compliance with the standard meets the performance or functional requirements of the contracting authority.

*Article 33*  
*Labels*

1. Where contracting authorities or contracting entities lay down environmental, social or other characteristics of a works, service or supply in terms of performance or functional requirements as referred to in Article 32 paragraph 3 (a), they may require that these works, services or supplies bear a specific label, provided that:

- (g) the requirements for the label only concern characteristics which are linked to the subject-matter of the contract and are appropriate to define characteristics of the works, supplies or services that are the object of the concession;
- (h) the requirements for the label are drawn up on the basis of scientific information or based on other objectively verifiable and non-discriminatory criteria;
- (i) the labels are established in an open and transparent procedure in which all stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations, can participate, and
- (j) they are accessible to all interested parties.

Contracting authorities or contracting entities requiring a specific label shall accept all equivalent labels, the requirements for which include the requirements for the label indicated by the contracting authorities or contracting entities. Where the economic operator concerned has no access to any of these labels, or no possibility of obtaining them within the relevant time limits, contracting authorities or contracting entities shall also accept other appropriate means of proof such as a technical dossier of the manufacturer.

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

3. Where the label produced by the economic operator does not include verification by a recognized body, contracting authorities may require, in addition to the label, the production of the means of proof referred to in Article 34 (1), subject to Article 34 (2).

*Article 34*  
*Test reports, certification and other means of proof*

1. Contracting authorities or contracting entities may require that economic operators provide a test report from a recognised body or a certificate issued by such a body as means of proof of conformity with the technical specifications.

Where contracting authorities require the production of certificates drawn up by recognised bodies attesting conformity with a particular technical specification, certificates from equivalent other recognised bodies shall also be accepted by the contracting authorities.

2. They shall also accept other appropriate means of proof such as a technical dossier of the manufacturer where the economic operator concerned has no access to the certificates or test

rappports referred to in paragraph 1, or no possibility of obtaining them within the relevant time limits.

3. Recognised bodies, within the meaning of this Article, are test and calibration laboratories and any certification and inspection bodies accredited in accordance with Regulation (EC) No 765/2008 of the European Parliament and of the Council<sup>18</sup>.

4. Member States shall make available to other Member States, upon request, any information related to the evidence and documents produced to prove compliance with the technical requirements referred to in Articles 32, 33 and this Article. The competent authorities of the Member State of establishment shall provide this information in accordance with provisions on governance as referred to in Article 46.

#### *Article 35* *Setting time limits*

1. When fixing the time limits for the submission of applications for the concession and submission of tenders, contracting authorities or 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 by this Chapter.

2. Where tenders can be made only after a visit to the site or after on-the-spot inspection of the documents supporting the procurement documents, the time limits for the submission of applications for the concession shall be extended so that all economic operators concerned may be aware of all the information needed to produce applications.

#### *Article 36*

##### *Time limits for submission of applications for the concession*

1. Where contracting authorities and contracting entities resort to a concession, the time limit for the submission of applications for the concession shall be not less than 52 days from the date on which the concession notice was sent.

2. The time limit for receipt of tenders may be reduced by five days where the contracting entity accepts that tenders may be submitted by electronic means in conformity with Article 24. If, for whatever reason, the concession documents and the supporting documents or additional information, although requested in good time, have not been supplied within a reasonable time before the time limit fixed for the receipt of tenders, or where tenders can be made only after a visit to the site or after on-the-spot inspection of the documents supporting the concession documents, the time limits for the receipt of tenders shall be extended accordingly, so that all economic operators concerned may be aware in good time of all the information needed for the preparation of a tender.

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<sup>18</sup> OJ L 218, 13.8.2008, p. 30.

## Section II

### *Choice of participants and award of concessions*

#### *Article 37*

##### *General principles*

Concessions shall be awarded on the basis of the criteria set out by the contracting authority or contracting entity in accordance with Article 41 provided that:

- the tender complies with the requirements, conditions and criteria set out in the concession notice or in the invitation to confirm interest and in the procurement documents; and
- the tender comes from a tenderer who meets the selection criteria set out by the contracting authority or contracting entity in accordance with Articles 39 and 40

#### *Article 38*

##### *Procedural guarantees*

1. During the awarding procedure, contracting authorities and contracting entities shall ensure equal treatment of all tenderers. In particular, they shall not provide information in a discriminatory manner which may give some tenderers an advantage over others.

2. Whenever the contracting authority or entity limits the number of applicants 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.

3. The rules on the organisation of the awarding procedure, including rules on communication, on the stages of the procedure and on timing, shall be established in advance and communicated to all participants.

4. Where the awarding procedure initiated by a contracting authority or entity involves negotiation, the method or plan of such negotiation shall be established in advance in a clear manner and communicated to all participants, including the aspects of the offer to be negotiated and the expected date of the award. The expected date of the award may only be postponed following communication to all participants.

Adjustments or modifications of the offer during the negotiation stage shall comply with the initial terms of the awarding procedure.

5. The contracting authority or entity shall establish a written record of formal deliberations and any other steps and events relevant for the procurement procedure. In particular, it shall ensure, by all appropriate means, the traceability of the negotiations.

6. Contracting authorities and entities shall as soon as possible inform each candidate and tenderer of decisions reached concerning the award of a concession.

7. On demand from any tenderer that have made an admissible tender contracting authorities and entities shall also inform the interested parties of the grounds for rejection of their

applications or tenders, the characteristics and relative advantages of the tender selected and the name of the successful tenderer.

8. However, contracting authorities may decide 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 39*

#### *Selection of and qualitative assessment of candidates*

1. In procedures for the award of concessions, contracting authorities and contracting entities shall conduct the selection of candidates or tenderers in transparent conditions, on the basis of non-discriminatory and proportionate selection criteria referring exclusively to the technical, financial and economic capacity of operators.

The contracting authority or entity shall specify, in the concession notice, the selection criteria it will use and the required level of specific competence of the economic operators.

Contracting authorities and contracting entities shall also indicate in the concession notice the reference or references 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. An economic operator may, where appropriate and for a particular concession, rely on the capacities of other entities, regardless of the legal nature of its links with them. That economic operator shall, in that case, prove to the contracting authority that it will have at its disposal, throughout the period of the concession, the necessary resources, for example, by producing an undertaking by those entities to that effect.

However, contracting authorities or contracting entities may require that certain critical tasks not exceeding 20% of the value of the contract shall be performed directly by the tenderer himself or, in the case of a tender being submitted by a group of economic operators as referred to in Article 21, a participant in the group.

3. Under the same conditions, a group of economic operators as referred to in Article 21 may rely on the capacities of participants in the group or of other entities.

### *Article 40*

#### *Qualification systems*

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

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

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

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

Where those criteria and rules include technical specifications, the provisions of Articles 32 to 34 shall apply. The criteria and rules may be updated as required.

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

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

A written record of qualified economic operators shall be kept.

4. Any charges that are billed in connection with requests for qualification or with updating or conserving an already obtained qualification pursuant to the system shall be proportionate to the general costs.

#### *Article 41*

##### *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 guarantee that tenders are assessed in conditions of effective competition.

Those 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 entity.

Those criteria have to ensure the possibility of effective competition and must be accompanied by requirements which permit the information provided by the tenderers to be effectively verified. Contracting authorities and contracting entities must therefore verify effectively on the basis of the information and proof provided by the tenderers, whether the tenders meet the award criteria.

2. The Contracting authority or entity shall indicate in the concession notice or documents the relative weighting which it gives to each of the criteria set out in paragraph 1 or list those criteria in descending order of importance.

3. Without prejudice to paragraph 1, contracting authorities and entities may also award concessions on the basis of the most economically advantageous tender.

The most economically advantageous tender from the point of view of the contracting authority or entity shall be identified on the basis of criteria linked to the subject-matter of the concession in question.

These criteria can include, for example

- quality, such as technical merit, aesthetic and functional characteristics, accessibility, design for all users, environmental characteristics.
- relevant experience of the staff assigned to executing the concession in question can be taken into consideration. Following award of the concession, such staff may only be replaced with the consent of the contracting authority or entity who must verify that replacements have equivalent experience;
- price and other costs,, including on the basis of a life-cycle costing approach as referred to in Article 42.
- after-sales service and technical assistance, delivery date and delivery period or period of completion, commitments with regard to parts and security of supply;
- The specific process of production or provision of the requested works, supplies or service or of any other stage of its life-cycle including criteria concerning the human resources. Contracting authorities and contracting entities shall only take into account factors directly involved in these processes.

4. In the case referred to in paragraph 3, the contracting authority or entity shall specify the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender.

Those weightings can be expressed by providing for a range with an appropriate maximum spread.

Where weighting is not possible for objective reasons, the contracting authority or entity shall indicate the criteria in descending order of importance.

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

#### *Article 42* *Life- cycle costing*

1. Life-cycle costing is the assessment expressed in monetary value of the following costs over the life-cycle of a product, service or works:
  - internal costs and
  - external environmental costs directly linked to the life-cycle, provided they can be monetarised and verified. Such external costs may include, for example, costs of emissions of CO<sub>2</sub> and of other pollutant emissions.
2. Whenever a common methodology for the calculation of life-cycle costs is adopted by a legislative act of the European Union, it shall be applied if life-cycle costing is included in the award criteria referred to in Article 41 paragraph (3).

A list of such legislative acts will be set out in Annex II , which shall be updated pursuant to the procedure set out in Article 49.



TITLE III  
RULES ON PERFORMANCE OF CONCESSIONS

*Article 43*

*Rules on subcontracting*

The conceding authority or entity may request the candidates for concessions to specify in their tenders the percentage, if any, of the total value of the work or services for which the concession is to be awarded which they intend to assign to third parties.

*Article 44*

Modification of concessions during their term

1. A modification of the provisions of a concession during its term constitutes a new award within the meaning of this Directive, thereby requiring a new procurement procedure in accordance with the provisions of the Directive, if it renders the concession substantially different in character from the one initially concluded.

A modification of a concession during its term shall be regarded as being substantial, in particular, if:

- it introduces conditions which, had they been part of the initial procurement procedure, would have allowed for the admission of tenderers other than those initially admitted or would have allowed for the acceptance of a tender other than the one initially accepted or
- it changes the economic balance of the concession in favour of the concessionaire or
- it extends the scope of the concession considerably to encompass supplies, services or works not initially covered.

The replacement of the concessionaire constitutes in principle a substantial modification. However, this does not apply in case of universal or partial succession of another economic operator into the contractual position of the initial concessionaire, following corporate restructuring operations, insolvency or on the basis of a contractual clause, provided that this does not entail other substantial modifications to the concession and is not aimed at circumventing the application of this Directive.

A modification, even though substantial according to the criteria set out above, shall not require a new procurement procedure if the following conditions are met:

- it has been brought about by circumstances which a diligent contracting authority or entity could not foresee and
- it does not alter the nature of the overall procurement
- in case of concessions awarded by contracting authorities: any increase in price is not higher than 50% of the value of the original concession.

Concession modifications shall not be considered substantial within the meaning of this article, if they have been provided for in the procurement documents in clear, precise and unequivocal review clauses or options. Such clauses shall state the scope and nature of possible modification as well as the conditions under which they may be used. They may not provide for modifications that would alter the nature of the overall procurement.

2. Contracting authorities and contracting entities may publish in the Official Journal of the European Union a notice on their intention to modify a concession. Such notices shall include the information set out in Annex VIII and be published in accordance with the provisions of Article 27.

Member States may provide that modifications may not be legally challenged if the following conditions are met:

- the value of the modification can be expressed in monetary terms and is below 5 % of the price of the initial contract;
- no objections to this modification have been raised by economic operators or the oversight body during a period of 30 days following publication of intention in the Official Journal of the European Union.

#### *Article 45*

##### *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 currency, if

- the exceptions foreseen in Article 18 cease to apply following a private participation in the legal person awarded the contract pursuant to Article 18 (4);
- a modification of the concession constitutes a new award within the meaning of Article 44;
- the Court of Justice of the European Union finds, in a procedure under Article 258 of the Treaty on the Functioning of the European Union, 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 observing its obligations under the Treaties and the present Directive.

#### *Article 46*

##### *Provisions on Governance*

Member States shall apply to concessions falling within the scope of the present Directive with the necessary adaptations all the provisions on Governance laid down in the Directives [replacing Directive 2004/17/EC and Directive 2004/18/EC]

TITLE V  
MODIFICATIONS OF DIRECTIVES ON REMEDIES IN THE FIELD OF PUBLIC  
PROCUREMENT

*Article 47*

*Amendments to Directive 89/665/EEC*

1. In Article 1(1) of Directive 89/665/EEC, the first and second subparagraphs are 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 contracts are excluded in accordance with Articles 11, 13 to 16 and 20 of that Directive.

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

2. In Article 1 first paragraph, 3 subparagraph, Article 2a paragraph 2, Article 2b point a), Article 2d paragraph 1 point a), Article 2d paragraph 4 and Article 3 of Directive 89/665/EEC the words "Directive 2004/18/EC" shall be followed by the words "or Directive [on Concessions]"

3. In Article 2a paragraph 2, subparagraph 4, first indent, of Directive 89/665/EEC the words "in Article 41 (2) of Directive 2004/18/EC, subject to the provisions of Article 41 (3) of that Directive" shall be followed by the words "or in Article 38 (7) of Directive [on Concessions], subject to the provisions of Article 38 (8) of that Directive".

4. In Article 2f paragraph 1, point a), first indent, of Directive 89/665/EEC the words "with Articles 35 (4), 36 and 37 of Directive 2004/18/EC" shall be followed by the words "or with Articles 26 and 27 of Directive [on Concessions]".

5. In Article 2f paragraph 1, point a), second indent, of Directive 89/665/EEC the words "Article 41 (2) of Directive 2004/18/EC, subject to the provisions of 41 (3) of that Directive" shall be followed by the words " or in in Article 38 (7) of Directive [on Concessions], subject to the provisions of Article 38 (8) of that Directive".

*Article 48*

*Amendments to Directive 92/13/EEC*

1. In Article 1(1) of Directive 92/13/EEC, the first and second subparagraph are replaced by the following:

"1. 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 the award of concessions] unless such contracts are excluded in accordance with Articles 11, 12, 14 to 16 and 20 of that Directive"

2. In Article 1 first paragraph, 3 subparagraph, Article 2a paragraph 2, Article 2b point a), Article 2c, Article 2d first paragraph point a), Article 2d paragraph 4 and Article 8 of Directive 92/13/EEC the words "Directive 2004/17/EC" shall be followed by the words "or Directive [on Concessions]"

3. In Article 2a paragraph 2, subparagraph 4, first indent, of Directive 92/13/EEC the words "in Article 49 (2) of Directive 2004/17/EC" shall be followed by the words "or in Article 38 (7) of Directive [on Concessions], subject to the provisions of Article 38 (8) of that Directive".

4. In Article 2f paragraph 1, point a), first indent, of Directive 92/13/EEC the words "with Articles 43 and 44 of Directive 2004/17/EC" shall be followed by the words "or with Articles 26 and 27 of Directive [on Concessions]".

5. In Article 2f paragraph 1, point a), second indent, of Directive 92/13/EEC the words " Article 49 (2) of Directive 2004/17/EC" shall be followed by the words " or in in Article 38 (7) of Directive [on Concessions], subject to the provisions of Article 38 (8) of that Directive".

TITLE VI  
DELEGATED POWERS, IMPLEMENTING POWERS AND FINAL PROVISIONS

*Article 49*  
*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 2, 20, 22, 52, 42 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 2, 20, 22, 52 and 42 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 50*  
*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 49(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 51*  
*Implementing powers*

1. The implementing acts referred to in Articles 25 to 27 and 30 shall be adopted in accordance with the advisory procedure, as they do not present any impact either from the financial point of views or on the nature and scope of obligations stemming from this Directive. These acts are characterised by a mere administrative purpose and serve to facilitate the application of the rules set by this Directive.

2. The Commission shall be assisted by the Advisory Committee for Public Contracts established by Council Decision 71/306/EEC<sup>19</sup>. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.

3. Where reference is made to this Article, Article 4 of Regulation (EU) No 182/2011 shall apply.

*Article 52*  
*Revision of the thresholds*

1. The Commission shall verify the thresholds established in Article 9 every two years from 30 June 2015 and shall, if necessary, revise them. The value of the thresholds set pursuant to paragraph 1 in the national currencies of the Member States which are not participating in monetary union is normally to be adjusted every two years from 1 January 2015 onwards. The calculation of such value shall be based on the average daily values of those currencies expressed in euro over the 24 months terminating on the last day of August preceding the revision with effect from 1 January.

2. The revised thresholds referred to in paragraph 1 and their corresponding values in the national currencies referred to in paragraph 3 shall be published by the Commission in the Official Journal of the European Union at the beginning of the month of November following their revision.

*Article 53*  
*Transposition*

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 30 June 2014 at the latest. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.

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 54*  
*Repeals*

Paragraphs 3 and 4 of Article 1 and Title III of Directive 2004/18/EC and paragraph 3 of Directive 2004/17/EC shall be repealed with effect from the date shown in Article 53.

References to the repealed paragraphs 3 and 4 of Article 1 and Title III of Directive 2004/18/EC Directive shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex XVII.

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<sup>19</sup> OJ L 185, 16.8.1971, p. 15.

*Article 55*

*Review*

The Commission shall review the economic effects on the Internal Market resulting from the application of the thresholds set in Article 9 and report thereon to the European Parliament and the Council by 30 June 2016.

*Article 56*

*Entry into force*

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

*Article 57*

*Addressees*

This Directive is addressed to the Member States.

Done at Brussels,

**ANNEX I**  
**LIST OF THE ACTIVITIES REFERRED TO IN ARTICLE 2(2)<sup>20</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
		45.12	Test drilling and boring	This class includes: — test drilling, test boring and core sampling for construction, geophysical, geological or similar purposes. This class excludes: — drilling of production oil or gas wells, see 11.20. — water well drilling, see 45.25, — shaft sinking, see 45.25, — oil and gas field exploration, geophysical, geological and seismic surveying, see 74.20.	45120000
	45.2		Building of complete constructions or parts thereof; civil engineering		45200000
		45.21	General	This class includes:	45210000

<sup>20</sup>

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



		construction of buildings and civil engineering works	<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>Except:</p> <ul style="list-style-type: none"> <li>-</li> <li>45213316</li> <li>45220000</li> <li>45231000</li> <li>45232000</li> </ul>
	45.22	Erection of roof covering and frames	<p>This class includes:</p> <ul style="list-style-type: none"> <li>— erection of roofs,</li> <li>— roof covering,</li> <li>— waterproofing.</li> </ul>	45261000
	45.23	Construction of highways, roads, airfields and sport facilities	<p>This class includes:</p> <ul style="list-style-type: none"> <li>— construction of highways, streets, roads, other vehicular and pedestrian ways,</li> <li>— construction of railways,</li> <li>— construction of airfield runways,</li> <li>— construction work, other than buildings, for stadiums, swimming pools, gymnasiums, tennis courts, golf courses and other sports installations,</li> <li>— painting of markings on road surfaces and car parks.</li> </ul> <p>This class excludes:</p> <ul style="list-style-type: none"> <li>— preliminary earth moving, see 45.11.</li> </ul>	<p>45212212 and DA03</p> <ul style="list-style-type: none"> <li>45230000</li> <li>except:</li> <li>-</li> <li>45231000</li> <li>-</li> <li>45232000</li> <li>-</li> <li>45234115</li> </ul>
	45.24	Construction of water projects	<p>This class includes</p> <ul style="list-style-type: none"> <li>— construction of:</li> <li>—</li> <li>— waterways, harbour and river works, pleasure ports (marinas), locks, etc.,</li> <li>— dams and dykes,</li> </ul>	45240000

				— dredging, — subsurface work.	
		45.25	Other construction work involving special trades	This class includes: — construction activities specialising in one aspect common to different kinds of structures, requiring specialised skill or equipment, — construction of foundations, including pile driving, — water well drilling and construction, shaft sinking, — erection of non-self-manufactured steel elements, — steel bending, — bricklaying and stone setting, — scaffolds and work platform erecting and dismantling, including renting of scaffolds and work platforms, — erection of chimneys and industrial ovens. This class excludes: — renting of scaffolds without erection and dismantling, see 71.32	45250000 45262000
	45.3		Building installation		45300000
		45.31	Installation of electrical wiring and fittings	This class includes: installation in buildings or other construction projects of: — electrical wiring and fittings, — telecommunications systems, — electrical heating systems, — residential antennas and aerials, — fire alarms, — burglar alarm systems, — lifts and escalators, — lightning conductors, etc.	45213316 45310000 Except: - 45316000
		45.32	Insulation work activities	This class includes: — installation in buildings or other construction projects of thermal, sound or vibration insulation. This class excludes: — waterproofing, see 45.22.	45320000
		45.33	Plumbing	This class includes: — installation in buildings or other construction projects of: — — plumbing and sanitary equipment, — gas fittings, — heating, ventilation, refrigeration or air-conditioning equipment and ducts, — sprinkler systems.	45330000

				This class excludes: — installation of electrical heating systems, see 45.31.	
		45.34	Other building installation	This class includes: — installation of illumination and signalling systems for roads, railways, airports and harbours, — installation in buildings or other construction projects of fittings and fixtures n.e.c.	45234115 45316000 45340000
	45.4		Building completion		45400000
		45.41	Plastering	This class includes: — application in buildings or other construction projects of interior and exterior plaster or stucco, including related lathing materials.	45410000
		45.42	Joinery installation	This class includes: — installation of not self-manufactured doors, windows, door and window frames, fitted kitchens, staircases, shop fittings and the like, of wood or other materials, — interior completion such as ceilings, wooden wall coverings, movable partitions, etc. This class excludes: — laying of parquet and other wood floor coverings, see 45.43.	45420000
		45.43	Floor and wall covering	This class includes: — laying, tiling, hanging or fitting in buildings or other construction projects of: — — ceramic, concrete or cut stone wall or floor tiles, — parquet and other wood floor coverings carpets and linoleum floor coverings, — including of rubber or plastic, — terrazzo, marble, granite or slate floor or wall coverings, — wallpaper.	45430000
		45.44	Painting and glazing	This class includes: — interior and exterior painting of buildings, — painting of civil engineering structures, — installation of glass, mirrors, etc. This class excludes: — installation of windows, see 45.42,	45440000
		45.45	Other building completion	This class includes: — installation of private swimming pools, — steam cleaning, sand blasting and similar activities for building exteriors,	45212212 and DA04 45450000

				— other building completion and finishing work n.e.c. This class excludes: — interior cleaning of buildings and other structures, see 74.70.	
	45.5		Renting of construction or demolition equipment with operator		45500000
		45.50	Renting of construction or demolition equipment with operator	This class excludes: — renting of construction or demolition machinery and equipment without operators, see 71.32.	45500000

(1) Council Regulation (EEC) No 3037/90 of 9 October 1990 on the statistical classification of economic activities in the European Community (OJ L 293, 24.10.1990, p. 1), Regulation as last amended by Commission Regulation (EEC) No 761/93 (OJ L 83, 3.4.1993, p. 1).

## **ANNEX II**

### **LIST OF EU LEGISLATION REFERRED TO IN ARTICLE 42 (2)**

- Directive 2009/33/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of clean and energy-efficient road transport vehicles<sup>21</sup>.

## **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; or
  - (b) the supply of gas or heat to such networks.

<sup>21</sup> OJ L 120, 15.5.2009, p. 5.

The supply of gas or heat to networks which provide a service to the public by a contracting entity referred to in paragraph 1 subparagraph 2 and subparagraph 3 of Article 4 shall not be considered a relevant activity within the meaning of paragraph 1 where:

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

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; or
- (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 subparagraph 2 and paragraph 3 of Article 4 shall not be considered a relevant activity within the meaning of paragraph 1 where:

- (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
- (k) 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; or
- (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:

- (a) are connected with 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) are connected with 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 subparagraph 1 and paragraph 2 of Article 4 shall not be considered a relevant activity within the meaning of paragraph 1 where:

- (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; and
  - (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.
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 postal services or, on the conditions set out in paragraph 2 (c), other services than postal services.

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

- (a) "postal item": means an item addressed in the final form in which it is to be carried, irrespective of weight. In addition to items of correspondence, such items also include for instance books, catalogues, newspapers, periodicals and postal packages containing merchandise with or without commercial value, irrespective of weight;
- (b) "postal services": means services consisting of the clearance, sorting, routing and delivery of postal items. This shall include both services falling within as well as services falling outside the scope of the universal service set up in conformity with Directive 97/67/EC; and
- (c) "other services than postal services": means services provided in the following areas:
  - mail service management services (services both preceding and subsequent to despatch, such as "mailroom management services"),
  - added-value services linked to and provided entirely by electronic means (including the secure transmission of coded documents by electronic

means, address management services and transmission of registered electronic mail),

- services concerning postal items not included in point (a), such as direct mail bearing no address,
- financial services, as defined in the CPV under the reference numbers from 66100000-1 to 66720000-3 and in Article and including in particular postal money orders and postal giro transfers,
- philatelic services, and
- logistics services (services combining physical delivery and/or warehousing with other non-postal functions),

on condition that such services are provided by an entity which also provides postal services within the meaning of point (b) and provided that the conditions set out in Article 27 (1) of the Directive [replacing Directive 2004/17/EC] are not satisfied in respect of the services falling within point (b).

7. Activities relating to the exploitation of a geographical area for the purpose of:
  - (a) extracting oil or gas, or
  - (b) exploring for or extracting coal or other solid fuels.

#### **ANNEX IV**

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

3. 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. Type of contracting authority or entity and main activity exercised.
5. Description of the procurement: nature and extent of works, nature and quantity or value of supplies, nature and extent of services, CPV Nomenclature reference No(s). Where the concession is divided into lots, this information shall be provided for each lot. Where appropriate, description of any options.
6. NUTS code for the main location of works in case of works concessions or NUTS code for the main place of performance service concessions; where the concession is divided into lots, this information shall be provided for each lot.

7. Estimated total value of concession(s); where the concession is divided into lots, this information shall be provided for each lot, together with detailed method of calculation of the estimated total value of the concession, in accordance with Art. 10 .
8. Where the concession is to be subdivided into lots, indication of the possibility of tendering for one, for several or for all of the lots; indication of any possible limitation of the number of lots that may be awarded to any one tenderer.
9. Time-frame for delivery or provision of supplies, works or services and, as far as possible, duration of the concession.
10. Conditions for participation, including:
  - (l) where appropriate, indication whether the concession is restricted to sheltered workshops, or whether its execution is restricted to the framework of protected job programmes,
  - (m) 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,
  - (n) a list and brief description of selection criteria; minimum level(s) of standards possibly required; indication of required information (self-declarations, documentation).
11. Description of award procedure used, if the procedure is to be conducted in stages, number of candidates to be admitted to a given stage or to be invited to submit tenders and objective criteria to be used to choose the candidates in question.
12.
  - (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
13. Criteria which will be applied in the award of the concession
14. Date of dispatch of the notice
15. 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.
16. Where appropriate, particular conditions to which performance of the concession is subject.
17. Address where applications or tenders shall be transmitted.
18. In case of one-stage procedures:
  - (o) Time limit for receipt of tenders
  - (p) time frame during which the tenderer must maintain its tender,



- (q) date, time and place for the opening of tenders,
  - (r) persons authorised to be present at such opening.
19. Where appropriate, indication of requirements and conditions related to the use of electronic means of communication
  20. Information whether the concession is related to a project and /or programme financed by European Union funds.

## ANNEX V

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

1. Name, identification number (where provided for in national legislation), address including NUTS code, telephone, fax number, email and internet address of the contracting authority or entity and, where different, of the service from which additional information may be obtained.
2. Type of contracting authority or entity and main activity exercised.
3. Where appropriate, state whether the concession is reserved for sheltered workshops or whether its performance is reserved in the context of sheltered employment programmes.
4. Purpose of the qualification system (description of the goods, services or works or categories thereof subject to concessions to be awarded through the system - nomenclature reference No(s)). NUTS code for the main location of works in case of works concessions or NUTS code for the main place of performance in service concessions.
5. Conditions to be fulfilled by the economic operators in view of their qualification pursuant to the system and the methods according to which each of those conditions will be verified. Where the description of such conditions and verification methods is voluminous and based on documents available to interested economic operators, a summary of the main conditions and methods and a reference to those documents shall be sufficient.
6. Period of validity of the qualification system and the formalities for its renewal.
7. Reference to the fact that the notice acts as the call for competition.
8. Address where further information and documentation concerning the qualification system can be obtained (where different from the addresses mentioned under 1).
9. Name and address of the body responsible for appeal and, where appropriate, mediation procedures. Precise information concerning time-limits for lodging appeals, or, if need be, the name, address, telephone number, fax number and e-mail address of the service from which this information may be obtained.

10. Where known, criteria referred to in Article 41 to be used for award of the concession, as well as their weighting or their order of importance, shall be mentioned where they do not appear in the specifications or will not be indicated in the invitation to tender or to negotiate.
11. Where appropriate, indication of requirements and conditions related to the use of electronic means of communication
12. Any other relevant information.

**ANNEX VI**  
**INFORMATION TO BE INCLUDED IN CONCESSION AWARD NOTICES**

**I INFORMATION TO BE INCLUDED IN CONCESSION AWARD NOTICES  
PUBLISHED IN ACCORDANCE WITH ARTICLE 26 (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.
2. Type of contracting authority or entity and main activity exercised.
3. Description of the procurement: nature and extent of works, nature and quantity or value of supplies, nature and extent of services, CPV Nomenclature reference No(s). Where the concession is divided into lots, this information shall be provided for each lot. Where appropriate, description of any options.
4. 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.
5. Description of award procedure used, in the case of award without prior publication, justification.
6. Criteria referred to in Article 41 which were used for award of the concession or concessions.
7. Date of concession award decision or decisions;
8. Number of tenders received with respect of each award, including:
  - (s) number of tenders received from economic operators which are small and medium enterprises,
  - (t) number of tenders received from abroad,
  - (u) number of tenders received electronically.
9. For each award, name, address including NUTS code, telephone, fax number, email address and internet address of the successful tenderer(s) including

- (v) information whether the successful tenderer is small and medium enterprise,
  - (w) information whether the concession was awarded to a consortium.
10. Value and main financial terms of the awarded concession, including fees and prices.
  11. Where appropriate, for each award, value and proportion of concession likely to be subcontracted to third parties.
  12. Information whether the concession is related to a project and /or programme financed by European Union funds.
  13. Name and address of the oversight body and the body responsible for review and, where appropriate, mediation procedures. Precise information concerning the deadline for review procedures, or if need be, the name, address, telephone number, fax number and email address of the service from which this information may be obtained
  14. Date(s) and reference(s) of previous publications in the Official Journal of the European Union relevant to the concession(s) advertised in this notice.
  15. Date of dispatch of the notice.
  16. Any other relevant information.

**II. INFORMATION TO BE INCLUDED IN CONCESSION AWARD NOTICES  
PUBLISHED IN ACCORDANCE WITH ARTICLE 26(2)**

1. Name, identification number (where provided for in national legislation), address including NUTS code, telephone, fax number, email and internet address of the contracting authority or entity and, where different, of the service from which additional information may be obtained.
2. Description of the procurement: nature and extent of works, nature and quantity or value of supplies, nature and extent of services, CPV Nomenclature reference No(s). Where the concession is divided into lots, this information shall be provided for each lot. Where appropriate, description of any options.
3. Type of contracting authority or entity and main activity exercised.
4. Date of concession award decision or decisions;
5. For each award, name, address including NUTS code, telephone, fax number, email address and internet address of the economic operators to which the concession has been awarded.
6. Value and main financial terms of the award, including fees and prices.
7. Detailed method of calculation of the estimated total value of the concession, in accordance with Article 10..

**ANNEX XVII**  
**INFORMATION TO BE INCLUDED IN CONCESSION AWARD NOTICES**  
**CONCERNING CONCESSIONS FOR SOCIAL AND OTHER SPECIFIC SERVICES**  
**(ARTICLE 26 (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.
2. Type of contracting authority or entity and main activity exercised.
3. At least a summary indication of the nature and quantity of the services and if applicable, works and supplies provided.
4. Number of tenders received.
5. Name and address of the chosen economic operator(s).
6. Any other relevant information.

**ANNEX VIII**  
**INFORMATION TO BE INCLUDED IN NOTICES OF MODIFICATIONS OF A**  
**CONCESSION DURING ITS TERM ACCORDING TO ARTICLE 44**

1. Name, identification number (where provided for in national legislation), address including NUTS code, telephone, fax number, email and internet address of the contracting authority or entity and, where different, of the service from which additional information may be obtained.
2. CPV Nomenclature reference No(s);
3. NUTS code for the main location of works in case of public works concessions or works concessions or NUTS code for the main place of delivery or performance in service concessions;
4. Description of the procurement before and after the modification: nature and extent of the works, nature and quantity or value of supplies, nature and extent of services.
5. Where applicable, increase in price caused by the modification.
6. Description of the circumstances which have rendered necessary the modification.
7. Date of concession award decision.
8. Where applicable, the name, address including NUTS code, telephone, fax number, email address and internet address of the new economic operator or operators.
9. Information whether the concession is related to a project and /or programme financed by European Union funds.
10. Name and address of the oversight body and the body responsible for review and, where appropriate, mediation procedures. Precise information concerning the deadline for review procedures, or if need be, the name, address, telephone number, fax number and email address of the service from which this information may be obtained.

**ANNEX IX**  
**DEFINITION OF CERTAIN TECHNICAL SPECIFICATIONS**

For the purposes of this Directive:

1. (a) "technical specification", in the case of public works concessions or works concessions, means the totality of the technical prescriptions contained in particular in the procurement 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. These characteristics shall 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. They shall 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) "technical specification", in the case of service concessions, means 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;

2. "standard" means a technical specification approved by a recognised standardising body for repeated or continuous application, compliance with which is not compulsory and which falls into one of the following categories:

- international standard: a standard adapted by an international standards organisation and made available to the general public,
- European standard: a standard adopted by a European standards organisation and made available to the general public,
- national standard: a standard adopted by a national standards organisation and made available to the general public;

3. "European technical approval" means a favourable technical assessment of the fitness for use of a product for a particular purpose, based on the fulfilment of the essential requirements for building works, by means of the inherent characteristics of the product and the defined conditions of application and use. European technical approvals are issued by an approval body designated for this purpose by the Member State;

4. "Common technical specification" means a technical specification laid down in accordance with a procedure recognised by the Member States which has been published in the Official Journal of the European Union;

5. "Technical reference": any deliverable produced by European standardisation bodies, other than European standards, according to procedures adopted for the development of market needs.

**ANNEX X**  
**FEATURES CONCERNING PUBLICATION**

1. Publication of notices

Notices referred to in Articles 25, 26 and 30 must be sent by the contracting authorities or entities to the Publications Office of the European Union in the format established by implementing measures to be adopted by the Commission in accordance with the procedure referred to Article 51.

- (a) Notices referred to in Articles 25, 26 and 30 are published by the Publications Office of the European Union
- (b) The Publications Office of the European Union will give the contracting authority or entity the confirmation referred to in Article 27(5).

2. Publication of complementary or additional information

- (a) Contracting authorities and entities shall publish the specifications and the additional documents in their entirety on the Internet.

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 XI**  
**SERVICES REFERRED TO IN ARTICLE 6**

CPV Code	Description
7511000-4 and from 85000000-9 to 85323000-9 (except 85321000-5 and 85322000-2)	Health and social services
75121000-0, 75122000-7, 75124000-1	Administrative educational, healthcare and cultural services
75300000-9	Compulsory social security services
75310000-2, 75311000-9, 75312000-6, 75313000-3, 75313100-4, 75314000-0, 75320000-5, 75330000-8, 75340000-1	Benefit services
98000000-3	Other community, social and personal services
98120000-0	Services furnished by trade unions
98131000-0	Religious services

**ANNEX XII**  
**LIST OF EUROPEAN UNION LEGISLATION REFERRED TO IN ARTICLE 4(2)**

Rights which have been granted by means of a procedure in which adequate publicity has been ensured and where the granting of these 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 98/30/EC.
- (b) Authorisation or an invitation to tender for the construction of new electricity production installations in accordance with the provisions of Directive 96/92/EC.
- (c) The granting in accordance with the procedures laid down in Article 9 of Directive 97/67/EC of authorisations in relation to a postal service which is not or shall not be reserved.
- (d) A procedure for granting an authorisation to carry on an activity involving the exploitation of hydrocarbons in accordance with Directive 94/22/EC.
- (e) Public service contracts within the meaning of Regulation (EC) No 1370/2007 which have been awarded on the basis of a competitive tendering procedure in accordance with its Article 5(3).

**ANNEX XIII**  
**REQUIREMENTS RELATING TO DEVICES FOR THE ELECTRONIC RECEIPT**  
**OF TENDERS, REQUESTS FOR PARTICIPATION AND PLANS AND PROJECTS**  
**IN CONTESTS**

1. Devices for the electronic receipt of tenders, requests for participation and plans and projects in contests must at least guarantee, through technical means and appropriate procedures, that:

- (a) the exact time and date of the receipt of tenders, requests to participate and the submission of plans and projects can be determined precisely;
- (b) it may be reasonably ensured that, before the time limits laid down, no-one can have access to data transmitted under these requirements;
- (c) where that access prohibition is infringed, it may be reasonably ensured that the infringement is clearly detectable;
- (d) only authorised persons may set or change the dates for opening data received;
- (e) during the different stages of the procurement procedure or of the contest access to all data submitted, or to part thereof, must be possible only through simultaneous action by authorised persons;
- (f) simultaneous action by authorised persons must give access to data transmitted only after the prescribed date;
- (g) data received and opened in accordance with these requirements must remain accessible only to persons authorised to acquaint themselves therewith, and
- (h) authentication of tenders must conform to the requirements set out in this Annex.

2. Contracting authorities shall be deemed to offer suitable alternative means of access within the meaning of Article 24 (4) where they:



- (a) offer unrestricted and full direct access by electronic means to these tools from the date of publication of the notice in accordance with Annex X or the invitation to confirm interest is sent. The text of the notice or the invitation to confirm interest shall specify the internet address at which these tools are accessible;
  - (b) ensure that tenderers established in other Member States than the contracting authority's may access the procurement procedure through the use of provisional tokens made available online at no extra cost, or
  - (c) support an alternative channel for electronic submission of tenders.
4. To implement Article 24 (5) with regard to electronic signatures, the following rules shall apply:
- (a) The contracting authority shall establish the required advanced signature format on the basis of formats established in Commission Decision 2011/130/EU<sup>22</sup> and shall put in place necessary measures to be able to process these formats technically;
  - (b) In case of tenders signed with the support of a qualified certificate that is included in the Trusted list, and which shall be accepted pursuant Article 24(5)(d) (as long as the signature is valid) , no additional requirements can be applied that may hinder the use of these signatures by tenderers.