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Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on the award of concession contracts

(Text with EEA relevance)

{SEC(2011) 1588 final}

{SEC(2011) 1589 final}

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

The Commission announced the intention to adopt a legislative initiative on concessions in its communication *The Single Market Act Twelve levers to boost growth and strengthen confidence* of 13 April 2011.

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, in particular limiting access by European businesses, especially small and medium-sized enterprises, to the economic opportunities offered by concession contracts. The lack of legal certainty also results in inefficiencies.

The present initiative aims to reduce the uncertainty surrounding the award of concessions contracts, and thereby benefit public authorities and economic operators. EU law does not restrict a contracting authority or entity's freedom to perform the public interest tasks falling within its remit by using its own resources, but when a contracting authority decides to call on an outside entity to carry out such tasks, all EU economic operators must be granted effective access to the market.

In the context of severe budgetary constraints and economic difficulties in many EU Member States, efficient allocation of public funds is of particular concern. An adequate legal framework for the award of concession contracts would favour public and private investment in infrastructure and strategic services at best value for money. The potential of a legislative initiative on concession contracts to create 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*.

This draft is being put forward in tandem with the revision of Public Procurement Directives.¹ It will result in the adoption of a separate legal instrument regulating the award of concessions which, together with the two proposals to revise Public Procurement Directives (2004/17/EC and 2004/18/EC), aims at creating a modern public procurement legislative framework.

2. RESULTS OF CONSULTATIONS WITH THE INTERESTED PARTIES AND IMPACT ASSESSMENT

Between 12 May and 9 July 2010, the Commission held a public online consultation open to the general public. Between 5 August and 30 September 2010 another public consultation targeting the business community, social partners and contracting entities was held. The consultations confirmed that the lack of legal certainty caused problems and they demonstrated the obstacles that companies face with regard to market access. They also suggested that appropriate EU action should be taken. The

¹ COM(2010) 608 final, point 1.4, proposal n° 17.

results can be found at http://ec.europa.eu/internal_market/consultations/2010/concessions_en.htm

These conclusions have been corroborated by a number of bilateral meetings with the representatives of Member States, at local level, with businesses active in the sectors concerned and with industry associations.

The information gathered during the consultations fed into the Impact Assessment Report, which was examined and accepted by the Impact Assessment Board on 21st March 2011. The Impact Assessment Board made recommendations on providing, in particular, additional evidence on the scale of the problems, the consequences of the distortions found, the differences in treatment between public contracts and concessions and on strengthening the impact analysis and the comparison of options. These recommendations were taken into account in the re-submitted version of the Impact Assessment. The Impact Assessment Board's opinions on the report have been published together with this proposal, the final Impact Assessment report and the executive summary of the report.

The report confirmed the need for new legislation. It found that economic operators are faced with an unlevel playing field, which often leads to missed business opportunities. This situation gives rise to costs and is detrimental to competitors located in other Member States, contracting authorities and contracting entities and consumers. Moreover, both the definition of concessions and 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 that illegally awarded contracts will be canceled or terminated early and it ultimately discourages the authorities from using concessions where this type of contract could be a good solution.

Even if Member States were to pass legislation setting up a legal framework based on the Treaty principles the legal uncertainty related to interpretations of those principles by national lawmakers and the large disparities between the laws of different Member States would remain. In certain cases the total lack of national legislation has been cited as a cause for direct awards with the associated risks of malpractice or even corruption.

The optimal solution identified was legislation based on the current provisions on public works concessions, adequately adjusted and supplemented with certain specific provisions. A more restrictive approach, would be to extend to concessions the provisions that apply to public contracts. This approach was considered counter-productive in that it could potentially discourage contracting authorities from using concessions.

3. LEGAL ELEMENTS OF THE PROPOSAL

- **Legal basis**

The proposal is based on Articles 53(1), 62 and 114 of the Treaty on the Functioning of the European Union (TFEU).

- **Subsidiarity principle**

The subsidiarity principle applies insofar as the proposal does not fall under the exclusive competence of the EU.

The objectives of the proposal cannot be sufficiently achieved by the Member States for the following reason:

The coordination of procedures for public procurement above certain thresholds is an important means of complementing the internal market in the field of public purchasing by ensuring effective and equal access to concessions for economic operators across the single market. European-wide procurement procedures provide transparency and objectivity in public procurement, resulting in considerable savings and improved procurement outcomes that benefit Member States' authorities and, ultimately, the European taxpayer.

This objective could not be sufficiently achieved through action by Member States which would inevitably result in divergent requirements and possibly conflicting procedural regimes thereby increasing regulatory complexity and causing unwarranted obstacles to cross-border activity. Indeed, until now many Member States have not interpreted, clarified or implemented the relevant Treaty principles of transparency and equal treatment in a manner that ensures that concession contracts are awarded correctly. The ensuing lack of legal certainty and foreclosure of markets is unlikely to be eliminated without intervention at the appropriate level.

EU intervention is therefore necessary to overcome existing barriers to an EU-wide concession market and to ensure convergence and a level playing field, ultimately guaranteeing the free movement of goods and services throughout 27 Member States.

The proposal therefore complies with the subsidiarity principle.

- **Proportionality principle**

The proposal complies with the proportionality principle since it does not go beyond what is necessary in order to achieve the objective of ensuring the proper functioning of the internal market by laying down limited rules on the award of concessions.

The Impact Assessment allowed a range of solutions to be identified. These were then analysed to see whether they would adequately meet the objectives of the legislation. This analysis showed that the objectives cannot be achieved by means of infringement policy or other non-legislative tools such as 'soft law'. The most basic set of provisions, currently applicable to public works concessions, was also found to be inadequate because it does not provide sufficient legal certainty and compliance with the Treaty principles. On the other hand, more detailed legislation similar to the existing rules for the award of public contracts was considered to go beyond what is necessary to achieve the objectives.

- **Choice of instruments**

Since the proposal is based on Articles 53(1), 62 and 114 TFEU the use of a Regulation applying both to the procurement of both goods and services would not be permitted by the Treaty. The instrument proposed is therefore a Directive.

Non-legislative options were discarded for reasons set out in detail in the impact assessment.

4. BUDGETARY IMPLICATION

The proposal has no budgetary implications.

5. ADDITIONAL INFORMATION

- **Review/revision/sunset clause**

The proposal contains a review clause concerning the economic effects on the internal market resulting from the application of the thresholds laid down in Article 5.

- **Detailed explanation of the proposal**

The proposed Directive is expected to guarantee transparency, fairness and legal certainty in the award of concession contracts, and thereby contribute to improved investment opportunities and ultimately to more and better quality of works and services. It will apply to concessions awarded after its entry into force. This provision is in line with rulings by the Court of Justice of the European Union on modifying contracts (without prejudice to the temporary arrangements that may prove strictly necessary to ensure the continuity of the provision of the service pending the award of a new concession).

The gains referred to above are expected to be obtained thanks to a number of procedural requirements and clarifications applicable to concession awards, pursuing two major objectives: increasing legal certainty and ensuring a better access to the concessions markets for all European undertakings.

Legal certainty

The main objective of the Directive is to provide for clarity on the legal framework applicable to the award of concessions, but another is to clearly delimit the scope of application of this framework. The specific obligations in the field of concessions will increase legal certainty on one hand by providing contracting authorities and contracting entities with clear rules incorporating the Treaty principles governing the award of concessions and on the other hand by giving economic operators with some basic guarantees with regard to the award procedure..

Definition: The present proposal for a Directive on the award of concession contracts provides for a more precise definition of concession contracts with reference to the notion of operational risk. It makes clear what types of risk are to be considered

operational and how to define significant risk. It also provides references as to the maximum duration of concessions.

Incorporation of Treaty obligations into secondary law: The proposal extends the majority of the obligations which currently apply to the award of public works concessions to all services concessions. . It also lays down a number of concrete and more precise requirements, applicable at different stages of the award process on the basis of the Treaty principles, as interpreted in the case law of the Court of Justice of the European Union. Moreover, it extends the application of secondary law to the award of concession contracts in the utilities sector, which is currently exempt from such legislation.

Public-public cooperation: There is considerable legal uncertainty as to 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 differently between Member States and even between contracting authorities. Hence the present proposal clarifies the cases in which contracts concluded between contracting authorities are not subject to the application of concession award rules. Such clarification is guided by the principles set out in the relevant case law of the Court of Justice.

Modifications: The modification of concessions during their term has become an increasingly relevant and problematic issue for practitioners. A specific provision on modifying concessions incorporates the basic solutions developed in the case law and provides a pragmatic solution for dealing with unforeseen circumstances requiring an a concession to be modified during its term.

Better access to the concessions markets

The proposal provides for a fundamental improvement economic operators' access to the concessions markets. The provisions are primarily designed to increase the transparency and fairness of award procedures by restricting the arbitrariness of contracting authorities and contracting entities' decisions on such issues as prior and post-publication, procedural safeguard, selection and award criteria and the deadlines imposed on tenderers. Furthermore, they provide for a better access to justice in order to prevent or to address violations of those provisions.

Publication in the Official Journal: In order to ensure transparency and equal treatment to all economic operators, the present proposal provides for compulsory publication of concession contracts with a value equal to or greater than EUR 5 000 000. This threshold, which already applies to works concessions, has now been extended to services concessions taking into account the public consultations and studies carried out by the Commission in preparing this proposal. It is aimed at keeping any additional administrative burden and costs proportionate to the value of the contract and at focusing on contracts with a clear cross-border interest. The threshold applies to the value of such contracts calculated following a methodology spelled out in the contract. In the case of services, this value reflects the estimated overall value of all services to be provided by the concessionaire during the whole term of the concession.

The new rules also define the minimum scope of information to be given to potential tenderers.

Deadlines: This proposal also sets a minimum deadline for the submission of interest in any concession award procedure, amounting to 52 days, as this is currently the case for public works concessions. It has been decided to provide for concessions a longer deadline than in case of public contracts, given that concession contracts are usually more complex.

Selection and exclusion criteria: The proposal provides for obligations relating to the selection criteria to be applied by the contracting authorities or contracting entities when awarding concessions. These rules are less restrictive than similar provisions currently applicable to public contracts. However, they restrict the selection criteria to those related to the economic, financial and technical capacity of the bidder and limit the scope of the acceptable exclusion criteria.

Award criteria: The proposal provides for an obligation to apply objective criteria linked to the subject matter of the concession, ensuring compliance with the principles of transparency, non-discrimination and equal treatment, guaranteeing that tenders are assessed in conditions of effective competition allowing an overall economic advantage for the contracting authority or the contracting entity to be determined. These criteria should prevent arbitrary decisions by contracting authorities and contracting entities and must be published in advance and listed in descending order of importance. Member States or contracting authorities or contracting entities which so wish, may also provide for or apply the ‘most economically advantageous tender’ criterion for the award of concessions.

Procedural guarantees: Unlike the Public Procurement Directives, the proposed rules do not contain a fixed catalogue of award procedures. This solution allows contracting authorities and contracting entities to follow more flexible procedures when awarding concessions notably reflecting national legal traditions and permitting the award process to be organised in the most efficient way. However, the proposal establishes a number of clear procedural safeguards to be applied to the award of concessions notably during negotiations. These safeguards aim at ensuring that the process is fair and transparent..

Remedies: This proposal 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 in order to guarantee effective channels for challenging the award decision in court and provide minimal judicial standards which have to be observed by contracting authorities or entities.

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(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments,

Having regard to the opinion of the European Economic and Social Committee²,

Having regard to the opinion of the Committee of the Regions³,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) The absence of clear rules at Union level governing the award of concession contracts gives rise to legal uncertainty and to obstacles to the free provision of services and causes distortions in the functioning of the Internal Market. As a result, economic operators, in particular Small and Medium Enterprises (SMEs), are being deprived of their rights within the Internal Market and miss out on important business opportunities, while public authorities may not find the best use of public money so that EU citizens benefit from quality services at best prices. An adequate legal framework for the award of concessions would ensure effective and non-discriminatory access to the market to all Union economic operators and legal certainty, favouring public investments in infrastructures and strategic services to the citizen.
- (2) Public procurement plays a key role in the Europe 2020 strategy⁴ as one of the market-based instruments to be used to achieve a smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. The award of works concessions

² OJ C , , p. .

³ OJ C , , p. .

⁴ COM(2010) 2020 final, 3.3-2010.

is presently subject to basic rules of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts while the award of services concessions with a cross-border interest is subject to the principles of the Treaty, and in particular the principle of free movement of goods, freedom of establishment and freedom to provide services as well as to the principles deriving therefrom such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. There is a risk of legal uncertainty related to different interpretations of the principles of the Treaty by national legislators and of wide disparities among the legislations of different Member States. Such risk has been confirmed by the extensive case law of the Court of Justice of the European Union but which has only partially addressed certain aspects of the award of concession contracts. Hence, a uniform concretisation of the Treaty principles across all Member States and the elimination of discrepancies in their understanding following therefrom is necessary at the Union level in order to eliminate persisting distortions of the Internal Market.

- (3) This Directive should not in any way affect the freedom of Member States or public authorities to decide on the direct provision of works or services to the public or on the outsourcing of such provision to third parties. Member States or public authorities should 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
- (4) For concessions above a certain value, it is appropriate to provide for a minimum coordination of national procedures for the award of such contracts based on principles of the Treaty so as to guarantee the opening-up of concessions to competition and adequate legal certainty. Those coordinating provisions should not go beyond what is necessary in order to achieve the aforementioned objectives. However, Member States should be allowed to complete and develop further those provisions if they find it appropriate notably to better ensure compliance with the principles above.
- (5) Certain coordination provisions should also be introduced for the award of works and services concessions awarded in the water, energy, transport and postal services sectors given that national authorities may influence the behaviour of entities operating in those sectors and taking into account the closed nature of the markets in which they operate, due to the existence of special or exclusive rights granted by the Member States concerning the supply to, provision or operation of networks for providing the services concerned.
- (6) Concessions are contracts for pecuniary interest concluded between one or more economic operators and one or more contracting authorities or entities and having as their object the acquisition of works or services where the consideration consists, normally, in the right to exploit the works or services that are the subject of the contract. The execution of these works or services are subject to specific binding obligations defined by the contracting authority or entity which are legally enforceable. By contrast, certain State acts such as authorisations or licences whereby the State or a public authority establishes the conditions for the exercise of an economic activity, should not qualify as concessions. The same applies to certain agreements having as their object the right of an economic operator to exploit certain public domains or resources, such as land lease contracts whereby the State or

contracting authority or entity establishes only general conditions for their use without acquiring specific works or services.

- (7) 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 rules governing the award of concessions would not be justified if the contracting authority or entity relieved the contractor of any potential loss, by guaranteeing a minimal revenue, equal or higher to the costs that the contractor has to incur in relation with the performance of the contract. At the same time it should be made clear that certain arrangements which are fully paid by a contracting authority or a contracting entity should qualify as concessions where the recoupement of the investments and costs incurred by the operator for execution the work or providing the service depends on the actual demand for or the availability of the service or asset.
- (8) 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 should not qualify as a concession within the meaning of this Directive.
- (9) The notion of special or exclusive rights is central to the definition of the scope of this Directive, since entities which are neither contracting entities pursuant to Article 4 (1) (1) nor public undertakings are subject to its provisions only to the extent that they exercise one of the activities covered on the basis of such rights. It is therefore appropriate to clarify that rights which have been granted by means of a procedure based on objective criteria, notably pursuant to Union legislation, and for which adequate publicity has been ensured do not constitute special or exclusive rights for the purposes of this Directive. This legislation should include Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas⁵, Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity⁶, Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service⁷, Directive 94/22/EC of the European Parliament and of the Council of 20 May 1994 on the conditions for granting and using authorisations for the prospection, exploration and production of hydrocarbons⁸ and Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70⁹. The increasingly diverse forms of public action made it

⁵ OJ L 204, 21.7.1998, p. 1

⁶ OJ L 27, 30.1.1997, p. 20.

⁷ OJ L 15, 21.1.1998, p. 14.

⁸ OJ L 164, 30.6.1994, p. 3.

⁹ OJ L 315, 3.12.2007, p. 1.

necessary to define more clearly the notion of procurement itself. The Union rules on concessions refer to the acquisition of works or services for a consideration consisting in exploitation of those works or services. The notion of acquisition should be understood broadly in the sense of obtaining the benefits of the works or services in question not requiring in all cases a transfer of ownership to contracting authorities or contracting entities. Furthermore, the mere financing of an activity, which is frequently linked to the obligation to reimburse the amounts received where they are not used for the purposes intended, does not usually fall under this Directive.

- (10) It has also proven necessary to clarify what should be understood as a 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 this Directive, and that the procurement should be advertised as a whole, possibly split into lots. The concept of single procurement encompasses all supplies, works and services needed to carry out a particular project. Indications for the existence of one single project can for instance 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.
- (11) To ensure a real opening up of the market and a fair balance in the application of concession award rules in the water, energy, transport and postal services sectors it is necessary for the entities covered to be identified on a basis other than their legal status. It should be ensured, therefore, that the equal treatment of contracting entities operating in the public sector and those operating in the private sector is not prejudiced. It is also necessary to ensure, in keeping with Article 345 of the Treaty, that the rules governing the system of property ownership in Member States are not prejudiced.
- (12) Concessions may be awarded by contracting entities for the purpose of meeting the requirements of several activities, possibly subject to different legal regimes. It should be clarified that the legal regime applicable to a single concession intended to cover several activities should be subject to the rules applicable to the activity for which it is principally intended. Determination of the activity for which the concession is principally intended may be based on an analysis of the requirements which the specific concession must meet, carried out by the contracting entity for the purposes of estimating the concession value and drawing up the concession award documents. In certain cases, it might be objectively impossible to determine for which activity the concession is principally intended. The rules applicable to such cases should be indicated.
- (13) It is appropriate to exclude from the scope of this Directive certain services concessions awarded to an economic operator which is itself a contracting authority or a contracting entity on the basis of an exclusive right which that operator enjoys under published national law or administrative act and which has been granted in accordance with the Treaty and Union sectoral legislation concerning the management of networks infrastructure related to the activities set out in annex III, since such exclusive right makes it impossible to follow a competitive procedure for the award. By way of derogation and without prejudice to the legal consequences of the general exclusion from the scope of this Directive, concessions as defined in article 8 (1) should be subject to the obligation to publish a concession award notice in view of

ensuring basic transparency unless the conditions of such transparency are provided for in sectoral legislation.

- (14) It is appropriate to exclude certain service and works concessions awarded to an undertakings affiliated to contracting entities, having as its principal activity the provision of such services or works to the group of which it is part, rather than offering them on the market. It is also appropriate to exclude certain service and works concessions awarded by a contracting entity to a joint venture which is formed by a number of contracting entities for the purpose of carrying out activities covered by this Directive and of which that entity is part. However, it is appropriate to ensure that this exclusion does not give rise to distortions of competition to the benefit of the undertakings or joint ventures that are affiliated with the contracting entities; it is appropriate to provide a suitable set of rules, in particular as regards the maximum limits within which the undertakings may obtain a part of their turnover from the market and above which they would lose the possibility of being awarded concessions without calls for competition, the composition of joint ventures and the stability of links between those joint ventures and the contracting entities of which they are composed.
- (15) This Directive should not apply to concessions awarded by contracting entities and intended to permit the performance of an activity referred to in Annex III if, in the Member State in which this activity is carried out, it is directly exposed to competition on markets to which access is not limited, as established following a procedure provided for to this purpose in accordance with Art. 27 and 28 of Directive [current 2004/17/EC]. This procedure should provide legal certainty for the entities concerned, as well as an appropriate decision-making process, ensuring, within short time limits, uniform application of Union law in this area.
- (16) This Directive does not apply to the concession award carried out by international organisations on their own behalf and for their own account. There is, however, a need to clarify to which extent it is appropriate to apply this Directive to concession award governed by specific international rules.
- (17) There is considerable legal uncertainty as to how far cooperation between public authorities should be covered by concession award rules. The relevant case-law of the Court of Justice of the European Union is interpreted differently between Member States and even between contracting authorities or certain contracting entities. It is therefore necessary to clarify in what cases concessions concluded between such authorities are not subject to the application of public concession award rules. Such clarification should be guided by the principles set out in the relevant case-law of the Court of Justice. The sole fact that both parties to an agreement are themselves contracting authorities or contracting entities under Art. 4 (1) (1) does not as such rule out the application of concession award rules. However, the application of concession award rules should not interfere with the freedom of public authorities to decide how to organise the way they carry out their public service tasks. Concessions awarded to controlled entities or cooperation for the joint execution of the public service tasks of the participating contracting authorities or entities should therefore be exempted from the application of the rules if the conditions set out in this Directive are fulfilled. This Directive should aim to ensure that any exempted public-public cooperation does not cause a distortion of competition in relation to private economic operators. Neither

should the participation of a contracting authority as a tenderer in a procedure for the award of a public contract cause any distortion of competition.

- (18) In order to ensure adequate advertisement of works and services concessions above a certain value awarded by contracting entities and by the contracting authorities, the award of such contracts should be preceded by the compulsory publication of a concession notice in the Official Journal of the European Union. The 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 concessionaire from the point of view of a potential tenderer.
- (19) In view of the detrimental effects on competition, awarding concessions without prior publication should only be permitted in very exceptional circumstances. This exception should be limited to cases where it is clear from the outset that a publication would not trigger more competition, notably because there is objectively only one economic operator who can perform the concession. Only situations of objective exclusivity can justify the award of a concession without publication to an economic operator, where the situation of exclusivity has not been created by the contracting authority or contracting entity itself in view of the future award procedure, and where there are no adequate substitutes, the availability of which should be assessed thoroughly.
- (20) A review of so-called priority and non-priority services ('A' and 'B' services) by the Commission has shown that it is not justified to restrict the full application of procurement law to a limited group of services. As a result, this Directive should apply to a number of services (such as catering and water distribution services), which both showed a potential for cross-border trade.
- (21) In the light of the results of the evaluation conducted by the Commission on the reform of public procurement rules it is appropriate to exclude from the full application of this Directive only those services which have a limited cross-border dimension, namely the so-called services to the person such as certain social, health and educational services. These services are provided within a particular context that varies widely amongst Member States, due to different cultural traditions. A specific regime should therefore be established for concession for these services which takes into account the fact that they are newly regulated. An obligation to publish a prior information notice and a concession award notice of any concession with a value equal to or greater than thresholds established in this Directive is an adequate way to provide information on business opportunities to potential tenderers as well as on the number and type of contracts awarded to all interested parties. Furthermore, Member States should put in place appropriate measures with reference to the award of concession contracts for these services aimed at ensuring compliance with the principles of transparency and equal treatment of economic operators while allowing contracting authorities and contracting entities to take into account the specificities of the services in question. Member States should ensure that contracting authorities and contracting entities may take into account the need to ensure quality, continuity, accessibility, availability and comprehensiveness of the services, the specific needs of different categories of users, the involvement and empowerment of users and innovation.

- (22) Given the importance of the cultural context and the sensitivity of these services, Member States should be given wide discretion to organise the choice of the service providers in the way they consider most appropriate. The rules of this Directive do not prevent Member States to apply specific quality criteria for the choice of service providers, such as the criteria set out in the voluntary European Quality Framework for Social Services of the European Union's Social Protection Committee . Member States and/or public authorities remain free to provide these services themselves or to organise social services in a way that does not entail the conclusion of concessions, for example through the mere financing of such services or by granting licences or authorisations to all economic operators meeting the conditions established beforehand by the contracting authority or contracting entity, without any limits or quotas, provided such system ensures sufficient advertising and complies with the principles of transparency and non-discrimination.
- (23) In order to make it possible for all interested operators to submit applications and tenders, contracting authorities and contracting entities should be obliged to respect a minimum time limit for the receipt of such applications.
- (24) The choice and application of proportional, non-discriminatory and fair selection criteria to economic operators is crucial for their effective access to the economic opportunities related to concessions. In particular, the possibility for a candidate to rely on the capacities of other entities can be decisive to enable the participation of small and medium sized enterprises. Therefore, it is appropriate to provide that the selection criteria should relate exclusively to the technical, financial and economic capacity of operators, should be announced in the concession notice and cannot preclude an economic operator 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.
- (25) In order to ensure transparency and equal treatment, criteria for the award of concessions should always comply with some general standards. These should be disclosed in advance to all potential tenderers, be related to the subject matter of the contract and should not offer to the contracting authority or contracting entity an unrestricted freedom of choice. They should ensure the possibility of effective competition and be accompanied by requirements that allow the information provided by the tenderers to be effectively verified. In order to comply with these standards while improving legal certainty, Member States may provide for the use of the criterion of the most economically advantageous tender.
- (26) Where contracting authorities and contracting entities choose to award a concession to the most economically advantageous tender, they should 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 those criteria depends on the object of the concession since they should 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.
- (27) Concessions are usually long term, complex arrangements where the contractor assumes responsibilities and risks traditionally born by the contracting authorities and normally falling within their remit and contracting entities. For this reason, contracting

authorities or entities 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.

- (28) The technical specifications drawn up by contracting authorities and contracting entities need to allow concession award to be opened up to competition. To that end, it must be possible to submit tenders that reflect the diversity of technical solutions so as to obtain a sufficient level of competition. Consequently, technical specifications should be drafted in such a way to avoid artificially narrowing down competition through requirements that favour a specific economic operator by mirroring key characteristics of the supplies, services or works habitually offered by that economic operator. Drawing up the technical specifications in terms of functional and performance requirements generally allows this objective to be achieved in the best way possible and favours innovation. Where reference is made to a European standard or, in the absence thereof, to a national standard, tenders based on equivalent arrangements should be considered by contracting authorities or contracting entities. To demonstrate equivalence, tenderers can be required to provide third-party verified evidence; however, other appropriate means of proof such as a technical dossier of the manufacturer should also be allowed where the economic operator concerned has no access to such certificates or test reports, or no possibility of obtaining them within the relevant time limits.
- (29) In technical specifications and in award criteria, contracting authorities and contracting entities should be allowed to refer to a specific production process, a specific mode of provision of services, or a specific process for any other stage of the life cycle of a product or service, provided that they are linked to the subject-matter of the concession. In order to better integrate social considerations in the award of concessions, procurers may also be allowed to include, in the award criteria, characteristics related to the working conditions. However, where the contracting authorities or contracting entities use the most economically advantageous tender, such criteria may only relate to the working conditions of the persons directly participating in the process of production or provision in question. Those characteristics may only concern the protection of health of the staff involved in the production process or the favouring of social integration of disadvantaged persons or members of vulnerable groups amongst the persons assigned to performing the contract, including accessibility for persons with disabilities. In this case, any award criteria which include those characteristics should in any event remain limited to characteristics that have immediate consequences on staff members in their working environment. They should be applied in accordance with Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services¹⁰ and in a way that does not discriminate directly or indirectly against economic operators from other Member States or from third countries parties to the Agreement or to Free Trade Agreements to

¹⁰ OJ L 18, 21.1.1997, p.1.

which the Union is party. Contracting authorities and contracting entities should, also where they use the criterion of the most economically advantageous tender, be allowed to use as an award criterion the organisation, qualification and experience of the staff assigned to performing the concession in question, as this may affect the quality of concession performance and, as a result, the economic value of the tender.

- (30) Electronic means of information and communication can greatly simplify the publication of contracts and increase the efficiency and transparency of concession award processes. They should become the standard means of communication and information exchange in concession award procedures. The use of electronic means also leads to time savings. 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 Union level. Moreover, electronic means of information and communication including adequate functionalities can enable contracting authorities and contracting entities to prevent, detect and correct errors that occur during procurement procedures.
- (31) 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 concession award designating the applicable law should be established in order to facilitate setting up cross-border joint public concession award. In addition, contracting authorities and contracting entities from different Member States may set up joint legal bodies established under national or Union law. Specific rules should be established for such form of joint concession award.
- (32) The laws, regulations and collective agreements, at both national and European Union level, which are in force in the areas of employment conditions and safety at work should apply during performance of a concession, providing that such rules, and their application, comply with Union law. In cross-border situations, where workers from one Member State provide services in another Member State for the purpose of performing a concession, Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services¹¹ lays down the minimum conditions which must be observed by the host country in respect of such posted workers.
- (33) Concessions should not be awarded to economic operators that have participated in a criminal organisation or have been found guilty of corruption, fraud to the detriment of the Union's financial interests or money laundering. Non-payment of taxes or social security contributions should also be sanctioned by mandatory exclusion at the level of the Union. Furthermore, contracting authorities and contracting entities should be given the possibility to exclude candidates or tenderers for serious violations of Union or national law aimed at the protection of public interests compatible with the Treaty or where the economic operator has shown significant or persistent deficiencies in the

¹¹ OJ L 18, 21.1.1997, p. 1.

performance of a prior concession or concessions of a similar nature with the same contracting authority or contracting entity.

- (34) 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 of the European Union. A new award procedure is required in case of material 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. An exceptional and temporary extension of the term of the concession strictly aimed at ensuring the continuity of the provision of the service pending the award of a new concession should not normally qualify as a material change to the initial concession.
- (35) Contracting authorities and contracting entities can be faced with external circumstances that they could not foresee when they awarded the concession. In this case, a certain degree of flexibility is needed to adapt the concession to these circumstances without a new award procedure. The notion of circumstances that a diligent contracting authority or contracting entity could not foresee refers to those circumstances which could not be predicted despite reasonably diligent preparation of the initial award by the contracting authority or contracting entity, taking into account its available means, the nature and characteristics of the specific project, good practice in the field in question and the need to ensure an appropriate relationship between the resources spent in preparing the award and its foreseeable value. However, this cannot apply in cases where a modification results in an alteration of the nature of the overall procurement, for instance by replacing the works, supplies or services to be procured by something different or by fundamentally changing the type of procurement since, in such a situation, a hypothetical influence on the outcome may be assumed.
- (36) In line with the principles of equal treatment and transparency, the successful tenderer should not be replaced by another economic operator without reopening the concession to competition. 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 structural changes should not automatically require new award procedures for all concessions performed by that undertaking.
- (37) Contracting authorities or contracting entities should have the possibility to provide for modifications to a concession in the concession contract itself, by way of review clauses which should not give them unlimited discretion. This Directive should therefore set out to what extent modifications may be provided for in the initial concession.
- (38) In order to adapt to rapid technical and economic developments, the power to adopt acts in accordance with Article 290 of the Treaty should be delegated to the Commission in respect of a number of non-essential elements of this Directive. In fact, the technical details and characteristics of the devices for electronic receipt should be kept up to date with technological developments and administrative needs; it is also necessary to empower the Commission to make mandatory technical standards for

electronic communication to ensure the interoperability of technical formats, processes and messaging in concession award procedures conducted using electronic means of communication taking into account technological developments and administrative needs. Furthermore, the list of legislative acts of the Union establishing common methodologies for the calculation of life-cycle costs should be quickly adapted to incorporate the measures adopted on a sectoral basis. In order to satisfy these needs, the Commission should be empowered to keep the list of legislative acts including LCC methodologies up-to date.

- (39) In order to ensure adequate judicial protection of candidates and tenderers in the concession award procedures, as well as to make effective the enforcement of the rules of this Directive and of the Treaty principles, Council Directive 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts¹² 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 sectors¹³ should also apply to services concessions and to works concessions awarded by both contracting authorities and contracting entities. Directives 89/665/EEC and 92/13/EEC should, therefore, be amended accordingly.
- (40) The processing of personal data pursuant to this Directive should be governed by Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data¹⁴.
- (41) The law of the Union on public procurement requires Member States to consistently and systematically monitor the implementation and functioning of those rules in order to ensure the efficient and uniform application of Union law. Hence, where Member States designate a single national authority in charge of monitoring, implementation and control of public procurement, that authority may have the same responsibilities regarding concessions. A single body with overarching tasks should ensure an overview of main difficulties in implementation and suggest appropriate remedies to more structural problems. That body may also provide immediate feedback on the functioning of policy and potential weaknesses in national legislation and practice, thus contributing to the quick identification of solutions and the improvement of concession award procedures.
- (42) It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level. The Commission, when preparing and drawing-up delegated acts, should ensure a simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and Council.
- (43) 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

¹² OJ L 395, 30.12.1989, p. 33.

¹³ OJ L 76, 23.3.1992, p. 14.

¹⁴ OJ L 281, 23.11.1995, p. 31.

data referred to in Annexes IV to VI, 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 powers¹⁵. The advisory procedure should be used for the adoption of implementing acts, which do not have any impact either from the financial point of views or on the nature and scope of obligations stemming from this Directive. On the contrary, these acts characterised by a mere administrative purpose and serve to facilitate the application of the rules set by this Directive.

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

HAVE ADOPTED THIS DIRECTIVE:

¹⁵ OJ L 55, 28.2.2011, p. 13.

Directive on concessions

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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 with respect to concessions whose value is estimated to be not less than the thresholds laid down in Article 5.
2. This Directive applies to the acquisition of works or services, including supplies which are incidental to the subject matter of a concession, from economic operators chosen by either of the following:
 - a) Contracting authorities whether or not the works or services including the related supplies, are intended for a public purpose;
 - b) Contracting entities provided that the works or services including the related supplies, are intended for the pursuit of one of the activities referred to in Annex III.

Article 2

Definitions

1. For the purposes of this Directive the following definitions shall apply:
 - (1) 'concessions' means public works concessions, works concessions or services concessions.
 - (2) a 'public works concession' means 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.
 - (3) '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.

- (4) 'works concession' means a contract for pecuniary interest concluded in writing between one or more economic operators and one or more contracting entities 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;
 - (5) 'execution of works' means the execution, or both the design and execution, of works related to one of the activities referred to in Annex I or of a work, or the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority exercising a decisive influence on the type or design of the work.
 - (6) 'work' means the outcome of building or civil engineering works taken as a whole which is sufficient in itself to fulfil an economic or technical function.
 - (7) 'services concession' means a contract for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities or contracting entities and having as their object the provision of services other than those referred to in points 2 and 4 where the consideration for the services to be provided consists either solely in the right to exploit the services that are subject of the contract or in that right together with payment.
 - (8) 'candidate' means an economic operator that has sought an invitation or has been invited to take part in a concession award procedure ;
 - (9) 'concessionaire' means an economic operator which has been awarded a concession.
 - (10) "economic operator" means any natural or legal person, or public entity, or a group of such persons and/or entities which offers the execution of works and/or a work, supplies or services on the market.
 - (11) 'tenderer' means an economic operator that has submitted a tender
 - (12) '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.
 - (13) 'concession documents' means all documents produced or referred to by the contracting authority or contracting entity to describe or determine elements of the procurement or the procedure, including the contract notice, the technical specifications, proposed conditions of contract, formats for the presentation of documents by candidates and tenderers, information on generally applicable obligations and any additional documents.
 - (14) 'life cycle' means all consecutive and/or interlinked stages, including production, transport, use and maintenance, throughout the existence of a product or a works or the provision of a service, from raw material acquisition or generation of resources to disposal, clearance and finalisation.
2. The right to exploit the works or services as referred to in points 2, 4 and 7 of the first paragraph shall imply 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-matter of the concession.

That economic risk may consist in either of the following:

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

Article 3 *Contracting authorities*

1. For the purposes of this Directive ‘Contracting authorities’ are State, regional or local authorities, bodies governed by public law, associations formed by one or more such authorities or one or more such bodies governed by public law, other than those awarding a concession for the purpose of pursuing an activity as referred to in Annex III..
2. ‘Regional authorities’ include all authorities of the administrative units falling under NUTS 1 and 2, as referred to by Regulation No. (EC) 1059/2003 of the European Parliament and of the Council¹⁶.
3. ‘Local authorities’ include all authorities of the administrative units falling under NUTS 3 and smaller administrative units, as referred to by Regulation No. 1059/2003.
4. ‘Bodies governed by public law’ means bodies that have all of the following characteristics:
 - (a) they are established for or have the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;
 - (b) they have legal personality;
 - (c) they are financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or have an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law.

For the purpose of point (a) of the first subparagraph, a body which operates in normal market conditions, aims to make a profit, and bears the losses resulting from 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.

¹⁶ OJ L 154, 21.6.2003, p. 1

Article 4
Contracting entities

1. For the purposes of this Directive , "Contracting entities" are one of the following:
 - (1) state, regional or local authorities, bodies governed by public law, associations formed by one or more such authorities or one or more such bodies governed by public law as defined in paragraphs 2-4 of Article 3.
 - (2) public undertakings as defined in paragraph 2 of this Article;
 - (3) entities which are not contracting authorities or public undertakings, operating on the basis of special or exclusive rights granted by a competent authority of a Member State

when they award a concession for the purpose of pursuing one of the activities as referred to in Annex III.

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:

- (a) hold the majority of the undertaking's subscribed capital, or
 - (b) control the majority of the votes attaching to shares issued by the undertaking, or
 - (c) can appoint more than half of the undertaking's administrative, management or supervisory body.
3. '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 those rights was based on objective criteria shall not constitute "special or exclusive rights" within the meaning of this Directive. Such procedure includes:

- (a) procurement procedures with a prior call for competition in conformity with Directive [2004/18/EC or 2004/17/EC] or this Directive

- (b) procedures pursuant to other legislative acts of the Union, listed in Annex XI, ensuring adequate prior transparency for granting authorisations on the basis of objective criteria.

The Commission shall be empowered to adopt delegated acts in accordance with Article 46 to modify the list of the Union legislative acts set out in Annex XI where, due to the adoption of new Union legislation or repeal of Union legislation, such modification proves necessary.

Article 5 Thresholds

1. This Directive shall apply to the following concessions the value of which is equal to or greater than EUR 5 000 000:
 - (a) concessions concluded by contracting entities for the pursuit of one of the activities referred to in Annex III;
 - (b) concessions concluded by contracting authorities.
2. Services concessions the value of which is equal to or greater than EUR 2 500 000 but lower than EUR 5 000 000 other than social services and other specific services shall be subject to the obligation to publish a concession award notice in accordance with Articles 27 and 28.

Article 6 Methods for calculating the estimated value of concessions

1. The calculation of the estimated value of a concession 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.
2. The estimated value of a concession shall be calculated as the value of an entirety of works or services, even if purchased through different contracts, where 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 or contracting entity, the fact that the different elements purchased fulfil a single economic and technical function or that they are otherwise logically interlinked.

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.

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

4. This estimate shall be valid at the moment at which the concession notice is sent, or, in cases where such notice is not foreseen, at the moment at which the contracting authority or the contracting entity commences the concession award procedure, in particular by defining the essential characteristics of the intended concession.
5. 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 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.
6. 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.
7. Where the aggregate value of the lots is equal to or exceeds the threshold laid down in Article 5, this Directive shall apply to the awarding of each lot.
8. Contracting authorities or contracting entities may award concessions for individual lots without applying the provisions on the award 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.
9. 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, calculated in accordance with an objective methodology which shall be specified in the concession notice or in the concession documents.

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

- (a) for insurance services: the premium payable and other forms of remuneration;
 - (b) for banking and other financial services: fees, commissions, interest and other forms of remuneration;
 - (c) for design services: fees, commission payable and other forms of remuneration;
10. 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.

Article 7
General Principles

Contracting authorities and contracting entities shall treat economic operators equally and shall act in a transparent and proportionate way. The design of the concession award procedure shall not be made with the objective of excluding it from the scope of this Directive or of artificially narrowing competition.

SECTION II
EXCLUSIONS

Article 8

Exclusions applicable to concessions awarded by contracting authorities and contracting entities

1. This Directive shall not apply to services concessions awarded by a contracting authority or by a contracting entity to an economic operator which is a contracting entity or an association of thereof, on the basis of an exclusive right that economic operator enjoys pursuant to applicable and published national law, regulation or administrative provision, and which has been granted in accordance with the Treaty and Union sectoral legislation concerning the management of networks infrastructure related to the activities set out in annex III.
2. By way of derogation from paragraph 1 of this Article, where sectoral legislation referred to in paragraph 1 of this Article does not provide for sector specific transparency obligations, the requirements of Article 27 (1) and (3) shall apply
3. This Directive shall not apply to concessions which the contracting authority or a contracting entity is obliged to award or organise in accordance with procurement procedures set out in:
 - (a) an international agreement concluded in conformity with the Treaty 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;
 - (b) a concluded international agreement relating to the stationing of troops and concerning the undertakings of a Member State or a third country;
 - (c) the particular procedure of an international organisation.
 - (d) where the concessions are fully financed by an international organisation or international financing institution.

All agreements referred to in point (a) of the first subparagraph shall be communicated to the Commission, which may consult the Advisory Committee for Public Contracts referred to in Article 48.

For the purposes of point (d) of the first subparagraph, where a concession is co-financed for a considerable part by an international organisation or international

financing institution the parties decide on applicable concession award procedures which shall be in conformity with the provisions of the Treaty on the Functioning of the European Union.

4. Subject to Article 346 of the Treaty, this Directive shall not apply to the awarding of concessions in the fields of defence and security to the extent that the protection of the essential security interests of a Member State cannot be guaranteed by the rules provided for in this Directive.
5. This Directive shall not apply to service concessions for:
 - (a) the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property or concerning rights thereon; however financial service concessions awarded at the same time as, before or after the contract of acquisition or rental, in whatever form, shall be subject to this Directive;
 - (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) arbitration and conciliation services;
 - (d) financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments within the meaning of Directive 2004/39/EC of the European Parliament and of the Council, central bank services and operations conducted with the European Financial Stability Facility (EFSF);
 - (e) employment contracts;
 - (f) Air transport services based on the grant of an operating licence within the meaning of Regulation (EC) 1008/2008¹⁷ of the European Parliament and of the Council¹⁸;
 - (g) Public passenger transport services within the meaning of Regulation (EC) 1370/2007 of the European Parliament and of the Council.¹⁹

The broadcasting referred to in point (b) of the first paragraph shall include any transmission and distribution using any form of electronic network.

¹⁷ Regulation of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community

¹⁸ OJ L 293, 31.10.2008, p. 3.

¹⁹ OJ L 315, 3.12.2007,

Article 9
Specific exclusions in the field of electronic communications

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

For the purposes of this Article:

- (a) 'public communications network' means an electronic communications network used wholly or mainly for the provision of electronic communications services available to the public which support the transfer of information between network termination points;
- (b) 'electronic communications network' means transmission systems and, where applicable, switching or routing equipment and other resources, including network elements which are not active, which permit the conveyance of signals by wire, radio, optical or other electromagnetic means, including satellite networks, fixed (circuit and packet-switched, including Internet) and mobile terrestrial networks, electricity cable systems, to the extent that they are used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed ;
- (c) a 'network termination point' (NTP) means the physical point at which a subscriber is provided with access to a public communications network; in the case of networks involving switching or routing, the NTP is identified by means of a specific network address, which may be linked to a subscriber number or name;
- (d) 'electronic communications services' means a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting, but exclude services providing, or exercising editorial control over, content transmitted using electronic communications networks and services; it does not include information society services, as defined in Article 1 of Directive 98/34/EC, which do not consist wholly or mainly in the conveyance of signals on electronic communications networks.

Article 10
Exclusions applicable to concessions awarded by contracting entities

1. This Directive shall not apply to concessions awarded by contracting entities 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 Union.
2. 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 11
Concessions awarded to an affiliated undertaking

1. For the purposes of this Article, "affiliated undertaking" means any undertaking the annual account of which are consolidated with those of the contracting entity in accordance with the requirements of the Seventh Council Directive 83/349/EEC²⁰.
2. In the case of entities not subject to that Directive, "affiliated undertaking" shall mean any undertaking that :
 - (a) may be, directly or indirectly, subject to a dominant influence by the contracting entity within the meaning of the second paragraph of Article 4 of this Directive;
 - (b) may exercise a dominant influence over the contracting entity;
 - (c) in common with the contracting entity, is subject to the dominant influence of another undertaking by virtue of ownership, financial participation, or the rules which govern it.
3. Article 15 notwithstanding and provided that the conditions in paragraph 4 are met, this Directive shall not apply to the following concessions:
 - (a) concessions awarded by a contracting entity to an affiliated undertaking;
 - (b) concessions awarded by a joint venture, formed exclusively by a number of contracting entities for the purpose of carrying out activities described in Annex III, to an undertaking which is affiliated with one of those contracting entities.
4. Paragraph 3 shall apply:
 - (a) to service concessions provided that at least 80 % of the average total turnover of the affiliated undertaking with respect to services in general for the preceding three years derives from the provision of services to undertakings with which it is affiliated;
 - (b) works concessions provided that at least 80 % of the average total turnover of the affiliated undertaking with respect to works in general for the preceding three years derives from the provision of works to undertakings with which it is affiliated.
5. Where, because of the date on which an affiliated undertaking was created or commenced activities, the turnover is not available for the preceding three years, it shall be sufficient for that undertaking to show that the turnover referred to in points (a) or (b) of paragraph 4 is credible, particularly by means of business projections.

²⁰ 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).

6. Where more than one undertaking affiliated with the contracting entity provides the same or similar services, supplies or works, the above percentages referred to in paragraph 4 shall be calculated taking into account the total turnover deriving respectively from the provision of services, supplies or works by those affiliated undertakings.

Article 12

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

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

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

Article 13

Notification of information by contracting entities

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 11 and of Article 12.

- (a) the names of the undertakings or joint ventures concerned,
- (b) the nature and value of the concessions involved,
- (c) proof deemed necessary by the Commission 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 11 or 12.

Article 14

Exclusion of activities which are directly exposed to competition

This Directive shall not apply to concessions awarded by contracting entities where, in the Member State in which such concessions are performed the activity is directly exposed to competition in accordance with Article 27 and 28 of Directive [replacing Directive 2004/17/EC].

Article 15
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 shall fall outside the scope of this Directive where the following cumulative conditions are fulfilled:
 - 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 for other legal persons controlled by that 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 within the meaning of point (a) of the first subparagraph where it exercises a decisive influence over both strategic objectives and significant decisions of the controlled legal person.

2. Paragraph 1 also applies where a controlled entity which is a contracting authority or contracting entity as referred to in paragraph 1 subparagraph 1 of Article 4 awards a concession to its controlling entity, 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, which does not exercise over a legal person control within the meaning of paragraph 1, may nevertheless award a concession without applying the provisions of the current Directive to a legal person which it controls jointly with other such contracting authorities or entities, where the following conditions are fulfilled:
 - a) the contracting authorities or entities as referred to in paragraph 1 subparagraph 1 of Article 4 exercise jointly 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.

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

- (a) the decision-making bodies of the controlled legal person are composed of representatives of all participating contracting authorities or contracting entities as referred to in paragraph 1 subparagraph 1 of Article 4;
- (b) those contracting authorities or contracting entities as referred to in paragraph 1 subparagraph 1 of Article 4 are able to jointly exert decisive influence over the strategic objectives and significant decisions of the controlled legal person;
- (c) the controlled legal person does not pursue any interests which are distinct from that of the public authorities affiliated to it;
- (d) the controlled legal person does not 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 contracting entities as referred to in paragraph 1 subparagraph 1 of Article 4 shall not be deemed to be a concession within the meaning of point 1 of paragraph 1 of Article 2 of this Directive, where the following cumulative conditions are fulfilled:

- (a) the agreement establishes a genuine co-operation between the participating contracting authorities or entities aimed at carrying out jointly their public service tasks and involving mutual rights and obligations of the parties;
- (b) the agreement is governed only by considerations relating to the public interest;
- (c) the participating contracting authorities or entities shall do 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;
- (d) the agreement does not involve financial transfers between the participating contracting authorities or entities, other than those corresponding to the reimbursement of actual costs of the works, services or supplies;
- (e) there is no private participation in any of the contracting authorities or entities involved.

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

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

SECTION III GENERAL PROVISIONS

Article 16 Duration of the concession

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

Article 17 Social and other specific services

Concessions for social and other specific services listed in Annex X falling within the scope of this Directive shall be subject to the obligation of paragraph 3 of Art. 26 and of paragraph 1 of Article 27.

Article 18 Mixed concessions

1. Contracts which have as their object both services and supplies shall be awarded in accordance with this Directive where the main object of the contract in question are services and where they are concessions within the meaning of point (1) of the first paragraph of Article 2
2. Concessions which have as their object both services within the meaning of Article 17 and other services shall be awarded in accordance with the provisions applicable to the type of service that characterises the main object of the contract in question.
3. In the case of mixed contracts referred to in paragraphs 1 and 2, the main object shall be determined by a comparison of the values of the respective services or supplies.
4. Where contracts have as their object concessions covered by this Directive as well as procurement or other elements not covered by it nor by Directives [replacing 2004/17/EC and Directive 2004/18] or 2009/81/EC, the part of the contract which constitutes a concession covered by this Directive shall be awarded in accordance with this Directive. However, when the different parts of the contract are objectively not separable, the application of this Directive shall be determined on the basis of the main subject of that contract.
5. In the case of concessions subject to this Directive and contracts subject to [Directive 2004/18/EC or 2004/17/EC] or 2009/81/EC²¹, the part of the contract which constitutes a concession covered by this Directive shall be awarded in accordance with the provisions thereof.

²¹ OJ L 217, 20.8.2009, p. 76.

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

Article 19

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. Where one of the activities for which the concession subject to the provisions of this Directive is intended is listed in Annex III and the other is not listed therein and where it is objectively impossible to determine for which activity the concession is principally intended, the concession shall be awarded in accordance with the provisions applicable to concessions awarded by contracting authorities.
3. 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/EC²² 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.

SECTION IV SPECIFIC SITUATIONS

Article 20

Reserved concessions

Member States may reserve the right to participate in concession award procedures to sheltered workshops and economic operators whose main aim is the social and professional integration of disabled and disadvantaged workers or provide for such concessions to be performed in the context of sheltered employment programmes provided that more than 30% of the employees of those workshops, economic operators or programmes are disabled or disadvantaged workers. The concession notice shall make reference to this provision.

Article 21

Research and development services

1. This Directive shall apply to service concessions for research and development services with CPV reference numbers 73000000-2 to 73436000-7, except 73200000-

²² OJ L 217, 20.8.2009, p. 76.

4, 73210000-7 or 73220000-0, provided that the following conditions are both fulfilled:

- (a) the benefits accrue exclusively to the contracting authority or contracting entity for use in the conduct of its own affairs,
 - (b) the service provided is wholly remunerated by the contracting authority or contracting entity
2. 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 where one of the above conditions is not met.
 3. The Commission shall be empowered to adopt delegated acts in accordance with Article 46 concerning the reference numbers of this Article, 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.

CHAPTER II

Principles

Article 22 *Economic operators*

1. Economic operators that, under the law of the Member State in which they are established, are entitled to provide the relevant service, shall not be rejected solely on the ground that, under the law of the Member State in which the concession is awarded, they would be required to be either natural or legal persons.
2. However, legal persons may be required to indicate in the tender or the application, the names and relevant professional qualifications of the staff to be responsible for the performance of the concession in question.
3. Groups of economic operators may submit tenders or put themselves forward as candidates.
4. Contracting authorities and contracting entities shall not establish specific conditions for participation of such groups in concession award procedures which are not imposed on individual candidates. In order to submit an application or a tender, these groups shall not be required by the contracting authorities or contracting entities to assume a specific legal form.

Contracting authorities and contracting entities may establish specific conditions for the performance of the concession by a group, provided that those conditions are justified by objective reasons and proportionate. Those conditions may require a group to assume a specific legal form once it has been awarded the contract, to the

extent that this change is necessary for the satisfactory performance of the concession.

Article 23
Nomenclatures

1. Any references to nomenclatures in the context of the award of concessions shall be made using the ‘Common Procurement Vocabulary (CPV)’ as adopted by Regulation (EC) No 2195/2002²³.
2. The Commission shall be empowered to adopt delegated acts in accordance with Article 46 to adapt the reference numbers used in Annex I and X, whenever changes in the CPV nomenclature must be reflected in this Directive and they do not imply a modification of the scope of this Directive.

Article 24
Confidentiality

1. Unless otherwise provided in this Directive or in the national law concerning access to information, and without prejudice to the obligations relating to the advertising of awarded contracts and to the information to candidates and tenderers set out in Articles 27 and 35 of this Directive, the contracting authority shall not disclose information forwarded to it by economic operators which they have designated as confidential, including, but not limited to, technical or trade secrets and the confidential aspects of tenders.
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 concession award procedure.

Article 25
Rules applicable to communication

1. Except where use of electronic means is mandatory pursuant to Articles 28 (2) and 30 of this Directive contracting authorities and contracting entities may choose between the following means of communication for all communication and information exchange:
 - (a) electronic means in accordance with paragraphs 3, 4 and 5;
 - (b) post or fax;

²³ OJ L 340, 16.12.2002, p. 1.

- (c) telephone in the cases and circumstances referred to in paragraph 6, or
- (d) 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 28 (2) and 30 of this Directive.

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

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

3. The tools to be used for communicating by electronic means, as well as their technical characteristics, shall be non-discriminatory, generally available and interoperable with the information and communication technology products in general use and shall not restrict economic operators' access to the concession award procedure. The technical details and characteristics of the devices for the electronic receipts to be deemed in compliance with the first subparagraph of this paragraph are set out in Annex XII

The Commission shall be empowered to adopt delegated acts in accordance with Article 46 to amend the technical details and characteristics set out in Annex XII due to technical developments or administrative reasons.

To ensure the interoperability of technical formats as well as of process and messaging standards, especially in a cross-border context, the Commission shall be empowered to adopt delegated acts in accordance with Article 46 to establish the mandatory use of specific technical standards, at least with regard to the use of e-submission, electronic catalogues and means for electronic authentication.

4. Contracting authorities and contracting entities may, where necessary, require the use of tools which are not generally available, provided that they offer alternative means of access.

Contracting authorities and contracting entities shall be deemed to offer suitable alternative means of access in any of the following situations:

- (a) They offer unrestricted and full direct access by electronic means to these tools from the date of publication of the notice in accordance with Annex IX or from the date when 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 concession award procedure through the use of provisional tokens made available online at no extra cost;

(c) support an alternative channel for electronic submission of tenders.

5. The following rules shall apply to devices for the electronic transmission and receipt of tenders and for the electronic transmission and 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 XII;
- 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 concession award procedure followed. The level shall be proportionate to the risks attached.
- d) where advanced Electronic Signatures as defined by Directive 1999/93/EC²⁴ of the European Parliament and of the Council 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/EC²⁵, created with or without a secure signature creation device, subject to compliance with the following conditions:
 - (i) they must establish the required advanced signature format on the basis of formats established in Commission Decision 2011/130/EU²⁶ and put in place necessary measures to be able to process these formats technically;
 - (ii) where a tender is signed with the support of a qualified certificate that is included in the Trusted list, they must not apply additional requirements that may hinder the use of those signatures by tenderers.

6. The following rules shall apply to the transmission of applications to participate:

- (a) applications to participate in a procedure for the award of a concession may be made in writing or by telephone; in the latter case, a written confirmation must be sent before expiry of the time limit set for their receipt;
- (b) contracting authorities or contracting entities may require that applications for participation made by fax must be confirmed by post or by electronic means, where this is necessary for the purposes of legal proof.

For the purposes of point (b), the contracting authority or entity shall indicate in the concession notice or in the invitation to confirm interest that it requires applications

²⁴ OJ L 13, 19.1.2000, p. 12.

²⁵ OJ L 274, 20.10.2009, p. 36.

²⁶ OJ L 53, 26.2.2011, p. 66.

to participate made by fax to be confirmed by post or by electronic means and the time limit for sending such confirmation

7. Member States shall ensure that, at the latest 5 years after the date provided for in Article 49 (1), all procedures for the award of concessions under this Directive are performed using electronic means of communication, in particular e-submission, in accordance with the requirements of this Article.

This obligation shall not apply where the use of electronic means would require specialised tools or file formats that are not generally available in all the Member States within the meaning of paragraph 3. It is the responsibility of the contracting authorities or contracting entities using other means of communication for submission of tenders to demonstrate in the concession documents that the use of electronic means, due to the particular nature of the information to be exchanged with the economic operators, would require specialised tools or file formats that are not generally available in all the Member States.

Contracting authorities and contracting entities shall be deemed to have legitimate reasons not to request electronic means of communication in the submission process in the following cases:

- (a) the description of the technical specifications, due to the specialised nature of the concession award, cannot be rendered using file formats that are generally supported by commonly used applications;
 - (b) the applications supporting file formats that are suitable for the description of the technical specifications are under a proprietary licensing schema and cannot be made available for downloading or remote use by the contracting authority;
 - (c) the applications supporting file formats that are suitable for the description of the technical specifications use file formats that cannot be handled by any other open or downloadable applications.
8. Contracting authorities may use the data processed electronically for public procurement procedures in order to prevent, detect and correct errors occurring at each stage by developing appropriate tools.

TITLE II

RULES ON THE AWARD OF CONCESSIONS

CHAPTER I

Publication and Transparency

Article 26

Concession notices

1. Contracting authorities and contracting entities wishing to award a concession shall make known their intention by means of a concession notice.
2. Concession notices shall contain the information referred to in part of Annex IV and, where appropriate, any other information deemed useful by the contracting authority or entity, in accordance with the format of standard forms.
3. Contracting authorities and contracting entities wishing to award a concession for social and other specific services shall make known their intention of planned concession award through the publication of a prior information notice as soon as possible after the beginning of the budgetary year. Those notices shall contain the information set out in Annex XIII.
4. The Commission shall establish those standard forms. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 48.
5. By way of derogation from paragraph 1, the contracting authorities and entities shall not be required to publish a concession notice in any of the following cases:
 - (a) where no tenders or no suitable tenders or no applications have been submitted in response to a concession procedure, provided that the initial conditions of the concession contract are not substantially altered and on condition that a report is sent to the Commission or to the national oversight body designated pursuant to Article 84 of Directive [replacing Directive 2004/18/EC] where they so request;
 - (b) where the works or services can be supplied only by a particular economic operator due to the absence of competition for technical reasons, the protection of patents, copyrights or other intellectual property rights or the protection of other exclusive rights and where no reasonable alternative or substitute exists and the absence of competition is not the result of an artificial narrowing down of the parameters of the concession award;
 - (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 subject to the obligation referred to in paragraph 1, 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 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 5

6. For the purposes of point (a) of the first subparagraph, 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 concession documents.

Tenders shall be considered to be irregular, where they do not comply with the concession documents or where the prices offered are sheltered from normal competitive forces.

Tenders shall be considered to be unacceptable in any of the following cases:

(a) where they have been received late;

(b) they have been submitted by tenderers who do not have the requisite qualifications;

(c) their price exceeds the contracting authority or contracting entity's budget as determined prior to the launching of the concession award procedure and documented in writing;

(d) they have been found to be abnormally low

Article 27

Concession award notices

1. Not later than 48 days after the award of a concession, contracting authorities and contracting entities shall send a concession award notice on the results of the concession award procedure.

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 6 (5), is equal to or higher than 2 500 000 EUR with the sole exception of social services and other specific services as referred to in Article 17.

3. Such notices shall contain the information set out in Annex V or in relation to concessions for social services and other specific services the information set out in VI and be published in accordance with the provisions of Article 28

Article 28
Form and manner of publication of notices

1. The notices referred to in Articles 26 and 27 and the second subparagraph of Article 43(6) shall include the information set out Annexes IV to VI and in the format of standard forms, including standard forms for corrigenda.

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

2. The notices shall be drawn up, transmitted by electronic means to the Commission and published in accordance with Annex IX. Notices shall be published not later than five days after they are sent. The costs of publication of the notices by the Commission shall be borne by the Union.
3. The notices referred to in Article 26 shall be published in full in an official language of the Union as chosen by the contracting authority or contracting entity. That language version shall constitute 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 shall be able to supply proof of the dates on which notices are dispatched.

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

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

Article 29
Publication at national level

1. Notices referred to in Articles 26 and 27 and the information contained therein shall not be published at national level before the publication pursuant to Article 28.
2. Notices published at national level shall not contain information other than that contained in the notices dispatched to the Commission but shall indicate the date of dispatch of the notice to the Commission.

Article 30
Electronic availability of concession documents

1. Contracting authorities and contracting entities shall offer unrestricted and full direct access free of charge by electronic means to the concession documents from the date of publication of the notice in accordance with Article 28 or the date on which the

invitation to submit tenders is sent. The text of the notice or of these invitations shall specify the internet address at which this documentation is accessible.

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

CHAPTER II

Conduct of the procedure

SECTION I

JOINT CONCESSIONS, TIME LIMITS AND TECHNICAL SPECIFICATIONS

Article 31

Joint concessions between contracting authorities or contracting entities from different Member States

1. Without prejudice to Article 15, contracting authorities or contracting entities from different Member States may jointly award public concessions by using one of the means described in this Article.
2. Several contracting authorities or contracting entities from different Member States may jointly award a concession. In that case, the participating contracting authorities or contracting entities shall conclude an agreement that determines
 - (a) which national provisions shall apply to the concession award procedure.
 - (b) the internal organisation of the concession award procedure, including the management of the procedure, the sharing of responsibilities, the distribution of the works, supplies or services to be procured and the conclusion of concessions.

When determining the applicable national law in accordance with point (a), contracting authorities or contracting entities may choose the national provisions of any Member State in which at least one of the participating authorities is located.

3. Where several contracting authorities or contracting entities from different Member States have set up a joint legal entity, including European Groupings of territorial cooperation under Regulation (EC) N° 1082/2006 of the European Parliament and of the Council²⁷, the participating contracting authorities or participating contracting entities shall, by a decision of the competent body of the joint legal entity, agree on the applicable national concession award rules of one of the following Member States:

²⁷ OJ L 210 of 31.7.2006, p. 19

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

This agreement may either apply for an undetermined period, when fixed in the constitutive act of the joint legal body, or may be limited to a certain period of time, certain types of concessions or to one or more individual concession awards.

4. In the absence of an agreement determining the applicable concession rules, 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 participating contracting authority or participating contracting entity on behalf of the others, 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 participating contracting authority or participating contracting entity on behalf of the others, and
 - (i) 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;
 - (ii) 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 bears the biggest share of the costs.

5. In the absence of an agreement determining the applicable concession award law under paragraph 3, the national legislation governing concession award procedures conducted by joint legal bodies set up by several contracting authorities or contracting entities from different Member States shall be determined following the following rules:

- (a) where the procedure is conducted or managed by the competent organ of the joint legal body, the national provisions of the Member State where the legal body has its registered office shall apply.
- (b) where the procedure is conducted or managed by a member of the legal body on behalf of that legal body, the rules set out in points (a) and (b) of paragraph 4 shall apply.
- (c) where it is not possible to determine the applicable national law pursuant to points (a) or (b) of paragraph 4, the contracting authorities or

contracting entities shall apply the national provisions of the Member State where the legal body has its registered office.

6. One or more contracting authorities or one or more contracting entities may award individual concessions under a framework agreement concluded by or jointly with a contracting authority located in another Member State, provided that the framework agreement contains specific provisions enabling the respective contracting authority or contracting authorities or to award contracting entity or contracting entities the individual concessions.
7. Decisions on the award of concessions in cross-border concession award shall be subject to the ordinary review mechanisms available under the national law applicable.
8. In order to enable the effective operation of review mechanisms, Member States shall allow the decisions of review bodies within the meaning of Council Directive 89/665/EEC²⁸ and of Council Directive 92/13/EEC located in other Member States to be fully executed in their domestic legal order, where such decisions involve contracting authorities or contracting entities established on their territory participating in the relevant cross-border concession award procedure.

Article 32
Technical specifications

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

These characteristics may also refer to the specific process of production or provision of the requested works, supplies or services or of any other stage of its life cycle as referred to in point (14) of Article 2.

The technical specifications shall also specify whether the transfer of intellectual property rights will be required.

For all concession awards the subject of which is intended for use by persons, whether general public or staff of the contracting authority or contracting entity, those 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 Union, technical specifications shall, as far as accessibility criteria are concerned, be defined by reference thereto.

2. Technical specifications shall guarantee equal access of economic operators to the concession award procedure and not have the effect of creating unjustified obstacles to the opening up of concession award to competition.

²⁸ OJ L 395, 30.12. 1989, p. 33.

3. Without prejudice to mandatory national technical rules, to the extent that they are compatible with Union law, the technical specifications shall be formulated in one of the following ways:
 - (a) in terms of performance or functional requirements, including environmental characteristics, provided that the parameters are sufficiently precise to allow tenderers to determine the subject-matter of the contract and to allow contracting authorities or contracting entities to award the contract;
 - (b) by reference to technical specifications defined in Annex VIII 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 those do not exist — national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the supplies; each reference shall be accompanied by the words ‘or equivalent’;
 - (c) in terms of performance or functional requirements as referred to in point (a), with reference to the technical specifications referred to in point (b) as a means of presuming conformity with such performance or functional requirements;
 - (d) by reference to the technical specifications referred to in point (b) for certain characteristics, and by reference to the performance or functional requirements referred to in point (a) for other characteristics.
4. Unless justified by the subject-matter of the contract, technical specifications shall not refer to a specific make or source, or 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 uses the option of referring to the specifications referred to in point (b) of paragraph 3, it shall not 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 including the means of proof referred to in Article 33 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 point (a) of paragraph 3 to formulate technical specifications 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 including the means of proof referred to in Article 33 that the work, supply or service in compliance with the standard meets the performance or functional requirements of the contracting authority or contracting entity.

Article 33

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. Contracting authorities or contracting entities 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 reports 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 Council²⁹.
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 Article 32 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 88 of (Directive replacing Directive 2004/18/EC).

SECTION II

CHOICE OF PARTICIPANTS AND AWARD OF CONCESSIONS

Article 34

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 39 provided that the following cumulative conditions are fulfilled:

²⁹ OJ L 218, 13.8.2008, p. 30.

- (a) 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 concession award documents;
- (b) the tender comes from a tenderer who
 - (i) is not excluded from participating in the award procedure in accordance with paragraphs 4 to 8 of Article 36 and
 - (ii) meets the selection criteria set out by the contracting authority or contracting entity in accordance with paragraphs 1 to 3 of Article 36.

Article 35

Procedural guarantees

1. Contracting authorities and contracting entities shall indicate in the contract notice, in the invitation to submit tenders or in the concession documents a description of the concession, the award criteria and the minimum requirements to be met. This information must allow to identify the nature and scope of the concession, enabling economic operators to decide whether they request to participate in the concession award procedure. The description, award criteria and minimum requirements shall not be changed in the course of the negotiations.
2. During the concession award, contracting authorities and contracting entities shall ensure the 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.
3. Whenever the contracting authority or contracting 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.
4. The rules on the organisation of the concession award procedure, including rules on communication, on the stages of the procedure and on timing, shall be established in advance and communicated to all participants
5. Where the concession award involves negotiation, contracting authorities or contracting entities shall comply with the following rules:
 - (a) where the negotiation takes place after the submission of tenders they shall negotiate with tenderers the tenders submitted by them in order to adapt them to the criteria and requirements indicated in accordance with paragraph 1.
 - (b) they shall not reveal to the other participants solutions proposed or other confidential information communicated by a candidate participating in the negotiations without its agreement. This agreement shall not take the form of a general waiver but must be given with reference to the intended communication of specific solutions or other confidential information;

- (c) they may conduct the negotiation in successive stages in order to reduce the number of tenders to be negotiated by applying the award criteria in the contract notice, in the invitation to submit tenders or in the concession documents. In the contract notice, the invitation to submit tenders or the concession documents, the contracting authority shall indicate whether it has had recourse to this option.
 - (d) they shall assess the tenders as negotiated on the basis of the initially indicated award criteria;
 - (e) they shall establish a written record of formal deliberations and any other steps and events relevant for the concession award procedure. In particular, it shall ensure, by all appropriate means, the traceability of the negotiations.
6. Contracting authorities and contracting entities shall as soon as possible inform each candidate and tenderer of decisions reached concerning the award of a concession including the grounds for any decision not to award a contract for which there has been publication of a concession notice or to recommence the procedure.
7. On request from the party concerned, the contracting authority shall as quickly as possible, and in any case within 15 days from receipt of a written request, inform:
- (a) any unsuccessful candidates of the reasons for the rejection of their application,
 - (b) any unsuccessful tenderers of the reasons for the rejection of their tender, including, for the cases referred to in Article 32 (5) and (6), the reasons for its decision of non-equivalence or its decision that the works, supplies or services do not meet the performance or functional requirements,
 - (c) any tenderers that have made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer or the parties to the framework agreement,
 - (d) any tenderers that have made an admissible tender of the conduct and progress of negotiations and dialogue with tenderers.
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 36

Selection of and qualitative assessment of candidates

1. Contracting authorities shall specify, in the concession notice the conditions for participation relating to:
- (a) suitability to pursue the professional activity;
 - (b) economic and financial standing;

- (c) technical and professional ability.

Contracting authorities shall limit any conditions for participation to those that are appropriate to ensure that a candidate or tenderer has the legal and financial capacities and the commercial and technical abilities to perform the concession to be awarded. All requirements shall be related and strictly proportionate to the subject-matter of the contract, taking into account the need to ensure genuine competition.

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. With regard to the criteria referred to in paragraph 1, an economic operator may, where appropriate and for a particular concession, rely on the capacities of other entities, regardless of the legal nature of its links with them. It shall, in that case, prove to the contracting authority or the contracting entity that it will have at its disposal, throughout the period of the concession, the necessary resources, for example, by producing an undertaking by those entities to that effect. With regard to economic and financial standing, contracting authorities and contracting entities may require that the economic operator and those entities are jointly liable for the execution of the contract.
3. Under the same conditions, a group of economic operators as referred to in Article 22 may rely on the capacities of participants in the group or of other entities.
4. Member States shall adopt rules combating favouritism, corruption and preventing conflicts of interest, aimed at ensuring the transparency of the award procedure and the equal treatment of all tenderers.

With regard to conflicts of interest the measures adopted shall not go beyond what is strictly necessary to prevent or eliminate the conflict identified. In particular, they shall allow for the exclusion of a tenderer or candidate from the procedure only where the conflict of interests cannot be effectively remedied by other means.

5. Any candidate or tenderer that has been the subject of a conviction by a final judgment for one of the reasons listed below shall be excluded from participation in a concession:
 - (a) participation in a criminal organisation, as defined in Article 2(1) of Council Framework Decision 2008/841/JHA³⁰;
 - (b) corruption, as defined in Article 3 of the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union and Article 2 of Council Framework Decision 2003/568/JHA³¹ as well as corruption as defined in the national law of the contracting authority or the economic operator;

³⁰ OJ L 300, 11.11.2008, p. 42.

³¹ OJ L 192, 31.7.2003, p. 54.

- (c) fraud within the meaning of Article 1 of the Convention on the protection of the financial interests of the European Communities³²;
- (d) terrorist offences or offences linked to terrorist activities, as defined in Articles 1 and 3 of Framework Decision 2002/475/JHA³³ respectively, or inciting, aiding or abetting or attempting to commit an offence, as referred to in Article 4 of that Framework Decision;
- (e) money laundering, as defined in Article 1 of Council Directive 91/308/EEC³⁴.

The obligation to exclude a candidate or a tenderer from participation in a concession shall also apply where the conviction by final judgment has condemned company directors or any other any person having powers of representation, decision or control in respect of the candidate or tenderer.

6. Any economic operator shall be excluded from participation in a concession where the contracting authority or contracting entity is aware of a decision having the force of res judicata establishing that it has not fulfilled obligations relating to the payment of taxes or social security contributions in accordance with the legal provisions of the country in which it is established or with those of the Member State of the contracting authority or entity.
7. Member States may provide that contracting authorities or contracting entities exclude from participation in a concession award any economic operator if one of the following conditions is fulfilled:
 - (a) where it is aware of any other serious violation of provisions of European Union or of national law aimed at the protection of public interests compatible with the Treaty;
 - (b) where the economic operator is the subject of insolvency or winding-up proceedings, where its assets are being administered by a liquidator or by the court, where it has entered into an arrangement with creditors, where it has suspended business activities or is in any analogous situation arising from a similar procedure under national laws and regulations;
 - (c) where the economic operator has shown significant or persistent deficiencies in the performance of any substantive requirement under a prior concession or concessions of a similar nature with the same contracting authority or contracting entity.

In order to apply the ground for exclusion referred to in point (c) of the first subparagraph, contracting authorities and contracting entities shall provide a method for the assessment of contractual performance that is based on objective and measurable criteria and applied in a systematic, consistent and transparent way. Any performance assessment has to be communicated to the economic operator in

³² OJ C 316, 27.11.1995, p. 48.

³³ OJ L 164, 22.6.2002, p. 3.

³⁴ OJ L 166, 28.6.1991, p. 77.

question, which must be given the opportunity to object to the findings and to obtain judicial protection.

8. Any candidate or tenderer that is in one of the situations referred to in paragraphs 5 to 7 may provide the contracting authority or contracting entity with evidence demonstrating its reliability despite the existence of the relevant ground for exclusion.
9. Member States shall specify the implementing conditions for this article. They shall make available to other Member States, upon request, any information related to the exclusion grounds listed in this Article. The competent authorities of the Member State of establishment shall provide this information in accordance with the provisions of Article 88 of Directive [replacing Directive 2004/18/EC].

Article 37
Setting time limits

1. When fixing the time limits for the submission of applications for the concession and submission of tenders, contracting authorities or contracting entities shall take account in particular of the complexity of the concession and the time required for drawing up tenders, without prejudice to the minimum time limits set out in Article 37.
2. Where applications or tenders can be made only after a visit to the site or after on-the-spot inspection of the documents supporting the concession award documents, the time limits for the submission of applications for the concession shall be extended so that all economic operators concerned may be aware of all the information needed to produce applications or tenders.

Article 38
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 25.

Article 39
Concession award criteria

1. Concessions shall be awarded on the basis of objective criteria which ensure compliance with the principles of transparency, non-discrimination and equal treatment and which ensure that tenders are assessed in conditions of effective competition permitting to identify an overall economic advantage for the contracting authority or the contracting entity.

2. The award criteria shall be linked to the subject matter of the concession, and shall not confer an unrestricted freedom of choice on the contracting authority or the contracting entity.

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

3. The contracting authority or the contracting 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.
4. Member States may provide that contracting authorities and contracting entities shall base the award of concessions on the criterion of the most economically advantageous tender, in compliance with paragraph 2. Those criteria may include, in addition to price or costs, any of the following criteria

- (a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, environmental characteristics and innovative character.
- (b) for service concessions and concessions involving the design of works, the organisation, qualification and experience of the staff assigned to performing the concession in question may be taken into consideration, with the consequence that, following the award of the concession, such staff may only be replaced with the consent of the contracting authority or the contracting entity, which must verify that replacements ensure equivalent organisation and quality;
- (c) after-sales service and technical assistance, delivery date and delivery period or period of completion;
- (d) the specific process of production or provision of the requested works, supplies or services or of any other stage of its life cycle as referred to in point 14 of paragraph 1 of Article 2, to the extent that those criteria concern factors directly involved in these processes and characterise the specific process of production or provision of the requested works, supplies or services.

5. In the case referred to in paragraph 4, the contracting authority or entity shall specify in the contract notice, in the invitation to submit a tender, or in the concession documents, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender.

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

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

Article 40
Life-cycle costing

1. Life-cycle costing shall to the extent relevant cover all of the following costs over the life cycle of a product, service or works as defined in point 14 of paragraph 1 of Article 2:
 - (a) internal costs, including costs relating to acquisition (such as production costs), use (such as energy consumption, maintenance costs) and end of life (such as collection and recycling costs)
 - (b) external environmental costs directly linked to the life cycle, provided their monetary value can be determined and verified, which may include the cost of emissions of greenhouse gases and of other pollutant emissions and other climate change mitigation costs.

2. Where contracting authorities assess the costs using a life-cycle costing approach, they shall indicate in the concession award documents the methodology used for the calculation of the life-cycle costs. The methodology used must fulfil all of the following conditions:
 - (a) It has been drawn up on the basis of scientific information or is based on other objectively verifiable and non-discriminatory criteria;
 - (b) It has been established for repeated or continuous application;
 - (c) It is accessible to all interested parties.

Contracting authorities and contracting entities shall allow economic operators to apply a different methodology for establishing the life-cycle costs of their offer, provided that they prove that this methodology complies with the requirements set out in points a, b and c and is equivalent to the methodology indicated by the contracting authority or contracting entity.

3. Whenever a common methodology for the calculation of life-cycle costs is adopted as part of a legislative act of the Union, including by delegated acts pursuant to sector specific legislation, it shall be applied where life-cycle costing is included in the award criteria referred to in Article 39 paragraph (4).

A list of such legislative and delegated acts is set out in Annex II. The Commission shall be empowered to adopt delegated acts in accordance with Article 46 concerning the update of this list, when on the basis of the adoption of new legislation, repeal or modification of such legislation, such amendments prove necessary.

TITLE III

Rules on performance of concessions

Article 41 *Subcontracting*

1. In the concession documents, the contracting authority or contracting entity may ask or may be required by a Member State to ask the tenderer to indicate in its tender any share of the contract it may intend to subcontract to third parties and any proposed subcontractors.
2. Paragraph 1 shall be without prejudice to the question of the principal economic operator's liability.

Article 42 *Modification of concessions during their term*

1. A substantial modification of the provisions of a concession during its term shall be considered as a new award for the purposes of this Directive and shall require a new concession award procedure in accordance with this Directive.
2. A modification of a concession during its term shall be considered substantial within the meaning of paragraph 1, where it renders the concession substantially different from the one initially concluded, In any case, without prejudice to paragraph 3 and 4, a modification shall be considered substantial where one of the following conditions is met:
 - (a) the modification introduces conditions which, had they been part of the initial concession award procedure, would have allowed for the selection of other applicants than those initially selected, or would have allowed for awarding the concession to another applicant or tenderer;
 - (b) the modification changes the economic balance of the concession in favour of the concessionaire or
 - (c) the modification extends the scope of the concession considerably to encompass supplies, services or works not initially covered.
3. The replacement of the concessionaire shall be considered a substantial modification within the meaning of paragraph 1.

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

4. Where the value of a modification can be expressed in monetary terms, the modification shall not be considered to be substantial within the meaning of paragraph 1, where its value does not exceed the thresholds set out in Article 5 and where it is below 5% of the price of the initial contract, provided that the modification does not alter the overall nature of the contract. Where several successive modifications are made, the value shall be assessed on the basis of the cumulative value of the successive modifications.
5. Concession modifications shall not be considered substantial within the meaning of paragraph 1, where they have been provided for in the concession documents in clear, precise and unequivocal review clauses or options. Such clauses shall state the scope and nature of possible modifications or options as well as the conditions under which they may be used. They shall not provide for modifications or options that would alter the overall nature of the concession.
6. By way of derogation from paragraph 1, a substantial modification shall not require a new concession award procedure where the following cumulative conditions are fulfilled:
 - (d) the need for modification has been brought about by circumstances which a diligent contracting authority or entity could not foresee
 - (e) the modification does not alter the overall nature of the concession
 - (f) in case of concessions awarded by contracting authorities where any increase in price is not higher than 50% of the value of the original concession.

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

7. Contracting authorities and contracting entities shall not have recourse to modifications of the concession in the following cases:
 - (a) where the modification would aim at remedying deficiencies in the performance of the concessionaire or the consequences thereof, which can be remedied through the enforcement of contractual obligations;
 - (b) where the modification would aim at compensating risks of price increases that are the result of price fluctuations that could substantially impact the performance of a contract and that have been hedged by the concessionaire.

Article 43
Termination of concessions

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

- (a) the exceptions provided for in Article 15 cease to apply following a private participation in the legal person awarded the contract pursuant to Article 15 (4);
- (b) a modification of the concession constitutes a new award within the meaning of Article 42;
- (c) the Court of Justice of the European Union finds, in a procedure pursuant to Article 258 of the Treaty, that a Member State has failed to fulfil its obligations under the Treaties by the fact that a contracting authority or entity belonging to that Member State has awarded the concession in question without complying with its obligations under the Treaties and this Directive.

TITLE V

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

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

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

1. Article 1 is amended as follows:

(a) paragraph 1 is replaced by the following:

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

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

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

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

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

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

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

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

tenderers and candidates concerned or at least 10 calendar days with effect from the day following the date of the receipt of the contract award decision.’;

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

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

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

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

4. Article 2d is amended as follows:

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

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

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

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

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

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

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

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

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

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

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

Article 45
Amendments to Directive 92/13/EEC

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. Article 2c is replaced by the following:

Article 2c

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

5. Article 2d is amended as follows:

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

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

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

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

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

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

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

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

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

TITLE VI

DELEGATED POWERS, IMPLEMENTING POWERS AND FINAL PROVISIONS

Article 46

Exercise of the delegation of powers

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.
2. The delegation of power referred to in Articles 4 (3), 21 (3), 23 (2), 25 (3), 40 (3) and 52 (2) shall be conferred on the Commission for an indeterminate period of time from the [date of entry into force of the present Directive].
3. The delegation of power referred to in Articles 4 (3), 21 (3), 23 (2), 25 (3), 40 (3) and 52 (2), may be revoked at any time by the European Parliament or by the Council. A revocation decision shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the *Official Journal of the European Union* or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.
4. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.
5. A delegated act adopted pursuant to this Article shall enter into force only where no objection has been expressed either by the European Parliament or by the Council within a period of two months of notification of the act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by two months at the initiative of the European Parliament or the Council.

Article 47

Urgency procedure

1. Delegated acts adopted under this Article shall enter into force without delay and shall apply as long as no objection is expressed in accordance with paragraph 2. The notification of a delegated act to the European Parliament and to the Council shall state the reasons for the use of the urgency procedure.
2. Either the European Parliament or the Council may object to a delegated act in accordance with the procedure referred to in Article 46(5). In such a case, the Commission shall repeal the act without delay following the notification of the decision to object by the European Parliament or the Council.

Article 48
Committee Procedure

1. The Commission shall be assisted by the Advisory Committee for Public Contracts established by Council Decision 71/306/EEC³⁵. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.
2. Where reference is made to this Article, Article 4 of Regulation (EU) No 182/2011 shall apply.

Article 49
Transposition

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

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.
2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 50
Transitional provisions

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

Article 51
Review

The Commission shall review the economic effects on the Internal Market resulting from the application of the thresholds set in Article 5 and report thereon to the European Parliament and the Council by 30 June 2016.

Article 52
Entry into force

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

³⁵ OJ L 185, 16.8.1971, p. 15.

Article 53
Addressees

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President

ANNEX I
LIST OF THE ACTIVITIES REFERRED TO IN POINT (5) OF THE FIRST
PARAGRAPH OF ARTICLE 2³⁶

NACE Rev. 1 (4)					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	45120000

³⁶ In the event of any difference of interpretation between the CPV and the NACE, the CPV nomenclature will apply.

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

				<p>— construction work, other than buildings, for stadiums, swimming pools, gymnasiums, tennis courts, golf courses and other sports installations, see 45.23,</p> <p>— building installation, see 45.3,</p> <p>— building completion, see 45.4,</p> <p>— architectural and engineering activities, see 74.20,</p> <p>— project management for construction, see 74.20.</p>	
		45.22	Erection of roof covering and frames	<p>This class includes:</p> <p>— erection of roofs,</p> <p>— roof covering,</p> <p>— waterproofing.</p>	45261000
		45.23	Construction of highways, roads, airfields and sport facilities	<p>This class includes:</p> <p>— construction of highways, streets, roads, other vehicular and pedestrian ways,</p> <p>— construction of railways,</p> <p>— construction of airfield runways,</p> <p>— construction work, other than buildings, for stadiums, swimming pools, gymnasiums, tennis courts, golf courses and other sports installations,</p> <p>— painting of markings on road surfaces and car parks.</p> <p>This class excludes:</p> <p>— preliminary earth moving, see 45.11.</p>	<p>45212212 and DA03</p> <p>45230000</p> <p>except:</p> <p>- 45231000</p> <p>- 45232000</p> <p>- 45234115</p>
		45.24	Construction of water projects	<p>This class includes</p> <p>— construction of:</p> <p>—</p> <p>— waterways, harbour and river works,</p>	45240000

				<p>pleasure ports (marinas), locks, etc.,</p> <p>— dams and dykes,</p> <p>— dredging,</p> <p>— subsurface work.</p>	
		45.25	Other construction work involving special trades	<p>This class includes:</p> <p>— construction activities specialising in one aspect common to different kinds of structures, requiring specialised skill or equipment,</p> <p>— construction of foundations, including pile driving,</p> <p>— water well drilling and construction, shaft sinking,</p> <p>— erection of non-self-manufactured steel elements,</p> <p>— steel bending,</p> <p>— bricklaying and stone setting,</p> <p>— scaffolds and work platform erecting and dismantling, including renting of scaffolds and work platforms,</p> <p>— erection of chimneys and industrial ovens.</p> <p>This class excludes:</p> <p>— renting of scaffolds without erection and dismantling, see 71.32</p>	<p>45250000</p> <p>45262000</p>
	45.3		Building installation		45300000
		45.31	Installation of electrical wiring and fittings	<p>This class includes:</p> <p>installation in buildings or other construction projects of:</p> <p>— electrical wiring and fittings,</p> <p>— telecommunications systems,</p>	<p>45213316</p> <p>45310000</p> <p>Except:</p> <p>-</p> <p>45316000</p>

				<ul style="list-style-type: none"> — electrical heating systems, — residential antennas and aerials, — fire alarms, — burglar alarm systems, — lifts and escalators, — lightning conductors, etc. 	
		45.32	Insulation work activities	<p>This class includes:</p> <ul style="list-style-type: none"> — installation in buildings or other construction projects of thermal, sound or vibration insulation. <p>This class excludes:</p> <ul style="list-style-type: none"> — waterproofing, see 45.22. 	45320000
		45.33	Plumbing	<p>This class includes:</p> <ul style="list-style-type: none"> — 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. <p>This class excludes:</p> <ul style="list-style-type: none"> — installation of electrical heating systems, see 45.31. 	45330000
		45.34	Other building installation	<p>This class includes:</p> <ul style="list-style-type: none"> — installation of illumination and signalling systems for roads, railways, airports and harbours, — installation in buildings or other construction projects of fittings and fixtures 	45234115 45316000 45340000

				n.e.c.	
	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:	45440000

				<ul style="list-style-type: none"> — interior and exterior painting of buildings, — painting of civil engineering structures, — installation of glass, mirrors, etc. <p>This class excludes:</p> <ul style="list-style-type: none"> — installation of windows, see 45.42, 	
		45.45	Other building completion	<p>This class includes:</p> <ul style="list-style-type: none"> — installation of private swimming pools, — steam cleaning, sand blasting and similar activities for building exteriors, — other building completion and finishing work n.e.c. <p>This class excludes:</p> <ul style="list-style-type: none"> — interior cleaning of buildings and other structures, see 74.70. 	45212212 and DA04 45450000
	45.5		Renting of construction or demolition equipment with operator		45500000
		45.50	Renting of construction or demolition equipment with operator	<p>This class excludes:</p> <ul style="list-style-type: none"> — 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 40 (3)

1. Directive 2009/33/EC³⁷.

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

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

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

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

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

- (a) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of electricity;
- (b) the supply of electricity to such networks.

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

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

³⁷ OJ L 120, 15.5.2009, p. 5.

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

3. As far as water is concerned:

- (a) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of drinking water;
- (b) the supply of drinking water to such networks.

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

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

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

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

4. Activities relating to the provision or operation of networks providing a service to the public in the field of transport by railway, automated systems, tramway, trolley bus, bus or cable.

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

5. Activities relating to the exploitation of a geographical area for the purpose of the provision of airports and maritime or inland ports or other terminal facilities to carriers by air, sea or inland waterway.
6. Activities relating to the provision of :
 - (a) postal services; on the conditions set out in point (c),
 - (b) other services than postal services, on condition that such services are provided by an entity which also provides postal services within the meaning of point (b) of subparagraph 2 and provided that the conditions set out in Article 27(1) of Directive [replacing 2004/17/EC] are not satisfied in respect of the services falling within point (b) of subparagraph 2.

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

"postal item": means an item addressed in the final form in which it is to be carried, irrespective of weight. In addition to items of correspondence, such items also include for instance books, catalogues, newspapers, periodicals and postal packages containing merchandise with or without commercial value, irrespective of weight;

- (a) "postal services": means services consisting of the clearance, sorting, routing and delivery of postal items. This shall include both services falling within as well as services falling outside the scope of the universal service set up in conformity with Directive 97/67/EC;
- (b) "other services than postal services": means services provided in the following areas:
 - (1) mail service management services (services both preceding and subsequent to despatch, including "mailroom management services"),
 - (2) 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),
 - (3) services concerning postal items not included in point (a), such as direct mail bearing no address,
 - (4) financial services, as defined in the CPV under the reference numbers from 66100000-1 to 66720000-3 and in Article 8 (5)(d) and including in particular postal money orders and postal giro transfers,
 - (5) philatelic services,
 - (6) logistics services (services combining physical delivery and/or warehousing with other non-postal functions),

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

ANNEX IV
INFORMATION TO BE INCLUDED IN CONCESSION NOTICES

1. Name, identification number (where provided for in national legislation), address including NUTS code, telephone, fax number, email and internet address of the contracting authority or entity and, where different, of the service from which additional information may be obtained.
2. Type of contracting authority or entity and main activity exercised.
3. If the applications are to contain tenders, email or internet address at which the specifications and any supporting documents will be available for unrestricted and full direct access, free of charge.
4. Description of the procurement: nature and extent of works, nature and quantity or value of supplies, nature and extent of services, Where the concession is divided into lots, this information shall be provided for each lot. Where appropriate, description of any options.
5. CPV Nomenclature reference No(s). Where the concession is divided into lots, this information shall be provided for each lot.
6. NUTS code for the main location of works in case of works concessions or NUTS code for the main place of performance service concessions; where the concession is divided into lots, this information shall be provided for each lot.
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. 6
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:
 - (a) where appropriate, indication whether the concession is restricted to sheltered workshops, or whether its execution is restricted to the framework of protected job programmes,
 - (b) where appropriate, indication whether the provision of the service is reserved by law, regulation or administrative provision to a particular

- profession; reference to the relevant law, regulation or administrative provision,
- (c) a list and brief description of selection criteria; 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.
- (a) Time limit for the submission of applications
- (b) Address to which they must be sent
- (c) Language(s) in which they must be written
12. Criteria which will be applied in the award of the concession
13. Date of dispatch of the notice
14. Name and address of the body responsible for appeal and, where appropriate, mediation procedures. Precise information concerning the deadline for lodging appeals or, if need be, the name, address, telephone number, fax number and email address of the service from which this information may be obtained.
15. Where appropriate, particular conditions to which performance of the concession is subject.
16. Address where applications or tenders shall be transmitted.
17. In case of one-stage procedures:
- (a) Time limit for receipt of tenders, if different from the time limit the submission of applications
- (b) time frame during which the tenderer must maintain its tender,
- (c) date, time and place for the opening of tenders,
- (d) persons authorised to be present at such opening.
18. Where appropriate, indication of requirements and conditions related to the use of electronic means of communication
19. Information whether the concession is related to a project and /or programme financed by European Union funds.

ANNEX V
INFORMATION TO BE INCLUDED IN CONCESSION AWARD NOTICES

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

1. Name, identification number (where provided for in national legislation), address including NUTS code, telephone, fax number, email and internet address of the contracting authority or entity and, where different, of the service from which additional information may be obtained.
2. Type of contracting authority or entity and main activity exercised.
3. CPV Nomenclature reference No(s).
4. NUTS code for the main location of works in case of works concessions or NUTS code for the main place of performance in case of service concessions;
5. Description of the procurement: nature and extent of works, nature and quantity or value of supplies, nature and extent of services. Where the concession is divided into lots, this information shall be provided for each lot. Where appropriate, description of any options.
6. Description of award procedure used, in the case of award without prior publication, justification.
7. Criteria referred to in Article 39 which were used for award of the concession or concessions.
8. Date of concession award decision or decisions;
9. Number of tenders received with respect of each award, including:
 - (a) number of tenders received from economic operators which are small and medium enterprises,
 - (b) number of tenders received from abroad,
 - (c) number of tenders received electronically.
10. For each award, name, address including NUTS code, telephone, fax number, email address and internet address of the successful tenderer(s) including
 - (a) information whether the successful tenderer is small and medium enterprise,
 - (b) information whether the concession was awarded to a consortium.
11. Value and main financial terms of the awarded concession, including fees and prices.
12. Where appropriate, for each award, value and proportion of concession likely to be subcontracted to third parties.
13. Information whether the concession is related to a project and /or programme financed by European Union funds.

14. 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
15. Date(s) and reference(s) of previous publications in the Official Journal of the European Union relevant to the concession(s) advertised in this notice.
16. Date of dispatch of the notice.
17. Detailed method of calculation of the estimated total value of the concession, in accordance with Article 6.
18. Any other relevant information.

II. INFORMATION TO BE INCLUDED IN CONCESSION AWARD NOTICES PUBLISHED IN ACCORDANCE WITH ARTICLE 27(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, Where the concession is divided into lots, this information shall be provided for each lot. Where appropriate, description of any options.
3. CPV Nomenclature reference No(s).
4. Type of contracting authority or entity and main activity exercised.
5. Date of concession award decision or decisions;
6. 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.
7. Value and main financial terms of the award, including fees and prices.
8. Detailed method of calculation of the estimated total value of the concession, in accordance with Article 6.

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

1. Name, identification number (where provided for in national legislation), address including NUTS code, telephone, fax number, email and internet address of the contracting authority or entity and, where different, of the service from which additional information may be obtained.
2. Type of contracting authority or entity and main activity exercised.
3. CPV Nomenclature reference No(s); where the contract is divided into lots, this information shall be provided for each lot.
4. At least a summary indication of the nature and quantity of the services and if applicable, works and supplies provided.
5. Number of tenders received.
6. Value and main financial terms of the award, including fees and prices.

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

ANNEX VII

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

1. Name, identification number (where provided for in national legislation), address including NUTS code, telephone, fax number, email and internet address of the contracting authority or entity and, where different, of the service from which additional information may be obtained.
2. CPV Nomenclature reference No(s);
3. NUTS code for the main location of works in case of public works concessions or works concessions or NUTS code for the main place of delivery or performance in service concessions;
4. Description of the concession before and after the modification: nature and extent of the works, nature and quantity or value of supplies, nature and extent of services.
5. Where applicable, modification of financial terms of the concession, including increase in prices or fees caused by the modification.
6. Description of the circumstances which have rendered necessary the modification.
7. Date of concession award decision.
8. Where applicable, the name, address including NUTS code, telephone, fax number, email address and internet address of the new economic operator or operators.
9. Information whether the concession is related to a project and /or programme financed by European Union funds.
10. Name and address of the 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.
11. Date(s) and reference(s) of previous publications in the Official Journal of the European Union relevant to the contract(s) concerned by this notice.
12. Date of dispatch of the notice.
13. Any other relevant information.

ANNEX VIII

DEFINITION OF CERTAIN TECHNICAL SPECIFICATIONS

For the purposes of this Directive:

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

ANNEX IX
FEATURES CONCERNING PUBLICATION

1. Publication of notices

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

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

The Publications Office of the European Union will give the contracting authority or entity the confirmation referred to in Article 28 (5).

2. Publication of complementary or additional information

Contracting authorities and contracting 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 X
SERVICES REFERRED TO IN ARTICLE 17

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,	Benefit services

75320000-5, 75330000-8, 75340000-1

98000000-3	Other community, social and personal services
98120000-0	Services furnished by trade unions
98131000-0	Religious services

ANNEX XI
LIST OF EUROPEAN UNION LEGISLATION REFERRED TO IN
ARTICLE 4 (3) (b)

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

- (a) Granting authorisation to operate natural gas installations in accordance with the procedures laid down in Article 4 of Directive 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 XII
REQUIREMENTS RELATING TO DEVICES FOR THE ELECTRONIC RECEIPT
OF TENDERS, AND APPLICATIONS

1. Devices for the electronic receipt of tenders and applications must at least guarantee, through technical means and appropriate procedures, that:
 - (a) the exact time and date of the receipt of tenders and applications can be determined precisely;
 - (a) it may be reasonably ensured that, before the time limits laid down, no-one can have access to data transmitted under these requirements;
 - (b) where that access prohibition is infringed, it may be reasonably ensured that the infringement is clearly detectable;

- (c) only authorised persons may set or change the dates for opening data received;
- (d) during the different stages of the concession award procedure access to all data submitted, or to part thereof, must be possible only through simultaneous action by authorised persons;
- (e) simultaneous action by authorised persons must give access to data transmitted only after the prescribed date;
- (f) data received and opened in accordance with these requirements must remain accessible only to persons authorised to acquaint themselves therewith, and
- (g) authentication of tenders must conform to the requirements set out in this Annex.

ANNEX XIII
INFORMATION TO BE INCLUDED IN PRIOR INFORMATION NOTICES
CONCERNING CONCESSIONS FOR SOCIAL AND OTHER SPECIFIC SERVICES
(as referred to in Article 26(3))

1. Name, identification number (where provided for in national legislation), address including NUTS code, telephone, fax number, email and internet address of the contracting authority or contracting entity and, where different, of the service from which additional information may be obtained.
2. Where appropriate, email or internet address at which the specifications and any supporting documents will be available.
3. Type of contracting authority or contracting entity and main activity exercised.
4. CPV Nomenclature reference No(s); where the contract is divided into lots, this information shall be provided for each lot.
5. NUTS code for the main place of delivery or performance of service concessions
6. Description of the services and where applicable, incidental works and supplies to be procured
7. Estimated total value of concession(s); where the concession is divided into lots, this information shall be provided for each lot.
8. Conditions for participation.
9. Where applicable, time limit(s) for contacting the contracting authority or contracting entity in view of participation.

10. Where applicable, brief description of the main features of the award procedure to be applied.
11. Any other relevant information.