

Commission Implementing Decision (EU) 2016/1804 of 10 October 2016 on the detailed rules for the application of Articles 34 and 35 of Directive 2014/25/EU of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors (notified under document C(2016) 6351) (Text with EEA relevance)

COMMISSION IMPLEMENTING DECISION (EU) 2016/1804

of 10 October 2016

on the detailed rules for the application of Articles 34 and 35 of Directive 2014/25/EU of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors

(notified under document C(2016) 6351)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC⁽¹⁾, and in particular Article 35(6) thereof,

After consulting the Advisory Committee for Public Contracts

Whereas:

- (1) In view of the time-limits laid down for the conduct of the procedure under Article 35 of Directive 2014/25/EU, it is necessary to provide that requests concerning the applicability of its Article 34 must include information which is useful and relevant to the evaluation of the request. To this end, a list should be drawn up of the information to be contained in such requests and of other practical procedures relating to them.
- (2) In order to ensure legal certainty and for purposes of transparency, notices of receipt or withdrawal of requests concerning the applicability of Article 34 of Directive 2014/25/EU, notices of extension or suspension of the period for the adoption by the Commission of implementing acts concerning those requests and notices of the applicability of Article 34 where no implementing act has been adopted within the deadline should be published in the *Official Journal of the European Union*. It is also necessary to stipulate the information to be contained in such notices.
- (3) With regard in particular to the information to be requested and the wording of notices, this Decision draws on the experience gained through the application of Commission Decision 2005/15/EC⁽²⁾ which established detailed rules for the application of the procedure provided for in Article 30 of Directive 2004/17/EC of the European Parliament and of the Council⁽³⁾, since the material conditions for exempting an activity

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from the provisions of Directive 2004/17/EC are substantially the same as under Article 34 of Directive 2014/25/EU.

- (4) It should be recalled that the assessment of direct exposure to competition that can be carried out in the context of Directive 2014/25/EU is without prejudice to the full-fledged application of competition law.
- (5) This Decision should replace Decision 2005/15/EC which was adopted on the basis of Directive 2004/17/EC. Decision 2005/15/EC should therefore be repealed.

HAS ADOPTED THIS DECISION:

Article 1

1 Requests concerning the applicability of Article 34 of Directive 2014/25/EU submitted in accordance with Article 35 of that Directive ('requests concerning the applicability of Article 34') shall contain at least the information laid down in Annex I to this Decision. They shall follow the structure of Annex I to this Decision.

2 Where an independent national authority that is competent in relation to the activity concerned has adopted a reasoned and substantiated position as referred to in Article 35 of Directive 2014/25/EU, that position shall accompany the request.

3 Except under the particular circumstances referred to in the fourth subparagraph of Article 40(1) and where generalised use of electronic means of communication has been postponed pursuant to Article 106(2) of Directive 2014/25/EU, the requests referred to in paragraph 1 and the positions referred to in paragraph 2 shall be transmitted by electronic means to the electronic mailbox indicated for that purpose on the Commission's website and communicated to the Member States.

4 Where a request as referred to in paragraph 1 or a position as referred to in paragraph 2 is transmitted by other means than electronic means of communication in accordance with Article 40(1) or Article 106(2) of Directive 2014/25/EU, they shall be transmitted in triplicate by post or other suitable carrier to the Commission address published on its website and communicated to the Member States.

Article 2

1 Where the Commission receives a request concerning the applicability of Article 34 and access to the market is deemed not to be restricted in accordance with the first subparagraph of Article 34(3) of Directive 2014/25/EU, it shall publish a notice containing the information set out in Part A of Annex II to this Decision.

Where the Commission receives a request concerning the applicability of Article 34 and free access to the market cannot be presumed pursuant to the first subparagraph of Article 34(3) of Directive 2014/25/EU, it shall publish a notice containing the information set out in Part B of Annex II to this Decision.

2 Where the period for the adoption of the implementing acts referred to in Article 35 of Directive 2014/25/EU is extended in accordance with the fourth subparagraph of paragraph 1 of Annex IV to that Directive, the Commission shall publish a notice containing the information set out in Part A of Annex III to this Decision.

3 Where the period for the adoption of the implementing acts referred to in Article 35 of Directive 2014/25/EU is suspended in accordance with paragraph 2 of Annex IV to that Directive, the Commission shall publish a notice containing the information set out in Part B of

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Annex III to this Decision. The Commission shall publish a notice containing the information set out in Part C of Annex III to this Decision when the suspension ends.

4 Where the request concerning the applicability of Article 34 of Directive 2014/25/EU is withdrawn by the applicant, the Commission shall publish a notice containing the information set out in Part D of Annex III to this Decision.

5 Where contracts intended to enable a given activity to be carried out and design contests that are organised for the pursuit of such an activity cease to be subject to Directive 2014/25/EU because the Commission has not adopted the implementing act within the period provided for in Annex IV to that Directive, the Commission shall publish a notice containing the information set out in Annex IV to this Decision.

6 The information foreseen in the notices set out in Annexes II, III and IV may be changed and added to as appropriate, for instance where a previously submitted request is substantially modified in accordance with Article 35(4) of Directive 2014/25/EU.

7 The notices provided for in paragraphs 1 to 5 shall be published in the *Official Journal of the European Union*.

Article 3

Decision 2005/15/EC is repealed.

Article 4

This Decision is addressed to the Member States.

Done at Brussels, 10 October 2016.

For the Commission

The President

Jean-Claude JUNCKER

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ANNEX I

INFORMATION TO BE PROVIDED IN REQUESTS CONCERNING THE APPLICABILITY OF ARTICLE 34 OF DIRECTIVE 2014/25/EU

1. Section 1 — Identity and status of applicant

Article 35 of Directive 2014/25/EU provides that requests concerning the applicability of Article 34 are to be made by the Member States or, when the legislation of the Member State concerned provides for it, by the contracting entities. Depending on the case, the term ‘applicant’ may refer therefore to either the Member State or the contracting entities. It is used merely in the interest of simplification.

1.1. Full name and address of the applicant:

In the event that the activity covered by this request is carried out by undertakings affiliated⁽⁴⁾ to the applicant, the term ‘applicant’ will be deemed to refer to both the entity indicated in point 1.1 and the affiliated undertakings in question. Thus, in particular for sections 5 and 6 below, it will be necessary to supply the requisite information for the ‘applicant’ as thus defined.

1.2. Status of the applicant: contracting authority⁽⁵⁾, public undertaking⁽⁶⁾ or private undertaking?

1.3. For a contracting authority: are you making the request for and on behalf of your Member State?

If so, please supply the information requested for each point in sections 2 to 6 inclusive. With regard to each point in sections 5 and 6 in particular, please provide the requisite information for each of the entities carrying out the activity covered by this request. However, where there are a large number of such entities, the information may be restricted to those entities holding 10 % or more of the geographical market in question⁽⁷⁾. Where the information is similar or identical for several entities, they may be grouped together, on condition that this is specified.

1.4. For contracting entities (the contracting authorities, the public undertakings and the private undertakings carrying out one of the activities referred to in Directive 2014/25/EU⁽⁸⁾): Please state the provision of national law stating that contracting entities may submit a request under Article 35.

2. Section 2 — Description of the activity covered by this request

2.1. Describe the activity to which the conditions of Article 34(1)⁽⁹⁾ apply in your view. The activity concerned may form a part of a larger sector⁽¹⁰⁾ or be exercised only in certain parts of the Member State concerned.

2.2. Where this differs from the national territory as a whole, indicate the area in which the activity covered by this request is carried out. Mention only the area in which you consider that the conditions of Article 34(1) are met.

3. Section 3 — The relevant market

A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of their characteristics, their prices and their intended use⁽¹¹⁾.

The following factors are normally considered to be relevant to the determination of the relevant product market and should be taken into account in the analysis⁽¹²⁾:

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- the own- and cross-price elasticities of demand of the relevant products and/or services,
- any differences in the end use to which the products are put,
- differences in price between two products,
- the cost of switching from one product to another, in the case of two potentially competing products,
- established or entrenched consumer preferences for one type or category of product,
- product classifications (classifications maintained by trade associations, etc.).

The relevant geographical market comprises the area in which the entities 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⁽¹³⁾.

Factors relevant to the assessment of the relevant geographical market include⁽¹⁴⁾:

- the nature and characteristics of the products or services concerned,
- the existence of barriers to entry,
- consumer preferences,
- appreciable differences in market shares or substantial price differences between neighbouring areas,
- transport costs.

- 3.1. In the light of the above, please explain the definition of the relevant product market or markets that, in your opinion, should form the basis of the Commission's analysis.

In your reply, please give reasons for assumptions or conclusions, supported by appropriate empirical evidence⁽¹⁵⁾, and explain how the factors outlined above have been taken into account. In particular, please state the specific products or services directly or indirectly affected by this request and identify the categories of products considered as substitutable in your market definition.

In the questions below, this (or these) definition(s) is (are) referred to as 'the relevant product market(s)'.

- 3.2. Please explain the definition of the relevant geographical market or markets that in your opinion should form the basis of the Commission's analysis. In your reply, please give reasons for assumptions or conclusions, supported by appropriate empirical evidence⁽¹⁶⁾, and explain how the factors outlined above have been taken into account. In particular, please specify the geographical area in which the entity or entities concerned by this request are active in the relevant product market(s), and if you consider the relevant geographical market to be wider than a single Member State, give the reasons for this.

In the questions below, this (or these) definition(s) is (are) referred to as 'the relevant geographical market(s)'.

4. **Section 4 — Applicability of the legislative acts referred to in Annex III to Directive 2014/25/EU.**

- 4.1. Is the activity covered by this request subject to one of the legislative acts referred to in Annex III to Directive 2014/25/EU⁽¹⁷⁾? If so, indicate the act or acts of national law transposing the Union legislation concerned.

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5. Section 5 — Information concerning the relevant market and access to that market

This section must be completed irrespective of the reply to point 4.1 above.

Certain points may not be relevant for some activities or the factual situation of a given applicant — in such cases, please indicate so point by point.

The applicant may limit itself to giving a precise reference point by point to the relevant part(s) of a reasoned and substantiated position as referred to in Article 35 of Directive 2014/25/EU, adopted by an independent national authority that is competent in relation to the activity concerned, in which the point concerned is analysed.

- 5.1. Please give the reasons why you consider that access to the relevant market is not restricted.
- 5.2. For each relevant market, for each of the last three financial years⁽¹⁸⁾, and for each of the following territories:
 - (a) the EEA territory,
 - (b) the EU as a whole,
 - (c) the territory of the EFTA States as a whole,
 - (d) each Member State and each EFTA State where the applicant carries out an activity, and
 - (e) the relevant geographical market⁽¹⁹⁾, if the applicant considers that this market is different,

please provide the information referred to in points 5.2.1 to 5.2.9:

- 5.2.1. an estimate of the total size of the market in terms of sales value (in Euro) and volume (units)⁽²⁰⁾, indicating the basis for the calculations and sources used and providing documents, where available, to confirm these calculations;
- 5.2.2. the sales in value and volume, as well as an estimate of the market share held by the applicant;
- 5.2.3. an estimate of the market share in value (and, where appropriate, volume) of all competitors (including importers) having at least 10 % of the geographical market under consideration. Provide documents, where available, to confirm the calculation of these market shares and provide the name, address, telephone number, fax number and appropriate contact person, of these competitors;
- 5.2.4. an estimate of the total value, volume and source of imports from outside the EEA territory and identify:
 - (a) the share of such imports attributable to the applicant;
 - (b) an estimate of the extent to which any quotas, tariffs and non-tariff barriers to trade constitute barriers to these imports; and
 - (c) an estimate of the extent to which transportation and other costs affect these imports;
- 5.2.5. the extent to which trade between States within the territory of the EEA is hindered by:

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- (a) transportation and other costs; and
 - (b) other non-tariff barriers to trade;
- 5.2.6. the manner in which the applicant produces and sells the products or services; for example, whether they are manufactured locally, or are sold through local distribution networks;
- 5.2.7. a comparison of the applicant's and its competitors' price levels in each Member State and EFTA State and a similar comparison of price levels between the EU, the EFTA States and other areas where these products are produced (for example, Eastern Europe, the United States of America, Japan, or any other relevant area);
- 5.2.8. the nature and extent of the vertical integration of the applicant compared with the largest competitors;
- 5.2.9. information on the cost structure of the applicant⁽²¹⁾. Also, specify any assets or infrastructure used jointly with other entities or used to carry out more than one activity covered by Directive 2014/25/EU. Where the use of such assets or infrastructures is subject to special conditions, such as universal service obligations or special rights, please specify.
- 5.3. Please provide the following information:
- 5.3.1. Over the last five years, has there been any significant entry to the geographical market(s) for the relevant products⁽²²⁾? If the answer is 'yes', where possible provide the name, address, telephone number and fax number of the undertaking concerned, as well as the appropriate contact person, and an estimate of their current market share.
- 5.3.2. In the opinion of the applicant are there any undertakings (including those at present operating only in markets outside the EU or outside the EEA) that could enter the market? If the answer is 'yes', please explain why and identify such undertakings by name, address, telephone number, fax number and appropriate contact person, and give an estimate of the time within which such market entry is likely to occur.
- 5.3.3. Describe the various factors influencing entry into the relevant markets in this case, from both a geographical and product viewpoint. In so doing, take account of the following, where appropriate:
- (a) the total costs of entry (research and development, distribution systems necessary, promotion, advertising, after-sales service, etc.) on an equivalent scale to that of a significant viable competitor, indicating the market share of such a competitor;
 - (b) any legal or regulatory barriers to entry, such as government authorisation or the existence of any standards;
 - (c) any restrictions created by the existence of patents, know-how and other intellectual property rights in these markets and any restrictions created by the licensing of such rights;
 - (d) the extent to which the applicant is a licensee or licensor of patents, know-how and other rights in the relevant markets;
 - (e) the importance of economies of scale for the production of products in the relevant markets;
 - (f) access to sources of supply, such as availability of raw materials.

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RESEARCH AND DEVELOPMENT

5.3.4. Give an account of the importance of research and development in the ability of an undertaking operating in the relevant market(s) to compete in the long term. Explain the nature of the research and development carried out by the applicant in the relevant markets.

In so doing, take account of the following, where appropriate:

- (a) trends and intensity of research and development⁽²³⁾ in these markets and for the applicant;
- (b) technological developments in these markets over an appropriate time period (in particular developments in products and/or services, production processes, distribution systems, and so on);
- (c) the major innovations that have been made in these markets and the undertakings responsible for these innovations;
- (d) the cycle of innovation in these markets and where the parties are in this cycle of innovation.

COOPERATION AGREEMENTS

5.3.5. To what extent do cooperation agreements (horizontal or vertical) exist in the relevant markets?

5.3.6. Give details of the most important cooperation agreements concluded by the applicant in the relevant markets, such as research and development, licensing, joint production, specialisation, distribution, long term supply and exchange of information agreements.

6. Section 6 — Exposure to competition

Certain points may not be relevant for some activities or the factual situation of a given applicant — in such cases, please indicate so point by point.

The applicant may limit itself to giving a precise reference point by point to the relevant part(s) of a reasoned and substantiated position as referred to in Article 35 of Directive 2014/25/EU, adopted by an independent national authority that is competent in relation to the activity concerned, in which the point concerned is analysed.

According to Article 34(2) of Directive 2014/25/EU, the question of whether an activity is directly exposed to competition must be decided on the basis of criteria that are in conformity with provisions on competition of the TFEU, such as the characteristics of the goods or services concerned, the existence of alternative goods or services, the prices, and the actual or potential presence of more than one supplier of the goods or services in question.

6.1. Explain why you consider that the activity covered by this request is fully exposed to competition in the relevant product market on the relevant geographical market(s). In particular, give the following information:

GENERAL CONDITIONS ON THE RELEVANT MARKET

6.1.1. Identify the five largest independent suppliers⁽²⁴⁾ to the applicant and their individual shares of the applicant's purchases (of raw materials or goods used to produce the relevant products). Provide the name, address, telephone number, fax number and appropriate contact person, of these suppliers.

Please also identify the undertakings affiliated to the applicant and their individual shares of the applicant's purchases (of raw materials or goods used to produce the relevant products).

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Provide the name, address, telephone number, fax number and appropriate contact person, of these undertakings.

STRUCTURE OF SUPPLY IN THE RELEVANT MARKETS

6.1.2. Describe the distribution channels and after-sales service networks that exist in the relevant markets. In doing so, take account of the following, where appropriate:

- (a) the existing distribution systems and their importance in these markets. To what extent is distribution performed by third parties or by undertakings affiliated to the applicant?
- (b) the existing after-sales service networks (for example, maintenance and repair) and their importance in these markets. To what extent are these services performed by third parties or by undertakings affiliated to the applicant?

6.1.3. Where appropriate, provide an estimate of the total EU-wide and EFTA-wide capacity for the last three years. During this period, what was the capacity of the applicant and what was the rate of its capacity utilisation?

6.1.4. Please indicate any other supply-side considerations you consider to be relevant.

STRUCTURE OF DEMAND IN THE RELEVANT MARKETS

6.1.5. Identify the five largest independent customers of the applicant in the relevant market and their individual shares of total sales of the relevant products by the applicant. Provide the name, address, telephone number, fax number and appropriate contact person, of each of these customers.

6.1.6. Explain the structure of demand in terms of:

- (a) the different phases of the markets, for example, take-off, expansion, maturity and decline, and a forecast of the growth rate of demand;
- (b) the importance of customer preferences, in terms of brand loyalty, product differentiation and the provision of a full range of products;
- (c) the degree of concentration or dispersion of demand;
- (d) segmentation of customers into different groups with a description of the 'typical customer' of each group;
- (e) the importance of exclusive distribution contracts and other types of long-term contracts;
- (f) the extent to which contracting authorities, State undertakings or similar bodies are important as a source of demand.

6.1.7. Provide estimates of the degree of consumer activity in terms of switching supplier and renegotiating contracts in the last five years. Also give the sources used for this and, where available, the necessary documents to confirm the estimates.

ANNEX II

INFORMATION TO BE CONTAINED IN NOTICES OF REQUESTS CONCERNING THE APPLICABILITY OF ARTICLE 34 OF DIRECTIVE 2014/25/EU

A. Access to the market is deemed not to be restricted in accordance with the first subparagraph of Article 34(3) of Directive 2014/25/EU

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Request [from a Member State/made by a contracting entity⁽²⁵⁾]

On [...] the Commission received a request pursuant to Article 35 of Directive 2014/25/EU of the European Parliament and of the Council⁽²⁶⁾. The first working day following receipt of the request is [...].

This request, made by [name of the Member State concerned/name of the relevant contracting entity]⁽²⁷⁾, concerns [brief mention of the relevant sector or activity] in [that country/indicate the Member State concerned]. Article 34 of Directive 2014/25/EU provides that ‘contracts intended to enable an activity mentioned in Articles 8 to 14 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 35 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 assessment of direct exposure to competition that can be carried out in the context of Directive 2014/25/EU is without prejudice to the full-fledged application of competition law.

The Commission is allowed a period of [90⁽²⁸⁾/105⁽²⁹⁾]⁽³⁰⁾ working days to take a decision on this request, commencing on the working day referred to above. The period therefore expires on [...].

According to Article 35(5) of Directive 2014/25/EU, further requests concerning [brief mention of the relevant sector or activity] in [indicate the Member State concerned] before the expiry of the period opened in respect of this request shall not be considered as new procedures and shall be treated in the context of this request.

B. Free access to the market cannot be presumed on the basis of the first subparagraph of Article 34(3) of Directive 2014/25/EU

Request [from a Member State/made by a contracting entity⁽³¹⁾]

On [...] the Commission received a request pursuant to Article 35 of Directive 2014/25/EU of the European Parliament and of the Council⁽³²⁾. The first working day following receipt of the request is [...].

This request, made by [name of the Member State concerned/name of the relevant contracting entity]⁽³³⁾, concerns [brief mention of the relevant sector or activity] in [that country/indicate the Member State concerned]. Article 34 of Directive 2014/25/EU provides that ‘contracts intended to enable an activity mentioned in Articles 8 to 14 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 35 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 assessment of direct exposure to competition that can be carried out in the context of Directive 2014/25/EU is without prejudice to the full-fledged application of competition law.

The Commission is allowed a period of [130⁽³⁴⁾/145⁽³⁵⁾]⁽³⁶⁾ working days to take a decision on this request, commencing on the working day referred to above. The period therefore expires on [...].

According to Article 35(5) of Directive 2014/25/EU, further requests concerning [brief mention of the relevant sector or activity] in [indicate the Member State concerned] before the expiry

of the period opened in respect of this request shall not be considered as new procedures and shall be treated in the context of this request.

ANNEX III

INFORMATION TO BE CONTAINED IN NOTICES OF REQUESTS CONCERNING THE APPLICABILITY OF ARTICLE 34 OF DIRECTIVE 2014/25/EU — EXTENSION OR SUSPENSION OF PERIODS FOR THE ADOPTION OF IMPLEMENTING ACTS OR WITHDRAWAL OF A REQUEST

A. Extension of the period for adoption of implementing acts

Request [from a Member State/made by a contracting entity⁽³⁷⁾] — extension of deadline

On [...] the Commission received a request pursuant to Article 35 of Directive 2014/25/EU of the European Parliament and of the Council⁽³⁸⁾.

This request, made by [name of the Member State concerned/name of the relevant contracting entity]⁽³⁹⁾, concerns [brief mention of the relevant sector or activity] in [that country/indicate the Member State concerned]. The relevant notice was published on page number [...] of OJEU C number [...] of [...]. The [initial/prolonged]⁽⁴⁰⁾ deadline was [...].

Pursuant to the fourth subparagraph of paragraph 1 to Annex IV of Directive 2014/25/EU, the deadline may be extended by the Commission with the agreement of those having made the request for exemption concerned. Given that [brief justification for the extension] and with the agreement of [name of the Member State concerned/name of the relevant contracting entity]⁽⁴¹⁾, the period available to the Commission for deciding on this request is hereby extended by [...] working days.

The final deadline therefore expires on [...].

B. Suspension of the period for adoption of implementing acts

On [...] the Commission received a request pursuant to Article 35 of Directive 2014/25/EU⁽⁴²⁾. The first working day following receipt of the request was [...] and the initial period available to the Commission for deciding on this request was of [90/105/130/145]⁽⁴³⁾ working days.

This request, made by [name of the Member State concerned/name of the relevant contracting entity]⁽⁴⁴⁾, concerns [brief mention of the relevant sector or activity] in [that country/indicate the Member State concerned]. The relevant notice was published on page number [...] of OJEU C number [...] of [...]. The [initial/prolonged]⁽⁴⁵⁾ deadline was [...].

Pursuant to Annex IV, paragraph 2, of Directive 2014/25/EU, the Commission may require the Member State or the contracting entity concerned or the competent independent national authority or any other competent national authority to provide all necessary information or to supplement or clarify information given within an appropriate time limit. On [...] the Commission asked [...] to provide additional information by [...] at the latest.

In the event of late or incomplete answers⁽⁴⁶⁾, the initial deadline 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.

The final deadline will therefore expire after [...⁽⁴⁷⁾] working days after the receipt of the complete and correct information.

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C. **End of the suspension of the period for adoption of implementing acts**

On [...] the Commission received a request pursuant to Article 35 of Directive 2014/25/EU of the European Parliament and of the Council⁽⁴⁸⁾.

This request, made by [name of the Member State concerned/name of the relevant contracting entity]⁽⁴⁹⁾, concerns [brief mention of the relevant sector or activity] in [that country/indicate the Member State concerned]. The relevant notice was published on page number [...] of OJEU C number [...] of [...].

On [...] the Commission asked [...] to provide additional information by [...] at the latest. As announced in the notice that was published on page number [...] of OJEU C number [...] of [...], the final deadline was prolonged by [...] working days after the receipt of the complete and correct information. Complete and correct information was received on [...].

The final deadline therefore expires on [...].

D. **Withdrawal of a request concerning the applicability of Article 34 of Directive 2014/25/EU**

On [...] the Commission received a request pursuant to Article 35 of Directive 2014/25/EU of the European Parliament and of the Council⁽⁵⁰⁾.

This request, made by [name of the Member State concerned/name of the relevant contracting entity]⁽⁵¹⁾, concerns [brief mention of the relevant sector or activity] in [that country/indicate the Member State concerned]. The relevant notice was published on page number [...] of OJEU C number [...] of [...]. The [initial/prolonged]⁽⁵²⁾ deadline was [...].

On [...], the applicant withdrew the request, which is to be considered null and void. There is consequently no reason to decide whether Article 34 of Directive 2014/25/EU applies to [brief mention of the relevant sector or activity] in [that country/indicate the Member State concerned]. Directive 2014/25/EU therefore continues to apply in accordance with its own provisions when contracting entities award contracts for the pursuit of [brief mention of the relevant sector or activity] in [indicate the Member State concerned] and when they organise design contests for the pursuit of this activity in that geographical area.

ANNEX IV

INFORMATION TO BE CONTAINED IN NOTICES OF REQUESTS CONCERNING THE APPLICABILITY OF ARTICLE 34 OF DIRECTIVE 2014/25/EU — APPLICABILITY OF ARTICLE 34(1) OF THE DIRECTIVE WHERE NO IMPLEMENTING ACT HAS BEEN ADOPTED WITHIN THE DEADLINE

Request [from a Member State/made by a contracting entity]⁽⁵³⁾

On [...] the Commission received a request pursuant to Article 35 of Directive 2014/25/EU of the European Parliament and of the Council⁽⁵⁴⁾.

This request, made by [name of the Member State concerned/name of the relevant contracting entity]⁽⁵⁵⁾, concerns [brief mention of the relevant sector or activity] in [that country/indicate the Member State concerned]. The relevant notice was published on page number [...] of OJEU C number [...] of [...]. The [initial/prolonged]⁽⁵⁶⁾ deadline was [...].

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Since the period for adoption of a decision expired on [...] without the adoption of a decision, Article 34(1) of said Directive is deemed to apply. Consequently, the provisions of Directive 2014/25/EU do not apply to the award of contracts for the pursuit of [brief mention of the relevant sector or activity] in [indicate the Member State concerned] nor to design contests organised for the pursuit of this activity in that geographical area.

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- (1) [OJ L 94, 28.3.2014, p. 243.](#)
- (2) Commission Decision 2005/15/EC of 7 January 2005 on the detailed rules for the application of the procedure provided for in Article 30 of Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors ([OJ L 7, 11.1.2005, p. 7](#)).
- (3) 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 ([OJ L 134, 30.4.2004, p. 1](#)).
- (4) Within the meaning of Article 29(1) of Directive 2014/25/EU, “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 Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC ([OJ L 182, 29.6.2013, p. 19](#)). Article 29(2) adds that ‘in the case of entities, which are not subject to Directive 2013/34/EU, “affiliated undertaking” shall mean any undertaking that:
 - (a) may be, directly or indirectly, subject to a dominant influence by the contracting entity;
 - (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.’
- (5) According to Article 3 of Directive 2014/25/EU, “contracting authorities” means State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law.
“Bodies governed by public law” means bodies that have 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 by other bodies governed by public law; or are subject to management supervision by those authorities or bodies; or which 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.’
- (6) According to Article 4(2) of Directive 2014/25/EU, “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.
A dominant influence 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’.
- (7) See section 3.
- (8) The relevant activities or sectors may be summed up as follows:
electricity (production, transmission, distribution); gas (production, transport, distribution); heat (production, transport, distribution); hydrocarbons (extraction); coal and other solid fuels (exploration and extraction); drinking water (production, transport, distribution); urban transport (bus, underground etc.); railways (transport of persons and goods; making infrastructure available and management/operation of actual transport services); ports (seaports or inland ports, infrastructure to be made available and management/operation of the infrastructure); airports (making infrastructure available and management/operation of the infrastructure); and postal services. For an exact definition of the activities covered, see Articles 7 to 14 of Directive 2014/25/EU.
- (9) ‘Contracts intended to enable an activity mentioned in Articles 8 to 14 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 35 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. ...’
- (10) An example might be electricity generation by conventional means only, which is a part of the larger electricity sector.

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- (11) Where appropriate, specify also if the products are readily substitutable; perfect substitutes; less perfect substitutes or partial substitutes.
For any given product (for the purposes of this definition, the term ‘product’ refers to products or services) there is a variety of substitutes. This variety includes all the substitutes which could be envisaged for the product in question, that is to say, all the products which, to a greater or lesser extent, will fulfil the consumer's requirements. The range of substitutes extends from very exact (or perfect) substitutes (products to which consumers would turn immediately, for example, in the event of a very small increase in the price of the product in question) to very inexact (or imperfect) substitutes (products to which consumers would turn only in the event of a very sharp increase in the price of the product in question).
When it defines the relevant market, the Commission considers only products which can be readily substituted for the products in question. Readily substitutable products are those to which consumers would turn in response to a modest but significant increase in the price of the relevant product (e.g. 5 %). This permits the Commission to assess the competitive situation in the context of a relevant market comprising all the products to which consumers of the products in question would readily turn.
However, this does not mean that the Commission fails to take account of the constraints on the competitive behaviour of the entities concerned resulting from the existence of imperfect substitutes [those to which a consumer would not turn in response to a modest but significant increase in the price of the relevant product (e.g. 5 %). These effects are taken into account once the market has been defined and market share quantified].
It is consequently important for the Commission to have information on both products which can be readily substituted for the products in question and less perfect substitutes. [Example of perfect demand-side substitute: electricity produced from coal and that produced from renewable sources]. Partial substitutes are regarded as those products and services which can replace each other only within a certain geographical area, only during part of the year or only for certain uses [Example: in passenger transport, rail, underground, tram and bus would be only partially interchangeable at national level since these forms of transport coexist only within a given geographical area. However, within this area, they could be considered as perfect substitutes.]
- (12) This list is not exhaustive: the applicant may refer to other factors.
- (13) See the second subparagraph of Article 34(2) of Directive 2014/25/EU.
- (14) This list is not exhaustive: the applicant may refer to other factors.
- (15) I.e. facts and evidence that can be independently verified. All the analyses performed must be replicable in an independent manner. In particular, in the case of providing supporting evidence stemming from empirical analysis, the applicant must provide the sources, the raw data and all the details on the specific technical steps taken in order to reach the final conclusions.
- (16) I.e. facts and evidence that can be independently verified. All the analyses performed must be replicable in an independent manner. In particular, in the case of providing supporting evidence stemming from empirical analysis, the applicant must provide the sources, the raw data and all the details on the specific technical steps taken in order to reach the final conclusions.
- (17) Annex III reads as follows:
- 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
[No entry]
 - D. Contracting entities in the field of rail services
Rail freight transport
Directive 2012/34/EU
International rail passenger transport
Directive 2012/34/EU
National rail passenger transport
[No entry]
 - E. Contracting entities in the field of urban railway, tramway, trolleybus or motor bus services
[No entry]
 - F. Contracting entities in the field of postal services
Directive 97/67/EC
 - G. Extraction of oil or gas
Directive 94/22/EC

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- H. Exploration for and extraction of coal or other solid fuels
[No entry]
 - I. Contracting entities in the field of seaport or inland port or other terminal equipment
[No entry]
 - J. Contracting entities in the field of airport installations
[No entry]
- (18) The information requested under headings 5.2.1 and 5.2.2 below should be supplied for all the territories referred to in points (a), (b), (c), (d) and (e).
 - (19) See section 3.
 - (20) The value and volume of a market should reflect production, plus imports, less exports for the geographical areas in question.
 - (21) Where appropriate, this shall take account of synergies that can arise (e.g. in the case of joint production of various products or the reuse of by-products), quantifying their extent. Moreover, whenever possible, the information shall include an estimate of the applicant's position in the market in terms of cost efficiency (e.g. by comparing the applicant's cost structure with the one of closer competitors and/or with those operating in the same industry or sector).
 - (22) See section 3.
 - (23) Research and development intensity is defined as research and development expenditure as a proportion of turnover.
 - (24) Independent suppliers are suppliers who are not affiliated to the applicant. For the definition of affiliated undertakings, see footnote 1 to point 1.1.
 - (25) Delete as appropriate.
 - (26) Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ L 94, 28.3.2014, p. 243).
 - (27) Delete as appropriate.
 - (28) Pursuant to paragraph 1 a of Annex IV to Directive 2014/25/EU.
 - (29) Pursuant to paragraph 1 a of Annex IV to Directive 2014/25/EU in combination with the second subparagraph of said paragraph 1.
 - (30) Delete as appropriate: the 105 working days will apply 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 34(1) to the activity concerned.
 - (31) Delete as appropriate.
 - (32) Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ L 94, 28.3.2014, p. 243).
 - (33) Delete as appropriate.
 - (34) Pursuant to paragraph 1 b of Annex IV to Directive 2014/25/EU.
 - (35) Pursuant to paragraph 1 b of Annex IV to Directive 2014/25/EU in combination with the second subparagraph of said paragraph 1.
 - (36) Delete as appropriate: the 145 working days will apply 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 34(1) to the activity concerned.
 - (37) Delete as appropriate.
 - (38) Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ L 94, 28.3.2014, p. 243).
 - (39) Delete as appropriate.

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- (40) Delete as appropriate.
- (41) Delete as appropriate.
- (42) Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC ([OJ L 94, 28.3.2014, p. 243](#)).
- (43) Delete as appropriate.
- (44) Delete as appropriate.
- (45) Delete as appropriate.
- (46) See the second sentence of said Annex IV, paragraph 2.
- (47) Initial number of working days available minus the number of working days between the first working day following the receipt of the request for exemption and the expiration of the deadline for providing the additional information.
- (48) Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC ([OJ L 94, 28.3.2014, p. 243](#)).
- (49) Delete as appropriate.
- (50) Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC ([OJ L 94, 28.3.2014, p. 243](#)).
- (51) Delete as appropriate.
- (52) Delete as appropriate.
- (53) Delete as appropriate.
- (54) Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC ([OJ L 94, 28.3.2014, p. 243](#)).
- (55) Delete as appropriate.
- (56) Delete as appropriate.

Status:

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Changes to legislation:

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