



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 12 July 2012**

**12489/12**

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**Interinstitutional File:  
2011/0437 (COD)**

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**MAP 49  
MI 488  
CODEC 1894**

**NOTE**

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from: General Secretariat

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to: Working Party on Public Procurement

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No. Cion prop.: 18960/12 MAP 8 MI 684

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

- Presidency compromise proposal

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On behalf of the Presidency, delegations will find in the Annex a compromise proposal on the articles specific to the Concessions Directive.

Changes compared to the previous documents (6625/12 and 8075/12) are underlined, deletions are marked [...].

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Recitals

- (6) Concessions are contracts for pecuniary interest concluded between one or more economic operators and one or more contracting authorities or entities and having as their object the acquisition of works or services where the consideration consists, normally, in the right to exploit the works or services that are the subject of the contract. They provide for mutually binding obligations where the execution of these works or services are subject to specific requirements defined by the contracting authority or entity which are legally enforceable. By contrast, certain State acts such as authorisations or licences whereby the State or a public authority establishes the conditions for the exercise of an economic activity and where the economic operator remains free to withdraw from the provision of works or services, should not qualify as concessions. The same applies to certain agreements having as their object the right of an economic operator to exploit certain public domains or resources, such as land lease contracts whereby the State or contracting authority or entity establishes only general conditions for their use without acquiring specific works or services.
- (7) Difficulties related to the interpretation of the concepts of concession and public contract have been source of continued legal uncertainty among stakeholders and have given rise to numerous judgments of the Court of Justice of the European Union on this subject. Therefore, the definition of concession should be clarified, in particular by referring to the concept of substantial operating risk. The main feature of a concession, the right to exploit the works or services, always implies the transfer to the concessionaire of an economic risk involving the possibility that it will not recoup the investments made and the costs incurred in operating the works or services awarded. The application of specific rules governing the award of concessions would not be justified if the contracting authority or entity relieved the contractor of any potential loss, by guaranteeing a minimal revenue, equal or higher to the costs that the contractor has to incur in relation with the performance of the contract.

At the same time it should be made clear that certain arrangements which are fully paid by a contracting authority or a contracting entity should qualify as concessions where the recoupement of the investments and costs incurred by the operator for executing on the work or providing the service depends on the actual demand for or the availability of the service or asset.

(8) Where sector specific regulation provides for a guarantee to the concessionaire on breaking even on investments and costs incurred for operating the contract, such contract should not qualify as a concession within the meaning of this Directive.

(8a) An operating risk must stem from the factors which are outside the control of the parties and thus can not result from inappropriate performance of the contract by any of the parties to the contract. An operating risk may consist in either a demand or an availability risk or in both a demand and an availability risk. Demand risk is to be understood as the risk on actual demand for the works or services which are the object of the contract. Availability risk is to be understood as the risk on the supply of the works or services which are the object of the contract, in particular the risk that the supply of the services will not match demand and the risk of liability for harm or damage resulting from inadequacy of the works or services. [...]

The new Recital 8a includes the explanation of the notion of "operating risk", transferred from Art. 2 paragraph 2.
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(9) The notion of special or exclusive rights is central to the definition of the scope of this Directive, since entities which are neither contracting entities pursuant to Article 4 (1) (1) nor public undertakings are subject to its provisions only to the extent that they exercise one of the activities covered on the basis of such rights. It is therefore appropriate to clarify that rights which have been granted by means of a procedure based on objective criteria, notably pursuant to Union legislation, and for which adequate publicity has been ensured do not constitute special or exclusive rights for the purposes of this Directive.

This legislation should include Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas , 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 , 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, 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 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.

It should also be clarified that this list of legislation is not exhaustive and that rights in any form, including by way of acts of concession, which have been granted by means of other procedures based on objective criteria and for which adequate publicity has been ensured do not constitute special or exclusive rights for the purposes of this Directive.

Clarification added, so as to take into account the intended evolution of the text of the Utilities Directive proposal.
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- (10) While calculating the estimated value of a concession, contracting authorities and entities shall take account of the revenue from all contracts which are part of one single project. Indications for the existence of one single project consist in overall prior planning and conception by the contracting authority or contracting entity, the fact that the different elements purchased fulfil a single economic and technical function or that they are otherwise logically interlinked.

Recital 10 has been re-drafted so as to better reflect the specificity of concessions. It also contains explanation of the concept "one single project", which previously featured in Article 6.
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- (14) It is appropriate to exclude from the scope of this Directive certain services concessions awarded to an economic operator which is itself a contracting authority or a contracting entity on the basis of an exclusive right which that operator enjoys under published national law or administrative act and which has been granted in accordance with the Treaty and Union sectoral legislation concerning the management of networks infrastructure related to the activities set out in annex III, since such exclusive right makes it impossible to follow a competitive procedure for the award. By way of derogation and without prejudice to the legal consequences of the general exclusion from the scope of this Directive, concessions as defined in article 8 (1) should be subject to the obligation to publish a concession award notice in view of ensuring basic transparency unless the conditions of such transparency are provided for in sectoral legislation.
- (16) This Directive does not apply to the concession award carried out by international organisations on their own behalf and for their own account. There is, however, a need to clarify to which extent it is appropriate to apply this Directive to concession award governed by specific international rules.
- (18) In order to ensure adequate advertisement of works and services concessions above a certain value awarded by contracting entities and by the contracting authorities, the award of such contracts should be preceded by the compulsory publication of a concession notice in the Official Journal of the European Union. The thresholds should reflect the clear cross-border interest of concessions to economic operators located in other Member States. To calculate the value of a services concession, account must be taken of the estimated value of all services to be provided by the concessionaire from the point of view of a potential tenderer.
- (19) In view of the detrimental effects on competition, awarding concessions without prior publication should only be permitted in very exceptional circumstances. This exception should be limited to cases where it is clear from the outset that a publication would not trigger more competition, notably because there is objectively only one economic operator who can perform the concession. Only situations of objective exclusivity can justify the award of a concession without publication to an economic operator, where the situation of exclusivity has not been created by the contracting authority or contracting entity itself in view of the future award procedure, and where there are no adequate substitutes, the availability of which should be assessed thoroughly.

(19a) Concessions of a very long duration are likely to result in the foreclosure of the market, thereby hindering the free movement of services and the freedom of establishment. However, such a duration may be justified if it is indispensable to enable the concessionaire to recoup the investments made in order to perform the concession, as well as to obtain a return on the invested capital, which should correspond to a return expected under normal market conditions. These investments may relate notably to infrastructure, equipment or personnel used to perform a concession.

Recital 19a explains the rationale and clarifies the key notions of Art. 16, namely "investment" and "return on the capital".
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- (21) In the light of the results of the evaluation conducted by the Commission on the reform of public procurement rules it is appropriate to exclude from the full application of this Directive only those services which have a limited cross-border dimension, namely the so-called services to the person such as certain social, health and educational services. These services are provided within a particular context that varies widely amongst Member States, due to different cultural traditions. A specific regime should therefore be established for concession for these services which takes into account the fact that they are newly regulated. An obligation to publish a prior information notice and a concession award notice of any concession with a value equal to or greater than thresholds established in this Directive is an adequate way to provide information on business opportunities to potential tenderers as well as on the number and type of contracts awarded to all interested parties. Furthermore, Member States should put in place appropriate measures with reference to the award of concession contracts for these services aimed at ensuring compliance with the principles of transparency and equal treatment of economic operators while allowing contracting authorities and contracting entities to take into account the specificities of the services in question. Member States should ensure that contracting authorities and contracting entities may take into account the need to ensure quality, continuity, accessibility, availability and comprehensiveness of the services, the specific needs of different categories of users, the involvement and empowerment of users and innovation.

- (22) Given the importance of the cultural context and the sensitivity of these services, Member States should be given wide discretion to organise the choice of the service providers in the way they consider most appropriate. The rules of this Directive do not prevent Member States to apply specific quality criteria for the choice of service providers, such as the criteria set out in the voluntary European Quality Framework for Social Services of the European Union's Social Protection Committee . Member States and/or public authorities remain free to provide these services themselves or to organise social services in a way that does not entail the conclusion of concessions, for example through the mere financing of such services or by granting licences or authorisations to all economic operators meeting the conditions established beforehand by the contracting authority or contracting entity, without any limits or quotas, provided such system ensures sufficient advertising and complies with the principles of transparency and non-discrimination.
- (23) In order to make it possible for all interested operators to submit applications and tenders, contracting authorities and contracting entities should be obliged to respect a minimum time limit for the receipt of such applications.
- (24) The choice and application of proportional, non-discriminatory and fair selection criteria to economic operators is crucial for their effective access to the economic opportunities related to concessions. In particular, the possibility for a candidate to rely on the capacities of other entities can be decisive to enable the participation of small and medium sized enterprises. Therefore, it is appropriate to provide that the selection criteria should relate exclusively to the technical, financial and economic capacity of operators, should be announced in the concession notice and cannot preclude an economic operator from relying on the capacities of other entities, regardless of the legal nature of its links with those entities, if the latter proves to the contracting authority or entity that it will have at its disposal the necessary resources.
- (25) In order to ensure transparency and equal treatment, criteria for the award of concessions should always comply with some general standards. These should be disclosed in advance to all potential tenderers, be related to the subject matter of the contract and should not offer to the contracting authority or contracting entity an unrestricted freedom of choice. They should ensure the possibility of effective competition and be accompanied by requirements that allow the information provided by the tenderers to be effectively verified. [...]

- (26) [...]
- (27) Concessions are usually long term, complex arrangements where the contractor assumes responsibilities and risks traditionally born by the contracting authorities or contracting entities and normally falling within their remit and contracting entities. For this reason, contracting authorities or entities should maintain a margin of flexibility in organising the awarding process, involving also a possibility to negotiate the content of the contract with the candidates. However, in order to ensure equal treatment and transparency throughout the awarding procedure, it is appropriate to provide for certain requirements as to the structure of the awarding process, including negotiations, the dissemination of information and the availability of written records. It is also necessary to provide that the initial terms of the concession notice should not be deviated from, in order to prevent unfair treatment of any potential candidates.
- (29) In technical specifications and in award criteria, contracting authorities and contracting entities should be allowed to refer to a specific production process, a specific mode of provision of services, or a specific process for any other stage of the life cycle of a product or service, provided that they are linked to the subject-matter of the concession. In order to better integrate social considerations in the award of concessions, procurers may also be allowed to include, in the award criteria, characteristics related to the working conditions.  
[...]

References to MEAT disappear from recitals 25, 26, 29, following the re-drafting of Art. 39 on the award criteria.

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

(39) In order to ensure adequate judicial protection of candidates and tenderers in the concession award procedures, as well as to make effective the enforcement of the rules of this Directive and of the Treaty principles, Council Directive 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts and Council Directive 92/13/EEC coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors should also apply to services concessions and to works concessions awarded by both contracting authorities and contracting entities. Directives 89/665/EEC and 92/13/EEC should, therefore, be amended accordingly.

**TITLE I**  
**DEFINITIONS, SCOPE AND PRINCIPLES**

**CHAPTER I**  
**Definitions, general principles and scope**

**SECTION I**  
**DEFINITIONS, GENERAL PRINCIPLES AND THRESHOLDS**

*Article 2*

*Definitions*

1. For the purposes of this Directive the following definitions shall apply:
  - (1) 'concessions' means [...] works concessions or services concessions.
  - (2) '[...] works concession' means a contract for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and entities and having as their object the execution of works, where the consideration for the works to be carried out consists either solely in the right to exploit the works that are the subject of the contract or in that right together with payment;
  - (3) 'written' or 'in writing' means any expression consisting of words or figures which can be read, reproduced and subsequently communicated. It may include information which is transmitted and stored by electronic means.  
  
[...]
  - (4) 'execution of works' means the execution, or both the design and execution, of works related to one of the activities referred to in Annex I or of a work, or the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority or contracting entity exercising a decisive influence on the type or design of the work.

- (5) '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.
- (6) 'services concession' means a contract for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities or contracting entities and having as their object the provision of services other than those referred to in point 2 [...] where the consideration for the services to be provided consists either solely in the right to exploit the services that are subject of the contract or in that right together with payment.
- (7) 'candidate' means an economic operator that has sought an invitation or has been invited to take part in a concession award procedure ;
- (8) 'concessionaire' means an economic operator which has been awarded a concession.
- (9) "economic operator" means any natural or legal person, or public entity, or a group of such persons and/or entities which offers the execution of works and/or a work, the supply of products or the provision of services on the market.
- (10) 'tenderer' means an economic operator that has submitted a tender
- (11) 'electronic means' means using electronic equipment for the processing (including digital compression) and storage of data which is transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means.
- (12) 'concession documents' means all documents produced or referred to by the contracting authority or contracting entity to describe or determine elements of the procurement or the procedure, including the concession notice, [...] the technical specifications, proposed conditions of concession, formats for the presentation of documents by candidates and tenderers, information on generally applicable obligations and any additional documents.
- (14) [...]

2. The right to exploit the works or services as referred to in points 2, 4 and 7 of the first paragraph shall require the transfer to the concessionaire of substantial operating risk. The concessionaire shall be deemed to assume substantial operating risk where it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services which are the subject-matter of the concession.

[....]

The changes introduced in Article 2, paragraph 1 (3) are in line with the wording of the revised PP Directive as proposed by the DK Presidency after the negotiations in the Working Party. The definition of "public works concession" has been suppressed and the definition of "works concession" has been widened so as to include also concessions awarded by contracting authorities. The definition of the "life cycle" has been removed following the disappearance of Art. 40 and re-drafting of Art 39. A reference to "economic risk" has been replaced with the one to "operating risk", so as to make the wording more coherent. The explanation of the notion of "operating risk" has been moved to recital 8a.

#### *Article 4*

##### *Contracting entities*

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

2. A ‘public undertaking’ is any undertaking over which the contracting authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it.

A dominant influence on the part of the contracting authorities shall be presumed when these authorities, directly or indirectly, in relation to an undertaking:

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

3. ‘Special or exclusive rights’ means rights granted by a competent authority of a Member State by way of any legislative, regulatory or administrative provision the effect of which is to limit the exercise of activities defined in Annex III to one or more entities, and which substantially affects the ability of other entities to carry out such activity.

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

- (a) procurement procedures with a prior call for competition in conformity with Directive [2004/18/EC or 2004/17/EC] or this Directive;
- (b) procedures pursuant to other legislative acts of the Union, listed in Annex XI, ensuring adequate prior transparency for granting authorisations on the basis of objective criteria.

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

#### *Article 5*

##### *Thresholds*

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

[....]

The obligation to publish an award notice following an award of concessions of a value ranging from 2,5 million and 5 million has been removed from Art. 27 – thus, there is no need to mention the 2,5 million threshold in Art. 5.

#### *Article 6*

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

1. The [...] value of a concession shall be the estimated [...] total revenue of the concessionaire, net of VAT, [...] to be received from third parties and from the contracting authority or the contracting entity, in consideration for the works and services, including supplies, to be provided in the execution of the concession.
2. The method for calculating the estimated value of a concession shall be specified in the concession documents. When estimating the value of the concession, contracting authorities and contracting entities shall take into account, in particular, the:

- a) Value of any form of option and any extension of the duration of the concession;
  - b) [...] Revenue from the payment of fees and fines by the users of the works or services;
  - c) Payments or any financial advantage in any form whatsoever made by the contracting authority or any other public authority to the concessionaire including compensation for compliance with a public service;
  - d) Value of grants or any other financial advantages in any form whatsoever from third parties for the performance of the concession;
  - e) Revenue from sales of any assets which are part of the concession;
  - f) Value of all the supplies and services that are made available to the concessionaire by the contracting authorities or entities provided that they are necessary for executing the works or services;
  - g) Prizes or payments to candidates or tenderers [...];
  - h) For insurance services: the premium payable and other forms of remuneration;
  - i) For banking and other financial services: fees, commissions, interest and other forms of remuneration;
  - j) For design services: fees, commission payable and other forms of remuneration.
3. The estimate shall be valid at the moment at which the concession notice is sent, or, in cases where such notice is not foreseen, at the moment at which the contracting authority or the contracting entity commences the concession award procedure. [...]

4. Where a proposed work or purchase of services may result in concessions being awarded at the same time in the form of separate lots, account shall be taken of the total estimated value of all such lots.
5. Where the aggregate value of the lots is equal to or exceeds the threshold laid down in Article 5, this Directive shall apply to the awarding of each lot.
6. Contracting authorities or contracting entities may award concessions for individual lots without applying the provisions on the award provided for under this Directive, provided that the estimated value net of VAT of the lot concerned is less than EUR 1 million. However, the aggregate value of the lots thus awarded without applying this Directive shall not exceed 20% of the aggregate value of all the lots into which the proposed work or the proposed purchase of services has been divided.

[...]

Article 6 is redrafted so as to make it clearer and easier to apply: the same method to calculate the value relevant for the threshold is incorporated for both services concessions and works concessions. The method is based on the total revenue of the concessionnaire realised on the whole duration of a concession. The provision also contains a minimal list of elements to be taken into account.

#### *Article 8*

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

1. This Directive shall not apply to services concessions awarded by a contracting authority or by a contracting entity to an economic operator which is a contracting entity or an association of thereof, on the basis of an exclusive right that economic operator enjoys pursuant to applicable and published national law, regulation or administrative provision, and which has been granted in accordance with the Treaty and Union sectoral legislation concerning the management of networks infrastructure related to the activities set out in annex III.

2. By way of derogation from paragraph 1 of this Article, where sectoral legislation referred to in paragraph 1 of this Article does not provide for sector specific transparency obligations, the requirements of Article 27 (1) and (3) shall apply.

[....]

3. This Directive shall not apply to concessions which the contracting authority or a contracting entity is obliged to award or organise in accordance with procurement procedures different from those of this Directive established by any of the following set out in:

- (a) an international agreement concluded in conformity with the Treaty between a Member State and one or more third countries and covering works, supplies or services intended for the joint implementation or exploitation of a project by the signatory States;
- (b) a concluded international agreement relating to the stationing of troops and concerning the undertakings of a Member State or a third country;
- (c) the particular procedure of an international organisation;
- (d) procurement rules provided by an international organisation or international financing institution for concessions 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 where the concessions are fully financed by an international organisation or international financing institution.

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

For the purposes of point (d) of the first subparagraph, where a concession is co-financed for a considerable part by an international organisation or international financing institution the parties decide on applicable concession award procedures which shall be in conformity with the provisions of the Treaty on the Functioning of the European Union.

4. Subject to Article 346 of the Treaty on the Functioning of the European Union, this Directive shall apply to the awarding of concessions in the fields of defence and security, with the exception of the following contracts:

- (a) concessions for which the application of the rules of this Directive would oblige a Member State to supply information the disclosure of which it considers contrary to the essential interests of its security,
- (b) concessions awarded in the framework of a cooperative programme referred to in Article 13 (c) of Directive 2009/81/EC,
- (c) contracts awarded by a government to another government relating to works and services directly linked to military equipment or sensitive equipment, or works and services specifically for military purposes, or sensitive works and sensitive services;
- (d) concessions awarded in a third country, carried out when forces are deployed outside the territory of the Union where operational needs require them to be concluded with economic operators located in the area of operations.

[....]

5. This Directive shall not apply to concessions for:

- (a) the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property or concerning rights thereon; however financial service concessions awarded at the same time as, before or after the contract of acquisition or rental, in whatever form, shall be subject to this Directive;

- (b) the acquisition, development, production or co-production of programme material intended for broadcasting, defined as transmission and distribution using any form of electronic network, that are awarded by broadcasters, nor to concessions for broadcasting time, that are awarded to broadcasters;
- (c) arbitration and conciliation services;
- (d) financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments within the meaning of Directive 2004/39/EC of the European Parliament and of the Council, central bank services and operations conducted with the European Financial Stability Facility (EFSF);
- (e) employment contracts;
- (f) air transport services based on the grant of an operating licence within the meaning of Regulation (EC) 1008/2008 of the European Parliament and of the Council;
- (g) public passenger transport services within the meaning of Regulation (EC) 1370/2007 of the European Parliament and of the Council.

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

6. This Directive shall not apply to concessions where the protection of the essential security interests of a Member State cannot be guaranteed in a concession award procedure as framed by the provisions of this Directive.

Paragraph 3 has been aligned with the reform. Paragraph 4 and 6 have been redrafted/added in order to exclude certain concessions in the field of the defence or otherwise related to procurement of sensitive nature (in line with the revised Directive 2004/18/EC).

### SECTION III

#### GENERAL PROVISIONS

##### *Article 16*

##### *Duration of the concession*

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

The observations pointing at the problem with concessions which do not require important upfront investments have been taken into account. As the purpose of the Directive is to prevent clear abuse and not to impose very short terms in case of concessions with insignificant investments, the rule should apply only to the concessions the duration of which is longer than 5 years. Other suggestions (such as reference to performance indicators and the time necessary to achieve the objectives of the concession) have been found difficult to apply and inappropriate for many concessions. Also the reference to the unclear notion of "reasonable" return has been eliminated.

##### *Article 17*

##### *Social and other specific services*

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

**TITLE II**  
**RULES ON THE AWARD OF CONCESSIONS**

**CHAPTER I**

**Publication and Transparency**

*Article 26*

*Concession notices*

1. Contracting authorities and contracting entities wishing to award a concession shall make known their intention by means of a concession notice.
2. Concession notices shall contain the information referred to in part of Annex IV and, where appropriate, any other information deemed useful by the contracting authority or entity, in accordance with the format of standard forms.
3. Contracting authorities and contracting entities wishing to award a concession for social and other specific services shall make known their intention of planned concession award through the publication of a prior information notice as soon as possible after the beginning of the budgetary year. Those notices shall contain the information set out in Annex XIII.

[....]

4. By way of derogation from paragraph 1, the contracting authorities and entities shall not be required to publish a concession notice in any of the following cases:
  - (a) where no tenders or no suitable tenders or no applications have been submitted in response to a concession procedure, provided that the initial conditions of the concession contract are not substantially altered and on condition that a report is sent to the Commission [or [....] to the national oversight body designated pursuant to Article 84 of Directive [replacing Directive 2004/18/EC] where they so request];

To be updated in light of result of discussion on Cluster 9
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(b) where the works or services can be supplied only by a particular economic operator for any of the [...] following reasons:

(i) the aim of the concession is the creation or acquisition of a unique work of art or artistic performance;

(ii) the competition is absent for technical reasons;

(iii) the protection of [...] exclusive rights, including intellectual property rights;

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

(c) for new works or services consisting in the repetition of similar works or services entrusted to the economic operator to which the same contracting authorities or contracting entities awarded an original concession subject to the obligation referred to in paragraph 1, provided that such works or services are in conformity with a basic project for which the original concession was awarded. The basic project shall 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 the total estimated cost of subsequent works or services shall be taken into consideration by the contracting authorities or contracting entities when they apply the provisions of Article 5.

5. For the purposes of point (a) of the first subparagraph of paragraph 3 a tender shall be considered not to be suitable where:

- it is irrelevant to the concession, being incapable, without substantial changes, of meeting the contracting authority or contracting entity's needs as specified in the concession documents.

[...]

In light of the special nature of services "to the person", the obligation to publish a prior information notice has been deleted.

Article 26 (3) (a) will be aligned with modifications to be introduced in Art. 30 of revised PP Directive Proposal, following modifications introduced in the Cluster 9 (Article 84 and 83).

Article 26 (3) (b) is aligned with the wording of Art. 30 of the revised PP Directive Proposal, as proposed by the DK Presidency following the Working Party.

Paragraph 4 has been deleted, as it was a repetition of a provision included in Art. 28.

Paragraph 5 has been re-drafted, as there was no need to define "irregular" and "unacceptable" tenders. Indeed, the access to negotiated procedure is not restricted in the Concessions Directive, whereas the condition for non-publication included in paragraph 3(a) refers only to unsuitable tenders.

#### *Article 27*

##### *Concession award notices*

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

[...]

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

## *Article 28*

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

1. The notices referred to in Articles 26 and 27 and the second subparagraph of Article 42(6) shall include the information set out Annexes IV to VI and in the format of standard forms, including standard forms for corrigenda.

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

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

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

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

[....]

## Article 35

### *Procedural guarantees*

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

[....]

3. Where the contracting authority or contracting entity limits the number of candidates to an appropriate level, this shall be done in a transparent manner and on the basis of objective criteria which are available to all interested economic operators. The number of candidates invited shall be sufficient to ensure genuine competition.
4. The rules on the organisation of the concession award procedure, including rules on communication, on the stages of the procedure [...] on planned timing and the period of validity of the tenders, shall be established in advance and communicated to all interested economic operators [...].
5. Where the concession award involves negotiation, contracting authorities or contracting entities shall comply with the following rules:
  - (a) they shall indicate in the concession documents which elements may be subject to negotiation and which elements define the minimum requirements as referred to in paragraph 1 [...];

- (b) where the negotiation takes place after the submission of tenders they shall negotiate with tenderers the tenders submitted by them in order to improve their overall content based on the criteria and requirements indicated in [...] paragraph 1;
- (c) they shall not reveal to the other participants solutions proposed or other confidential information communicated by a candidate participating in the negotiations without its agreement. This agreement shall not take the form of a general waiver but must be given with reference to the intended communication of specific solutions or other confidential information;
- (d) they shall assess the tenders as negotiated on the basis of the award criteria indicated in the concession documents also when they conduct the negotiation in successive stages in order to reduce the number of tenders to be negotiated [...] to the number indicated in the concession documents;

[...]

- (e) they shall establish a [...] record which ensures [...], by all appropriate means, [...] the traceability of the whole procedure, including the negotiations, where applicable.

6. Contracting authorities and contracting entities shall as soon as possible inform each candidate and tenderer of decisions reached concerning the award of a concession including the grounds for any decision not to award a contract for which there has been publication of a concession notice or to recommence the procedure.

7. On request from the party concerned, the contracting authority shall as quickly as possible, and in any case within 15 days from receipt of a written request, inform:

- (a) any unsuccessful candidates of the reasons for the rejection of their application,

- (b) any unsuccessful tenderers of the reasons for the rejection of their tender, including, for the cases referred to in Article 32 (5) and (6), the reasons for its decision of non-equivalence or its decision that the works, supplies or services do not meet the performance or functional requirements,
- (c) any tenderers that have made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer [...],
- (d) any tenderers that have made an admissible tender of the conduct and progress of negotiations and dialogue with tenderers.

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

Changes in Article 35 are aimed at making this provision clearer and easier to understand. Paragraph 1 is reformulated in order to make the intention of the legislator explicit: the choice of a procedure is completely left to a decision by a contracting authority.

Paragraph 3 has been reformulated, but the current meaning had been implicit in the original text ("appropriate level"). The same concerns paragraph 5 (d)

### Article 36

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

1. [...] The conditions for participation shall be specified in the concession notice [...] and shall be limited to those relating to:

[...]

- (a) economic and financial standing;

(b) technical and professional ability.

[...] All requirements shall be related and strictly proportionate to the need to ensure the ability of the concessionaire to perform the concession, taking into account the subject-matter of the contract [...] and the purpose of guaranteeing [...] genuine competition.

Contracting authorities and contracting entities shall also indicate in the concession notice the reference or references to be submitted as proof of the economic operator's capacities. The requirements in respect of those references shall be non-discriminatory and proportionate to the subject-matter of the concession.

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

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

5. [...] Contracting authorities and contacting entities as referred to in paragraph 1 point (1) of Article 4 shall exclude from participation in a concession award procedure any candidate or tenderer that has been the subject of a conviction by a final judgment of which the contracting authorities and contacting entities as referred to in paragraph 1 point (1) of Article 4 are aware for one of the reasons listed below :
- (a) participation in a criminal organisation, as defined in Article 2(1) of Council Framework Decision 2008/841/JHA<sup>1</sup>;
  - (b) corruption, as defined in Article 3 of the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union and Article 2 of Council Framework Decision 2003/568/JHA<sup>2</sup> as well as corruption as defined in the national law of the contracting authority or the economic operator;
  - (c) fraud within the meaning of Article 1 of the Convention on the protection of the European Communities' financial interests<sup>3</sup>;
  - (d) terrorist offences or offences linked to terrorist activities, as defined in Articles 1 and 3 of Framework Decision 2002/475/JHA<sup>4</sup> respectively, or inciting, aiding or abetting or attempting to commit an offence, as referred to in Article 4 of that Framework Decision;
  - (e) money laundering and terrorist financing, as defined in Article 1 of [...] Directive [...] 2005/60/EC<sup>5</sup>.

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

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<sup>1</sup> OJ L 300, 11.11.2008, p. 42.

<sup>2</sup> OJ L 192, 31.7.2003, p. 54.

<sup>3</sup> OJ C 316, 27.11.1995, p. 48.

<sup>4</sup> OJ L 164, 22.6.2002, p. 3.

<sup>5</sup> OJ L 309, 25.11.2005, p. 15.

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

[...]

8. Any economic operator that is in one of the situations referred to in paragraphs 5 to 7 may provide the contracting authority or contracting entity with evidence so as to enable the contracting authority or contracting entity as referred to in paragraph 1 point (1) of Article 4 to assess whether the measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion. If the contracting authority or contracting entity consider the evidence as sufficient, it shall not exclude the economic operator concerned.

An economic operator which has been excluded by a final judgement from participating in procurement procedures shall not be entitled to make use of the faculty provided under the present paragraph during the period of exclusion resulting from that judgement.

9. Member States shall specify the implementing conditions for this article. They shall make available to other Member States, upon request, any information related to the exclusion grounds listed in this Article. The competent authorities of the Member State of establishment shall provide this information in accordance with the provisions of Article 88 of Directive [replacing Directive 2004/18/EC].

The conditions for participation in Article 36, paragraph 1 are simplified and clarified.

Paragraph 4 is redrafted in line with the wording of the revised PP Directive as proposed by the DK Presidency after the negotiations in the Working Party.

The new formulation of paragraph 5 excludes from the application of this provision public undertakings and private entities enjoying special and exclusive rights and is in line with the Utilities Directive.

The formulation of paragraph 7 (c) extends the scope of the exclusion to operators having shown deficiencies under any concession or contract of a similar nature (including public contracts, irrespectively from the subject matter), not only with the same contracting authority or entity which is in line with expectations of some Member States and with the wording of the revised PP Directive as proposed by the DK Presidency after the negotiations in the Working Party.

Paragraph 8 is aligned with the wording of the revised PP Directive as proposed by the DK Presidency after the negotiations in the Working Party.

Article 37

Time limits for submission of applications and tenders for the concession

1. When fixing the time limits for the submission of applications for the concession and submission of tenders, contracting authorities or contracting entities shall take account in particular of the complexity of the concession and the time required for drawing up tenders, without prejudice to the minimum time limits set out in paragraphs 3 to 5.
2. Where applications or tenders can be made only after a visit to the site or after on-the-spot inspection of the documents supporting the concession award documents, the time limits for the submission of applications for the concession shall be extended so that all economic operators concerned may be aware of all the information needed to produce applications or tenders.

[....]

3. Where contracting authorities and contracting entities resort to a concession, the minimum time limit for the receipt of applications for the concession shall be 30 days from the date on which the concession notice was sent.
4. Where the procedure takes place in successive stages in order to reduce the number of candidates the minimum time limit for the receipt of tenders shall be 22 days from the date on which the invitation to tender is sent.
5. The minimum time limit for receipt of applications and of tenders may be reduced by five days where the contracting authority or contracting entity accepts that tenders may be submitted by electronic means in conformity with Article 25.

Former Art. 37 and 38 have been merged into one Article. Furthermore, the deadlines are adjusted and clarified: 30 days for the submission of applications, not less than 22 days for the submission of tenders, is separated from the submission of applications (typically in case of e.g. restricted procedure).
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*Article 39*  
*Concession award criteria*

1. Concessions shall be awarded on the basis of objective criteria which ensure compliance with the principles of transparency, non-discrimination and equal treatment and which ensure that tenders are assessed in conditions of effective competition permitting to identify an overall economic advantage for the contracting authority or the contracting entity.
  
2. The award criteria shall be linked to the subject matter of the concession, and shall not confer an unrestricted freedom of choice on the contracting authority or the contracting entity.

Those criteria shall ensure effective competition and shall be accompanied by requirements which allow the information provided by the tenderers to be effectively verified. [...]

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

[...]

The reference to MEAT has been removed. The original formulation had been misleading: it created a wrong impression that transposition of MEAT was still required.  
Paragraph 2 has been revised in line with the modifications to the PP Directive proposed by the Danish Presidency.

*Article 41*  
*Subcontracting*

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

[....]

The paragraphs are aligned with the revised PP Directive as proposed by the DK Presidency after the negotiations in the Working Party.
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**TITLE V**  
**AMMENDEMENTS OF DIRECTIVES 89/665/EEC AND 92/13/EEC**

*Article 44*

*Amendments to Directive 89/665/EEC*

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

1. Article 1 is amended as follows:

(a) paragraph 1 is replaced by the following:

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

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

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

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

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

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

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

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

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

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

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

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

4. Article 2d is amended as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. Article 2c is replaced by the following:

*Article 2c*

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

5. Article 2d is amended as follows:

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

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

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

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

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

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

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

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

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

### ANNEX III

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

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

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

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

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

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

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

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

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

3. As far as water is concerned:

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

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

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

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

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

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

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

5. Activities relating to the exploitation of a geographical area for the purpose of the provision of airports and maritime or inland ports or other terminal facilities to carriers by air, sea or inland waterway.

6. Activities relating to the provision of :

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

[...]

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

- (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:
  - (1) mail service management services (services both preceding and subsequent to despatch, including "mailroom management services"),
  - (2) added-value services linked to and provided entirely by electronic means (including the secure transmission of coded documents by electronic means, address management services and transmission of registered electronic mail),
  - (3) services concerning postal items not included in point (a), such as direct mail bearing no address,
  - (4) financial services, as defined in the CPV under the reference numbers from 66100000-1 to 66720000-3 and in Article 8 (5)(d) and including in particular postal money orders and postal giro transfers,
  - (5) philatelic services,
  - (6) logistics services (services combining physical delivery and/or warehousing with other non-postal functions),

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

Corrections of drafting and formatting errors.
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**ANNEX IV**  
**INFORMATION TO BE INCLUDED IN CONCESSION NOTICES**

1. Name, identification number (where provided for in national legislation), address including NUTS code, telephone, fax number, email and internet address of the contracting authority or entity and, where different, of the service from which additional information may be obtained.
2. Type of contracting authority or entity and main activity exercised.
3. If the applications are to contain tenders, email or internet address at which the specifications and any supporting documents will be available for unrestricted and full direct access, free of charge.
4. Description of the procurement: nature and extent of works or services, nature and quantity [...] of supplies, where possible, duration of the contract. Where the concession is divided into lots, this information shall be provided for each lot. Where appropriate, description of any options.
5. CPV Nomenclature reference No(s). Where the concession is divided into lots, this information shall be provided for each lot.

6. NUTS code for the main location of works in case of works concessions or NUTS code for the main place of performance service concessions; where the concession is divided into lots, this information shall be provided for each lot.

[...]

7. Conditions for participation, including:

- (a) where appropriate, indication whether the concession is restricted to sheltered workshops, or whether its execution is restricted to the framework of protected job programmes,
- (b) where appropriate, indication whether the provision of the service is reserved by law, regulation or administrative provision to a particular profession; reference to the relevant law, regulation or administrative provision,
- (c) a list and brief description of selection criteria; minimum level(s) of standards possibly required; indication of required information (self-declarations, documentation).

8. Description of award procedure used, if the procedure is to be conducted in stages, number of candidates to be admitted to a given stage or to be invited to submit tenders and objective criteria to be used to choose the candidates in question.

- (a) Time limit for the submission of applications
- (b) Address to which they must be sent
- (c) Language(s) in which they must be written

9. Criteria which will be applied in the award of the concession

10. Date of dispatch of the notice
  
11. Name and address of the body responsible for appeal and, where appropriate, mediation procedures. Precise information concerning the deadline for lodging appeals or, if need be, the name, address, telephone number, fax number and email address of the service from which this information may be obtained.
  
12. Where appropriate, particular conditions to which performance of the concession is subject.
  
13. Address where applications or tenders shall be transmitted.
  
14. In case of one-stage procedures:
  - (a) Time limit for receipt of tenders, if different from the time limit the submission of applications
  
  - (b) time frame during which the tenderer must maintain its tender,
  
  - (c) date, time and place for the opening of tenders,
  
  - (d) persons authorised to be present at such opening.
  
15. Where appropriate, indication of requirements and conditions related to the use of electronic means of communication
  
16. Information whether the concession is related to a project and /or programme financed by European Union funds.

## ANNEX V

### INFORMATION TO BE INCLUDED IN CONCESSION AWARD NOTICES

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

1. Name, identification number (where provided for in national legislation), address including NUTS code, telephone, fax number, email and internet address of the contracting authority or entity and, where different, of the service from which additional information may be obtained.
2. Type of contracting authority or entity and main activity exercised.
3. CPV Nomenclature reference No(s).
4. NUTS code for the main location of works in case of works concessions or NUTS code for the main place of performance in case of service concessions;
5. Description of the procurement: nature and extent of works or services, nature and quantity [...] of supplies [...]. Where the concession is divided into lots, this information shall be provided for each lot. Where appropriate, description of any options.
6. Description of award procedure used, in the case of award without prior publication, justification.
7. Criteria referred to in Article 39 which were used for award of the concession or concessions.
8. Date of concession award decision or decisions;

9. Number of tenders received with respect of each award, including:
  - (a) number of tenders received from economic operators which are small and medium enterprises,
  - (b) number of tenders received from abroad,
  - (c) number of tenders received electronically.
10. For each award, name, address including NUTS code, telephone, fax number, email address and internet address of the successful tenderer(s) including
  - (a) information whether the successful tenderer is small and medium enterprise,
  - (b) information whether the concession was awarded to a consortium.
11. Value and main financial terms of the awarded concession, including fees and prices.
12. Where appropriate, for each award, value and proportion of concession likely to be subcontracted to third parties.
13. Information whether the concession is related to a project and /or programme financed by European Union funds.
14. Name and address of [...] the body responsible for review and, where appropriate, mediation procedures. Precise information concerning the deadline for review procedures, or if need be, the name, address, telephone number, fax number and email address of the service from which this information may be obtained
15. Date(s) and reference(s) of previous publications in the Official Journal of the European Union relevant to the concession(s) advertised in this notice.

16. Date of dispatch of the notice.
17. [...] Value and the method of its calculation of the concession, in accordance with Article 6.
18. Any other relevant information.

Part II disappears, as there is no compulsory publication of award notice above 2, 5 million.

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

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

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

1. Publication of notices

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

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

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

2. Publication of complementary or additional information

Contracting authorities and contracting entities shall publish the specifications and the additional documents in their entirety on the Internet.

3. Format and procedures for sending notices electronically

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

**ANNEX X**  
**SERVICES REFERRED TO IN ARTICLE 17**

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

Aligned with the revised PP Directive.

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

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

- (a) Granting authorisation to operate natural gas installations in accordance with the procedures laid down in Article 4 of Directive 98/30/EC.
- (b) Authorisation or an invitation to tender for the construction of new electricity production installations in accordance with the provisions of Directive 96/92/EC.
- (c) The granting in accordance with the procedures laid down in Article 9 of Directive 97/67/EC of authorisations in relation to a postal service which is not or shall not be reserved.
- (d) A procedure for granting an authorisation to carry on an activity involving the exploitation of hydrocarbons in accordance with Directive 94/22/EC.
- (e) Public service contracts within the meaning of Regulation (EC) No 1370/2007 which have been awarded on the basis of a competitive tendering procedure in accordance with its Article 5(3).

**ANNEX XII**  
**REQUIREMENTS RELATING TO DEVICES FOR THE ELECTRONIC RECEIPT OF**  
**TENDERS, AND APPLICATIONS**

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

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

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