

# Voorstel nieuwe richtlijn speciale sectorbedrijven

2011/0439 (COD)

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**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 15 July 2013**

**11746/13**

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**Interinstitutional File:  
2011/0439 (COD)**

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**LIMITE**

**MAP 60  
MI 595  
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**NOTE**

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From:	General Secretariat
To:	Permanent Representatives Committee
No. prev. doc.:	11644/13 MAP 58 MI 589
No. Cion prop.:	18964/11 MAP 9 MI 685
Subject:	Proposal for a Directive of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors (First reading) - Approval of the final compromise text

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**I. INTRODUCTION**

1. On 21 December 2011, the Commission submitted to the European Parliament and the Council a set of proposals on a Public procurement package. The above proposal was submitted together with a proposal for a Directive of the European Parliament and of the Council on public procurement (Classical Directive)<sup>1</sup> and a proposal for a Directive of the European Parliament and of the Council on the award of concessions contracts (Concessions Directive)<sup>2</sup>.

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<sup>1</sup> Doc. 18966/11 MAP 10 MI 686

<sup>2</sup> Doc. 18960/11 MAP 8 MI 684

2. Intensive preparatory negotiations were conducted in the Working Party on public procurement under the Danish and Cyprus Presidencies.
3. The proposals have been singled out as a Single Market Act key action with a significant potential for enhancing growth, innovation and job creation while supporting the most efficient use of public funds. The European Council has called for the adoption of the package by the end of 2012. Member States affirmed the importance of giving a high priority to the negotiations on the proposals in order to reach agreement with the European Parliament by the end of 2012.
4. The Competitiveness Council on 20 February 2012 held an orientation debate on the basis of doc. 6436/12. A progress report was submitted to the Competitiveness Council on 30 May 2012 and a further orientation debate held on the basis of doc. 9696/12.
5. On 10 December 2012, the Competitiveness Council adopted a General Approach on the public procurement Directive (doc. 16725/1/12 REV 1) as well as on the utilities Directive (doc. 18011/12) and on the concessions Directive (doc. 18007/12). On the basis of the General Approach, the Working Party was able to start the considerations of the European Parliament's amendments (doc. 5931/13). The IMCO Committee of the European Parliament had voted on the proposal for a Classical Directive on 18 December 2012 and on the proposal for a Utilities Directive and the proposal for a Concessions Directive on 24 January 2013. At its meeting on 21 February 2013, the IMCO Committee voted to give a mandate to the Rapporteurs to start negotiations with Council on all three proposals.
6. Consequently, trilogues were held, under the Irish Presidency, on all three Directives, according to the following schedule:

- 6 March: Classical Directive I
- 12 March: Concessions Directive I
- 26 March: Classical Directive II
- 10 April: Concessions Directive II
- 18 April: Classical Directive III
- 25 April: Concessions Directive III
- 6 May: Joint issues trilogue I
- 23 May: Classical Directive IV
- 28 May: Trilogue V on issues specific to Utilities Directive
- 3 June: Concessions Directive IV
- 4 June: Classical Directive VI
- 13 June: Joint issues trilogue II
- 21 June: Joint issues trilogue III
- 25 June: 3 trilogues on remaining issues on all three Directives

During this process, the Permanent Representatives Committee was regularly debriefed on the progress achieved and gave revised mandates for moving the negotiations forward, based on the intensive technical work by the preparatory bodies.

## **II. THE COMPROMISE**

7. On 21 June and 25 June, four final trilogues took place and the provisional agreement was reached on final compromise texts on the three Directives. The Permanent Representatives Committee was debriefed in detail on the outcome of the trilogues on 27 June 2013 (doc. 11644/13). Because of the very great volume and technical complexity of the proposals, additional technical meetings were held on 27 and 28 June and on 1, 2, 3 and 4 July to complete the text.

8. The final outcome of these trilogues and technical work has been presented to the delegations in the four column document 12168/13. In the Annex to this note, delegations will find the final compromise in the clean format with technical corrections clearly indicated. The key content of the compromise has been explained in doc. 11644/13 with the following most important components of the agreement:
- a) Public-public cooperation: Art.11 of Classical Directive, Art. 15 of Concessions Directive,
  - b) Affiliated undertakings: Articles 9a and 11a of Concessions Directive, with the complete exclusion of the water sector from the scope of the Directive
  - c) The European Single Procurement Document, based on a standard form of self-declarations, has replaced the European Procurement Passport, Articles 57 to 59 and 88,
  - d) The light regime for the Social and Other Specific Services contained in Annex XVI of Classical and Annex X of Concessions Directive
  - e) The exclusions from the scope of Article 10 Public Procurement and Article 8 Concessions (loans and financial services, political campaign services, audio-visual service, legal services, civil defence, lottery operators who have an exclusive right granted pursuant to applicable national laws) ,
  - f) Social and Environmental Considerations Article 15(2) with recitals 14c, 14d, 14e, 14f, 14g, 41a of Classical and Article -26a(3) of Concessions Directive,
  - g) Subcontracting - Article 71 in Classical and Article 41 in Concessions Directive,
  - h) Reciprocity: Articles 69a and 69b in Classical and 79a and 79b in Utilities Directive,

- i) Transposition Deadlines and Transition to e-procurement (24 months and additional 30 months for e-procurement)
- j) Framework Agreements (maximum 4 years in Public Procurement and 8 years in Utilities, except in duly justified circumstances),
- k) Contract Modifications
- l) Governance (Article 51, reporting every three years)
- m) Reserved contracts

In addition, recitals in all three Directives have been aligned wherever appropriate so that identical solutions are explained by identical recitals and differences in recitals reflect real specificities of individual Directives.

### III. CONCLUSION

The Permanent Representatives Committee is therefore invited to

- agree to the compromise text on the Directive on procurement by entities operating in the water, energy, transport and postal services sectors as set out in the Annex to this note; and
- give to the Chairman of the Permanent Representatives Committee the mandate to inform the Chair of the European Parliament's IMCO Committee that, should the European Parliament adopt the amendments to the Commission proposal in the exact form as set out in the Annex to this note, subject to legal-linguistic verification of all the language versions by Legal-linguists of both Institutions, the Council would adopt the Directive in the form of the Commission proposal as thus amended by the Parliament.

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Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

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

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments<sup>3</sup>,

Having regard to the opinion of the European Economic and Social Committee<sup>4</sup>,

Having regard to the opinion of the Committee of the Regions<sup>5</sup>,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) In the light of the results of the Evaluation on the Impact and Effectiveness of EU Public Procurement Legislation it appears appropriate to maintain rules on procurement by entities operating in the water, energy, transport and postal services sectors, since national authorities continue to be able to influence the behaviour of those entities, including participation in their capital and representation in the entities' administrative, managerial or supervisory bodies. Another reason to continue to regulate procurement in those sectors is the closed nature of the markets in which they operate, due to the existence of special or exclusive rights granted by the Member States concerning the supply to, provision or operation of networks for providing the service concerned.

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<sup>3</sup> OJ C

<sup>4</sup> OJ C

<sup>5</sup> OJ C



- (2) In order to guarantee the opening up to competition of procurement by entities operating in the water, energy, transport and postal services sectors, provisions should be drawn up coordinating procurement procedures in respect of contracts above a certain value. Such coordination is needed to ensure the effect of the principles of the Treaty on the Functioning of the European Union and in particular the free movement of goods, the freedom of establishment and the freedom to provide services as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. In view of the nature of the sectors affected by such coordination, the latter should, while safeguarding the application of those principles, establish a framework for sound commercial practice and should allow maximum flexibility.
- (3) For procurement the value of which is lower than the thresholds triggering the application of the provisions of Union coordination, it is advisable to recall the case-law developed by the Court of Justice according to which the rules and principles of the Treaty apply.
- (4) Public procurement plays a key role in the Europe 2020 strategy<sup>6</sup> as one of the market-based instruments to be used to achieve a smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. For that purpose, the current public procurement rules adopted pursuant to Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors<sup>7</sup> and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts<sup>8</sup> have to be revised and modernised in order to increase the efficiency of public spending, facilitating in particular the participation of small and medium-sized enterprises in public procurement and to enable procurers to make better use of public procurement in support of common societal goals. There is also a need to clarify basic notions and concepts to ensure better legal certainty and to incorporate certain aspects of related well-established case-law of the Court of Justice of the European Union.

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<sup>6</sup> COM(2010) 2020 final, 3.3-2010.

<sup>7</sup> OJ L 134, 30.4.2004, p. 1.

<sup>8</sup> OJ L 134, 30.4.2004, p. 114.

- (4a) When implementing this Directive, the United Nations Convention on the Rights of Persons with Disabilities<sup>9</sup> should be taken into account, in particular in the connection with the choice of means of communications, technical specifications, award criteria and contract performance conditions.
- (6) It is appropriate that the notion of procurement is as close as possible to that applied pursuant to Directive of the European Parliament and of the Council of ...on public procurement]<sup>10</sup>, having due regard for the specificities of the sectors covered by this Directive.
- (6a) It should be recalled that nothing in this Directive obliges Member States to contract out or externalise the provision of services that they wish to provide themselves or to organise by means other than procurement within the meaning of Article 1(2). The provision of services based on law or regulations, or employment contracts, should not be covered. In some Member States, this might for example be the case for the provision of certain services to the community, such as the supply of drinking water.
- (6b) It is also appropriate to recall that this Directive should not affect the social security legislation of the Member States nor should it deal with the liberalisation of services of general economic interest, reserved to public or private entities, nor with the privatisation of public entities providing services. [Articles 1(2) and 1(6) of Directive 2006/123/EC]

It should equally be recalled that Member States are free to organise the provision of compulsory social services or of other services such as postal services either as services of general economic interest or as non-economic services of general interest or as a mixture thereof. It is appropriate to clarify that non-economic services of general interest should not fall within the scope of this Directive.

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<sup>9</sup> Approved by Council Decision 2010/48/EC of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities (OJ L 23, 27.1.2010, p. 35).

<sup>10</sup> See p. [ ] of this Official Journal.

(6c) It should finally be recalled that this Directive is without prejudice to the freedom of national, regional and local authorities to define, in conformity with Union law, services of general economic interest, their scope and the characteristics of the service to be provided, including any conditions regarding the quality of the service, in order to pursue its public policy objectives. It should also be without prejudice to the power of national, regional and local authorities to provide, commission and finance services of general economic interest in accordance with Article 14 TFEU and Protocol No 26 annexed to the Treaties. In addition, this Directive does not deal with the funding of services of general economic interest or with systems of aids granted by Member States, in particular in the social field, in accordance with Union rules on competition.

(6d) A contract should be deemed to be a works contract only if its subject matter specifically covers the execution of activities listed in Annex I, even if the contract covers the provision of other services necessary for the execution of such activities. Service contracts, in particular in the sphere of property management services, may, in certain circumstances, include works.

However, insofar as such works are incidental to the principal subject-matter of the contract, and are a possible consequence thereof or a complement thereto, the fact that such works are included in the contract does not justify the qualification of the service contract as a works contract.

However, in view of the diversity of works contracts, contracting entities should be able to make provision for contracts for the design and execution of work to be awarded either separately or jointly. It is not the intention of this Directive to prescribe either joint or separate contract awards.

(6e) The realisation of a work corresponding to the requirements specified by a contracting entity requires that the entity in question must have taken measures to define the type of the work or, at the very least, have had a decisive influence on its design. Whether the contractor realises all or part of the work by his own means or ensures their realisation by other means should not change the classification of the contract as a works contract, as long as the contractor assumes a direct or indirect obligation that is legally enforceable to ensure that the works will be realised.

- (6f) The notion of "contracting authorities" and in particular that of "bodies governed by public law" have been examined repeatedly in the jurisprudence of the Court of Justice of the European Union. To clarify that the scope of the Directive *ratione personae* should remain unaltered, it is appropriate to maintain the definition on which the Court based itself and to incorporate a certain number of clarifications given by that jurisprudence as a key to the understanding of the definition itself without the intention to alter the understanding of the concept as elaborated by the jurisprudence.

For that purpose, it should be clarified that a body which operates in normal market conditions, aims to make a profit, and bears the losses resulting from the exercise of its activity should not be considered as being a "body governed by public law" since the needs in the general interest, that it has been set up to meet or been given the task of meeting, can be deemed to have an industrial or commercial character. Similarly, the condition relating to the origin of the funding of the body considered, has also been examined by jurisprudence, which has clarified i. a. that financed for "the most part" means for more than half and that such financing may include payments from users which are imposed, calculated and collected according to rules of public law.

- (6e) In the case of mixed contracts, the applicable rules should be determined in function of the main subject of the contract where the different parts which constitute the contract are objectively not separable. It should therefore be clarified how contracting entities should determine whether the different parts are separable or not. Such clarification should be based on the relevant jurisprudence of the Court of Justice of the European Union. The determination should be carried out on a case-by-case basis, in which the expressed or presumed intentions of the contracting entity to regard the various aspects making up a mixed contract as indivisible should not be sufficient, but should be supported by objective evidence capable of justifying them and of establishing the need to conclude a single contract. Such a justified need to conclude a single contract could for instance be present in case of the construction of one single building, a part of which to be used directly by the contracting entity concerned and another part to be operated on a concessions basis, for instance to provide parking facilities to the public. It should be clarified that the need to conclude a single contract may be due to reasons both of a technical nature and of an economical nature.

- (6f) In the case of mixed contracts, which can be separated, contracting entities are, of course, always free to award separate contracts for the separate parts of the mixed contract, in which case the provisions applicable to each separate part should be determined exclusively in function of the characteristics of that specific contract. On the other hand, where contracting entities choose to include other elements in the procurement, whatever their value and whatever the legal regime the added elements would otherwise have been subject to, the main principle should be that where a contract should be awarded pursuant to the provisions of this Directive, if awarded on its own, then this Directive should continue to apply to the entire mixed contract.
- (6g) However, special provisions should be foreseen for mixed contracts involving defence or security aspects or parts not falling within the scope of the Treaty. In such cases, non-application of this Directive should be possible provided that the award of a single contract is justified for objective reasons and that the decision to award a single contract is not taken for the purpose of excluding contracts from the application of this Directive or Directive 2009/81/EC. It should be clarified that contracting entities should not be prevented from choosing to apply this Directive to certain mixed contracts instead of applying Directive 2009/81/EC.
- (6h) Furthermore, contracts may be awarded for the purpose of meeting the requirements of several activities, possibly subject to different legal regimes. It should be clarified that the legal regime applicable to a single contract intended to cover several activities should be subject to the rules applicable to the activity for which it is principally intended. Determination of the activity for which the contract is principally intended may be based on an analysis of the requirements which the specific contract must meet, carried out by the contracting entity for the purposes of estimating the contract value and drawing up the procurement documents. In certain cases, such as the purchase of a single piece of equipment for the pursuit of activities for which information allowing an estimation of the respective rates of use would be unavailable, it might be objectively impossible to determine for which activity the contract is principally intended. The rules applicable to such cases should be indicated.

- (6i) It should be clarified that the notion of "economic operators" should be interpreted in a broad manner so as to include any persons and/or entities which offers the execution of works and/or a work, the supply of products or the provision of services on the market, irrespective of the legal form they have chosen to operate under. Thus, firms, branches, subsidiaries, partnerships, cooperative societies, limited companies, universities, public or private, and other forms of entities than natural persons should all fall within the notion of economic operator, whether or not they are "legal persons" in any and all relations.
- (6j) It should be clarified that groups of economic operators, including where they have come together in the form of a temporary association, may participate in award procedures without it being necessary for them to take on a specific legal form. To the extent this is necessary, for instance where joint and several liability is required, a specific form may be required where they are awarded the contract.

It should also be clarified that contracting entities should be able to set out explicitly how groups of economic operators are to meet the criteria and requirements for qualification and qualitative selection set out in Articles 71 to 75 which are required of economic operators participating on their own.

Performance of contracts by groups of economic operators may necessitate setting conditions, which are not imposed on individual participants. Such conditions, which should be justified by objective reasons and proportionate, could for instance include requiring the appointment of a joint representation or a lead partner for the purposes of the procurement procedure or requiring information on their constitution.

- (7) To ensure a real opening up of the market and a fair balance in the application of procurement rules in the water, energy, transport and postal services sectors it is necessary for the entities covered to be identified on a basis other than their legal status. It should be ensured, therefore, that the equal treatment of contracting entities operating in the public sector and those operating in the private sector is not prejudiced. It is also necessary to ensure, in keeping with Article 345 of the Treaty on the Functioning of the European Union, that the rules governing the system of property ownership in Member States are not prejudiced.

- (8) The notion of special or exclusive rights is central to the definition of the scope of this Directive, since entities which are neither contracting authorities nor public undertakings within the meaning of this Directive are subject to its provisions only to the extent that they exercise one of the activities covered on the basis of such rights. It is therefore appropriate to clarify that rights which have been granted by means of a procedure based on objective criteria, notably pursuant to Union legislation, and for which adequate publicity has been ensured do not constitute special or exclusive rights for the purposes of this Directive.

This legislation should include Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC<sup>11</sup>, Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC<sup>12</sup>, Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service<sup>13</sup>, Directive 94/22/EC of the European Parliament and of the Council of 20 May 1994 on the conditions for granting and using authorisations for the prospection, exploration and production of hydrocarbons<sup>14</sup> and Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70<sup>15</sup>.

It should also be clarified that this list of legislation is not exhaustive and that rights in any form, including by way of acts of concession, which have been granted by means of other procedures based on objective criteria and for which adequate publicity has been ensured do not constitute special or exclusive rights for the purposes of defining the scope of this Directive *rationae personae*. The concept of exclusive rights should also be used in the context of determining whether use of a negotiated procedure without prior call for competition would be justified because the works, supplies or services can be supplied only by a particular economic operator because of the protection of certain exclusive rights.

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<sup>11</sup> OJ L 211, 14.8.2009, p. 94

<sup>12</sup> OJ L 211, 14.8.2009, p. 55

<sup>13</sup> OJ L 15, 21.1.1998, p. 14.

<sup>14</sup> OJ L 164, 30.6.1994, p. 3.

<sup>15</sup> OJ L 315, 3.12.2007, p. 1.

However, bearing in mind the different ratio legis behind these provisions, it should be clarified that the notion of exclusive rights does not need to have the same meaning in the two contexts. It should thus be clarified that an entity, which has won the exclusive right to provide a given service in a given geographic area following a procedure based on objective criteria for which adequate transparency has been ensured would not, if a private body, be a contracting entity itself, but would, nevertheless, be the only entity that could provide the service concerned in that area.

- (8aaa) Certain entities are active in the fields of production, transmission and/or distribution of both heat and cooling. There may be some uncertainty as to which rules apply to respectively heat and cooling related activities. It should therefore be clarified that contracting authorities, public undertakings and private companies, which are active in the heating sector are subject to this Directive; however, in the case of private undertakings on the additional condition of operating on the basis of special or exclusive rights. On the other hand, contracting authorities operating in the cooling field are subject to the rules of [Directive 2004/18/EC], whereas public undertakings and private undertakings, irrespectively of whether these latter operate on the basis of special or exclusive rights, are not subject to procurement rules. It should finally be clarified that contracts awarded for the pursuit of both heating and cooling contracts should be examined under the provisions on contracts for the pursuit of several activities to determine which procurement rules, if any, will govern their award.
- (8aa) Before envisaging any change to the scope of the Directives for this sector, the situation of the cooling sector should be examined in order to obtain sufficient information, in particular in respect of the competitive situation, the degree of cross-border procurement and the views of stakeholders. Given that the application of the Concessions Directive to this sector could have a substantial impact in terms of market-opening, it would be appropriate to conduct the examination when assessing the impact of the Concessions Directive.



- (8a) Without in any way extending the scope of the Directive, it should be clarified that production, wholesale and retail sale of electricity are covered when the Directive refers to the supply of electricity.
- (9) Contracting entities that operate in the drinking water sector may also deal with other activities relating to water, such as projects in the field of hydraulic engineering, irrigation, land drainage or the disposal and treatment of sewage. In such case, contracting entities should be able to apply the procurement procedures provided for in this Directive in respect of all their activities relating to water, whichever part of the "water cycle" is concerned. However, procurement rules of the type proposed for supplies of goods are inappropriate for purchases of water, given the need to procure water from sources near the area in which it will be used.
- (10) It is appropriate to exclude procurement made for the purpose of exploring for oil and gas as that sector has consistently been found to be subject to such competitive pressure that the procurement discipline brought about by the EU procurement rules is no longer needed. As extraction of oil and gas continues to fall within the scope of this Directive, there might be a need to distinguish between exploration and extraction. In doing so, "exploration" should be considered to include the activities that are undertaken in order to verify whether (commercially exploitable) oil and gas is present in a given zone, whereas "extraction" should be considered as the "production" of oil and gas. In line with established practice in merger cases, "production" should be taken to include also 'development', i.e. the setting up of adequate infrastructure for future production (oil platforms, pipelines, terminals, etc.).
- (12) Contracting entities should make use of all possible means at their disposal under national law in order to prevent distortions in procurement procedures stemming from conflicts of interest. This could include procedures in order to identify, prevent and remedy conflicts of interests.

(14) Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the Agreements reached in the Uruguay Round multilateral negotiations (1986 to 1994)<sup>16</sup>, approved in particular the World Trade Organisation Agreement on Government Procurement, hereinafter referred to as the "Agreement". The aim of the Agreement is to establish a multilateral framework of balanced rights and obligations relating to public contracts with a view to achieving the liberalisation and expansion of world trade. For contracts covered by Annexes I, II, IV and V and the General Notes to the European Union's Appendix 1 to the Agreement, as well as by other relevant international agreements by which the Union is bound, contracting entities should fulfil the obligations under those agreements by applying this Directive to economic operators of third countries that are signatories to the agreements.

(15) The Agreement applies to contracts above certain thresholds, set in the Agreement and expressed as special drawing rights. The thresholds laid down by this Directive should be aligned to ensure that they correspond to the euro equivalents of the thresholds of the Agreement. Provision should also be made for periodic reviews of the thresholds expressed in euros so as to adjust them, by way of a purely mathematical operation, to possible variations in the value of the euro in relation to the special drawing right.

Apart from these periodic mathematical adjustments, an increase of the thresholds set in the Agreement should be explored during the next round of negotiations.

To avoid a multiplication of thresholds it is furthermore appropriate, without prejudice to the international commitments of the Union, to continue to apply the same thresholds to all contracting entities, regardless of the sector in which they operate.

(15a) It should be clarified that, for the estimation of the value of a contract, all revenues have to be taken into account, whether received from the contracting entity or from third parties.

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<sup>16</sup> OJ L 336, 23.12.1994, p. 1.

It should also be clarified that, for the purpose of estimating the thresholds, the notion of similar supplies should be understood as products which are intended for identical or similar uses, e.g. supplies of a range of foods or of different items of office furniture. Typically, an economic operator being active in the field concerned would be likely to carry such supplies as part of his normal product range.

- (15b) For the purposes of estimating the value of a given procurement, it should be clarified that it should be allowed to base the estimation of the value on a subdivision of the procurement only where this is justified by objective reasons. For instance, it could be justified to estimate contract values at the level of a separate operational unit of the contracting entity provided that the unit in question is independently responsible for its procurement. This can be assumed where the separate operational unit independently runs the procurement procedures and makes the buying decisions, disposes of a separate budget line for the procurements concerned, concludes the contract independently and finances it from a budget over which it disposes. A subdivision is not justified where the contracting entity merely organises a procurement in a decentralised way.
- (16) The results of the Evaluation suggested that the exclusion of certain services from the full application of this directive should be reviewed. As a result, the full application of the Directive is extended to a number of services
- (17) Certain categories of services continue by their very nature to have a limited cross-border dimension, namely what are known as services to the person such as certain social, health and educational services. Those services are provided within a particular context that varies widely amongst Member States, due to different cultural traditions. A specific regime should therefore be established for contracts for those services, with a higher threshold of EUR 1 000 000.

In the particular context of procurement in those sectors, services to the person with values below this threshold will typically not be of interest to providers from other Member States unless there are concrete indications to the contrary, such as Union financing for transborder projects.

Contracts for services to the person above this threshold should be subject to Union-wide transparency. Given the importance of the cultural context and the sensitivity of those services, Member States should be given wide discretion to organise the choice of the service providers in the way they consider most appropriate. The rules of this directive take account of that imperative, imposing only observance of basic principles of transparency and equal treatment and making sure that contracting entities are able to apply specific quality criteria for the choice of service providers, such as the criteria set out in the voluntary European Quality Framework for Social Services of the European Union's Social Protection Committee<sup>17</sup>. When determining the procedures to be used for the award of contracts for services to the person, Member States should keep Protocol (No 26) on Services of General Interest and Article 14 TFEU in mind. In so doing, Member States should also pursue the objectives of simplification and alleviating the administrative burden for contracting entities and economic operators; it should be clarified that so doing might also entail relying on rules applicable to service contracts not subject to the specific regime.

Member States and/or contracting entities remain free to provide those services themselves or to organise social services in a way that does not entail the conclusion of public contracts, for example through the mere financing of such services or by granting licences or authorisations to all economic operators meeting the conditions established beforehand by the contracting entity, without any limits or quotas, provided such a system ensures sufficient advertising and complies with the principles of transparency and non-discrimination.

(17a) Likewise, hotel and restaurant services are typically offered only by operators located in the specific place of delivery of these services and have therefore also a limited cross-border dimension. They should therefore only be covered by the particular regime set out for social and other specific services, as from a threshold of EUR 1 000 000. Large hotel and restaurant service contracts above this threshold may be of interest for various economic operators, such as travel agencies and other intermediaries, also on a cross-border basis.

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17 SPC/2010/10/8 Final of 6.10.2010.

- (17b) Similarly, certain legal services exclusively concern issues of purely national law and are therefore typically offered only by operators located in the Member State concerned and have consequently also a limited cross-border dimension. They should therefore only be covered by the particular regime set out for social and other specific services, as from a threshold of EUR 1 000 000. Large legal service contracts above this threshold may be of interest for various economic operators, such as international law firms, also on a cross-border basis, in particular where they involve legal issues arising from or having as its background EU or other international law or implicating more than one country.
- (17c) Experience has shown that a series of other services, such as rescue services, firefighting services and prison services normally only present a certain cross-border interest as of the moment where they acquire sufficient critical mass through their relatively high value. In so far as they are not excluded from the scope of the directive, they should be included under the particular regime set out for social and other specific services. To the extent that their provision is actually based on contracts, other categories of services, such as investigation and security services, would normally only be likely to present a cross-border interest as of a threshold of EUR 1 000 000 and should consequently only be subject to the particular regime set out for social and other specific services.
- (17ca) In order to ensure continuity of public services this Directive should allow that participation in procurement procedures for certain services in the fields of health, social and cultural services could be reserved for organisations based on employee ownership or active participation in the governance and for existing organisations such as cooperatives to participate in delivering these services to end users. This provision is limited in scope exclusively to certain health, social and related services, certain education and training services, library, archives, museums and other cultural services, sporting services, and services for private households, and is not intended to cover any of the exclusions otherwise provided for by this Directive. Such procurement procedures shall be subject to the rules on publicity applicable to services in the light regime.

- (17d) It is appropriate to identify these services by reference to specific positions of the ‘Common Procurement Vocabulary (CPV)’ as adopted by Regulation (EC) No 2195/2002, which is a hierarchically structured nomenclature, divided into divisions, groups, classes, categories and subcategories. To avoid legal uncertainty, it should be clarified that reference to a division does not implicitly entail a reference to subordinate subdivisions. Such comprehensive coverage should instead be set out explicitly by mentioning all the relevant positions, where appropriate as a range of codes.
- (18) Being addressed to Member States, this directive does not apply to procurement carried out by international organisations on their own behalf and for their own account. There is, however, a need to clarify to what extent this directive should be applied to procurement governed by specific international rules.
- 18aa It should be recalled that arbitration and conciliation services and other similar forms of alternative dispute resolution are usually provided by bodies or individuals which are agreed on, or selected, in a manner which cannot be governed by procurement rules [Cf. Recital 26 of Directive 2004/18/EC]. It should be clarified that the Directive should not apply to service contracts for the provision of such services, whatever their denomination under national law.
- (18a) A certain number of legal services are rendered by service providers that are designated by a court or tribunal of a Member State, involve representation of clients in judicial proceedings by lawyers, must be provided by notaries or are connected with the exercise of official authority. Such legal services are usually provided by bodies or individuals designated or selected in a manner which cannot be governed by procurement rules, such may for instance be the case for the designation of State Attorneys in certain Member States; they should consequently be excluded from the scope of this Directive.

- (18b) It is appropriate to specify that the notion of financial instruments as referred to in this Directive is given the same meaning as in other Internal Market legislation and, in view of the recent creation of the European Financial Stability Facility, it should be stipulated that operations conducted with that facility should be excluded from the scope of this Directive. It should finally be clarified that loans, whether or not these are in connection with the issue or other operations concerning securities or other financial instruments, should be excluded from the scope of the Directive.
- (18c) It should be recalled that Article 5(1) of Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70<sup>18</sup> explicitly provides that Directives 2004/17/EC and 2004/18/EC apply to (public) service contracts for public passenger transport services by bus or tram, whereas the Regulation applies to service concessions for public passenger transport by bus or tram. It should furthermore be recalled that the Regulation continues to apply to (public) service contracts as well as service concessions for public passenger transport by railway or metro. To clarify the relations between this Directive and the Regulation, it should be provided explicitly that the provisions of this Directive should not be applicable to service contracts for the provision of public passenger transport services by rail or metro, the award of which should continue to be subject to the provisions of the Regulation. Insofar as the Regulation leaves it to national law to depart from the rules laid down by it, Member States may continue to provide in their national law that service contracts for public passenger transport services by rail or metro have to be awarded by a contract award procedure following their general public procurement rules.

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<sup>18</sup> OJ L 315, 3.12.2007, p. 1

- (18ca) This Directive should not apply to certain emergency services where these are performed by non-profit organisations or associations, since the particular nature of these organisations would be difficult to preserve in case the service providers would have to be chosen in accordance with the procedures set out in this Directive. However, the exclusion should not be extended beyond the strict necessary; it should therefore be set out explicitly that patient transport ambulance services should not be excluded. In that context it is furthermore necessary to clarify that CPV Group 601 “ Land Transport Services” does not cover ambulance services, to be found in CPV class 8514. It should therefore be clarified that services within CPV code 85143000-3 consisting exclusively of patient transport ambulance services should be subject to the light regime; consequently, contracts for the provision of ambulance services in general would also be subject to the light regime if the value of the patient transport ambulance services were greater than the value of other ambulance services;
- (18d) In certain cases, a given contracting authority or a given association thereof may be the sole source for a given service, for the provision of which it enjoys an exclusive right pursuant to published laws, regulations or administrative provisions which are compatible with the Treaty. It should be clarified that a service contract may be awarded to that contracting authority or association thereof without the Directive being applied.
- (19) There is considerable legal uncertainty as to how far contracts concluded between contracting authorities should be covered by public procurement rules. The relevant case-law of the Court of Justice of the European Union is interpreted differently between Member States and even between contracting authorities. As this jurisprudence would be equally applicable to public authorities when operating in the sectors covered by this directive, it is appropriate to ensure that the same rules apply and are interpreted in the same way in both this directive and Directive .../.../EU on public procurement.



- (20) Many contracting entities are organised as an economic group which may comprise a series of separate undertakings; often each of these undertakings have a specialised role in the overall context of the economic group. It is therefore appropriate to exclude certain service, supply and works contracts awarded to an affiliated undertaking having as its principal activity the provision of such services, supply or works to the group of which it is part, rather than offering them on the market. It is also appropriate to exclude certain service, supply and works contracts awarded by a contracting entity to a joint venture which is formed by a number of contracting entities for the purpose of carrying out activities covered by this Directive and of which that entity is part. However, it is appropriate to ensure that this exclusion does not give rise to distortions of competition to the benefit of the undertakings or joint ventures that are affiliated with the contracting entities; it is appropriate to provide a suitable set of rules, in particular as regards the maximum limits within which the undertakings may obtain a part of their turnover from the market and above which they would lose the possibility of being awarded contracts without calls for competition, the composition of joint ventures and the stability of links between those joint ventures and the contracting entities of which they are composed.
- (21) It is also appropriate to clarify the relations between the provisions on cooperation between public authorities and the provisions on the award of contracts to affiliated undertakings or in the context of joint ventures.
- (21aa) Companies should be considered to be affiliated where a direct or indirect dominant influence exist between the contracting entity and the undertaking concerned or where both are subject to the dominant influence of another undertaking; in this context, private participation should, *per se*, not be relevant. Verification of whether an undertaking is affiliated to a given contracting entity or not should be as easy to perform as possible. Consequently, and given that the possible existence of such direct or indirect dominant influence will already have to be verified for the purposes of deciding whether the annual accounts of the undertakings and entities concerned should be consolidated,

undertakings should be considered to be affiliated wherever their annual accounts are consolidated, However, Union rules on consolidated accounts are not applicable in a certain number of cases, for instance because of the size of the undertakings involved or because certain conditions relating to their legal form are not met. In such cases, where the Seventh Council Directive 83/349/EEC<sup>19</sup> is not applicable, it will be necessary to examine whether a direct or indirect dominant influence is present based on ownership, financial participation or the rules governing these undertakings.

- (21a) The co-financing of research and development (R&D) programmes by industry sources should be encouraged; it should consequently be clarified that this Directive only applies where there is no such co-financing and where the outcome of the R&D activities go to the contracting entity concerned; this should not exclude that the service provider having carried out these activities could publish an account thereof as long as the contracting entity retains the exclusive right to use the outcome of the R&D in the conduct of its own affairs. However any fictitious sharing of the results of the R&D or any symbolic participation in the remuneration of the service provider will not prevent the application of this Directive.
- (22) This Directive should apply neither to contracts intended to permit the performance of an activity that is subject to this Directive nor to design contests organised for the pursuit of such an activity if, in the Member State in which this activity is carried out, it is directly exposed to competition on markets to which access is not limited. It is therefore appropriate to maintain the procedure, applicable to all sectors, or parts thereof, covered by this Directive that will enable the effects of current or future opening up to competition to be taken into account. Such a procedure should provide legal certainty for the entities concerned, as well as an appropriate decision-making process, ensuring, within short time limits, uniform application of Union law in this area. For the sake of legal certainty it should be clarified that all Decisions adopted prior to the entry into force of this Directive concerning the applicability of the corresponding provisions set out in Article 30 of Directive 2004/[...]17/EC continue to be applicable.

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<sup>19</sup> OJ L 193, 18.7.1983, p. 1. Directive as last amended by Directive 2001/65/EC of the European Parliament and of the Council (OJ L 283, 27.10.2001, p. 28).

- (23) Direct exposure to competition should be assessed on the basis of objective criteria, taking account of the specific characteristics of the sector concerned or of the concerned parts thereof. This assessment is, however, limited by the applicable short deadlines and by having to be based on the information available to the Commission – either from already available sources or from the information obtained in the context of the application pursuant to Article 28 - which can not be supplemented by more time consuming methods, including notably public inquiries of economic operators concerned. The assessment of direct exposure to competition that can be carried out in the context of this directive is consequently without prejudice to the full-fledged application of competition law.
- (23a) Assessing whether a given sector, or parts thereof, are directly exposed to competition should be examined in respect of the specific area in which the activity, or the parts thereof concerned, are carried out by the relevant economic operators, the so-called relevant geographical market. As this notion is crucial for the assessment, it should be given an appropriate definition, based on existing notions in Union law. It should also be clarified that the relevant geographical market might not coincide with the territory of the Member State concerned; consequently, decisions concerning the applicability of the exemption could be limited to parts of the territory of the Member State concerned.
- (24) The implementation and application of appropriate Union legislation opening a given sector, or a part of it, will be considered to provide sufficient grounds for assuming that there is free access to the market in question. Such appropriate legislation should be identified in an annex which can be updated by the Commission. When updating, the Commission should in particular take into account the possible adoption of measures entailing a genuine opening up to competition of sectors other than those for which a legislation is already mentioned in Annex III, such as that of national railway passenger transports.

(24a) Where free access to a given market is not presumed on the basis of the implementation of appropriate Union legislation, it should be demonstrated that, de jure and de facto, such access is free. Where a Member State extends the application of a Union legal act opening up a given sector to competition to situations falling outside the scope of that legal act, for instance by applying Directive 94/22/EC to the coal sector or Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area<sup>20</sup> to passenger service at the national level, this circumstance should be taken into account when assessing whether access to the sector concerned is free, de jure and de facto.

(24b) Independent national authorities, such as sectoral regulators or competition authorities, normally possess specialised know-how, information and knowledge that would be pertinent when assessing whether a given activity or parts thereof are directly exposed to competition on markets to which access is not limited. Requests for exemption should therefore where appropriate be accompanied by, or incorporate, a recent position on the competitive situation in the sector concerned, adopted by an independent national authority that is competent in relation to the activity concerned.

In the absence of a reasoned and substantiated position adopted by an independent national authority that is competent in relation to the activity concerned, more time would be needed for the assessment of a request for exemption. The periods of which the Commission dispose for its assessments of such requests should therefore be modulated accordingly.

(24c) The Commission should always be obliged to examine requests, which are in conformity with the detailed rules for the application of the procedures for establishing whether a given activity, or parts thereof, are directly exposed to competition on markets to which access is not restricted. It should, however, also be clarified that the complexity of such requests may be such that it might not always be possible to ensure the adoption within the applicable deadlines of implementing acts establishing whether a given activity or parts thereof are directly exposed to competition on markets to which access is not restricted.

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<sup>20</sup> OJ L 343, 14.12.2012, p. 32

- (24d) It should be clarified that the Commission should have the possibility to require Member States or contracting entities to provide or to supplement or clarify information. The Commission should set an appropriate time limit for so doing which, having due regard also to the need to meet the deadlines set for the Commission's adoption of its implementing act, should take into account factors such as the complexity of the information requested and whether the information is readily accessible.
- (24e) Employment and occupation contribute to integration in society and are key elements in guaranteeing equal opportunities for all. In this context, sheltered workshops can play a significant role. The same is true for other social businesses whose main aim is to support the social and professional integration or reintegration of disabled and disadvantaged persons, such as unemployed, members of disadvantaged minorities or otherwise socially marginalised groups. However, such workshops or businesses might not be able to obtain contracts under normal conditions of competition. Consequently, it is appropriate to provide that Member States should be able to reserve the right to participate in award procedures for public contracts or for certain lots thereof to such workshops or businesses or reserve performance of contracts to the context of sheltered employment programmes.
- (24f) In view of an appropriate integration of environmental, social and labour requirements in public procurement procedures it is of particular importance that Member States and contracting entities take relevant measures to ensure compliance with obligations in the fields of environmental, social and labour law that apply at the place where the works are executed or the services provided and result from laws, regulations, decrees and decisions, at both national and Union level, as well as from collective agreements, provided that such rules, and their application, comply with Union law. Equally, obligations stemming from international agreements ratified by all Member States and listed in Annex XIV should apply during contract performance. However, this should in no way prevent the application of terms and conditions of employment which are more favourable to workers.

The relevant measures should be applied in conformity with the basic principles of European Union law, notably with a view to ensure equal treatment. Such relevant measures should be applied in accordance with Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services and in a way that ensures equal treatment and does not discriminate directly or indirectly against economic operators and workers from other Member States.

- (24g) Services should be considered to be provided at the place at which the characteristic performances are executed; when services are provided at a distance, for example services provided by call centres, the services will be considered to be provided at the place where the services are executed, irrespective of the places and Member States to which the services are directed.
- (24h) The relevant obligations could be mirrored in contract clauses. It should also be possible to include clauses ensuring compliance with collective agreements in compliance with Union law in public contracts. Non-compliance with the relevant obligations may be considered to be grave misconduct on the part of the economic operator concerned, liable to exclusion of that economic operator from the procedure for the award of a public contract.
- (24i) Control of the observance of these environmental, social and labour law provisions should be performed at the relevant stages of the procurement procedure, that is when applying the general principles governing the choice of participants and the award of contracts [Article 70], when applying the exclusion criteria [Article 74] and when applying the provisions concerning abnormally low tenders [Article 79]. The necessary verification for that purpose should be carried out in accordance with the relevant provisions of Title II, Chapter III, section 3 [Articles 70 to 79], of this Directive, in particular those governing means of proof and self-declarations.
- (24j) Nothing in this Directive should prevent the imposition or enforcement of measures necessary to protect public policy, public morality, public security, health, human and animal life, the preservation of plant life or other environmental measures, in particular with a view to sustainable development, provided that these measures are in conformity with the Treaty.

- (25) Research and innovation, including eco-innovation and social innovation, are among the main drivers of future growth and have been put at the centre of the Europe 2020 strategy for smart, sustainable and inclusive growth. Contracting entities should make the best strategic use of public procurement to spur innovation. Buying innovative goods, works and services plays a key role in improving the efficiency and quality of public services while addressing major societal challenges. It contributes to achieving best value for money as well as wider economic, environmental and societal benefits in terms of generating new ideas, translating them into innovative products and services and thus promoting sustainable economic growth.

It should be recalled that a series of procurement models have been outlined in the Commission's communication of 14.12.2007 on pre-commercial procurement<sup>21</sup>, which deal with the procurement of those research and development services not falling within the scope of this Directive. Those models would continue to be available as hitherto, but this directive should also contribute to facilitating procurement of innovation and help Member States in achieving the Innovation Union targets.

- (25a) Because of the importance of innovation, contracting entities should be encouraged to allow variants as often as possible; their attention should consequently be drawn to the need of defining the minimum requirements to be met by variants before indicating that variants may be submitted.

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<sup>21</sup> COM(2007) 799 final: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Pre-commercial Procurement: driving innovation to ensure sustainable high quality public services in Europe.

- (25b) Where a need for the development of an innovative product or service or innovative works and the subsequent purchase of the resulting supplies, services or works cannot be met by solutions already available on the market, contracting entities should have access to a specific procurement procedure in respect of contracts falling within the scope of this Directive. This specific procedure should allow contracting entities to establish a long-term innovation partnership for the development and subsequent purchase of a new, innovative product, service or works provided that such innovative product or service or innovative works can be delivered to agreed performance levels and costs, without the need for a separate procurement procedure for the purchase. The Innovation partnership should be based on the procedural rules that apply to negotiated procedures with prior call for competition and contracts should be awarded on the sole basis of the best price quality ratio, which is most suitable for comparing tenders for innovative solutions. Whether in respect of very large projects or smaller innovative projects, the innovation partnership should be structured in such a way that it can provide the necessary “market-pull” incentivising the development of an innovative solution without foreclosing the market. Contracting entities should consequently not use innovation partnerships in such a way as to prevent, restrict or distort competition; in certain cases, setting up innovation partnerships with several partners could contribute to avoiding such effects.
- (25c) Experience has shown that the competitive dialogue, which is provided for under Directive 2004/18/EC, has been of use in cases where contracting authorities are unable to define the means of satisfying their needs or of assessing what the market can offer in terms of technical, financial or legal solutions. This situation may arise in particular with innovative projects, the implementation of major integrated transport infrastructure projects, large computer networks or projects involving complex and structured financing. Member States should therefore be allowed to place this tool at the disposal of contracting entities. Where relevant, contracting authorities should be encouraged to appoint a project leader to ensure good cooperation between the economic operators and the contracting authority during the award procedure.



- (26) In view of the detrimental effects on competition, negotiated procedures without a call for competition should only be used in very exceptional circumstances. This exception should be limited to cases where publication is either not possible, for reasons of extreme urgency brought about by events unforeseeable for and not attributable to the contracting entity, or where it is clear from the outset that publication would not trigger more competition or better procurement outcomes, not least because there is objectively only one economic operator that can perform the contract. This is the case for works of art, where the identity of the artist intrinsically determines the unique character and value of the art object itself. Exclusivity can also arise from other reasons, but only situations of objective exclusivity can justify the use of the negotiated procedure without a call for competition, where the situation of exclusivity has not been created by the contracting entity itself with a view to the future procurement procedure.

Contracting entities relying on this exception should provide reasons why there are no reasonable alternatives or substitutes such as using alternative distribution channels including outside the Member State of the contracting entity or considering functionally comparable works, supplies and services.

Where the situation of exclusivity is due to technical reasons, these should be rigorously defined and justified on a case-by-case basis. They could include, for instance, near technical impossibility for another economic operator to achieve the required performance or the necessity to use specific know-how, tools or means which only one economic operator has at its disposal. Technical reasons may also derive from specific interoperability requirements which must be fulfilled in order to ensure the functioning of the works, supplies or services to be procured.

Finally, a procurement procedure is not useful where supplies are purchased directly on a commodity market, including trading platforms for commodities such as agricultural goods, raw materials and energy exchanges, where the regulated and supervised multilateral trading structure naturally guarantees market prices.

- (26a) It should be clarified that the provisions concerning protection of confidential information do not in any way prevent public disclosure of non-confidential parts of concluded contracts, including any subsequent changes. [Am. 107] [This solution could also be applied for the Classic Directive as a new Recital 18a to take into account AM 92]
- (27) Electronic means of information and communication can greatly simplify the publication of contracts and increase the efficiency and transparency of procurement processes. They should become the standard means of communication and information exchange in procurement procedures, as they greatly enhance the possibilities of economic operators to participate in procurement procedures across the Internal Market. For that purpose, transmission of notices in electronic form, electronic availability of the procurement documents and – after a transition period of thirty months – fully electronic communication, meaning communication by electronic means at all stages of the procedure, including the transmission of requests for participation and, in particular, the transmission of the tenders (e-submission) should be made mandatory. Member States and contracting entities should remain free to go further if they so wish. It should also be clarified that mandatory use of electronic means of communications pursuant to this Directive should not, however, oblige contracting entities to carry out electronic processing of tenders, nor should it mandate electronic evaluation or automatic processing. Furthermore, pursuant to this Directive, no elements of the public procurement process after the award of the contract should be covered by the obligation to use electronic means of communication nor should internal communication within the contracting entity.
- (27a) Contracting entities should, except in certain specific situations, use electronic means of communication which are non-discriminatory, generally available and interoperable with the information and communication technology products in general use and do not restrict economic operators' access to the procurement procedure. Such means of communication should also take accessibility for persons with disabilities into due account. It should be clarified that the obligation to use electronic means at all stages of the procurement procedure would not be appropriate where the use of electronic means would require specialised tools or file formats that are not generally available nor where the communications concerned could only be handled using specialised office equipment. Contracting entities should therefore not be obliged to require the use of electronic means of communication in the submission process in certain cases, which should be listed exhaustively.

The Directive should stipulate that such cases should include situations which would require the use of specialised office equipment not generally available to the contracting entities such as wide-format printers. In some procurement procedures the procurement documents may require the submission of a physical or scale model which cannot be submitted to the contracting entities using electronic means. In such situations, the model should be transmitted to the contracting entities by post.

It should however be clarified that the use of other means of communication should be limited to those elements of the tender for which electronic means of communications are not required.

It is appropriate to clarify that, where necessary for technical reasons, contracting entities should be able to set a maximum limit to the size of the files that may be submitted.

- (27aa) There may be exceptional cases in which contracting entities should be allowed not to use electronic means of communication where so doing would be necessary in order to protect the particularly sensitive nature of information. It should be clarified that where the use of electronic tools which are not generally available can offer the necessary level of protection, such electronic tools should be used. Such may for instance be the case where contracting entities require the use of dedicated secure means of communication to which they offer access as provided for in Article 33(4).
- (27b) Differing technical formats or processes and messaging standards could potentially create obstacles to interoperability, not only within each Member State but also and especially between the Member States. For example, in order to participate in a procurement procedure in which use of electronic catalogues, which is a format for the presentation and organisation of information in a manner that is common to all the participating bidders and which lends itself to electronic treatment, is permitted or required, economic operators would, in the absence of standardisation, be required to customise their own catalogues to each procurement procedure, which would entail providing very similar information in different formats depending on the specifications of the contracting entities concerned. Standardising the catalogue formats would thus improve the level of interoperability, enhance efficiency and would also - and perhaps above all - reduce the effort required of economic operators.

- (27c) When considering whether there is a need to ensure or enhance interoperability between differing technical formats or process and messaging standards by rendering the use of specific standards mandatory, and if so which standards to impose, the Commission should take the utmost account of the opinions of the stakeholders concerned. It should also consider the extent to which a given standard has already been used in practice by economic operators and contracting entities and how well it has worked; before making use of any technical standard mandatory, the Commission should also carefully consider the costs that this may entail, in particular in terms of adaptations to existing e-procurement solutions, including infrastructure, processes or software.

Where the standards concerned are not developed by an international, European or national standardisation organisation, they should meet the requirements applicable to ICT standards as set out in Regulation (EU) 1025/2012 on European standardisation.

- (27d) Before specifying the level of security required for the electronic means of communications to be used at the various stages of the award procedure, Member States and contracting entities should evaluate the proportionality between on the one hand the requirements aimed at ensuring correct and reliable identification of the senders of the communication concerned as well as the integrity of its content and on the other hand the risk of problems e. g. in situations where messages are sent by a different sender than the one indicated. All other things being equal, this would mean that the level of security required of, for instance, an email requesting confirmation of the exact address at which an information meeting will be held would not need to be set at the same level as for the tender itself which constitutes a binding offer for the economic operator. Similarly, the evaluation of proportionality could result in lower levels of security being required in connection with the resubmission of electronic catalogues or the submission of tenders in the context of mini-competitions under a framework agreement or the access to procurement documents.

- (27e) While essential elements of a procurement procedure such as the procurement documents, requests for participation, confirmation of interest and tenders should always be made in writing, oral communication with economic operators should otherwise continue to be possible, provided that its content is documented to a sufficient degree. This is necessary to ensure an adequate level of transparency that allows for a verification of whether the principle of equal treatment has been adhered to. In particular, it is essential that oral communications with tenderers which could have an impact on the content and assessment of the tenders be documented to a sufficient extent and by appropriate means, such as written or audio records or summaries of the main elements of the communication.
- (28) There is a strong trend emerging across Union public procurement markets towards the aggregation of demand by public purchasers, with a view to obtaining economies of scale, including lower prices and transaction costs, and to improving and professionalising procurement management. This can be achieved by concentrating purchases either by the number of contracting entities involved or by volume and value over time. However, the aggregation and centralisation of purchases should be carefully monitored in order to avoid excessive concentration of purchasing power and collusion, and to preserve transparency and competition, as well as market access opportunities for small and medium-sized enterprises.
- (29) The instrument of framework agreements can be an efficient procurement technique throughout Europe; however, there is a need to enhance competition by improving transparency of and access to procurement carried out by means of framework agreements. It is therefore appropriate to revise the provisions applicable to those agreements, notably by providing for the award of specific contracts based on the agreement to be awarded on the basis of objective rules and criteria, for instance following a mini-competition, and by limiting the duration of framework agreements.

29a It should also be clarified that while contracts based on a framework agreement are to be awarded before the end of the term of the framework agreement itself, the duration of the individual contracts based on a framework agreement does not need to coincide with the duration of that framework agreement, but may, as appropriate, be shorter or longer. In particular, it should be allowed to set the length of individual contracts based on a framework agreement taking account of factors such as the time needed for their performance; where maintenance of equipment with an expected useful life of more than eight years is included or where extensive training of staff to perform the contract is needed.

It should also be clarified that there may be cases in which the length of the framework agreements themselves should be allowed to be longer than eight years. Such cases, which should be duly justified, in particular by the subject of the framework agreement, may arise for instance where economic operators need to dispose of equipment for which the amortisation period is longer than eight years and which must be available at any time over the entire duration of the framework agreement. In the particular context of utilities providing essential services to the public there may be cases where there will be a need for both longer framework agreements as well as for longer duration of individual contracts, for instance in the case of framework agreements aimed at ensuring ordinary and extraordinary maintenance of networks which may require expensive equipment to be operated by personnel having received highly specialised ad-hoc training aimed at ensuring continuation of the services and minimisation of possible disruptions.

(30) In view of the experience acquired, there is also a need to adjust the rules governing dynamic purchasing systems to enable contracting entities to take full advantage of the possibilities afforded by that instrument. The systems need to be simplified, in particular they should be operated in the form of a restricted procedure, hence eliminating the need for indicative tenders, which have been identified as one of the major burdens associated with dynamic purchasing systems. Thus any economic operator who submits a request to participate and meets the selection criteria should be allowed to take part in procurement procedures carried out through the dynamic purchasing system over its period of validity.

This purchasing technique allows the contracting entity to have a particularly broad range of tenders and hence to ensure optimum use of funds through broad competition in respect of commonly used or off-the-shelf goods, works or services which are generally available on the market.

- (30a) The examination of these requests to participate should normally be performed within a maximum of 10 working days, given that the evaluation of the selection criteria will take place on the basis of the requirements for documentation set out by the contracting entities, where applicable in accordance with the simplified provisions of Directive 2004/18/EC. However, when a dynamic purchasing system is first set up, contracting entities may, in response to the first publication of the contract notice or the invitation to confirm interest, be faced with such a large number of requests for participation that they may need more time to examine the requests. This should be admissible, provided that no specific procurement is launched as long as all the requests have not been examined.

Contracting entities should be free to organise the way in which they intend to examine the requests for participation, for instance by deciding to conduct such examinations only once a week, provided the deadlines for the examination of each request of admission are observed. Contracting entities using the exclusion or selection criteria provided for under Directive 2004/18/EC in the context of a dynamic purchasing system, should apply the relevant provisions of that Directive in the same way as contracting authorities operating a dynamic purchasing system pursuant to Directive 2004/18/EC.

- (30b) In order to further the possibilities of SMEs to participate in a large-scale dynamic purchasing system, for instance one that is operated by a central purchasing body, the contracting authority or entity concerned should be able to articulate the system in objectively defined categories of products, works or services. Such categories should be defined by reference to objective factors which may for instance include the maximum allowable size of specific contracts to be awarded within the category concerned or a specific geographic area in which subsequent specific contracts are to be performed.

Where a dynamic purchasing system is divided into categories, the contracting authority or entity should apply selection criteria that are proportional to the characteristics of the category concerned.

- (30c) It should be clarified that electronic auctions are typically not suitable for certain works contracts and certain service contracts having as their subject-matter intellectual performances, such as the design of works, because only the elements suitable for automatic evaluation by electronic means, without any intervention and/or appreciation by the contracting entity, namely elements which are quantifiable so that they can be expressed in figures or percentages, may be the object of electronic auctions.

It should, however, also be clarified that electronic auctions may be used in a procurement procedure for the purchase of a specific intellectual property right. It is also appropriate to recall that while contracting entities to apply selection criteria enabling them to reduce the number of candidates or tenderers as long as the auction has not yet started, no further reduction of the number of tenderers participating in the electronic auction should be allowed after the auction has started.

- (31) In addition, new electronic purchasing techniques are constantly being developed, such as electronic catalogues. Electronic catalogues are a format for the presentation and organisation of information in a manner that is common to all the participating bidders and which lends itself to electronic treatment; an example could be tenders presented in the form of a spreadsheet. Contracting entities may require electronic catalogues in all available procedures where the use of electronic means of communication is required. Electronic catalogues help to increase competition and streamline public purchasing, particularly in terms of savings in time and money. Certain rules should however be laid down to ensure that such use complies with the rules of this Directive and the principles of equal treatment, non-discrimination and transparency.



Thus, use of electronic catalogues for the presentation of tenders should not entail that economic operators may limit themselves to the transmission of their general catalogue. Economic operators should still have to adapt their general catalogues in view of the specific procurement procedure. Such adaptation will ensure that the catalogue that is transmitted in response to a given procurement procedure only contains products, works or services that the economic operators estimated - after an active examination - correspond to the requirements of the contracting entity. In so doing, economic operators should be allowed to copy information contained in their general catalogue, but they should not be allowed to submit the general catalogue as such. Furthermore, where sufficient guarantees are offered in respect of ensuring traceability, equal treatment and predictability, contracting entities should be allowed to generate tenders in relation to specific purchases on the basis of previously transmitted electronic catalogues, in particular where competition has been reopened under a framework agreement or where a dynamic purchasing system is being used.

Where tenders have been generated by the contracting entity, the economic operator concerned should be given the possibility to verify that the tender thus constituted by the contracting entity does not contain any material errors. Where material errors are present, the economic operator should not be bound by the tender generated by the contracting entity unless the error is corrected.

In line with the requirements of the rules for electronic means of communication, contracting entities should avoid unjustified obstacles to economic operators' access to procurement procedures in which tenders are to be presented in the form of electronic catalogues and which guarantee compliance with the general principles of non-discrimination and equal treatment.

- (32) Centralised purchasing techniques are increasingly used in most Member States. Central purchasing bodies are responsible for making acquisitions, managing dynamic purchasing systems or awarding contracts/framework agreements for other contracting authorities or contracting entities, with or without remuneration. The contracting entities for whom a framework agreement is concluded should be able to use it for individual or repetitive purchases. In view of the large volumes purchased, such techniques may help increase competition and professionalise public purchasing. Provision should therefore be made for a Union definition of central purchasing bodies dedicated to contracting entities and it should be clarified that central purchasing bodies operate in two different manners.

Firstly, they should be able to act as wholesalers by buying, stocking and reselling or, secondly, as intermediaries by awarding contracts, operating dynamic purchasing systems or concluding framework agreements to be used by contracting entities.

Such intermediary role might in some cases be carried out by conducting the relevant award procedures autonomously, without detailed instructions from the contracting entities concerned; in other cases, by conducting the relevant award procedures under the instructions of the contracting entities concerned, on their behalf and for their account.

Furthermore, rules should be laid down for allocating responsibility for the observance of the obligations pursuant to this Directive, also in the case of remedies, among the central purchasing body and the contracting entities procuring from or through the central purchasing body. Where the latter has sole responsibility for the conduct of the procurement procedures, it should also be solely and directly responsible for the legality of the procedures. Where a contracting entity conducts certain parts of the procedure, for instance the reopening of competition under a framework agreement or the award of individual contracts based on a dynamic purchasing system, it should continue to be responsible for the stages it conducts.

- (32a) Contracting entities should be allowed to award a service contract for the provision of centralised purchasing activities to a central purchasing body without applying the procedures provided for in this Directive; it should also be permitted that such service contracts include the provision of ancillary purchasing activities. Such service contracts for the provision of ancillary purchasing activities should, when performed otherwise than by a central purchasing body in connection with its provision of central purchasing activities to the contracting entity concerned, be awarded in accordance with the provisions of this Directive. It should also be recalled that this Directive should not apply where centralised or ancillary purchasing activities are provided other than through a contract for pecuniary interest which constitutes procurement within the meaning of this Directive.
- (32b) Strengthening the provisions concerning central purchasing bodies should in no way prevent the current practices of occasional joint procurement, i. e. less institutionalised and systematic common purchasing or the established practice of having recourse to service providers that prepare and manage procurement procedures on behalf and for the account of a contracting entity and under its instructions. On the contrary, certain features of joint procurement should be clarified because of the important role joint procurement may play, not least in connection with innovative projects.

Joint procurement may take many different forms, ranging from coordinated procurement through the preparation of common technical specifications for works, supplies or services that will be procured by a number of contracting entities, each conducting a separate procurement procedure, to situations where the contracting entities concerned jointly conduct one procurement procedure either by acting together or by entrusting one contracting entities with the management of the procurement procedure on behalf of all contracting entities.

Where different contracting entities are jointly conducting a procurement procedure, they should be jointly responsible for fulfilling their obligations under this Directive. However, where only parts of the procurement procedure are jointly conducted by the contracting entities, joint responsibility should only apply to those parts of the procedure that have been carried out together.

Each contracting entity should be solely responsible in respect of procedures or parts of procedures it conducts on its own, such as the awarding of a contract, the conclusion of a framework agreement, the operation of a dynamic purchasing system or the reopening of competition under a framework agreement.

- (33) Electronic means of communication are particularly well suited to support centralised purchasing practices and tools because of the possibility they offer to re-use and automatically process data and to minimise information and transaction costs. The use of such electronic means of communication should therefore, as a first step, be rendered compulsory for central purchasing bodies, while also facilitating converging practices across the Union. This should be followed by a general obligation to use electronic means of communication in all procurement procedures after a transition period of thirty months.
- (34) Joint awarding of contracts by contracting entities from different Member States currently encounters specific legal difficulties concerning conflicts of national laws. Despite the fact that Directive 2004/17/EC implicitly allowed for cross-border joint public procurement, contracting entities are still facing considerable legal and practical difficulties in purchasing from central purchasing bodies in other Member States or jointly awarding contracts. In order to allow contracting entities to derive maximum benefit from the potential of the internal market in terms of economies of scale and risk-benefit sharing, not least for innovative projects involving a greater amount of risk than reasonably bearable by a single contracting entity, these difficulties should be remedied. Therefore new rules on cross-border joint procurement should be established in order to facilitate cooperation between contracting entities and enhancing the benefits from the internal market by creating cross-border business opportunities for suppliers and service providers. Those rules should determine the conditions for cross-border utilisation of central purchasing bodies and designate the applicable public procurement legislation, including the applicable legislation on remedies, in cases of cross-border joint procedures, complementing the conflict of law rules of Regulation (EC) No 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I). In addition, contracting entities from different Member States may set up joint legal bodies established under national or Union law. Specific rules should be established for such form of joint procurement.

However, contracting entities should not make use of the possibilities for cross-border joint procurement for the purpose of circumventing mandatory public law rules, in conformity with Union law, which are applicable to them in the Member State where they are located. Such rules may include, for example, provisions on transparency and access to documents or specific requirements for the traceability of sensitive supplies.

- (35) The technical specifications drawn up by purchasers need to allow public procurement to be open to competition as well as to achieve objectives of sustainability. To that end, it should be possible to submit tenders that reflect the diversity of technical solutions, standards and technical specifications in the marketplace, including those drawn up on the basis of performance criteria linked to the life cycle and the sustainability of the production process of the works, supplies and services.

Consequently, technical specifications should be drafted in such a way to avoid artificially narrowing down competition through requirements that favour a specific economic operator by mirroring key characteristics of the supplies, services or works habitually offered by that economic operator. Drawing up the technical specifications in terms of functional and performance requirements generally allows this objective to be achieved in the best way possible. Functional and performance related requirements are also appropriate means to favour innovation in public procurement and should be used as widely as possible. Where reference is made to a European standard or, in the absence thereof, to a national standard, tenders based on other equivalent arrangements which meet the requirements of the contracting entities and are equivalent in terms of safety should be considered by the contracting entities. It should be the responsibility of the economic operator to prove equivalence with the requested label.

To prove equivalence, tenderers can be required to provide third-party verified evidence; however, other appropriate means of proof such as a technical dossier of the manufacturer should also be allowed where the economic operator concerned has no access to such certificates or test reports, or no possibility of obtaining them within the relevant time limits provided that the economic operator concerned thereby proves that the works, supplies or services meet the requirements or criteria set out in the technical specifications, the award criteria or the contract performance conditions.

- (35a) For all procurement intended for use by persons, whether general public or staff of the contracting entity, it is necessary that contracting entities lay down technical specifications so as to take into account accessibility criteria for people with disabilities or design for all users, except in duly justified cases.
- (36) Contracting entities that wish to purchase works, supplies or services with specific environmental, social or other characteristics should be able to refer to particular labels, such as the European Eco-label, (multi-) national eco-labels or any other label provided that the requirements for the label are linked to the subject-matter of the contract, such as the description of the product and its presentation, including packaging requirements. It is furthermore essential that those requirements are drawn up and adopted on the basis of objectively verifiable criteria, using a procedure in which stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations can participate, and that the label is accessible and available to all interested parties. It should be clarified that stakeholders could be public or private bodies, businesses or any sort of non-governmental organizations (organizations that are not a part of a government and are not conventional for-profit businesses).

It should equally be clarified that specific national or government bodies or organizations may be involved in setting up label requirements that may be used in connection with procurement by public authorities without these bodies or organizations losing their status as third parties.

It should be avoided that references to labels would have the effect of restricting innovation.

- (37a) When drawing up technical specifications, contracting entities should take into account requirements ensuing from data protection law in relation to the design of the processing of personal data (data protection by design).

- (38) Public procurement should be adapted to the needs of small and medium-sized enterprises (SMEs). Contracting entities should be encouraged to make use of the Code of Best Practices set out in the Commission Staff Working Document of 25 June 2008 entitled 'European Code of Best Practices Facilitating Access by SMEs to Public Procurement Contracts'<sup>22</sup>, providing guidance on how they may apply the public procurement framework in a way that facilitates SME participation. To that end, it should be provided explicitly that contracts may be divided into lots. Such division could be done on a quantitative basis, making the size of the individual contracts better correspond to the capacity of SMEs, or on a qualitative basis, in accordance with the different trades and specialisations involved, to adapt the content of the individual contracts more closely to the specialised sectors of SMEs and/or in accordance with different subsequent project phases. The size and subject-matter of the lots should be determined freely by the contracting entity, which, in accordance with the relevant rules on the calculation of the estimated value of procurement, should also be allowed to award some of the lots without applying the procedures of this Directive.

Member States should remain free to go further in their efforts to facilitate the involvement of SMEs in the public procurement market, by introducing an obligation to consider the appropriateness of dividing contracts into lots to smaller contracts, by requiring contracting entities to provide a justification for a decision not to divide contracts into lots or by rendering a division into lots obligatory under certain conditions.

With the same purpose, Member States should also be free to provide mechanisms for direct payments to subcontractors.

- (38a) Where contracts are divided into lots, contracting entities should, for instance in order to preserve competition or to ensure reliability of supply, be allowed to limit the number of lots for which an economic operator may tender; they should also be allowed to limit the number of lots that may be awarded to any one tenderer.

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<sup>22</sup> SEC(2008)2193.

However, the objective of facilitating greater access to public procurement by SMEs might be hampered if contracting entities would be obliged to award the contract lot by lot even where this would entail having to accept substantially less advantageous solutions compared to an award grouping several or all of the lots. Where the possibility to apply such a method has been clearly indicated beforehand, it should therefore be possible for contracting entities to conduct a comparative assessment of the tenders in order to establish whether the tenders submitted by a particular tenderer for a specific combination of lots would, taken as whole, fulfil the award criteria set out pursuant to Article 76 with regard to these lots better than the tenders for the individual lots concerned seen in isolation. If so, then the contracting entities should be allowed to award a contract combining the lots in question to the tenderer concerned. It should be clarified that contracting entities should conduct such a comparative assessment by first determining which tenders best fulfil the award criteria set out pursuant to Article 76 for each individual lot and then comparing it with the tenders submitted by a particular tenderer for a specific combination of lots, taken as whole.

- (38b) In order to make procedures faster and more efficient, time limits for participation in procurement procedures should be kept as short as possible without creating undue barriers to access for economic operators from across the Internal Market and in particular SMEs. It should therefore be kept in mind that, when fixing the time limits for the receipt of tenders and requests to participate, contracting entities should take account in particular of the complexity of the contract and the time required for drawing up tenders, even if this entails setting time limits that are longer than the minima provided for under this Directive. Use of electronic means of information and communication, in particular full electronic availability to economic operators, tenderers and candidates of procurement documents and electronic transmission of communications does on the other hand lead to increased transparency and time savings. Therefore, provision should be made for reducing the minimum time limits applicable to open procedures in line with the rules set by the Agreement and subject to the condition that they are compatible with the specific mode of transmission envisaged at Union level. Furthermore, contracting entities should have the opportunity to further shorten the time limits for receipt of tenders in open procedures in cases where a state of urgency renders the regular time limit in open procedures impracticable, but does not make an open procedure with shortened deadline impossible.



Only in exceptional situations where extreme urgency brought about by events unforeseeable by the contracting entity concerned that are not attributable to that contracting entity makes it impossible to conduct a regular procedure even with shortened time limits, contracting entities should, insofar as strictly necessary, have the possibility to award contracts by negotiated procedure without prior call for competition. This may be case where natural catastrophes require immediate action.

- (38ba) It should be clarified that the need to ensure that economic operators dispose of sufficient time in which to draw up responsive tenders may entail that the time limits which were set initially may have to be prolonged. Such would in particular be the case where significant changes are made to the procurement documents. It should also be specified that, in this context, significant changes should be understood as covering changes, in particular to the technical specifications, in respect of which economic operators would need to dispose of additional time in order to understand and respond appropriately. It should, however, be clarified that such changes should not be so substantial that the admission of other candidates than those initially selected would have been allowed for or additional participants in the procurement procedure would have been attracted; such could in particular be the case where the changes renders the contract or the framework agreement materially different in character from the one initially set out in the procurement documents.
- (38c) It should be clarified that the information concerning certain decisions taken during a procurement procedure, including the decision not to award a contract or conclude a framework agreement should be sent by the contracting entities, without candidates or tenderer having to request such information. It should also be recalled that Directive 92/13/EEC provides for an obligation for contracting entities, again without candidates or tenderer having to request it, to provide the concerned candidates and tenderers with a summary of the relevant reasons for some of the central decisions that are taken in the course of a procurement procedure. It should finally be clarified that candidates and tenderers should be enabled to request more detailed information concerning these reasons,

which contracting entities should be required to give except where there would be serious grounds for not doing so. These grounds should be set out in the Directive. To ensure the necessary transparency in the context of procurement procedures involving negotiations and dialogues with tenderers, tenderers having made an admissible tender should, within the same limits, also be enabled to request information on the conduct and progress of the procedure.

- (39) Insofar as compatible with the need to ensure the objective of sound commercial practice while allowing for maximum flexibility, it is appropriate to provide for the application of Directive 2004/18/EC on public procurement in respect of requirements concerning economic and financial capacity and documentary evidence. It is therefore foreseen that contracting entities may apply the selection criteria provided for in Directive 2004/18/EC and that, where they do, they are then obliged to apply the provisions concerning notably the ceiling to requirements on minimum turnover as well as on use of the European Single Procurement Document.
- (39a) Contracting entities may require that environmental management measures or schemes are to be applied during the performance of a contract. Environmental management schemes, whether or not they are registered under Union instruments such as Regulation (EC) No 1221/2009 of the European Parliament and of the Council of 25 November 2009 on the voluntary participation by organisations in a Community eco-management and audit scheme (EMAS)<sup>23</sup>, can demonstrate that the economic operator has the technical capability to perform the contract. A description of the measures implemented by the economic operator to ensure the same level of environmental protection should be accepted as an alternative to environmental management registration schemes as a form of evidence, where the economic operator concerned has no access to such environmental management registration schemes or no possibility of obtaining them within the relevant time limits.

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<sup>23</sup> OJ L 342, 22.12.2009, p. 1.

(39bb) The notion of award criteria is central to this Directive, it is therefore important that the relevant provisions are presented in as simple and streamlined a way as possible. This may be obtained by using the terminology "most economically advantageous tender" as the overriding concept as all winning tenders should finally be chosen in accordance with what the individual contracting entity considers to be the economically best solution among those offered. To avoid confusion with the award criterion that is currently known as the "most economically advantageous tender" in Directives 2004/17/EC and 2004/18/EC, a different terminology should be used to cover that concept, the "best price-quality ratio"; consequently, it should be interpreted in accordance with the relative jurisprudence under those Directives, except where there is a clearly materially different solution in this Directive.

(39b) Contracts should be awarded on the basis of objective criteria that ensure compliance with the principles of transparency, non-discrimination and equal treatment, with a view to ensuring an objective comparison of the relative value of the tenders in order to determine, in conditions of effective competition, which tender is the most economically advantageous tender. It should be set out explicitly that the most economically advantageous tender should be assessed on the basis of the best price-quality ratio which should always include a price or cost element. It should equally be clarified that such assessment of the most economically advantageous tender could also be carried out on the basis of either price or cost effectiveness only. It is furthermore appropriate to recall that contracting entities are free to set adequate quality standards by using technical specifications or contract performance conditions.

In order to encourage a greater quality orientation of public procurement, Member States should be permitted to prohibit or restrict use of price only or cost only to assess the most economically advantageous tender where they deem this appropriate.

To ensure compliance with the principle of equal treatment in the award of contracts, contracting entities should be obliged to create the necessary transparency to enable all tenderers to be reasonably informed of the criteria and arrangements which will be applied in the contract award decision.

Contracting entities should therefore be obliged to indicate the contract award criteria and the relative weighting given to each of those criteria. Contracting entities should, however, be permitted to derogate from that obligation to indicate the weighting of the criteria in duly justified cases for which they must be able to give reasons, where the weighting cannot be established in advance, in particular because of the complexity of the contract. In such cases, they should indicate the criteria in decreasing order of importance.

- (39c) Under Article 11 of the Treaty on the Functioning of the European Union, environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development. This Directive clarifies how the contracting entities may contribute to the protection of the environment and the promotion of sustainable development, whilst ensuring that they can obtain the best value for money for their contracts.
- (39d) When assessing the best price-quality ratio contracting entities should determine the economic and qualitative award criteria linked to the subject-matter of the contract on the basis of which they will assess tenders in order to identify the most economically advantageous tender from the view of the contracting entity. These criteria should thus allow for a comparative assessment of the level of performance offered by each tender to be assessed in the light of the subject-matter of the contract, as defined in the technical specifications. In the context of the best price-quality ratio, a non-exhaustive list of possible award criteria is set out in this Directive. Contracting entities should be encouraged to choose award criteria that allow them to obtain high-quality works, supplies and services that are optimally suited to their needs.

The chosen award criteria should not confer an unrestricted freedom of choice on the contracting entity and they should ensure the possibility of effective competition and be accompanied by requirements that allow the information provided by the tenderers to be effectively verified.

To identify the most economically advantageous tender, the contract award decision should not be based on non-cost criteria only. Qualitative criteria should therefore be accompanied by a cost criterion that could, at the choice of the contracting entity, be either the price or a cost-effectiveness approach such as life-cycle costing. However, the award criteria should not affect the application of national provisions determining the remuneration of certain services or setting out fixed prices for certain supplies.

- (39da) Where national provisions determine the remuneration of certain services or set out fixed prices for certain supplies, it should be clarified that it remains possible to assess value for money on the basis of other factors than the sole price or remuneration. Depending on the service or product concerned, such factors could, for instance, include conditions of delivery and payment, aspects of after-sale service (e.g. extent of advisory and replacement services) or environmental or social aspects (e.g. whether books were stamped on recycled paper or paper from sustainable timber, the cost imputed to environmental externalities or whether the social integration of disadvantaged persons or members of vulnerable groups amongst the persons assigned to performing the contract has been furthered). Given the numerous possibilities of evaluating value for money on the basis of substantive criteria, recourse to drawing of lots as the sole means of awarding the contract should be avoided.
- (39e) Wherever the quality of the staff employed is relevant to the level of performance of the contract, contracting entities should also be allowed to use as an award criterion the organisation, qualification and experience of the staff assigned to performing the contract in question, as this may affect the quality of contract performance and, as a result, the economic value of the tender. This may be the case, for example, in contracts for intellectual services such as consultancy or architectural services. Contracting entities which make use of this possibility should ensure, by appropriate means of contractual law, that the staff assigned to contract performance effectively fulfil the specified quality standards and that such staff may only be replaced with the consent of the contracting entity which verifies that the replacement staff affords an equivalent level of quality.

(39g) It is of utmost importance to fully exploit the potential of public procurement to achieve the objectives of the Europe 2020 Strategy for sustainable growth. In this context, it should be recalled that public procurement is crucial to driving innovation, which is of great importance for future growth in Europe. In view of the important differences between individual sectors and markets, it would however not be appropriate to set general mandatory requirements for environmental, social and innovation procurement.

The Union legislature has already set mandatory procurement requirements for obtaining specific goals in the sectors of road transport vehicles (Directive 2009/33/EC of the European Parliament and the Council of 23 April 2009 on the promotion of clean and energy-efficient road transport vehicles<sup>24</sup>) and office equipment (Regulation (EC) No 106/2008 of the European Parliament and the Council of 15 January 2008 on a Community energy-efficiency labelling programme for office equipment<sup>25</sup>). In addition, the definition of common methodologies for life cycle costing has significantly advanced.

It therefore appears appropriate to continue on that path, leaving it to sector-specific legislation to set mandatory objectives and targets in function of the particular policies and conditions prevailing in the relevant sector and to promote the development and use of European approaches to life-cycle costing as a further underpinning for the use of public procurement in support of sustainable growth.

(39h) Those sector-specific measures should be complemented by an adaptation of the public procurement Directives empowering contracting entities to pursue the objectives of the Europe 2020 Strategy in their purchasing strategies. It should hence be made clear that, except where it is assessed on the basis of price only, contracting entities can determine the most economically advantageous tender and the lowest cost using a life-cycle costing approach. The notion of life-cycle costing includes all costs over the life-cycle of a works, supplies or services.

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<sup>24</sup> OJ L 120, 15.5.2009, p. 5.

<sup>25</sup> OJ L 39, 13.2.2008, p. 1.

This means internal costs such as research to be carried out, development, production, transport, use, maintenance and end-of-life disposal costs, but can also include costs imputed to environmental externalities, such as pollution caused by extraction of the raw materials used in the product or caused by the product itself or its manufacturing, provided they can be monetised and monitored. The methods which contracting entities use for assessing costs imputed to environmental externalities should be established in advance in an objective and non-discriminatory manner and be accessible to all interested parties. Such methods can be established at national, regional or local level, but they should, to avoid distortions of competition through tailor-made methodologies, remain general in the sense that they should not be set up specifically for a particular public procurement procedure. Common methodologies should be developed at the level of the Union for the calculation of life-cycle costs for specific categories of supplies or services . Where such common methodologies are developed, their use should be made compulsory.

Furthermore, the feasibility of establishing a common methodology on social life cycle costing should be examined, taking into account existing methodologies such as the Guidelines for Social Life Cycle Assessment of Products adopted within the framework of the United Nations Environment Programme.

- (39i) Furthermore, in view of a better integration of social and environmental considerations in the procurement procedures, contracting entities should be allowed to use award criteria or contract performance conditions relating to the works, supplies or services to be provided under the public contract in any respect and at any stage of their life cycles from extraction of raw materials for the product to the stage of disposal of the product, including factors involved in the specific process of production, provision or trading and its conditions of those works, supplies or services or a specific process during a later stage of their life cycle, even where such factors do not form part of their material substance. Criteria and conditions referring to such a production or provision process are for example that the manufacturing of the purchased goods did not involve toxic chemicals, or that the purchased services are provided using energy-efficient machines.

In accordance with the case-law of the Court of Justice of the European Union, this includes also award criteria or contract performance conditions relating to the supply or utilisation of fair trade products in the course of the performance of the contract to be awarded. Contract performance conditions pertaining to environmental considerations may include, for example, the delivery, package and disposal of products, and in respect of works and services contracts, waste minimisation or resource efficiency.

However, the condition of a link with the subject-matter of the contract excludes criteria and conditions relating to general corporate policy, which cannot be considered as a factor characterising the specific process of production or provision of the purchased works, supplies or services. Contracting entities should hence not be allowed to require tenderers to have a certain corporate social or environmental responsibility policy in place.

- (39j) It is essential that award criteria or contract performance conditions concerning social aspects of the production process relate to the works, supplies or services to be provided under the contract. In addition, they should be applied in accordance with Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services<sup>26</sup>, as interpreted by the European Court of Justice and should not be chosen or applied in a way that discriminates directly or indirectly against economic operators from other Member States or from third countries parties to the Agreement or to Free Trade Agreements to which the Union is party. Thus, requirements concerning the basic working conditions regulated in Directive 96/71/EC, such as minimum rates of pay, should remain at the level set by national legislation or by collective agreements applied in accordance with Union law in the context of that Directive

Contract performance conditions may also be intended to favour the promotion of equality of women and men at work, the increased participation of women in the labour market and the reconciliation of work and private life, the protection of the environment or animal welfare and, to comply in substance with fundamental International Labour Organization (ILO) Conventions, and to recruit more disadvantaged persons than are required under national legislation.

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<sup>26</sup> OJ L 18, 21.1.1997, p.1.



- (41b) Measures aiming at the protection of health of the staff involved in the production process, the favouring of social integration of disadvantaged persons or members of vulnerable groups amongst the persons assigned to performing the contract or training in the skills needed for the contract in question can also be the subject of award criteria or contract performance conditions provided that they relate to the works, supplies or services to be provided under the contract. For instance, such criteria or conditions may refer, amongst other things, to the employment of long-term job-seekers, the implementation of training measures for the unemployed or young persons in the course of the performance of the contract to be awarded. In technical specifications contracting entities can provide such social requirements which directly characterise the product or service in question, such as accessibility for persons with disabilities or design for all users.
- (40) Public contracts should not be awarded to economic operators that have participated in a criminal organisation or have been found guilty of corruption, fraud to the detriment of the Union's financial interests, terrorist offences, money laundering or terrorist financing. Non-payment of taxes or social security contributions should also be sanctioned by mandatory exclusion at the level of the Union. Member States should, however, be able to provide for a derogation from these mandatory exclusions in exceptional situations where overriding requirements in the general interest make a contract award indispensable. This might, for example, be the case where urgently needed vaccines or emergency equipment can only be purchased from an economic operator to whom one of the mandatory grounds for exclusion applies. Given that contracting entities, which are not contracting authorities, might not have access to indisputable proof on the matter, it is appropriate to leave the choice of whether or not to apply the exclusion criteria listed in Directive 2004/18 to such contracting entities. The obligation to apply Article 55(1) and (2) of Directive ... replacing Directive 2004/18 should therefore be limited to contracting entities that are contracting authorities.

- (40a) Contracting entities should further be given the possibility to exclude economic operators which have environmental protection requirements violations of environmental or social obligations, including rules on accessibility for disabled persons or other forms of grave professional misconduct, such as violations of competition rules or of intellectual property rights.

Bearing in mind that the contracting entity will be responsible for the consequences of its possible erroneous decision, contracting entities should also remain free to consider that there has been grave professional misconduct, where, before a final and binding decision on the presence of mandatory exclusion grounds has been rendered, they can demonstrate by any appropriate means that the economic operator has violated its obligations, including obligations relating to the payment of taxes or social security contributions, unless otherwise provided by the applicable national law.

They should also be able to exclude candidates or tenderers whose performance in earlier public contracts or contracts with other contracting entities has shown major deficiencies with regard to substantive requirements, for instance failure to deliver or perform, significant shortcomings of the product or service delivered, making it unusable for the intended purpose, or misbehaviour that casts serious doubts as to the reliability of the economic operator. National law should provide for a maximum duration for such exclusions.

In applying facultative grounds for exclusion, particular attention should be paid to the principle of proportionality. Minor irregularities should only in exceptional circumstances lead to the exclusion of an economic operator. However repeated cases of minor irregularities can give rise to doubts about the reliability of an economic operator which might justify its exclusion.

- (41) Where contracting entities are obliged or choose to apply the just mentioned exclusion criteria, they should apply Directive ... replacing Directive 2004/18 concerning the possibility that economic operators adopt compliance measures aimed at remedying the consequences of any criminal offences or misconduct and at effectively preventing further occurrences of the misbehaviour.

- (49) Tenders that appear abnormally low in relation to the works, supplies or services might be based on technically, economically or legally unsound assumptions or practices. Where the tenderer cannot provide a sufficient explanation, the contracting entity should be entitled to reject the tender. Rejection should be mandatory in cases where the contracting entity has established that the abnormally low price or costs proposed results from non-compliance with mandatory Union legislation or national law compatible with it in the fields of social, labour or environmental law or international labour law provisions.
- (49aaa) Contract performance conditions are for laying down specific requirements relating to the performance of the contract. Unlike contract award criteria which are the basis for a comparative assessment of the quality of tenders, contract performance conditions constitute fixed objective requirements that have no impact on the assessment of tenders. Contract performance conditions are compatible with this Directive provided that they are not directly or indirectly discriminatory and are linked to the subject matter of the contract, which comprises all factors involved in the specific process of production, provision or commercialisation. This includes conditions concerning the process of performance of the contract, but excludes requirements referring to a general corporate policy.
- (49aa) It is important that observance by subcontractors of applicable obligations in the fields of environmental, social and labour law, established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex XIV, provided that such rules, and their application, comply with Union law, is ensured through appropriate actions within the scope of their responsibilities and remit by the competent national authorities, such as for instance labour inspections or environmental protection agencies.

It is also necessary to ensure some transparency in the subcontracting chain, as this will give contracting entities information on who are present at building sites on which works are being performed for them or which undertakings are providing services in or at buildings, infrastructures or areas, such as town halls, municipal schools, sports facilities, ports or motorways, for which the contracting entities are responsible or over which they have a direct oversight. It should be clarified that the obligation to deliver the required information will in any case be incumbent on the main contractor, either on the basis of specific clauses, that each contracting entity would have to include in all procurement procedures, or on the basis of obligations which Member States would impose on main contractors by means of generally applicable provisions.

It should also be clarified that the conditions relating to the enforcement of observance of applicable obligations in the fields of environmental, social and labour law, established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex XIV, provided that such rules, and their application, comply with Union law, should be applied whenever the national law of a Member State provides for a mechanism of joint liability between subcontractors and the main contractor. Furthermore, it should be stated explicitly that Member States may go further, for instance by extending the transparency obligations, by enabling direct payment to subcontractors or by enabling or requiring contracting authorities to verify that subcontractors are not in any of the situations in which exclusion of economic operators would be warranted.

Where such measures are applied to subcontractors, coherence with the provisions applicable to main contractors should be ensured so that existence of compulsory exclusion grounds would be followed by a requirement that the main contractor substitute the subcontractor concerned. Where such verification shows the presence of non-compulsory grounds for exclusion, it should be clarified that contracting authorities may require the substitution; it should, however, also be set out explicitly that contracting authorities may be obliged to require the substitution of the subcontractor concerned where exclusion of main contractors has been rendered obligatory in the same cases.

It should finally be set out explicitly that Member States remain free to provide for more stringent liability rules under national law or to go further under national law on direct payments to subcontractors.

- (49a) Having regard to current discussions on horizontal provisions governing relations with third countries in the context of public procurement, it is appropriate to maintain for an interim period the status quo of the regime which is currently applicable to the utilities sector pursuant to Articles 58 and 59 of Directive 2004/17/EC. Consequently, these provisions should be kept unchanged, including the provision for the adoption of implementing acts where Union undertakings have difficulties in accessing third country markets. Under these circumstances, these acts should continue to be taken by the Council.
- (52) It should be recalled that Council Regulation (EEC, Euratom) No 1182/71 of 3 June 1971 determining the rules applicable to periods, dates and time limits applies to the calculation of the time limits contained in this Directive.
- (53) It is necessary to clarify the conditions under which modifications of a contract during its performance require a new procurement procedure, taking into account the relevant case-law of the Court of Justice of the European Union. A new procurement procedure is required in case of material changes to the initial contract, in particular to the scope and content of the mutual rights and obligations of the parties, including the distribution of intellectual property rights. Such changes demonstrate the parties' intention to renegotiate essential terms or conditions of that contract. This is the case in particular if the amended conditions would have had an influence on the outcome of the procedure, had they been part of the initial procedure.

Modifications of the contract resulting in a minor change of the contract value up to a certain value should always be possible without the need to carry out a new procurement procedure. To this effect and in order to ensure legal certainty this directive should provide for “de minimis” thresholds, below which a new procurement procedure is not necessary. Modifications of the contract above those thresholds should be possible without the need to carry out a new procurement procedure to the extent they comply with conditions laid down in Article 82.

(54a) Contracting entities may be faced with situations where additional works supplies or services become necessary; in such cases a modification of the initial contract without a new procurement procedure may be justified, in particular where the additional deliveries are intended either as a partial replacements or as the extension of existing services, supplies or installations where a change of supplier would oblige the contracting entity to acquire material, works or services having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance

(54) Contracting entities can be faced with external circumstances that they could not foresee when they awarded the contract, in particular when the performance of the contract covers a longer period of time. In this case, a certain degree of flexibility is needed to adapt the contract to those circumstances without a new procurement procedure. The notion of unforeseeable circumstances refers to circumstances that could not have been predicted despite reasonably diligent preparation of the initial award by the contracting entity, taking into account its available means, the nature and characteristics of the specific project, good practice in the field in question and the need to ensure an appropriate relationship between the resources spent in preparing the award and its foreseeable value.

However, this cannot apply in cases where a modification results in an alteration of the nature of the overall procurement, for instance by replacing the works, supplies or services to be procured by something different or by fundamentally changing the type of procurement since, in such a situation, a hypothetical influence on the outcome may be assumed.

(55) In line with the principles of equal treatment and transparency, the successful tenderer should not, for instance where a contract is terminated because of deficiencies in the performance, be replaced by another economic operator without reopening the contract to competition. However, the successful tenderer performing the contract may, in particular where the contract has been awarded to more than one undertaking, undergo certain structural changes during the performance of the contract, such as purely internal reorganisations, takeovers, mergers and acquisitions or insolvency. Such structural changes should not automatically require new procurement procedures for all contracts performed by that tenderer.

- (56) Contracting entities should, in the individual contracts themselves, have the possibility to provide for modifications by way of review or option clauses, but such clauses should not give them unlimited discretion. This directive should therefore set out to what extent modifications may be provided for in the initial contract. It should consequently be clarified that sufficiently clearly drafted review or option clauses may for instance provide for price indexations or ensure that, e. g. , communications equipment to be delivered over a given period continues to be suitable, also in case of changing communications protocols or other technological changes. It should also be possible under sufficiently clear clauses to provide for adaptations of the contract which are rendered necessary by technical difficulties which have appeared during operation or maintenance. It should finally be recalled that contracts could, for instance, include both ordinary maintenance as well as provide for extraordinary maintenance interventions that might become necessary in order to ensure continuation of a public service.
- (61a) Contracting entities are sometimes faced with circumstances that require the early termination of public contracts in order to comply with obligations stemming from EU law in the field of public procurement. Member States should therefore ensure that contracting entities have the possibility, under the conditions determined by the applicable national law, to terminate a public contract during its term if so required by Union law.
- (61b) Design contests have traditionally mostly been used in the fields of town and country planning, architecture and engineering or data processing. It should, however, be recalled that these flexible instruments could be used also for other purposes and that it may be stipulated that the subsequent service contracts would be awarded to the winner or one of the winners of the design contest by a negotiated procedure without publication.

(61c) The evaluation has shown that there is still considerable room for improvement in the application of the Union public procurement rules. In view of a more efficient and consistent application of the rules, it is essential to get a good overview on possible structural problems and general patterns in national procurement policies, in order to address possible problems in a more targeted way. This overview should be gained through appropriate monitoring, the results of which should be regularly published, in order to allow an informed debate on possible improvements of procurement rules and practice. Acquiring such a good overview could also allow insights on the application of public procurement rules in the context of the implementation of projects co-financed by the Union. Member States should remain free to decide how and by whom this monitoring should be carried out in practice; in so doing, they should also remain free to decide whether the monitoring should be based on a sample-based ex-post control or on a systematic, ex-ante control of public procurement procedures covered by this Directive. It should be possible to bring potential problems to the attention of the proper instances; this should not necessarily require that those having performed the monitoring are given an independent standing before courts and tribunals.

Better guidance, information and support to contracting entities and economic operators could also greatly contribute to enhancing the efficiency of public procurement, through better knowledge, increased legal certainty and professionalisation of procurement practices; such guidance should be made available to contracting entities and economic operators wherever it appears necessary to improve correct application of the rules. The guidance to be provided could cover all matters relevant to public procurement, such as acquisition planning, procedures, choice of techniques and instruments and good practices in the conduct of the procedures.

With regard to legal questions, guidance should not necessarily amount to a complete legal analysis of the issues concerned; it could be limited to a general indication of the elements that should be taken into consideration for the subsequent detailed analysis of the questions, for instance by pointing to jurisprudence that could be relevant or to guidance notes or other sources having examined the specific question concerned.



(61d) Council Directive 92/13/EEC provides for certain review procedures to be available at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement of Union law in the field of public procurement or national rules transposing that law. These review procedures should not be affected by this Directive. However, citizens, concerned stakeholders, organised or not, and other persons or bodies which do not have access to review procedures pursuant to Council Directive 92/13/EEC do nevertheless have a legitimate interest as taxpayers in sound procurement procedures.

They should therefore be given a possibility, otherwise than through the review system pursuant to Directive 92/13/EEC and without it necessarily involving them being given standing before courts and tribunals, to indicate possible violations of this Directive to a competent authority or structure. So as not to duplicate existing authorities or structures, Member States should be able to provide for recourse to general monitoring authorities or structures, sectoral oversight bodies, municipal oversight authorities, competition authorities, the ombudsman or national auditing authorities.

(61e) In order to fully exploit the potential of public procurement to achieve the objectives of the Europe 2020 Strategy for sustainable growth, environmental, social and innovation procurement will also have to play its part. It is therefore important to obtain an overview of the developments in the field of strategic procurement so as to take an informed view on the general trends at the overall (macro) level in this area. Any already prepared, appropriate reports can of course be used in this context also.

(61f) Given the potential of SMEs for job creation, growth and innovation it is important to encourage their participation in public procurement, both through appropriate provisions in this Directive as well as through initiatives at the national level. The new provisions provided for in this Directive should contribute towards an improvement of the level of success, by which is understood the share of SMEs in the total value of contracts awarded. It is not appropriate to impose obligatory shares of success, however, the national initiatives to enhance SME participation should be closely monitored given its importance.

- (61g) A series of procedures and working methods have already been established in respect of the Commission's communications and contacts with Member States, such as communications and contacts relating to the procedures provided for under Articles 258 and 260 TFEU, SOLVIT and EU Pilot, which are obviously not modified by this Directive. They should, however, be complemented by the designation of one single point of reference in each Member State for the cooperation with the Commission, which would function as sole entry point for matters concerning public procurement in the Member State concerned. This function may be performed by persons or structures which are already regularly in contact with the Commission on issues relating to public procurement, such as national contact points, members of the Advisory Committee on Public Procurement, Members of the Procurement Network or national coordinating instances.
- (61h) Traceability and transparency of decision-making in procurement procedures is essential for ensuring sound procedures, including efficiently fighting corruption and fraud. Contracting authorities should hence keep copies of concluded high-value contracts, in order to be able to provide access to these documents to interested parties in accordance with applicable rules on access to documents. Furthermore, the essential elements and decisions of individual procurement procedures should be documented by contracting entities in a procurement report. To avoid administrative burden wherever possible, it should be permitted that the procurement report refer to information already contained in the relevant contract award notice.

The electronic systems for publication of these notices, managed by the Commission, should also be improved with a view of facilitating the entry of data while making it easier to extract global reports and exchange data between systems.

- (61i) In the interests of administrative simplification and in order to lessen the burden on Member States, the Commission should periodically examine whether the quality and completeness of the information contained in the notices which are published in connection with public procurement procedures is sufficient to allow the Commission to extract the statistical information that would otherwise have to be transmitted by the Member States.

(61j) Effective administrative cooperation is necessary for the exchange of information needed for conducting award procedures in cross-border situations, in particular with regard to the verification of the grounds for exclusion and the selection criteria and the application of quality and environmental standards. The Internal Market Information System (IMI) established by Regulation (EU) No 1024/2012 of the European Parliament and of the Council of 25 October 2012 on administrative cooperation through the Internal Market Information System and repealing Commission Decision 2008/49/EC ('the IMI Regulation')<sup>27</sup> could provide a useful electronic means to facilitate and enhance administrative cooperation managing the exchange of information on the basis of simple and unified procedures overcoming language barriers. A pilot project should consequently be launched as soon as possible to test the suitability of an expansion of IMI to cover the exchange of information under this Directive.

(62) In order to adapt to rapid technical, economic and regulatory developments, the power to adopt acts in accordance with Article 290 of the Treaty on the Functioning of the European Union should be delegated to the Commission in respect of a number of non-essential elements of this Directive. In fact, due to the need to comply with international agreements, the Commission should be empowered to modify the technical procedures for the calculation methods concerning thresholds as well as to periodically revise the thresholds themselves; references to the CPV nomenclature may undergo regulatory changes at EU level and it is necessary to reflect those changes into the text of this Directive; the technical details and characteristics of the devices for electronic receipt should be kept up to date with technological developments ; it is also necessary to empower the Commission to make mandatory certain technical standards for electronic communication to ensure the interoperability of technical formats, processes and messaging in procurement procedures conducted using electronic means of communication taking into account technological developments ; the Commission should also be empowered to adapt the list of legislative acts of the Union establishing common methodologies for the calculation of life-cycle costs,

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<sup>27</sup> OJ L 316 of 14.11.2012, p. 1.

referred to in article 77(3); the list of International Social and Environmental Conventions referred to in Articles 70 And 79 and the list of Union legislation referred to in article 27(3) whose implementation creates a presumption of free access to a given market as well as Annex II, referred to in Article 4(4), setting out a list of legislative acts to be taken into account when assessing the existence of special or exclusive rights, should be quickly adapted to incorporate the measures adopted on a sectoral basis. In order to satisfy this need, the Commission should be empowered to keep the lists up-to date.

- (63) It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level. When preparing and drawing up delegated acts, the Commission should ensure simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and the Council.
- (63a) In the application of the Directive the Commission should consult appropriate groups of experts in the field of e-procurement ensuring a balanced composition of the main stakeholder groups.
- (64) In order to ensure uniform conditions for the implementation of this Directive, as for the procedure for sending and publishing data referred to in Annex IX and the procedures for drawing up and transmitting notices, the standard forms for the publication of notices , implementing powers should be conferred on the Commission. Those powers should be exercised in accordance with Regulation (EU) No. 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by the Member States of the Commission's exercise of implementing powers<sup>28</sup>. The advisory procedure should be used for the adoption of those implementing acts, which do not have any impact either from the financial point of views or on the nature and scope of obligations stemming from this Directive. On the contrary, those acts are characterised by a mere administrative purpose and serve to facilitate the application of the rules set by this Directive.

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<sup>28</sup> OJ L 55, 28.2.2011, p. 13.

Furthermore, decisions to establish whether a given activity is directly exposed to competition on markets to which access is free should be adopted under conditions ensuring uniform conditions for implementing that provision. Implementing powers should therefore be conferred on the Commission also in respect of the detailed provisions for the implementation of the procedure, provided for under Article 28, for establishing whether Article 27 is applicable as well as the implementing acts themselves. Those powers should be exercised in accordance with Regulation (EU) 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by the Member States of the Commission's exercise of implementing powers<sup>29</sup>. The advisory procedure should be used for the adoption of those implementing acts.

- (64a) The Commission should review the effects on the internal market resulting from the application of the thresholds and report thereon to the European Parliament and the Council at the latest three years after the entry into force of this Directive. In so doing, it should take into account factors such as the level of cross-border procurement, SME participation, transaction costs and the cost-benefit trade-off.

According to its Article XXII(7), the Agreement shall be the subject of further negotiations three years after its entry into force and periodically thereafter. In that context, the appropriateness of the level of thresholds should be examined, bearing in mind the impact of inflation in view of a long period without changes of the thresholds in the Agreement; in case the level of thresholds should change as a consequence, the Commission should, where appropriate, adopt a legislative proposal amending the thresholds set out in this Directive.

- (65) Since the objective of this Directive, namely the coordination of laws, regulations and administrative provisions of the Member States applying to certain public procurement procedures, cannot be sufficiently achieved by the Member States and can therefore be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.

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<sup>29</sup> OJ L 55, 28.2.2011, p. 13.

- (66) Directive 2004/17/EC should therefore be repealed.
- (67) In accordance with the Joint Political Declaration of Member States and the Commission on explanatory documents of [date], Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified,

HAVE ADOPTED THIS DIRECTIVE:

## TITLE I:

### SCOPE, DEFINITIONS AND GENERAL PRINCIPLES

#### CHAPTER I

##### *Subject-matter and definitions*

##### *Article 1*

##### *Subject matter and scope*

1. This Directive establishes rules on the procedures for procurement by contracting entities as defined in Article 4 with respect to contracts as well as design contests, whose value is estimated to be not less than the thresholds defined in Article 12.
2. Procurement within the meaning of this Directive is the acquisition by means of a supply, works and service contract as defined in Article 2(7) of works, supplies or services by one or more contracting entities from economic operators chosen by those contracting entities, provided that the works, supplies or services are intended for the pursuit of one of the activities referred to in Articles 5 to 11.
3. The application of this Directive is subject to Article 346 of the Treaty on the Functioning of the European Union.
4. This Directive does not affect the freedom of Member States to define, in conformity with Union law, what they consider to be services of general economic interest, how those services should be organised and financed, in compliance with the State aid rules, and what specific obligations they should be subject to. Equally, this Directive does not affect the decision of public authorities whether, how and to what extent they want to perform public functions themselves pursuant to Protocol (No 26) on Services of General Interest and Article 14 TFEU.
5. This Directive does not affect the way in which the Member States organise their social security systems.
6. The scope of this Directive shall not include non-economic services of general interest.

*Article 2*  
*Definitions*

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

- (1) "contracting authorities" means State, regional or local authorities, bodies governed by public law, associations formed by one or more such authorities or one or more such bodies governed by public law. "Regional authorities" are listed non-exhaustively in NUTS 1 and 2, as referred to by Regulation (EC) No. 1059/2003 of the European Parliament and of the Council<sup>30</sup> while "local authorities" include all authorities of the administrative units falling under NUTS 3 and smaller administrative units, as referred to by Regulation (EC) No. 1059/2003;
- (4) a "body governed by public law" means any body that has all of the following characteristics:
  - (a) they are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;
  - (b) they have legal personality; and
  - (c) they are financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or have an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law.
- (5) a "public undertaking" means any undertaking over which the contracting authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it;
- (6) transferred to Art. 4(2)

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<sup>30</sup> OJ L 154, 21.6.2003, p. 1



- (7) "supply, works and service contracts" means contracts for pecuniary interest concluded in writing between one or more of the contracting entities referred to in Article 4(1), and one or more economic operators and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive;
- (8) "works contracts" means contracts having as their object one of the following:
- (a) the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex I;
  - (b) the execution, or both the design and execution, of a work;
  - (c) the realisation by whatever means of a work corresponding to the requirements specified by the contracting entity exercising a decisive influence on the type or design of the work;
- (9) "a work" means the outcome of building or civil engineering works taken as a whole which is sufficient in itself to fulfil an economic or technical function;
- (10) "supply contracts" means contracts having as their object the purchase, lease, rental or hire-purchase, with or without an option to buy, of products. A supply contract may include, as an incidental matter, siting and installation operations;
- (11) "service contracts" means contracts having as their object the provision of services other than the execution of works referred to in point 8;
- (12) "economic operator" means any natural or legal person, or a contracting entity, or a group of such persons and/or entities, including temporary associations of undertakings, which offers the execution of works and/or a work, the supply of products or the provision of services on the market;
- (13) "tenderer" means an economic operator that has submitted a tender;

- (14) "candidate" means an economic operator that has sought an invitation or has been invited to take part in a restricted or negotiated procedure, in a competitive dialogue or in an innovation partnership;
- (15) 'procurement document means any document produced or referred to by the contracting entity to describe or determine elements of the procurement or the procedure, including the contract notice, the periodic indicative notice or the notices on the existence of a qualification system where they are used as a means of calling for competition, the technical specifications, the descriptive document, proposed conditions of contract, formats for the presentation of documents by candidates and tenderers, information on generally applicable obligations and any additional documents;
- (16) "centralised purchasing activities" means activities conducted on a permanent basis, in one of the following forms:
- (a) the acquisition of supplies and/or services intended for contracting entities,
  - (b) the award of contracts or the conclusion of framework agreements for works, supplies or services intended for contracting entities;
- (17) "ancillary purchasing activities" means activities consisting in the provision of support to purchasing activities, in particular in the following forms:
- (a) technical infrastructure enabling contracting entities to award public contracts or to conclude framework agreements for works, supplies or services;
  - (b) advice on the conduct or design of procurement procedures;
  - (c) preparation and management of procurement procedures on behalf and for the account of the contracting entity concerned;
- (18) "central purchasing body" means a contracting entity within the meaning of Article 4 (1) or a contracting authority within the meaning of point 1 of Article 2 of Directive 2004/18/EC providing centralised purchasing activities and, possibly, ancillary purchasing activities.

Procurement carried out by a central purchasing body in order to perform centralised purchasing activities shall be deemed to be procurement for the pursuit of an activity as described in Articles 5 to 11. Article 15 shall not apply to procurement carried out by a central purchasing body in order to perform centralised purchasing activities;

- (19) "procurement service provider" means a public or private body, which offers ancillary purchasing activities on the market;
- (20) "written" or "in writing" means any expression consisting of words or figures which can be read, reproduced and subsequently communicated, including information transmitted and stored by electronic means;
- (21) "electronic means" means electronic equipment for the processing (including digital compression) and storage of data which is transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means;
- (22) 'life cycle' means all consecutive and/or interlinked stages, including research and development to be carried out, production, trading and its conditions, transport, use and maintenance, throughout the existence of a product or a works or the provision of a service, from raw material acquisition or generation of resources to disposal, clearance and end of service or utilisation;
- (23) "Design contests" means those procedures which enable the contracting entity to acquire, mainly in the fields of town and country planning, architecture, engineering or data processing, a plan or design selected by a jury after being put out to competition with or without the award of prizes.
- (23a) 'innovation' means the implementation of a new or significantly improved good, service or process, a new marketing method, or a new organisational method in business practices, workplace organisation or external relations inter alia with the purpose to help solving societal challenges or to support the Europe 2020 strategy for smart, sustainable and inclusive growth. [Am. 56]

- (25) “label” means any document, certificate or attestation confirming that a given work, goods, service, process or procedure meet certain requirements;

“label requirement(s)” means the requirements to be met by a given work, goods, service, process or procedure in order to obtain the label concerned.

### *Article 3*

#### *Mixed procurement covering the same activity*

1. Paragraph 1a shall apply to mixed contracts which have as their subject different types of procurement all of which are covered by this Directive.

Paragraphs 1b to 5 shall apply to mixed contracts which have as their subject procurement covered by this Directive and procurement covered by other legal regimes.

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

In the case of mixed contracts consisting partly of services within the meaning of Chapter I of Title III and partly of other services or of mixed contracts consisting partly of services and partly of supplies, the main subject shall be determined according to which of the estimated values of the respective services or supplies is the highest.

- 1b. Where the different parts of a given contract are objectively separable, paragraph 2 shall apply; where the different parts of a given contract are objectively not separable, paragraph 5 shall apply.

Where part of a given contract is covered by Directive 2009/81/EC or Article 346 of the Treaty on the Functioning of the European Union, Article 20b shall apply.

2. In the case of contracts which have as their subject procurement covered by this Directive as well as procurement not covered by this Directive, contracting entities may choose to award separate contracts for the separate parts or to award a single contract. Where contracting entities choose to award separate contracts for separate parts, the decision of which legal regime applies to any one of such separate contracts shall be taken on the basis of the characteristics of the separate part concerned.

Where contracting entities choose to award a single contract, this Directive shall, unless otherwise provided in Article 20b, apply to the ensuing mixed contract, irrespective of the value of the parts that would otherwise fall under a different legal regime and irrespective of which legal regime these parts would otherwise have been subject to.

Thus, in the case of mixed contracts containing elements of supply, works and service contracts and of concessions, the mixed contract shall be awarded in accordance with the provisions of this Directive, provided that the estimated value of the part of the contract which constitutes a contract covered by this Directive, calculated in accordance with the provisions Article 13, is equal to or greater than the relevant threshold set out in Article 12.

5. Where the different parts of a given contract are objectively not separable, the applicable legal regime shall be determined on the basis of the main subject of that contract.

#### *Article 3a*

##### *Procurement covering several activities*

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

Where contracting entities choose to award a single contract, paragraphs 2 and 3 shall apply, Article 3 notwithstanding. However, where one of the activities concerned is covered by Directive 2009/81/EC or Article 346 TFEU, Article 20c shall apply..

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

2. A contract which is intended to cover several activities shall be subject to the rules applicable to the activity for which it is principally intended.
3. In the case of contracts for which it is objectively impossible to determine for which activity the contract is principally intended, the applicable rules shall be determined in accordance with points a to c:
  - (a) the contract shall be awarded in accordance with Directive 2004/18, if one of the activities for which the contract is intended is subject to this Directive and the other to the abovementioned 2004/18;
  - (b) the contract shall be awarded in accordance with this Directive, if one of the activities for which the contract is intended is subject to this Directive and the other to the Directive on Concessions;
  - (c) the contract shall be awarded in accordance with this Directive, if one of the activities for which the contract is intended is subject to this Directive and the other is not subject to either this Directive, Directive 2004/18 or Directive on Concessions.

## CHAPTER II

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

#### Section 1

#### Entities

#### *Article 4*

#### *Contracting entities*

1. This Directive shall apply to contracting entities:
  - (a) which are contracting authorities or public undertakings and which pursue one of the activities referred to in Articles 5 to 11;

- (b) which, when they are not contracting authorities or public undertakings, have as one of their activities any of the activities referred to in Articles 5 to 11, or any combination thereof and operate on the basis of special or exclusive rights within the meaning of paragraph 3 granted by a competent authority of a Member State.

2. A dominant influence within the meaning of point 5 of Article 2 on the part of the contracting authorities shall be presumed in any of the following cases in which those authorities, directly or indirectly:

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

3. For the purposes of this Article, "special or exclusive rights" mean rights granted by a competent authority of a Member State by way of any legislative, regulatory or administrative provision the effect of which is to limit the exercise of activities defined in Articles 5 to 11 to one or more entities, and which substantially affects the ability of other entities to carry out such activity.

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 the first subparagraph.

Such procedures include:

- (a) procurement procedures with a prior call for competition in conformity with Directive 2004/18/EC, Directive 2009/81/EC, Directive ... (concessions)] or this Directive;
- (b) procedures pursuant to other legislative acts of the Union listed in Annex II, ensuring adequate prior transparency for granting authorisations on the basis of objective criteria.

4. The Commission shall be empowered to adopt delegated acts in accordance with Article 98 concerning the modification of the list of Union legislation set out in Annex II, when on the basis of the adoption of new legislation, repeal or modification of such legislation, such amendments prove necessary.

#### *Article 4a*

#### *Common provisions*

For the purposes of Articles 5, 6 and 7, “supply” shall include generation (production), wholesale and retail sale.

However, production of gas in the form of extraction falls within the scope of Article 11.

#### Section 2

#### Activities

#### *Article 5*

#### *Gas and heat*

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



## Article 6 Electricity

1. As far as electricity is concerned, this Directive shall apply to the following activities:
  - (a) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of electricity;
  - (b) the supply of electricity to such networks.
2. The supply of electricity to networks which provide a service to the public by a contracting entity other than a contracting authority shall not be considered a relevant activity within the meaning of paragraph 1 where all of the following conditions are met:
  - (a) the production of electricity by the entity concerned takes place because its consumption is necessary for carrying out an activity other than those referred to in paragraph 1 or in Articles 5 and 7 to 8;
  - (b) supply to the public network depends only on the entity's own consumption and has not exceeded 30% of the entity's total production of energy, on the basis of the average for the preceding three years, including the current year.

## *Article 7* *Water*

1. This Directive shall apply to the following activities:
  - (a) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of drinking water;
  - (b) the supply of drinking water to such networks.

2. This Directive shall also apply to contracts or design contests awarded or organised by entities which pursue an activity referred to in paragraph 1 and which are connected with one of the following:
  - (a) hydraulic engineering projects, irrigation or land drainage, provided that the volume of water to be used for the supply of drinking water represents more than 20 % of the total volume of water made available by such projects or irrigation or drainage installations,
  - (b) the disposal or treatment of sewage.
3. The supply of drinking water to networks which provide a service to the public by a contracting entity other than a contracting authority shall not be considered a relevant activity within the meaning of paragraph 1 where all of the following conditions are met:
  - (a) the production of drinking water by the entity concerned takes place because its consumption is necessary for carrying out an activity other than those referred to in Articles 5 to 8;
  - (b) the supply to the public network depends only on the entity's own consumption and has not exceeded 30 % of the entity's total production of drinking water, on the basis of the average for the preceding three years, including the current year.

#### *Article 8*

#### *Transport services*

1. This Directive shall apply to activities relating to the provision or operation of networks providing a service to the public in the field of transport by railway, automated systems, tramway, trolley bus, bus or cable.

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

## *Article 9*

### *Ports and airports*

This Directive shall apply to activities relating to the exploitation of a geographical area for the purpose of the provision of airports and maritime or inland ports or other terminal facilities to carriers by air, sea or inland waterway.

## *Article 10*

### *Postal services*

1. This Directive shall apply to activities relating to the provision of:
  - (a) postal services;
  - (b) other services than postal services, on condition that such services are provided by an entity which also provides postal services within the meaning of point (b) of paragraph 2 and provided that the conditions set out in Article 27(1) are not satisfied in respect of the services falling within point (b) of paragraph 2.
2. For the purpose of this Directive and without prejudice to Directive 97/67/EC:
  - (a) "postal item": means an item addressed in the final form in which it is to be carried, irrespective of weight. In addition to items of correspondence, such items also include for instance books, catalogues, newspapers, periodicals and postal packages containing merchandise with or without commercial value, irrespective of weight;
  - (b) "postal services": means services consisting of the clearance, sorting, routing and delivery of postal items. This shall include both services falling within as well as services falling outside the scope of the universal service set up in conformity with Directive 97/67/EC;

- (c) "other services than postal services": means services provided in the following areas:
  - (i) mail service management services (services both preceding and subsequent to despatch, including "mailroom management services");
  - (ii) services concerning postal items not included in point (a), such as direct mail bearing no address;

### *Article 11*

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

This Directive shall apply to activities relating to the exploitation of a geographical area for the purpose of:

- (a) extracting oil or gas;
- (b) exploring for or extracting coal or other solid fuels.

## Chapter III

### *Material scope*

#### Section 1

### THRESHOLDS

#### *Article 12*

##### *Thresholds*

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

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

#### *Article 13*

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

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

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

- 1a. Where a contracting entity is comprised of separate operational units, account shall be taken of the total estimated value for all the individual operational units.

Notwithstanding subparagraph 1, where a separate operational unit is independently responsible for its procurement or certain categories thereof, the values may be estimated at the level of the unit in question.

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

7. Where a proposed work or a proposed provision of services may result in contracts being awarded in the form of separate lots, account shall be taken of the total estimated value of all such lots.

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

8. Where a proposal for the acquisition of similar supplies may result in contracts being awarded in the form of separate lots, account shall be taken of the total estimated value of all such lots when applying Article 12.

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

9. Paragraphs 7 and 8 notwithstanding, contracting entities may award contracts for individual lots without applying the procedures provided for under this Directive, provided that the estimated value net of VAT of the lot concerned is less than EUR 80 000 for supplies or services or EUR 1 million for works. However, the aggregate value of the lots thus awarded without applying this Directive shall not exceed 20 % of the aggregate value of all the lots into which the proposed work, the proposed acquisition of similar supplies or the proposed provision of services has been divided.

10. In the case of supply or service contracts which are regular in nature or which are intended to be renewed within a given period, the calculation of the estimated contract value shall be based on the following:

- (a) either the total actual value of the successive contracts of the same type awarded during the preceding 12 months or financial year adjusted, if possible, to take account of the changes in quantity or value which would occur in the course of the 12 months following the initial contract;
- (b) or the total estimated value of the successive contracts awarded during the 12 months following the first delivery, or during the financial year where that is longer than 12 months.

11. With regard to supply contracts relating to the leasing, hire, rental or hire purchase of products, the value to be taken as a basis for calculating the estimated contract value shall be as follows:
- (a) in the case of fixed-term contracts, if that term is less than or equal to 12 months, the total estimated value for the term of the contract or, where the term of the contract is greater than 12 months, the total value including the estimated residual value;
  - (b) in the case of contracts without a fixed term or the term of which cannot be defined, the monthly value multiplied by 48.
12. With regard to service contracts, the basis for calculating the estimated contract value shall, where appropriate, be the following:
- (a) insurance services: the premium payable, and other forms of remuneration;
  - (b) banking and other financial services: the fees, commissions, interest and other forms of remuneration;
  - (c) design contracts: fees, commission payable and other forms of remuneration.
13. With regard to service contracts which do not indicate a total price, the basis for calculating the estimated contract value shall be the following:
- (a) in the case of fixed-term contracts, where that term is less than or equal to 48 months: the total value for their full term;
  - (b) in the case of contracts without a fixed term or with a term greater than 48 months: the monthly value multiplied by 48.



*Article 14*  
*Revision of the thresholds*

1. Every two years from 30 June 2013, the Commission shall verify that the thresholds set out in points (a) and (b) of Article 12 correspond to the thresholds established in the Government Procurement and shall, where necessary, revise them.

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

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

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

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

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

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

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

## Section 2

Excluded Contracts and design contests; Special provisions for procurement involving defence and security aspects

### Subsection 1

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

### *Article 15*

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

1. This Directive shall not apply to contracts awarded for purposes of resale or lease to third parties, provided that the contracting entity enjoys no special or exclusive right to sell or lease the subject of such contracts, and other entities are free to sell or lease it under the same conditions as the contracting entity.
2. The contracting entities shall notify the Commission if so requested of all the categories of products or activities which they regard as excluded under paragraph 1. The Commission may periodically publish in the Official Journal of the European Union, for information purposes, lists of the categories of products and activities which it considers to be covered by this exclusion. In so doing, the Commission shall respect any sensitive commercial aspects that the contracting entities may point out when forwarding information.

## *Article 16*

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

1. This Directive shall not apply to contracts which the contracting entities award for purposes other than the pursuit of their activities as described in Articles 5 to 11 or for the pursuit of such activities in a third country, in conditions not involving the physical use of a network or geographical area within the Union nor shall it apply to design contests organised for such purposes.
2. The contracting entities shall notify the Commission if so requested of any activities which they regard as excluded under paragraph 1. The Commission may periodically publish in the Official Journal of the European Union for information purposes, lists of the categories of activities which it considers to be covered by this exclusion. In so doing, the Commission shall respect any sensitive commercial aspects that the contracting entities may point out when forwarding this information.

## *Article 18*

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

1. This Directive shall not apply to contracts or design contests which the contracting entity is obliged to award or organise in accordance with procurement procedures different from those of this Directive established by any of the following:
  - (a) a legal instrument creating international law obligations, such as an international agreement concluded in accordance with the Treaty between a Member State and one or more third countries or subdivisions thereof and covering works, supplies or services intended for the joint implementation or exploitation of a project by their signatories;
  - (c) an international organisation.

All legal instruments referred to in point (a) of the first subparagraph shall be communicated to the Commission, which may consult the Advisory Committee for Public Contracts referred to in Article 100.

2. This Directive shall not apply to contracts and design contests which the contracting entity awards in accordance with procurement rules provided by an international organisation or international financing institution, where the contracts or design contests concerned are fully financed by this organisation or institution; in the case of contracts or design contests co-financed the most part by an international organisation or international financing institution the parties shall agree on applicable procurement procedures .
3. Paragraphs 1 and 2 notwithstanding, Article 20d shall apply to contracts and design contests involving defence and security aspects which are awarded or organised pursuant to international rules.

### *Article 19*

#### *Specific exclusions for service contracts*

This Directive shall not apply to service contracts for:

- (a) the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property or concerning rights thereon;
- (b) arbitration and conciliation services;
- (ba) any of the following legal services:
  - (i) legal representation of a client by a lawyer within the meaning of Article 1 of Directive 77/249/EEC in:
    - an arbitration or conciliation held in a Member State, a third country or before an international arbitration or conciliation instance; or
    - in judicial proceedings before the courts, tribunals or public authorities of a Member State, a third country or international courts, tribunals or institutions;

- (ii) legal advice given in preparation of any of the proceedings referred to in point (i) or where there is a tangible indication and high probability that the matter to which the advice relates will become the subject of such proceedings, provided that the advice is given by a lawyer within the meaning of Article 1 of Directive 77/249/EEC;
- (iii) document certification and authentication services which must be provided by notaries;
- (iv) legal services provided by trustees, appointed guardians or other legal services the providers of which are designated by a court or tribunal in the Member State concerned **or are designated by law to carry out specific tasks under the supervision of such tribunals or courts;**
- (v) other legal services which in the Member State concerned are connected, even occasionally, with the exercise of official authority;
- (c) financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments within the meaning of Directive 2004/39/EC of the European Parliament and of the Council<sup>31</sup> and operations conducted with the European Financial Stability Facility;
- (ca) loans, whether or not in connection with the issue, sale, purchase or transfer of securities or other financial instruments;
- (d) employment contracts;
- (e) public passenger transport services by rail or metro;
- (ga) civil defence, civil protection, and danger prevention that are provided by non-profit organisations or associations, and which fall under the following CPV codes: 75250000-3, 75251000-0, 75251100-1, 75251110-4, 75251120-7, 75252000-7, 75222000-8; 98113100-9; 85143000-3 except patient transport ambulance services;
- (f) contracts for broadcasting time or programme provision that are awarded to audiovisual or radio media service providers.

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<sup>31</sup> OJ L 145, 30.04.2004, p. 1.

For the purposes of this Article, "media service providers" shall have the same meaning as pursuant to Article 1(1)(d) of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive)<sup>32</sup>. "Programme" shall have the same meaning as pursuant to Article 1(1)(b) of Directive 2010/13/EU, but shall also include radio programmes and radio programme materials. Furthermore, for the purposes of this provision, "programme material" shall have the same meaning as "programme".

#### *Article 19a*

##### *Service contracts awarded on the basis of an exclusive right*

This Directive shall not apply to service contracts awarded to an entity which is itself a contracting authority within the meaning of Article 2(1) or to an association of contracting authorities on the basis of an exclusive right which they enjoy pursuant to a published law, regulation or administrative provision which is compatible with the Treaty.

#### *Article 20*

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

This Directive shall not apply:

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

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<sup>32</sup> OJ L 95, 15.4.2010, p. 1.

Subsection 1a

Procurement involving defence and security aspects

*Article 20a*

*Defence and security*

1. In respect of contracts awarded and design contests organised in the fields of defence and security, this Directive shall not apply to:
  - (a) contracts falling within the scope of Directive 2009/81/EC;
  - (b) contracts to which Directive 2009/81/EC does not apply pursuant to Articles 8, 12 and 13 thereof.
2. This Directive shall not apply to contracts and design contests not otherwise exempted under paragraph 1 to the extent that the protection of the essential security interests of a Member State cannot be guaranteed by less intrusive measures, for instance by imposing requirements aimed at protecting the confidential nature of information which the contracting entity makes available in a contract award procedure as provided for in this Directive. [Am. 66]

Furthermore, and in conformity with Article 346(1)(a) TFEU, this Directive shall not apply to contracts and design contests not otherwise exempted under paragraph 1 to the extent that the application 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

- 2a Where the procurement and performance of the contract or contest are declared to be secret or must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in a Member State, this Directive shall not apply provided that the Member State has determined that the essential interests concerned cannot be guaranteed by less intrusive measures, for instance such as referred to in the first subparagraph of paragraph 2.



*Article 20b*

*Mixed procurement covering the same activity and involving defence and security aspects*

1. In the case of mixed contracts covering the same activity which have as their subject procurement covered by this Directive and procurement or other elements covered by Directive 2009/81/EC or Article 346 TFEU, this Article shall apply.

2. Where the different parts of a given contract are objectively separable, contracting entities may choose to award separate contracts for the separate parts or to award a single contract.

Where contracting entities choose to award separate contracts for separate parts, the decision of which legal regime applies to any one of such separate contracts shall be taken on the basis of the characteristics of the separate part concerned.

Where contracting entities choose to award a single contract, the following criteria shall apply to determine the applicable legal regime:

- (a) where part of a given contract is covered by Article 346 TFEU, the contract may be awarded without applying this Directive, provided that the award of a single contract is justified for objective reasons;
- (b) where part of a given contract is covered by Directive 2009/81/EC, the contract may be awarded in accordance with the provisions of Directive 2009/81/EC, provided that the award of a single contract is justified for objective reasons. This sub-paragraph is without prejudice to the thresholds and exclusions for which Directive 2009/81/EC provides.

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

3. Point a of paragraph 2 shall apply to mixed contracts to which both point a and point b could otherwise apply.

5. Where the different parts of a given contract are objectively not separable, the contract may be awarded without applying this Directive where it includes elements to which Article 346 TFEU applies; otherwise it may be awarded in accordance with the provisions of Directive 2009/81/EC.

#### *Article 20c*

##### *Procurement covering several activities and involving defence and security aspects*

1. In the case of contracts intended to cover several activities, contracting entities may choose to award separate contracts for the purposes of each separate activity or to award a single contract. Where contracting entities choose to award separate contracts for separate parts, the decision of which legal regime applies to any one of such separate contracts shall be taken on the basis of the characteristics of the separate activity concerned.

Where contracting entities choose to award a single contract, paragraph 2 shall apply. The choice between awarding a single contract and awarding a number of separate contracts shall not be made with the objective of excluding it from the scope of this Directive or Directive 2009/81/EC.

2. In the case of contracts intended to cover an activity which is subject to this Directive and another which is:

(a) subject to Directive 2009/81/EC, or

(b) covered by Article 346 TFEU,

the contract may be awarded in accordance with the provisions of Directive 2009/81/EC in the cases set out under point (a) and may be awarded without applying this Directive in the cases set out under point (b). This sub-paragraph is without prejudice to the thresholds and exclusions for which Directive 2009/81/EC provides.

Contracts as set out under point (a), which in addition include procurement or other elements which are covered by Article 346 TFEU may be awarded without applying this Directive.

However, it is a condition for the application of the first and second subparagraph that the award of a single contract is justified for objective reasons and the decision to award a single contract is not taken for the purpose of excluding contracts from the application of this Directive.

*Article 20d*

*Contracts and design contests involving defence and security aspects which are awarded or organised pursuant to international rules*

1. This Directive shall not apply to contracts or design contests involving defence and security aspects which the contracting entity is obliged to award or organise in accordance with procurement procedures different from those of this Directive established by any of the following:
  - (a) an international agreement or arrangement concluded in accordance with the Treaty between a Member State and one or more third countries or subdivisions thereof and covering works, supplies or services intended for the joint implementation or exploitation of a project by their signatories;
  - (b) an international agreement or arrangement relating to the stationing of troops and concerning the undertakings of a Member State or a third country;
  - (c) an international organisation.

2. This Directive shall not apply to contracts and design contests involving defence and security aspects which the contracting entity awards in accordance with procurement rules provided by an international organisation or international financing institution, where the contracts or design contests concerned are fully financed by this organisation or institution; in the case of contracts or design contests co-financed the most part by an international organisation or international financing institution the parties shall agree on applicable procurement procedures .

#### Subsection 2

Special relations ( cooperation, affiliated undertakings and joint ventures)

#### *Article 21*

##### *Contracts between contracting authorities*

1. A contract awarded by a contracting authority to another legal person governed by private or public law shall fall outside the scope of this Directive where the following cumulative conditions are fulfilled:
  - (a) the contracting authority exercises over the legal person concerned a control which is similar to that which it exercises over its own departments;
  - (b) more than 80% of the activities of that legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by that contracting authority;
  - (c) there is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by applicable national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.

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

2. Paragraph 1 also applies where a controlled person which is a contracting authority awards a contract to its controlling contracting authority, or to another legal person controlled by the same contracting authority, provided that there is no direct private capital participation in the legal person being awarded the public contract with the exception of non-controlling and non-blocking forms of private capital participation required by law, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.
3. A contracting authority, which does not exercise over a legal person governed by private or public law control within the meaning of paragraph 1, may nevertheless award a contract without applying this Directive to that legal person, where the following cumulative conditions are fulfilled:
  - (a) the contracting authority exercises jointly with other contracting authorities over that legal person a control which is similar to that which they exercise over their own departments.
  - (b) more than 80% of the activities of that legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authorities or by other legal persons controlled by the same contracting authorities;
  - (c) there is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by applicable national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.

For the purposes of point (a) of the first subparagraph, contracting authorities shall be deemed to exercise joint control over a legal person where the following cumulative conditions are fulfilled:

- (a) the decision-making bodies of the controlled legal person are composed of representatives of all participating contracting authorities. Individual representatives may represent several or all of the participating contracting authorities;
- (b) those contracting authorities are able to jointly exert decisive influence over the strategic objectives and significant decisions of the controlled legal person;
- (c) the controlled legal entity person does not pursue any interests which are contrary to those of the controlling contracting authorities ;

4. A contract concluded between two or more contracting authorities shall fall outside the scope of this Directive, where the following cumulative conditions are met:

- (a) the contract establishes or implements a co-operation between the participating contracting authorities with the aim of ensuring that public services they have to perform are provided with a view to achieving objectives they have in common;
- (b) the implementation of that cooperation is governed solely by considerations relating to the public interest;
- (c) the participating contracting authorities perform on the open market less than 20% of the activities concerned by the cooperation;

6. For the determination of the percentage of activities referred to in 21 (1)(b), 21 (3)(b) and 21(4)(c) above, the average total turnover, or an appropriate alternative activity based measure such as costs incurred by the relevant legal person with respect to services, supplies and works for the three years preceding the contract award shall be taken into consideration.

When, because of the date the relevant legal person was created or commenced activities or because of a reorganisation of its activities, the turnover, or alternative activity based measure such as costs, are either not available for the preceding three years or no longer relevant, it will be sufficient to show that the measurement of activity is credible, particularly by means of business projections.

## *Article 22*

### *Contracts awarded to an affiliated undertaking*

1. For the purposes of this Article, "affiliated undertaking" means any undertaking the annual accounts of which are consolidated with those of the contracting entity in accordance with the requirements of the Seventh Council Directive 83/349/EEC<sup>33</sup>.
2. In the case of entities, which are not subject to Directive 83/349/EEC pursuant to its provisions, "affiliated undertaking" shall mean any undertaking that:
  - (a) may be, directly or indirectly, subject to a dominant influence by the contracting entity; or
  - (b) may exercise a dominant influence over the contracting entity; or
  - (c) in common with the contracting entity, is subject to the dominant influence of another undertaking by virtue of ownership, financial participation, or the rules which govern it.

For the purposes of this Directive, the notion of 'dominant influence' is defined in point 5 of Article 2 and Article 4(2). [Am. 88]

3. Article 21 notwithstanding and provided that the conditions in paragraph 4 are met, this Directive shall not apply to contracts awarded:
  - (a) by a contracting entity to an affiliated undertaking, or
  - (b) by a joint venture, formed exclusively by a number of contracting entities for the purpose of carrying out activities within the meaning of Articles 5 to 11, to an undertaking which is affiliated with one of those contracting entities.

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<sup>33</sup> OJ L 193, 18.7.1983, p. 1. Directive as last amended by Directive 2001/65/EC of the European Parliament and of the Council (OJ L 283, 27.10.2001, p. 28).

4. Paragraph 3 shall apply:

- (a) to service contracts provided that at least 80 % of the average total turnover of the affiliated undertaking, taking into account all services provided by that undertaking, over the preceding three years derives from the provision of services to the contracting entity or other undertakings with which it is affiliated;
- (b) to supply contracts provided that at least 80 % of the average total turnover of the affiliated undertaking, taking into account all supplies provided by that undertaking, over the preceding three years derives from the provision of supplies to the contracting entity or other undertakings with which it is affiliated;
- (c) to works contracts provided that at least 80 % of the average total turnover of the affiliated undertaking, taking into account all works provided by that undertaking, over the preceding three years derives from the provision of works to the contracting entity or other undertakings with which it is affiliated.

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

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



### *Article 23*

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

Article 21 notwithstanding and provided that the joint venture has been set up in order to carry out the activity concerned over a period of at least three years and that the instrument setting up the joint venture stipulates that the contracting entities, which form it, will be part thereof for at least the same period, this Directive shall not apply to contracts awarded by any of the following:

- (a) by a joint venture, formed exclusively by a number of contracting entities for the purpose of carrying out activities within the meaning of Articles 5 to 11, to one of those contracting entities, or
- (b) by a contracting entity to such a joint venture of which it forms part.

### *Article 24*

#### *Notification of information*

Contracting entities shall notify to the Commission , if so requested, the following information regarding the application of Article 22, paragraphs 2, 3 and Article 23:

- (a) the names of the undertakings or joint ventures concerned,
- (b) the nature and value of the contracts involved,
- (c) proof deemed necessary by the Commission that the relationship between the undertaking or joint venture to which the contracts are awarded and the contracting entity complies with the requirements of Articles 22 or 23.

Subsection 3  
Specific situations

*Article 25*

*Research and development services*

1. This Directive shall apply to service contracts for research and development services with CPV reference numbers 73000000-2 to 73120000-9, 73300000-5, 73420000-2 and 73430000-5 provided that the following conditions are both fulfilled:
  - (a) the benefits accrue exclusively to the contracting entity for its use in the conduct of its own affairs,
  - (b) the service provided is wholly remunerated by the contracting entity.
  
2. The Commission shall be empowered to adopt delegated acts in accordance with Article 98 to amend the CPV reference numbers referred to in paragraph 1 to reflect changes in the CPV nomenclature provided that such amendments do not imply a modification of the scope of this Directive.

*Article 26*

*Contracts subject to special arrangements*

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

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

#### Subsection 4

Activities directly exposed to competition and procedural provisions relating thereto

#### *Article 27*

#### *Activities directly exposed to competition*

1. Contracts intended to enable an activity mentioned in Articles 5 to 11 to be carried out shall not be subject to this Directive if the Member State or the contracting entities having introduced the request pursuant to Article 28 can demonstrate that, in the Member State in which it is performed, the activity is directly exposed to competition, on markets to which access is not restricted; nor shall design contests that are organised for the pursuit of such an activity in that geographic area be subject to this Directive. The activity concerned may form a part of a larger sector or be exercised only in certain parts of the Member State concerned. The competition assessment referred to in the first sentence, which will be made in the light of the information available to the Commission and for the purposes of this Directive, is without prejudice to the application of competition law. Such assessment shall be made having regard to the market for the activities in question and the geographical reference market within the meaning of paragraph 2.
2. For the purposes of paragraph 1, the question of whether an activity is directly exposed to competition shall be decided on the basis of criteria that are in conformity with the provisions on competition of the Treaty; those may include the characteristics of the goods or services concerned, the existence of alternative goods or services considered to be substitutable on the supply side or demand side, the prices and the actual or potential presence of more than one supplier of the goods or provider of the services in question.  
  
The geographical reference market, on the basis of which exposure to competition is assessed, shall consist of the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because, in particular, conditions of competition are appreciably different in those areas. This assessment shall take account in particular of the nature and characteristics of the products or services concerned, of the existence of entry barriers or of consumer preferences, of appreciable differences of the undertakings' market shares between the area concerned and neighbouring areas or of substantial price differences.

3. For the purposes of paragraph 1, access to a market shall be deemed not to be restricted if the Member State has implemented and applied the Union legislation listed in Annex III.
- If free access to a given market cannot be presumed on the basis of the first subparagraph, it must be demonstrated that access to the market in question is free de facto and de jure.

### *Article 28*

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

1. Where a Member State or, where the legislation of the Member State concerned provides for it, a contracting entity considers that, on the basis of the criteria set out in Article 27(2) and (3), a given activity is directly exposed to competition on markets to which access is not restricted, it may submit a request to the Commission to establish that this Directive does not apply to the award of contracts or the organisation of design contests for the pursuit of that activity, where appropriate together with the position adopted by an independent national authority that is competent in relation to the activity concerned. Such requests may concern activities which are part of a larger sector or which are exercised only in certain parts of the Member State concerned.

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

- 1a. Unless a request coming from a contracting entity is accompanied by a reasoned and substantiated position, adopted by an independent national authority that is competent in relation to the activity concerned, which thoroughly analyses the conditions for the possible applicability of Article 27(1) to the activity concerned in accordance with its paragraphs 2 and 3, the Commission shall immediately inform the Member State concerned. The latter shall in such cases inform the Commission of all relevant facts, and in particular of any law, regulation, administrative provision or agreement concerning compliance with the conditions set out in Article 27(1).

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

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

- (a) The Commission has adopted the implementing act establishing the applicability of Article 27(1) within the period provided for in Annex IIIA;
  - (b) has not adopted the implementing act within the period provided for in Annex IIIA.
- 3a. After the submission of a request, the Member State or the contracting entity concerned may, with the Commission's agreement, substantially modify its request, in particular as regards the activities or the geographical areas concerned. If so, a new period for the adoption of the implementing act shall apply, which shall be calculated in accordance with paragraph 1 of Annex III A, unless a shorter period is agreed on by the Commission and the Member State or contracting entity which has presented the request.
4. Where an activity in a given Member State is already the subject of a procedure under paragraphs 1, 2 and 3a, further requests concerning the same activity in the same Member State before the expiry of the period opened in respect of the first request shall not be considered as new procedures and shall be treated in the context of the first request.
5. The Commission shall adopt an implementing act establishing detailed rules for the application of paragraphs 1 to 4. That implementing act shall include at least rules and provisions relating to:
- (a) The publication in the Official Journal of the European Union, for information, of the date on which the period set out in paragraph 1 of Annex III A begins and ends, including prolongations or suspensions of those periods, if any, as provided for in that Annex;

- (b) publication of the possible applicability of Article 27(1) in accordance with point b of the second subparagraph of paragraph 2 of this Article;
- (c) implementing provisions concerning the form, content and other details of requests pursuant to paragraph 1 of this Article.;

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

## CHAPTER IV

### General principles

#### *Article 29*

##### *Principles of procurement*

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

The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement was made with the intention of unduly favouring or disadvantaging certain economic operators.

Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex XIV.

#### *Article 30*

##### *Economic operators*

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

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



2. Groups of economic operators, including temporary associations, may participate in procurement procedures and may not be required by the contracting entities to have a specific legal form in order to submit a tender or a request to participate.

Where necessary, contracting entities may clarify in the procurement documents how groups of economic operators shall meet the criteria and requirements for qualification and qualitative selection set out in Articles 71 to 75 provided this is justified by objective reasons and proportionate. Member States may establish standard terms for so doing instead of the individual contracting entities.

Conditions for the performance of a contract by such groups, which are different from those imposed on individual participants, shall also be justified by objective reasons and proportionate. Groups of economic operators may, however, be required to assume a specific legal form once they have been awarded the contract, to the extent that this change is necessary for the satisfactory performance of the contract.

#### *Article 31*

##### *Reserved contracts*

1. Member States may reserve the right to participate in procurement procedures to sheltered workshops and economic operators whose main aim is the social and professional integration of disabled and disadvantaged persons or provide for such contracts to be performed in the context of sheltered employment programmes, provided that at least 30% of the employees of those workshops, economic operators or programmes are disabled or disadvantaged workers.

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3. The call for competition shall make reference to this Article.

### *Article 32*

#### *Confidentiality*

1. Unless otherwise provided in this Directive or in the national law to which the contracting entity is subject, in particular legislation concerning access to information, and without prejudice to the obligations relating to the advertising of awarded contracts and to the information to candidates and tenderers set out in Articles 64 and 69 of this directive the contracting entity shall not disclose information forwarded to it by economic operators which they have designated as confidential, including, but not limited to, technical or trade secrets and the confidential aspects of tenders.
2. Contracting entities may impose on economic operators requirements aimed at protecting the confidential nature of information which the contracting entities make available throughout the procurement procedure, including information made available in connection with the operation of a qualification system, whether or not this has been the subject of a notice on the existence of a qualification system used as a means of calling for competition.

### *Article 33*

#### *Rules applicable to communication*

1. Member States shall ensure that all communication and information exchange under this Directive, in particular e-submission, are performed using electronic means of communication in accordance with the requirements of this Article. The tools and devices to be used for communicating by electronic means, as well as their technical characteristics, shall be non-discriminatory, generally available and interoperable with the information and communication technology products in general use and shall not restrict economic operators' access to the procurement procedure.

Notwithstanding the first subparagraph, contracting entities are not obliged to require electronic means of communication in the submission process in the following situations:

- (a) due to the specialised nature of the procurement, the use of electronic means of communication would require specific tools, devices or file formats that are not generally available or supported by generally available applications;
- (b) the applications supporting file formats that are suitable for the description of the tenders use file formats that cannot be handled by any other open or generally available applications or are under a proprietary licensing scheme and cannot be made available for downloading or remote use by the contracting entity;
- (c) the use of electronic communication would require specialised office equipment that is not generally available to contracting entities;
- (d) the procurement documents require the submission of physical or scale models which cannot be submitted transmitted using electronic means.

In respect of communications for which electronic means of communication are not used pursuant to subparagraph 2, communication shall be done by post or by a combination of post and electronic means.

Notwithstanding the first subparagraph, contracting entities are not obliged to require electronic means of communication in the submission process to the extent that the use of means of communication other than electronic means is necessary either because of a breach of security of these means of communications or for the protection of the particularly sensitive nature of information requiring such a high level of protection that it cannot be properly ensured by using electronic tools and devices that are either generally available to economic operators or can be made available to them by alternative means of access within the meaning of paragraph 4.

It is the responsibility of the contracting entities requiring, in accordance with the second subparagraph, means of communication other than electronic means in the submission process to indicate in the individual report referred to in Article 94 the reasons for it. Where applicable, contracting entities shall indicate in the individual report the reasons why use of means of communication other than electronic has been considered necessary in application of the third subparagraph.

- 1a. Paragraph 1 notwithstanding, oral communication may be used in respect of communications other than the essential elements of a procurement procedure such as the procurement documents, requests for participation, confirmations of interest and tenders, provided that the content of the oral communication be documented to a sufficient degree. In particular, oral communications with tenderers which could have a substantial impact on the content and assessment of the tenders shall be documented to a sufficient extent and by appropriate means, such as written or audio records or summaries of the main elements of the communication.
2. In all communication, exchange and storage of information, contracting entities shall ensure that the integrity of data and the confidentiality of tenders and requests to participate are preserved. They shall examine the content of tenders and requests to participate only after the time limit set for submitting them has expired.
3. Member States may require the use of specific electronic tools, such as of building information electronic modelling tools or similar. They shall offer alternative means of access as provided for in paragraph 4 until such time as these tools become generally available within the meaning of the second sentence of the first subparagraph of paragraph 1

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

Contracting entities shall be deemed to offer suitable alternative means of access in any of the following situations, where they:

- (a) offer unrestricted and full direct access by electronic means to those tools and devices from the date of publication of the notice in accordance with Annex IX or from the date on which the invitation to confirm interest is sent. The text of the notice or the invitation to confirm interest shall specify the internet address at which these tools and devices are accessible;
  - (b) ensure that tenderers having no access to the tools and devices concerned, or no possibility of obtaining them within the relevant time limits, provided that the lack of access is not attributable to the tenderer concerned, may access the procurement procedure through the use of provisional tokens made available online at no extra cost; or
  - (c) support an alternative channel for electronic submission of tenders.
5. In addition to the requirements set out in Annex IV, the following rules shall apply to tools and devices for the electronic transmission and receipt of tenders and for the electronic receipt of requests to participate:
- (a) information on specifications for the electronic submission of tenders and requests to participate, including encryption and time-stamping, shall be available to interested parties;
  - (c) Member States, or contracting entities acting within an overall framework established by the Member State concerned, shall specify the level of security required for the electronic means of communication to be used in the various stages of the specific procurement procedure; the level shall be proportionate to the risks attached;

- (d) where Member States, or contracting entities acting within an overall framework established by the Member State concerned, conclude that the level of risks, assessed in conformity with point c, is such that advanced Electronic Signatures as defined by Directive 1999/93/EC are required, contracting entities shall accept signatures supported by a qualified electronic certificate referred to in the Trusted List as provided for in the Commission Decision 2009/767/EC, created with or without a secure signature creation device, subject to compliance with the following conditions:
  - (i) they must establish the required advanced signature format on the basis of formats established in Commission Decision 2011/130/EU and shall put in place necessary measures to be able to process those formats technically; in case where a different format of electronic signature is used, the electronic signature or the electronic document carrier shall include information on existing validation possibilities, which shall be under the responsibility of the Member State. The validation possibilities shall allow the contracting entity to validate online, free of charge and in a way that is understandable for non-native speakers the received electronic signature as an advanced electronic signature supported by a qualified certificate. Member States shall notify information on the provider of validation services to the Commission, which shall make the information received from the Member States available to the public on line;
  - (ii) where a tender is signed with the support of a qualified certificate that is included in the Trusted list, they must not apply additional requirements that may hinder the use of those signatures by tenderers.

In respect of documents used in the context of a procurement procedure that are signed by a competent authority of a Member State authority or by another issuing entity, the competent issuing authority or entity may establish the required advanced signature format according to the requirements set out in Article 1(2) of Decision 2011/130/EU; they shall put in place necessary measures to be able to process these formats technically by including the information required for the purpose of processing the signature in the document concerned. Such documents must contain in the electronic signature or in the electronic document carrier information on existing validation possibilities that allow to validate the received electronic signature online, free of charge and in a way that is understandable for non-native speakers.

- 7a. The Commission shall be empowered to adopt delegated acts in accordance with Article 98 to amend the technical details and characteristics set out in Annex IV due to technical developments.

The Commission shall be empowered to adopt delegated acts in accordance with Article 98 to amend the list set out in points a to d of the second subparagraph of paragraph 1 where technological developments render continued exceptions from the use of electronic means of communication inappropriate or, exceptionally, where new exclusions must be provided for because of technological developments.

To ensure the interoperability of technical formats as well as of process and messaging standards, especially in a cross-border context, the Commission shall be empowered to adopt delegated acts in accordance with Article 98 to establish the mandatory use of such specific technical standards, in particular with regard to the use of e-submission, electronic catalogues and means for electronic authentication, only where technical standards have been thoroughly tested and proved their usefulness in practice. Before making use of any technical standard mandatory, the Commission shall also carefully consider the costs that this may entail, in particular in terms of adaptations to existing e-procurement solutions, including infrastructure, processes or software.

#### *Article 35*

#### *Nomenclatures*

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

*Article 36*  
*Conflicts of interests*

1. Member States shall, in respect of contracting authorities within the meaning of point 1 of Article 2, ensure that contracting authorities take appropriate measures to effectively prevent, identify and remedy conflicts of interests arising in the conduct of procurement procedures so as to avoid any distortion of competition and ensure equal treatment of all economic operators.

The concept of conflicts of interest shall at least cover any situation where staff members of the contracting authority or of a procurement service provider acting on behalf of the contracting authority who are involved in the conduct of the procurement procedure or may influence the outcome of that procedure have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure.

TITLE II  
RULES APPLICABLE TO CONTRACTS

CHAPTER I

Procedures

*Article 38*

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

As far as covered by Annexes III, IV and V and the General Notes to the European Union's Appendix 1 to the Government Procurement Agreement and by the other international agreements by which the Union is bound, contracting entities within the meaning of Article 4(1)(a) shall accord to the works, supplies, services and economic operators of the signatories to those agreements treatment no less favourable than the treatment accorded to the works, supplies, services and economic operators of the Union.



*Article 39*  
*Choice of procedures*

1. When awarding supply, works or service contracts, contracting entities shall apply the procedures adjusted to be in conformity with this Directive, provided that, without prejudice to Article 42, a call for competition has been published in accordance with this Directive.

Member States shall provide that contracting entities may apply open or restricted procedures or negotiated procedures with prior call for competition as regulated in this Directive. Member States shall also provide that contracting entities may apply competitive dialogues and innovation partnerships as regulated in this Directive.

2. The call for competition may be made by one of the following means:
  - (a) a periodic indicative notice pursuant to Article 61 where the contract is awarded by restricted or negotiated procedure;
  - (b) a notice on the existence of a qualification system pursuant to Article 62 where the contract is awarded by restricted or negotiated procedure or by a competitive dialogue or an innovation partnership,
  - (c) by means of a contract notice pursuant to Article 63.

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

3. In the specific cases and circumstances referred to expressly in Article 44, Member States may provide that contracting entities may apply a negotiated procedure without prior call for competition. Member States shall not allow the use of this procedure in any other cases than those referred to in Article 44.

*Article 40*  
*Open procedure*

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

The minimum time limit for the receipt of tenders shall be 35 days from the date on which the contract notice was sent.

The tender shall be accompanied by the information for qualitative selection that is requested by the contracting entity.

2. Where contracting entities have published a periodic indicative notice which was not itself used as a means of calling for competition, the minimum time limit for the receipt of tenders, as laid down in the second subparagraph of paragraph 1 of this Article, may be shortened to 15 days, provided that all of the following conditions are fulfilled:
  - (a) the periodic indicative notice included, in addition to the information required by Section I of Part A of Annex VI, all the information required by Section II of Part A of Annex VI, insofar as the latter information was available at the time the periodic indicative notice was published;
  - (b) the periodic indicative notice was sent for publication between 35 days and 12 months before the date on which the contract notice was sent.
3. Where a state of urgency duly substantiated by the contracting entities renders impracticable the time limit laid down in the second subparagraph of paragraph 1, they may fix a time limit which shall be not less than 15 days from the date on which the contract notice was sent.
4. The contracting entity may reduce by five days the time limit for receipt of tenders set out in the second subparagraph of paragraph 1 of this Article where it accepts that tenders may be submitted by electronic means in accordance with first subparagraph of Article 33(3) and Article 33,(4) and (5).

## *Article 41*

### *Restricted procedure*

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

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

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

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

In the absence of agreement on the time limit for the receipt of tenders, the time limit shall be at least 10 days from the date on which the invitation to tender was sent.

## *Article 42*

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

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

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

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

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

In the absence of agreement on the time limit for the receipt of tenders, the time limit shall be at least 10 days from the date on which the invitation to tender is sent.

*Article 42a*  
*Competitive dialogue*

1. In competitive dialogues, any economic operator may submit a request to participate in response to a call for competition in accordance with points (b) and (c) of Article 39(2) by providing the information for qualitative selection that is requested by the contracting entity.

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

Only those economic operators invited by the contracting entity following the assessment of the information provided may participate in the dialogue. Contracting entities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with Article 72(2). The contract shall be awarded on the sole basis of the award criterion of the most economically advantageous tender in accordance with Article 76(1)(a).

2. Contracting entities shall set out and define their needs and requirements in the call for competition and/or in a descriptive document. At the same time and in the same documents, they shall also set out and define the chosen award criteria and set out an indicative timeframe.

3. Contracting entities shall open, with the participants selected in accordance with the relevant provisions of Articles 70 to 75, a dialogue the aim of which shall be to identify and define the means best suited to satisfying their needs. They may discuss all aspects of the procurement with the chosen participants during this dialogue.

During the dialogue, contracting entities shall ensure equality of treatment among all participants. To that end, they shall not provide information in a discriminatory manner which may give some participants an advantage over others.

In accordance with Article 32, contracting entities shall not reveal to the other participants solutions proposed or other confidential information communicated by a participating candidate or tenderer in the dialogue without its agreement. Such agreement shall not take the form of a general waiver but shall be given with reference to the intended communication of specific information.

4. Competitive dialogues may take place in successive stages in order to reduce the number of solutions to be discussed during the dialogue stage by applying the award criteria defined in the call for competition or in the descriptive document. In the call for competition or the descriptive document, the contracting entity shall indicate whether it will use this option.
5. The contracting entity shall continue the dialogue until it can identify the solution or solutions which are capable of meeting its needs.
6. Having declared that the dialogue is concluded and having so informed the remaining participants, contracting entities shall ask them to submit their final tenders on the basis of the solution or solutions presented and specified during the dialogue. Those tenders shall contain all the elements required and necessary for the performance of the project.

Those tenders may be clarified, specified and fine-tuned at the request of the contracting entity. However, such clarification, specification, fine-tuning or additional information may not involve changes to the essential aspects of the tender or of the procurement, including the needs and requirements set out in the call for competition or in the descriptive document, where variations to those aspects, needs and requirements are likely to distort competition or have a discriminatory effect.

7. Contracting entities shall assess the tenders received on the basis of the award criteria laid down in the call for competition or in the descriptive document.

At the request of the contracting entity, negotiations with the tenderer identified as having submitted [the most economically advantageous tender in accordance with Article 76(1)(a)] may be carried out to confirm financial commitments or other terms contained in the tender by finalising the terms of the contract provided such negotiations do not have the effect of materially modifying essential aspects of the tender or of the procurement, including the needs and requirements set out in the call for competition or in the descriptive document and does not risk distorting competition or causing discrimination.

8. The contracting entities may specify prizes or payments to the participants in the dialogue.

#### *Article 43*

##### *Innovation partnership*

In innovation partnerships, any economic operator may submit a request to participate in response to a call for competition in accordance with points (b) and (c) of Article 39(2) by providing the information for qualitative selection that is requested by the contracting entity.

In the procurement documents, the contracting entity shall identify the need for an innovative product, service or works that cannot be met by purchasing products, services or works already available on the market. It shall indicate which elements of this description define the minimum requirements to be met by all tenders. The indications shall be sufficiently precise to enable economic operators to identify the nature and scope of the required solution and decide whether to request to participate in the procedure.

The contracting entity may decide to set up the innovation partnership with one partner or with several partners conducting separate research and development activities.

The minimum time limit for receipt of requests to participate shall, as a general rule, be fixed at no less than 30 days from the date on which the contract notice is sent and may in no case be less than 15 days.. Only those economic operators invited by the contracting entity following the assessment of the information provided may participate in the procedure. Contracting entities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with Article 72(2).The contracts shall be awarded on the sole basis of the award criterion of [the most economically advantageous tender in accordance with Article 76(1)(a)].

2. The innovation partnership shall aim at the development of an innovative product, service or works and the subsequent purchase of the resulting supplies, services or works, provided that they correspond to the agreed performance levels and maximum costs.

The innovation partnership shall be structured in successive stages following the sequence of steps in the research and innovation process, which may include the manufacturing of the supply, the provision of the services or the completion of the works. The innovation partnership shall set intermediate targets to be attained by the partners and provide for payment of the remuneration in appropriate instalments.

Based on those targets, the contracting entity may decide after each stage to terminate the innovation partnership or, in the case of an innovation partnership with several partners, to reduce the number of partners by terminating individual contracts, provided that the contracting entity has indicated in the procurement documents these possibilities and the conditions for their use.

3. Unless otherwise provided for in this Article, contracting entities shall negotiate with tenderers the initial and all subsequent tenders submitted by them, except for the final tender, to improve the content thereof.

The minimum requirements and the award criteria shall not be subject to negotiations.

- 3a. During the negotiations, contracting entities shall ensure the equal treatment of all tenderers. To that end, they shall not provide information in a discriminatory manner which may give some tenderers an advantage over others. They shall inform all tenderers, whose tenders have not been eliminated pursuant to paragraph 3(b), in writing of any changes to the technical specifications or other procurement documents other than those setting out the minimum requirements. Following these changes, contracting entities shall provide sufficient time for tenderers to modify and re-submit amended tenders, as appropriate.

In accordance with Article 32, contracting entities shall not reveal to the other participants confidential information communicated by a candidate or tenderer participating in the negotiations without its agreement. Such agreement shall not take the form of a general waiver but shall be given with reference to the intended communication of specific information.

- 3b. Negotiations during innovation partnership procedures may take place in successive stages in order to reduce the number of tenders to be negotiated by applying the award criteria specified in the contract notice, in the invitation to confirm interest or in the procurement documents. In the contract notice, the invitation to confirm interest or in the procurement documents, the contracting entity shall clearly indicate whether it will use that option.
- 3c. In selecting candidates, contracting entities shall in particular apply criteria concerning the candidates' capacity in the field of research and development and of developing and implementing innovative solutions.

Only those economic operators invited by the contracting entity following its assessment of the requested information may submit research and innovation projects aimed at meeting the needs identified by the contracting entity that cannot be met by existing solutions.



In the procurement documents, the contracting entity shall define the arrangements applicable to intellectual property rights. In the case of an innovation partnership with several partners, the contracting entity shall not, in accordance with Article 32, reveal to the other partners solutions proposed or other confidential information communicated by a partner in the framework of the partnership without its agreement. Such agreement shall not take the form of a general waiver but shall be given with reference to the intended communication of specific information.

4. The contracting entity shall ensure that the structure of the partnership and, in particular the duration and value of the different phases reflect the degree of innovation of the proposed solution and the sequence of the research and innovation activities required for the development of an innovative solution not yet available on the market. The estimated value of the supplies, services or works purchased shall not be disproportionate in relation to the investment for their development.

#### *Article 44*

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

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

- (a) where no tenders or no suitable tenders or no requests to participate or no suitable requests for participation have been submitted in response to a procedure with a prior call for competition, provided that the initial conditions of the contract are not substantially altered;

A tender shall be considered not to be suitable where it is irrelevant to the contract, being manifestly incapable, without substantial changes, of meeting the contracting entity's needs and requirements as specified in the procurement documents. A request for participation shall be considered not to be suitable where the economic operator concerned is to be or may be excluded pursuant to Articles 72(1) or 74(1), or does not meet the selection criteria set out by the contracting entity pursuant to Articles 72 or 74;

- (b) where a contract is purely for the purpose of research, experiment, study or development, and not for the purpose of securing a profit or of recovering research and development costs, and insofar as the award of such contract does not prejudice the competitive award of subsequent contracts which do seek, in particular, those ends;
- (d) where the works, supplies or services can be supplied only by a particular economic operator for any of the following reasons:
  - (i) the aim of the procurement is the creation or acquisition of a unique work of art or artistic performance;
  - (ia) competition is absent for technical reasons;
  - (iii) the protection of exclusive rights, including intellectual property rights;

The exceptions set out in points (ia) 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 procurement;

- (e) insofar as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable for the contracting entity, the time limits laid down for open procedures, restricted procedures and negotiated procedures with prior call for competition cannot be complied with. The circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting entity;
- (f) in the case of supply contracts for additional deliveries by the original supplier which are intended either as a partial replacement of supplies or installations or as the extension of existing supplies or installations, where a change of supplier would oblige the contracting entity to acquire supplies having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance;

- (g) for new works or services consisting in the repetition of similar works or services assigned to the contractor to which the same contracting entities awarded an earlier contract, provided that such works or services conform to a basic project for which a first contract was awarded according to a procedure in accordance with Article 39(1).

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 possible use of this procedure shall be disclosed and the total estimated cost of subsequent works or services shall be taken into consideration by the contracting entities when they apply Articles 12 and 13.

- (h) for supplies quoted and purchased on a commodity market ;
- (i) for bargain purchases, where it is possible to procure supplies by taking advantage of a particularly advantageous opportunity available for a very short time at a price considerably lower than normal market prices;
- (j) for purchases of supplies or services under particularly advantageous conditions from either a supplier which is definitively winding up its business activities or the liquidator in an insolvency procedure, an arrangement with creditors or a similar procedure under national laws or regulations;
- (k) where the service contract concerned follows a design contest organised in accordance with this Directive and is to be awarded, under the rules foreseen in the design contest, to the winner or to one of the winners of that contest; in the latter case, all the winners shall be invited to participate in the negotiations.

## CHAPTER II

### Techniques and instruments for electronic and aggregated procurement

#### *Article 45*

#### *Framework agreements*

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

A framework agreement means an agreement between one or more contracting entities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantities envisaged.

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

2. Contracts based on a framework agreement shall be awarded on the basis of objective rules and criteria, which may include reopening the competition among those economic operators party to the framework agreement as concluded. These rules and criteria shall be set out in the procurement documents for the framework agreement.

The objective rules and criteria referred to in the first subparagraph shall ensure equal treatment of the economic operators who are parties to the agreement. Where a reopening the competition is included, contracting entities shall set a time limit which is sufficiently long to allow tenders for each specific contract to be submitted and contracting entities shall award each contract to the tenderer that has submitted the best tender on the basis of the award criteria set out in the specifications of the framework agreement.

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

*Article 46*  
*Dynamic purchasing systems*

1. For commonly used purchases, the characteristics of which, as generally available on the market, meet the requirements of the contracting entities, they may use a dynamic purchasing system. The dynamic purchasing system shall be operated as a completely electronic process and shall be open throughout the validity of the purchasing system to any economic operator that satisfies the selection criteria. It may be divided into categories of products, works or services that are objectively defined on the basis of characteristics of the procurement to be undertaken under the category concerned. Such characteristics may include reference to the maximum allowable size of the subsequent specific contracts or to a specific geographic area in which subsequent specific contracts will be performed.
2. In order to procure under a dynamic purchasing system, contracting entities shall follow the rules of the restricted procedure. All the candidates who satisfy the selection criteria shall be admitted to the system; the number of candidates to be admitted to the system shall not be limited in accordance with Article 72 (2).

Where contracting entities have divided the system into categories of products or services in accordance with paragraph 1 of this Article, they shall specify the applicable selection criteria for each category.

Article 41 notwithstanding, the following time limits shall apply:

- (a) A minimum time limit for receipt of requests to participate shall, as a general rule, be fixed at no less than 30 days from the date on which the contract notice or, where a periodic indicative notice is used as a means of calling for competition, the invitation to confirm interest is sent and may in no case be less than 15 days. No further time limits for receipt of requests to participate shall apply once the invitation to tender for the first specific procurement under the dynamic purchasing system has been sent.

- (b) The minimum time limit for receipt of tenders shall be at least 10 days from the date on which the invitation to tender is sent. The second and third subparagraphs of Article 41(2) shall apply.
- (2a) All communications in the context of a dynamic purchasing system shall only be made with electronic means in accordance with Article 33(1), (2),(3) and (5).
- 3. For the purposes of awarding contracts under a dynamic purchasing system, contracting entities shall:
  - (a) publish a call for competition making it clear that a dynamic purchasing system is involved;
  - (b) indicate in the procurement documents, at least the nature and estimated quantity of the purchases envisaged, as well as all the necessary information concerning the purchasing system, the electronic equipment used and the technical connection arrangements and specifications;\_including how the dynamic purchasing system operates, the electronic equipment used and the technical connection arrangements and specifications
  - (ba) indicate any division into categories of products or services and the characteristics defining them;
  - (c) offer unrestricted and full direct access, as long as the system is valid, to the procurement documents in accordance with Article 67.
- 4. Contracting entities shall give any economic operator, throughout the entire period of validity of the dynamic purchasing system, the possibility of requesting to participate in the system under the conditions referred to in paragraph 2. Contracting entities shall finalise their assessment of such requests according to the selection criteria within 10 working days following their receipt. This deadline may be prolonged to 15 working days in individual cases where justified, in particular because of the need to examine additional documentation or to otherwise verify whether the selection criteria are met.

Notwithstanding the first subparagraph, as long as the invitation to tender for the first specific procurement under the dynamic purchasing system has not been sent, contracting entities may extend the evaluation period provided that no invitation to tender is issued during the extended evaluation period. In the procurement documents they shall indicate the length of the extended period that they intend to apply.

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

5. Contracting entities shall invite all admitted participants to submit a tender for each specific procurement under the dynamic purchasing system, in accordance with Article 68. Where the dynamic purchasing system has been divided into categories of works, products or services, contracting entities shall invite all participants having been admitted to the category corresponding to the specific procurement concerned to submit a tender.

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

- 5a. Contracting entities who, pursuant to Article 74 apply exclusion grounds and selection criteria provided for under Directive 2004/18, may, at any time during the period of validity of the dynamic purchasing system, require admitted participants to submit a renewed and updated self-declaration as provided for in Article 57(1) of Directive 2004/18, within five working days from the date on which that request is transmitted. Paragraphs (2) to (4) of said Article 57 shall apply throughout the entire period of validity of the dynamic purchasing system.
6. Contracting entities shall indicate the period of validity of the dynamic purchasing system in the call for competition. They shall notify the Commission of any change in period of validity, using the following standard forms:
  - (a) where the period of validity is changed without terminating the system, the form used initially for the call for competition for the dynamic purchasing system;
  - (b) where the system is terminated, a contract award notice referred to in Article 64.

7. No charges may be billed to the economic operator interested in or party to the dynamic purchasing system.

#### *Article 47*

#### *Electronic auctions*

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

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

As certain service contracts and certain works contracts having as their subject-matter intellectual performances, such as the design of works, cannot be ranked using automatic evaluation methods, such contracts shall not be the object of electronic auctions.

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

In the same circumstances, an electronic auction may be held on the reopening of competition among the parties to a framework agreement as provided for in Article 45(2) and on the opening for competition of contracts to be awarded under the dynamic purchasing system referred to in Article 46.

3. The electronic auction shall be based on one of the following elements of the tenders:
  - (a) solely on prices where the contract is awarded on the basis of price only,
  - (b) on prices and/or on the new values of the features of the tenders indicated in the procurement documents, where the contract is awarded on the basis of the best price/quality ratio or to the tender with the lowest cost using a cost-effectiveness approach.



4. Contracting entities which decide to hold an electronic auction shall state that fact in the contract notice, in the invitation to confirm interest or, where a notice on the existence of a qualification system is used as a means of calling for competition, in the invitation to tender. The procurement documents shall include at least the information set out in Annex VII.
5. Before proceeding with the electronic auction, contracting entities shall make a full initial evaluation of the tenders in accordance with the award criterion or criteria and with the weighting fixed for them.

A tender shall be considered admissible where it has been submitted by a tenderer, who has not been excluded pursuant to Article 72(1) or 74(1) and who meets the selection criteria laid down pursuant to Articles 72 and 74, and whose tender is in conformity with the technical specifications without being irregular or unacceptable within the meaning of point (b) of Article 24(1c) of [Directive 2004/18/EC] or unsuitable within the meaning of point a of Article 44 of this Directive.

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

6. The invitation shall be accompanied by the outcome of a full evaluation of the relevant tender carried out in accordance with the weighting provided for in the first subparagraph of Article 76(5).

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

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

7. Throughout each phase of an electronic auction the contracting entities shall instantaneously communicate to all tenderers sufficient information to enable them to ascertain their relative rankings at any moment. They may also communicate other information concerning other prices or values submitted, provided that that is stated in the specifications. They may also at any time announce the number of participants in that phase of the auction. In no case, however, may they disclose the identities of the tenderers during any phase of an electronic auction.
8. Contracting entities shall close an electronic auction in one or more of the following manners:
  - (a) at the previously indicated date and time;
  - (b) when they receive no more new prices or new values which meet the requirements concerning minimum differences, provided that they have previously stated the time which they will allow to elapse after receiving the last submission before they close the electronic auction; or
  - (c) when the previously indicated number of phases in the auction has been completed.

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

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

*Article 48*  
*Electronic catalogues*

1. Where use of electronic means of communication is required, contracting entities may require tenders to be presented in the format of an electronic catalogue or to include an electronic catalogue.

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

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

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

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

3. Where the presentation of tenders in the form of electronic catalogues is accepted or required, contracting entities shall:
  - (a) state so in the contract notice, in the invitation to confirm interest, or, where the means of calling for competition is a notice on the existence of a qualification system, in the invitation to tender or to negotiate;
  - (b) indicate in the procurement documents all the necessary information pursuant to Article 33(5) concerning the format, the electronic equipment used and the technical connection arrangements and specifications for the catalogue.

4. Where a framework agreement has been concluded with more than one economic operator following the submission of tenders in the form of electronic catalogues, contracting entities may provide that the reopening of competition for specific contracts takes place on the basis of updated catalogues. In such case, contracting entities shall use one of the following alternative methods:
- (a) invite tenderers to resubmit their electronic catalogues, adapted to the requirements of the specific contract in question;
  - (b) notify tenderers that they intend to collect from the electronic catalogues which have already been submitted the information needed to constitute tenders adapted to the requirements of the specific contract in question , provided that the use of this method has been announced in the procurement documents for the framework agreement.
5. Where contracting entities reopen competition for specific contracts in accordance with point (b) of paragraph (4), they shall specify the date and time at which they intend to collect the information needed to constitute tenders adapted to the requirements of the specific contract in question and shall give tenderers the possibility to refuse such collection of information.
- Contracting entities shall allow for an adequate period between the notification and the actual collection of information.
- Before awarding the contract, contracting entities shall present the collected information to the tenderer concerned so as to give it the opportunity to contest or confirm that the tender thus constituted does not contain any material errors.
6. Contracting entities may award contracts based on a dynamic purchasing system by requiring that offers for specific contract shall be presented in the format of an electronic catalogue.

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

#### *Article 49*

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

1. Member States may provide that contracting entities may acquire works, supplies and/or services from a central purchasing body offering the centralised purchasing activity referred to in point a of Article 2(16).

Member States may also provide that contracting entities may acquire works, supplies and services by using contracts awarded by a central purchasing body, by using dynamic purchasing systems operated by a central purchasing body or by using a framework agreement concluded by a central purchasing body offering the centralised purchasing activity referred to in point b of Article 2(16). Where a dynamic purchasing system which is operated by a central purchasing body may be used by other contracting entities, this shall be mentioned in the call for competition setting up the system.

In relation to subparagraphs 1 and 2, Member States may provide that certain procurements shall be made by having recourse to central purchasing bodies or to one or more specific central purchasing bodies.

3. A contracting entity fulfils its obligations pursuant to this Directive when it purchases supplies or services from a central purchasing body offering the centralised purchasing activity referred to in point a of Article 2(16).

Furthermore, a contracting entity also fulfils its obligations pursuant to this Directive where it purchases works, supplies and services by using contracts awarded by the central purchasing body, by using dynamic purchasing systems operated by the central purchasing body or by using a framework agreement concluded by the central purchasing body offering the centralised purchasing activity referred to in point b of Article 2(16).

However, the contracting entity concerned shall be responsible for fulfilling the obligations pursuant to this Directive in respect of the parts it conducts itself, such as:

- (a) awarding a contract under a dynamic purchasing system, which is operated by a central purchasing body; or
- (b) conducting a reopening of competition under a framework agreement that has been concluded by a central purchasing body.

4. All procurement procedures conducted by a central purchasing body shall be performed using electronic means of communication, in accordance with the requirements set out in Article 33.
5. Contracting entities may, without applying the procedures provided for in this Directive, award a service contract for the provision of centralised purchasing activities to a central purchasing body. Such service contracts may also include the provision of ancillary purchasing activities.

*Article 51*  
*Occasional joint procurement*

1. Two or more contracting entities may agree to perform certain specific procurements jointly.
2. Where the conduct of a procurement procedure in its entirety is carried out jointly in the name and on behalf of all the contracting entities concerned, they shall be jointly responsible for fulfilling their obligations pursuant to this Directive. This applies also in cases where one contracting entity alone manages the procurement procedure, acting on its own behalf and on the behalf of the other contracting entities concerned.

Where the conduct of a procurement procedure is not in its entirety carried out in the name and on behalf of the contracting entities concerned, they shall be jointly responsible only for those parts carried out jointly. Each contracting entity shall have sole responsibility for fulfilling its obligations pursuant to this Directive in respect of the parts it conducts in its own name and on its own behalf.

*Article 52*  
*Procurement implicating contracting entities from different Member States*

1. Without prejudice to Title I, Chapter III, Section 2, Subsection 2: Special relations, contracting entities from different Member States may act jointly in the award of contracts by using one of the means provided in this Article.

Contracting entities shall not use the means provided in this Article for the purpose of avoiding the application of mandatory public law provisions in conformity with Union law to which they are subject in the Member State where they are located.

2. A Member State shall not prohibit its contracting entities from using centralised purchasing activities offered by central purchasing bodies established in another Member State.

In respect of centralised purchasing activities offered by a central purchasing body established in another Member State than the contracting entity, Member States may, however, choose to specify that their contracting entities may only use the centralised purchasing activities as defined in either point a or in point b of Article 2(16).

- 2a. The provision of the centralised purchasing activities as defined in point a and b of Article 2(16) by a central purchasing body located in another Member State shall be conducted in accordance with the national provisions of the Member State where the central purchasing body is located.

The national provisions of the Member State where the central purchasing body is located shall also apply to the following:

- (a) the award of a contract under a dynamic purchasing system;
  - (b) the conduct of a reopening of competition under a framework agreement.
3. Several contracting entities from different Member States may jointly award a contract, conclude a framework agreement or operate a dynamic purchasing system. They may also award contracts based on the framework agreement or on the dynamic purchasing system. Unless the necessary provisions have been regulated by an international agreement concluded between the Member States concerned, the participating contracting entities shall conclude an agreement that determines:
- (a) the responsibilities of the parties and the ensuing applicable national provisions;
  - (b) the internal organisation of the procurement procedure, including the management of the procedure, the distribution of the works, supplies or services to be procured, and the conclusion of contracts.

A participating contracting entity fulfils its obligations pursuant to this Directive when it purchases works, supplies or services from a contracting entity which is responsible for the procurement procedure. When determining the responsibilities and the applicable national law in accordance with point (a), contracting entities may choose to allocate responsibilities to one or more of the participating contracting entities and the ensuing applicable national provisions of any Member State in which at least one of the participating entities is located.



The allocation of responsibilities and the ensuing applicable national law shall be mentioned in the procurement documents for jointly awarded contracts.

4. Where several contracting entities from different Member States have set up a joint legal entity, including European Groupings of territorial cooperation under Regulation (EC) No° 1082/2006 of the European Parliament and of the Council or other entities established under Union law, the participating contracting entities shall, by a decision of the competent body of the joint legal entity, agree on the applicable national procurement rules of one of the following Member States:

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

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

## CHAPTER III

### Conduct of the procedure

#### Section 1

#### Preparation

##### *Article 53*

##### *Preliminary market consultations*

Before launching a procurement procedure, contracting entities may conduct market consultations with a view to the preparation of the procurement and to inform economic operators of their procurement plans and requirements.

For this purpose, contracting entities may for example seek or accept advice from independent experts or authorities or from market participants which may be used in the planning and conduct of the procurement procedure, provided that such advice does not have the effect of distorting competition and does not result in a violation of the principles of non-discrimination and transparency.

##### *Article 53a*

##### *Prior involvement of candidates or tenderers*

Where a candidate or tenderer or an undertaking related to a candidate or tenderer has advised the contracting entity, whether in the context of Article 53 or not, or has otherwise been involved in the preparation of the procurement procedure, the contracting entity shall take appropriate measures to ensure that competition is not distorted by the participation of that candidate or tenderer.

Such measures shall include the communication to the other candidates and tenderers of relevant information exchanged in the context of or resulting from the involvement of the candidate or tenderer in the preparation of the procurement procedure and the fixing of adequate time limits for the receipt of tenders.

The candidate or tenderer concerned shall only be excluded from the procedure where there are no other means to ensure compliance with the duty to observe the principle of equal treatment.

Prior to any such exclusion, candidates or tenderers shall be given the opportunity to prove that their involvement in preparing the procurement procedure is not capable of distorting competition.

The measures taken shall be documented in the individual report required by to Article 94.

#### *Article 54*

##### *Technical specifications*

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

These characteristics may also refer to the specific process or method of production or provision of the requested works, supplies or services or to a specific process for another stage of its life cycle even where such factors do not form part of their material substance, provided that they are linked to the subject-matter of the contract and proportionate to its value and its objectives.

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

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

Where mandatory accessibility standards are adopted by a legislative act of the Union, technical specifications shall, as far as accessibility criteria for persons with disabilities or design for all users are concerned, be defined by reference thereto.

2. Technical specifications shall afford equal access of economic operators to the procurement procedure and shall not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.
3. Without prejudice to mandatory national technical rules, to the extent that they are compatible with Union law, the technical specifications shall be formulated in one of the following ways:
  - (a) in terms of performance or functional requirements, including environmental characteristics, provided that the parameters are sufficiently precise to allow tenderers to determine the subject-matter of the contract and to allow contracting entities to award the contract;
  - (b) by reference to technical specifications and, in order of preference, to national standards transposing European standards, European Technical Assessments, common technical specifications, international standards, other technical reference systems established by the European standardisation bodies or when any of those do not exist national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the supplies; each reference shall be accompanied by the words "or equivalent";
  - (c) in terms of performance or functional requirements referred to in point (a), with reference to the technical specifications referred to in point (b) as a means of presuming conformity with such performance or functional requirements;
  - (d) by reference to the technical specifications referred to in point (b) for certain characteristics, and by reference to the performance or functional requirements referred to in point (a) for other characteristics.

4. Unless justified by the subject-matter of the contract, technical specifications shall not refer to a specific make or source, or to a particular process which characterises the products or services provided by a specific economic operator, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products. Such reference shall be permitted, on an exceptional basis, where a sufficiently precise and intelligible description of the subject-matter of the contract pursuant to paragraph 3 is not possible. Such reference shall be accompanied by the words "or equivalent".
5. Where a contracting entity uses the option of referring to the technical specifications referred to in point (b) of paragraph 3, it shall not reject a tender on the ground that the works, supplies or services tendered for do not comply with the technical specifications to which it has referred, once the tenderer proves in its tender, by any appropriate means, including the means of proof referred to in Article 56, that the solutions proposed satisfy in an equivalent manner the requirements defined by the technical specifications.
6. Where a contracting entity uses the option provided for in point (a) of paragraph 3 to formulate technical specifications in terms of performance or functional requirements, it shall not reject a tender for supplies, services or works which comply with a national standard transposing a European standard, with a European technical approval, a common technical specification, an international standard, or a technical reference system established by a European standardisation body, where those specifications address the performance or functional requirements which it has laid down.

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

## *Article 55*

### *Labels*

1. Where contracting entities intend to purchase works, supplies or services with specific environmental, social or other characteristics they may, in the technical specifications, the award criteria or the contract performance conditions, require a specific label as means of proof that the works, supplies or services correspond to the required characteristics, provided that all of the following conditions are fulfilled:
  - (a) the label requirements only concern criteria which are linked to the subject-matter of the contract and are appropriate to define the characteristics of the works, supplies or services that are the subject-matter of the contract;
  - (b) the label requirements are based on objectively verifiable and non-discriminatory criteria;
  - (c) the labels are established in an open and transparent procedure in which all relevant stakeholders, including government bodies, consumers, social partners, manufacturers, distributors and non-governmental organisations may participate;
  - (d) the labels are accessible to all interested parties;
  - (e) the label requirements are set by a third party over which the economic operator applying for the label cannot exercise a decisive influence.

Contracting entities requiring a specific label shall accept all labels confirm that the works, supplies or services meet equivalent label requirements. Where an economic operator has demonstrably no possibility of obtaining the specific label indicated by the contracting entity or an equivalent label within the relevant time limits for reasons that are not attributable to that economic operator, the contracting entity shall accept other appropriate means of proof, which may include a technical dossier of the manufacturer, provided that the economic operator concerned proves that the works, supplies and services to be provided by it fulfil the requirements of the specific label or the specific requirements indicated by the contracting entity.

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

#### *Article 56*

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

1. Contracting entities may require that economic operators provide a test report from a conformity assessment body or a certificate issued by such a body as means of proof of conformity with requirements or criteria set out in the technical specifications, the award criteria or the contract performance conditions.

Where contracting entities require the submission of certificates drawn up by a specific conformity assessment body, certificates from equivalent other conformity assessment bodies shall also be accepted by the contracting entities.

For the purpose of this paragraph, a conformity assessment body shall be a body that performs conformity assessment activities including calibration, testing, certification and inspection accredited in accordance with Regulation (EC) No 765/2008 of the European Parliament and of the Council.

2. Contracting entities shall accept other appropriate means of proof than those referred to in paragraph 1, such as a technical dossier of the manufacturer where the economic operator concerned has no access to such certificates or test reports referred to in paragraph 1, or no possibility of obtaining them within the relevant time limits, provided that the lack of access is not attributable to the economic operator concerned provided that the economic operator concerned thereby proves that the works, supplies or services meet the requirements or criteria set out in the technical specifications, the award criteria or the contract performance conditions.

3. Member States shall make available to other Member States, upon request, any information related to the evidence and documents submitted in accordance with Article 54(6), Article 55 and paragraphs 1 and 2 of this Article. The competent authorities of the Member State of establishment of the economic operator shall provide this information in accordance with Article 96.

### *Article 57*

#### *Communication of technical specifications*

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

However, the technical specifications shall be transmitted by other means than electronically where unrestricted and full direct access free of charge by electronic means to certain procurement documents cannot be offered for one of the reasons set out in the second subparagraph of Article 33(1) or where unrestricted and full direct access free of charge by electronic means to certain procurement documents cannot be offered because contracting entities intend to apply Article 32(1).

2. Where the technical specifications are based on documents available by electronic means through unrestricted and full direct access free of charge to interested economic operators, the inclusion of a reference to those documents shall be sufficient.



## *Article 58*

### *Variants*

1. Contracting entities may authorise or require tenderers to submit variants which meet the minimum requirements specified by the contracting entities.

Contracting entities shall indicate in the procurement documents whether or not they authorise or require variants and, if so, the minimum requirements to be met by the variants and any specific requirements for their presentation, in particular whether variants may be submitted only where a tender, which is not a variant, has also been submitted. Where variants are authorised or required, they shall also ensure that the chosen award criteria can be applied to variants meeting those minimum requirements as well as to conforming tenders which are not variants.

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

## *Article 59*

### *Division of contracts into lots*

- 1 Contracting entities may decide to award a contract in the form of separate lots and may determine the size and subject-matter of such lots. Article 13(7) applies.

Contracting entities shall indicate, in the contract notice, in the invitation to confirm interest, or, where the means of calling for competition is a notice on the existence of a qualification system, in the invitation to tender or to negotiate, whether tenders may be submitted for one, for several or for all of the lots.

2. Contracting entities may, even where tenders may be submitted for several or all lots, limit the number of lots that may be awarded to one tenderer provided that the maximum number of lots per tenderer is stated in the contract notice or in the invitation to confirm interest, to tender or to negotiate. Contracting entities shall indicate in the procurement documents the objective and non-discriminatory criteria or rules they intend to apply for determining which lots will be awarded where the application of the award criteria would result in one tenderer being awarded more lots than the maximum number.
3. Member States may provide that, where more than one lot may be awarded to the same tenderer, contracting entities may award a contract combining several or all lots where they have specified in the contract notice or in the invitation to confirm interest, to tender or to negotiate that they reserve the possibility to do so and indicate how the lots or groups of lots that may be combined.
4. Member States may render it obligatory to award contracts in the form of separate lots under conditions to be specified in accordance with their national law and having regard for Union law. The second subparagraph of paragraph 1 and, where appropriate, paragraph 3 of this Article shall apply.

#### *Article 60*

##### *Setting time limits*

1. When fixing the time limits for requests to participate and the receipt of tenders, contracting entities shall take particular account of the complexity of the contract and the time required for drawing up tenders, without prejudice to the minimum time limits set out in Articles 40 to 43.

2. Where tenders can be made only after a visit to the site or after on-the-spot inspection of the documents supporting the procurement documents, the time limits for the receipt of tenders, which shall be longer than the minimum time limits set out in Articles 40 to 43, shall be fixed, so that all economic operators concerned may be aware of all the information needed to produce tenders.
3. Contracting entities shall extend the time limits for the receipt of tenders so that all economic operators concerned may be aware of all the information needed to produce tenders in the following cases:
  - (a) where, for whatever reason, additional information, although requested in good time, is not supplied at the latest six days before the time limit fixed for the receipt of tenders. In the event of an accelerated open procedure as referred to in Article 40(3), that period shall be four days;
  - (b) where significant changes are made to the procurement documents.

The length of the extension shall be proportionate to the importance of the information or change.

Where the additional information has either not been requested in good time or its importance in view of preparing responsive tenders is insignificant, deadlines need not be prolonged.

Section 2  
Publication and transparency

*Article 61*

*Periodic indicative notices*

1. Contracting entities may make known their intentions of planned procurement through the publication of a periodic indicative notice . Those notices shall contain the information set out in part A, section I of Annex VI. They shall be published either by the Commission or by the contracting entities on their buyer profiles in accordance with point 2(b) of Annex IX. Where the notice is published by the contracting entities on their buyer profile, they shall send a notice of the publication of the periodic indicative notice on a buyer profile in accordance with point 3 of Annex IX. Those notices shall contain the information set out in Annex VI Part B.
2. When a call for competition is made by means of a periodic indicative notice in respect of restricted procedures and negotiated procedures with prior call for competition, the notice shall meet all the following requirements:
  - (a) it refers specifically to the supplies, works or services that will be the subject of the contract to be awarded;
  - (b) it indicates that the contract will be awarded by restricted or negotiated procedure without further publication of a call for competition and invites interested economic operators to express their interest in writing;
  - (c) it contains, in addition to the information set out in part A, section I of Annex VI, the information set out in part A, section II of Annex VI;
  - (d) it has been sent for publication between 35 days and 12 months prior to the date on which the invitation to confirm interest is sent.

Such notices shall not be published on a buyer profile.; however, the additional publication at national level pursuant to Article 66, if any, may be made on a buyer profile.

The period covered by the periodic indicative notice shall at the most be a 12-month period from the date the notice is transmitted for publication. However, in the case of contracts for social and other specific services, the periodic indicative notice referred to in point b of Article 85(1) may cover a period which is longer than 12 months.

## *Article 62*

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

1. Where contracting entities choose to set up a qualification system in accordance with Article 71, the system shall be the subject of a notice as referred to in Annex X, indicating the purpose of the qualification system and how to have access to the rules concerning its operation.
2. Contracting entities shall indicate the period of validity of the qualification system in the notice on the existence of the system. They shall notify the Commission of any change in period of validity, using the following standard forms:
  - (a) where the period of validity is changed without terminating the system, the form for notices on the existence of qualification systems;
  - (b) where the system is terminated, a contract award notice referred to in Article 64.

## *Article 63*

### *Contract notices*

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

## *Article 64*

### *Contract award notices*

1. Not later than 30 days after the conclusion of a contract or of a framework agreement following the decision to award or conclude it, contracting entities shall send a contract award notice on the results of the procurement procedure.

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

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

In the case of framework agreements concluded in accordance with Article 45, contracting entities shall not be bound to send a notice of the results of the procurement procedure for each contract based on that agreement. Member States may provide that contracting entities shall group notices of the results of the procurement procedure for contracts based on the framework agreement on a quarterly basis. In that case, contracting entities shall send the grouped notices within 30 days of the end of each quarter.

Contracting entities shall send a contract award notice within 30 days after the award of each contract based on a dynamic purchasing system. They may, however, group such notices on a quarterly basis. In that case, they shall send the grouped notices within 30 days of the end of each quarter.

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

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

- (a) the indication "R&D services" where the contract has been awarded by a negotiated procedure without a call for competition in accordance with Article 44(b);
- (b) at least as detailed information as was indicated in the notice that was used as a means of calling for competition.

- 4. Information provided in accordance with Annex XII and marked as not being intended for publication shall be published only in simplified form and in accordance with Annex IX for statistical purposes.

#### *Article 65*

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

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

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

- 2. Notices referred to in Articles 61 to 64 shall be drawn up, transmitted by electronic means to the Commission and published in accordance with Annex IX. Notices shall be published not later than five days after they are sent. The costs of publication of the notices by the Commission shall be borne by the Union.
- 3. Notices referred to in Articles 61 to 64 shall be published in full in the official language(s) of the Union as chosen by the contracting entity. That language version or those language versions shall constitute the sole authentic text(s). A summary of the important elements of each notice shall be published in the other official languages.

4. The Commission shall ensure that the full text and the summary of periodic indicative notices referred to in Article 61(2), calls for competition setting up a dynamic purchasing system as referred to in Article 46(3)(a) and notices on the existence of a qualification system used as a means of calling for competition in accordance with Article 39(2)(b) continue to be published:
- (a) in the case of periodic indicative notices for 12 months or until receipt of a contract award notice as provided for in Article 64 (2) indicating that no further contracts will be awarded during the 12 month period covered by the call for competition. However, in the case of contracts for social and other specific services, the periodic indicative notice referred to in point b of Article 85(1) shall continue to be published until the end of its originally indicated period of validity or until receipt of a contract award notice as provided for in Article 64 indicating that no further contracts will be awarded during the period covered by the call for competition;
  - (b) in the case of calls for competition setting up a dynamic purchasing system for the period of validity of the dynamic purchasing system;
  - (c) in the case of notices on the existence of a qualification system for its period of validity.
5. Contracting entities shall be able to supply proof of the dates on which notices are dispatched.
- The Commission shall give the contracting entity confirmation of the receipt of the notice and of the publication of the information sent, indicating the date of that publication. Such confirmation shall constitute proof of publication.
6. Contracting entities may publish notices for works, supply or service contracts that are not subject to the publication requirements laid down in this Directive provided that those notices are sent to the Commission by electronic means in accordance with the format and procedures for transmission indicated in Annex IX.



*Article 66*  
*Publication at national level*

1. Notices referred to in Articles 61 to 64 and the information contained therein shall not be published at national level before the publication pursuant to Article 65. However, publication may in any case take place at the national level where contracting entities have not been notified of the publication within 48 hours after confirmation of the receipt of the notice according to Article 65.
2. Notices published at national level shall not contain information other than that contained in the notices dispatched to the Commission or published on a buyer profile, but shall indicate the date of dispatch of the notice to the Commission or its publication on the buyer profile.
3. Periodic indicative notices shall not be published on a buyer profile before the dispatch to the Commission of the notice of their publication in that form; they shall indicate the date of that dispatch.

*Article 67*  
*Electronic availability of procurement documents*

1. Contracting entities shall by electronic means offer unrestricted and full direct access free of charge the procurement documents from the date of publication of the notice in accordance with Article 65 or the date on which the invitation to confirm interest is sent.

Where the means of calling for competition is a notice on the existence of a qualification system, such access shall be offered as soon as possible and at the latest when the invitation to tender or to negotiate is sent. The text of the notice or of those invitations shall specify the internet address at which this documentation is accessible.

Where unrestricted and full direct access free of charge by electronic means to certain procurement documents cannot be offered for one of the reasons set out in the second subparagraph of Article 33(2), contracting entities may indicate in the notice or the invitation to confirm interest that the procurement documents concerned will be transmitted by other means than electronically in accordance with paragraph 2 of this Article. In such case, the time limit for the submission of tenders shall be prolonged by five days, except in the cases of duly substantiated urgency referred to in Article 40(3) and where the time limit is set by mutual agreement pursuant to the 2<sup>nd</sup> subparagraph of Article 41(2) or the 2<sup>nd</sup> subparagraph of Article 42(2).

Where unrestricted and full direct access free of charge by electronic means to certain procurement documents cannot be offered because contracting entities intend to apply Article 32(1), they shall indicate in the notice or the invitation to confirm interest or or, where the means of calling for competition is a notice on the existence of a qualification system, in the procurement documents which measures aimed at protecting the confidential nature of the information they require and how access can be obtained to the documents concerned. In such case, the time limit for the submission of tenders shall be prolonged by five days, except in the cases of duly substantiated urgency referred to in Article 40(3) and where the time limit is set by mutual agreement pursuant to the 2<sup>nd</sup> subparagraph of Article 41(2) or the 2<sup>nd</sup> subparagraph of Article 42(2).

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

## *Article 68*

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

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

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

2. The invitations referred to in paragraph 1 shall include a reference to the electronic address on which the procurement documents have been made directly available by electronic means. The invitations shall be accompanied by the procurement documents, where these documents have not been the subject of unrestricted and full direct access, free of charge, for the reasons set out in the second and third subparagraph of Article 67(1) and have not already been made otherwise available. In addition, the invitations referred to in paragraph 1 shall include the information set out in Annex XIII.

## *Article 69*

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

1. Contracting entities shall as soon as possible inform each candidate and tenderer of decisions reached concerning the conclusion of a framework agreement, the award of the contract, or admission to a dynamic purchasing system, including the grounds for any decision not to conclude a framework agreement or award a contract for which there has been a call for competition or to recommence the procedure, or not to implement a dynamic purchasing system.

2. On request from the party concerned, contracting entities shall, as soon as possible, and in any case within 15 days from receipt of a written request, inform:
- (a) any unsuccessful candidate of the reasons for the rejection of its request to participate;
  - (b) any unsuccessful tenderer of the reasons for the rejection of its tender, including, for the cases referred to in Article 54(5) and (6), the reasons for their decision of non-equivalence or their decision that the works, supplies or services do not meet the performance or functional requirements;
  - (c) any tenderer that has made an admissible tender of the characteristics and relative advantages of the tender selected, as well as the name of the successful tenderer or the parties to the framework agreement;
  - (d) any tenderer that has made an admissible tender of the conduct and progress of negotiations and dialogue with tenderers.
3. Contracting entities may decide that certain information on the contract award or the conclusion of the framework agreement or the admission to a dynamic purchasing system, referred to in paragraphs 1 and 2, is to be withheld where its release would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of a particular economic operator, public or private, including the interests of the economic operator to whom the contract has been awarded, or might prejudice fair competition between economic operators.
4. Contracting entities which establish and operate a system of qualification shall inform applicants of their decision as to qualification within a period of six months.

If the decision will take longer than four months from the presentation of an application, the contracting entity shall inform the applicant, within two months of the application, of the reasons justifying the longer period and of the date by which his application will be accepted or refused.

5. Applicants whose qualification is refused shall be informed of this decision and the reasons for refusal as soon as possible and under no circumstances more than 15 days later than the date of the decision. The reasons shall be based on the criteria for qualification referred to in Article 71(2).
6. Contracting entities which establish and operate a system of qualification may bring the qualification of an economic operator to an end only for reasons based on the criteria for qualification referred to in Article 71(2). Any intention to bring qualification to an end shall be notified in writing to the economic operator beforehand, at least 15 days before the date on which qualification is due to end, together with the reason or reasons justifying the proposed action.

Section 3  
Choice of participants and award of contracts

*Article 70*

*General principles*

1. For the purpose of selecting participants in their procurement procedures, the following cumulative rules apply:
  - (a) contracting entities having provided rules and criteria for the exclusion of tenderers or candidates in accordance with Article 72(1) or Article 74(1) shall exclude economic operators identified in accordance with such rules and fulfilling such criteria;
  - (b) they shall select tenderers and candidates in accordance with the objective rules and criteria laid down pursuant to Articles 72 and 74;
  - (c) in restricted procedures, in negotiated procedures with a call for competition, in competitive dialogues and in innovation partnerships, they shall where appropriate reduce in accordance with Article 72(2) the number of candidates selected pursuant to points (a) and (b) of this paragraph.
2. When a call for competition is made by means of a notice on the existence of a qualification system and for the purpose of selecting participants in procurement procedures for the specific contracts which are the subject of the call for competition, contracting entities shall:
  - (a) qualify economic operators in accordance with Article 71;
  - (b) apply to such qualified economic operators those provisions of paragraph 1 that are relevant to restricted or negotiated procedures, to competitive dialogues or to innovation partnerships.
3. When selecting participants for a restricted or negotiated procedure, a competitive dialogue or an innovation partnership, in reaching their decision as to qualification or when the criteria and rules are being updated, contracting entities shall not:
  - (a) impose administrative, technical or financial conditions on certain economic operators which would not be imposed on others;
  - (b) require tests or evidence which would duplicate objective evidence already available.

- 3a. Where information or documentation to be submitted by economic operators is or appears to be incomplete or erroneous or where specific documents are missing, contracting entities may, unless otherwise provided by the applicable national law implementing this Directive; request the economic operators concerned to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit, provided that such requests are made in full compliance with the principles of equal treatment and transparency.
4. Contracting entities shall verify that the tenders submitted by the selected tenderers comply with the rules and requirements applicable to tenders and award the contract on the basis of the criteria laid down in Articles 76 and 79, taking into account Article 58.
5. Contracting entities may decide not to award a contract to the tenderer submitting the best tender where they have established that the tender does not comply with the applicable obligations referred to in Article 29(2).
6. In open procedures, contracting entities may decide to examine tenders before verifying the suitability of tenderers, provided that the relevant provisions of Articles 70 to 79 are observed, including the rule that the contract shall not be awarded to a tenderer who should have been excluded pursuant to Article 74 or who does not meet the selection criteria set out by the contracting entity in accordance with Article 72(1) and Article 74.

Member States may exclude the use of the procedure in the first subparagraph for or restrict it to certain types of procurement or specific circumstances.

7. The Commission shall be empowered to adopt delegated acts in accordance with Article 98 to amend the list in Annex XIV, where necessary, to add new international agreements that have been ratified by all Member States or where the existing international agreements referred to are no longer ratified by all Member States or they are otherwise changed, for instance in respect of their scope, content or denomination.

Subsection 1  
Qualification and qualitative selection

*Article 71*  
*Qualification systems*

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

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

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

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

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

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

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

4. A written record of qualified economic operators shall be kept; it may be divided into categories according to the type of contract for which the qualification is valid.



5. When a call for competition is made by means of a notice on the existence of a qualification system, specific contracts for the works, supplies or services covered by the qualification system shall be awarded by restricted procedures or negotiated procedures, in which all tenderers and participants are selected among the candidates already qualified in accordance with such a system.
6. Any charges that are billed in connection with requests for qualification or with updating or conserving an already obtained qualification pursuant to the system shall be proportionate to the generated costs.

## *Article 72*

### *Criteria for qualitative selection*

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

### *Article 73*

#### *Reliance on the capacities of other entities*

1. Where the objective rules and criteria for the exclusion and selection of economic operators requesting qualification in a qualification system include requirements relating to the economic and financial capacity of the economic operator, or to its technical and professional abilities, the economic operator may where necessary rely on the capacity of other entities, whatever the legal nature of the link between itself and those entities. With regard to criteria relating to the educational and professional qualifications of the service provider or contractor or those of the undertaking's managerial staff or to the relevant professional experience, economic operators may however only rely on the capacities of other entities where the latter will perform the works or services for which these capacities are required. Where an economic operator wants to rely on the capacities of other entities, it shall prove to the contracting entity that those resources will be available to it throughout the period of the validity of the qualification system, for example by producing a commitment by those entities to that effect.

Where, pursuant to Article 74, contracting entities have referred to exclusion or selection criteria provided for under Directive 2004/18/EC, contracting entities shall verify in accordance with Article 74(3) whether the other entities on whose capacity the economic operator intends to rely fulfil the relevant selection criteria or whether there are grounds for exclusion, to which the contracting entities have referred, pursuant to Article 55 of Directive 2004/18/EC. The contracting entity shall require that the economic operator substitutes an entity in respect of which there are compulsory grounds for exclusion to which the contracting entity has referred. The contracting entity may require that the economic operator substitutes an entity in respect of which there are non-compulsory grounds for exclusion to which the contracting entity has referred.

Where an economic operator relies on the capacities of other entities with regard to criteria relating to economic and financial standing, contracting entities may require that the economic operator and those entities be jointly liable for the execution of the contract.

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

2. Where the objective rules and criteria for the exclusion and selection of candidates and tenderers in open, restricted or negotiated procedures, in competitive dialogues or in innovation partnerships include requirements relating to the economic and financial capacity of the economic operator, or to its technical and professional abilities the economic operator may where necessary and for a particular contract rely on the capacity of other entities, whatever the legal nature of the link between itself and those entities. With regard to criteria relating to the educational and professional qualifications of the service provider or contractor or those of the undertaking's managerial staff or to the relevant professional experience, economic operators may however only rely on the capacities of other entities where the latter will perform the works or services for which these capacities are required. Where an economic operator wants to rely on the capacities of other entities, it shall prove to the contracting entity that the necessary resources will be available to it, for example by delivering a commitment by those entities to that effect.

Where, pursuant to Article 74, contracting entities have referred to exclusion or selection criteria provided for under Directive 2004/18/EC, contracting entities shall verify in accordance with Article 74(3) whether the other entities on whose capacity the economic operator intends to rely fulfil the relevant selection criteria or whether there are grounds for exclusion, to which the contracting entities have referred, pursuant to Article 55 of Directive 2004/18/EC. The contracting entity shall require that the economic operator substitutes an entity which does not meet a relevant selection criterion, or in respect of which there are compulsory grounds for exclusion to which the contracting entity has referred. The contracting entity may require that the economic operator substitutes an entity in respect of which there are non-compulsory grounds for exclusion to which the contracting entity has referred.

Where an economic operator relies on the capacities of other entities with regard to criteria relating to economic and financial standing, contracting entities may require that the economic operator and those entities be jointly liable for the execution of the contract.

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

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

#### *Article 74*

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

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

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

If so required by Member States, those criteria and rules shall, in addition, include the exclusion grounds listed in Article 55(3) of Directive 2004/18/EC on the terms and conditions set out in that Article.

2. The criteria and rules referred to in paragraph 1 may include the selection criteria set out in Article 56 of Directive 2004/18/EC on the terms and conditions set out therein, notably as regards the limits to requirements concerning yearly turnovers, as provided for under the third subparagraph of paragraph 3 of that Article.
3. For the purpose of applying paragraphs 1 and 2 of this Article, Articles 57 to 58 of Directive 2004/18/EC shall apply.

## *Article 75*

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

1. Contracting entities shall, where they require the production of certificates drawn up by independent bodies attesting that the economic operator complies with certain quality assurance standards, including on accessibility for disabled persons, refer to quality assurance systems based on the relevant European standards series certified by accredited bodies. They shall recognise equivalent certificates from bodies established in other Member States. They shall also accept other evidence of equivalent quality assurance measures where the economic operator concerned has no possibility of obtaining such certificates within the relevant time limits for reasons that are not attributable to that economic operator provided that the economic operator proves that the proposed quality assurance measures comply with the required quality assurance standards.
2. Where contracting entities require the production of certificates drawn up by independent bodies attesting that the economic operator complies with certain environmental management systems or standards, they shall refer to the European Union Eco-Management and Audit Scheme (EMAS) or to other environmental management systems as recognized in accordance with Article 45 of Regulation (EC) No 1221/2009 of the European Parliament and of the Council or other environmental management standards based on the relevant European or international standards by accredited bodies. They shall recognise equivalent certificates from bodies established in other Member States.

Where an economic operator has demonstrably no access to such certificates, or no possibility of obtaining them within the relevant time limits for reasons that are not attributable to that economic operator, the contracting entity shall also accept other evidence of environmental management measures, provided that the economic operator concerned proves that these measures are equivalent to those required under the applicable environmental management system.

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

## Subsection 2

### Award of the contract

#### *Article 76*

#### *Contract award criteria*

1. Without prejudice to national laws, regulations or administrative provisions on the price of certain supplies or the remuneration of certain services, contracting entities shall base the award of contracts on the most economically advantageous tender.
2. The most economically advantageous tender from the point of view of the contracting entity shall be identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing in accordance with Article 77, and may include the best price-quality ratio, which shall be assessed on the basis of criteria including qualitative, environmental and/or social aspects linked to the subject-matter of the contract in question. Such criteria may comprise, for instance:
  - quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics, trading and its conditions
  - organisation, qualification and experience of staff assigned to performing the contract, where the quality of the staff employed can significantly impact the level of performance of the contract,
  - after-sales service and technical assistance, delivery conditions such as delivery date, delivery process and delivery period or period of completion, commitments with regard to parts and security of supply. The cost element may also take the form of a fixed price or cost on the basis of which economic operators will compete on quality criteria only.

Member States may provide that contracting entities may not use price only or cost only as the sole award criterion or restrict their use to certain categories of contracting entities or certain types of contracts.

3. Award criteria shall be considered to be linked to the subject-matter of the public contract where they relate to the works, supplies or services to be provided under that contract in any respect and at any stage of their life cycle, including factors involved:
- (a) in the specific process of production, provision or trading of those works, supplies or services, or
  - (b) in a specific process for another stage of their life cycle,
- even where such factors do not form part of their material substance.
4. Award criteria shall not have the effect of conferring an unrestricted freedom of choice on the contracting entity. They shall ensure the possibility of effective competition and shall be accompanied by specifications that allow the information provided by the tenderers to be effectively verified in order to assess how well the tenders meet the award criteria. In case of doubt, contracting entities shall verify effectively the accuracy of the information and proof provided by the tenderers.
5. The contracting entity shall specify in the procurement documents the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender except where this is identified on the basis of price alone.

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

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

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

*Article 77*

*Life-cycle costing*

1. Life-cycle costing shall to the extent relevant cover parts or all of the following costs over the life cycle of a product, service or works
  - (a) costs, borne by the contracting entity or other users, such as:
    - (i) costs relating to acquisition,
    - (ii) costs of use, such as consumption of energy and other resources,
    - (iii) maintenance costs,
    - (iv) end of life costs, such as collection and recycling costs
  - (b) cost imputed to environmental externalities linked to the product, service or works during its life cycle, provided their monetary value can be determined and verified; these costs may include the cost of emissions of greenhouse gases and of other pollutant emissions and other climate change mitigation costs.
2. Where contracting entities assess the costs using a life-cycle costing approach, they shall indicate in the procurement documents the data to be provided by the tenderers and the method which the contracting entity will use to determine the life-cycle costs on the basis of these data..



The method used for the assessment of costs imputed to environmental externalities shall fulfil all of the following conditions:

- (a) it is based on objectively verifiable and non-discriminatory criteria. In particular where it has not been established for repeated or continuous application, it shall not unduly favour or disadvantage certain economic operators
- (c) it is accessible to all interested parties
- (d) the data required can be provided with reasonable effort by normally diligent economic operators, including economic operators from third countries party to the Agreement or other international agreements by which the Union is bound.

3. Whenever a common method for the calculation of life-cycle costs has been made mandatory by a legislative act of the Union that common method shall be applied for the assessment of costs.

A list of such legislative acts, and where necessary the delegated acts supplementing them, is set out in Annex XV.

The Commission, shall be empowered to adopt delegated acts in accordance with Article 98 concerning the update of that list, when an update of the list is necessary due to the adoption of new legislation making a common method mandatory or the repeal or modification of existing legislation.

## *Article 79*

### *Abnormally low tenders*

1. Contracting entities shall require economic operators to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services.
2. The explanations referred to in paragraph 1 may in particular relate to:
  - (a) the economics of the manufacturing process, of the services provided and of the construction method;
  - (b) the technical solutions chosen or any exceptionally favourable conditions available to the tenderer for the supply of the goods or services or for the execution of the work;
  - (c) the originality of the supplies, services or work proposed by the tenderer;
  - (d) compliance with obligations referred to in Article 29(2);
  - (da) compliance with obligations referred to in Article 81
  - (e) the possibility of the tenderer obtaining State aid.

4. The contracting entity shall assess the information provided by consulting the tenderer.

It may only reject the tender where the evidence supplied does not satisfactorily account for the low level of price or costs proposed, taking into account the elements referred to in paragraph 2.

Contracting entities shall reject the tender, where they have established that the tender is abnormally low because it does not comply with applicable obligations referred to in Article 29(2).

- Alignment to ensure coherence with Classic Directive for which no similar amendment was adopted.

5. Where a contracting entity establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender may be rejected on that ground alone only after consultation with the tenderer where the latter is unable to prove, within a sufficient time limit fixed by the contracting entity, that the aid in question was compatible with the internal market within the meaning of Article 107 of the Treaty. Where the contracting entity rejects a tender in those circumstances, it shall inform the Commission thereof.  
  
- Alignment to ensure coherence with Classic Directive for which no similar amendment was adopted.
6. Upon request, Member States shall make available to other Member States by way of administrative cooperation any information at its disposal, such as laws, regulations, universally applicable collective agreements or national technical standards, relating to the evidence and documents produced in relation to details listed in paragraph 2.

#### Section 4

Tenders comprising products originating in third countries and relations with those countries

#### *Article 79a*

##### *Tenders comprising products originating in third countries*

1. This Article shall apply to tenders covering products originating in third countries with which the Community has not concluded, whether multilaterally or bilaterally, an agreement ensuring comparable and effective access for Community undertakings to the markets of those third countries. It shall be without prejudice to the obligations of the Community or its Member States in respect of third countries.
2. Any tender submitted for the award of a supply contract may be rejected where the proportion of the products originating in third countries, as determined in accordance with Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code<sup>34</sup>, exceeds 50 % of the total value of the products constituting the tender.

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<sup>34</sup> OJ L 302, 19.10.1992, p. 1.

For the purposes of this Article, software used in telecommunications network equipment shall be regarded as products.

3. Subject to the second subparagraph, where two or more tenders are equivalent in the light of the contract award criteria defined in Article 76, preference shall be given to those tenders which may not be rejected pursuant to paragraph 2. The prices of those tenders shall be considered equivalent for the purposes of this Article, if the price difference does not exceed 3 %.

However, a tender shall not be preferred to another pursuant to the first subparagraph where its acceptance would oblige the contracting entity to acquire equipment having technical characteristics different from those of existing equipment, resulting in incompatibility, technical difficulties in operation and maintenance, or disproportionate costs.

4. For the purposes of this Article, those third countries to which the benefit of the provisions of this Directive has been extended by a Council Decision in accordance with paragraph 1 shall not be taken into account for determining the proportion, referred to in paragraph 2, of products originating in third countries.
5. The Commission shall submit an annual report to the Council, commencing in the second half of the first year following the entry into force of this Directive, on progress made in multilateral or bilateral negotiations regarding access for Community undertakings to the markets of third countries in the fields covered by this Directive, on any result which such negotiations may have achieved, and on the implementation in practice of all the agreements which have been concluded.

The provisions of this Article may be amended in the light of such developments.

*Article 79b*

*Relations with third countries as regards works, supplies and service contracts*

1. Member States shall inform the Commission of any general difficulties, in law or in fact, encountered and reported by their undertakings in securing the award of service contracts in third countries.
2. The Commission shall report to the Council 3 years after the date provided for in Article 101(1), and periodically thereafter, on the opening up of service contracts in third countries and on progress in negotiations with these countries on this subject, particularly within the framework of the WTO.
3. The Commission shall endeavour, by approaching the third country concerned, to remedy any situation whereby it finds, on the basis either of the reports referred to in paragraph 2 or of other information, that, in the context of the award of service contracts, a third country:
  - (a) does not grant Community undertakings effective access comparable to that granted by the Community to undertakings from that country; or
  - (b) does not grant Community undertakings national treatment or the same competitive opportunities as are available to national undertakings; or
  - (c) grants undertakings from other third countries more favourable treatment than Community undertakings.
4. Member States shall inform the Commission of any difficulties, in law or in fact, encountered and reported by their undertakings and which are due to the non-observance of the international labour law provisions listed in Annex XIV when these undertakings have tried to secure the award of contracts in third countries.

5. In the circumstances referred to in paragraphs 3 and 4, the Commission may at any time propose that the Council adopt an implementing act to suspend or restrict, over a period to be laid down in the decision, the award of service contracts to:
- (a) undertakings governed by the law of the third country in question;
  - (b) undertakings affiliated to the undertakings specified in point (a) and having their registered office in the Community but having no direct and effective link with the economy of a Member State;
  - (c) undertakings submitting tenders which have as their subject-matter services originating in the third country in question.

The Council shall act, by qualified majority, as soon as possible.

The Commission may propose these measures on its own initiative or at the request of a Member State.

6. This Article shall be without prejudice to the commitments of the Community in relation to third countries ensuing from international agreements on public procurement, particularly within the framework of the WTO.

Chapter IV  
Contract performance

*Article 80*  
*Conditions for performance of contracts*

Contracting entities may lay down special conditions relating to the performance of a contract, provided that they are linked to the subject-matter of the contract within the meaning of Article 76(3) and indicated in the call for competition or in the procurement documents. Those conditions may include economic, innovation-related, environmental, social or employment- related considerations.

*Article 81*  
*Subcontracting*

1. Observance of the obligations referred to in Article 29(2) by subcontractors is ensured through appropriate action by the competent national authorities acting within the scope of their responsibility and remit.
2. In the procurement documents, the contracting entity may ask, or may be required by a Member State to ask, the tenderer to indicate in its tender any share of the contract it may intend to subcontract to third parties and any proposed subcontractors.
3. Member States may provide that at the request of the subcontractor and where the nature of the contract so allows, the contracting entity shall transfer due payments directly to the subcontractor for services, supplies or works provided to the economic operator to whom the contract has been awarded ( the main contractor). Such measures may include appropriate mechanisms permitting the main contractor to object to undue payments. The arrangements concerning that mode of payment shall be set out in the procurement documents.

4. Paragraphs 1 to 3 shall be without prejudice to the question of the main contractor's liability.
5. In the case of works contracts and in respect of services to be provided at the facilities under the direct oversight of the contracting entity, after the award of the contract and at the latest when the performance of the contract commences, the contracting entity shall require the main contractor to indicate to the contracting entity the name, contact details and legal representatives of its subcontractors, involved in such works or services, insofar as known at this point in time. The contracting entity shall require the main contractor to notify the contracting entity of any changes to this information during the course of the contract as well as of the required information for any new subcontractors which it subsequently involves in such works or services. Alternatively, Member States may impose the obligation to deliver the required information directly on the main contractor.

Where necessary for the purposes point b of paragraph 6 the required information shall be accompanied by the subcontractors' self-declarations as referred to in Article 74(3). The implementing measures pursuant to paragraph 8 may provide that subcontractors which are presented after the award of the contract shall provide the certificates and other supporting documents instead of the self-declaration.

The first subparagraph shall not apply to suppliers.

Contracting entities may extend or may be required by a Member State to extend the obligations provided for in the first subparagraph for instance:

- (a) to supply contracts, to services contracts other than those concerning services to be provided at the facilities under the direct oversight of the contracting entity or to suppliers involved in works or services contracts;
- (b) to subcontractors of the main contractor's subcontractors or further down the subcontracting chain.



6. With the aim of avoiding breaches of the obligations referred to in Article 29(2), appropriate measures may be taken, such as:
- (a) Where the national law of a Member State provides for a mechanism of joint liability between subcontractors and the main contractor, the Member State concerned shall ensure that the relevant rules are applied in compliance with the conditions set in out in Article 29.2.
  - (b) Contracting authorities may, in accordance with Article 74(3), verify or may be required by Member States to verify whether there are grounds for exclusion of subcontractors pursuant to Article 55 of [Directive ... replacing 2004/18/EC]. In such cases, the contracting authority shall require that the economic operator substitutes a subcontractor in respect of which the verification has shown that there are compulsory grounds for exclusion. The contracting authority may require or may be required by a Member State to require that the economic operator substitutes a subcontractor in respect of which the verification has shown that there are non-compulsory grounds for exclusion.
7. Member States may provide for more stringent liability rules under national law or to go further under national law on direct payments to subcontractors, for instance by providing for direct payments to subcontractors without it being necessary for them to request this.
8. Member States having chosen to provide for measures pursuant to paragraphs 3, 5 or 6 shall, by law, regulation or administrative provisions and having regard for Union law, specify the implementing conditions for those measures. In so doing, Member States may limit their applicability, for instance in respect of certain types of contracts, certain categories of contacting entities or economic operators or as of certain amounts.

## Article 82

### *Modification of contracts during their term*

1. Contracts and framework agreements may be modified without a new procurement procedure in accordance with this Directive in any of the following cases:
  - (a) where the modifications, irrespective of their monetary value, have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses, which may include *price revision clauses*, or options. Such clauses shall state the scope and nature of possible modifications or options as well as the conditions under which they may be used. They shall not provide for modifications or options that would alter the overall nature of the contract or framework agreement;
  - (b) for additional works, services or supplies by the original contractor, irrespective of their value, that were not included in the initial procurement where a change of contractor:
    - (i) cannot be made for economic or technical reasons such as requirements of interchangeability or interoperability with existing equipment, software, services or installations procured under the initial procurement; and
    - (ii) would cause significant inconvenience or substantial duplication of costs for the contracting entity.
  - (c) where the following cumulative conditions are fulfilled:
    - (i) the need for modification has been brought about by circumstances which a diligent contracting entity could not foresee;
    - (ii) the modification does not alter the overall nature of the contract;

Contracting entities having modified a contract in the cases set out under points b and c shall publish in the Official Journal of the European Union a notice to that effect. Such notices shall contain the information set out in Annex XVI and be published in accordance with Article 65;

- (d) Where a new contractor replaces the one to which the contracting entity had initially awarded the contract as a consequence of either:
    - (i) an unequivocal review clause or option in conformity with point (a),
    - (ii) universal or partial succession into the position of the initial contractor, following corporate restructuring, including takeover, merger, acquisition or insolvency, of another economic operator that fulfils the criteria for qualitative selection initially established provided that this does not entail other substantial modifications to the contract and is not aimed at circumventing the application of this Directive; or
    - (iii) in the event that the contracting entity itself assumes the main contractor's obligations towards its subcontractors where this possibility is provided for under national legislation pursuant to Article 81;
  - (e) where the modifications, irrespective of their value, are not substantial within the meaning of paragraph 4.
2. Furthermore, and without any need to verify whether the conditions set out under points a to d of paragraph 4 are met, contracts may equally be modified without a new procurement procedure in accordance with this Directive being necessary where the value of the modification is below both of the following values:
- (i) the thresholds set out in Article 12, and
  - (ii) 10% of the initial contract value for service and supply contracts and below 15% of the initial contract value for works contracts.

However, the modification may not alter the overall nature of the contract or framework agreement. Where several successive modifications are made, the value shall be assessed on the basis of the net cumulative value of the successive modifications.

3. For the purpose of the calculation of the price referred to in paragraph 2 of this Article, the updated price shall be the reference value when the contract includes an indexation clause.  
[Am. 208]
4. A modification of a contract or a framework agreement during its term shall be considered substantial within the meaning of point (e) of paragraph 1, where it renders the contract or the framework agreement materially different in character from the one initially concluded. In any case, without prejudice to paragraphs 1 and 2, a modification shall be considered substantial where one of the following conditions is met:
  - (a) the modification introduces conditions which, had they been part of the initial procurement procedure, would have allowed for the admission of other candidates than those initially selected or for the acceptance of an offer other than that originally accepted or would have attracted additional participants in the procurement procedure;
  - (b) the modification changes the economic balance of the contract or the framework agreement in favour of the contractor in a manner which was not provided for in the initial contract or framework agreement;
  - (c) the modification extends the scope of the contract or framework agreement considerably ;
  - (d) where a new contractor replaces the one to which the contracting entity had initially awarded the contract in other cases than those provided for under point d) of paragraph 1.
5. A new procurement procedure in accordance with this Directive shall be required for other modifications of the provisions of a works, supply or service contract or a framework agreement during its term than those provided for under paragraphs 1 and 2

*Article 83*  
*Termination of contracts*

Member States shall ensure that contracting entities have the possibility, at least under the following circumstances and under the conditions determined by the applicable national law, to terminate a works, supply or service contract during its term, where it turns out that :

- (b) the contract has been subject to a substantial modification that constitutes a new award within the meaning of Article 82;
- (ba) the contractor has been, at the time of contract award, in one of the situations referred to in [Article 55(1) of Directive ... replacing Directive 2004/18/EC and should therefore have been excluded from the procurement procedure pursuant to the second subparagraph of Article 74(1) of this Directive;
- (c) the contract should not have been awarded to the contractor in view of a serious infringement of the obligations under the Treaties and this Directive that has been declared by the Court of Justice of the European Union in a procedure under Article 258 of the Treaty.

TITLE III  
PARTICULAR PROCUREMENT REGIMES

CHAPTER I  
Social and other specific services

*Article 84*  
*Award of contracts for social and other specific services*

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

*Article 85*  
*Publication of notices*

1. Contracting entities intending to award a contract for the services referred to in Article 84 shall make known their intention by any of the following means:
  - (a) by means of a contract notice; or
  - (b) by means of a periodic indicative notice, which shall be published continuously. The periodic indicative notice shall refer specifically to the types of services that will be the subject of the contracts to be awarded. It shall indicate that the contracts will be awarded without further publication and invite interested economic operators to express their interest in writing; or
  - (c) By means of a notice on the existence of a qualification system, which shall be published continuously.

The first subparagraph shall, however, not apply where a negotiated procedure without prior call for competition could have been used in conformity with the provisions of Article 44 for the award of a service contract.

2. Contracting entities that have awarded a contract for the services referred to in Article 84 shall make known the results by means of contract award notice. They may, however, group such notices on a quarterly basis. In that case, they shall send the grouped notices within 30 days of the end of each quarter.
3. The notices referred to in paragraphs 1 and 2 shall contain the information referred to in Annex XVIII, respectively in parts A, B, C or D, in accordance with the standard model notices. The Commission shall establish the standard forms by means of implementing acts. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 100.
4. The notices referred to in this article shall be published in accordance with Article 65.

#### *Article 86*

#### *Principles of awarding contracts*

1. Member States shall put in place national rules for the award of contracts subject to this Chapter, in order to ensure contracting entities comply with the principles of transparency and equal treatment of economic operators. Member States are free to determine the procedural rules applicable as long as such rules allow contracting entities to take into account the specificities of the services in question.
2. Member States shall ensure that contracting entities may take into account the need to ensure quality, continuity, accessibility, affordability, availability and comprehensiveness of the services, the specific needs of different categories of users, including disadvantaged and vulnerable groups, the involvement and empowerment of users and innovation. Member States may also provide that the choice of the service provider shall be made on the basis of the most economically advantageous tender, taking into account quality and sustainability criteria for social services. .

*Article 86 (a)*

*Reserved contracts for certain services*

1. Member States may provide that contracting entities which are contracting authorities may reserve the right for organisations to participate in procedures for the award of public contracts exclusively for those health, social and cultural services referred to in Article 84, as covered by CPV reference numbers 75121000-0, 75122000-7, 75123000-4, , 79622000-0, 79624000-4, 79625000-1, 80110000-8, 80300000-7, 8042000-4, 80430000-7, 80511000-9, 80520000-5, 80590000-6, from 85000000-9 to 85323000-9, 9250000-6, 92600000-7, 98133000-4, 98133110-8.
2. The organisation referred to in paragraph 1 must fulfil the following cumulative conditions:
  - (a) its objective is the pursuit of a public service mission linked to the delivery of the services referred to in Paragraph 1;
  - (b) profits are reinvested with a view to achieving the organisation's objective. Where profits are distributed or redistributed, this should be based on participatory considerations;
  - (c) the structures of management or ownership of the organisation performing the contract shall be based on employee ownership or participatory principles, or shall require the active participation of employees, users or stakeholders;
  - (d) the organisation shall not have been awarded a contract for the services concerned by the contracting authority concerned pursuant to this Article within the past three years.
3. The maximum duration of the contract shall not be longer than three years.
4. The call for competition shall make reference to this Article.
5. Notwithstanding the provisions of Article 103, the Commission shall assess the effects of this Article and report to the European Parliament and the Council by three years later than the date provided for in Article 101(1).



## CHAPTER II

### RULES GOVERNING DESIGN CONTESTS

#### *Article 88*

##### *Scope*

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

#### *Article 89*

##### *Notices*

1. Contracting entities that intend to organise a design contest shall call for competition by means of a contest notice. Where they intend to award a subsequent service contract pursuant to point (k) of Article 44, this shall be indicated in the design contest notice.

Contracting entities that have held a design contest shall make the results known by means of a notice.

2. The call for competition shall include the information set out in Annex XIX and the notice of the results of a design contest shall include the information set out in Annex XX in the format of standard forms by means of implementing acts. The Commission shall establish the standard forms. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 100.

The notice of the results of a design contest shall be forwarded to the Commission within 30 days of the closure of the design contest.

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

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

#### *Article 90*

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

1. When organising design contests, contracting entities shall apply procedures which are adapted to Title I and this Chapter.
  - 1a. The admission of participants to design contests shall not be limited:
    - (a) by reference to the territory or part of the territory of a Member State;
    - (b) on the grounds that, under the law of the Member State in which the contest is organised, they would be required to be either natural or legal persons.
2. Where design contests are restricted to a limited number of participants, contracting entities shall establish clear and non-discriminatory selection criteria. In any event, the number of candidates invited to participate shall be sufficient to ensure genuine competition.

3. The jury shall be composed exclusively of natural persons who are independent of participants in the contest. Where a particular professional qualification is required of participants in a contest, at least a third of the jury members shall have the same qualification or an equivalent qualification.

*Article 91*

*Decisions of the jury*

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

TITLE IV  
GOVERNANCE

*Article 92*

*Enforcement*

1. In order to effectively ensure correct and efficient implementation, Member States shall make sure that at least the tasks set out in this Article are performed by one or more authorities, bodies or structures. They shall indicate to the Commission all authorities or structures competent for these tasks.

2. Member States shall ensure that the application of public procurement rules is monitored.

Where monitoring authorities or structures identify by their own initiative or upon the receipt of information specific violations or systemic problems, they shall be empowered to indicate those problems to national auditing authorities, courts or tribunals or other appropriate authorities or structures, such as the ombudsman, national Parliaments or committees thereof.

3. The results of the monitoring activities pursuant to paragraph 2 shall be made available to the public through appropriate means of information. These results shall also be made available to the Commission. For instance, they may be integrated in the monitoring reports referred to in the second subparagraph of this paragraph.

Member States shall transmit to the Commission every three years, a monitoring report covering, where applicable, information on the most frequent sources of wrong application or of legal uncertainty, including possible structural or recurring problems in the application of the rules, on the level of SME participation in public procurement and about prevention, detection and adequate reporting of cases of procurement fraud, corruption, conflict of interest and other serious irregularities.

The Commission may, at most every three years, request Member States to provide information on the practical implementation of national strategic procurement policies

For the purposes of this paragraph, SME shall be understood as defined in Commission Recommendation 2003/361/EC<sup>35</sup>. On the basis of the data received, the Commission shall regularly issue a report on the implementation and best practices of national procurement policies in the internal market. 4. Member States shall ensure that:

- information and guidance on the interpretation and application of the Union public procurement law is available free of charge to assist contracting authorities and economic operators, in particular SMEs, in correctly applying the Union public procurement rules.

and

- that support is available to contracting authorities with regard to planning and carrying out procurement procedures.

5. Member States shall, without prejudice to the general procedures and working methods established by the Commission for its communications and contacts with Member States, designate a point of reference for cooperation with the Commission as regards the application of public procurement legislation.
6. Contracting authorities shall, at least for the duration of the contract, keep copies of all concluded contracts with a value equal to or greater than:
  - (a) 1 000 000 EUR in the case of supply contracts or service contracts;
  - (b) 10 000 000 EUR in the case of works contracts.

They shall grant access to these contracts; however, access to specific documents or items of information may be denied to the extent and on the conditions provided for in the applicable Union or national rules on access to documents and data protection.

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<sup>35</sup> Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, OJ L 124 of 20.5.2003, p. 36.

*Article 94*

*Individual reports on procedures for the award of contracts*

1. Contracting entities shall keep appropriate information on each contract or framework agreement covered by this Directive and each time a dynamic purchasing system is established. This information shall be sufficient to permit them at a later date to justify decisions taken in connection with:
  - (a) the qualification and selection of economic operators and the award of contracts;
  - (b) the use of negotiated procedures without a call for competition by virtue of Article 44;
  - (c) the non-application of Chapters II to IV of Title II by virtue of the derogations provided for in Chapters II and III of Title I
  - (d) where necessary, the reasons why other means of communication than electronic means for the e-submission have been used.

To the extent that the contract award notice drawn up pursuant to Articles 64 or 85(2) contains the information required in this paragraph, contracting entities may refer to that notice.

2. Contracting entities shall document the progress of all procurement procedures, whether or not the procedures are conducted by electronic means. To that end, they shall ensure that they keep sufficient documentation to justify decisions taken in all stages of the procurement procedure, such as documentation on communications with economic operators and internal deliberations, preparation of the procurement documents, dialogue or negotiation if any, selection and award of the contract. The documentation shall be kept for at least three years from the date of award of the contract.
3. The information or documentation, or the main elements thereof, shall be communicated to the Commission or the national authorities, bodies or structures referred to in Article 92 where they so request.

*Article 95*  
*Statistical information*

1. The Commission shall review the quality and completeness of data that can be extracted from the notices, referred to in Articles 61 to 65, 85 and 89, which are published in accordance with Annex IX.

Where the quality and completeness of the data referred to in the first subparagraph of this Article is not compliant with the obligations stipulated in Articles 61(1), 62(1), 63 and 64(1), 85(3) and 89(2), the Commission shall request complementary information from the Member State concerned. Within a reasonable time, the Member State concerned shall supply the missing statistical information requested by the Commission.

2. Every three years, Member States shall forward to the Commission a statistical report for procurement which would have been covered by this Directive if its value had exceeded the relevant threshold laid down in Article 12 of this Directive, indicating an estimation of the aggregated total value of such procurement during the period concerned. This estimation may in particular be based on data available under national publication requirements or on sample-based estimates.

This report may be integrated in the report referred to in Article 92 paragraph 3.

*Article 97*

*Administrative cooperation*

1. Member States shall provide mutual assistance to each other, and shall put in place measures for effective cooperation with one another, in order to ensure exchange of information on issues referred to in Articles 56, 75 and 79. They shall ensure the confidentiality of the information which they exchange.
2. The competent authorities of all Member States concerned shall exchange information in compliance with personal data protection legislation provided for in Directives 95/46/EC of the European Parliament and of the Council and 2002/58/EC of the European Parliament and of the Council.
3. To test the suitability of using the Internal Market Information System (IMI) established by Regulation (EU) No. 1024/2012 of the European Parliament and of the Council on administrative cooperation through the Internal Market Information System for the purpose of exchanging information covered by the Directive, a pilot project shall be launched at the latest 12 months after its entry into force.



TITLE V  
DELEGATED POWERS, IMPLEMENTING POWERS AND FINAL PROVISIONS

*Article 98*

*Exercise of the delegation*

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.
2. The delegation of power referred to in Articles 4, 8, 14, 25, 33, 35, 38, 70 and 77 shall be conferred on the Commission for an indeterminate period of time from the [date of entry into force of this Directive].
3. The delegation of power referred to in Articles 4, 8, 14, 25, 33, 35, 38, 70 and 77 may be revoked at any time by the European Parliament or by the Council. A revocation decision shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the Official Journal of the European Union or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.
4. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.
5. A delegated act adopted pursuant to Article 98 shall enter into force only if no objection has been expressed either by the European Parliament or by the Council within a period of 2 months of notification of the act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by 2 months at the initiative of the European Parliament or the Council.

*Article 99*  
*Urgency procedure*

1. Delegated acts adopted under this Article shall enter into force without delay and shall apply as long as no objection is expressed in accordance with paragraph 2. The notification of a delegated act to the European Parliament and to the Council shall state the reasons for the use of the urgency procedure.
2. Either the European Parliament or the Council may object to a delegated act in accordance with the procedure referred to in Article 98(5). In such a case, the Commission shall repeal the act without delay following the notification of the decision to object by the European Parliament or the Council.

*Article 100*  
*Committee procedure*

1. The Commission shall be assisted by the Advisory Committee for Public Procurement established by Council Decision 71/306/EEC<sup>36</sup>. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.
2. Where reference is made to this paragraph, Article 4 of Regulation (EU) No 182/2011 shall apply.
3. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply.

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<sup>36</sup> OJ L 185, 16.8.1971, p. 15

## *Article 101*

### *Transposition and transitional provisions*

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 24 months following the entry into force pursuant to Article 104. They shall forthwith communicate to the Commission the text of those provisions.
2. Notwithstanding paragraph 1, Member States may postpone the application of Article 33(1) until 54 months after the entry into force of this Directive, except where use of electronic means is mandatory pursuant to Articles 46, 47, 48, Articles 49(4) or 65(2) or Article 67.

Notwithstanding paragraph 1, the application of Article 33(1) for central purchasing bodies pursuant to Article 49(4) may be postponed by Member States until 36 months after the entry into force of this Directive.

Where a Member State chooses to postpone the application of Article 33(1), that Member State shall provide that contracting entities may choose between the following means of communication for all communication and information exchange:

- (a) electronic means in accordance with Article 33;
  - (b) post;
  - (c) fax;
  - (d) a combination of those means.
3. When Member States adopt the measures referred to in paragraphs 1 and 2, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

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

## *Article 102*

### *Repeal*

Directive 2004/17/EC is hereby repealed with effect from 24 months following the entry into force pursuant to Article 104.

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

## *Article 103*

### *Review*

The Commission shall review the economic effects on the internal market, in particular in terms of factors such as cross-border award of contracts and transaction costs, resulting from the application of the thresholds set in Article 12 and report thereon to the European Parliament and the Council by 3 years later than the date provided for in Article 101(1).

The Commission shall, where possible and appropriate, consider suggesting an increase of the threshold amounts applicable under the Agreement during the next round of negotiations. In the event of any change to the threshold amounts applicable under the Agreement, the report shall, if appropriate, be followed by a legislative proposal amending the thresholds set out in this Directive.

## *Article 104*

### *Entry into force*

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

*Article 105*

*Addressees*

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament

For the Council

The President      The President

## LIST OF ACTIVITIES AS SET OUT IN POINT 8(a) OF ARTICLE 2

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

NACE <sup>(1)</sup>					CPV code
SECTION F			CONSTRUCTION		
Division	Group	Class	Subject	Notes	
45			Construction	This division includes:  construction of new buildings and works, restoring and common repairs.	45000000
	45.1		Site preparation		45100000
		45.11	Demolition and wrecking of buildings; earth moving	<p>This class includes:</p> <ul style="list-style-type: none"><li>— demolition of buildings and other structures,</li><li>— clearing of building sites,</li><li>— earth moving: excavation, landfill, levelling and grading of construction sites, trench digging, rock removal, blasting, etc.</li><li>— site preparation for mining:</li><li>— overburden removal and other development and preparation of mineral properties and sites.</li></ul> <p>This class also includes:</p> <ul style="list-style-type: none"><li>— building site drainage.</li><li>— drainage of agricultural or forestry land.</li></ul>	45110000

		45.12	Test drilling and boring	<p>This class includes:</p> <ul style="list-style-type: none"> <li>— test drilling, test boring and core sampling for construction, geophysical, geological or similar purposes.</li> </ul> <p>This class excludes:</p> <ul style="list-style-type: none"> <li>— drilling of production oil or gas wells, see 11.20.</li> <li>— water well drilling, see 45.25,</li> <li>— shaft sinking, see 45.25,</li> <li>— oil and gas field exploration, geophysical, geological and seismic surveying, see 74.20.</li> </ul>	45120000
	45.2		Building of complete constructions or parts thereof; civil engineering		45200000
		45.21	General construction of buildings and civil engineering works	<p>This class includes:</p> <ul style="list-style-type: none"> <li>— construction of all types of buildings construction of civil engineering constructions,</li> <li>— bridges, including those for elevated highways, viaducts, tunnels and subways,</li> <li>— long-distance pipelines, communication and power lines,</li> <li>— urban pipelines, urban communication and power lines,</li> <li>— ancillary urban works,</li> <li>— assembly and erection of prefabricated constructions on the site.</li> </ul> <p>This class excludes:</p> <ul style="list-style-type: none"> <li>— service activities incidental to oil and gas extraction, see 11.20,</li> <li>— erection of complete prefabricated constructions from self-manufactured parts not of concrete, see divisions 20, 26 and 28,</li> <li>— construction work, other than buildings, for stadiums, swimming pools, gymnasiums, tennis courts, golf courses and other sports installations, see 45.23,</li> <li>— building installation, see 45.3,</li> <li>— building completion, see 45.4,</li> <li>— architectural and engineering activities, see 74.20,</li> <li>— project management for construction, see 74.20.</li> </ul>	<p>45210000</p> <p>Except:</p> <p>-</p> <p>45213316</p> <p>45220000</p> <p>45231000</p> <p>45232000</p>

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



		45.25	Other construction work involving special trades	<p>This class includes:</p> <ul style="list-style-type: none"> <li>— construction activities specialising in one aspect common to different kinds of structures, requiring specialised skill or equipment,</li> <li>— construction of foundations, including pile driving,</li> <li>— water well drilling and construction, shaft sinking,</li> <li>— erection of non-self-manufactured steel elements,</li> <li>— steel bending,</li> <li>— bricklaying and stone setting,</li> <li>— scaffolds and work platform erecting and dismantling, including renting of scaffolds and work platforms,</li> <li>— erection of chimneys and industrial ovens.</li> </ul> <p>This class excludes:</p> <ul style="list-style-type: none"> <li>— renting of scaffolds without erection and dismantling, see 71.32</li> </ul>	45250000 45262000
	45.3		Building installation		45300000
		45.31	Installation of electrical wiring and fittings	<p>This class includes:</p> <p>installation in buildings or other construction projects of:</p> <ul style="list-style-type: none"> <li>— electrical wiring and fittings,</li> <li>— telecommunications systems,</li> <li>— electrical heating systems,</li> <li>— residential antennas and aerials,</li> <li>— fire alarms,</li> <li>— burglar alarm systems,</li> <li>— lifts and escalators,</li> <li>— lightning conductors, etc.</li> </ul>	45213316 45310000 Except: - 45316000
		45.32	Insulation work activities	<p>This class includes:</p> <ul style="list-style-type: none"> <li>— installation in buildings or other construction projects of thermal, sound or vibration insulation.</li> </ul> <p>This class excludes:</p> <ul style="list-style-type: none"> <li>— waterproofing, see 45.22.</li> </ul>	45320000

		45.33	Plumbing	<p>This class includes:</p> <ul style="list-style-type: none"> <li>— installation in buildings or other construction projects of:</li> <li>— plumbing and sanitary equipment,</li> <li>— gas fittings,</li> <li>— heating, ventilation, refrigeration or air-conditioning equipment and ducts,</li> <li>— sprinkler systems.</li> </ul> <p>This class excludes:</p> <ul style="list-style-type: none"> <li>— installation of electrical heating systems, see 45.31.</li> </ul>	45330000
		45.34	Other building installation	<p>This class includes:</p> <ul style="list-style-type: none"> <li>— installation of illumination and signalling systems for roads, railways, airports and harbours,</li> <li>— installation in buildings or other construction projects of fittings and fixtures n.e.c.</li> </ul>	45234115 45316000 45340000
	45.4		Building completion		45400000
		45.41	Plastering	<p>This class includes:</p> <ul style="list-style-type: none"> <li>— application in buildings or other construction projects of interior and exterior plaster or stucco, including related lathing materials.</li> </ul>	45410000
		45.42	Joinery installation	<p>This class includes:</p> <ul style="list-style-type: none"> <li>— installation of not self-manufactured doors, windows, door and window frames, fitted kitchens, staircases, shop fittings and the like, of wood or other materials,</li> <li>— interior completion such as ceilings, wooden wall coverings, movable partitions, etc.</li> </ul> <p>This class excludes:</p> <ul style="list-style-type: none"> <li>— laying of parquet and other wood floor coverings, see 45.43.</li> </ul>	45420000

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

		45.50	Renting of construction or demolition equipment with operator	This class excludes:  — renting of construction or demolition machinery and equipment without operators, see 71.32.	45500000
(i) Council Regulation (EEC) No 3037/90 of 9 October 1990 (OJ L 293, 24.10.1990, p. 1), Regulation as amended by Commission Regulation (EEC) No 761/93 (OJ L 83, 3.4.1993, p. 1).					

## LIST OF UNION LEGISLATION REFERRED TO IN ARTICLE 4(3)

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 Article 4 of this Directive:

- (a) granting authorisation to operate natural gas installations in accordance with the procedures laid down in Article 4 of Directive 2009/73/EC;
- (b) authorisation or an invitation to tender for the construction of new electricity production installations in accordance with Directive 2009/72/EC;
- (c) the granting in accordance with the procedures laid down in Article 9 of Directive 97/67/EC of authorisations in relation to a postal service which is not or shall not be reserved;
- (d) a procedure for granting an authorisation to carry on an activity involving the exploitation of hydrocarbons in accordance with Directive 94/22/EC;
- (e) public service contracts within the meaning of Regulation (EC) No 1370/2007 for the provision of public passenger transport services by bus, tramway, rail or metro which have been awarded on the basis of a competitive tendering procedure in accordance with its Article 5(3), provided that its length is in conformity with Article 4(3) or 4(4) of the Regulation.

LIST OF UNION LEGISLATION REFERRED TO IN ARTICLE 27(3)

A. TRANSPORT OR DISTRIBUTION OF GAS OR HEAT

Directive 2009/73/EC

B. PRODUCTION, TRANSMISSION OR DISTRIBUTION OF ELECTRICITY

Directive 2009/72/EC

C. PRODUCTION, TRANSPORT OR DISTRIBUTION OF DRINKING WATER

None

D. CONTRACTING ENTITIES IN THE FIELD OF RAIL SERVICES

Rail Freight transport

Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area<sup>37</sup>

International rail passenger transport

Directive 2012/34/EU

National rail passenger transport

None

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<sup>37</sup> OJ L 343, 14.12.2012, p. 32

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

None

F. CONTRACTING ENTITIES IN THE FIELD OF POSTAL SERVICES

Directive 97/67/EC

G. EXTRACTION OF OIL OR GAS

Directive 94/22/EC

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

None

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

None

J. CONTRACTING ENTITIES IN THE FIELD OF AIRPORT INSTALLATIONS

None

Deadlines for the adoption of the implementing acts referred to in Article 28

1. The implementing acts referred to in Article 28 shall be adopted within the following periods:
  - (a) 90 working days where free access to a given market is presumed on the basis of the first subparagraph of Article 27(3);
  - (b) 130 working days in cases other than those referred to in point (a).

The periods set out in points a and b of this paragraph shall be prolonged by 15 working days where the request is not accompanied by a reasoned and substantiated position, adopted by an independent national authority that is competent in relation to the activity concerned, which thoroughly analyses the conditions for the possible applicability of Article 27(1) to the activity concerned in accordance with its paragraphs 2 and 3.

Those deadlines shall commence on the first working day following the date on which the Commission receives the request referred to in Article 28(1) or, where the information to be supplied with the request is incomplete, on the working day following the receipt of the complete information.

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

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



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

*Directive 2004/17/EC: Annex XXIV*

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

- (a) the exact time and date of the receipt of tenders, requests to participate, applications for qualification as well as the submission of plans and projects can be determined precisely;*
- (b) it may be reasonably ensured that, before the time limits laid down, no-one can have access to data transmitted under those requirements;*
- (c)*
- (d) only authorised persons may set or change the dates for opening data received;*
- (e) during the various stages of the qualification procedure, the procurement procedure or contest, access to all data submitted, or to part thereof, must be possible only for authorised persons;*
- (f) only authorised persons must give access to data transmitted and only after the prescribed date;*

(g) *data received and opened in accordance with those requirements must remain accessible only to persons authorised to acquaint themselves therewith,*

(h)

(i) *where the access prohibitions or conditions referred to under points b, d, e, f and g are infringed or there is an attempt to do so, it may be reasonably ensured that the infringements or attempts are clearly detectable.*

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

I. INFORMATION TO BE INCLUDED IN ALL CASES

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

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

6. A reference to the fact that interested economic operators shall advise the entity of their interest in the contract or contracts.
7. *Email or internet address at which the specifications procurement documents will be available for unrestricted and full direct access, free of charge.*  
  
*Where unrestricted and full direct access, free of charge, is not available for the reasons set out in the second and third subparagraph of Article 67(1), an indication of how the procurement documents can be accessed.*
8. Where appropriate, state whether the contract is reserved for sheltered workshops or whether its performance is reserved in the context of sheltered employment programmes.
9. Time limit for the receipt of applications for an invitation to tender or to negotiate.
10. Nature and quantity of the goods to be supplied or general nature of the work or category of service and description, stating if framework agreement(s) are envisaged, including any options for further procurement and the estimated time available for exercising those options as well as the number of renewals, if any. In the case of recurring contracts, also, an estimate of the timing of the subsequent calls for competition. State whether purchase, lease, rental or hire-purchase or any combination of those is involved.
11. NUTS code for the main location of works in case of works or NUTS code for the main place of delivery or performance in supplies and service ; if the contract is divided into lots, this information shall be provided for each lot.
12. Time limits for delivery or completion or duration of service contract and, as far as possible, for starting.
13. Address to which interested undertakings shall send their expressions of interest in writing.

14. Time limit for receipt of expressions of interest.
15. Language or languages authorised for the presentation of candidatures or tenders.
16. Economic and technical conditions, and financial and technical guarantees required of suppliers.
17.
  - (a) Estimated date for initiating the procurement procedures in respect of the contract or contracts (if known);
  - (b) *Type of procurement procedure (restricted procedures, whether or not involving a dynamic purchasing system, or negotiated procedures).*
  - (c)
18. Where appropriate, particular conditions to which the performance of the contract is subject.
19. Where appropriate, indication whether:
  - (a) *E-submission of tenders or requests to participate will be required/accepted,*
  - (b) *E-ordering will be used,*
  - (c) *E-invoicing will be used,*
  - (d) *E-payment will be accepted.*
20. Name and address of the body responsible for appeal and, where appropriate, mediation procedures. Precise information concerning time limits for lodging appeals, or, if need be, the name, address, telephone number, fax number and e-mail address of the service from which this information may be obtained.

21. Where known, criteria referred to in Article 76 to be used for award of the contract: "lowest cost" or "most economically advantageous tender". Criteria representing the most economically advantageous tender as well as their weighting or, where appropriate, the order of importance of those criteria shall be mentioned, where they do not appear in the specifications, or will not be indicated in the invitation to confirm interest referred to in Article 61(2)(b) or in the invitation tender or to negotiate.

## PART B

### INFORMATION TO BE INCLUDED IN NOTICES OF PUBLICATION OF A PERIODIC INDICATIVE NOTICE ON A BUYER PROFILE NOT USED AS A MEANS OF CALLING FOR COMPETITION (as referred to in Article 61(1))

1. Name, identification number (where provided for in national legislation), address including NUTS code, telephone, fax number, email and internet address of the contracting entity and, where different, of the service from which additional information may be obtained.
2. Main activity exercised.
3. CPV Nomenclature reference No(s).
4. Internet address of the "buyer profile" (URL).
5. Date of dispatch of the notice of the publication of the prior information notice on the buyer profile

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

Where contracting entities have decided to hold an electronic auction, the procurement documents shall include at least the following details:

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

## DEFINITION OF CERTAIN TECHNICAL SPECIFICATIONS

For the purposes of this Directive,

(1) "technical specification" means one of the following:

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



- (2) (a) "standard" means a technical specification approved by a recognised standardising body for repeated or continuous application, compliance with which is not compulsory and which falls into one of the following categories:
- (i) international standard: a standard adopted by an international standards organisation and made available to the general public,
  - (ii) European standard: a standard adopted by a European standards organisation and made available to the general public,
  - (iii) national standard: a standard adopted by a national standards organisation and made available to the general public;
- (3) "European Technical Assessment" means the documented assessment of the performance of a construction product, in relation to its essential characteristics, in accordance with the respective European Assessment Document, as defined in Regulation (EU) No 305/2011 of the European Parliament and of the Council of 9 March 2011 laying down harmonised conditions for the marketing of construction products <sup>38</sup> ;
- (4) "Common technical specification" means a technical specification in the field of ICT laid down in accordance with a procedure recognised by the Member States [or in accordance with Articles 9 and 10 of Regulation (EU) 1025/2012 of the European Parliament and the Council on European standardisation which has been published in the *Official Journal of the European Union*];
- (5) "Technical reference" means any deliverable produced by European standardisation bodies, other than European standards, according to procedures adapted to the development of market needs
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<sup>38</sup> OJ L 88, 4.4.2011, p. 5

## FEATURES CONCERNING PUBLICATION

### 1. Publication of notices

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

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

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

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

### 2. Publication of complementary or additional information

- (a) *Except where otherwise provided for in the second and third subparagraph of Article 67(1), contracting entities shall publish the procurement documents in their entirety on the Internet;*
- (b) *The buyer profile may include periodic indicative notices as referred to in Article 61 (1), information on ongoing invitations to tender, scheduled purchases, contracts concluded, procedures cancelled and any useful general information, such as a contact point, a telephone and a fax number, a postal address and an e-mail address. The buyer profile may also include periodic indicative notices used as a means of calling for competition, which are published at national level pursuant to Article 66.*

### 3. Format and procedures for the electronic transmission of notices

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

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

(as referred to in point (b) of Article 39(2) and in Article 62)

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

9. Name and address of the body responsible for appeal and, where appropriate, mediation procedures. Precise information concerning time-limits for lodging appeals, or, if need be, the name, address, telephone number, fax number and e-mail address of the service from which this information may be obtained.
10. Where known, criteria referred to in Article 76 to be used for award of the contract: "lowest cost" or "most economically advantageous tender". Criteria representing the most economically advantageous tender as well as their weighting or, where appropriate, the order of importance of those criteria, shall be mentioned where they do not appear in the specifications or will not be indicated in the invitation to tender or to negotiate.
11. Where appropriate, indication whether:
  - (a) E-submission of tenders or requests to participate will be required/accepted,
  - (b) E-ordering will be used,
  - (c) E-invoicing will be used,
  - (d) E-payment will be accepted.
12. Any other relevant information.

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

A. OPEN PROCEDURES

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

- (b) Indication of whether the suppliers may tender for some and/or all the goods required.

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

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

7. For services:

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

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

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

10. Email or internet address at which the procurement documents will be available for unrestricted and full direct access, free of charge

Where unrestricted and full direct access, free of charge, is not available for the reasons set out in the second and third subparagraph of Article 67(1), an indication of how the procurement documents can be accessed.

11. (a) Final date for receipt of tenders or indicative tenders where a dynamic purchasing system is introduced;
- (b) Address to which they shall be sent;
- (c) Language or languages in which they shall be drawn up.
12. (a) Where applicable, the persons authorised to be present at the opening of tenders;
- (b) Date, time and place of such opening.
13. Where applicable, any deposits and guarantees required.
14. Main terms concerning financing and payment and/or references to the provisions in which those are contained.
15. Where appropriate, the legal form to be taken by the grouping of economic operators to whom the contract is awarded.
16. Minimum economic and technical conditions required of the economic operator to whom the contract is awarded.
17. Period during which the tenderer is bound to keep open his tender.
18. Where appropriate, particular conditions to which the performance of the contract is subject.



19. Criteria referred to in Article 76 to be used for award of the contract: "lowest cost" or "most economically advantageous tender". Criteria representing the most economically advantageous tender as well as their weighting or, where appropriate, the order of importance of those criteria shall be indicated where they do not appear in the specifications.
20. Where appropriate, date(s) and the reference(s) to publication in the *Official Journal of the European Union* of the periodic information notice or of the notice of the publication of this notice on the buyer profile to which the contract refers.
21. Name and address of the body responsible for appeal and, where appropriate, mediation procedures. Precise information concerning time limits for lodging appeals, or, if need be, the name, address, telephone number, fax number and e-mail address of the department from which this information may be obtained.
22. Date of dispatch of the notice by the contracting entity.
23. Any other relevant information.

## B. RESTRICTED PROCEDURES

1. Name, identification number (where provided for in national legislation), address including NUTS code, telephone, fax number, email and internet address of the contracting entity and, where different, of the service from which additional information may be obtained.
2. Main activity exercised.
3. Where appropriate, state whether the contract is reserved for sheltered workshops or whether its performance is reserved in the context of sheltered employment programmes.

4. Nature of the contract (supplies, works or services; where appropriate, state if it is a framework agreement); description (nomenclature reference No(s)). Where appropriate, state whether tenders are requested for purchase, lease, rental or hire purchase or any combination of those.
5. NUTS code for the main location of works in case of works or NUTS code for the main place of delivery or performance in supplies and service.
6. For supplies and works:
  - (a) The nature and quantity of the goods to be supplied (nomenclature reference No(s)), including any options for further procurement and, if possible, the estimated time available for exercising those options as well as the number of renewals, if any. In the case of recurring contracts, also, if possible, an estimate of the timing of the subsequent calls for competition for the goods to be procured or the nature and extent of the services to be provided and general nature of the work (nomenclature reference No(s));
  - (b) Indication of whether the suppliers may tender for some and/or all the goods required.

If, for works contracts, the work or the contract is subdivided into several lots, the order of size of the different lots and the possibility of tendering for one, for several or for all the lots;
  - (c) Information concerning the purpose of the work or the contract where the latter also involves the drawing-up of projects.

7. For services:

- (a) The nature and quantity of the goods to be supplied, including any options for further procurement and, if possible, the estimated time available for exercising those options as well as the number of renewals, if any. In the case of recurring contracts, also, if possible, an estimate of the timing of the subsequent calls for competition for the services to be procured;

- (b) Indication of whether the performance of the service is reserved by law, regulation or administrative provision to a particular profession;
  - (c) Reference to the law, regulation or administrative provision;
  - (d) Indication of whether legal persons shall indicate the names and professional qualifications of the staff to be responsible for the performance of the service;
  - (e) Indication of whether service providers may tender for a part of the services concerned.
8. Where known, indication of whether authorisation to submit variants exists or not.
9. Time limits for delivery or completion or duration of the contract and, as far as possible, for starting.
10. Where appropriate, the legal form to be taken by the grouping of economic operators to whom the contract is awarded.
11. (a) Final date for receipt of requests to participate;
- (b) Address to which they shall be sent;
- (c) Language or languages in which they shall be drawn up.
12. Final date for dispatch of invitations to tender.
13. Where applicable, any deposits and guarantees required.
14. Main terms concerning financing and payment and/or references to the provisions in which those are contained.
15. Information concerning the economic operator's position and the minimum economic and technical conditions required of him.

16. Criteria referred to in Article 76 to be used for award of the contract: "lowest cost" or "most economically advantageous tender". Criteria representing the most economically advantageous tender as well as their weighting or, where appropriate, the order of importance of those criteria shall be indicated where they do not appear in the specifications or will not be indicated in the invitation to tender.
17. Where appropriate, particular conditions to which the performance of the contract is subject.
18. Where appropriate, the date(s) and reference(s) to publication in the *Official Journal of the European Union* of the periodic information notice or of the notice of the publication of this notice on the buyer profile to which the contract refers.
19. Name and address of the body responsible for appeal and, where appropriate, mediation procedures. Precise information concerning time limits for lodging appeals, or, if need be, the name, address, telephone number, fax number and e-mail address of the service from which this information may be obtained.
20. Date of dispatch of the notice by the contracting entities.
21. Any other relevant information.

### C. NEGOTIATED PROCEDURES

1. Name, identification number (where provided for in national legislation), address including NUTS code, telephone, fax number, email and internet address of the contracting entity and, where different, of the service from which additional information may be obtained.
2. Main activity exercised.
3. Where appropriate, state whether the contract is reserved for sheltered workshops or whether its performance is reserved in the context of sheltered employment programmes.

4. Nature of the contract (supplies, works or services; where appropriate, state if it is a framework agreement); description (nomenclature reference No(s)). Where appropriate, state whether tenders are requested for purchase, lease, rental or hire purchase or any combination of those.
5. NUTS code for the main location of works in case of works or NUTS code for the main place of delivery or performance in supplies and service.
6. For supplies and works:
  - (a) The nature and quantity of the goods to be supplied (nomenclature reference No(s)), including any options for further procurement and, if possible, the estimated time available for exercising those options as well as the number of renewals, if any. In the case of recurring contracts, also, if possible, an estimate of the timing of the subsequent calls for competition for the goods to be procured or the nature and extent of the services to be provided and general nature of the work (nomenclature reference No(s));
  - (b) Indication of whether the suppliers may tender for some and/or all the goods required.

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

  - (c) For works contracts: information concerning the purpose of the work or the contract where the latter also involves the drawing-up of projects.
7. For services:
  - (a) The nature and quantity of the services to be supplied, including any options for further procurement and, if possible, the estimated time available for exercising those options as well as the number of renewals, if any. In the case of recurring contracts, also, if possible, an estimate of the timing of the subsequent calls for competition for the services to be procured;

- (b) Indication of whether the performance of the service is reserved by law, regulation or administrative provision to a particular profession;
  - (c) Reference of the law, regulation or administrative provision;
  - (d) Indication of whether legal persons shall indicate the names and professional qualifications of the staff to be responsible for the performance of the service;
  - (e) Indication of whether service providers may tender for a part of the services concerned.
8. Where known, indication of whether authorisation to submit variants exists or not.
9. Time limits for delivery or completion or duration of the contract and, as far as possible, for starting.
10. Where appropriate, the legal form to be taken by the grouping of economic operators to whom the contract is awarded.
11.
  - (a) Final date for receipt of requests to participate;
  - (b) Address to which they shall be sent;
  - (c) Language or languages in which they shall be drawn up.
12. Where appropriate, any deposits and guarantees required.
13. Main terms concerning financing and payment and/or references to the provisions in which those are contained.
14. Information concerning the economic operator's position and the minimum economic and technical conditions required of him.

15. Criteria referred to in Article 76 to be used for award of the contract: "lowest cost" or "most economically advantageous tender". Criteria representing the most economically advantageous tender as well as their weighting or, where appropriate, the order of importance of those criteria shall be indicated where they do not appear in the specifications or will not be indicated in the invitation to negotiate.
16. Where appropriate, the names and addresses of the economic operators already selected by the contracting entity.
17. Where appropriate, particular conditions to which the performance of the contract is subject.
18. Where appropriate, the dates and reference(s) of publication in the *Official Journal of the European Union* of the periodic information notice or of the notice of the publication of this notice on the buyer profile to which the contract refers.
19. Name and address of the body responsible for appeal and, where appropriate, mediation procedures. Precise information concerning time limits for lodging appeals, or, if need be, the name, address, telephone number, fax number and e-mail address of the service from which this information may be obtained.
20. Date of dispatch of the notice by the contracting entity.
21. Any other relevant information.

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

I. Information for publication in the *Official Journal of the European Union*<sup>39</sup>

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

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<sup>39</sup> Information in headings 6, 9 and 11 is deemed information not intended for publication where the awarding entity considers that publication thereof might be detrimental to a sensitive commercial interest.



(b) number of tenders received from abroad,

(c) number of tenders received electronically.

In the case of multiple awards (lots, multiple framework agreements), this information shall be given for each award.

8. *Date of the conclusion of the contract(s) or of the framework agreement(s) following the decision to award or conclude it/them.*
9. Price paid for bargain purchases pursuant to Article 44(i).
10. For each award, name, address including NUTS code, telephone, fax number, email address and internet address of the successful tenderer(s) including:
  - (a) information whether the successful tenderer is small and medium-sized enterprise,
  - (b) information whether the contract was awarded to a consortium.
11. State, where appropriate, whether the contract has been, or may be, subcontracted.
12. Price paid or the prices of the highest and lowest tenders taken into account in the award of the contract.
13. Name and address of the body responsible for the appeal and, where appropriate, mediation procedures. Precise information concerning the time limit for lodging appeals, or, if need be, the name, address, telephone number, fax number and e-mail address of the service from which this information may be obtained.
14. Optional information:
  - value and share of the contract which has been or may be subcontracted to third parties,
  - award criteria.

## II. Information not intended for publication

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

Contents of the invitations to submit a tender, *participate in the dialogue*, to negotiate or to confirm interest provided for under Article 68

1. The invitation to submit a tender, *to participate in the dialogue* or to negotiate provided for under Article 68 must contain at least:

- (a) the final date for receipt of tenders, the address to which they are to be sent, and the language or languages in which they are to be drawn up;

However, in the case of contracts awarded through *a competitive dialogue* or an innovation partnership, this information shall not appear in the invitation to negotiate but it shall appear in the invitation to submit a tender.

- (aa) in the case of competitive dialogue the date and the address set for the start of consultation and the language or languages used;*

- (b) a reference to any published call for competition;

- (c) an indication of any documents to be attached;

- (d) the criteria for the award of the contract, where they are not indicated in the notice on the existence of a qualification system used as a means of calling for competition;

- (e) the relative weighting of the contract award criteria or, where appropriate, the order of importance of such criteria, if this information is not given in the contract notice, the notice on the existence of a qualification system or the specifications.

2. When a call for competition is made by means of a periodic indicative notice, contracting entities shall subsequently invite all candidates to confirm their interest on the basis of detailed information on the contract concerned before beginning the selection of tenderers or participants in negotiations.

This invitation shall include at least the following information:

- (a) *nature and quantity, including all options concerning complementary contracts and, if possible, the estimated time available for exercising those options for renewable contracts, the nature and quantity and, if possible, the estimated publication dates of future notices of competition for works, supplies or services to be put out to tender;*
- (b) *type of procedure: restricted or negotiated;*
- (c) *where appropriate, the date on which the delivery of supplies or the execution of works or services is to commence or terminate;*
- (d) *where electronic access cannot be offered, the address and closing date for the submission of requests for procurement documents and the language or languages in which they are to be drawn up;*
- (e) *the address of the contracting entity;*
- (f) *economic and technical conditions, financial guarantees and information required from economic operators;*
- (g) *the form of the contract which is the subject of the invitation to tender: purchase, lease, hire or hire-purchase, or any combination of those; and*
- (h) *the contract award criteria and their weighting or, where appropriate, the order of importance of such criteria, if this information is not given in the indicative notice or the specifications or in the invitation to tender or to negotiate.*

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

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

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

(a) Directive 2009/33/EC<sup>40</sup>

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<sup>40</sup> OJ L 120, 15.5.2009, p. 5.

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

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

## SERVICES REFERRED TO IN ARTICLE 17

CPV Code	Description
<p>75200000-8; 75231200-6; 75231240-8;  79611000-0; 79622000-0 [Supply services of domestic help personnel]; 79624000-4 [Supply services of nursing personnel] and 79625000-1 [Supply services of medical personnel]  from 85000000-9 to 85323000-9;  98133100-5, 98133000-4; 98200000-5 and ;  98500000-8 [Private households with employed persons] and 98513000-2 to 98514000-9 [Manpower services for households, Agency staff services for households, Clerical staff services for households, Temporary staff for households, Home-help services and Domestic services]</p>	Health and social and related services
<p>85321000-5 and 85322000-2, 75000000-6 [Administration, defence and social security services], 75121000-0, 75122000-7, 75124000-1; from 79995000-5 to 79995200-7; from 80000000-4 Education and training services to 80660000-8; from 92000000-1 to 92700000-8  79950000-8 [Exhibition, fair and congress organisation services], 79951000-5 [Seminar organisation services], 79952000-2 [Event services], 79952100-3 [Cultural event organisation services], 79953000-9 [Festival organisation services], 79954000-6 [Party organisation services], 79955000-3 [Fashion shows organisation services], 79956000-0 [Fair and exhibition organisation services]</p>	Administrative social, educational, healthcare and cultural services



75300000-9	Compulsory social security services <sup>41</sup>
75310000-2, 75311000-9, 75312000-6, 75313000-3, 75313100-4, 75314000-0, 75320000-5, 75330000-8, 75340000-1	Benefit services
98000000-3, 98120000-0; 98132000-7; 98133110-8 and 98130000-3	Other community, social and personal services including services furnished by trade unions, political organisations, youth associations and other membership organisation services
deleted	deleted
98131000-0	Religious services
55100000-1 to 55410000-7; 55521000-8 to 55521200-0 [55521000-8 Catering services for private households, 55521100-9 Meals-on-wheels services, 55521200-0 Meal delivery service]  55510000-8 [Canteen services], 55511000-5 [Canteen and other restricted-clientele cafeteria services], 55512000-2 [Canteen management services], 55523100-3 [School-meal services], 55520000-1[Catering services], 55522000-5 [Catering services for transport enterprises], 55523000-2 [Catering services for other enterprises or other institutions], 55524000-9 [School catering services]	Hotel and restaurant services
79100000-5 to 79140000-7; 75231100-5;	Legal services, to the extent not excluded pursuant to Article 10 <del>(ea)</del> -19(ba)
75100000-7 to 75120000-3; 75123000-4; 75125000-8 to 75131000-3	Other administrative services and government services

<sup>41</sup> These services are not covered by the present Directive where they are organised as non-economic services of general interest. Member States are free to organise the provision of compulsory social services or of other services as services of general interest or as non-economic services of general interest.

75200000-8 to 75231000-4	Provision of services to the community
75231210-9 to 75231230-5; 75240000-0 to 75252000-7; 794300000-7; 98113100-9	Prison related services, public security and rescue services, to the extent not excluded pursuant to Article 19(ga)
79700000-1 to 79721000-4 [Investigation and security services, Security services, Alarm-monitoring services, Guard services, Surveillance services, Tracing system services, Absconder-tracing services, Patrol services, Identification badge release services, Investigation services and Detective agency services]  79722000-1 [Graphology services], 79723000-8 [Waste analysis services]	Investigation and security services
98900000-2 [Services provided by extra-territorial organisations and bodies] and 98910000-5 [Services specific to international organisations and bodies]	International services
64000000-6 [Postal and telecommunications services], 64100000-7 [Post and courier services], 64110000-0 [Postal services], 64111000-7 [Postal services related to newspapers and periodicals], 64112000-4 [Postal services related to letters], 64113000-1 [Postal services related to parcels], 64114000-8 [Post office counter services], 64115000-5 [Mailbox rental], 64116000-2 [Post-restante services], 64122000-7 [Internal office mail and messenger services]	Postal Services
50116510-9 [Tyre-remoulding services], 71550000-8 [Blacksmith services]	Miscellaneous services

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