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**PROPOSAL**

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Subject: Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF  
THE COUNCIL on procurement by entities operating in the water, energy,  
transport and postal services sectors

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Delegations will find attached a proposal from the Commission, submitted under a covering letter from Mr Jordi AYET PUIGARNAU, Director, to Mr Uwe CORSEPIUS, Secretary-General of the Council of the European Union.

Encl.: COM(2011) 895 final



EUROPEAN COMMISSION

Brussels, 20.12.2011  
COM(2011) 895 final

2011/0439 (COD)

Proposal for a

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

**on procurement by entities operating in the water, energy, transport and postal services  
sectors**

(Text with EEA relevance)

{SEC(2011) 1585}

{SEC(2011) 1586}

## EXPLANATORY MEMORANDUM

### 1. CONTEXT OF THE PROPOSAL

- **Grounds for and objectives of the proposal**

The Europe 2020 strategy for smart, sustainable and inclusive growth [COM(2010) 2020] is based on three interlocking and mutually reinforcing priorities: developing an economy based on knowledge and innovation; promoting a low-carbon, resource-efficient and competitive economy; and fostering a high-employment economy delivering social and territorial cohesion.

Public procurement plays a key role in the Europe 2020 strategy as one of the market-based instruments to be used to achieve those objectives by improving the business environment and conditions for business to innovate and by encouraging wider use of green procurement supporting the shift towards a resource efficient and low-carbon economy. At the same time, the Europe 2020 strategy stresses that public procurement policy must ensure the most efficient use of funds and that procurement markets must be kept open Union-wide.

In the face of those challenges, the existing public procurement legislation needs to be revised and modernised in order to make it better suited to deal with the evolving political, social and economic context. This concerns not only procurement by the State and public authorities, but also contract awards by utilities operators which have their own specific procurement regime.

In its communication of 13 April 2011 on “The Single Market Act: Twelve levers to boost growth and confidence”, the European Commission included among its twelve key priority actions to be adopted by the EU institutions before the end of 2012, a revised and modernised public procurement legislative framework to make the award of contracts more flexible and enable public contracts to be put to better use in support of other policies.

This proposal has two complementary objectives:

- Increase the efficiency of spending to ensure the best possible procurement outcomes in terms of value for money. This implies in particular a simplification and flexibilisation of the existing public procurement rules. Streamlined, more efficient procedures will benefit all economic operators and facilitate the participation of SMEs and cross-border bidders.
- Allow procurers to make better use of procurement in support of common societal goals such as protection of the environment, higher resource and energy efficiency, combating climate change, promoting innovation, employment and social inclusion and ensuring the best possible conditions for the provision of high quality social services.

- **General context**

Public procurement plays an important role in the overall economic performance of the European Union. In Europe, public purchasers spend around 18% of GDP on supplies, works and services. Given the volume of purchases, public procurement can be used as a powerful lever for achieving a Single Market fostering smart, sustainable and inclusive growth.

The current generation of public procurement Directives – Directives 2004/17/EC<sup>1</sup> and 2004/18/EC<sup>2</sup> – are the product of a long evolution that started in 1971 with the adoption of Directive 71/305/EEC. By guaranteeing transparent and non-discriminatory procedures, those Directives principally aim to ensure that economic operators from across the Single Market benefit fully from the basic freedoms in competing for public contracts.

A comprehensive economic evaluation has shown that the procurement Directives have achieved their objectives to a considerable extent. They have resulted in greater transparency and higher levels of competition while achieving measurable savings through lower prices.

Stakeholders have nevertheless voiced demand for a review of the public procurement directives to simplify the rules, increase their efficiency and effectiveness and make them better suited to deal with the evolving political, social and economic context. Streamlined, more efficient procedures will increase flexibility for contracting authorities, benefit all economic operators and facilitate the participation of SMEs and cross-border bidders. Improved procurement rules will also allow contracting entities to make better use of procurement in support of common societal goals, such as the protection of the environment, higher resource and energy efficiency and combating climate change, promoting innovation and social inclusion, and ensuring the best possible conditions for the provision of high quality social services. Those orientations were confirmed by the results of a consultation of stakeholders conducted by the European Commission in spring 2011, where a very large majority of stakeholders supported the proposal to review the procurement Directives in order to adapt them better to the new challenges faced by procurers and economic operators alike.

- **Existing provisions in the area of the proposal**

Together with the proposed new Directive on procurement by public authorities, the proposal will replace Directives 2004/17/EC and 2004/18/EC as the core elements of the European Union public procurement legislative framework.

The Directive will be complemented by the further elements of that legislative framework:

- Directive 2009/81/EC<sup>3</sup> sets specific rules for defence and sensitive security procurement,
- Directive 92/13/EEC<sup>4</sup> establishes common standards for national review procedures to ensure that rapid and effective means of redress is available in all EU countries in cases where bidders consider that contracts have been awarded unfairly.

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<sup>1</sup> Directive 2004/17/EC of 31 March 2004 coordinating the procurement procedures of entities in the water, energy, transport and postal services sectors, OJ L 134, 30.4.2004, p. 1.

<sup>2</sup> Directive 2004/18/EC of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ L 134, 30.4.2004, p. 114.

<sup>3</sup> Directive 2009/81/EC of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC, OJ L 216, 20.8.2009, p. 76.

<sup>4</sup> Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunication sectors, OJ L 76, 23.3.1992, p. 14.

- **Consistency with the other policies and objectives of the Union**

This initiative implements the Europe 2020 strategy for smart, sustainable and inclusive growth [COM(2010) 2020] and the Europe 2020 Flagship Initiatives on a Digital Agenda for Europe [COM(2010) 245], the Innovation Union [COM(2010) 546], an Integrated Industrial Policy for the Globalisation Era [COM(2010) 614], Energy 2020 [COM(2010) 639] and a Resource Efficient Europe [COM(2011) 21]. It also implements the Single Market Act [COM(2011) 206], in particular its twelfth key action “Revised and Modernised Public Procurement Legislative Framework”. It is a CWP 2011 strategic initiative.

## 2. CONSULTATION OF INTERESTED PARTIES AND IMPACT ASSESSMENT

- **Consultation of interested parties**

### Consultation methods, main sectors targeted and general profile of respondents

The European Commission published on 27 January 2011 a *Green Paper on the modernisation of EU public procurement policy – Towards a more efficient European Procurement Market*<sup>5</sup> launching a broad public consultation on options for legislative changes to make the award of contracts easier and more flexible and enable public contracts to be put to better use in support of other policies. The purpose of the Green Paper was to identify a number of key areas for reform and ask for stakeholders’ views on concrete options for legislative change. Among the issues covered were the needs for simplifying and flexibilising procedures, strategic use of public procurement to promote other policy objectives, improving access for SMEs to public contracts and combating favouritism, corruption and conflicts of interest.

The public consultation closed on 18 April 2011 and met with a high response. In total, 623 replies were received, coming from a wide variety of stakeholder groups including central Member State authorities, local and regional public purchasers and their associations, undertakings, industry associations, academics, civil society organisations (including trade unions) and individual citizens. The majority of replies originated from the United Kingdom, Germany, France and, to a lesser degree, Belgium, Italy, the Netherlands, Austria, Sweden, Spain and Denmark.

The results of the consultation were summarised in a synthesis paper<sup>6</sup> and presented and discussed at a public conference on 30 June 2011<sup>7</sup>.

### Summary of responses and how they have been taken into account

A very large majority of stakeholders appreciated the initiative of the European Commission to review the current procurement policy. Amongst the different subjects discussed in the Green Paper, stakeholders put a particularly strong emphasis on the need to simplify procedures and make them more flexible. There was also consensus among all stakeholder

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<sup>5</sup> COM(2011) 15.

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0015:FIN:EN:PDF>

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[http://ec.europa.eu/internal\\_market/consultations/docs/2011/public\\_procurement/synthesis\\_document\\_en.pdf](http://ec.europa.eu/internal_market/consultations/docs/2011/public_procurement/synthesis_document_en.pdf)

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[http://ec.europa.eu/internal\\_market/publicprocurement/modernising\\_rules/conferences/index\\_en.htm](http://ec.europa.eu/internal_market/publicprocurement/modernising_rules/conferences/index_en.htm)

groups that the rules on procurement by utilities were still relevant. A clear majority of respondents agreed that there was still a need for a specific set of rules to be applied to public utilities operators and that the different rules applying to utilities operators adequately reflect the specific character of utilities procurement.

In the same vein, a clear majority of respondents agree that the criteria used for defining the entities subject to the utilities rules (activities carried out by the entities concerned, their legal statute and, where they are private, the existence of special or exclusive rights) are still appropriate and should be maintained. Most respondents are also in agreement that the profit-seeking or commercial ethos of private companies cannot be regarded as sufficient to guarantee objective and fair procurement, if those companies are operating on the basis of special or exclusive rights.

On the strategic use of public procurement to achieve the societal goals of the Europe 2020 strategy, stakeholders' opinions were mixed. Many stakeholders, especially businesses, showed a general reluctance to the idea of using public procurement in support of other policy objectives. Other stakeholders, notably civil society organisations, were strongly in favour of such strategic use and advocated far-reaching changes to the very principles of the European Union public procurement policy.

- **Collection and use of expertise**

In addition to the Green Paper consultation, the European Commission conducted in 2010/2011 a comprehensive evaluation of the impact and effectiveness of EU procurement legislation drawing on an extensive body of evidence and new independent research. The studies assessed mainly the cost and effectiveness of procurement procedures, issues of cross border procurement, SMEs' access to procurement markets and the strategic use of procurement in Europe. With regard to utilities procurement, the evaluation examined whether the utilities sectors are now more exposed to competition than they were at the time of adoption of the procurement regime.

The findings of the evaluation showed that legislative activity to liberalise access to utility sectors has not yet translated into sustained or effective competitive pressure on incumbent operators. In many utility sectors, high levels of market concentration or anaemic competition continue to be observed. The evaluations concluded that conditions have not evolved to the extent that competition can be deemed to be sufficiently strong on a sector wide basis to permit the exclusion of sectors from the scope of the utilities procurement Directive. The rationale of the Directive continues to apply in general while specific exemptions from the application of the procurement rules may be justified on the basis of an in-depth, case by case analysis.

- **Impact assessment**

The impact assessment and its executive summary give an overview of the different options for each of the five groups of basic problems (administrative organisation, scope, procedures, strategic procurement and access to procurement markets). Based on an analysis of the advantages and disadvantages of the different options, a package of preferred options was identified that should optimise the synergies between the different solutions allowing savings due to one type of action to neutralise related costs caused by another (e.g. possible increased procedural requirements caused by strategic procurement actions could partially be

neutralised by savings related to the improved design of procurement procedures). Those preferred options form the basis of the present proposal.

The draft Impact Assessment report was scrutinised by the Impact Assessment Board, who asked for amendments concerning in particular the identification of the specific elements of the legislative framework to be addressed, the description of the options under discussion, a more in-depth cost-benefit analysis of the selected headline actions and the systematic integration of stakeholder views, both in the problem definition and to complement the analysis of impacts. Those recommendations for improvement were integrated in the final report. The opinion of the Impact Assessment Board on the report is published together with this proposal, as well as the final Impact Assessment report and its executive summary.

### **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 procurement procedures above certain thresholds has proven an important tool for the achievement of the Internal Market in the field of purchasing by utilities. It ensures effective and equal access to contracts for economic operators across the Internal Market. Experience with Directives 2004/17/EC and 2004/18/EC and the earlier generations of procurement Directives has shown that European-wide procurement procedures provide transparency and objectivity in procurement resulting in considerable savings and improved procurement outcomes that benefit utilities operators, their customers 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 increasing regulatory complexity and causing unwarranted obstacles for cross-border activities.

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 through a set of European-wide coordinated procurement procedures. Moreover, the proposal is based on a “tool box” approach, allowing Member State a maximum of flexibility in adapting the procedures and tools to their specific situation.

Compared to the current procurement Directives, the proposal will reduce administrative burden related to the conduct of the procedure both for contracting entities and economic operators; where new requirements are foreseen (for instance, in the context of strategic procurement), those will be compensated by the removal of constraints in other areas.

- **Choice of instruments**

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

During the impact assessment process, 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**

- **Repeal of existing legislation**

The adoption of the proposal will lead to the repeal of existing legislation (Directive 2004/17/EEC).

- **Review/revision/sunset clause**

The proposal contains a review clause concerning the economic effects of the threshold amounts.

- **Transposition measures and explanatory documents**

The proposal concerns an area where Union legislation has a coordination purpose, with a significant impact on a wide range of national legal sectors. Notwithstanding the coordination purpose, many provisions constitute full harmonisation and the proposal includes a large number of legal obligations. Member States supplement Union rules with national additional provisions so as the whole system becomes operational.

In this context, the Commission has identified a number of factors which render explanations by Member States necessary both for the correct understanding of transposing measures and for the functioning of the whole picture of procurement rules at national level:

- transposing and implementing measures are adopted at different institutional levels (national / federal, regional, local);
- in addition to the different regulatory layers, in many Member States rules are also established according to the sector involved or the type of procurement concerned;
- administrative measures of general or specific nature complement and in some cases overlap the main legal framework.



Only Member States can explain how the different measures transpose the Union directives in the public procurement sector and how the same measures interact each with the others.

For those reasons, the communication of documents explaining the relationship between the various parts of this directive and the corresponding parts of national transposition measures should be communicated together with the transposing measures, in particular concordance tables, which constitute an operational tool for the analysis of the national measures.

- **European Economic Area**

The proposed act concerns an EEA matter and should therefore extend to the European Economic Area.

- **Detailed explanation of the proposal**

*1) Simplification and flexibilisation of procurement procedures*

The proposed Directive provides for a simplification and flexibilisation of the procedural regime set by the current public procurement Directives. For this purpose, it contains the following measures:

*Clarification of scope:* The basic concept of “procurement” which appears also in the title of the proposed Directive has been newly introduced in order to better determine the scope and purpose of procurement law and to facilitate the application of the thresholds. The definitions of certain key notions determining the scope of the Directive (such as body governed by public law, public works and service contracts, mixed contracts) have been revised in the light of the case-law of the Court of Justice. At the same time, the proposal endeavours to keep continuity in the use of notions and concepts that have been developed over the years through the Court’s case-law and are well known to practitioners. In this context, it should be noted that minor deviations from the wording or presentation known from the previous Directives do not necessarily imply a change of substance, but may be due to simplification of texts.

The notion of special or exclusive rights is central to the definition of the scope of this Directive, since entities which are neither contracting authorities nor public undertakings within the meaning of this Directive are subject to this Directive 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 in which adequate publicity has been ensured and where the granting of those rights was based on objective criteria, notably pursuant to Union legislation, do not constitute special or exclusive rights for the purposes of this Directive.

The traditional distinction between so-called priority and non-priority services (“A” and “B” services) will be abolished. The results of the evaluation have shown that it is no longer justified to restrict the full application of procurement law to a limited group of services. However, it became also clear that the regular procurement regime is not adapted to social services which need a specific set of rules (see below).

Following the results of the evaluation, the scope in terms of sectors covered remains largely unchanged. However, procurement made for the purpose of exploring oil and gas has been withdrawn from the scope as that sector has been found to be subject to such competitive pressure that the procurement discipline brought about by the Directive is no longer needed.

The competitive situation in this sector of activity has been examined in the context of four different requests for exemption under the current Article 30<sup>8</sup>. In all four cases, the relevant geographical market was consistently found to be worldwide, which is furthermore in accordance with well-established practice in merger cases<sup>9</sup>. The conclusions have consistently been that the exploration market is not highly concentrated. Apart from state owned companies, the market is characterised by the presence of three international vertically integrated private players named the super majors (BP, ExxonMobil and Shell) as well as a certain number of so-called ‘majors’ and the individual market share of even super majors is well below one percent. All of this has consistently been found to constitute indications of direct exposure to competition and access to the market is furthermore liberalised through the provisions of the Hydrocarbon Licensing Directive<sup>10</sup>. It therefore appropriate to simplify the legal situation and to lessen the administrative burden on all concerned (contracting entities, Member States, the European Commission, the European Parliament and Council) by avoiding the need to adopt individual Article 30 Decisions in respect of each of the remaining 23 Member States.

*Toolbox approach:* Member State systems will provide the three basic forms of procedure which already exist under current Directives: open and restricted procedures as well as negotiated procedures with prior call for competition. They may, in addition, foresee either as standard procedure or subject to certain conditions the innovation partnership, a new form of procedure for innovative procurement (see below).

Contracting entities will furthermore have at their disposal a set of six specific procurement techniques and tools intended for aggregated and electronic procurement: framework agreements, dynamic purchasing systems, electronic auctions, electronic catalogues, central purchasing bodies and joint procurement. Compared to the existing Directive, those tools have been improved and clarified with a view to facilitating e-procurement.

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<sup>8</sup> European Commission Implementing Decision 2011/481/EU of 28 July 2011 exempting exploration for oil and gas and exploitation of oil in Denmark, excluding Greenland and the Faroe Islands, from the application of Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ L 197 of 29.7.2011, p. 20; European Commission Implementing Decision 2011/372/EU of 24 June 2011 exempting exploration for oil and gas and exploitation of oil in Italy from the application of Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ L 166 of 25.6.2011, p. 28; European Commission Decision 2010/192/EU of 29 March 2010 exempting exploration for and exploitation of oil and gas in England, Scotland and Wales from the application of Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors; OJ L 84 of 31.03.2010, p. 52; European Commission Decision 2009/546/EC of 8 July 2009 exempting exploration for and exploitation of oil and gas in the Netherlands from the application of Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ L 181 of 14.07.2009, p. 53.

<sup>9</sup> See in particular European Commission Decision 2004/284/EC of 29 September 1999 declaring a concentration compatible with the common market and the EEA Agreement (Case No IV/M.1383 — Exxon/Mobil) and subsequent decisions, inter alia, European Commission Decision of 03/05/2007 declaring a concentration to be compatible with the common market (Case No COMP/M.4545 — STATOIL/HYDRO) according to Council Regulation (EEC) No 139/2004.

<sup>10</sup> Directive 94/22/EEC of the European Parliament and of the Council of 30 May 1994 on the conditions for granting and using authorizations for the prospecting, exploration and production of hydrocarbons, OJ L 79 of 29.3.1996, p. 30.

*Promotion of e-procurement:* The use of electronic communications and transaction processing by purchasers can deliver significant savings and improved procurement outcomes while reducing waste and error. The proposal aims at helping Member States to achieve the switchover to e-procurement enabling suppliers to take part in online procurement procedures across the Internal Market. For this purpose, the proposed Directive provides for the mandatory transmission of notices in electronic form, the mandatory electronic availability of the procurement documents and imposes the switch to fully electronic communication, in particular e-submission, in all procurement procedures within a transition period of two years. It streamlines and improves Dynamic Purchasing Systems and electronic catalogues, fully electronic procurement tools that are particularly adapted to highly aggregated procurement done by Central Purchasing Bodies. The e-procurement instrument would also enable contracting authorities to prevent, detect and correct errors generally due to wrong understanding or interpretation of public procurement rules.

*Modernisation of procedures:* The proposal provides a more flexible and user-friendly approach for certain important features of procurement procedures. Time-limits for participations and submission of offers have been shortened, allowing for quicker and more streamlined procurement. The distinction between selection of tenderers and award of the contract which is often a source of errors and misunderstandings has been made more flexible, allowing contracting entities to decide on the most practical sequencing by examining award criteria before selection criteria and to take into account the organisation and quality of the staff assigned to performing the contract as an award criterion.

The procedure for exemption of contracts awarded in sufficiently competitive markets (the current “Article 30 decisions”) has been simplified and streamlined. A number of exemptions, in particular the intra-group and joint venture exemptions which are important in practice have also been reviewed and clarified.

The modification of contracts during their term has become an increasingly relevant and problematic issue for practitioners. A specific provision on modification of contracts takes up the basic solutions developed by case-law and provides a pragmatic solution for dealing with unforeseen circumstances requiring an adaptation of a public contract during its term.

## *2) Strategic use of public procurement in response to new challenges*

The proposed Directive is based on *enabling approach* providing contracting entities with the instruments needed to contribute to the achievement of the Europe 2020 strategic goals by using their purchasing power to procure goods and services that foster innovation, respect the environment and combat climate change while improving employment, public health and social conditions.

*Life-cycle costing:* The proposal gives purchasers the possibility to base their award decisions on life-cycle costs of the products, services or works to be purchased. The life cycle covers all stages of the existence of a product or works or provision of a service, from raw material acquisition or generation of resources until disposal, clearance and finalisation. The costs to be taken into account do not only include direct monetary expenses, but also external environmental costs if they can be monetised and verified. Where a common European Union methodology for the calculation of life-cycle costs has been developed, contracting entities are obliged to make use of it.

*Production process:* Contracting entities may refer to all factors directly linked to the production process in the technical specifications and in the award criteria, as long as they refer to aspects of the production process which are closely related to the specific production or provision of the good or service purchased. This excludes requirements that are not related to the process of producing the products, works or services covered by the procurement, such as a general corporate social responsibility requirement covering the whole operation of the contractor.

*Labels:* Contracting entities may require that works, supplies or services bear specific labels certifying environmental, social or other characteristics, provided that they accept also equivalent labels. This applies for instance to European or (multi-)national eco-labels or labels certifying that a product is free of child-labour. The certification schemes in question must concern characteristics linked to the subject-matter of the contract and be drawn up on the basis of scientific information, established in an open and transparent procedure and accessible to all interested parties.

*Sanctioning violations of mandatory social, labour or environmental law:* Under the proposed Directive, a contracting entity can exclude economic operators from the procedure, if it identifies infringements of obligations established by Union legislation in the field of social, labour or environmental law or of international labour law provisions. Moreover, contracting entities will be obliged to reject tenders if they have established that they are abnormally low because of violations of Union legislation in the field of social, labour or environmental law.

*Social services:* The evaluation on the impact and effectiveness of EU public procurement legislation has shown that social, health and education services have specific characteristics which make them inappropriate for the application of the regular procedures for the award of public service contracts. Those services are typically provided within a specific context that varies widely between Member States due to different administrative, organisational and cultural circumstances. The services have, by their very nature, only a very limited cross-border dimension. Member States should therefore have large discretion to organise the choice of service providers. The proposal takes account of this by providing a specific regime for contracts for those services, with a higher threshold of EUR 1 000 000 and imposing only the respect of basic principles of transparency and equal treatment. A quantitative analysis of the values of contracts for the relevant services awarded to economic operators from abroad has shown that contracts below this value have typically no cross-border interest in the particular context of procurement in the utilities' sectors.

*Innovation:* Research and innovation play a central role in the Europe 2020 strategy for smart, sustainable and inclusive growth. Purchasers should be enabled to buy innovative products and services promoting future growth and improving efficiency and quality of public services. The proposal provides for this purpose the innovation partnership, a new special procedure for the development and subsequent purchase of new, innovative products, works and services, provided they can be delivered to agreed performance levels and costs. In addition, the proposal improves and simplifies the competitive dialogue procedure and facilitates cross-border joint procurement which is an important instrument for innovative purchasing.

### *3) Better access to the market for SMEs and Start-ups*

Small and medium-sized enterprises (SMEs) have a huge potential for job creation, growth and innovation. Easy access to procurement markets can help them unlock this potential while allowing contracting entities to broaden their supplier base, with positive effects of higher

competition for public contracts. In order to make public contracts as accessible as possible to SMEs, the European Commission published in 2008 the “European Code of Best Practices facilitating access by SMEs to public procurement contracts”<sup>11</sup>. The proposal builds on this work and provides concrete measures to remove barriers for market access by SMEs.

*Simplification of information obligations:* It is therefore foreseen that contracting entities may apply the selection criteria provided for in the proposed Directive on public procurement and that, where they do, they are then obliged to apply the provisions concerning notably the ceiling to requirements on minimum turnover as well as the provisions on in particular self-certification.

*Better access to framework agreements:* Under the current Directives, there is no limitation to the duration of framework agreements concluded in the utilities sectors. This can lead to market foreclosure. The proposal limits the duration to four years (except in duly justified circumstances), improving access to business opportunities and enhancing competition, also to the benefit of SMEs.

*Direct payment of subcontractors:* In addition, Member State can provide that subcontractors may request for direct payment by the contracting entity of supplies, works and services provided to the main contractor in the context of the contract performance. This offers subcontractors which are often SMEs an efficient way of protecting their interest in being paid.

#### 4) Sound procedures

The financial interests at stake and the interaction between the public and the private sector make procurement a risk area for unsound business practices such as conflict of interest, favouritism and corruption. The proposal improves the existing safeguards against such risks and provides for additional protection.

*Conflicts of interest:* The proposal contains a specific provision on conflicts of interest covering actual, potential or perceived conflict of interest situations affecting staff members of the contracting authority or of procurement service providers intervening in the procedure and members of the contracting authority's management who may influence the outcome of a procurement procedure even if they are not formally involved in it. Given the differences in the decision-making processes of respectively contracting authorities and undertakings, it is appropriate to limit such provisions to procurement carried out by the former.

*Illicit conduct:* The proposal contains a specific provision against illicit behaviour by candidates and tenderers, such as attempts to improperly influence the decision-making process or entering into agreements with other participants to manipulate the outcome of the procedure have to be excluded from the procedure. Such illicit activities violate basic principles of European Union law and can result in serious distortions of competition.

*Unfair advantages:* Market consultations are a useful instrument for contracting entities to obtain information on the structure, capability and capacity of a market while at the same time informing market actors on purchasers' procurement projects and requirements. However, preliminary contacts with market participants must not result in unfair advantages and distortions of competitions. The proposal contains therefore a specific provision on safeguards

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<sup>11</sup> European Commission Staff Working Document SEC(2008) 2193.

against undue preference in favour of participants who have advised the contracting entity or have been involved in the preparation of the procedure.

### 5) Governance

*National oversight bodies:* The evaluation has shown that not all Member States are consistently and systematically monitoring the implementation and functioning of the procurement rules. This compromises the efficient and uniform application of European Union law. The proposal provides therefore that Member States designate a single national authority in charge of monitoring, implementation and control of procurement law. Only a single body with overarching tasks will ensure an overview of main implementation difficulties and will be able to suggest appropriate remedies to more structural problems. It will be in the position to provide immediate feedback on the functioning of the policy and the potential weaknesses in national legislation and practice, thus contributing to the quick identification of solutions and the improvement of the procurement procedures.

*Knowledge centres:* In many cases, contracting entities do not have the internal expertise to deal with complex procurement projects. Appropriate and independent professional support by administrative structures could considerably improve procurement outcomes by expanding the knowledge base and the professionalism of public procurers and delivering assistance to businesses, notably SMEs. The proposal obliges therefore Member States to provide support structures offering legal and economic advice, guidance, training and assistance in preparing and conducting procurement procedures. Support structures or mechanisms exist already at national level, although organised in very different manners and covering different areas of interest for contracting authorities and contracting entities. Member states will therefore be able to use those mechanisms, build on their expertise and promote their services as an appropriate and modern tool capable to provide appropriate support to contracting authorities, contracting entities and economic operators. To reinforce the fight against corruption and favouritism, contracting authorities will be obliged to transmit the text of concluded contracts to the oversight body, which will thus be able to scrutinize these contracts for suspicious patterns, and give access to these documents to interested persons to the extent that legitimate public or private interests are not jeopardized. Because of the evident problems of protecting legitimate commercial interests and avoid distortion of competition, this obligation should not be extended to undertakings (public or private) operating in these sectors. Furthermore, the creation of disproportionate administrative burden must be avoided; the obligation to transmit the full text of concluded contracts should therefore remain limited to relatively high value contracts. The thresholds proposed would strike the right balance between increasing administrative burden and ensuring greater transparency: with a threshold of 1 000 000 EUR for supplies and services, and of 10 000 000 EUR, this obligation would apply to 10 - 20 % of all procurement published in the Official Journal.

It is not foreseen that requirements concerning oversight bodies and knowledge centres will generate overall an additional financial burden for Member States. If some costs are expected to re-organise or fine tune the activities of existing mechanisms and structures, they will be neutralised by a reduction of litigation costs (both for contracting entities and business), costs related to delays in the attribution of contracts, due to misapplication of public procurement rules or to the bad preparation of the procurement procedures, as well as costs related to the fact that advice to contracting entities is currently provided in a fragmented and inefficient manner.

*Administrative cooperation:* The proposal provides also for effective cooperation allowing national oversight bodies to share information and best practices and to cooperate through the Internal Market Information System (IMI).

Proposal for a

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

**on procurement by entities operating in the water, energy, transport and postal services sectors**

(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) and 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<sup>12</sup>,

Having regard to the opinion of the European Economic and Social Committee<sup>13</sup>,

Having regard to the opinion of the Committee of the Regions<sup>14</sup>,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) In the light of the results of the Evaluation on the Impact and Effectiveness of EU Public Procurement Legislation<sup>15</sup> it appears appropriate to maintain rules on procurement by entities operating in the water, energy, transport and postal services sectors, since national authorities continue to be able to influence the behaviour of those entities, including participation in their capital and representation in the entities' administrative, managerial or supervisory bodies. Another reason to continue to regulate procurement in those sectors is 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 service concerned.
- (2) In order to guarantee the opening up to competition of procurement by entities operating in the water, energy, transport and postal services sectors, provisions should be drawn up coordinating procurement procedures in respect of contracts above a

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<sup>12</sup> OJ C

<sup>13</sup> OJ C

<sup>14</sup> OJ C

<sup>15</sup> SEC(2011) 853 Final of 27.6.2011



certain value. Such coordination is needed to ensure the effect of the principles of the Treaty on the Functioning of the European Union and in particular the free movement of goods, the freedom of establishment and the freedom to provide services as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. In view of the nature of the sectors affected by such coordination, the latter should, while safeguarding the application of those principles, establish a framework for sound commercial practice and should allow maximum flexibility.

- (3) For procurement the value of which is lower than the thresholds triggering the application of the provisions of Union coordination, it is advisable to recall the case-law developed by the Court of Justice according to which the rules and principles of the Treaty apply.
- (4) Public procurement plays a key role in the Europe 2020 strategy<sup>16</sup> as one of the market-based instruments to be used to achieve a smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. For that purpose, the current public procurement rules adopted pursuant to 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<sup>17</sup> and 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<sup>18</sup> have to be revised and modernised in order to increase the efficiency of public spending, facilitating in particular the participation of small and medium-sized enterprises in public procurement and to enable procurers to make better use of public procurement in support of common societal goals. There is also a need to clarify basic notions and concepts to ensure better legal certainty and to incorporate certain aspects of related well-established case-law of the Court of Justice of the European Union.
- (5) Under Article 11 of the Treaty on the Functioning of the European Union, environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development. This Directive clarifies how the contracting entities may contribute to the protection of the environment and the promotion of sustainable development, whilst ensuring that they can obtain the best value for money for their contracts.
- (6) It is appropriate that the notion of procurement or the definition of what constitutes a single procurement are as close as possible to those applied pursuant to Directive [...] of the European Parliament and of the Council of [...] on public procurement<sup>19</sup>, having due regard for the specificities of the sectors covered by this Directive. The concept of single procurement encompasses all supplies, works and services needed to carry out a particular project, for instance a works project or an entirety of works, supplies and/or services. Indications for the existence of one single project can for instance consist in overall prior planning and conception by the contracting entity, the

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<sup>16</sup> COM(2010) 2020 final, 3.3-2010.

<sup>17</sup> OJ L 134, 30.4.2004, p. 1.

<sup>18</sup> OJ L 134, 30.4.2004, p. 114.

<sup>19</sup> See p. [ ] of this Official Journal.

fact that the different elements purchased fulfil a single economic and technical function or that they are otherwise logically interlinked and carried out in a narrow time frame.

- (7) To ensure a real opening up of the market and a fair balance in the application of procurement rules in the water, energy, transport and postal services sectors it is necessary for the entities covered to be identified on a basis other than their legal status. It should be ensured, therefore, that the equal treatment of contracting entities operating in the public sector and those operating in the private sector is not prejudiced. It is also necessary to ensure, in keeping with Article 345 of the Treaty on the Functioning of the European Union, that the rules governing the system of property ownership in Member States are not prejudiced.
- (8) The notion of special or exclusive rights is central to the definition of the scope of this Directive, since entities which are neither contracting authorities nor public undertakings within the meaning of this Directive 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 gas<sup>20</sup>, Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity<sup>21</sup>, Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service<sup>22</sup>, Directive 94/22/EC of the European Parliament and of the Council of 20 May 1994 on the conditions for granting and using authorisations for the prospection, exploration and production of hydrocarbons<sup>23</sup> and Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70<sup>24</sup>.
- (9) Contracting entities that operate in the drinking water sector may also deal with other activities relating to water, such as projects in the field of hydraulic engineering, irrigation, land drainage or the disposal and treatment of sewage. In such case, contracting entities should be able to apply the procurement procedures provided for in this Directive in respect of all their activities relating to water, whichever part of the "water cycle" is concerned. However, procurement rules of the type proposed for supplies of goods are inappropriate for purchases of water, given the need to procure water from sources near the area in which it will be used.
- (10) It is appropriate to exclude procurement made for the purpose of exploring for oil and gas as that sector has consistently been found to be subject to such competitive

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<sup>20</sup> OJ L 204, 21.7.1998, p. 1

<sup>21</sup> OJ L 27, 30.1.1997, p. 20.

<sup>22</sup> OJ L 15, 21.1.1998, p. 14.

<sup>23</sup> OJ L 164, 30.6.1994, p. 3.

<sup>24</sup> OJ L 315, 3.12.2007, p. 1.

pressure that the procurement discipline brought about by the EU procurement rules is no longer needed.

- (11) Contracts may be awarded 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 contract 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 contract is principally intended may be based on an analysis of the requirements which the specific contract must meet, carried out by the contracting entity for the purposes of estimating the contract value and drawing up the procurement documents. In certain cases, such as the purchase of a single piece of equipment for the pursuit of activities for which information allowing an estimation of the respective rates of use would be unavailable, it might be objectively impossible to determine for which activity the contract is principally intended. The rules applicable to such cases should be indicated.
- (12) Even if they do not necessarily lead to corrupt conduct, actual, potential or perceived conflicts of interest have a high potential to improperly influence public procurement decisions with the effect of distorting competition and jeopardising equal treatment of tenderers. Effective mechanisms should therefore be set up to prevent, identify and remedy conflicts of interest. Given the differences in the decision-making processes of respectively contracting authorities and undertakings, it is appropriate to limit such provisions to procurement carried out by the former.
- (13) Illicit conduct by participants in a procurement procedure, such as attempts to unduly influence the decision-making process or to enter into agreements with other candidates to manipulate the outcome of the procedure can result in violations of the basic principles of Union law and in serious distortions of competition. Economic operators should therefore be required to submit a declaration on honour that they do not engage in such illicit activities and be excluded if this declaration proves to be false.
- (14) Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the Agreements reached in the Uruguay Round multilateral negotiations (1986 to 1994)<sup>25</sup>, approved in particular the World Trade Organisation Agreement on Government Procurement, hereinafter referred to as the "Agreement". The aim of the Agreement is to establish a multilateral framework of balanced rights and obligations relating to public contracts with a view to achieving the liberalisation and expansion of world trade. For contracts covered by the Agreement, as well as by other relevant international agreements by which the Union is bound, contracting entities fulfil the obligations under those agreements by applying this Directive to economic operators of third countries that are signatories to the agreements.
- (15) The Agreement applies to contracts above certain thresholds, set in the Agreement and expressed as special drawing rights. The thresholds laid down by this Directive should be aligned to ensure that they correspond to the euro equivalents of the thresholds of the Agreement. Provision should also be made for periodic reviews of the thresholds

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<sup>25</sup> OJ L 336, 23.12.1994, p. 1.

expressed in euros so as to adjust them, by way of a purely mathematical operation, to possible variations in the value of the euro in relation to the special drawing right. To avoid a multiplication of thresholds it is furthermore appropriate, without prejudice to the international commitments of the Union, to continue to apply the same thresholds to all contracting entities, regardless of the sector in which they operate.

- (16) The results of the Evaluation demonstrated that the exclusion of certain services from the full application of this directive should be reviewed. As a result, the full application of the Directive is extended to a number of services (such as hotel and legal services, which both showed a particularly high percentage of cross-border trade).
- (17) Other categories of services continue by their very nature to have a limited cross-border dimension, namely what are known as services to the person such as certain social, health and educational services. Those services are provided within a particular context that varies widely amongst Member States, due to different cultural traditions. A specific regime should therefore be established for contracts for those services, with a higher threshold of EUR 1 000 000. In the particular context of procurement in those sectors, services to the person with values below this threshold will typically not be of interest to providers from other Member States unless there are concrete indications to the contrary, such as Union financing for transborder projects. Contracts for services to the person above this threshold should be subject to Union-wide transparency. Given the importance of the cultural context and the sensitivity of those services, Member States should be given wide discretion to organise the choice of the service providers in the way they consider most appropriate. The rules of this directive take account of that imperative, imposing only observance of basic principles of transparency and equal treatment and making sure that contracting entities are able 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<sup>26</sup>. Member States and/or contracting entities remain free to provide those services themselves or to organise social services in a way that does not entail the conclusion of public contracts, 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 entity, without any limits or quotas, provided such a system ensures sufficient advertising and complies with the principles of transparency and non-discrimination.
- (18) Being addressed to Member States, this directive does not apply to procurement carried out by international organisations on their own behalf and for their own account. There is, however, a need to clarify to what extent this directive should be applied to procurement governed by specific international rules.
- (19) 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 divergently between Member States and even between contracting authorities. As this jurisprudence would be equally applicable to public authorities when operating in the sectors covered by this

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<sup>26</sup> SPC/2010/10/8 Final of 6.10.2010.

directive, it is appropriate to ensure that the same rules apply in both this directive and Directive [.../.../EU][on public procurement].

- (20) It is appropriate to exclude certain service, supply and works contracts awarded to an affiliated undertaking having as its principal activity the provision of such services, supply 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, supply and works contracts 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 contracts 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.
- (21) It is also appropriate to clarify the relations between the provisions on cooperation between public authorities and the provisions on the award of contracts to affiliated undertakings or in the context of joint ventures.
- (22) This Directive should apply neither to contracts intended to permit the performance of an activity referred to in Articles 5 to 11 nor to design contests organised for the pursuit of such an activity 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. It is therefore appropriate to maintain the procedure, applicable to all sectors covered by this Directive that will enable the effects of current or future opening up to competition to be taken into account. Such a procedure should provide legal certainty for the entities concerned, as well as an appropriate decision-making process, ensuring, within short time limits, uniform application of Union law in this area.
- (23) Direct exposure to competition should be assessed on the basis of objective criteria, taking account of the specific characteristics of the sector concerned. This assessment is, however, limited by the applicable short deadlines and by having to be based on the information available to the Commission – either from already available sources or from the information obtained in the context of the application pursuant to Article 28 - which can not be supplemented by more time consuming methods, including notably public inquiries of economic operators concerned. The assessment of direct exposure to competition that can be carried out in the context of this directive is consequently without prejudice to the full-fledged application of competition law.
- (24) The implementation and application of appropriate Union legislation opening a given sector, or a part of it, will be considered to provide sufficient grounds for assuming that there is free access to the market in question. Such appropriate legislation should be identified in an annex which can be updated by the Commission. It is appropriate that this annex should currently refer to Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the

internal market in natural gas and repealing Directive 2003/55/EC<sup>27</sup>, Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC<sup>28</sup> and Directive 94/22/EC.

- (25) Research and innovation, including eco-innovation and social innovation, are among the main drivers of future growth and have been put at the centre of the Europe 2020 strategy for smart, sustainable and inclusive growth. Contracting entities should make the best strategic use of public procurement to spur innovation. Buying innovative goods and services plays a key role in improving the efficiency and quality of public services while addressing major societal challenges. It contributes to achieving best value for money as well as wider economic, environmental and societal benefits in terms of generating new ideas, translating them into innovative products and services and thus promoting sustainable economic growth. This directive should contribute to facilitating procurement of innovation and help Member States in achieving the Innovation Union targets. A specific procurement procedure should therefore be provided for which allows contracting entities to establish a long-term innovation partnership for the development and subsequent purchase of a new, innovative product, service or works provided it can be delivered to agreed performance levels and costs. The partnership should be structured in such a way that it can provide the necessary “market-pull” incentivising the development of an innovative solution without foreclosing the market.
- (26) In view of the detrimental effects on competition, negotiated procedures without a call for competition should only be used in very exceptional circumstances. This exception should be limited to cases where publication is either not possible, for reasons of force majeure in line with the standing case-law of the Court of Justice of the European Union, or where it is clear from the outset that publication would not trigger more competition, not least because there is objectively only one economic operator that can perform the contract. Only situations of objective exclusivity can justify the use of the negotiated procedure without a call for competition, where the situation of exclusivity has not been created by the contracting entity itself with a view to the future procurement procedure, and where there are no adequate substitutes, the availability of which should be assessed thoroughly.
- (27) Electronic means of information and communication can greatly simplify the publication of contracts and increase the efficiency and transparency of procurement processes. They should become the standard means of communication and information exchange in procurement 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 to prevent, detect and correct errors that occur during procurement procedures.

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<sup>27</sup> OJ L 211, 14.8.2009, p. 94

<sup>28</sup> OJ L 211, 14.8.2009, p. 55

- (28) There is a strong trend emerging across Union public procurement markets towards the aggregation of demand by public purchasers, with a view to obtaining economies of scale, including lower prices and transaction costs, and to improving and professionalising procurement management. This can be achieved by concentrating purchases either by the number of contracting entities involved or by volume and value over time. However, the aggregation and centralisation of purchases should be carefully monitored in order to avoid excessive concentration of purchasing power and collusion, and to preserve transparency and competition, as well as market access opportunities for small and medium-sized enterprises.
- (29) The instrument of framework agreements can be an efficient procurement technique throughout Europe; however, there is a need to enhance competition by improving transparency of and access to procurement carried out by means of framework agreements. It is therefore appropriate to revise the provisions applicable to those agreements, notably by providing for mini-competitions for the award of specific contracts based on the agreement and by limiting the duration of framework agreements.
- (30) In view of the experience acquired, there is also a need to adjust the rules governing dynamic purchasing systems to enable contracting entities to take full advantage of the possibilities afforded by this instrument. The systems need to be simplified, in particular by operating them in the form of a restricted procedure, hence eliminating the need for indicative tenders, which have been identified as one of the major burdens associated with those systems. Thus any economic operator who submits a request to participate and meets the selection criteria should be allowed to take part in procurement procedures carried out through the dynamic purchasing system. This purchasing technique allows the contracting entity to have a particularly broad range of tenders and hence to ensure optimum use of funds through broad competition.
- (31) In addition, new electronic purchasing techniques are constantly being developed, such as electronic catalogues. They help to increase competition and streamline public purchasing, particularly in terms of savings in time and money. Certain rules should however be laid down to ensure that such use complies with the rules of this Directive and the principles of equal treatment, non-discrimination and transparency. In particular where competition has been reopened under a framework agreement or where a dynamic purchasing system is being used and where sufficient guarantees are offered in respect of ensuring traceability, equal treatment and predictability, contracting entities should be allowed to generate tenders in relation to specific purchases on the basis of previously transmitted electronic catalogues. In line with the requirements of the rules for electronic means of communication, contracting entities should avoid unjustified obstacles to economic operators' access to procurement procedures in which tenders are to be presented in the form of electronic catalogues and which guarantee compliance with the general principles of non-discrimination and equal treatment.
- (32) Centralised purchasing techniques are increasingly used in most Member States. Central purchasing bodies are responsible for making acquisitions or awarding contracts/framework agreements for other contracting authorities or for contracting entities. In view of the large volumes purchased, such techniques help increase competition and professionalise public purchasing. Provision should therefore be made for a Union definition of central purchasing bodies dedicated to contracting entities,

without preventing the continuation of less institutionalised and systematic common purchasing or the established practice of having recourse to service providers that prepare and manage procurement procedures on behalf and for the account of a contracting entity. Rules should also be laid down for allocating responsibility for the observance of the obligations pursuant to this Directive, also in the case of remedies, among the central purchasing body and the contracting entities procuring from or through the central purchasing body. Where the latter has sole responsibility for the conduct of the procurement procedures, it should also be solely and directly responsible for the legality of the procedures. Where a contracting entity conducts certain parts of the procedure, for instance the reopening of competition under a framework agreement or the award of individual contracts based on a dynamic purchasing system, it should continue to be responsible for the stages it conducts.

- (33) Electronic means of communication are particularly well suited to support centralised purchasing practices and tools because of the possibility they offer to re-use and automatically process data and to minimise information and transaction costs. The use of such electronic means of communication should therefore, as a first step, be rendered compulsory for central purchasing bodies, while also facilitating converging practices across the Union. This should be followed by a general obligation to use electronic means of communication in all procurement procedures after a transition period of two years.
- (34) Joint awarding of contracts by contracting entities from different Member States currently encounters specific legal difficulties, with special reference to conflicts of national laws. Despite the fact that Directive 2004/17/EC implicitly allowed for cross-border joint public procurement, in practice several national legal systems have explicitly or implicitly rendered cross-border joint procurement legally uncertain or impossible. Contracting entities from different Member States may be interested in cooperating and in jointly awarding contracts in order to derive maximum benefit from the potential of the internal market in terms of economies of scale and risk-benefit sharing, not least for innovative projects involving a greater amount of risk than reasonably bearable by a single contracting entity. Therefore new rules on cross-border joint procurement designating the applicable law should be established in order to facilitate cooperation between contracting entities across the Single Market. In addition, 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 procurement.
- (35) The technical specifications drawn up by purchasers need to allow public procurement to be opened up to competition. To that end, it should 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 other equivalent arrangements which meet the requirements of the contracting entities and are equivalent in terms of safety must be considered by the 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.

- (36) Contracting entities that wish to purchase works, supplies or services with specific environmental, social or other characteristics should be able to refer to particular labels, such as the European Eco-label, (multi-) national eco-labels or any other label provided that the requirements for the label are linked to the subject-matter of the contract, such as the description of the product and its presentation, including packaging requirements. It is furthermore essential that those requirements are drawn up and adopted on the basis of objectively verifiable criteria, using a procedure in which stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations can participate, and that the label is accessible and available to all interested parties.
- (37) For all procurement intended for use by persons, whether general public or staff of the contracting entity, it is necessary that contracting entities lay down technical specifications so as to take into account accessibility criteria for people with disabilities or design for all users except in duly justified cases.
- (38) In order to encourage the involvement of small and medium-sized enterprises (SMEs) in the procurement market, it should be provided explicitly that contracts may be divided into lots, whether homogenous or heterogeneous. Where contracts are divided into lots, contracting entities may, for instance in order to preserve competition or to ensure security of supply, limit the number of lots for which an economic operator may tender; they may also limit the number of lots that may be awarded to any one tenderer.
- (39) Insofar as compatible with the need to ensure the objective of sound commercial practice while allowing for maximum flexibility, it is appropriate to provide for the application of Directive [2004/18/EC] on public procurement in respect of requirements concerning economic and financial capacity and documentary evidence. It is therefore foreseen that contracting entities may apply the selection criteria provided for in Directive [2004/18/EC] and that, where they do, they are then obliged to apply the provisions concerning notably the ceiling to requirements on minimum turnover as well as on self-certification.
- (40) Public contracts 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. Given that contracting entities, which are not contracting authorities, might not have access to indisputable proof on the matter, it is appropriate to leave the choice of whether or not to apply the exclusion criteria listed in Directive [2004/18] to such contracting entities. The obligation to apply Article 55(1) and (2) of Directive [2004/18] should therefore be limited to contracting entities that are contracting authorities. Furthermore, contracting entities should be given the possibility to exclude candidates or tenderers for violations of environmental or social obligations, including rules on accessibility for disabled persons or other forms of grave professional misconduct, such as violations of competition rules or of intellectual property rights.

- (41) Where contracting entities are obliged or choose to apply the just mentioned exclusion criteria, they should apply Directive [2004/18] concerning the possibility that economic operators adopt compliance measures aimed at remedying the consequences of any criminal offences or misconduct and at effectively preventing further occurrences of the misbehaviour.
- (42) Contracting entities may require that environmental management measures or schemes are to be applied during the performance of a contract. Environmental management schemes, whether or not they are registered under Union instruments such as Regulation (EC) No 1221/2009 of the European Parliament and of the Council of 25 November 2009 on the voluntary participation by organisations in a Community eco-management and audit scheme (EMAS)<sup>29</sup>, can demonstrate that the economic operator has the technical capability to perform the contract. A description of the measures implemented by the economic operator to ensure the same level of environmental protection should be accepted as an alternative to environmental management registration schemes as a form of evidence, where the economic operator concerned has no access to such environmental management registration schemes or no possibility of obtaining them within the relevant time limits.
- (43) Contracts should be awarded on the basis of objective criteria that ensure compliance with the principles of transparency, non-discrimination and equal treatment. Those criteria should guarantee that tenders are assessed in conditions of effective competition, also where contracting entities require high-quality works, supplies and services that are optimally suited to their needs. As a result, contracting entities should be allowed to adopt as award criteria either "the most economically advantageous tender" or "the lowest cost", taking into account that in the latter case they are free to set adequate quality standards by using technical specifications or contract performance conditions.
- (44) Where contracting entities choose to award a contract to the most economically advantageous tender, they must determine the award criteria on the basis of which they will assess tenders in order to identify which one offers the best value for money. The determination of those criteria depends on the subject-matter of the contract, since they must allow the level of performance offered by each tender to be assessed in the light of the subject-matter of the contract, as defined in the technical specifications, and the value for money of each tender to be measured. Furthermore, the chosen award criteria should not confer an unrestricted freedom of choice on the contracting entity and 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.
- (45) It is of utmost importance to fully exploit the potential of public procurement to achieve the objectives of the Europe 2020 Strategy for sustainable growth. In view of the important differences between individual sectors and markets, it would however not be appropriate to set general mandatory requirements for environmental, social and innovation procurement. The Union legislature has already set mandatory procurement requirements for obtaining specific goals in the sectors of road transport vehicles (Directive 2009/33/EC of the European Parliament and the Council of 23 April 2009

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<sup>29</sup> OJ L 342, 22.12.2009, p. 1.

on the promotion of clean and energy-efficient road transport vehicles<sup>30</sup>) and office equipment (Regulation (EC) No 106/2008 of the European Parliament and the Council of 15 January 2008 on a Community energy-efficiency labelling programme for office equipment<sup>31</sup>). In addition, the definition of common methodologies for life cycle costing has significantly advanced. It therefore appears appropriate to continue on that path, leaving it to sector-specific legislation to set mandatory objectives and targets in function of the particular policies and conditions prevailing in the relevant sector and to promote the development and use of European approaches to life-cycle costing as a further underpinning for the use of public procurement in support of sustainable growth.

- (46) Those sector-specific measures must be complemented by an adaptation of the public procurement Directives empowering contracting entities to pursue the objectives of the Europe 2020 Strategy in their purchasing strategies. It should hence be made clear that contracting entities can determine the most economically advantageous tender and the lowest cost using a life-cycle costing approach, provided that the methodology to be used is established in an objective and non-discriminatory manner and accessible to all interested parties. The notion of life-cycle costing includes all costs over the life-cycle of a works, supplies or services, both their internal costs (such as development, production, use, maintenance and end-of-life disposal costs) and their external costs, provided they can be monetised and monitored. Common methodologies should be developed at the level of the Union for the calculation of life-cycle costs for specific categories of supplies or services; whenever such a methodology is developed its use should be made compulsory.
- (47) Furthermore, in technical specifications and in award criteria, 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 contract. In order to better integrate social considerations in public procurement, procurers may also be allowed to include, in the award criterion of the most economically advantageous tender characteristics related 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. 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 services<sup>32</sup> 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 which the Union is party.

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<sup>30</sup> OJ L 120, 15.5.2009, p. 5.

<sup>31</sup> OJ L 39, 13.2.2008, p. 1.

<sup>32</sup> OJ L 18, 21.1.1997, p.1.

- (48) For service contracts and for contracts involving the design of works, contracting entities should also be allowed to use as an award criterion the organisation qualification and experience of the staff assigned to performing the contract in question, as this may affect the quality of the contract performance and, as a result, the economic value of the tender.
- (49) Tenders that appear abnormally low in relation to the works, supplies or services might be based on technically, economically or legally unsound assumptions or practices. In order to prevent possible disadvantages during contract performance, contracting entities should be obliged to ask for an explanation of the price charged where a tender significantly undercuts the prices demanded by other tenderers. Where the tenderer cannot provide a sufficient explanation, the contracting entity should be entitled to reject the tender. Rejection should be mandatory in cases where the contracting entity has established that the abnormally low price results from non-compliance with mandatory Union legislation in the fields of social, labour or environmental law or international labour law provisions.
- (50) Contract performance conditions are compatible with this Directive provided that they are not directly or indirectly discriminatory, are linked to the subject-matter of the contract and are indicated in the notice used to make the call for competition, or in the procurement documents. They may, in particular, be intended to favour on-site vocational training, the employment of people experiencing particular difficulty in achieving integration, the fight against unemployment, protection of the environment or animal welfare. For example, mention may be made of the requirements applicable during the performance of the contract to recruit long-term job-seekers or to implement training measures for the unemployed or for young persons, to comply in substance with fundamental International Labour Organisation (ILO) Conventions, even where such Conventions have not been implemented in national law, and to recruit more disadvantaged persons than are required under national legislation.
- (51) The laws, regulations and collective agreements, at both national and Union level, that are in force in the areas of employment conditions and safety at work apply during the performance of a contract, provided 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 contract, Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services<sup>33</sup> lays down the minimum conditions that must be observed by the host country in respect of such posted workers. Where national law contains provisions to this effect, non-compliance with those obligations may be considered to be grave misconduct on the part of the economic operator concerned, liable to lead to the exclusion of that economic operator from the procedure for the award of a public contract.
- (52) Council Regulation (EEC, Euratom) No 1182/71 of 3 June 1971 determining the rules applicable to periods, dates and time limits<sup>34</sup> should apply to the calculation of the time limits contained in this Directive.

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<sup>33</sup> OJ L 18, 21.1.1997, p. 1.

<sup>34</sup> OJ L 124, 8.6.1971, p. 1.

- (53) It is necessary to clarify the conditions under which modifications of a contract during its performance require a new procurement procedure, taking into account the relevant case-law of the Court of Justice of the European Union. A new procurement procedure is required in case of material changes to the initial contract, in particular to the scope and content of the mutual rights and obligations of the parties, including the distribution of intellectual property rights. Such changes demonstrate the parties' intention to renegotiate essential terms or conditions of that contract. This is the case in particular if the amended conditions would have had an influence on the outcome of the procedure, had they been part of the initial procedure.
- (54) Contracting entities can be faced with external circumstances that they could not foresee when they awarded the contract. In this case, a certain degree of flexibility is needed to adapt the contract to those circumstances without a new procurement procedure. The notion of unforeseeable circumstances refers to circumstances that could not have been predicted despite reasonably diligent preparation of the initial award by the contracting 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.
- (55) In line with the principles of equal treatment and transparency, the successful tenderer should not be replaced by another economic operator without reopening the contract to competition. However, the successful tenderer performing the contract may undergo certain structural changes during the performance of the contract, such as purely internal reorganisations, mergers and acquisitions or insolvency. Such structural changes should not automatically require new procurement procedures for all contracts performed by that undertaking.
- (56) Contracting entities should, in the individual contracts themselves, have the possibility to provide for modifications by way of review clauses, but such clauses should not give them unlimited discretion. This directive should therefore set out to what extent modifications may be provided for in the initial contract.
- (57) The evaluation has shown that Member States do not consistently and systematically monitor the implementation and the functioning of public procurement rules. This has a negative impact on the correct implementation of provisions stemming from those directives, which is a major source of cost and uncertainty. Several Member States have appointed a national central body dealing with public procurement issues, but the functions that such bodies are empowered with vary considerably across Member States. Clearer, more consistent and authoritative monitoring and control mechanisms would increase knowledge of the functioning of procurement rules, legal certainty for businesses and contracting entities, and contribute to establish a level playing field. Such mechanisms could serve as tools for detection and early resolution of problems, especially with regard to projects cofunded by the Union, and for the identification of structural deficiencies. There is in particular a strong need to coordinate those mechanisms to ensure consistent application, controls and monitoring of public

procurement policy, as well as systematic assessment of the outcomes of procurement policy across the Union.

- (58) Member States should designate a single national authority in charge of monitoring, implementation and control of public procurement. Such a central body should have first hand and timely information particularly in relation to different problems affecting the implementation of public procurement law. It should be able to provide immediate feedback on the functioning of the policy, the potential weaknesses in national legislation and practice and contribute to the quick identification of solutions. In view of efficiently fighting corruption and fraud, this central body and the general public should also have the possibility to inspect the texts of concluded contracts. High-value contracts should hence be transmitted to the oversight body with a possibility of interested persons to have access to these documents, to the extent that legitimate public or private interests are not jeopardized.
- (59) Not all contracting entities may have the internal expertise to deal with economically or technically complex contracts. Against this background, appropriate professional support would be an effective complement to monitoring and control activities. On the one hand, this objective can be achieved by knowledge sharing tools (knowledge centres) offering technical assistance to contracting entities; on the other hand, business, not least SMEs, should benefit from administrative assistance, in particular when participating in procurement procedures on a cross-border basis.
- (60) Monitoring, oversight and support structures or mechanisms exist already at national level and can of course be used to ensure monitoring, implementation and control of public procurement and to provide the required support to contracting entities and economic operators.
- (61) Effective cooperation is necessary to ensure consistent advice and practice within each Member State and across the Union. Bodies designated for monitoring, implementation, control and technical assistance should be able to share information and cooperate; in the same context, the national authority designated by each Member State should act as the preferred contact point with the Commission services for the purpose of collecting data, exchanging information and monitoring the implementation of Union public procurement law.
- (62) In order to adapt to rapid technical, economic and regulatory developments, the power to adopt acts in accordance with Article 290 of the Treaty on the Functioning of the European Union should be delegated to the Commission in respect of a number of non-essential elements of this Directive. In fact, due to the need to comply with international agreements, the Commission should be empowered to modify the technical procedures for the calculation methods concerning thresholds as well as to periodically revise the thresholds themselves; references to the CPV nomenclature may undergo regulatory changes at EU level and it is necessary to reflect those changes into the text of this Directive; 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 certain technical standards for electronic communication to ensure the interoperability of technical formats, processes and messaging in procurement procedures conducted using electronic means of communication taking into account technological developments and administrative

needs; the Commission should also be empowered to adapt the mandatory content of the information to be included in notices to reflect administrative needs and regulatory changes at both national and EU level; the list of legislative acts of the Union establishing common methodologies for the calculation of life-cycle costs, referred to in article 77(3); the list of International Social and Environmental Conventions referred to in Articles 70 And 79 and the list of Union legislation referred to in article 27(3) whose implementation creates a presumption of free access to a given market as well as Annex II, referred to in Article 4(4), setting out a list of legislative acts to be taken into account when assessing the existence of special or exclusive rights should be quickly adapted to incorporate the measures adopted on a sectoral basis. In order to satisfy this need, the Commission should be empowered to keep the lists up-to date.

- (63) It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level. When preparing and drawing up delegated acts, the Commission should ensure simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and the Council.
- (64) In order to ensure uniform conditions for the implementation of this Directive, as for the procedure for sending and publishing data referred to in Annex IX and the procedures for drawing up and transmitting notices, the standard forms for the publication of notices as well as of process and messaging standards and the common template to be used by the oversight bodies for drawing up the implementation and statistical report, implementing powers should be conferred on the Commission. Those powers should be exercised in accordance with Regulation (EU) No. 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by the Member States of the Commission's exercise of implementing powers<sup>35</sup>. The advisory procedure should be used for the adoption of those 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, those acts are characterised by a mere administrative purpose and serve to facilitate the application of the rules set by this Directive. Furthermore, decisions to establish whether a given activity is directly exposed to competition on markets to which access is free should be adopted under conditions ensuring uniform conditions for implementing that provision. Implementing powers should therefore be conferred on the Commission also in respect of the detailed provisions for the implementation of the procedure, provided for under Article 28, for establishing whether Article 27 is applicable as well as the Decisions themselves. Those powers should be exercised in accordance with Regulation (EU) 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by the Member States of the Commission's exercise of implementing powers<sup>36</sup>. The advisory procedure should be used for the adoption of those implementing acts.
- (65) Since the objective of this Directive, namely the coordination of laws, regulations and administrative provisions of the Member States applying to certain public procurement procedures, cannot be sufficiently achieved by the Member States and can therefore be better achieved at Union level, the Union may adopt measures, in accordance with the

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<sup>35</sup> OJ L 55, 28.2.2011, p. 13.

<sup>36</sup> OJ L 55, 28.2.2011, p. 13.

principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.

(66) Directive 2004/17/EC should therefore be repealed.

(67) 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:

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# TITLE I

## SCOPE, DEFINITIONS AND GENERAL PRINCIPLES

### CHAPTER I

#### *Subject-matter and definitions*

##### *Article 1*

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

1. This Directive establishes rules on the procedures for procurement by contracting entities as defined in Article 4 with respect to contracts as well as design contests, whose value is estimated to be not less than the thresholds defined in Article 12.
2. Procurement within the meaning of this Directive is the purchase or other forms of acquisition of works, supplies or services by one or more contracting entities from economic operators chosen by those contracting entities, provided that the works, supplies or services are intended for the pursuit of one of the activities referred to in Articles 5 to 11.

An entirety of works, supplies and/or services, even if purchased through different contracts, constitutes a single procurement within the meaning of this Directive, if the contracts are part of one single project.

##### *Article 2*

###### *Definitions*

For the purposes of this Directive, the following definitions shall apply:

- (1) "contracting authorities" means 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;
- (2) "regional authorities" include all authorities of the administrative units falling under NUTS 1 and 2, as referred to by Regulation (EC) No. 1059/2003 of the European Parliament and of the Council<sup>37</sup>;
- (3) "local authorities" include all authorities of the administrative units falling under NUTS 3 and smaller administrative units, as referred to by Regulation (EC) No. 1059/2003;
- (4) a "body governed by public law" means any body that has all of the following characteristics:

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<sup>37</sup> OJ L 154, 21.6.2003, p. 1

- (a) It is established for or has the specific purpose of meeting needs in the general interest, not having an industrial or commercial character; for that purpose, a body which operates in normal market conditions, aims to make a profit, and bears the losses resulting from the exercise of its activity does not have the purpose of meeting needs in the general interest, not having an industrial or commercial character;
  - (b) it has legal personality;
  - (c) it is 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 has 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;
- (5) a "public undertaking" means 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;
- (6) "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 Articles 5 to 11 to one or more entities, and which substantially affects the ability of other entities to carry out such activity;
- (7) "supply, works and service contracts" means contracts for pecuniary interest concluded in writing between one or more of the contracting entities referred to in Article 4(3), and one or more economic operators and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive;
- (8) "works contracts" means contracts having as their object one of the following:
- (a) the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex I;
  - (b) the execution, or both the design and execution, of a work;
  - (c) the realisation by whatever means of a work corresponding to the requirements specified by the contracting entity exercising a decisive influence on the type or design of the work;
- (9) "a work" means the outcome of building or civil engineering works taken as a whole which is sufficient in itself to fulfil an economic or technical function;
- (10) "supply contracts" means contracts having as their object the purchase, lease, rental or hire-purchase, with or without an option to buy, of products. A supply contract may include, as an incidental matter, siting and installation operations;
- (11) "service contracts" means contracts having as their object the provision of services other than those referred to in paragraph 8;



- (12) "economic operator" means any natural or legal person, or a contracting entity, or a group of such persons and/or entities which offers the execution of works and/or a work, the supply of products or the provision of services on the market;
- (13) "tenderer" means an economic operator that has submitted a tender;
- (14) "candidate" means an economic operator that has sought an invitation or has been invited to take part in a restricted or negotiated procedure or in an innovation partnership;
- (15) 'procurement documents' means all documents produced or referred to by the contracting entity to describe or determine elements of the procurement or the procedure, including the contract notice, the prior information notice or the notices on the existence of a qualification system where they are used as a means of calling for competition, 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;
- (16) "centralised purchasing activities" means activities conducted on a permanent basis, in one of the following forms:
- (a) the acquisition of supplies and/or services intended for contracting entities,
  - (b) the award of contracts or the conclusion of framework agreements for works, supplies or services intended for contracting entities;
- (17) "ancillary purchasing activities" means activities consisting in the provision of support to purchasing activities, in particular in the following forms:
- (a) technical infrastructure enabling contracting entities to award public contracts or to conclude framework agreements for works, supplies or services;
  - (b) advice on the conduct or design of procurement procedures;
  - (c) preparation and management of procurement procedures on behalf and for the account of the contracting entity concerned;
- (18) "central purchasing body" means a contracting authority within the meaning of point 1 of Article 2 or a contracting authority within the meaning of point 1 of Article 2 of Directive [2004/18/EC] providing centralised purchasing activities and, possibly, ancillary purchasing activities;
- (19) "procurement service provider" means a public or private body, which offers ancillary purchasing activities on the market;
- (20) "written" or "in writing" means any expression consisting of words or figures which can be read, reproduced and subsequently communicated, including information transmitted and stored by electronic means;
- (21) "electronic means" means electronic equipment for the processing (including digital compression) and storage of data which is transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means;

- (22) '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;
- (23) "Design contests" means those procedures which enable the contracting entity to acquire, mainly in the fields of town and country planning, architecture, engineering or data processing, a plan or design selected by a jury after being put out to competition with or without the award of prizes.

### *Article 3*

#### *Mixed procurement and procurement covering several activities*

1. Contracts which have as their subject two or more types of procurement (works, services or supplies) shall be awarded in accordance with the provisions applicable to the type of procurement that characterises the main subject of the contract in question.

In the case of mixed contracts consisting of services within the meaning of Chapter I of Title III and other services or of services and supplies, the main object shall be determined by a comparison of the values of the respective services or supplies.

In the case of mixed contracts containing elements of supply, works and service contracts and of concessions, the part of the contract which constitutes a contract covered by this Directive shall be awarded in accordance with the provisions of this Directive.

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

2. A contract which is intended to cover several activities shall be subject to the rules applicable to the activity for which it is principally intended.

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

3. If one of the activities for which the contract is intended is subject to this Directive and the other to the abovementioned [2004/18] and if it is objectively impossible to determine for which activity the contract is principally intended, the contract shall be awarded in accordance with the abovementioned Directive [2004/18].
4. If one of the activities for which the contract is intended is subject to this Directive and the other is not subject to either this Directive or to Directive [2004/18] or Directive 2009/81/EC of the European Parliament and of the Council<sup>38</sup>, and if it is objectively impossible to determine for which activity the contract is principally intended, the contract shall be awarded in accordance with this Directive.

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<sup>38</sup> OJ L 217, 20.8.2009, p. 76.

## CHAPTER II

### Personal scope: *definition of the activities and entities covered*

#### SECTION 1 ENTITIES

##### *Article 4 Contracting entities*

1. A dominant influence within the meaning of point 5 of Article 2 on the part of the contracting authorities shall be presumed in any of the following cases in which those authorities, directly or indirectly:
  - (a) hold the majority of the undertaking's subscribed capital;
  - (b) control the majority of the votes attaching to shares issued by the undertaking,
  - (c) can appoint more than half of the undertaking's administrative, management or supervisory body.
  
2. Rights which have been granted by means of a procedure in which adequate publicity has been ensured and where the granting of those rights was based on objective criteria shall not constitute "special or exclusive rights" within the meaning of point 6 of Article 2.

This includes:

  - (a) procurement procedures with a prior call for competition in conformity with Directive [2004/18/EC], [Directive ... (concessions)] or this Directive;
  - (b) procedures pursuant to other legislative acts of the Union listed in Annex II, ensuring adequate prior transparency for granting authorisations on the basis of objective criteria.
  
3. This Directive shall apply to contracting entities:
  - (a) which are contracting authorities or public undertakings and which pursue one of the activities referred to in Articles 5 to 11;
  - (b) which, when they are not contracting authorities or public undertakings, have as one of their activities any of the activities referred to in Articles 5 to 11, or any combination thereof and operate on the basis of special or exclusive rights granted by a competent authority of a Member State.
  
4. The Commission shall be empowered to adopt delegated acts in accordance with Article 98 concerning the amendment/modification of the list of Union legislation set out in Annex II, when on the basis of the adoption of new legislation, repeal or modification of such legislation, such amendments prove necessary.

## SECTION 2 ACTIVITIES

### *Article 5 Gas and heat*

1. As far as gas and heat are concerned, this Directive shall apply to the following activities:
  - (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.
2. The supply of gas or heat to networks which provide a service to the public by a contracting entity other than a contracting authority shall not be considered a relevant activity within the meaning of paragraph 1 where all of the following conditions are met:
  - (a) the production of gas or heat by the entity concerned is the unavoidable consequence of carrying out an activity other than those referred to in paragraph 1 or in Articles 6 to 8;
  - (b) the supply to the public network is aimed only at the economic exploitation of such production and amounts to not more than 20 % of the entity's turnover on the basis of the average for the preceding three years, including the current year.

### *Article 6 Electricity*

1. As far as electricity is concerned, this Directive shall apply to the following activities:
  - (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.

2. The supply of electricity to networks which provide a service to the public by a contracting entity other than a contracting authority shall not be considered a relevant activity within the meaning of paragraph 1 where all of the following conditions are met:

- (a) the production of electricity by the entity concerned takes place because its consumption is necessary for carrying out an activity other than those referred to in paragraph 1 or in Articles 5 and 7 to 8;
- (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.

*Article 7*  
*Water*

1. This Directive shall apply to the following activities:
  - (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.
2. This Directive shall also apply to contracts or design contests awarded or organised by entities which pursue an activity referred to in paragraph 1 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,
  - (b) the disposal or treatment of sewage.
3. The supply of drinking water to networks which provide a service to the public by a contracting entity other than a contracting authority shall not be considered a relevant activity within the meaning of paragraph 1 where all of the following conditions are met:
  - (a) the production of drinking water by the entity concerned takes place because its consumption is necessary for carrying out an activity other than those referred to in Articles 5 to 8;
  - (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.

*Article 8*  
*Transport services*

This Directive shall apply to 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.

*Article 9*  
*Ports and airports*

This Directive shall apply to 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.

*Article 10*  
*Postal services*

1. This Directive shall apply to activities relating to the provision of:
  - (a) postal services;
  - (b) other services than postal services, on condition that such services are provided by an entity which also provides postal services within the meaning of point (b) of paragraph 2 and provided that the conditions set out in Article 27(1) are not satisfied in respect of the services falling within point (b) of paragraph 2.
2. For the purpose of this Directive and without prejudice to Directive 97/67/EC:
  - (a) "postal item": means an item addressed in the final form in which it is to be carried, irrespective of weight. In addition to items of correspondence, such items also include for instance books, catalogues, newspapers, periodicals and postal packages containing merchandise with or without commercial value, irrespective of weight;
  - (b) "postal services": means services consisting of the clearance, sorting, routing and delivery of postal items. This shall include both services falling within as well as services falling outside the scope of the universal service set up in conformity with Directive 97/67/EC;
  - (c) "other services than postal services": means services provided in the following areas:
    - (i) mail service management services (services both preceding and subsequent to despatch, including "mailroom management services");
    - (ii) 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);
    - (iii) services concerning postal items not included in point (a), such as direct mail bearing no address;

- (iv) financial services, as defined in the CPV under the reference numbers from 66100000-1 to 66720000-3 and in Article 19(c) and including in particular postal money orders and postal giro transfers;
- (v) philatelic services;
- (vi) logistics services (services combining physical delivery and/or warehousing with other non-postal functions).

#### *Article 11*

#### *Extraction of oil and gas and exploration for, or extraction of, coal or other solid fuels*

This Directive shall apply to 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.

### **Chapter III: Material scope**

#### **SECTION 1 THRESHOLDS**

#### *Article 12 Thresholds*

Save where they are ruled out by the exclusions in Articles 15 to 20 or pursuant to Article 27, concerning the pursuit of the activity in question, this Directive shall apply to procurements with a value exclusive of value-added tax (VAT) estimated to be no less than the following thresholds:

- (a) EUR 400 000 for supply and service contracts as well as for design contests;
- (b) EUR 5 000 000 for works contracts;
- (c) EUR 1 000 000 for contracts for social and other specific services listed in Annex XVII.

#### *Article 13*

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

1. The calculation of the estimated value of a procurement shall be based on the total amount payable, net of VAT, as estimated by the contracting entity, including any form of option and any renewals of the contract.

Where 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 contract.

2. The choice of the method used to calculate the estimated value of a procurement shall not be made with the intention of excluding it from the scope of this Directive. A single procurement shall therefore not be subdivided with the effect of preventing it from falling within the scope of this Directive, unless justified by objective reasons.
3. This estimate shall be valid at the moment at which the call for competition is sent or, in cases where such notice is not foreseen, at the moment at which the contracting entity commences the contract procurement procedure, in particular by defining the essential characteristics of the intended procurement.
4. With regard to framework agreements and dynamic purchasing systems, the value to be taken into consideration shall be the maximum estimated value net of VAT of all the contracts envisaged for the total term of the agreement or system.
5. In the case of innovation partnerships, the value to be taken into consideration shall be the maximum estimated value net of VAT of the research and development activities to take place during the all stages of the envisaged partnership as well as of the supplies, services or works to be developed and procured at the end of the envisaged partnership.
6. For the purposes of Article 12, contracting entities shall include in the estimated value of a works contract both the cost of the works and the total estimated value of any supplies or services that are made available to the contractor by the contracting entities provided that they are necessary for the execution of the works.
7. Where a proposed work or purchase of services may result in contracts being awarded at the same time in the form of separate lots, account shall be taken of the total estimated value of all such lots.

Where the aggregate value of the lots is equal to or exceeds the threshold laid down in Article 12, this Directive shall apply to the awarding of each lot.

8. Where a proposal for the acquisition of similar supplies may result in contracts 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 when applying Article 12.

Where the aggregate value of the lots is equal to or exceeds the threshold laid down in Article 12, this Directive shall apply to the awarding of each lot.

9. Contracting entities may award contracts for individual lots without applying the procedures provided for under this Directive, provided that the estimated value net of VAT of the lot concerned is less than EUR 80 000 for supplies or services or EUR 1 million for works. 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, the proposed acquisition of similar supplies or the proposed purchase of services has been divided.



10. In the case of supply or service contracts which are regular in nature or which are intended to be renewed within a given period, the calculation of the estimated contract value shall be based on the following:
  - (a) either the total actual value of the successive contracts of the same type awarded during the preceding 12 months or financial year adjusted, if possible, to take account of the changes in quantity or value which would occur in the course of the 12 months following the initial contract;
  - (b) or the total estimated value of the successive contracts awarded during the 12 months following the first delivery, or during the financial year where that is longer than 12 months.
11. With regard to supply contracts relating to the leasing, hire, rental or hire purchase of products, the value to be taken as a basis for calculating the estimated contract value shall be as follows:
  - (a) in the case of fixed-term contracts, if that term is less than or equal to 12 months, the total estimated value for the term of the contract or, where the term of the contract is greater than 12 months, the total value including the estimated residual value;
  - (b) in the case of contracts without a fixed term or the term of which cannot be defined, the monthly value multiplied by 48.
12. With regard to service contracts, the basis for calculating the estimated contract value shall, where appropriate, be the following:
  - (a) insurance services: the premium payable, and other forms of remuneration;
  - (b) banking and other financial services: the fees, commissions, interest and other forms of remuneration;
  - (c) design contracts: fees, commission payable and other forms of remuneration.
13. With regard to service contracts which do not indicate a total price, the basis for calculating the estimated contract value shall be the following:
  - (a) in the case of fixed-term contracts, where that term is less than or equal to 48 months: the total value for their full term;
  - (b) in the case of contracts without a fixed term or with a term greater than 48 months: the monthly value multiplied by 48.

*Article 14*  
*Revision of the thresholds*

1. Every two years from 30 June 2014, the Commission shall verify that the thresholds set out in points (a) and (b) of Article 12 correspond to the thresholds established in the Government Procurement Agreement, and shall, where necessary, revise them.

In accordance with the calculation method set out in the Government Procurement Agreement, the Commission shall calculate the value of those thresholds on the basis of the average daily value of the euro in terms of the special drawing rights (SDRs), over a period of 24 months terminating on the last day of August preceding the revision with effect from 1 January. The value of the thresholds thus revised shall, where necessary, be rounded down to the nearest thousand euros so as to ensure that the thresholds in force provided for by the Agreement, expressed in SDR, are observed.

2. Every two years from 1 January 2014, the Commission shall determine the values, in the national currencies of Member States not participating in Monetary Union, of the thresholds referred to in points (a) and (b) of Article 12, revised pursuant to paragraph 1 of this Article.

At the same time, the Commission shall determine the value, in the national currencies of the Member States which are not participating in monetary union, of the threshold referred to in point (c) of Article 12.

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

3. The revised thresholds referred to in paragraph 1 and their values in national currencies shall be published by the Commission in the *Official Journal of the European Union* at the beginning of the month of November following their revision.
4. The Commission shall be empowered to adopt delegated acts in accordance with Article 98 to adapt the methodology set out in the second subparagraph of paragraph 1 to any change in the methodology provided in the Government Procurement Agreement for the revision of the thresholds referred to in points (a) and (b) of Article 12 and for the determination of the thresholds in the national currencies of the Member States not participating in monetary union, as referred to in paragraph 2 of this Article.

It shall also be empowered to adopt delegated acts in accordance with Article 98 to revise the thresholds referred to in points (a) and (b) of Article 12 when necessary.

5. Where it is necessary to revise the thresholds referred to in points (a) and (b) of Article 12 and time constraints prevent the use of the procedure set in article 98 and therefore imperative grounds of urgency so require, the procedure provided for in Article 99 shall apply to delegated acts adopted pursuant to the second subparagraph of paragraph 4 of this Article.

## SECTION 2 EXCLUDED CONTRACTS AND DESIGN CONTESTS

### *Subsection 1*

#### *Exclusions applicable to all contracting entities and special exclusions for the water and energy sectors*

### *Article 15*

#### *Contracts awarded for purposes of resale or lease to third parties*

1. This Directive shall not apply to contracts awarded for purposes of resale or lease to third parties, provided that the contracting entity enjoys no special or exclusive right to sell or lease the subject of such contracts, and other entities are free to sell or lease it under the same conditions as the contracting entity.
2. The contracting entities shall notify the Commission or the national oversight body at their request of all the categories of products or activities which they regard as excluded under paragraph 1. The Commission may periodically publish in the *Official Journal of the European Union*, for information purposes, lists of the categories of products and 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 information.

### *Article 16*

#### *Contracts and design contests awarded or organised for purposes other than the pursuit of a covered activity or for the pursuit of such an activity in a third country*

1. This Directive shall not apply to contracts which the contracting entities award for purposes other than the pursuit of their activities as described in Articles 5 to 11 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 nor shall it apply to design contests organised for such purposes.
2. The contracting entities shall notify the Commission or the national oversight body at their request of any activities which they regard as excluded under paragraph 1. 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 17*

#### *Defence and security*

1. In respect of contracts awarded and design contests organised in the fields of defence and security, this Directive shall not apply to:
  - (a) contracts to which Directive 2009/81/EC applies;

- (b) contracts to which Directive 2009/81/EC does not apply pursuant to Articles 8, 12 and 13 thereof.
2. This Directive shall not apply to contracts and design contests other than those mentioned in the first paragraph to the extent that the protection of the essential security interests of a Member State cannot be guaranteed in an procurement procedure as provided for in Article 39(1).

#### *Article 18*

##### *Contracts awarded and design contests organised pursuant to international rules*

This Directive shall not apply to contracts or design contests which the contracting entity is obliged to award or organise in accordance with procurement procedures different from those of this Directive established by any of the following:

- (a) an international agreement concluded in accordance 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) an international agreement relating to the stationing of troops and concerning the undertakings of a Member State or a third country;
- (c) a particular procedure of an international organisation;
- (d) procurement rules provided by an international organisation or international financing institution for contracts or design contests fully financed by this organisation or institution; in the case of contracts or design contests co-financed to a considerable extent by an international organisation or international financing institution the parties shall agree on applicable procurement procedures, which shall be in conformity with the Treaty.

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 100.

#### *Article 19*

##### *Specific exclusions for service contracts*

This Directive shall not apply to service contracts 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 contracts concluded at the same time as, before or after the contract of acquisition or rental, in whatever form, shall be subject to this Directive;
- (b) arbitration and conciliation services;
- (c) financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments within the meaning of Directive 2004/39/EC of the

European Parliament and of the Council<sup>39</sup> and operations conducted with the European Financial Stability Facility;

- (d) employment contracts;
- (e) public passenger transport services by rail or metro;
- (f) contracts for broadcasting time that are awarded to broadcasters.

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

#### *Article 20*

*Contracts awarded by certain contracting entities for the purchase of water and for the supply of energy or of fuels for the production of energy*

This Directive shall not apply:

- (a) to contracts for the purchase of water if awarded by contracting entities engaged in one or both of the activities relating to drinking water referred to in Article 7(1).
- (b) to contracts awarded by contracting entities themselves being active in the energy sector by being engaged in an activity referred to in Article 5(1), Article 6(1) or Article 11 for the supply:
  - (i) of energy;
  - (ii) of fuels for the production of energy.

#### *Subsection 2*

*Special relations (Controlled entities, cooperation, affiliated undertakings and joint ventures)*

#### *Article 21*

*Relations between public authorities*

1. A contract awarded by a contracting authority to another legal person shall fall outside the scope of this Directive where the following cumulative conditions are fulfilled:
  - (a) the contracting authority 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 for other legal persons controlled by that contracting authority;
  - (c) there is no private participation in the controlled legal person.

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<sup>39</sup> OJ L 145, 30.04.2004, p. 1.

A contracting authority 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 awards a contract 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 contract.
3. A contracting authority, which does not exercise over a legal person control within the meaning of paragraph 1, may nevertheless award a contract without applying this Directive to a legal person which it controls jointly with other contracting authorities, where the following conditions are fulfilled:
  - (a) the contracting authorities exercise jointly over the legal person a control which is similar to that which they exercise over their own departments.
  - (b) at least 90 % of the activities of that legal person are carried out for the controlling contracting authorities or other legal persons controlled by the same contracting authorities;
  - (c) there is no private participation in the controlled legal person.

For the purposes of point (a) contracting authorities 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;
  - (b) those contracting authorities 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 shall not be deemed to be a “works, supply or service contract” within the meaning of point 7 of Article 2 of this Directive, where the following cumulative conditions are met:
  - (a) the agreement establishes a genuine co-operation between the participating contracting authorities 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 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, 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 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 contract or of the conclusion of the agreement.

The exclusions provided for in paragraphs 1 to 4 shall cease to apply from the moment any private participation takes place, with the effect that ongoing contracts need to be opened to competition through regular procurement procedures.

*Article 22*  
*Contracts awarded to an affiliated undertaking*

1. For the purposes of this Article, "affiliated undertaking" means any undertaking the annual accounts of which are consolidated with those of the contracting entity in accordance with the requirements of the Seventh Council Directive 83/349/EEC<sup>40</sup>.
2. In the case of entities not subject to that Directive, "affiliated undertaking" shall mean any undertaking that:
  - (a) may be, directly or indirectly, subject to a dominant influence by the contracting entity within the meaning of point (5) of Article 2 and Article 4(1) 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 21 notwithstanding and provided that the conditions in paragraph 4 are met, this Directive shall not apply to contracts awarded:
  - (a) by a contracting entity to an affiliated undertaking, or
  - (b) by a joint venture, formed exclusively by a number of contracting entities for the purpose of carrying out activities within the meaning of Articles 5 to 11, to an undertaking which is affiliated with one of those contracting entities.
4. Paragraph 3 shall apply:

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<sup>40</sup> OJ L 193, 18.7.1983, p. 1. Directive as last amended by Directive 2001/65/EC of the European Parliament and of the Council (OJ L 283, 27.10.2001, p. 28).

- (a) to service contracts provided that at least 80 % of the average total turnover of the affiliated undertaking with respect to services in general for the preceding three years derives from the provision of services to undertakings with which it is affiliated;
  - (b) to supply contracts provided that at least 80 % of the average total turnover of the affiliated undertaking with respect to supplies in general for the preceding three years derives from the provision of supplies to undertakings with which it is affiliated;
  - (c) to works contracts 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. When, because of the date on which an affiliated undertaking was created or commenced activities, the turnover is not available for the preceding three years, it will be sufficient for that undertaking to show that the turnover referred to in points (a), (b) or (c) of paragraph 4 is credible, particularly by means of business projections.

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

#### *Article 23*

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

Article 21 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 contracts 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 Articles 5 to 11, to one of those contracting entities, or
- (b) by a contracting entity to such a joint venture of which it forms part.

#### *Article 24*

##### *Notification of information*

Contracting entities shall notify to the Commission or the national oversight body, at their request, the following information regarding the application of Article 22, paragraphs 2, 3 and Article 23:

- (a) the names of the undertakings or joint ventures concerned,



- (b) the nature and value of the contracts 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 contracts are awarded and the contracting entity complies with the requirements of Articles 22 or 23.

*Subsection 3  
Specific situations*

*Article 25  
Research and development services*

1. This Directive shall apply to service contracts for research and development services with CPV reference numbers 73000000-2 to 73436000-7, except 73200000-4, 73210000-7 or 73220000-0, provided that the following conditions are both fulfilled:
  - (a) the benefits accrue exclusively to the contracting entity for its use in the conduct of its own affairs,
  - (b) the service provided is wholly remunerated by the contracting entity.

This Directive shall not apply to service contracts 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 conditions referred to in points (a) or (b) of the first subparagraph is not met.

2. The Commission shall be empowered to adopt delegated acts in accordance with Article 98 to amend the CPV reference numbers referred to in paragraph 1 to reflect changes in the CPV nomenclature provided that such amendments do not imply a modification of the scope of this Directive.

*Article 26  
Contracts subject to special arrangements*

1. Without prejudice to Article 27 the Republic of Austria and the Federal Republic of Germany shall ensure, by way of the conditions of authorisation or other appropriate measures, that any entity operating in the sectors mentioned in Decisions 2002/205/EC and 2004/73/EC:
  - (a) observes the principles of non-discrimination and competitive procurement in respect of the award of supplies, works and service contracts, in particular as regards the information which the entity makes available to economic operators concerning its procurement intentions;

- (b) communicates to the Commission, under the conditions defined in Commission Decision 93/327/EEC<sup>41</sup>, information relating to the contracts they award.
2. Without prejudice to Article 27, the United Kingdom shall ensure, by way of the conditions of authorisation or other appropriate measures, that any entity operating in the sectors mentioned in Decision 97/367/EEC applies points (a) and (b) of paragraph 1 in respect of contracts awarded for the pursuit of said activity in Northern Ireland.
3. Paragraphs 1 and 2 shall not apply to contracts awarded for the purpose of exploring for oil or gas.

#### *Subsection 4*

#### *Activities directly exposed to competition and procedural provisions relating thereto*

#### *Article 27*

#### *Activities directly exposed to competition*

1. Contracts intended to enable an activity mentioned in Articles 5 to 11 to be carried out shall not be subject to this Directive if the Member State or the contracting entities having introduced the request pursuant to Article 28 can demonstrate that, in the Member State in which it is performed, the activity is directly exposed to competition on markets to which access is not restricted; nor shall design contests that are organised for the pursuit of such an activity in that geographic area be subject to this Directive. Such competition assessment, which will be made in the light of the information available to the Commission and for the purposes of this Directive, is without prejudice to the application of competition law.
2. For the purposes of paragraph 1, the question of whether an activity is directly exposed to competition shall be decided on the basis of criteria that are in conformity with the provisions on competition of the Treaty; those may include the characteristics of the goods or services concerned, the existence of alternative goods or services, the prices and the actual or potential presence of more than one supplier of the goods or provider of the services in question.

The geographical reference market, on the basis of which exposure to competition is assessed, shall consist of the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because, in particular, conditions of competition are appreciably different in those areas. This assessment shall take account in particular of the nature and characteristics of the products or services concerned, of the existence of entry barriers or of consumer preferences, of appreciable differences of the undertakings'

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<sup>41</sup> European Commission Decision of 13 May 1993 defining the conditions under which contracting entities exploiting geographical areas for the purpose of exploring for or extracting oil, gas, coal or other solid fuels must communicate to the European Commission information relating to the contracts they award, OJ L 129, 27.5.1993, p. 25.

market shares between the area concerned and neighbouring areas or of substantial price differences.

3. For the purposes of paragraph 1, access to a market shall be deemed not to be restricted if the Member State has implemented and applied the Union legislation listed in Annex III.

If free access to a given market cannot be presumed on the basis of the first subparagraph, it must be demonstrated that access to the market in question is free de facto and de jure.

#### *Article 28*

##### *Procedure for establishing whether Article 27 is applicable*

1. Where a Member State or, where the legislation of the Member State concerned provides for it, a contracting entity considers that, on the basis of the criteria set out in Article 27(2) and (3), a given activity is directly exposed to competition on markets to which access is not restricted, it may submit a request to establish that this Directive does not apply to the award of contracts or the organisation of desing contests for the pursuit of that activity.

Requests shall be accompanied by a reasoned and substantiated position adopted by an independent national authority that is competent in relation to the activity concerned. This position shall thoroughly analyse the conditions for the possible applicability of Article 27(1) to the activity concerned in accordance with its paragraphs 2 and 3.

The Member State or contracting entity concerned shall inform the Commission of all relevant facts, and in particular of any law, regulation, administrative provision or agreement concerning compliance with the conditions set out in Article 27(1).

2. Upon request submitted in accordance with paragraph 1 of this Article, the Commission may, by way of an implementing decision adopted within the periods set out in paragraph 4 of this Article, establish whether an activity referred to in Articles 5 to 11 is directly exposed to competition on the basis of the criteria set out in Article 27. Those implementing decisions shall be adopted in accordance with the advisory procedure referred to in Article 100(2).

Contracts intended to enable the activity concerned to be carried out and design contests that are organised for the pursuit of such an activity shall cease to be subject to this Directive in any of the following cases:

- (a) The Commission has adopted the implementing decision referred to in the first subparagraph of this paragraph establishing the applicability of Article 27(1) within the period provided for in paragraph 3 of this Article;
  - (b) has not adopted the implementing decision referred to in the first subparagraph of this paragraph within the period provided for in paragraph 3 of this Article.
3. The implementing decisions referred to in paragraph 2 shall be adopted within the following periods:

- (a) 90 working days where free access to a given market is presumed on the basis of the first subparagraph of Article 27(3);
- (b) 130 working days in cases other than those referred to in point (a).

Those deadlines shall commence on the first working day following the date on which the Commission receives the request referred to in paragraph 1 or, where the information to be supplied with the request is incomplete, on the working day following the receipt of the complete information.

The periods set out in the first subparagraph may be extended by the Commission with the agreement of the Member State or contracting entity which has presented the request.

The Commission may require the Member State or the contracting entity concerned or the independent national authority referred to under paragraph 1 of this Article or any other competent national authority, including the oversight body referred to in Article 93, to provide all necessary information or to supplement or clarify information given within an appropriate time limit. In the event of late or incomplete answers, the periods set out in the first subparagraph shall be suspended for the period between the expiry of the time limit set in the request for information, and the receipt of the complete and correct information.

- 4. Where an activity in a given Member State is already the subject of a procedure under paragraphs 1, 2 and 3, further requests concerning the same activity in the same Member State before the expiry of the period opened in respect of the first request shall not be considered as new procedures and shall be treated in the context of the first request.
- 5. The Commission shall adopt an implementing act establishing detailed rules for the application of paragraphs 1 to 4. That implementing act shall include at least:
  - (a) The publication in the *Official Journal of the European Union*, for information, of the date on which the period set out in the first subparagraph of paragraph 3 begins and ends, including prolongations or suspensions of those periods, if any, as provided for in paragraph 3 of this Article;
  - (b) publication of the possible applicability of Article 27(1) in accordance with point b of the second subparagraph of paragraph 2 of this Article;
  - (c) implementing provisions concerning the form, content and other details of requests pursuant to paragraph 1 of this Article;
  - (d) rules concerning the periods set out in paragraph 3 of this Article.

Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 100(2).

## **CHAPTER IV**

### ***General principles***

#### *Article 29*

##### *Principles of procurement*

Contracting entities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate way.

The design of the procurement shall not be made with the objective of excluding it from the scope of this Directive or of artificially narrowing competition.

#### *Article 30*

##### *Economic operators*

1. Economic operators that, under the law of the Member State in which they are established, are entitled to provide the relevant service, shall not be rejected solely on the ground that, under the law of the Member State in which the contract is awarded, they would be required to be either natural or legal persons.

However, in the case of service and works contracts as well as supply contracts covering in addition services or siting and installation operations, legal persons may be required to indicate, in the tender or the request to participate, the names and relevant professional qualifications of the staff responsible for the performance of the contract in question.

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

Contracting entities may establish specific conditions for the performance of the contract 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 contract.

#### *Article 31*

##### *Reserved contracts*

Member States may reserve the right to participate in procurement 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 contracts 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 call for competition shall make reference to this Article.

*Article 32*  
*Confidentiality*

1. Contracting entities may impose on economic operators requirements aimed at protecting the confidential nature of information which the contracting entities make available throughout the procurement procedure, including information made available in connection with the operation of a qualification system, whether or not this has been the subject of a notice on the existence of a qualification system used as a means of calling for competition.
2. 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 64 and 69 of this directive the contracting entity shall not disclose information forwarded to it by economic operators which they have designated as confidential, including, but not limited to, technical or trade secrets and the confidential aspects of tenders.

*Article 33*  
*Rules applicable to communication*

1. Except where use of electronic means is mandatory pursuant to Articles 46, 47, 48, 49(4), 65(2) or 67 of this Directive 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;
  - (c) telephone in the cases and circumstances referred to in paragraph 6;
  - (d) a combination of those means.

Member States may make mandatory the use of electronic means of communication in other situations than those provided for in Articles 46, 47, 48, 49(4), 65(2) or 67 of this Directive.

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

In all communication, exchange and storage of information, contracting entities shall ensure that the integrity of data and the confidentiality of tenders and requests to participate are preserved. They shall examine the content of tenders and requests to participate 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 procurement 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 IV.

The Commission shall be empowered to adopt delegated acts in accordance with Article 98 to amend the technical details and characteristics set out in Annex IV 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 98 to establish the mandatory use of certain technical standards, at least with regard to the use of e-submission, electronic catalogues and means for electronic authentication.

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

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 those tools from the date of publication of the notice in accordance with Annex IX or from the date on which 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 those tools are accessible;
  - (b) they ensure that tenderers established in other Member States than the contracting entity's may access the procurement procedure through the use of provisional tokens made available online at no extra cost;
  - (c) they 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 receipt of requests to participate:
    - (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) the devices, methods for authentication and electronic signatures shall comply with the requirements of Annex IV;
    - (c) contracting entities shall specify the level of security required for the electronic means of communication to be used in the various stages of the specific procurement procedure; the level shall be proportionate to the risks attached;

- (d) where advanced Electronic Signatures as defined by Directive 1999/93/EC<sup>42</sup> are required, contracting entities shall, as long as the signature is valid, accept signatures supported by a qualified electronic certificate referred to in the Trusted List as provided for in the Commission Decision 2009/767/EC<sup>43</sup>, 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/EU<sup>44</sup> and shall put in place necessary measures to be able to process those 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 requests to participate:

- (a) requests to participate in procedures for the award of contracts 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 entities may require that requests 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 entity shall indicate in the notice used as a means of calling for competition or in the invitation to confirm interest that it requires requests to participate made by fax to be confirmed by post or by electronic means and the time limit for sending such confirmation.

7. Contracting entities 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.

#### *Article 34*

##### *General obligation to use electronic means of communication*

Member States shall ensure that, at the latest 2 years after the date provided for in Article 101(1), all procurement procedures 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

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<sup>42</sup> Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures, OJ L 13, 19.1.2000, p. 12.

<sup>43</sup> OJ L 274, 20.10.2009, p. 36.

<sup>44</sup> OJ L 53, 26.2.2011, p. 66.



meaning of paragraph 3. It is the responsibility of the contracting entities using other means of communication for submission of tenders to demonstrate in the procurement 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 entities shall be deemed to have legitimate reasons not to request electronic means of communication in the submission process where the following apply:

- (a) the description of the technical specifications, due to the specialised nature of the procurement, 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 entity;
- (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.

#### *Article 35* *Nomenclatures*

1. Any references to nomenclatures in the context of public procurement shall be made using the "Common Procurement Vocabulary (CPV)" as adopted by Regulation (EC) No 2195/2002<sup>45</sup>.
2. The Commission shall be empowered to adopt delegated acts in accordance with Article 98 to adapt the reference numbers used in Annex II and XVI, whenever changes in the CPV nomenclature have to be reflected in this Directive and they do not imply a modification of the scope of this Directive.

#### *Article 36* *Conflicts of interests*

1. Member States shall, in respect of contracting authorities within the meaning of point 1 of Article 2, provide for rules to effectively prevent, identify and immediately remedy conflicts of interests arising in the conduct of procurement procedures that are subject to this Directive, including the design and preparation of the procedure, the drawing-up of the procurement documents, the selection of candidates and tenderers and the award of the contract, so as to avoid any distortion of competition and ensure equal treatment of all tenderers.

The notion of conflict of interests shall at least cover any situation where the categories of persons referred to in paragraph 2 have, directly or indirectly, a private

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<sup>45</sup> OJ L 340, 16.12.2002, p. 1.

interest in the outcome of the procurement procedure, which may be perceived to impair the impartial and objective performance of their duties.

For the purposes of this Article, "private interests" means any family, emotional life, economic, political or other shared interests with the candidates or the tenderers, including conflicting professional interests.

2. The rules referred to in paragraph 1 shall apply to conflicts of interests involving at least the following categories of persons:
  - (a) staff members of the contracting authority, procurement service providers or staff members of other service providers who are involved in the conduct of the procurement procedure;
  - (b) the chairperson of the contracting authority and members of decision-making bodies of the contracting authority who, without necessarily being involved in the conduct of the procurement procedure, may nevertheless influence the outcome of that procedure.
3. Member States shall ensure in particular:
  - (a) that staff members referred to in paragraph 2(a) are required to disclose any conflict of interests in relation to any of the candidates or tenderers, as soon as they become aware of such conflicts, in order to enable the contracting authority to take remedial action,
  - (b) that candidates and tenderers are required to submit at the beginning of the procurement procedure a declaration on the existence of any privileged links with the persons referred to in paragraph 2(b), which are likely to place those persons in a situation of conflict of interests; the contracting authority shall indicate in the individual report referred to in Article 94 whether any candidate or tenderer has submitted a declaration.

In the event of a conflict of interests, the contracting authority shall take appropriate measures. Those measures may include the recusal of the staff member in question from involvement in the affected procurement procedure or the re-assignment of the staff member's duties and responsibilities. Where a conflict of interests cannot be effectively remedied by other means, the candidate or tenderer concerned shall be excluded from the procedure.

Where privileged links are identified, the contracting authority shall immediately inform the oversight body designated in accordance with Article 93 and take appropriate measures to avoid any undue influence on the award process and ensure equal treatment of candidates and tenderers. If the conflict of interests cannot be effectively remedied by other means, the candidate or tenderer concerned shall be excluded from the procedure.

4. All measures taken pursuant to this Article shall be documented in the individual report referred to in Article 94.

*Article 37*  
*Illicit conduct*

Candidates shall be required at the beginning of the procedure to provide a declaration on honour that they have not undertaken and will not undertake to:

- (a) unduly influence the decision-making process of the contracting entity or obtain confidential information that may confer upon them undue advantages in the procurement procedure;
- (b) enter into agreements with other candidates and tenderers aimed at distorting competition, or
- (c) deliberately provide misleading information that may have a material influence on decisions concerning exclusion, selection or award.

# TITLE II

## RULES APPLICABLE TO CONTRACTS

### CHAPTER I

#### *Procedures*

#### *Article 38*

#### *Conditions relating to the Government Procurement Agreement and other international agreements*

1. As far as covered by Annexes III, IV and V and the General Notes to the European Union's Appendix 1 to the Government Procurement Agreement and by the other international agreements by which the Union is bound, as listed in Annex V to this Directive, contracting entities within the meaning of Article 4(3)(a) shall accord to the works, supplies, services and economic operators of the signatories to those agreements treatment no less favourable than the treatment accorded to the works, supplies, services and economic operators of the Union. By applying this Directive to economic operators of the signatories to those agreements contracting entities shall comply with those agreements.
2. The Commission shall be empowered to adopt delegated acts in accordance with Article 98 to amend the list in Annex V, where necessary due to the conclusion of new international agreements or modification of existing international agreements.

#### *Article 39*

#### *Choice of procedures*

1. When awarding supply, works or service contracts, contracting entities shall apply the procedures adjusted to be in conformity with this Directive, provided that, without prejudice to Article 42, a call for competition has been published in accordance with this Directive.  
  
Member States shall provide that contracting entities may apply open or restricted procedures or negotiated procedures with prior call for competition as regulated in this Directive.
2. The call for competition may be made by one of the following means:
  - (a) a periodic indicative notice pursuant to Article 61 where the contract is awarded by restricted or negotiated procedure;
  - (b) a notice on the existence of a qualification system pursuant to Article 62 where the contract is awarded by restricted or negotiated procedure or by an innovation partnership,
  - (c) by means of a contract notice pursuant to Article 63.

In the case referred to in point (a), economic operators having expressed their interest following the publication of the periodic indicative notice shall subsequently be invited to confirm their interest in writing by means of an ‘invitation to confirm interest’ in conformity with Article 68.

3. Member States may provide that contracting entities may apply a negotiated procedure without prior call for competition only in the specific cases and circumstances referred to expressly in Article 42.

*Article 40*  
*Open procedure*

1. In open procedures any interested economic operator may submit a tender in response to a call for competition.

The minimum time limit for the receipt of tenders shall be 40 days from the date on which the contract notice was sent.

The tender shall be accompanied by the requested information for qualitative selection.

2. Where contracting entities have published a periodic indicative notice which is not used as a means of calling for competition, the minimum time limit for the receipt of tenders, as laid down in the second subparagraph of paragraph 1 of this Article, may be shortened to 20 days, provided that both of the following conditions are fulfilled:

- (a) the periodic indicative notice has included, in addition to the information required by Section I of Part A of Annex VI, all the information required by Section II of Part A of Annex VI, insofar as the latter information is available at the time the periodic indicative notice is published;

- (b) it was sent for publication between 45 days and 12 months before the date on which the contract notice was sent.

3. Where a state of urgency duly substantiated by the contracting entities renders impracticable the time limit laid down in the second subparagraph of paragraph 1, they may fix a time limit which shall be not less than 20 days from the date on which the contract notice was sent.

4. The contracting entity may reduce by five days the time limit for receipt of tenders set out in the second subparagraph of paragraph 1 where it accepts that tenders may be submitted by electronic means in accordance with Article 33(3), (4) and (5).

*Article 41*  
*Restricted procedure*

1. In restricted procedures, any economic operator may submit a request to participate in response to a call for competition by providing the requested information for qualitative selection.

The minimum time limit for the receipt of requests to participate shall, as a general rule, be fixed at no less than 30 days from the date on which the contract notice or the invitation to confirm interest is sent and may in no case be less than 15 days.

2. Only those economic operators invited by the contracting entity following their assessment of the requested information may submit a tender. Contracting entities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with Article 72(2).

The time limit for the receipt of tenders may be set by mutual agreement between the contracting entity and the selected candidates, provided that all candidates have the same time to prepare and submit their tenders;

Where it is not possible to reach agreement on the time limit for the receipt of tenders, the contracting entity shall fix a time limit which shall in no case be less than 10 days from the date on which the invitation to tender is sent.

#### *Article 42*

##### *Negotiated procedure with prior call for competition*

1. In negotiated procedures with prior call for competition, any economic operator may submit a request to participate in response to a call for competition by providing the requested information for qualitative selection.

The minimum time limit for the receipt of requests to participate shall, as a general rule, be fixed at no less than 30 days from the date on which the contract notice or, where a periodic indicative notice is used as a means of calling for competition, the invitation to confirm interest is sent and may in no case be less than 15 days.

2. Only those economic operators invited by the contracting entity following their assessment of the requested information may participate in the negotiations. Contracting entities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with Article 72(2).

The time limit for the receipt of tenders may be set by mutual agreement between the contracting entity and the selected candidates, provided that all candidates have the same time to prepare and submit their tenders;

Where it is not possible to reach agreement on the time limit for the receipt of tenders, the contracting entity shall fix a time limit which shall in no case be less than 10 days from the date on which the invitation to tender is sent.

#### *Article 43*

##### *Innovation partnership*

1. Member States may provide that contracting entities may apply innovation partnerships as regulated in this Directive. Member States may decide not to transpose into their national law innovation partnerships or to restrict the use of it to certain types of procurement.

In innovation partnerships, any economic operator may submit a request to participate in response to a call for competition in accordance with points (b) and (c) of Article 39(2) with a view to establishing a structured partnership for the development of an innovative product, service or works and the subsequent purchase of the resulting supplies, services or works, provided that they correspond to the agreed performance levels and costs.

2. The partnership shall be structured in successive stages following the sequence of steps in the research and innovation process, possibly up to the manufacturing of the supply or the provision of the services. It shall provide for intermediate targets to be attained by the partner and provide for payment of the remuneration in appropriate instalments. Based on those targets, the contracting entity can decide after each stage to terminate the partnership and launch a new procurement procedure for the remaining phases, provided that it has acquired the relevant intellectual property rights.
3. The contract shall be awarded in accordance with the rules for a negotiated procedure with prior call for competition set out in Article 42.

In selecting candidates, contracting entities shall pay particular attention to criteria concerning the tenderers' capacity and experience in the field of research and development or of developing innovative solutions. They may limit the number of suitable candidates to be invited to participate in the procedure in accordance with Article 72(2).

Only those economic operators invited by the contracting entity following its assessment of the requested information may submit research and innovation projects, aimed at meeting the needs identified by the contracting entity that cannot be met by existing solutions. The contract shall be awarded on the sole basis of the award criterion of the most economically advantageous tender in accordance with Article 76 (1)(a).

4. The structure of the partnership and, in particular the duration and value of the different phases shall reflect the degree of innovation of the proposed solution and the sequence of the research and innovation activities required for the development of an innovative solution not yet available on the market. The value and duration of a contract for the purchase of the resulting supply, service or works shall remain within appropriate limits, taking into account the need to recover the costs, including those incurred in developing an innovative solution, and to achieve an adequate profit.

Contracting entities shall not use innovation partnerships in such a way as to prevent, restrict or distort competition.

#### *Article 44*

##### *Use of the negotiated procedure without prior call for competition*

Contracting entities may use a negotiated procedure without prior call for competition in the following cases:

- (a) where no tenders or no suitable tenders or no requests to participate have been submitted in response to a procedure with a prior call for competition, provided that the initial conditions of the contract are not substantially altered;
- (b) where a contract is purely for the purpose of research, experiment, study or development, and not for the purpose of securing a profit or of recovering research and development costs, and insofar as the award of such contract does not prejudice the competitive award of subsequent contracts which do seek, in particular, those ends;
- (c) where the aim of the procurement is the creation or obtention of a work of art;
- (d) where the works, supplies or services can be supplied only by a particular economic operator for any of the following reasons:
  - (i) the absence of competition for technical reasons;
  - (ii) the protection of patents, copyrights or other intellectual property rights;
  - (iii) the protection of other exclusive rights.

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

- (e) insofar as is strictly necessary where, for reasons of extreme urgency brought about by force majeure, the time limits laid down for open procedures, restricted procedures and negotiated procedures with prior call for competition cannot be complied with. The circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting entity;
- (f) in the case of supply contracts for additional deliveries by the original supplier which are intended either as a partial replacement of normal supplies or installations or as the extension of existing supplies or installations, where a change of supplier would oblige the contracting entity to acquire material having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance;
- (g) for new works or services consisting in the repetition of similar works or services assigned to the contractor to which the same contracting entities awarded an earlier contract, provided that such works or services conform to a basic project for which a first contract was awarded according to a procedure in accordance with Article 39(1).
- (h) for supplies quoted and purchased on a commodity market or other similar markets such as electricity exchanges;
- (i) for bargain purchases, where it is possible to procure supplies by taking advantage of a particularly advantageous opportunity available for a very short time at a price considerably lower than normal market prices;
- (j) for purchases of supplies under particularly advantageous conditions from either a supplier definitively winding up its business activities or the liquidators in an



insolvency procedure, an arrangement with creditors or a similar procedure under national laws or regulations;

- (k) where the service contract concerned follows a design contest organised in accordance with this Directive and is to be awarded, under the applicable rules, be awarded to the winner or to one of the winners of that contest; in the latter case, all the winners shall be invited to participate in the negotiations.

For the purposes of point (a), a tender shall be considered not to be suitable where:

- (a) it is irregular or unacceptable, and
- (b) it is completely irrelevant to the contract, being incapable of meeting the contracting entity's needs as specified in the procurement documents.

In particular, tenders shall be considered to be irregular, where they do not comply with the procurement documents or where the prices offered are sheltered from normal competitive forces;

In particular, tenders shall be considered to be unacceptable in any of the following cases:

- (a) they have been received late;
- (b) they have been submitted by tenderers that do not have the requisite qualifications;
- (c) their price either exceeds the contracting entity's budget as determined prior to the launching of the procurement procedure; the prior determination of the budget must be documented in writing;
- (d) they have been found to be abnormally low in accordance with Article 79.

For the purposes of point (g) of paragraph 1 of this Article, the basic project shall indicate 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, notice shall be given that this procedure might be adopted and the total estimated cost of subsequent works or services shall be taken into consideration by the contracting entities when they apply Articles 12 and 13.

## **CHAPTER II**

### **Techniques and instruments for electronic and aggregated procurement**

#### *Article 45* *Framework agreements*

1. Contracting entities may conclude framework agreements, provided that they apply the procedures provided for in this Directive.

A framework agreement means an agreement between one or more contracting entities and one or more economic operators, the purpose of which is to establish the

terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantities envisaged.

The term of a framework agreement shall not exceed four years, save in exceptional cases duly justified, in particular by the subject of the framework agreement.

2. Contracts based on a framework agreement shall be awarded in accordance with the procedures laid down in this paragraph and paragraphs 3 and 4.

Those procedures may be applied only between those contracting entities clearly identified for this purpose in the call for competition, in the invitation to confirm interest or, where a notice on the existence of a qualification system is used as a means of calling for competition, in the invitation to tender and those economic operators originally party to the framework agreement.

Contracts based on a framework agreement may under no circumstances make substantial modifications to the terms laid down in that framework agreement, in particular in the case referred to in paragraph 3.

Contracting entities shall not use framework agreements improperly or in such a way as to prevent, restrict or distort competition.

3. Where a framework agreement is concluded with a single economic operator, contracts based on that agreement shall be awarded within the limits of the terms laid down in the framework agreement.

For the award of those contracts, contracting entities may consult the operator party to the framework agreement in writing, requesting it to supplement its tender as necessary.

4. Where a framework agreement is concluded with more than one economic operator, it may be performed in one of the two following ways:
  - (a) following the terms and conditions of the framework agreement, without reopening competition, where it sets out all the terms governing the provision of the works, services and supplies concerned and the objective conditions for determining which of the economic operators, party to the framework agreement, shall perform them; the latter conditions shall be indicated in the procurement documents;
  - (b) where not all the terms governing the provision of the works, services and supplies are laid down in the framework agreement, through reopening competition amongst the economic operators parties to the framework agreement.

5. The competition referred to in paragraph (4)(b) shall be based on the same terms as applied for the award of the framework agreement and, where necessary, more precisely formulated terms, and, where appropriate, other terms referred to in the specifications of the framework agreement, in accordance with the following procedure:

- (a) for every contract to be awarded, contracting entities shall consult in writing the economic operators capable of performing the contract;
- (b) contracting entities shall fix a time limit which is sufficiently long to allow tenders for each specific contract to be submitted, taking into account factors such as the complexity of the subject-matter of the contract and the time needed to send in tenders;
- (c) tenders shall be submitted in writing, and their content shall not be opened until the stipulated time limit for reply has expired;
- (d) contracting entities shall award each contract to the tenderer that has submitted the best tender on the basis of the award criteria set out in the specifications of the framework agreement.

*Article 46*  
*Dynamic purchasing systems*

1. For commonly used purchases, the characteristics of which, as generally available on the market, meet the requirements of the contracting entities, they may use a dynamic purchasing system. The dynamic purchasing system shall be operated as a completely electronic process, open throughout its validity to any economic operator that satisfies the selection criteria.
2. In order to award contracts under a dynamic purchasing system, contracting entities shall follow the rules of the restricted procedure. All the candidates who satisfy the selection criteria shall be admitted to the system; the number of candidates to be admitted to the system shall not be limited in accordance with Article 72 (2). All communications in the context of a dynamic purchasing system shall only be made with electronic means in accordance with Article 33(2) to (6).
3. For the purposes of awarding contracts under a dynamic purchasing system, contracting entities shall:
  - (a) publish a call for competition making it clear that a dynamic purchasing system is involved;
  - (b) indicate in the specifications, at least the nature and estimated quantity of the purchases envisaged, as well as all the necessary information concerning the purchasing system, the electronic equipment used and the technical connection arrangements and specifications;
  - (c) offer unrestricted and full direct access, as long as the system is valid, to the specifications and to any additional documents in accordance with Article 67.
4. Contracting entities shall give any economic operator, throughout the entire duration of the dynamic purchasing system, the possibility of requesting to participate in the system under the conditions referred to in paragraph 2. Contracting entities shall finalise their assessment of such requests according to the selection criteria within 10 working days following their receipt.

Contracting entities shall inform the economic operator referred to in the first subparagraph at the earliest possible opportunity of whether or not it has been admitted to the dynamic purchasing system.

5. Contracting entities shall invite all qualified participants to submit a tender for each specific procurement under the dynamic purchasing system, in accordance with Article 68.

They shall award the contract to the tenderer that submitted the best tender on the basis of the award criteria set out in the contract notice for the dynamic purchasing system, in the invitation to confirm interest, or, where the means of calling for competition is a notice on the existence of a qualification system, in the invitation to tender. Those criteria may, where appropriate, be formulated more precisely in the invitation to tender.

6. Contracting entities shall indicate the duration of the dynamic purchasing system in the call for competition. They shall notify the Commission of any change in duration, using the following standard forms:
  - (a) where the duration is changed without terminating the system, the form used initially for the call for competition for the dynamic purchasing system;
  - (b) where the system is terminated, a contract award notice referred to in Article 64.
7. No charges may be billed to the interested economic operators or to parties to the dynamic purchasing system.

#### *Article 47* *Electronic auctions*

1. Contracting entities may use electronic auctions in which new prices, revised downwards, and/or new values concerning certain elements of tenders are presented.

For this purpose, contracting entities shall use a repetitive electronic process (electronic auction), which occurs after an initial full evaluation of the tenders, enabling them to be ranked using automatic evaluation methods.

2. In open, restricted or negotiated procedures with a prior call for competition, the contracting entities may decide that the award of a contract shall be preceded by an electronic auction when the tender specifications can be established with precision.

In the same circumstances, an electronic auction may be held on the reopening of competition among the parties to a framework agreement as provided for in point (b) of Article 45(4) and on the opening for competition of contracts to be awarded under the dynamic purchasing system referred to in Article 46.

3. The electronic auction shall be based on one of the the following criteria:
  - (a) solely on prices where the contract is awarded to the lowest cost,

- (b) on prices and/or on the new values of the features of the tenders indicated in the specifications, where the contract is awarded to the most economically advantageous tender.
4. Contracting entities which decide to hold an electronic auction shall state that fact in the contract notice, in the invitation to confirm interest or, where a notice on the existence of a qualification system is used as a means of calling for competition, in the invitation to tender. The specifications shall include at least the information set out in Annex VII.
  5. Before proceeding with the electronic auction, contracting entities shall make a full initial evaluation of the tenders in accordance with the award criterion or criteria and with the weighting fixed for them.

A tender shall be considered admissible where it has been submitted by a qualified tenderer and is in conformity with the technical specifications.

All tenderers that have submitted admissible tenders shall be invited simultaneously by electronic means to participate in the electronic auction using, as of the specified date and time, the connections in accordance with the instructions set out in the invitation. The electronic auction may take place in a number of successive phases. The electronic auction shall not start sooner than two working days after the date on which invitations are sent out.

6. Where the contract is to be awarded on the basis of the most economically advantageous tender, the invitation shall be accompanied by the outcome of a full evaluation of the relevant tender carried out in accordance with the weighting provided for in the first subparagraph of Article 76(5).

The invitation shall also state the mathematical formula to be used in the electronic auction to determine automatic re-rankings on the basis of the new prices and/or new values submitted. That formula shall incorporate the weighting of all the criteria established to determine the most economically advantageous tender, as indicated in the notice used as a means of calling for competition or in the specifications. For that purpose, any ranges shall, however, be reduced beforehand to a specified value.

Where variants are authorised, a separate formula shall be provided for each variant.

7. Throughout each phase of an electronic auction the contracting entities shall instantaneously communicate to all tenderers sufficient information to enable them to ascertain their relative rankings at any moment. They may also communicate other information concerning other prices or values submitted, provided that that is stated in the specifications. They may also at any time announce the number of participants in that phase of the auction. In no case, however, may they disclose the identities of the tenderers during any phase of an electronic auction.
8. Contracting entities shall close an electronic auction in one or more of the following manners:
  - (a) at the previously indicated date and time;

- (b) when they receive no more new prices or new values which meet the requirements concerning minimum differences, provided that they have previously stated the time which they will allow to elapse after receiving the last submission before they close the electronic auction;
- (c) when the previously indicated number of phases in the auction has been completed.

Where the contracting entities have decided to close an electronic auction in accordance with point (c), possibly in combination with the arrangements laid down in point (b), the invitation to take part in the auction shall indicate the timetable for each phase of the auction.

9. After closing an electronic auction the contracting entities shall award the contract in accordance with Article 76 on the basis of the results of the electronic auction.

#### *Article 48* *Electronic catalogues*

1. Where contracting entities require the use of electronic means of communication pursuant to Article 33 , they may require tenders to be presented in the format of an electronic catalogue.

Member States may render the use of electronic catalogues mandatory in connection with certain types of procurement.

Tenders presented in the form of an electronic catalogue may be accompanied by other documents, completing the tender.

2. Electronic catalogues shall be established by the candidates or tenderers with a view to participating in a specific procurement procedure in accordance with the technical specifications and format established by the contracting entity.

Furthermore, electronic catalogues shall comply with the requirements for electronic communication tools as well as with any additional requirements set by the contracting entity in accordance with Article 33.

3. Where the presentation of tenders in the form of electronic catalogues is accepted or required, contracting entities shall:
  - (a) state so in the contract notice, in the invitation to confirm interest, or, where the means of calling for competition is a notice on the existence of a qualification system, in the invitation to tender or to negotiate;
  - (b) indicate in the specifications all the necessary information pursuant to Article 33(5) concerning the format, the electronic equipment used and the technical connection arrangements and specifications for the catalogue.
4. Where a framework agreement has been concluded with more than one economic operator following the submission of tenders in the form of electronic catalogues, contracting entities may provide that the reopening of competition for specific

contracts takes place on the basis of updated catalogues. In such case, contracting entities shall use one of the following alternative methods:

- (a) invite tenderers to resubmit their electronic catalogues, adapted to the requirements of the specific contract in question;
- (b) notify tenderers that they intend to collect from the catalogues which have already been submitted the information needed to constitute tenders adapted to the requirements of the specific contract in question (hereinafter "punch out"), provided that the use of this method has been announced in the procurement documents for the framework agreement.

5. Where contracting entities reopen competition for specific contracts in accordance with point (b) of paragraph (4), they shall specify the date and time at which they intend to collect the information needed to constitute tenders adapted to the requirements of the specific contract in question and shall give tenderers the possibility to refuse such collection of information.

Contracting entities shall allow for an adequate period between the notification and the actual collection of information.

Before awarding the contract, contracting entities shall present the collected information to the tenderer concerned so as to give it the opportunity to contest or confirm the correctness of the tender thus constituted.

6. Contracting entities may award contracts based on a dynamic purchasing system through a punch out provided that the request for participation in the dynamic purchasing system is accompanied by an electronic catalogue in accordance with the technical specifications and format established by the contracting entity. This catalogue shall be completed subsequently by the candidates, when they are informed of the contracting entity's intention to constitute tenders by means of a punch out. The punch out shall be conducted in conformity with point (b) of paragraph 4 and paragraph 5.

#### *Article 49*

##### *Centralised purchasing activities and central purchasing bodies*

1. Contracting entities may purchase works, supplies and/or services from or through a central purchasing body.
2. Member States shall provide for the possibility for contracting entities to have recourse to centralised purchasing activities offered by central purchasing bodies established in another Member State.
3. A contracting entity fulfills its obligations pursuant to this Directive when it procures by having recourse to centralised purchasing activities, to the extent that the procurement procedures concerned and their performance are conducted by the central procurement body alone in all its stages from the publication of the call for competition to the end of the execution of the ensuing contract or contracts.

However, where certain stages of the procurement procedure or the performance of the ensuing contracts are carried out by the contracting entity concerned, the contracting entity continues to be responsible for fulfilling the obligations pursuant to this Directive in respect of the stages it conducts.

4. All procurement procedures conducted by a central purchasing body shall be performed using electronic means of communication, in accordance with the requirements of Article 33.
5. Contracting entities may, without applying the procedures provided for in this Directive, choose a central purchasing body to provide centralised purchasing activities, including where the central purchasing body is remunerated for so doing.
6. Central purchasing bodies shall also ensure the documentation of all transactions performed in the course of the execution of the contracts, framework agreements or dynamic purchasing systems they conclude in the course of their central purchasing activities.

*Article 50*  
*Ancillary purchasing activities*

The providers of ancillary purchasing activities shall be chosen in accordance with the procurement procedures set out in this Directive.

*Article 51*  
*Occasional joint procurement*

1. One or more contracting entities may agree to perform certain specific procurements jointly.
2. Where one contracting entity alone conducts the procurement procedures concerned in all its stages from the publication of the call for competition to the end of the performance of the ensuing contract or contracts, that contracting entity shall have sole responsibility for fulfilling the obligations pursuant to this Directive.

However, where the conduct of the procurement procedures and the performance of the ensuing contracts is carried out by more than one of the participating contracting entities, each shall continue to be responsible for fulfilling its obligations pursuant to this Directive in respect of the stages it conducts.

*Article 52*  
*Joint procurement between contracting entities from different Member States*

1. Without prejudice to Title I, Chapter III, Section 2, Subsection 2: Special relations, contracting entities from different Member States may jointly award contracts by using one of the means described in this Article.
2. Several contracting entities may purchase works, supplies and/or services from or through a central purchasing body located in another Member State. In that case, the



procurement procedure shall be conducted in accordance with the national provisions of the Member State where the central purchasing body is located.

3. Several contracting entities from different Member States may jointly award a contract. In that case, the participating contracting entities shall conclude an agreement that determines
  - (a) which national provisions shall apply to the procurement procedure;
  - (b) the internal organisation of the procurement 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 contracts.

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

4. Where several contracting entities from different Member States have set up a joint legal entity, including European Groupings of territorial cooperation under Regulation (EC) No° 1082/2006 of the European Parliament and of the Council<sup>46</sup> or other entities established under Union law, the participating contracting entities shall, by a decision of the competent body of the joint legal entity, agree on the applicable national procurement rules of one of the following Member States:
  - (a) the national provisions of the Member State where the joint legal entity has its registered office;
  - (b) the national provisions of the Member State where the joint legal entity is carrying out its activities.

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

5. In the absence of an agreement determining the applicable public procurement law, the national legislation governing the contract award shall be determined following the rules set out below:
  - (a) where the procedure is conducted or managed by one participating contracting entity on behalf of the others, the national provisions of the Member State of that contracting entity shall apply;
  - (b) where the procedure is not conducted or managed by one participating contracting entity on behalf of the others, and
    - (i) concerns a works contract, contracting entities shall apply the national provisions of the Member State where most of the works are located;

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<sup>46</sup> OJ L 210 of 31.7.2006, p. 19

- (ii) concerns a service or supply contract, contracting entities shall apply the national provisions of the Member State where the major part of the services or supplies is provided;
  - (c) where it is not possible to determine the applicable national law pursuant to points (a) or (b), contracting entities shall apply the national provisions of the Member State of the contracting entity which bears the biggest share of the costs.
- 6. In the absence of an agreement determining the applicable public procurement law under paragraph 4, the national legislation governing procurement procedures conducted by joint legal entities set up by several 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 entity, the national provisions of the Member State where the legal entity has its registered office shall apply;
  - (b) where the procedure is conducted or managed by a member of the legal entity on behalf of that legal entity, the rules set out in points (a) and (b) of paragraph 5 shall apply;
  - (c) where it is not possible to determine the applicable national law pursuant to points (a) or (b) of paragraph 5, the contracting entities shall apply the national provisions of the Member State where the legal entity has its registered office.
- 7. One or more contracting entities may award individual contracts under a framework agreement concluded by or jointly with a contracting entity located in another Member State, provided that the framework agreement contains specific provisions enabling the respective contracting entity or entities to award the individual contracts.
- 8. Decisions on the award of contracts in cross-border public procurement shall be subject to the ordinary review mechanisms available under the national law applicable.
- 9. In order to enable the effective operation of review mechanisms, Member States shall ensure that the decisions of review bodies within the meaning of Council Directive 92/13/EEC<sup>47</sup> located in other Member States are fully executed in their domestic legal order, where such decisions involve contracting entities established on their territory participating in the relevant cross-border public procurement procedure.

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<sup>47</sup> OJ L 76, 23.03.1992, p. 14.

## **CHAPTER III**

### ***Conduct of the procedure***

#### **SECTION 1 PREPARATION**

##### *Article 53*

##### *Preliminary market consultations*

1. Before launching a procurement procedure, contracting entities may conduct market consultations in order to assess the structure, capability and capacity of the market and to inform economic operators of their procurement plans and requirements.

For this purpose, contracting entities may seek or accept advice from administrative support structures or from third parties or market participants, provided that such advice does not have the effect of precluding competition and does not result in a violation of the principles of non-discrimination and transparency.

2. Where a candidate or tenderer or an undertaking related to a candidate or tenderer has advised the contracting entity or has otherwise been involved in the preparation of the procurement procedure, the contracting entity shall take appropriate measures to ensure that competition is not distorted by the participation of that candidate or tenderer.

Such measures shall include the communication to the other candidates and tenderers of any relevant information exchanged in the context of or resulting from the involvement of the candidate or tenderer in the preparation of the procurement procedure and the fixing of adequate time limits for the receipt of tenders. The candidate or tenderer concerned shall only be excluded from the procedure where there are no other means to ensure compliance with the duty to observe the principle of equal treatment.

Prior to any such exclusion, candidates or tenderers shall be given the opportunity to prove that their involvement in preparing the procurement procedure is not capable of distorting competition. The measures taken shall be documented in the individual report required by to Article 94.

##### *Article 54*

##### *Technical specifications*

1. The technical specifications as defined in point 1 of Annex VIII shall be set out in the procurement 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 (22) of Article 2.

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

For all procurement, the subject of which is intended for use by persons, whether general public or staff of the contracting 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 procurement procedure and not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.
3. Without prejudice to mandatory national technical rules, to the extent that they are compatible with 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 entities to award the contract;
  - (b) by reference to technical specifications 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 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 to 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 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 ground 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 56, that the solutions which it proposes satisfy in an equivalent manner the requirements defined by the technical specifications.

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

In its tender, the tenderer shall prove by any appropriate means including those referred to in Article 56, that the supplies, service or work in compliance with the standard meets the performance or functional requirements of the contracting entity.

#### *Article 55* *Labels*

1. Where contracting entities lay down environmental, social or other characteristics of a works, service or supply in terms of performance or functional requirements as referred to in point (a) of Article 54 paragraph 3, they may require that those works, supplies or services bear a specific label, provided that all of the following conditions are fulfilled:
  - (a) the requirements for the label only concern characteristics which are linked to the subject-matter of the contract and are appropriate to define the characteristics of the works, supplies or services that are the subject-matter of the contract;
  - (b) the requirements for the label are drawn up on the basis of scientific information or based on other objectively verifiable and non-discriminatory criteria;
  - (c) the labels are established in an open and transparent procedure in which all stakeholders, including government bodies, consumers, manufacturers, distributors and environmental organisations may participate,
  - (d) the labels are accessible to all interested parties;
  - (e) the criteria of the label are set by a third party which is independent from the economic operator applying for the label.

Contracting entities requiring a specific label shall accept all equivalent labels that fulfil the requirements of the label indicated by the contracting entities. For products that do not bear the label, contracting entities shall also accept a technical dossier of the manufacturer or other appropriate means of proof.

2. Where a label fulfils the conditions of provided in points (b), (c), (d) and (e) of paragraph 1 but also sets out requirements not linked to the subject-matter of the contract, contracting entities may use those of the detailed specifications of that label, or, if necessary, parts thereof, that are linked to the subject-matter of the contract and are appropriate to define characteristics of this subject-matter.

#### *Article 56*

##### *Test reports, certification and other means of proof.*

1. 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 entities require the submission 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 entities.

2. Contracting entities shall accept other appropriate means of proof than those referred to in paragraph 1, such as a technical dossier of the manufacturer where the economic operator concerned has no access to such 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 paragraph 1 of this Article shall be test and calibration laboratories, and any certification and inspection bodies accredited in accordance with Regulation (EC) No 765/2008 of the European Parliament and of the Council<sup>48</sup>.
4. Member States shall make available to other Member States, upon request, any information related to the evidence and documents submitted in accordance with Article 54(6), Article 55 and paragraphs 1, 2 and 3 of this Article to prove compliance with technical requirements. The competent authorities of the Member State of establishment shall provide this information in accordance with Article 96.

#### *Article 57*

##### *Communication of technical specifications*

1. On request from economic operators interested in obtaining a contract, contracting entities shall make available the technical specifications regularly referred to in their supply, works or service contracts, or the technical specifications which they intend to apply to contracts for which the call for competition is a periodic indicative notice. Those specifications shall be made available by electronic means through unrestricted and full direct access free of charge.
2. Where the technical specifications are based on documents available by electronic means through unrestricted and full direct access free of charge to interested

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<sup>48</sup> OJ L 218, 13.8.2008, p. 30.

economic operators, the inclusion of a reference to those documents shall be sufficient.

#### *Article 58*

##### *Variants*

1. Contracting entities may take account of variants which are submitted by a tenderer and meet the minimum requirements specified by the contracting entities.

Contracting entities shall indicate in the specifications whether or not they authorise variants and, if so, the minimum requirements to be met by the variants and any specific requirements for their presentation. Where variants are authorised, they shall also ensure that the chosen award criteria can be usefully applied to variants meeting those minimum requirements as well as to conforming tenders which are not variants.

2. In procedures for awarding supply or service contracts, contracting entities that have authorised variants shall not reject a variant on the sole ground that it would, where successful, lead either to a service contract rather than a supply contract or to a supply contract rather than a service contract.

#### *Article 59*

##### *Division of contracts into lots*

1. Contracts may be subdivided into homogenous or heterogeneous lots. Article 13(7) applies.

Contracting entities shall indicate, in the contract notice, in the invitation to confirm interest, or, where the means of calling for competition is a notice on the existence of a qualification system, in the invitation to tender or to negotiate, whether tenders are limited to one or more lots only.

2. Contracting entities may, even where the possibility to tender for all lots has been indicated, limit the number of lots that may be awarded to a tenderer provided that the maximum number is stated in the contract notice or in the invitation to confirm interest. Contracting entities shall determine and indicate in the procurement documents the objective and non-discriminatory criteria or rules for awarding the different lots where the application of the chosen award criteria would result in the award to one tenderer of more lots than the maximum number.
3. Where more than one lot may be awarded to the same tenderer, contracting entities may provide that they will either award a contract per lot or one or more contracts, covering several or all lots.

Contracting entities shall specify in the procurement documents whether they reserve the right to make such a choice and, if so, which lots may be grouped together under one contract.

Contracting entities shall first determine the tenders fulfilling best the award criteria set out pursuant to Article 76 for each individual lot. They may award a contract for

more than one lot to a tenderer that is not ranked first in respect of all individual lots covered by this contract, provided that the award criteria set out pursuant to Article 76 are better fulfilled with regard to all the lots covered by that contract. Contracting entities shall specify the methods they intend to use for such comparison in the procurement documents. Such methods shall be transparent, objective and non-discriminatory.

4. Contracting entities may require that all contractors coordinate under the direction of the economic operator to which a lot involving the coordination of the entire project or its relevant parts has been awarded.

#### *Article 60*

##### *Setting time limits*

1. When fixing the time limits for requests to participate and the receipt of tenders, contracting entities shall take particular account of the complexity of the contract and the time required for drawing up tenders, without prejudice to the minimum time limits set out in Articles 39 to 44.
2. Where tenders can be made only after a visit to the site or after on-the-spot inspection of the documents supporting the procurement documents, the time limits for the receipt of tenders shall be extended, so that all economic operators concerned may be aware of all the information needed to produce tenders.

## **Section 2**

### ***Publication and transparency***

#### *Article 61*

##### *Periodic indicative notices*

1. Contracting entities may make known their intentions of planned procurement through the publication of a periodic indicative notice as soon as possible after the beginning of the budgetary year. Those notices shall contain the information set out in part A, section I of Annex VI. They shall be published either by the Commission or by the contracting entities on their buyer profiles in accordance with point 2(b) of Annex IX. Where the notice is published by the contracting entities on their buyer profile, they shall send a notice of the publication of the periodic indicative notice on a buyer profile in accordance with point 3 of Annex IX.
2. When a call for competition is made by means of a periodic indicative notice in respect of restricted procedures and negotiated procedures with prior call for competition, the notice shall meet all the following requirements:
  - (a) it refers specifically to the supplies, works or services that will be the subject of the contract to be awarded;



- (b) it indicates that the contract will be awarded by restricted or negotiated procedure without further publication of a call for competition and invite interested economic operators to express their interest in writing;
- (c) it contains, in addition to the information set out in part A, section I of Annex VI, the information set out in part A, section II of Annex VI;
- (d) it has been published not more than 12 months prior to the date on which the invitation to confirm interest is sent.

#### *Article 62*

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

Where contracting entities choose to set up a qualification system in accordance with Article 71, the system shall be the subject of a notice as referred to in Annex X, indicating the purpose of the qualification system and how to have access to the rules concerning its operation. Where the system is of a duration greater than three years, the notice shall be published annually. Where the system is of a shorter duration, an initial notice shall suffice.

#### *Article 63*

##### *Contract notices*

Contract notices may be used as a means of calling for competition in respect of all procedures. They shall contain the information set out in the relevant part of Annex XI and shall be published in accordance with Article 65.

#### *Article 64*

##### *Contract award notices*

1. Within two months of the award of a contract or the conclusion of a framework agreement, contracting entities shall send a contract award notice on the results of the procurement procedure.

Such notice shall contain the information set out in Annex XII and shall be published in accordance with Article 65.

2. Where the call for competition for the contract concerned has been made in the form of a periodic indicative notice and the contracting entity does not intend to award further contracts during the 12 month period covered by the periodic indicative notice, the contract award notice shall contain a specific indication to that effect.

In the case of framework agreements concluded in accordance with Article 45, contracting entities shall not be bound to send a notice of the results of the procurement procedure for each contract based on that agreement.

Contracting entities shall send a contract award notice within two months after the award of each contract based on a dynamic purchasing system. They may, however, group such notices on a quarterly basis. In that case, they shall send the grouped notices within two months of the end of each quarter.

3. The information provided in accordance with Annex XII and intended for publication shall be published in accordance with Annex IX. Certain information on the contract award or the conclusion of the framework agreement may be withheld from publication where its release would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of a particular economic operator, public or private, including the interests of the economic operator to whom the contract has been awarded, or might prejudice fair competition between economic operators.

In the case of contracts for research-and-development services ("R&D services"), the information concerning the nature and quantity of the services may be respectively limited to:

- (a) the indication "R&D services" where the contract has been awarded by a negotiated procedure without a call for competition in accordance with Article 44(b);
  - (b) at least as detailed information as was indicated in the notice that was used as a means of calling for competition.
4. Information provided in accordance with Annex XII and marked as not being intended for publication shall be published only in simplified form and in accordance with Annex IX for statistical purposes.

#### *Article 65*

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

1. Notices referred to in Articles 61 to 64 shall include the information set out in Annexes XI, X, VI A, VI B and XII and in the format of standard forms, including standard forms for corrigenda.

The Commission shall establish those standard forms. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 100.

2. Notices referred to in Articles 61 to 64 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. Calls for competition within the meaning of Article 39(2) shall be published in full in an official language of the Union as chosen by the 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. The Commission shall ensure that the full text and the summary of periodic indicative notices referred to in Article 61(2), calls for competition setting up a dynamic purchasing system as referred to in Article 46(3)(a) and notices on the existence of a qualification system used as a means of calling for competition in accordance with Article 39(2)(b) continue to be published:

- (a) in the case of periodic indicative notices for 12 months or until receipt of a contract award notice as provided for in Article 64 (2) indicating that no further contracts will be awarded during the 12 month period covered by the call for competition;
  - (b) in the case of calls for competition setting up a dynamic purchasing system for the period of validity of the dynamic purchasing system;
  - (c) in the case of notices on the existence of a qualification system for its period of validity.
5. Contracting entities shall be able to supply proof of the dates on which notices are dispatched.

The Commission shall give the 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.

6. Contracting entities may publish notices for works, supply or service contracts that are not subject to the publication requirements laid down in this Directive provided that those notices are sent to the Commission by electronic means in accordance with the format and procedures for transmission indicated in Annex IX.

#### *Article 66*

##### *Publication at national level*

1. Notices referred to in Articles 61 to 64 and the information contained therein shall not be published at national level before the publication pursuant to Article 65.
2. Notices published at national level shall not contain information other than that contained in the notices dispatched to the Commission or published on a buyer profile, but shall indicate the date of dispatch of the notice to the Commission or its publication on the buyer profile.
3. Periodic indicative notices shall not be published on a buyer profile before the dispatch to the Commission of the notice of their publication in that form; they shall indicate the date of that dispatch.

#### *Article 67*

##### *Electronic availability of procurement documents*

1. Contracting entities shall offer unrestricted and full direct access free of charge by electronic means to the procurement documents from the date of publication of the notice in accordance with Article 65 or the date on which the invitation to confirm interest is sent. Where the means of calling for competition is a notice on the existence of a qualification system, such access shall be offered as soon as possible and at the latest when the invitation to tender or to negotiate is sent. The text of the notice or of those invitations shall specify the internet address at which this documentation is accessible.

2. Provided that it has been requested in good time, the contracting entities or competent departments shall supply additional information relating to the specifications and any supporting documents not later than six days before the time limit fixed for the receipt of tenders. In the event of an accelerated open procedure as referred to in Article 40(3), that period shall be four days.

#### *Article 68*

##### *Invitations to submit a tender or to negotiate; invitations to confirm interest*

1. In restricted procedures, innovation partnerships and negotiated procedures with prior call for competition, contracting entities shall simultaneously and in writing invite the selected candidates to submit their tenders or to negotiate.

Where a periodic indicative notice is used as a call for competition pursuant to point (a) of Article 39(2), contracting entities shall simultaneously and in writing invite the economic operators having expressed their interest to confirm their continuing interest.

2. The invitations referred to in paragraph 1 shall include a reference to the electronic address on which the specifications and any other supporting document have been made directly available by electronic means. In addition, they shall include the information set out in Annex XIII.

#### *Article 69*

##### *Informing applicants for qualification, candidates and tenderers*

1. Contracting entities shall as soon as possible inform each candidate and tenderer of decisions reached concerning the conclusion of a framework agreement, the award of the contract, or admission to a dynamic purchasing system, including the grounds for any decision not to conclude a framework agreement or award a contract for which there has been a call for competition or to recommence the procedure, or not to implement a dynamic purchasing system.
2. On request from the party concerned, contracting entities shall, as soon as possible, and in any case within 15 days from receipt of a written request, inform:
  - (a) any unsuccessful candidate of the reasons for the rejection of its request to participate;
  - (b) any unsuccessful tenderer of the reasons for the rejection of its tender, including, for the cases referred to in Article 54(5) and (6), the reasons for their decision of non-equivalence or their decision that the works, supplies or services do not meet the performance or functional requirements;
  - (c) any tenderer that has 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 tenderer that has made an admissible tender of the conduct and progress of negotiations and dialogue with tenderers.

3. Contracting entities may decide that certain information on the contract award or the conclusion of the framework agreement or the admission to a dynamic purchasing system, referred to in paragraph 1, is to be withheld where its release would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of a particular economic operator, public or private, including the interests of the economic operator to whom the contract has been awarded, or might prejudice fair competition between economic operators.
4. Contracting entities which establish and operate a system of qualification shall inform applicants of their decision as to qualification within a period of six months.  
  
If the decision will take longer than four months from the presentation of an application, the contracting entity shall inform the applicant, within two months of the application, of the reasons justifying the longer period and of the date by which his application will be accepted or refused.
5. Applicants whose qualification is refused shall be informed of this decision and the reasons for refusal as soon as possible and under no circumstances more than 15 days later than the date of the decision. The reasons shall be based on the criteria for qualification referred to in Article 71(2).
6. Contracting entities which establish and operate a system of qualification may bring the qualification of an economic operator to an end only for reasons based on the criteria for qualification referred to in Article 71(2). Any intention to bring qualification to an end shall be notified in writing to the economic operator beforehand, at least 15 days before the date on which qualification is due to end, together with the reason or reasons justifying the proposed action.

### **SECTION 3**

#### **CHOICE OF PARTICIPANTS AND AWARD OF CONTRACTS**

##### *Article 70* *General principles*

1. For the purpose of selecting participants in their procurement procedures, the following cumulative rules apply:
  - (a) contracting entities having provided rules and criteria for the exclusion of tenderers or candidates in accordance with Article 72(1) or Article 74(2) shall exclude economic operators identified in accordance with such rules and fulfilling such criteria;
  - (b) they shall select tenderers and candidates in accordance with the objective rules and criteria laid down pursuant to Articles 72 and 74;
  - (c) in restricted procedures, in negotiated procedures with a call for competition and in innovation partnerships, they shall where appropriate reduce in accordance with Article 72(2) the number of candidates selected pursuant to points (a) and (b) of this paragraph.

2. When a call for competition is made by means of a notice on the existence of a qualification system and for the purpose of selecting participants in procurement procedures for the specific contracts which are the subject of the call for competition, contracting entities shall:
  - (a) qualify economic operators in accordance with Article 71;
  - (b) apply to such qualified economic operators those provisions of paragraph 1 that are relevant to restricted or negotiated procedures or to innovation partnerships.
3. When selecting participants for a restricted or negotiated procedure or an innovation partnership, in reaching their decision as to qualification or when the criteria and rules are being updated, contracting entities shall not:
  - (a) impose administrative, technical or financial conditions on certain economic operators which would not be imposed on others;
  - (b) require tests or evidence which would duplicate objective evidence already available.
4. Contracting entities shall verify that the tenders submitted by the selected tenderers comply with the rules and requirements applicable to tenders and award the contract on the basis of the criteria laid down in Articles 76 and 79, taking into account Article 58.
5. Contracting entities may decide not to award a contract to the tenderer submitting the best tender where they have established that the tender does not comply, at least in an equivalent manner, with obligations established by Union legislation in the field of social and labour law or environmental law or of the international social and environmental law provisions listed in Annex XIV.
6. In open procedures, contracting entities may decide to examine tenders before verifying the suitability of tenderers, provided that the relevant provisions of Articles 70 to 79 are observed, including the rule that the contract shall not be awarded to a tenderer who should have been excluded pursuant to Article 74 or who does not meet the selection criteria set out by the contracting entity in accordance with Article 72(1) and Article 74.
7. The Commission shall be empowered to adopt delegated acts in accordance with Article 98 to amend the list in Annex XIV, where necessary due to the conclusion of new international agreements or modification of existing international agreements.

## **SUBSECTION 1**

### **QUALIFICATION AND QUALITATIVE SELECTION**

#### *Article 71*

#### *Qualification systems*

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

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

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

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

Where those criteria and rules include technical specifications, Articles 54 to 56 shall apply. The criteria and rules may be updated as required.

3. The criteria and rules referred to in paragraph 2 shall be made available to economic operators on request. Those those updated criteria and rules shall be communicated to interested economic operators.

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

4. A written record of qualified economic operators shall be kept; it may be divided into categories according to the type of contract for which the qualification is valid.
5. When a call for competition is made by means of a notice on the existence of a qualification system, specific contracts for the works, supplies or services covered by the qualification system shall be awarded by restricted procedures or negotiated procedures, in which all tenderers and participants are selected among the candidates already qualified in accordance with such a system.
6. Any charges that are billed in connection with requests for qualification or with updating or conserving an already obtained qualification pursuant to the system shall be proportionate to the generated costs.

#### *Article 72*

##### *Criteria for qualitative selection*

1. Contracting entities may establish objective rules and criteria for the exclusion and selection of tenderers or candidates; those rules and criteria shall be available to interested economic operators.
2. Where contracting entities need to ensure an appropriate balance between the particular characteristics of the procurement procedure and the resources required to conduct it, they may, in restricted or negotiated procedures or in innovation partnerships, establish objective rules and criteria that reflect this need and enable the contracting entity to reduce the number of candidates that will be invited to tender or to negotiate. The number of candidates selected shall, however, take account of the need to ensure adequate competition.

*Article 73*  
*Reliance on the capacities of other entities*

1. Where the objective rules and criteria for the exclusion and selection of economic operators requesting qualification in a qualification system include requirements relating to the economic and financial capacity of the economic operator, or to its technical and professional abilities, the economic operator may where necessary rely on the capacity of other entities, whatever the legal nature of the link between itself and those entities. In this case the economic operator shall prove to the contracting entity that those resources will be available to it throughout the period of the validity of the qualification system, for example by producing an undertaking by those entities to that effect. In the case of economic and financial standing, contracting entities may require that the economic operator and those entities are jointly liable for the execution of the contract.

Under the same conditions, a group of economic operators as referred to in Article 30 may rely on the capacity of participants in the group or of other entities.

2. Where the objective rules and criteria for the exclusion and selection of candidates and tenderers in open, restricted or negotiated procedures or in innovation partnerships include requirements relating to the economic and financial capacity of the economic operator, or to its technical and professional abilities the economic operator may where necessary and for a particular contract rely on the capacity of other entities, whatever the legal nature of the link between itself and those entities. In this case the economic operator shall prove to the contracting entity that the necessary resources will be available to it, for example by delivering an undertaking by those entities to that effect. In the case of economic and financial standing, contracting entities may require that the economic operator and those entities are jointly liable for the execution of the contract.

Under the same conditions, a group of economic operators as referred to in Article 30 may rely on the capacities of participants in the group or of other entities.

3. In the case of works contracts, service contracts and siting and installation operations in the context of a supply contract, contracting entities may require that certain critical tasks be performed directly by the tenderer itself or, where a tender is submitted by a group of economic operators as referred to in Article 30, a participant in the group.

*Article 74*

*Use of exclusion grounds and selection criteria provided for under [Directive 2004/18]*

1. The objective rules and criteria for the exclusion and selection of economic operators requesting qualification in a qualification system and the objective rules and criteria for the exclusion and selection of candidates and tenderers in open, restricted or negotiated procedures or in innovation partnerships may include the exclusion grounds listed in Article 55 of Directive 2004/18 on the terms and conditions set out therein.



Where the contracting entity is a contracting authority, those criteria and rules shall include the exclusion grounds listed in Article 55(1) and (2) of Directive 2004/18 on the terms and conditions set out in that Article.

2. The criteria and rules referred to in paragraph 1 may include the selection criteria set out in Article 56 of Directive 2004/18/EC on the terms and conditions set out therein, notably as regards the limits to requirements concerning yearly turnovers, as provided for under the second subparagraph of paragraph 3 of that Article.
3. For the purpose of applying paragraphs 1 and 2 of this Article, Articles 57 to 60 of Directive 2004/18/EC shall apply.

#### *Article 75*

##### *Quality assurance standards and environmental management standards*

1. Where they request the production of certificates drawn up by independent bodies attesting that the economic operator complies with certain quality assurance standards, including on accessibility for disabled persons, contracting entities shall refer to quality assurance systems based on the relevant European standards series certified by bodies conforming to the European standards series concerning certification.

Contracting entities shall recognise equivalent certificates from bodies established in other Member States. They shall also accept other evidence of equivalent quality assurance measures from economic operators that have no access to such certificates, or no possibility of obtaining them within the relevant time limits.

2. Where contracting entities require the production of certificates drawn up by independent bodies attesting that the economic operator complies with certain environmental management schemes or standards, they shall refer to the European Union Eco-Management and Audit Scheme (EMAS) or to other environmental management schemes as recognized in accordance with Article 45 of Regulation (EC) No 1221/2009 of the European Parliament and of the Council<sup>49</sup> or other environmental management standards based on the relevant European or international standards by accredited bodies.

Contracting entities shall recognise equivalent certificates from bodies established in other Member States. They shall also accept other evidence of equivalent environmental management measures from economic operators that have no access to such certificates, or no possibility of obtaining them within the relevant time limits.

3. Upon request, Member States shall make available to other Member States, in accordance with Article 97, any information relating to the documents produced as evidence of compliance with quality and environmental standards referred to in paragraphs 1 and 2 of this Article.

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<sup>49</sup> OJ L 342, 22.12.2009, p. 1.

## SUBSECTION 2 AWARD OF THE CONTRACT

### *Article 76 Contract award criteria*

1. Without prejudice to national laws, regulations or administrative provisions on the remuneration of certain services, the criteria on which contracting entities shall base the award of contracts shall be one of the following:

- (a) the most economically advantageous tender;
- (b) the lowest cost.

Costs may be assessed, at the choice of the contracting entity, on the basis of the price only or using a cost-effectiveness approach, such as a life-cycle costing approach, under the conditions set out in Article 77.

2. The most economically advantageous tender referred to in point (a) of paragraph 1) from the point of view of the contracting entity shall be identified on the basis of criteria linked to the subject-matter of the contract in question.

Those criteria shall include in addition to the price or costs referred to in point (b) of paragraph 1, other criteria linked to the subject-matter of the contract in question, such as:

- (a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, environmental characteristics and innovative character;
- (b) for service contracts and contracts involving the design of works, the organisation, qualification and experience of the staff assigned to performing the contract in question may be taken into consideration, with the consequence that, following the award of the contract, such staff may only be replaced with the consent of 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, commitments with regard to parts and security of supply;
- (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 22 of Article 2, to the extent that those criteria are specified in accordance with paragraph 4 and they concern factors directly involved in those processes and characterise the specific process of production or provision of the requested works, supplies or services.

3. Member States may provide that the award of certain types of contracts shall be based on the most economically advantageous tender referred to in point (a) of paragraph 1 and in paragraph 2.

4. Award criteria shall not confer an unrestricted freedom of choice on the contracting entity. They shall ensure the possibility of effective competition and shall be accompanied by requirements which allow the information provided by the tenderers to be effectively verified. Contracting entities shall verify effectively, on the basis of the information and proof provided by the tenderers, whether the tenders meet the award criteria.
5. In the case referred to in point (a) of paragraph 1, the contracting entity shall specify 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 entity shall indicate the criteria in descending order of importance.

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

#### *Article 77* *Life-cycle costing*

1. Life-cycle costing shall to the extent relevant cover the following costs over the life cycle of a product, service or works as defined in point 22 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 and
  - (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 entities assess the costs using a life-cycle costing approach, they shall indicate in the procurement 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 entities shall allow economic operators, including economic operators from third countries, 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 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 76 (1).

A list of such legislative and delegated acts is set out in Annex XV. The Commission, shall be empowered to adopt delegated acts in accordance with Article 98 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.

#### *Article 78* *Impediments to award*

Contracting entities shall not conclude the contract with a successful tenderer where one of the following conditions is fulfilled:

- (a) the tenderer is not able to provide the certificates and documents required pursuant to Article 74(3);
- (b) the declaration provided by the tenderer pursuant to Article 37 is false;
- (c) the declaration provided by the tenderer pursuant to Article 36(3)(b) is false.

#### *Article 79* *Abnormally low tenders*

1. The contracting entity shall request economic operators to explain the price or costs charged, where all of the following conditions are fulfilled:
  - (a) the price or cost charged is more than 50 % lower than the average price or costs of the remaining tenders;
  - (b) the price or cost charged is more than 20 % lower than the price or costs of the second lowest tender;
  - (c) at least five tenders have been submitted.
2. Where tenders appear to be abnormally low for other reasons, contracting entities may also request such explanations.
3. The explanations referred to in paragraphs 1 and 2 may in particular relate to:
  - (a) the economics of the manufacturing process, of the services provided and of the construction method;

- (b) the technical solutions chosen or any exceptionally favourable conditions available to the tenderer for the supply of the goods or services or for the execution of the work;
  - (c) the originality of the supplies, services or work proposed by the tenderer;
  - (d) compliance, at least in an equivalent manner, with obligations established by Union legislation in the field of social and labour law or environmental law or of the international social and environmental law provisions listed in Annex XIV or, where not applicable, with other provisions ensuring an equivalent level of protection;
  - (e) the possibility of the tenderer obtaining State aid.
4. The contracting entity shall verify the information provided by consulting the tenderer.
- It may only reject the tender where the evidence does not justify the low level of price or costs charged, taking into account the elements referred to in paragraph 3.
- Contracting entities shall reject the tender, where they have established that the tender is abnormally low because it does not comply with obligations established by Union legislation in the field of social and labour law or environmental law or by the international social and environmental law provisions listed in Annex XIV.
5. Where a contracting entity establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender may be rejected on that ground alone only after consultation with the tenderer where the latter is unable to prove, within a sufficient time limit fixed by the contracting entity, that the aid in question was compatible with the internal market within the meaning of Article 107 of the Treaty. Where the contracting entity rejects a tender in those circumstances, it shall inform the Commission thereof.
6. Upon request, Member States shall make available to other Member States, in accordance with Article 97, any information relating to the evidence and documents produced in relation to details listed in paragraph 3.

## **Chapter IV**

### **Contract performance**

#### *Article 80*

#### *Conditions for performance of contracts*

Contracting entities may lay down special conditions relating to the performance of a contract, provided that they are indicated in the call for competition or in the specifications. Those conditions may, in particular, concern social and environmental considerations. They may also include the requirement that economic operators foresee compensations for risks of price increases that are the result of price fluctuations (hedging) and that could substantially impact the performance of a contract.

*Article 81*  
*Subcontracting*

1. In the procurement documents, the 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. Member States may provide that, at the request of the subcontractor and where the nature of the contract so allows, the contracting entity shall transfer due payments directly to the subcontractor for services, supplies or works provided to the main contractor. In such case, Member States shall put in place appropriate mechanisms permitting the main contractor to object to undue payments. The arrangements concerning that mode of payment shall be set out in the procurement documents.
3. Paragraphs 1 and 2 shall be without prejudice to the question of the principal economic operator's liability.

*Article 82*  
*Modification of contracts during their term*

1. A substantial modification of the provisions of a works, supply or service contract during its term shall be considered as a new award for the purposes of this Directive and shall require a new procurement procedure in accordance with this Directive.
2. A modification of a contract during its term shall be considered substantial within the meaning of paragraph 1, where it renders the contract 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 procurement procedure, would have allowed for the selection of other candidates than those initially selected or would have allowed for awarding the contract to another tenderer;
  - (b) the modification changes the economic balance of the contract in favour of the contractor;
  - (c) the modification extends the scope of the contract considerably to encompass supplies, services or works not initially covered.
3. The replacement of the contractual partner 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 or insolvency, of another economic operator that fulfils the criteria for qualitative selection initially established provided that this does not entail other substantial modifications to the contract and is not aimed at circumventing the application of this Directive.

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 12 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. Contract modifications shall not be considered substantial within the meaning of paragraph 1 where they have been provided for in the procurement documents in clear, precise and unequivocal review clauses or options. Such clauses shall state the scope and nature of possible 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 contract.
6. By way of derogation from paragraph 1, a substantial modification shall not require a new procurement procedure where the following cumulative conditions are fulfilled:
  - (a) the need for modification has been brought about by circumstances which a diligent contracting entity could not foresee;
  - (b) the modification does not alter the overall nature of the contract.

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 XVI and be published in accordance with Article 65.

7. Contracting entities shall not have recourse to modifications of the contract in the following cases:
  - (a) where the modification would aim at remedying deficiencies in the performance of the contractor or the consequences, which can be remedied through the enforcement of contractual obligations;
  - (b) where the modification would aim at compensating risks of price increases that have been hedged by the contractor.

### *Article 83* *Termination of contracts*

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

- (a) the exceptions provided for in Article 21 cease to apply following a private participation in the legal person awarded the contract pursuant to Article 21 (4);
- (b) a modification of the contract constitutes a new award within the meaning of Article 82;

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



# TITLE III

## PARTICULAR PROCUREMENT REGIMES

### CHAPTER I

#### *Social and other specific services*

##### *Article 84*

###### *Award of contracts for social and other specific services*

Contracts for social and other specific services listed in Annex XVII shall be awarded in accordance with this Chapter where the value of the contracts is equal to or greater than the threshold indicated in Article 12(c).

##### *Article 85*

###### *Publication of notices*

1. Contracting entities intending to award a contract for the services referred to in Article 84 shall make known their intention by means of a contract notice.
2. Contracting entities that have awarded a contract for the services referred to in Article 84 shall make known the results by means of contract award notice.
3. The notices referred to in paragraphs 1 and 2 shall contain the information referred to in Annex XVIII in accordance with the standard model notices. The Commission shall establish the standard forms. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 100.
4. The notices referred to in paragraphs 1 and 2 shall be published in accordance with Article 65.

##### *Article 86*

###### *Principles of awarding contracts*

1. Member States shall put in place appropriate procedures for the award of contracts subject to this Chapter, ensuring full compliance with the principles of transparency and equal treatment of economic operators and allowing contracting entities to take into account the specificities of the services in question.
2. Member States shall ensure that 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. Member States may also provide that the choice of the service provider shall not be made solely on the basis of the price for the provision of the service.

## **CHAPTER II**

### **RULES GOVERNING DESIGN CONTESTS**

#### *Article 87* *General provisions*

1. The rules for the organisation of design contests shall be in conformity with this Chapter and shall be made available to those interested in participating in the contest.
2. The admission of participants to design contests shall not be limited:
  - (a) by reference to the territory or part of the territory of a Member State;
  - (b) on the grounds that, under the law of the Member State in which the contest is organised, they would be required to be either natural or legal persons.

#### *Article 88* *Scope*

1. This Chapter shall apply to design contests organised as part of a procurement procedure for a service contract, provided that the estimated value of the contract, net of VAT, and including any possible prizes or payments to participants, is equal to or greater than the amount set out in point (a) of Article 12.
2. This Chapter shall apply to all design contests where the total amount of contest prizes and payments to participants, including the estimated value net of VAT of the service contract which might subsequently be concluded under point (k) of Article 44 if the contracting entity does not exclude such an award in the contest notice, is equal to or greater than the amount set out in point (a) of Article 12.

#### *Article 89* *Notices*

1. Contracting entities that intend to organise a design contest shall call for competition by means of a contest notice. Where they intend to award a subsequent service contract pursuant to point (k) of Article 44, this shall be indicated in the design contest notice. Contracting entities that have held a design contest shall make the results known by means of a notice.
2. The call for competition shall include the information set out in Annex XIX and the notice of the results of a design contest shall include the information set out in Annex XX in the format of standard forms. The Commission shall establish the standard forms. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 100.

The notice of the results of a design contest shall be forwarded to the Commission within two months of the closure of the design contest.

Where release of information on the outcome of the contest would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of a particular economic operator, public or private, including the interests of the economic operator to whom the contract has been awarded, or might prejudice fair competition between economic operators, such information may be withheld from publication.

3. Paragraphs (2) to (6) of Article 65 shall also apply to notices relating to design contests.

#### *Article 90*

##### *Rules on the organisation of design contests, the selection of participants and the jury*

1. When organising design contests, contracting entities shall apply procedures which are adapted to this Directive.
2. Where design contests are restricted to a limited number of participants, contracting entities shall establish clear and non-discriminatory selection criteria. In any event, the number of candidates invited to participate shall be sufficient to ensure genuine competition.
3. The jury shall be composed exclusively of natural persons who are independent of participants in the contest. Where a particular professional qualification is required of participants in a contest, at least a third of the jury members shall have the same qualification or an equivalent qualification.

#### *Article 91*

##### *Decisions of the jury*

1. The jury shall be autonomous in its decisions or opinions.
2. The jury shall examine the plans and projects submitted by the candidates anonymously and solely on the basis of the criteria indicated in the contest notice.
3. The jury shall record its ranking of projects in a report, signed by its members, made according to the merits of each project, together with its remarks and any points that may need clarification.
4. Anonymity shall be observed until the jury has reached its opinion or decision.
5. Candidates may be invited, if need be, to answer questions that the jury has recorded in the minutes to clarify any aspects of the projects.
6. Complete minutes shall be drawn up of the dialogue between jury members and candidates.

## TITLE IV GOVERNANCE

### *Article 92 Enforcement*

In conformity with Council Directive 92/13/EEC, Member States shall ensure correct application of this Directive by effective, available and transparent mechanisms which complement the system in place for the review of decisions taken by contracting entities.

### *Article 93 Public oversight*

1. Member States shall appoint a single independent body responsible for the oversight and coordination of implementation activities (hereinafter "the oversight body"). Member States shall inform the Commission of their designation.

All contracting entities shall be subject to such oversight.

2. The competent authorities involved in the implementation activities shall be organised in such a manner that conflicts of interests are avoided. The system of public oversight shall be transparent. For this purpose, all guidance and opinion documents and an annual report illustrating the implementation and application of rules laid down in this Directive shall be published.

The annual report shall include the following:

- (a) an indication of the success rate of small and medium-sized enterprises (SMEs) in procurement; where the percentage is lower than 50 % in terms of values of contracts awarded to SMEs, the report shall provide an analysis of the reasons therefore;
  - (b) a global overview of the implementation of sustainable procurement policies, including on procedures taking into account considerations linked to the protection of the environment, social inclusion including accessibility for persons with disabilities or fostering innovation;
  - (c) centralized data about reported cases of fraud, corruption, conflict of interests and other serious irregularities in the field of public procurement, including those affecting projects cofinanced by the budget of the Union.
3. The oversight body shall be responsible for the following tasks:
    - (a) monitoring the application of public procurement rules and the related practice by contracting entities and in particular by central purchasing bodies;

- (b) providing legal advice to contracting entities on the interpretation of public procurement rules and principles and on the application of public procurement rules in specific cases;
- (c) issuing own initiative opinions and guidance on questions of general interest pertaining to the interpretation and application of public procurement rules, on recurring questions and on systemic difficulties related to the application of public procurement rules, in the light of the provisions of this Directive and of the relevant case-law of the Court of Justice of the European Union;
- (d) establishing and applying comprehensive, actionable 'red flag' indicator systems to prevent, detect and adequately report instances of procurement fraud, corruption, conflict of interest and other serious irregularities;
- (e) drawing the attention of the national competent institutions, including auditing authorities, to specific violations detected and to systemic problems;
- (f) examining complaints from citizens and businesses on the application of public procurement rules in specific cases and transmitting the analysis to the competent contracting entities, which shall have the obligation to take it into account in their decisions or, where the analysis is not followed, to explain the reasons for disregarding it;
- (g) monitoring the decisions taken by national courts and authorities following a ruling given by the Court of Justice of the European Union on the basis of Article 267 of the Treaty or findings of the European Court of Auditors establishing violations of Union public procurement rules related to projects cofinanced by the Union; the oversight body shall report to the European Anti-Fraud Office any infringement to Union procurement procedures where these were related to contracts directly or indirectly funded by the European Union.

The tasks referred to in point (e) shall be without prejudice to the exercise of rights of appeal under national law or under the system established on the basis of directive 92/13/EEC.

Member States shall empower the oversight body to seize the jurisdiction competent according to national law for the review of contracting entities' decisions where it has detected a violation in the course of its monitoring and legal advising activity.

4. Without prejudice to the general procedures and working methods established by the Commission for its communications and contacts with Member States, the oversight body shall act as a specific contact point for the Commission when it monitors the application of Union law and the implementation of the budget from the Union on the basis of Article 17 of the Treaty on the European Union and Article 317 of the Treaty on the Functioning of the European Union. It shall report to the Commission any violation of this Directive in procurement procedures for the award of contracts directly or indirectly funded by the Union.

The Commission may in particular refer to the oversight body the treatment of individual cases where the contract is not yet concluded or a review procedure can still be carried out. It may also entrust the oversight body with the monitoring

activities necessary to ensure the implementation of the measures to which Member States are committed in order to remedy a violation of Union public procurement rules and principles identified by the Commission.

The Commission may require the oversight body to analyse alleged breaches to Union public procurement rules affecting projects co-financed by the budget of the Union. The Commission may entrust the oversight body to follow-up certain cases and to ensure that the appropriate consequences of breaches to Union public procurement rules affecting projects co-financed are taken by the competent national authorities which will be obliged to follow its instructions.

5. The investigation and enforcement activities carried out by the oversight body to ensure that contracting entities' decisions comply with this Directive and the general principles of the Treaty on the Functioning of the European Union shall not replace or prejudice the institutional role of the Commission as guardian of the Treaty. When the Commission decides to refer the treatment of an individual case, it shall also retain the right to intervene in accordance with the powers conferred to it by the Treaty.
6. Contracting authorities shall transmit to the national oversight body the full text of all concluded contracts with a value equal to or greater than
  - (a) 1 000 000 EUR in the case of supply contracts or service contracts;
  - (b) 10 000 000 EUR in the case of works contracts.
7. Without prejudice to the national law concerning access to information, and in accordance with national and EU legislation on data protection, the oversight body shall, upon written request, give unrestricted and full direct access, free of charge, to the concluded contracts referred to in paragraph 6. Access to certain parts of the contracts may be refused where their disclosure would impede law enforcement or otherwise be contrary to the public interest, would harm the legitimate commercial interests of economic operators, public or private, or might prejudice fair competition between them.

Access to the parts that may be released shall be given within a reasonable delay and no later than 45 days from the date of the request.

The applicants filing a request for access to a contract shall not need to show any direct or indirect interest related to that particular contract. The recipient of information should be allowed to make it public.

8. A summary of all the activities carried out by the oversight body in accordance with paragraphs 1 to 7 shall be included in the annual report mentioned in paragraph 2.

#### *Article 94*

##### *Individual reports on procedures for the award of contracts*

1. Contracting entities shall keep appropriate information on each contract, framework agreement and each time a dynamic purchasing system is established. This

information shall be sufficient to permit them at a later date to justify decisions taken in connection with:

- (a) the qualification and selection of economic operators and the award of contracts;
- (b) the use of negotiated procedures without a call for competition by virtue of Article 44;
- (c) the non-application of Chapters II to IV of Title II by virtue of the derogations provided for in Chapters II and III of Title I.

Contracting entities shall document the progress of all procurement procedures, whether or not the procedures are conducted by electronic means. To that end, they shall document all stages in the procurement procedure, including all communications with economic operators and internal deliberations, preparation of the tenders, dialogue or negotiation if any, selection and award of the contract.

2. The information shall be kept for at least four years from the date of award of the contract so that the contracting entity will be able, during that period, to provide the necessary information to the Commission or the national oversight body where they so request it.

#### *Article 95* *National reporting*

1. The bodies established or appointed in accordance with Article 93 shall forward to the Commission an implementation and statistical report on each year, based on a standard form, not later than 31 October of the following year.
2. The report referred to in paragraph 1 shall contain at least the total value, broken down by category of activity to which Articles 5 to 11 refer, of the contracts awarded below the thresholds set out in Article 12 but which would be covered by this Directive if their value exceeded the threshold.
3. Member States shall ensure that this report contains at least the number and value of contracts awarded, broken down by categories of activity to which Articles 5 to 11 refer and any other information required to verify the proper application of the Agreement. This shall include the number and value of contracts awarded pursuant to a negotiated procedure without a call for competition, broken down according to the circumstances referred to in Article 44 and by categories of activity to which Articles 5 to 11 refer. It shall also specify the Member State or third country of the successful contractor.
4. The yearly report shall furthermore, for each of the activities to which Articles 5 to 11 refers, contain a list of contracting entities exercising the activity concerned, indicating for each entity the unique identification number where such number is provided for in national legislation.

The Commission may periodically publish the list of those contracting entities for information in the *Official Journal of the European Union*.

5. The Commission shall establish the standard form for the drawing-up of the annual implementation and statistical report referred to in paragraph 1. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 100.
6. The acts referred to under paragraph 5 shall ensure that:
  - (a) in the interests of administrative simplification, the statistical data may be collected on the basis of sampling, provided that its representativeness is not jeopardised;
  - (b) the confidential nature of the information provided is respected.

#### *Article 96*

##### *Assistance to contracting entities and businesses*

1. Member States shall make available technical support structures in order to provide legal and economic advice, guidance and assistance to contracting entities in preparing and carrying out procurement procedures. Member States shall also ensure that each contracting entity can obtain competent assistance and advice on individual questions.
2. With a view to improving access to public procurement for economic operators, in particular SMEs, and in order to facilitate correct understanding of the provisions of this Directive, Member States shall ensure that appropriate assistance can be obtained, including by electronic means or using existing networks dedicated to business assistance.
3. Specific administrative assistance shall be available to economic operators intending to participate in a procurement procedure in another Member State. Such assistance shall at least cover administrative requirements in the Member State concerned, as well as possible obligations related to electronic procurement.

Member States shall ensure that interested economic operators have easy access to appropriate information on the obligations relating to taxes, environmental protection and to social and labour law obligations, which are in force in the Member State, in the region or locality where the works are to be carried out or the services are to be provided and which will be applicable to the works carried out on site or to the services provided during the performance of the contract.

4. For the purposes of paragraphs 1, 2 and 3, Member States may appoint a single body or several bodies or administrative structures. Member States shall ensure case due coordination between those bodies and structures.

#### *Article 97*

##### *Administrative cooperation*

1. Member States shall provide mutual assistance to each other, and shall put in place measures for effective cooperation with one another, in order to ensure exchange of



information on issues referred to in Articles 56, 75 and 79. They shall ensure the confidentiality of the information which they exchange.

2. The competent authorities of all Member States concerned shall exchange information in compliance with personal data protection legislation provided for in Directives 95/46/EC of the European Parliament and of the Council<sup>50</sup> and 2002/58/EC of the European Parliament and of the Council<sup>51</sup>.
3. For the purposes of this Article, Member States shall designate one or more liaison points, the contact details of which shall be communicated to the other Member States, the oversight bodies and the Commission. Member States shall publish and regularly update the list of liaison points. The oversight body shall be in charge of the coordination of such liaison points.
4. The exchange of information shall take place via the Internal Market Information system established pursuant to Regulation (EU) N° XXX/XXXX of the European Parliament and Council<sup>52</sup> [*proposal for a Regulation of the European Parliament and Council on the administrative cooperation through the Internal Market Information System ('the IMI Regulation') COM(2011)522*]. Member States shall supply information requested by other Member States within the shortest possible period of time.

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<sup>50</sup> OJ L 281, 23.11.1995, p. 31.

<sup>51</sup> OJ L 201, 31.7.2002, p. 37.

<sup>52</sup> OJ L [...]

# TITLE V

## DELEGATED POWERS, IMPLEMENTING POWERS AND FINAL PROVISIONS

### *Article 98*

#### *Exercise of the delegation*

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.
2. The delegation of power referred to in Articles 4, 35, 33, 38, 25, 65, 70, 77, 85 and 95 shall be conferred on the Commission for an indeterminate period of time from the [date of entry into force of this Directive].
3. The delegation of power referred to in Articles 4, 35, 33, 38, 25, 65, 70, 77, 85 and 95 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 Article 98 shall enter into force only if no objection has been expressed either by the European Parliament or by the Council within a period of 2 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 2 months at the initiative of the European Parliament or the Council.

### *Article 99*

#### *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 98(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 100*  
*Committee procedure*

1. The Commission shall be assisted by the Advisory Committee for Public Contracts established by Council Decision 71/306/EEC<sup>53</sup>. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.
2. Where reference is made to this Article, Article 4 of Regulation (EU) No 182/2011 shall apply.

*Article 101*  
*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 measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

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

*Article 102*  
*Repeal*

Directive 2004/17/EC is hereby repealed with effect from 30 June 2014.

References to the repealed Directive shall be construed as being made to this Directive and shall be read in accordance with the correlation table in Annex XXI.

*Article 103*  
*Review*

The Commission shall review the economic effects on the internal market resulting from the application of the thresholds set in Article 12 and report thereon to the European Parliament and the Council by 30 June 2017.

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

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<sup>53</sup> OJ L 185, 16.8.1971, p. 15

*Article 104*  
*Entry into force*

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

*Article 105*  
*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 ACTIVITIES AS SET OUT IN POINT 8(a) OF ARTICLE 2**

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

| NACE <sup>(1)</sup> |       |       |  |  | CPV code |
|---------------------|-------|-------|--|--|----------|
| SECTION F           |       |       | CONSTRUCTION                                       |  |          |
| Division            | Group | Class | Subject  | Notes  |          |
| 45                  |       |       | Construction                                       | This division includes:<br><br>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:<br><br>— demolition of buildings and other structures,<br><br>— clearing of building sites,<br><br>— earth moving: excavation, landfill, levelling and grading of construction sites, trench digging, rock removal, blasting, etc.<br><br>— site preparation for mining:<br><br>— overburden removal and other development and preparation of mineral properties and sites.<br><br>This class also includes:<br><br>— building site drainage.<br><br>— drainage of agricultural or forestry land. | 45110000 |
|                     |       | 45.12 | Test drilling and boring                           | This class includes:<br><br>— test drilling, test boring and core sampling for construction, geophysical, geological or similar purposes.<br><br>This class excludes:<br><br>— drilling of production oil or gas wells, see 11.20.<br><br>— water well drilling, see 45.25,<br><br>— shaft sinking, see 45.25,<br><br>— oil and gas field exploration, geophysical, geological and seismic surveying, see 74.20.   | 45120000 |
|                     | 45.2  |       | Building of complete constructions                 |  | 45200000 |

|  |  |       |   |   |   |
|--|--|-------|---|---|---|
|  |  |       | or parts thereof; civil engineering                             |   |   |
|  |  | 45.21 | General construction of buildings and civil engineering works   | <p>This class includes:</p> <ul style="list-style-type: none"> <li>— construction of all types of buildings construction of civil engineering constructions,</li> <li>— bridges, including those for elevated highways, viaducts, tunnels and subways,</li> <li>— long-distance pipelines, communication and power lines,</li> <li>— urban pipelines, urban communication and power lines,</li> <li>— ancillary urban works,</li> <li>— assembly and erection of prefabricated constructions on the site.</li> </ul> <p>This class excludes:</p> <ul style="list-style-type: none"> <li>— service activities incidental to oil and gas extraction, see 11.20,</li> <li>— erection of complete prefabricated constructions from self-manufactured parts not of concrete, see divisions 20, 26 and 28,</li> <li>— construction work, other than buildings, for stadiums, swimming pools, gymnasiums, tennis courts, golf courses and other sports installations, see 45.23,</li> <li>— building installation, see 45.3,</li> <li>— building completion, see 45.4,</li> <li>— architectural and engineering activities, see 74.20,</li> <li>— project management for construction, see 74.20.</li> </ul> | <p>45210000</p> <p>Except:</p> <p>-</p> <p>45213316</p> <p>45220000</p> <p>45231000</p> <p>45232000</p> |
|  |  | 45.22 | Erection of roof covering and frames                            | <p>This class includes:</p> <ul style="list-style-type: none"> <li>— erection of roofs,</li> <li>— roof covering,</li> <li>— waterproofing.</li> </ul>  | 45261000  |
|  |  | 45.23 | Construction of highways, roads, airfields and sport facilities | <p>This class includes:</p> <ul style="list-style-type: none"> <li>— construction of highways, streets, roads, other vehicular and pedestrian ways,</li> <li>— construction of railways,</li> <li>— construction of airfield runways,</li> <li>— construction work, other than buildings, for stadiums, swimming pools, gymnasiums, tennis courts, golf courses and</li> </ul>  | <p>45212212 and DA03</p> <p>45230000</p> <p>except:</p> <p>-</p> <p>45231000</p> <p>-</p>               |

|  |      |       |   |   |
|--|------|-------|---|---|
|  |      |       | <p>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>45232000</p> <p>-</p> <p>45234115</p>                                |
|  |      | 45.24 | <p>Construction of water projects</p> <p>This class includes</p> <p>— construction of:</p> <p>— waterways, harbour and river works, pleasure ports (marinas), locks, etc.,</p> <p>— dams and dykes,</p> <p>— dredging,</p> <p>— subsurface work.</p>  | 45240000  |
|  |      | 45.25 | <p>Other construction work involving special trades</p> <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 | <p>Installation of electrical wiring and fittings</p> <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>— electrical heating systems,</p> <p>— residential antennas and aerials,</p>   | <p>45213316</p> <p>45310000</p> <p>Except:</p> <p>-</p> <p>45316000</p> |

|  |      |       |                             |  |                                  |
|--|------|-------|-----------------------------|--|----------------------------------|
|  |      |       |                             | <ul style="list-style-type: none"> <li>— fire alarms,</li> <li>— burglar alarm systems,</li> <li>— lifts and escalators,</li> <li>— lightning conductors, etc.</li> </ul>  |                                  |
|  |      | 45.32 | Insulation work activities  | <p>This class includes:</p> <ul style="list-style-type: none"> <li>— installation in buildings or other construction projects of thermal, sound or vibration insulation.</li> </ul> <p>This class excludes:</p> <ul style="list-style-type: none"> <li>— waterproofing, see 45.22.</li> </ul>  | 45320000                         |
|  |      | 45.33 | Plumbing                    | <p>This class includes:</p> <ul style="list-style-type: none"> <li>— installation in buildings or other construction projects of:</li> <li>— plumbing and sanitary equipment,</li> <li>— gas fittings,</li> <li>— heating, ventilation, refrigeration or air-conditioning equipment and ducts,</li> <li>— sprinkler systems.</li> </ul> <p>This class excludes:</p> <ul style="list-style-type: none"> <li>— installation of electrical heating systems, see 45.31.</li> </ul> | 45330000                         |
|  |      | 45.34 | Other building installation | <p>This class includes:</p> <ul style="list-style-type: none"> <li>— installation of illumination and signalling systems for roads, railways, airports and harbours,</li> <li>— installation in buildings or other construction projects of fittings and fixtures n.e.c.</li> </ul>  | 45234115<br>45316000<br>45340000 |
|  | 45.4 |       | Building completion         |  | 45400000                         |
|  |      | 45.41 | Plastering                  | <p>This class includes:</p> <ul style="list-style-type: none"> <li>— application in buildings or other construction projects of interior and exterior plaster or stucco, including related lathing materials.</li> </ul>   | 45410000                         |
|  |      | 45.42 | Joinery installation        | <p>This class includes:</p> <ul style="list-style-type: none"> <li>— installation of not self-manufactured doors, windows, door and window frames, fitted kitchens, staircases, shop fittings and the like, of wood or other materials,</li> <li>— interior completion such as ceilings, wooden wall coverings, movable partitions, etc.</li> </ul>  | 45420000                         |



|  |      |       |   |  |                               |
|--|------|-------|---|--|-------------------------------|
|  |      |       |   | <p>This class excludes:</p> <ul style="list-style-type: none"> <li>— laying of parquet and other wood floor coverings, see 45.43.</li> </ul>   |                               |
|  |      | 45.43 | Floor and wall covering                                       | <p>This class includes:</p> <ul style="list-style-type: none"> <li>— laying, tiling, hanging or fitting in buildings or other construction projects of:</li> <li>—</li> <li>— ceramic, concrete or cut stone wall or floor tiles,</li> <li>— parquet and other wood floor coverings carpets and linoleum floor coverings,</li> <li>— including of rubber or plastic,</li> <li>— terrazzo, marble, granite or slate floor or wall coverings,</li> <li>— wallpaper.</li> </ul> | 45430000                      |
|  |      | 45.44 | Painting and glazing  | <p>This class includes:</p> <ul style="list-style-type: none"> <li>— interior and exterior painting of buildings,</li> <li>— painting of civil engineering structures,</li> <li>— installation of glass, mirrors, etc.</li> </ul> <p>This class excludes:</p> <ul style="list-style-type: none"> <li>— installation of windows, see 45.42,</li> </ul>  | 45440000                      |
|  |      | 45.45 | Other building completion                                     | <p>This class includes:</p> <ul style="list-style-type: none"> <li>— installation of private swimming pools,</li> <li>— steam cleaning, sand blasting and similar activities for building exteriors,</li> <li>— other building completion and finishing work n.e.c.</li> </ul> <p>This class excludes:</p> <ul style="list-style-type: none"> <li>— interior cleaning of buildings and other structures, see 74.70.</li> </ul>   | 45212212 and DA04<br>45450000 |
|  | 45.5 |       | Renting of construction or demolition equipment with operator |  | 45500000                      |
|  |      | 45.50 | Renting of construction or                                    | <p>This class excludes:</p> <ul style="list-style-type: none"> <li>— renting of construction or demolition machinery and</li> </ul>  | 45500000                      |

|  |  |   |   |  |
|--|--|---|---|--|
|  |  | demolition<br>equipment<br>with<br>operator | equipment without operators, see 71.32. |  |
| <p>(1) Council Regulation (EEC) No 3037/90 of 9 October 1990 (OJ L 293, 24.10.1990, p. 1), Regulation as amended by Commission Regulation (EEC) No 761/93 (OJ L 83, 3.4.1993, p. 1).</p> |  |   |   |  |

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

Rights which have been granted by means of a procedure in which adequate publicity has been ensured and where the granting of 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 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 III**  
**LIST OF UNION LEGISLATION REFERRED TO IN ARTICLE 27(3)**

A. TRANSPORT OR DISTRIBUTION OF GAS OR HEAT

Directive 2009/73/EC

B. PRODUCTION, TRANSMISSION OR DISTRIBUTION OF ELECTRICITY

Directive 2009/72/EC

C. PRODUCTION, TRANSPORT OR DISTRIBUTION OF DRINKING WATER

None

D. CONTRACTING ENTITIES IN THE FIELD OF RAIL SERVICES

Rail Freight transport

Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways<sup>54</sup>

Rail passenger transport

None

E. CONTRACTING ENTITIES IN THE FIELD OF URBAN RAILWAY, TRAMWAY, TROLLEYBUS OR MOTOR BUS SERVICES

None

F. CONTRACTING ENTITIES IN THE FIELD OF POSTAL SERVICES

Directive 97/67/EC

G. EXTRACTION OF OIL OR GAS

Directive 94/22/EC

H. EXPLORATION FOR AND EXTRACTION OF COAL OR OTHER SOLID FUELS

None

I. CONTRACTING ENTITIES IN THE FIELD OF SEAPORT OR INLAND PORT OR OTHER TERMINAL EQUIPMENT

None

J. CONTRACTING ENTITIES IN THE FIELD OF AIRPORT INSTALLATIONS

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<sup>54</sup> OJ L 237, 24.8.1991, p. 25

None

**ANNEX IV**  
**REQUIREMENTS RELATING TO DEVICES FOR THE ELECTRONIC RECEIPT**  
**OF TENDERS, REQUESTS TO PARTICIPATE, APPLICATIONS FOR**  
**QUALIFICATION AS WELL AS PLANS AND PROJECTS IN CONTESTS**

Devices for the electronic receipt of tenders, requests to participate, applications for qualification as well as plans and projects in contests must guarantee, through technical means and appropriate procedures, at least that:

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

**ANNEX V**  
**LIST OF INTERNATIONAL AGREEMENTS REFERRED TO IN ARTICLE 38**

Agreements with the following countries or groupings of countries:

- Albania (OJ L 107, 28.4.2009)
- Former Yugoslav Republic of Macedonia (OJ L 87, 20.03.2004)
- CARIFOUM (OJ L 289, 30.10.2008)
- Chile (OJ L352, 30.12.2002)
- Croatia (OJ L 26, 28.1.2005)
- Mexico (OJ L 276, 28.10.2000, L 157/30.6.2000)
- Montenegro (OJ L 345 of 28.12.2007)
- South Korea - (OJ L 127/14.5.2011)
- Switzerland (OJ L 300, 31/12/1972)

**ANNEX VI**  
**PART A**  
**INFORMATION TO BE INCLUDED IN THE PERIODIC INDICATIVE NOTICE**  
(as referred to in Article 61)

I. INFORMATION TO BE INCLUDED IN ALL CASES

1. Name, identification number (where provided for in national legislation), address including NUTS code, telephone, fax number, email and internet address of the contracting entity and, where different, of the service from which additional information may be obtained.
2. Main activity exercised.
3.
  - (a) For supply contracts: nature and quantity or value of the services or products to be supplied (nomenclature reference No(s)).
  - (b) For works contracts: nature and extent of the services to be provided, the general characteristics of the work or of the lots by reference to the work (nomenclature reference No(s)).
  - (c) For service contracts: intended total procurement in each of the service categories envisaged (nomenclature reference No(s)).
4. Date of dispatch of the notice or of dispatch of the notice of the publication of this notice on the buyer profile.
5. Any other relevant information.

II. ADDITIONAL INFORMATION TO BE SUPPLIED WHERE THE NOTICE IS USED AS A MEANS OF CALLING FOR COMPETITION OR PERMITS THE REDUCTION OF THE TIME LIMITS FOR THE RECEIPT OF TENDERS (Article 61(2))

6. A reference to the fact that interested economic operators shall advise the entity of their interest in the contract or contracts.
7. Email or internet address at which the specifications and any supporting documents will be available for unrestricted and full direct access, free of charge.
8. Where appropriate, state whether the contract is reserved for sheltered workshops or whether its performance is reserved in the context of sheltered employment programmes.
9. Time limit for the receipt of applications for an invitation to tender or to negotiate.
10. Nature and quantity of the goods to be supplied or general nature of the work or category of service and description, stating if framework agreement(s) are envisaged, including any options for further procurement and the estimated time available for exercising those options as well as the number of renewals, if any. In the case of recurring contracts, also, an estimate of the timing of the subsequent calls for competition. State whether purchase, lease, rental or hire-purchase or any combination of those is involved.



11. NUTS code for the main location of works in case of works or NUTS code for the main place of delivery or performance in supplies and service ; if the contract is divided into lots, this information shall be provided for each lot.
12. Time limits for delivery or completion or duration of service contract and, as far as possible, for starting.
13. Address to which interested undertakings shall send their expressions of interest in writing.
14. Time limit for receipt of expressions of interest.
15. Language or languages authorised for the presentation of candidatures or tenders.
16. Economic and technical conditions, and financial and technical guarantees required of suppliers.
17.
  - (a) Estimated date for initiating the procurement procedures in respect of the contract or contracts (if known);
  - (b) Type of procurement procedure (restricted or negotiated);
  - (c) The amount of and payment details for any sum to be paid to obtain documents concerning the consultation.
18. Where appropriate, particular conditions to which the performance of the contract is subject.
19. Where appropriate, indication whether:
  - (a) E-submission of tenders or requests to participate will be required/accepted,
  - (b) E-ordering will be used,
  - (c) E-invoicing will be used,
  - (d) E-payment will be accepted.
20. Name and address of the body responsible for appeal and, where appropriate, mediation procedures. Precise information concerning time limits for lodging appeals, or, if need be, the name, address, telephone number, fax number and e-mail address of the service from which this information may be obtained.
21. Where known, criteria referred to in Article 76 to be used for award of the contract: "lowest cost" or "most economically advantageous tender". Criteria representing the most economically advantageous tender as well as their weighting or, where appropriate, the order of importance of those criteria shall be mentioned, where they do not appear in the specifications, or will not be indicated in the invitation to confirm interest referred to in Article 61(2)(b) or in the invitation tender or to negotiate.

**PART B**  
**INFORMATION TO BE INCLUDED IN NOTICES OF PUBLICATION OF A**  
**PERIODIC INDICATIVE NOTICE ON A BUYER PROFILE NOT USED AS A**  
**MEANS OF CALLING FOR COMPETITION**  
**(as referred to in Article 61(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 entity and, where different, of the service from which additional information may be obtained.
2. Main activity exercised.
3. CPV Nomenclature reference No(s).
4. Internet address of the "buyer profile" (URL).
5. Date of dispatch of the notice of the publication of the prior information notice on the buyer profile

**ANNEX VII**  
**INFORMATION TO BE INCLUDED IN THE SPECIFICATIONS IN ELECTRONIC AUCTIONS (ARTICLE 47(4))**

The specifications to be used where contracting entities have decided to hold an electronic auction shall include at least the following details:

- (a) the features whose values will be the subject of electronic auction, provided that such features are quantifiable and can be expressed in figures or percentages;
- (b) any limits on the values which may be submitted, as they result from the specifications relating to the subject of the contract;
- (c) the information which will be made available to tenderers in the course of the electronic auction and, where appropriate, when it will be made available to them;
- (d) the relevant information concerning the electronic auction process;
- (e) the conditions under which the tenderers will be able to bid and, in particular, the minimum differences which will, where appropriate, be required when bidding;
- (f) the relevant information concerning the electronic equipment used and the arrangements and technical specifications for connection.

**ANNEX VIII**  
**DEFINITION OF CERTAIN TECHNICAL SPECIFICATIONS**

For the purposes of this Directive,

- (1) "technical specification" means one of the following:
  - (e) in the case of service or supply contracts 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;
  - (b) in the case of works contracts, the totality of the technical prescriptions contained in particular in the procurement documents, defining the characteristics required of a material, product or supply, which permits a material, a product or a supply to be described in a manner such that it fulfils the use for which it is intended by the contracting 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 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;
- (2) "Standard" means a technical specification approved by a recognised standardisation 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 adopted 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, 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 specifications" means a technical specification laid down in accordance with a procedure recognised by the Member States or in accordance with Articles 9 and 10 of Parliament and Council Regulation [XXX] on European standardisation [and amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/105/EC and 2009/23/EC of the European Parliament and the Council] 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 official standards, according to procedures adapted to developments in market needs.

**ANNEX IX**  
**FEATURES CONCERNING PUBLICATION**

1. Publication of notices

The notices referred to in Articles 61, 62, 63, 64, 85 and 89 must be sent by the contracting entities to the Publications Office of the European Union and published in accordance with the following rules:

- (a) Notices referred to in Articles 61, 62, 63, 64, 85 and 89 shall be published by the Publications Office of the European Union or by the contracting entities in the event of a periodic indicative notice published on a buyer profile in accordance with Article 61 (1).

In addition, contracting entities may publish this information on the Internet on a "buyer profile" as referred to in point 2(b) below;

- (b) The Publications Office of the European Union will give the contracting entity the confirmation referred to in the second subparagraph of Article 65 (5).

2. Publication of complementary or additional information

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

- (b) The buyer profile may include periodic indicative notices as referred to in Article 61 (1), information on ongoing invitations to tender, scheduled purchases, contracts concluded, procedures cancelled and any useful general information, such as a contact point, a telephone and a fax number, a postal address and an e-mail address.

3. Format and procedures for the electronic transmission of notices

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

**ANNEX X**  
**INFORMATION TO BE INCLUDED IN THE NOTICE ON THE EXISTENCE OF A**  
**QUALIFICATION SYSTEM**  
**(as referred to in point (b) of Article 39(2) and in Article 62)**

1. Name, identification number (where provided for in national legislation), address including NUTS code, telephone, fax number, email and internet address of the contracting entity and, where different, of the service from which additional information may be obtained.
2. Main activity exercised.
3. Where appropriate, state whether the contract is reserved for sheltered workshops or whether its performance is reserved in the context of sheltered employment programmes.
4. Purpose of the qualification system (description of the goods, services or works or categories thereof to be procured through the system - nomenclature reference No(s)). NUTS code for the main location of works in case of works or NUTS code for the main place of delivery or performance in supplies and service.
5. Conditions to be fulfilled by the economic operators in view of their qualification pursuant to the system and the methods according to which each of those conditions will be verified. Where the description of such conditions and verification methods is voluminous and based on documents available to interested economic operators, a summary of the main conditions and methods and a reference to those documents shall be sufficient.
6. Period of validity of the qualification system and the formalities for its renewal.
7. Reference to the fact that the notice acts as the call for competition.
8. Address where further information and documentation concerning the qualification system can be obtained (where different from the addresses mentioned under 1).
9. Name and address of the body responsible for appeal and, where appropriate, mediation procedures. Precise information concerning time-limits for lodging appeals, or, if need be, the name, address, telephone number, fax number and e-mail address of the service from which this information may be obtained.
10. Where known, criteria referred to in Article 76 to be used for award of the contract: "lowest cost" or "most economically advantageous tender". Criteria representing the most economically advantageous tender as well as their weighting or, where appropriate, the order of importance of those criteria, shall be mentioned where they do not appear in the specifications or will not be indicated in the invitation to tender or to negotiate.
11. Where appropriate, indication whether:
  - (a) E-submission of tenders or requests to participate will be required/accepted,

- (b) E-ordering will be used,
- (c) E-invoicing will be used,
- (d) E-payment will be accepted.

12. Any other relevant information.



**ANNEX XI**  
**INFORMATION TO BE INCLUDED IN CONTRACT NOTICES**  
**(as referred to in Article 63)**

A. OPEN PROCEDURES

1. Name, identification number (where provided for in national legislation), address including NUTS code, telephone, fax number, email and internet address of the contracting entity and, where different, of the service from which additional information may be obtained.
2. Main activity exercised.
3. Where appropriate, state whether the contract is reserved for sheltered workshops or whether its performance is reserved in the context of sheltered employment programmes.
4. Nature of the contract (supply, works or service, where appropriate, state if it is a framework agreement or a dynamic purchasing system), description (nomenclature reference No(s)). Where appropriate, state whether tenders are requested for purchase, lease, rental or hire purchase or any combination of those.
5. NUTS code for the main location of works in case of works or NUTS code for the main place of delivery or performance in supplies and service.
6. For supplies and works:
  - (a) Nature and quantity of the goods to be supplied (nomenclature reference No(s)), including any options for further procurement and, if possible, the estimated time available for exercising those options as well as the number of renewals, if any. In the case of recurring contracts, also, if possible, an estimate of the timing of the subsequent calls for competition for the goods to be procured or the nature and extent of the services to be provided and general nature of the work (nomenclature reference No(s));
  - (b) Indication of whether the suppliers may tender for some and/or all the goods required.

If, for works contracts, the work or the contract is subdivided into several lots, the order of size of the different lots and the possibility of tendering for one, for several or for all the lots;
  - (c) For works contracts: information concerning the purpose of the work or the contract where the latter also involves the drawing-up of projects.
7. For services:
  - (a) The nature and quantity of the goods to be supplied, including any options for further procurement and, if possible, the estimated time available for exercising those options as well as the number of renewals, if any. In the case of recurring

contracts, also, if possible, an estimate of the timing of the subsequent calls for competition for the services to be procured;

- (b) Indication of whether the performance of the service is reserved by law, regulation or administrative provision to a particular profession;
  - (c) Reference of the law, regulation or administrative provision;
  - (d) Indication of whether legal persons shall indicate the names and professional qualifications of the staff to be responsible for the performance of the service;
  - (e) Indication of whether service providers may tender for a part of the services concerned.
8. Where known, indication of whether authorisation to submit variants exists or not.
  9. Time limits for delivery or completion or duration of service contract and, as far as possible, the starting date.
  10. Email or internet address at which the specifications and any supporting documents will be available for unrestricted and full direct access, free of charge
  11.
    - (a) Final date for receipt of tenders or indicative tenders where a dynamic purchasing system is introduced;
    - (b) Address to which they shall be sent;
    - (c) Language or languages in which they shall be drawn up.
  12.
    - (a) Where applicable, the persons authorised to be present at the opening of tenders;
    - (b) Date, time and place of such opening.
  13. Where applicable, any deposits and guarantees required.
  14. Main terms concerning financing and payment and/or references to the provisions in which those are contained.
  15. Where appropriate, the legal form to be taken by the grouping of economic operators to whom the contract is awarded.
  16. Minimum economic and technical conditions required of the economic operator to whom the contract is awarded.
  17. Period during which the tenderer is bound to keep open his tender.
  18. Where appropriate, particular conditions to which the performance of the contract is subject.
  19. Criteria referred to in Article 76 to be used for award of the contract: "lowest cost" or "most economically advantageous tender". Criteria representing the most economically advantageous tender as well as their weighting or, where appropriate,

the order of importance of those criteria shall be indicated where they do not appear in the specifications.

20. Where appropriate, date(s) and the reference(s) to publication in the *Official Journal of the European Union* of the periodic information notice or of the notice of the publication of this notice on the buyer profile to which the contract refers.
21. Name and address of the body responsible for appeal and, where appropriate, mediation procedures. Precise information concerning time limits for lodging appeals, or, if need be, the name, address, telephone number, fax number and e-mail address of the department from which this information may be obtained.
22. Date of dispatch of the notice by the contracting entity.
23. Any other relevant information.

## B. RESTRICTED PROCEDURES

1. Name, identification number (where provided for in national legislation), address including NUTS code, telephone, fax number, email and internet address of the contracting entity and, where different, of the service from which additional information may be obtained.
2. Main activity exercised.
3. Where appropriate, state whether the contract is reserved for sheltered workshops or whether its performance is reserved in the context of sheltered employment programmes.
4. Nature of the contract (supplies, works or services; where appropriate, state if it is a framework agreement); description (nomenclature reference No(s)). Where appropriate, state whether tenders are requested for purchase, lease, rental or hire purchase or any combination of those.
5. NUTS code for the main location of works in case of works or NUTS code for the main place of delivery or performance in supplies and service.
6. For supplies and works:
  - (a) The nature and quantity of the goods to be supplied (nomenclature reference No(s)), including any options for further procurement and, if possible, the estimated time available for exercising those options as well as the number of renewals, if any. In the case of recurring contracts, also, if possible, an estimate of the timing of the subsequent calls for competition for the goods to be procured or the nature and extent of the services to be provided and general nature of the work (nomenclature reference No(s));
  - (b) Indication of whether the suppliers may tender for some and/or all the goods required.

If, for works contracts, the work or the contract is subdivided into several lots, the order of size of the different lots and the possibility of tendering for one, for several or for all the lots;

- (c) Information concerning the purpose of the work or the contract where the latter also involves the drawing-up of projects.

7. For services:

- (a) The nature and quantity of the goods to be supplied, including any options for further procurement and, if possible, the estimated time available for exercising those options as well as the number of renewals, if any. In the case of recurring contracts, also, if possible, an estimate of the timing of the subsequent calls for competition for the services to be procured;
- (b) Indication of whether the performance of the service is reserved by law, regulation or administrative provision to a particular profession;
- (c) Reference to the law, regulation or administrative provision;
- (d) Indication of whether legal persons shall indicate the names and professional qualifications of the staff to be responsible for the performance of the service;
- (e) Indication of whether service providers may tender for a part of the services concerned.

8. Where known, indication of whether authorisation to submit variants exists or not.

9. Time limits for delivery or completion or duration of the contract and, as far as possible, for starting.

10. Where appropriate, the legal form to be taken by the grouping of economic operators to whom the contract is awarded.

11. (a) Final date for receipt of requests to participate;

(b) Address to which they shall be sent;

(c) Language or languages in which they shall be drawn up.

12. Final date for dispatch of invitations to tender.

13. Where applicable, any deposits and guarantees required.

14. Main terms concerning financing and payment and/or references to the provisions in which those are contained.

15. Information concerning the economic operator's position and the minimum economic and technical conditions required of him.

16. Criteria referred to in Article 76 to be used for award of the contract: "lowest cost" or "most economically advantageous tender". Criteria representing the most economically advantageous tender as well as their weighting or, where appropriate,

the order of importance of those criteria shall be indicated where they do not appear in the specifications or will not be indicated in the invitation to tender.

17. Where appropriate, particular conditions to which the performance of the contract is subject.
18. Where appropriate, the date(s) and reference(s) to publication in the *Official Journal of the European Union* of the periodic information notice or of the notice of the publication of this notice on the buyer profile to which the contract refers.
19. Name and address of the body responsible for appeal and, where appropriate, mediation procedures. Precise information concerning time limits for lodging appeals, or, if need be, the name, address, telephone number, fax number and e-mail address of the service from which this information may be obtained.
20. Date of dispatch of the notice by the contracting entities.
21. Any other relevant information.

### C. NEGOTIATED PROCEDURES

1. Name, identification number (where provided for in national legislation), address including NUTS code, telephone, fax number, email and internet address of the contracting entity and, where different, of the service from which additional information may be obtained.
2. Main activity exercised.
3. Where appropriate, state whether the contract is reserved for sheltered workshops or whether its performance is reserved in the context of sheltered employment programmes.
4. Nature of the contract (supplies, works or services; where appropriate, state if it is a framework agreement); description (nomenclature reference No(s)). Where appropriate, state whether tenders are requested for purchase, lease, rental or hire purchase or any combination of those.
5. NUTS code for the main location of works in case of works or NUTS code for the main place of delivery or performance in supplies and service.
6. For supplies and works:
  - (a) The nature and quantity of the goods to be supplied (nomenclature reference No(s)), including any options for further procurement and, if possible, the estimated time available for exercising those options as well as the number of renewals, if any. In the case of recurring contracts, also, if possible, an estimate of the timing of the subsequent calls for competition for the goods to be procured or the nature and extent of the services to be provided and general nature of the work (nomenclature reference No(s));
  - (b) Indication of whether the suppliers may tender for some and/or all the goods required.

If, for works contracts, the work or the contract is subdivided into several lots, the order of size of the different lots and the possibility of tendering for one, for several or for all the lots;

- (c) For works contracts: information concerning the purpose of the work or the contract where the latter also involves the drawing-up of projects.

7. For services:

- (a) The nature and quantity of the services to be supplied, including any options for further procurement and, if possible, the estimated time available for exercising those options as well as the number of renewals, if any. In the case of recurring contracts, also, if possible, an estimate of the timing of the subsequent calls for competition for the services to be procured;
- (b) Indication of whether the performance of the service is reserved by law, regulation or administrative provision to a particular profession;
- (c) Reference of the law, regulation or administrative provision;
- (d) Indication of whether legal persons shall indicate the names and professional qualifications of the staff to be responsible for the performance of the service;
- (e) Indication of whether service providers may tender for a part of the services concerned.

8. Where known, indication of whether authorisation to submit variants exists or not.

9. Time limits for delivery or completion or duration of the contract and, as far as possible, for starting.

10. Where appropriate, the legal form to be taken by the grouping of economic operators to whom the contract is awarded.

11. (a) Final date for receipt of requests to participate;

(b) Address to which they shall be sent;

(c) Language or languages in which they shall be drawn up.

12. Where appropriate, any deposits and guarantees required.

13. Main terms concerning financing and payment and/or references to the provisions in which those are contained.

14. Information concerning the economic operator's position and the minimum economic and technical conditions required of him.

15. Criteria referred to in Article 76 to be used for award of the contract: "lowest cost" or "most economically advantageous tender". Criteria representing the most economically advantageous tender as well as their weighting or, where appropriate,

the order of importance of those criteria shall be indicated where they do not appear in the specifications or will not be indicated in the invitation to negotiate.

16. Where appropriate, the names and addresses of the economic operators already selected by the contracting entity.
17. Where appropriate, particular conditions to which the performance of the contract is subject.
18. Where appropriate, the dates and reference(s) of publication in the *Official Journal of the European Union* of the periodic information notice or of the notice of the publication of this notice on the buyer profile to which the contract refers.
19. Name and address of the body responsible for appeal and, where appropriate, mediation procedures. Precise information concerning time limits for lodging appeals, or, if need be, the name, address, telephone number, fax number and e-mail address of the service from which this information may be obtained.
20. Date of dispatch of the notice by the contracting entity.
21. Any other relevant information.

**ANNEX XII**  
**INFORMATION TO BE INCLUDED IN THE CONTRACT AWARD NOTICE**  
**(as referred to in Article 64)**

I. Information for publication in the *Official Journal of the European Union*<sup>55</sup>

1. Name, identification number (where provided for in national legislation), address including NUTS code, telephone, fax number, email and internet address of the contracting entity and, where different, of the service from which additional information may be obtained.
2. Main activity exercised.
3. Nature of the contract (supplies, works or services and Nomenclature reference No(s); where appropriate state if it is a framework agreement).
4. At least a summary indication of the nature and quantity of the products, works or services provided.
5.
  - (a) Form of the call for competition (notice on the existence of a system of qualification; periodic notice; call for tenders);
  - (b) Date(s) and reference(s) of publication of the notice in the *Official Journal of the European Union*;
  - (c) In the case of contracts awarded without a prior call for competition, indication of the relevant provision of Article 44.
6. Procurement procedure (open, restricted or negotiated).
7. Number of tenders received, specifying
  - (a) number of tenders received from economic operators which are small and medium-sized enterprises,
  - (b) number of tenders received from abroad,
  - (c) number of tenders received electronically.

In the case of multiple awards (lots, multiple framework agreements), this information shall be given for each award.
8. Date of award of the contract(s).
9. Price paid for bargain purchases pursuant to Article 44(i).
10. For each award, name, address including NUTS code, telephone, fax number, email address and internet address of the successful tenderer(s) including:

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<sup>55</sup> Information in headings 6, 9 and 11 is deemed information not intended for publication where the awarding entity considers that publication thereof might be detrimental to a sensitive commercial interest.



- (a) information whether the successful tenderer is small and medium-sized enterprise,
  - (b) information whether the contract was awarded to a consortium.
11. State, where appropriate, whether the contract has been, or may be, subcontracted.
  12. Price paid or the prices of the highest and lowest tenders taken into account in the award of the contract.
  13. Name and address of the body responsible for the appeal and, where appropriate, mediation procedures. Precise information concerning the time limit for lodging appeals, or, if need be, the name, address, telephone number, fax number and e-mail address of the service from which this information may be obtained.
  14. Optional information:
    - value and share of the contract which has been or may be subcontracted to third parties,
    - award criteria.

## II. Information not intended for publication

15. Number of contracts awarded (where an award has been split between several suppliers).
16. Value of each contract awarded.
17. Country of origin of the product or service (Community origin or non-Community origin; if the latter, broken down by third country).
18. Which award criteria were used (most economically advantageous; lowest cost)?
19. Was the contract awarded to a tenderer who submitted a variant, in accordance with Article 58(1)?
20. Were any tenders excluded on the grounds that they were abnormally low, in accordance with Article 79?
21. Date of transmission of the notice by the contracting entity.

**ANNEX XIII**  
**CONTENTS OF THE INVITATIONS TO SUBMIT A TENDER, TO NEGOTIATE OR**  
**TO CONFIRM INTEREST PROVIDED FOR UNDER ARTICLE 68**

1. The invitation to submit a tender or to negotiate provided for under Article 68 must contain at least:
  - (a) the final date for receipt of tenders, the address to which they are to be sent, and the language or languages in which they are to be drawn up;  
  
However, in the case of contracts awarded through an innovation partnership, this information shall not appear in the invitation to negotiate but it shall appear in the invitation to submit a tender.
  - (b) a reference to any published call for competition;
  - (c) an indication of any documents to be attached;
  - (d) the criteria for the award of the contract, where they are not indicated in the notice on the existence of a qualification system used as a means of calling for competition;
  - (e) the relative weighting of the contract award criteria or, where appropriate, the order of importance of such criteria, if this information is not given in the contract notice, the notice on the existence of a qualification system or the specifications.
  
2. When a call for competition is made by means of a periodic indicative notice, contracting entities shall subsequently invite all candidates to confirm their interest on the basis of detailed information on the contract concerned before beginning the selection of tenderers or participants in negotiations.

This invitation shall include at least the following information:

- (a) nature and quantity, including all options concerning complementary contracts and, if possible, the estimated time available for exercising those options for renewable contracts, the nature and quantity and, if possible, the estimated publication dates of future notices of competition for works, supplies or services to be put out to tender;
- (b) type of procedure: restricted or negotiated;
- (c) where appropriate, the date on which the delivery of supplies or the execution of works or services is to commence or terminate;
- (d) the address and closing date for the submission of requests for procurement documents and the language or languages in which they are to be drawn up;
- (e) the address of the entity which is to award the contract and the information necessary for obtaining the specifications and other documents;

- (f) economic and technical conditions, financial guarantees and information required from economic operators;
- (g) the form of the contract which is the subject of the invitation to tender: purchase, lease, hire or hire-purchase, or any combination of those; and
- (h) the contract award criteria and their weighting or, where appropriate, the order of importance of such criteria, if this information is not given in the indicative notice or the specifications or in the invitation to tender or to negotiate.

**ANNEX XIV**  
**LIST OF INTERNATIONAL SOCIAL AND ENVIRONMENTAL CONVENTIONS**  
**REFERRED TO IN ARTICLES 70 AND 79**

- Convention 87 on Freedom of Association and the Protection of the Right to Organise;
- Convention 98 on the Right to Organise and Collective Bargaining;
- Convention 29 on Forced Labour;
- Convention 105 on the Abolition of Forced Labour;
- Convention 138 on Minimum Age;
- Convention 111 on Discrimination (Employment and Occupation);
- Convention 100 on Equal Remuneration;
- Convention 182 on Worst Forms of Child Labour;
- Vienna Convention for the protection of the Ozone Layer and its Montreal Protocol on substances that deplete the Ozone Layer;
- Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention);
- Stockholm Convention on Persistent Organic Pollutants (Stockholm POPs Convention);
- Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (UNEP/FAO) (The PIC Convention) Rotterdam, 10/09/1998 and its 3 regional Protocols.

**ANNEX XV**  
**LIST OF EU LEGISLATION REFERRED TO IN ARTICLE 77(3)**

- (a) Directive 2009/33/EC.

**ANNEX XVI**  
**INFORMATION TO BE INCLUDED IN NOTICES OF MODIFICATIONS OF A**  
**CONTRACT DURING ITS TERM**  
**(as referred to in Article 82(6))**

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

**ANNEX XVII**  
**SERVICES REFERRED TO IN ARTICLE 84**

| CPV Code  | Description   |
|---|---|
| 79611000-0 and<br>from 85000000-9 to 85323000-9<br>(except 85321000-5 and 85322000-2)   | Health and social services                                      |
| 75121000-0, 75122000-7, 75124000-1; from<br>79995000-5 to 79995200-7; from 80100000-<br>5 to 80660000-8 (except 80533000-9,<br>80533100-0, 80533200-1); from 92000000-1<br>to 92700000-8 (except 92230000-2,<br>92231000-9, 92232000-6) | Administrative educational, healthcare and<br>cultural services |
| 75300000-9  | Compulsory social security services                             |
| 75310000-2, 75311000-9, 75312000-6,<br>75313000-3, 75313100-4, 75314000-0,<br>75320000-5, 75330000-8, 75340000-1  | Benefit services  |
| 98000000-3  | Other community, social and personal<br>services                |
| 98120000-0  | Services furnished by trade unions                              |
| 98131000-0  | Religious services  |

**ANNEX XVIII**  
**Information to be included in notices concerning contracts for social and other specific services**  
**(as referred to in Article 85)**

**Part A Contract notice**

1. Name, identification number (where provided for in national legislation), address including NUTS code, telephone, fax number, email and internet address of the contracting entity and, where different, of the service from which additional information may be obtained.
2. Main activity exercised.
3. Description of the services or categories thereof and where applicable, incidental works and supplies to be procured, including an indication of the quantities or values involved, nomenclature reference No(s).
4. NUTS code for the main place of performance of the services.
5. Where appropriate, state whether the contract is reserved for sheltered workshops or whether its performance is reserved in the context of sheltered employment programmes.
6. Main conditions to be fulfilled by the economic operators in view of their participation, or, where appropriate, the electronic address where detailed information may be obtained.
7. Time limit(s) for contacting the contracting entity in view of participation.
8. Any other relevant information.

**Part B Contract award notice**

1. Name, identification number (where provided for in national legislation), address including NUTS code, telephone, fax number, email and internet address of the contracting entity and, where different, of the service from which additional information may be obtained.
2. Main activity exercised.
3. At least a summary indication of the nature and quantity of the services and where applicable, incidental works and supplies provided.
4. Reference of publication of the notice in the *Official Journal of the European Union*
5. Number of tenders received.
6. Name and address of the chosen economic operator(s).
7. Any other relevant information.



**ANNEX XIX**  
**INFORMATION TO BE INCLUDED IN THE DESIGN CONTEST NOTICE**  
**(as referred to in Article 89(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 entity and, where different, of the service from which additional information may be obtained.
2. Main activity exercised.
3. Project description (nomenclature reference No(s)).
4. Nature of the contest: open or restricted.
5. In the case of open contests: final date for receipt of projects.
6. In the case of restricted contests:
  - (a) the number of participants envisaged, or range;
  - (b) where applicable, names of participants already selected;
  - (c) criteria for the selection of participants;
  - (d) final date for receipt of requests to participate.
7. Where applicable, indication of whether participation is reserved to a particular profession.
8. Criteria to be applied in the evaluation of projects.
9. Where applicable, names of the selected members of the jury.
10. Indication of whether the decision of the jury is binding on the authority.
11. Where applicable, number and value of prizes.
12. Where applicable, details of payments to all participants.
13. Indication of whether the prize-winners are permitted any follow-up contracts.
14. Name and address of the body responsible for the appeal and, where appropriate, mediation procedures. Precise information concerning the time limit for lodging appeals, or, if need be, the name, address, telephone number, fax number and e-mail address of the service from which this information may be obtained.
15. Date of dispatch of the notice.
16. Any other relevant information

**ANNEX XX**  
**INFORMATION TO BE INCLUDED IN THE RESULTS OF DESIGN CONTEST**  
**NOTICES**  
**(as referred to in Article 89(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 entity and, where different, of the service from which additional information may be obtained.
2. Main activity exercised.
3. Project description (nomenclature reference No(s)).
4. Total number of participants.
5. Number of foreign participants.
6. Winner(s) of the contest.
7. Where applicable, the prize(s).
8. Other information.
9. Reference of the design contest notice.
10. Name and address of the body responsible for the appeal and, where appropriate, mediation procedures. Precise information concerning the time limit for lodging appeals, or, if need be, the name, address, telephone number, fax number and e-mail address of the service from which this information may be obtained.
11. Date of dispatch of the notice.

**ANNEX XXI**  
**CORRELATION TABLE**<sup>56</sup>

| This Directive                             | Directive 2004/17/EC   |         |
|--|--|---------|
| Art. 1                                     | -  | New     |
| Art. 2, 1 <sup>st</sup> sentence           | Art. 1, par. 1   | =       |
| Art. 2, point 1                            | Art. 2, par. 1, point (a), 1 <sup>st</sup> subpar.                         | =       |
| Art. 2, points 2 and 3                     | -  | New     |
| Art. 2, point 4, (a), 1 <sup>st</sup> part | Art. 2, par. 1, point (a), 2 <sup>nd</sup> subpar., 1 <sup>st</sup> indent | =       |
| Art. 2, point 4, (a), 2 <sup>nd</sup> part |  | New     |
| Art. 2, point 4, (b)                       | Art. 2, par. 1, point (a), 2 <sup>nd</sup> subpar., 2 <sup>nd</sup> indent | =       |
| Art. 2, point 4, (c)                       | Art. 2, par. 1, point (a), 2 <sup>nd</sup> subpar., 3 <sup>rd</sup> indent | =       |
| Art. 2, point 5                            | Art. 2, par. 1, point (b), 1 <sup>st</sup> subpar.                         | =       |
| Art. 2, point 6                            | Art. 2, par. 3   | Adapted |
| Art. 2, point 7                            | Art. 1, par. 2, point (a)  | Adapted |
| Art. 2, point 8                            | Art. 1, par. 2, point (b), 1 <sup>st</sup> sentence                        | Adapted |
| Art. 2, point 9                            | Art. 1, par. 2, point (b), 2 <sup>nd</sup> sentence                        | =       |
| Art. 2, point 10                           | Art. 1, par. 2, point (c)  | Adapted |
| Art. 2, point 11                           | Art. 1, par. 2, point (d), 1 <sup>st</sup> subpar.                         | Amended |
| Art. 2, point 12                           | Art. 1, par. 7, 1 <sup>st</sup> & 2 <sup>nd</sup> subpar.                  | Adapted |
| Art. 2, point 13                           | Art. 1, par. 7, 3 <sup>rd</sup> subpar.                                    | =       |

<sup>56</sup> "Adapted" means that the wording of the text was changed, while the meaning of the repealed directive was preserved. Changes to the meaning of the provisions of the repealed directive are indicated by the term "Amended".

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|--|--|---------|
| Art. 2, point 14                             | Art. 1, par. 7, 3 <sup>rd</sup> subpar.                              | Amended |
| Art. 2, point 15                             | Art. 34, par. 1  | Amended |
| Art. 2, point 16                             | Art. 1, par. 8   | Amended |
| Art. 2, point 17                             |  | New     |
| Art. 2, point 18                             | Art. 1, par. 8   | Amended |
| Art. 2, point 19                             |  | New     |
| Art. 2, point 20                             | Art. 1, par. 11  | =       |
| Art. 2, point 21                             | Art. 1, par. 12  | =       |
| Art. 2, point 22                             |  | New     |
| Art. 2, point 23                             | Art. 1, par. 10  | =       |
| Art. 3, par. 1, 1 <sup>st</sup> subparagraph |  | New     |
| Art. 3, par. 1, 2 <sup>nd</sup> subparagraph | Art. 1, par. 2, point (d), 2 <sup>nd</sup> & 3 <sup>rd</sup> subpar. | Amended |
| Art. 3, par. 1, 3 <sup>rd</sup> subparagraph |  | New     |
| Art. 3, par. 2                               | Art. 9, par. 1   | =       |
| Art. 3, par. 3                               | Art. 9, par. 2   | =       |
| Art. 3, par. 4                               | Art. 9, par. 3   | Amended |
| Art. 4, par. 1                               | Art. 2, par. 1, point (b) 2 <sup>nd</sup> subpar.                    | =       |
| Art. 4, par. 2, 1 <sup>st</sup> subparagraph | Art. 2, par. 3; Recital 25   | Adapted |
| Art. 4, par. 2, 2 <sup>nd</sup> subparagraph |  | New     |
| Art. 4, par. 3                               | Art. 2, par. 2   | =       |
| Art. 4, par. 4                               |  | New     |
| Art. 5                                       | Art. 3, par. 1 & 2   | =       |
| Art. 6, par. 1                               | Art. 3, par. 3   | Adapted |

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| Art. 6, par. 2             | Art. 3, par. 4   | =       |
| Art. 7                     | Art. 4   | =       |
| Art. 8                     | Art. 5, par. 1   | =       |
|                            | Art. 5, par. 2   | Deleted |
| Art. 9                     | Art. 7, point (b)  | =       |
| Art. 10, par. 1            | Art. 6, par. 1   | adapted |
| Art. 10, par. 2, point (a) | Art. 6, par. 2, point (a)  | =       |
| Art. 10, par. 2, point (b) | Art. 6, par. 2, point (b)  | Amended |
| Art. 10, par. 2, point (c) | Art. 6, par. 2, point (c)  | Adapted |
| Art. 11, point (a)         | Art. 7, point (a)  | Amended |
| Art. 11, point (b)         | Art. 7, point (a)  | =       |
|                            | Art. 8   | Deleted |
|                            | Annex I - X  | Deleted |
| Art. 12                    | Art. 16 & 61   | Amended |
| Art. 13, par. 1            | Art. 17, par. 1; Art. 17, par. 8   | Amended |
| Art. 13, par. 2            | Art. 17, par. 2; Art. 17, par. 8   | Amended |
| Art. 13, par. 3            |  | New     |
| Art. 13, par. 4            | Art. 17, par. 3  | =       |
| Art. 13, par. 5            |  | New     |
| Art. 13, par. 6            | Art. 17, par. 4 & 5  | Adapted |
| Art. 13, par. 7            | Art. 17, par. 6(a), 1 <sup>st</sup> & 2 <sup>nd</sup> subpar.                    | =       |
| Art. 13, par. 8            | Art. 17, par. 6(b), 1 <sup>st</sup> & 2 <sup>nd</sup> subpar.                    | =       |
| Art. 13, par. 9            | Art. 17, par. 6(a), 3 <sup>rd</sup> subpar. & par. 6(b), 3 <sup>rd</sup> subpar. | Adapted |
| Art. 13, par. 10           | Art. 17, par. 7  | =       |
| Art. 13, par. 11           | Art. 17, par. 9  | =       |

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| Art. 13, par. 12                                     | Art. 17, par. 10   | =       |
| Art. 13, par. 13                                     | Art. 17, par. 11   | =       |
| Art. 14  | Art. 69  | Adapted |
| Art. 15, par. 1                                      | Art. 19, par. 1  | =       |
| Art. 15, par. 2                                      | Art. 19, par. 1  | Amended |
| Art. 16, par. 1                                      | Art. 20, par. 1; Art. 62, point 1                          | Adapted |
| Art. 16, par. 2                                      | Art. 20, par. 2  | Amended |
| Art. 17, par. 1                                      | Art. 22a   | Adapted |
| Art. 17, par. 2                                      | Art. 21; Art. 62, point 1                                  | Amended |
| Art. 18  | Art. 22; Art. 62, point 1                                  | Amended |
| Art. 19, point (a) and (b)                           | Art. 24, point (a) and (b)                                 | =       |
| Art. 19, point (c)                                   | Art. 24, point (c)   | Amended |
| Art. 19, point (d)                                   | Art. 24, point (d)   | =       |
| Art. 19, point (e)                                   |  | New     |
| Art. 19, point (f) and 2 <sup>nd</sup> subparagraph. |  | New     |
| Art. 20  | Art. 26  | Adapted |
| Art. 21  |  | New     |
| Art. 22, par. 1                                      | Art. 23, par. 1  | Adapted |
| Art. 22, par. 2                                      | Art. 23, par. 1  | Adapted |
| Art. 22, par. 3                                      | Art. 23, par. 2  | Adapted |
| Art. 22, par. 4                                      | Art. 23, par. 3, points (a) to (c)                         | Adapted |
| Art. 22, par. 5                                      | Art. 23, par. 3, 2 <sup>nd</sup> & 3 <sup>rd</sup> subpar. | Adapted |
| Art. 23  | Art. 23, par. 4  | Adapted |
| Art. 24  | Art. 23, par. 5  | Amended |
| Art. 25, par. 1                                      | Art. 24, point (e)   | Amended |
| Art. 25, par. 2                                      |  | New     |

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| Art. 26, par. 1 and 2   | Art. 27   | Amended |
| Art. 26, par. 3   |   | New     |
| Art. 27, par. 1, 1 <sup>st</sup> sentence                       | Art. 30, par. 1; Art. 62, point (2)   | Adapted |
| Art. 27, par. 1, 2 <sup>nd</sup> sentence                       |   | New     |
| Art. 27, par. 2, 1 <sup>st</sup> subparagraph                   | Art. 30, par. 2   | =       |
| Art. 27, par. 2, 2 <sup>nd</sup> subparagraph                   |   | New     |
| Art. 27, par. 3   | Art. 30, par. 3   | =       |
| Art. 28, par. 1   | Art. 30, par. 4, 1 <sup>st</sup> subpar.; par. 5, 1 <sup>st</sup> & 2 <sup>nd</sup> subpar.   | Amended |
| Art. 28, par. 2   | Art. 30, par. 4, 2 <sup>nd</sup> subpar.; par. 5, 4 <sup>th</sup> subpar.; Art. 62, point (2) | Adapted |
|   | Art. 30, par. 4, 3 <sup>rd</sup> subpar.  | Deleted |
| Art. 28, par. 3, 1 <sup>st</sup> & 2 <sup>nd</sup> subparagraph | Art. 30, par. 6, 1 <sup>st</sup> subpar.  | Amended |
| Art. 28, par. 3, 3 <sup>rd</sup> subparagraph                   |   | New     |
| Art. 28, par. 3, 4 <sup>th</sup> subparagraph                   | Art. 30, par. 6, 1 <sup>st</sup> subpar., 2 <sup>nd</sup> sentence                            | Amended |
| Art. 28, par. 4   | Art. 30, par. 6, 2 <sup>nd</sup> subpar.  | =       |
| Art. 28, par. 5   | Art. 30, par. 6, 4 <sup>th</sup> subpar.  | Amended |
| Art. 29   | Art. 10   | Amended |
| Art. 30, par. 1   | Art. 11, par. 1   | Adapted |
| Art. 30, par. 2   | Art. 11, par. 2   | Amended |
| Art. 31   | Art. 28   | Amended |
| Art. 32   | Art. 13   | Amended |
| Art. 33, par. 1   | Art. 48, par. 1; Art. 64, par. 1  | Amended |
| Art. 33, par. 2   | Art. 48, par. 2 & 3; Art. 64, par.  | Adapted |

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|  | 1 & 2                                      |         |
| Art. 33, par 3, 1 <sup>st</sup> subparagraph | Art. 48, par. 4; Art. 64, par. 1           | Amended |
| Art. 33, par 3, 2 <sup>nd</sup> subparagraph | Art. 70, par 2, point (f)                  | =       |
| Art. 33, par. 3 3 <sup>rd</sup> subparagraph |  | New     |
| Art, 33, par. 4                              |  | New     |
| Art. 33, par. 5                              | Art. 48, par. 5; Art. 64, par. 3           | Amended |
| Art. 33, par. 6                              | Art. 48, par. 6                            | Adapted |
| Art. 33, par. 7                              |  | New     |
| Art. 34                                      |  | New     |
| Art. 35, par. 1                              | Art. 1, par. 13                            | Amended |
| Art. 35, par 2                               | Art. 70, par. 2, points (c) & (d)          | Adapted |
| Art. 36                                      |  | New     |
| Art. 37                                      |  | New     |
| Art. 38, par. 1                              | Art. 12                                    | Amended |
| Art. 38, par. 2                              |  | New     |
| Art. 39, par. 1                              | Art. 40, par. 1 & 2                        | Amended |
| Art. 39, par. 2                              | Art. 42                                    | =       |
| Art. 39, par. 3                              |  | New     |
| Art. 40, par. 1                              | Art. 1, par. 9, point (a); Art. 45, par. 2 | Amended |
| Art. 40, par. 2                              | Art. 45, par. 4                            | Amended |
| Art. 40, par. 3                              |  | New     |
| Art. 40, par. 4                              |  | New     |
| Art. 41                                      | Art. 1, par. 9, point (b); Art. 45, par. 3 | Amended |
| Art. 42                                      | Art. 1, par. 9, point (c); Art. 45,        | Amended |



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|---|---|---------|
|   | par. 3  |         |
| Art. 43   |   | New     |
| Art. 44, point (a)  | Art. 40, par. 3, point (a)                      | =       |
| Art. 44, point (b)  | Art. 40, par. 3, point (b)                      | =       |
| Art. 44, point (c)  | Art. 40, par. 3, point (c)                      | Amended |
| Art. 44, point (d)  | Art. 40, par. 3, point (c)                      | Amended |
| Art. 44, point (e)  | Art. 40, par. 3, point (d)                      | Amended |
| Art. 44, point (f)  | Art. 40, par. 3, point (e)                      | =       |
| Art. 44, point (g)  | Art. 40, par. 3, point (g)                      | Amended |
| Art. 44, point (h)  | Art. 40, par. 3, point (h)                      | Amended |
| Art. 44, point (i)  | Art. 40, par. 3, point (j)                      | =       |
| Art. 44, point (j)  | Art. 40, par. 3, point (k)                      | Adapted |
| Art. 44, point (k)  | Art. 40, par. 3, point (l)                      | Adapted |
| Art. 44, 2 <sup>nd</sup> and 3 <sup>rd</sup> subparagraphs      |   | New     |
| Art. 44, 4 <sup>th</sup> subparagraph                           | Art. 40, par. 3, point (g) in fine              | Adapted |
| Art. 45, par. 1, 1 <sup>st</sup> & 2 <sup>nd</sup> subparagraph | Art. 14, par. 1; Art. 1, par. 4                 | Adapted |
| Art. 45, par. 1, 3 <sup>rd</sup> subparagraph                   |   | New     |
| Art. 45, par. 2 to 5  | Art. 14, par. 2 - 4; Art. 40, par. 3, point (i) | Amended |
| Art. 46, par. 1   | Art. 1, par. 5; Art. 15, par. 1                 | Amended |
| Art. 46, par. 2   | Art. 15, par. 2                                 | Amended |
| Art. 46, par. 3   | Art. 15, par. 3                                 | Adapted |
| Art. 46, par. 4   | Art. 15, par. 4                                 | Amended |
| Art. 46, par. 5   | Art. 15, par. 6                                 | Amended |
| Art. 46, par. 6   |   | New     |

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|---|--|---------|
| Art. 46, par. 7                               | Art. 15, par. 7, 3 <sup>rd</sup> subpar. | =       |
| Art. 47, par. 1                               | Art. 1, par. 6; Art. 56, par. 1          | Amended |
| Art. 47, par. 2, 1 <sup>st</sup> subparagraph | Art. 56, par. 2, 1 <sup>st</sup> subpar. | =       |
| Art. 47, par. 2, 2 <sup>nd</sup> subparagraph | Art. 56, par. 2, 2 <sup>nd</sup> subpar. | Adapted |
| Art. 47, par. 3                               | Art. 56, par. 2, 3 <sup>rd</sup> subpar. | Adapted |
| Art. 47, par. 4                               | Art. 56, par. 3                          | Adapted |
| Art. 47, par. 5                               | Art. 56, par. 4                          | Adapted |
| Art. 47, par. 6                               | Art. 56, par. 5                          | Adapted |
| Art. 47, par. 7                               | Art. 56, par. 6                          | =       |
| Art. 47, par. 8                               | Art. 56, par. 7                          | Adapted |
| Art. 47, par. 9                               | Art. 56, par. 8, 1 <sup>st</sup> subpar. | =       |
| Art. 48                                       |  | New     |
| Art. 49, par. 1                               | Art. 29, par. 1                          | Amended |
| Art. 49, par. 2                               |  | New     |
| Art. 49, par. 3                               | Art. 29, par. 2                          | Amended |
| Art. 49, par. 4                               |  | New     |
| Art. 49, par. 5                               | Art. 29, par. 2                          | Amended |
| Art. 49, par. 6                               |  | New     |
| Art. 50                                       |  | New     |
| Art. 51                                       |  | New     |
| Art. 52                                       |  | New     |
| Art. 53, par. 1                               | Recital 15                               | Amended |
| Art. 53, par. 2                               |  | New     |
| Art. 54, par. 1                               | Art. 34, par. 1                          | Amended |
| Art. 54, par. 2                               | Art. 34, par. 2                          | Adapted |

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|-----------------|--|---------|
| Art. 54, par. 3 | Art. 34, par. 3  | Adapted |
| Art. 54, par. 4 | Art. 34, par. 8  | =       |
| Art. 54, par. 5 | Art. 34, par. 4  | Adapted |
| Art. 54, par. 6 | Art. 34, par. 5  | Amended |
| Art. 55, par. 1 | Art. 34, par. 6  | Amended |
| Art. 55, par. 2 | Art. 34, par. 6  | Adapted |
| Art. 56, par. 1 | Art. 34, par. 4, 5, 6, & 7                                 | Amended |
| Art. 56, par. 2 | Art. 34, par. 4, 5 & 6                                     | Amended |
| Art. 56, par. 3 | Art. 34, par. 7  | Adapted |
| Art. 56, par. 4 |  | New     |
| Art. 57         | Art. 35  | Amended |
| Art. 58, par. 1 | Art. 36, par. 1  | Amended |
| Art. 58, par. 2 | Art. 36, par. 2  | Adapted |
| Art. 59         |  | New     |
| Art. 60, par. 1 | Art. 45, par. 1  | Adapted |
| Art. 60, par. 2 | Art. 45, par. 9  | Amended |
|                 | Art. 45, par. 10   | Deleted |
| Art. 61, par. 1 | Art. 41, par. 1 & 2  | Adapted |
| Art. 61, par. 2 | Art. 42, par. 3; Art. 44, par. 1                           | Adapted |
| Art. 62         | Art. 41, par. 3  | Adapted |
| Art. 63         | Art. 42, par. 1, point (c); Art. 44, par. 1                | Adapted |
| Art. 64, par. 1 | Art. 43, par. 1, 1 <sup>st</sup> subpar.; Art. 44, par. 1  | Adapted |
| Art. 64, par. 2 | Art. 43, par. 1, 2 <sup>nd</sup> & 3 <sup>rd</sup> subpar. | Amended |
| Art. 64, par. 3 | Art. 43, par 2 & 3   | Amended |
| Art. 64, par. 4 | Art. 43, par. 5  | Adapted |

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|--------------------------|--|---------|
| Art. 65, par. 1          | Art. 44, par. 1; Art. 70, par. 1, point (b)                | Amended |
| Art. 65, par. 2          | Art. 44, par. 2, 3 & par. 4, 2 <sup>nd</sup> subpar.       | Amended |
| Art. 65, par. 3          | Art. 44, par. 4, 1 <sup>st</sup> subpar.                   | Adapted |
| Art. 65, par. 4          |  | New     |
| Art. 65, par. 5          | Art. 44, par. 6 & 7  | Amended |
| Art. 65, par. 6          | Art. 44, par. 8  | Amended |
| Art. 66, par. 1          | Art. 44, par. 5, 1 <sup>st</sup> subpar.                   | Amended |
| Art. 66, par. 2 and 3    | Art. 44, par. 5, 2 <sup>nd</sup> & 3 <sup>rd</sup> subpar. | Adapted |
| Art. 67, par. 1          | Art. 45, par. 6  | Amended |
| Art. 67, par. 2          | Art. 46, par. 2  | Amended |
| Art. 68, par. 1          | Art. 47, par. 1, 1 <sup>st</sup> sentence                  | Adapted |
| Art. 68, par. 2          | Art. 47, par. 1, 2 <sup>nd</sup> sentence                  | Adapted |
| Art. 69, par. 1          | Art. 49, par. 1  | Adapted |
| Art. 69, par. 2          | Art. 49, par. 2, 1 <sup>st</sup> & 2 <sup>nd</sup> subpar. | Adapted |
| Art. 69, par. 3          | Art. 49, par. 2, 3 <sup>rd</sup> subpar.                   | =       |
| Art. 69, par. 4, 5 and 6 | Art. 49, par. 3, 4 & 5                                     | =       |
| Art. 70, par. 1          | Art. 51, par. 1  | Adapted |
| Art. 70, par. 2          | Art. 51, par. 2  | =       |
| Art. 70, par. 3          | Art. 52, par. 1  | =       |
| Art. 70, par. 4          | Art. 51, par. 3  | Adapted |
| Art. 70, par. 5          |  | New     |
| Art. 70, par. 6          |  | New     |
| Art. 70, par. 7          |  | New     |
| Art. 71, par. 1          | Art. 53, par. 1  | =       |
| Art. 71, par. 2          | Art. 53, par. 2  | Adapted |

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| Art. 71, par. 3            | Art. 53, par. 6                                     | =       |
| Art. 71, par. 4            | Art. 53, par. 7                                     | =       |
| Art. 71, par. 5            | Art. 53, par. 9                                     | Adapted |
| Art. 71, par. 6            |   | New     |
| Art. 72, par. 1            | Art. 54, par. 1 & 2                                 | Adapted |
| Art. 72, par. 2            | Art. 54, par. 3                                     | Adapted |
| Art. 73, par. 1            | Art. 53, par. 4 & 5                                 | Amended |
| Art. 73, par. 2            | Art. 54, par. 5 & 6                                 | Amended |
| Art. 73, par. 3            |   | New     |
| Art. 74, par. 1            | Art. 53, par. 3; Art. 54, par. 4                    | Adapted |
| Art. 74, par. 2            |   | New     |
| Art. 74, par. 3            | Art. 53, par. 3; Art. 54, par. 4                    | Amended |
| Art. 75, par. 1            | Art. 52, par. 2                                     | Amended |
| Art. 75, par. 2            | Art. 52, par. 3                                     | Amended |
| Art. 75, par. 3            |   | New     |
| Art. 76, par. 1            | Art. 55, par. 1                                     | Amended |
| Art. 76, par. 2            | Art. 55, par. 1, point (a)                          | Amended |
| Art. 76, par. 3            |   | New     |
| Art. 76, par. 4            | Recital 1; Recital 55, 3 <sup>rd</sup> par.         | Amended |
| Art. 76, par. 5            |   | Amended |
| Art. 77                    |   | New     |
| Art. 78                    |   | New     |
| Art. 79, par. 1            | Art. 57, par. 1                                     | Amended |
| Art. 79, par. 2            | Art. 57, par. 1                                     | Adapted |
| Art. 79, par. 3, point (a) | Art. 57, par. 1, 2 <sup>nd</sup> subpar., point (a) | =       |
| Art. 79, par. 3, point (b) | Art. 57, par. 1, 2 <sup>nd</sup> subpar.,           | =       |

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|  | point (b)  |         |
| Art. 79, par. 3, point (c)   | Art. 57, par. 1, 2 <sup>nd</sup> subpar., point (c)  | =       |
| Art. 79, par. 3, point (d)   | Art. 57, par. 1, 2 <sup>nd</sup> subpar., point (d)  | Amended |
| Art. 79, par. 3, point (e)   | Art. 57, par. 1, 2 <sup>nd</sup> subpar., point (e)  | =       |
| Art. 79, par. 4, 1 <sup>st</sup> & 2 <sup>nd</sup> subparagraph    | Art. 57, par. 2  | Amended |
| Art. 79, par. 4, 3 <sup>rd</sup> subparagraph                      |  | New     |
| Art. 79, par. 5  | Art. 57, par. 3  | Adapted |
| Art. 79, par. 6  |  | New     |
|  | Art. 58; Art. 59   | Deleted |
| Art. 80  | Art. 38  | Amended |
| Art. 81, par. 1  | Art. 37, 1 <sup>st</sup> sentence  | =       |
| Art. 81, par. 2  |  | New     |
| Art. 81, par. 3  | Art. 37, 2 <sup>nd</sup> sentence  | Adapted |
| Art. 82, par. 1 – 5, par. 7  |  | New     |
| Art. 82, par. 6  | Art. 40, par. 3, point (f)   | Amended |
| Art. 83  |  | New     |
| Art. 84  |  | New     |
| Art. 85  |  | New     |
| Art. 86  |  | New     |
| Art. 87  | Art. 60  | =       |
| Art. 88  | Art. 61  | Adapted |
| Art. 89, par. 1  | Art. 63, par. 1, 1 <sup>st</sup> subpar.   | Adapted |
| Art. 89, par. 2, 1 <sup>st</sup> and 2 <sup>nd</sup> subparagraphs | Art. 63, par. 1, 1 <sup>st</sup> subpar; 2 <sup>nd</sup> subpar., 1 <sup>st</sup> sentence | Adapted |

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| Art. 89, par. 2, 3 <sup>rd</sup> subparagraph | Art. 63, par. 1, 2 <sup>nd</sup> subpar., 2 <sup>nd</sup> sentence | Amended |
| Art. 89, par. 3                               | Art. 63, par. 2  | Adapted |
| Art. 90                                       | Art. 65  | =       |
| Art. 91                                       | Art. 66  | =       |
| Art. 92                                       | Art. 72, 1 <sup>st</sup> subpar.                                   | Adapted |
| Art. 93, par. 1                               | Art. 72, 2 <sup>nd</sup> subpar.                                   | Amended |
| Art. 93, par. 2 - 8                           |  | New     |
| Art. 94                                       | Art. 50  | Amended |
| Art. 95, par. 1 - 3                           | Art. 67  | Amended |
| Art. 95, par. 4                               |  | New     |
| Art. 95, par. 5                               | Art. 70, par. 1, point (c)   | Adapted |
| Art. 95, par. 6                               | Art. 67, par. 3  | Amended |
| Art. 96                                       |  | New     |
| Art. 97                                       |  | New     |
| Art. 98                                       | Art. 68, par. 3 & 4  | Amended |
| Art. 99                                       | Art. 68, par. 5  | Amended |
| Art. 100, par. 1                              | Art. 68, par. 1  | Adapted |
| Art. 100, par. 2                              | Art. 68, par. 3  | Adapted |
| Art. 101, par. 1                              | Art. 71, par. 1  | Adapted |
| Art. 101, par. 2                              | Art. 71, par. 2  | =       |
| Art. 102                                      | Art. 73  | Adapted |
| Art. 103                                      |  | New     |
| Art. 104 and 105                              | Art. 74; Art. 75   | =       |
|   | Annex I to X   | Deleted |
| Annex I (except 1 <sup>st</sup> sentence)     | Annex XII (except footnote 1)                                      | =       |
| 1 <sup>st</sup> sentence of Annex I           | Footnote 1 to Annex XII  | Amended |

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| Annex II                                       |                                   | New     |
| Annex III, points A, B, C, E, F, G, H, I and J | Annex XI                          | Adapted |
| Annex III, point D                             |                                   | New     |
| Annex IV, (a) – (g)                            | Annex XXIV, (b) – (h)             | =       |
| Annex IV, (h)                                  |                                   | New     |
| Annex V  |                                   | New     |
| Annex VI                                       | Annex XV                          | Amended |
| Annex VII                                      | Art. 56, par. 3, points (a) – (f) | =       |
| Annex VIII, except for point 4                 | Annex XXI                         | Adapted |
| Annex VIII, point 4                            | Annex XXI                         | Amended |
| Annex IX                                       | Annex XX                          | Amended |
| Annex X  | Annex XIV                         | Amended |
| Annex XI                                       | Annex XIII                        | Amended |
| Annex XII                                      | Annex XVI                         | Amended |
| Annex XIII, 1.                                 | Art. 47, par. 4                   | Adapted |
| Annex XIII, 2.                                 | Art. 47, par. 5                   | Adapted |
| Annex XIV                                      | Annex XXIII                       | Amended |
| Annex XV                                       |                                   | New     |
| Annex XVI                                      | Annex XVI                         | Amended |
| Annex XVII                                     | Annex XVII                        | Amended |
| Annex XVIII                                    |                                   | New     |
| Annex XIX                                      | Annex XVIII                       | Amended |
| Annex XX                                       | Annex XIX                         | Amended |
| Annex XI                                       | Annex XXVI                        | Amended |
|  | Annex XXII                        | Deleted |



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|  | Annex XXV | Deleted |
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