

Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (Text with EEA relevance)

TITLE I

**SUBJECT-MATTER, SCOPE, PRINCIPLES AND DEFINITIONS**

*CHAPTER I*

*Scope, general principles and definitions*

*Section I*

*Subject-matter, scope, general principles, definitions and threshold*

*Article 1*

**Subject-matter and scope**

- 1 This Directive establishes rules on the procedures for procurement by contracting authorities and contracting entities by means of a concession, whose value is estimated to be not less than the threshold laid down in Article 8.
- 2 This Directive applies to the award of works or services concessions, to economic operators by:
  - a Contracting authorities; or
  - b Contracting entities, provided that the works or services are intended for the pursuit of one of the activities referred to in Annex II.
- 3 The application of this Directive is subject to Article 346 TFEU.
- 4 Agreements, decisions or other legal instruments that organise the transfer of powers and responsibilities for the performance of public tasks between contracting authorities or contracting entities or groupings of contracting authorities or contracting entities, and which do not provide for remuneration to be given for contractual performance, are considered to be a matter of internal organisation of the Member State concerned and, as such, are not affected in any way by this Directive.

*Article 2*

**Principle of free administration by public authorities**

- 1 This Directive recognises the principle of free administration by national, regional and local authorities in conformity with national and Union law. Those authorities are free to decide how best to manage the execution of works or the provision of services, to ensure in particular a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights in public services.

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Those authorities may choose to perform their public interest tasks with their own resources, or in cooperation with other authorities or to confer them upon economic operators.

2 This Directive does not affect Member States' systems of property ownership. In particular it does not require the privatisation of public enterprises providing services to the public.

### *Article 3*

#### **Principle of equal treatment, non-discrimination and transparency**

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

The design of the concession award procedure, including the estimate of the value, shall not be made with the intention of excluding it from the scope of this Directive or of unduly favouring or disadvantaging certain economic operators or certain works, supplies or services.

2 Contracting authorities and contracting entities shall aim at ensuring the transparency of the award procedure and of the performance of the contract, while complying with Article 28.

### *Article 4*

#### **Freedom to define services of general economic interest**

1 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 way in which the Member States organise their social security systems.

2 Non-economic services of general interest shall fall outside the scope of this Directive.

### *Article 5*

#### **Definitions**

For the purposes of this Directive the following definitions apply:

- (1) 'concessions' means works or services concessions, as defined in points (a) and (b):
  - (a) 'works concession' means a contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrust the execution of works to one or more economic operators the consideration for which consists either solely in the right to exploit the works that are the subject of the contract or in that right together with payment;
  - (b) 'services concession' means a contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrust the provision and the management of services other than the execution of works referred to in point (a) to one or more economic operators, the consideration of which consists either solely in the right to

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exploit the services that are the subject of the contract or in that right together with payment.

The award of a works or services concession shall involve the transfer to the concessionaire of an operating risk in exploiting those works or services encompassing demand or supply risk or both. The concessionaire shall be deemed to assume operating risk where, under normal operating conditions, it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services which are the subject-matter of the concession. The part of the risk transferred to the concessionaire shall involve real exposure to the vagaries of the market, such that any potential estimated loss incurred by the concessionaire shall not be merely nominal or negligible;

- (2) ‘economic operator’ means any natural or legal person, or public entity, or a group of such persons 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;
- (3) ‘candidate’ means an economic operator that has sought an invitation or has been invited to take part in a concession award procedure;
- (4) ‘tenderer’ means an economic operator which has submitted a tender;
- (5) ‘concessionaire’ means an economic operator which has been awarded a concession;
- (6) ‘written’ or ‘in writing’ means any expression consisting of words or figures which can be read, reproduced and subsequently communicated, including information which is transmitted and stored by electronic means;
- (7) ‘execution of works’ means the execution, or both the design and execution, of works related to one of the activities referred to in Annex I or of a work, or the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority or contracting entity exercising a decisive influence on the type or design of the work;
- (8) ‘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;
- (9) ‘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;
- (10) ‘exclusive right’ means a right granted by a competent authority of a Member State by means of any law, regulation or published administrative provision which is compatible with the Treaties the effect of which is to limit the exercise of an activity to a single economic operator and which substantially affects the ability of other economic operators to carry out such an activity;
- (11) ‘special right’ means a right granted by a competent authority of a Member State by means of any law, regulation or published administrative provision which is compatible with the Treaties the effect of which is to limit the exercise of an activity to two or more economic operators and which substantially affects the ability of other economic operators to carry out such an activity;
- (12) ‘concession document’ means any document produced or referred to by the contracting authority or contracting entity to describe or determine elements of the concession or the procedure, including the concession notice, the technical

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and functional requirements, proposed conditions of concession, formats for the presentation of documents by candidates and tenderers, information on generally applicable obligations and any additional documents;

- (13) ‘innovation’ means the implementation of a new or significantly improved product, service or process, including but not limited to production, building or construction processes a new marketing method, or a new organisational method in business practices, workplace organisation or external relations, inter alia, with the purpose of helping to solve societal challenges or to support the Europe 2020 strategy.

### *Article 6*

#### **Contracting authorities**

1 For the purposes of this Directive, ‘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 other than those authorities, bodies or associations which pursue one of the activities referred to in Annex II and award a concession for the pursuit of one of those activities.

2 ‘Regional authorities’ includes all authorities of the administrative units listed non-exhaustively in NUTS 1 and 2, as referred to in Regulation (EC) No 1059/2003 of the European Parliament and of the Council<sup>(1)</sup>.

3 ‘Local authorities’ includes all authorities of the administrative units falling under NUTS 3 and smaller administrative units, as referred to in Regulation (EC) No 1059/2003.

4 ‘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 bodies or authorities; 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.

### *Article 7*

#### **Contracting entities**

1 For the purposes of this Directive, ‘contracting entities’ means entities which pursue one of the activities referred to in Annex II and award a concession for the pursuit of one of those activities, and which are one of the following:

- a 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;
- b public undertakings as defined in paragraph 4 of this Article;
- c entities other than those referred to in points (a) and (b) of this paragraph, but which operate on the basis of special or exclusive rights, granted for the exercise of one of the activities referred to in Annex II.

2 Entities which have been granted special or exclusive rights 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 ‘contracting entities’ within the meaning of point (c) of paragraph 1. Such procedures shall include:

- a procurement procedures with a prior call for competition in conformity with Directive 2014/24/EU of the European Parliament and of the Council<sup>(2)</sup> and Directive 2014/25/EU, Directive 2009/81/EC or this Directive;
- b procedures pursuant to other legal acts of the Union listed in Annex III, ensuring adequate prior transparency for granting authorisations on the basis of objective criteria.

3 The Commission shall be empowered to adopt delegated acts in accordance with Article 48 concerning amendments to the list of the Union legal acts set out in Annex III where necessary because of the repeal or amendment of those acts, or because of the adoption of new acts.

4 ‘Public undertaking’ means any undertaking over which the contracting authorities may exercise, directly or indirectly, a dominant influence by virtue of their ownership thereof, 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.

#### *Article 8*

##### **Threshold and methods for calculating the estimated value of concessions**

1 This Directive shall apply to concessions the value of which is equal to or greater than [F<sup>1</sup>EUR 5 350 000].

2 The value of a concession shall be the total turnover of the concessionaire generated over the duration of the contract, net of VAT, as estimated by the contracting authority or the contracting entity, in consideration for the works and services being the object of the concession, as well as for the supplies incidental to such works and services.

That estimate shall be valid at the moment at which the concession notice is sent or, in cases where such notice is not provided for, at the moment at which the contracting authority or the contracting entity commences the concession award procedure, for instance by contacting economic operators in relation to the concessions.

For the purpose of paragraph 1, if the value of the concession at the time of the award is more than 20 % higher than its estimated value, the valid estimate shall be the value of the concession at the time of the award.

3 The estimated value of the concession shall be calculated using an objective method specified in the concession documents. When calculating the estimated value of the concession, contracting authorities and contracting entities shall, where applicable, take into account in particular:

- a the value of any form of option and any extension of the duration of the concession;

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- b revenue from the payment of fees and fines by the users of the works or services other than those collected on behalf of the contracting authority or contracting entity;
- c payments or any financial advantage in any form whatsoever made by the contracting authority or contracting entity or any other public authority to the concessionaire, including compensation for compliance with a public service obligation and public investment subsidies;
- d the value of grants or any other financial advantages, in any form, from third parties for the performance of the concession;
- e revenue from sales of any assets which are part of the concession;
- f the value of all the supplies and services that are made available to the concessionaire by the contracting authorities or contracting entities, provided that they are necessary for executing the works or providing the services;
- g any prizes or payments to candidates or tenderers.

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

5 Where a proposed work or service may result in concessions being awarded in the form of separate lots, account shall be taken of the total estimated value of all such lots.

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

#### Textual Amendments

- F1** Substituted by [Commission Delegated Regulation \(EU\) 2019/1827 of 30 October 2019 amending Directive 2014/23/EU of the European Parliament and of the Council in respect of the threshold for concessions \(Text with EEA relevance\).](#)

### Article 9

#### Revision of the threshold

1 Every two years from 30 June 2013, the Commission shall verify that the threshold set out in Article 8(1) corresponds to the threshold established in the World Trade Organisation Agreement on Government Procurement (the 'GPA') for works concessions and shall, where necessary, revise that threshold in accordance with this Article.

In accordance with the calculation method set out in the GPA, the Commission shall calculate the value of the threshold 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 31 August preceding the revision with effect from 1 January. The value of the threshold thus revised shall, where necessary, be rounded down to the nearest thousand euros so as to ensure that the threshold in force provided for by the GPA, expressed in SDRs, is observed.

2 Every two years from 1 January 2014, the Commission shall determine the values, in the national currencies of the Member States whose currency is not the euro, of the threshold referred to in Article 8(1), revised pursuant to paragraph 1 of this Article.

In accordance with the calculation method set out in the GPA, the determination of such values shall be based on the average daily values of those currencies corresponding to the applicable threshold expressed in euro over the 24 months terminating on 31 August preceding the revision with effect from 1 January.

3 The Commission shall publish the revised threshold referred to in paragraph 1, its corresponding value in the national currencies referred to in the first subparagraph of paragraph 2, and the value determined in accordance with the second subparagraph of paragraph 2, 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 48 to adapt the methodology set out in the second subparagraph of paragraph 1 of this Article to any change in the methodology provided in the GPA for the revision of the threshold referred to in Article 8(1) and for the determination of the corresponding values in the national currencies of the Member States whose currency is not the euro, as referred to in paragraph 2 of this Article.

The Commission shall also be empowered to adopt delegated acts in accordance with Article 48 to revise the threshold referred to in Article 8(1) pursuant to paragraph 1 of this Article.

5 Where it is necessary to revise that threshold and time constraints prevent use of the procedure set out in Article 48 and therefore imperative grounds of urgency so require, the procedure provided for in Article 49 shall apply to delegated acts adopted pursuant to the second subparagraph of paragraph 4 of this Article.

## *Section II*

### *Exclusions*

#### *Article 10*

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

1 This Directive shall not apply to services concessions awarded to a contracting authority or to a contracting entity as referred to in point (a) of Article 7(1) or to an association thereof on the basis of an exclusive right.

This Directive shall not apply to services concessions awarded to an economic operator on the basis of an exclusive right which has been granted in accordance with the TFEU and Union legal acts laying down common rules on access to the market applicable to activities referred to in Annex II.

2 By way of derogation from the second subparagraph of paragraph 1 of this Article, where Union sectoral legislation referred to in that subparagraph does not provide for sector-specific transparency obligations, Article 32 shall apply.

Where a Member State grants an exclusive right to an economic operator for the exercise of one of the activities referred to in Annex II, it shall inform the Commission thereof within one month after the award of that exclusive right.

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3 This Directive shall not apply to concessions for air transport services based on the granting of an operating licence within the meaning of Regulation (EC) No 1008/2008 of the European Parliament and of the Council<sup>(3)</sup> or to concessions for public passenger transport services within the meaning of Regulation (EC) No 1370/2007.

4 This Directive shall not apply to concessions which the contracting authority or contracting entity is obliged to award or organise in accordance with procedures different from those laid down in this Directive established by any of the following:

- a a legal instrument creating international law obligations, such as an international agreement concluded in conformity with the TFEU 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 organisation.

This Directive shall not apply to concessions which the contracting authority or contracting entity awards in accordance with procurement rules provided by an international organisation or international financing institution, where the concessions concerned are fully financed by that organisation or institution. In the case of concessions co-financed for the most part by an international organisation or international financing institution, the parties shall agree on applicable procurement procedures.

The Member States shall communicate all legal instruments referred to in point (a) of the first subparagraph of this paragraph to the Commission, which may consult the Advisory Committee on Public Procurement referred to in Article 50.

This paragraph shall not apply to concessions in the fields of defence and security as referred to in Directive 2009/81/EC.

5 This Directive shall not apply to concessions in the fields of defence and security as referred to in Directive 2009/81/EC, which are governed by:

- a specific procedural rules pursuant to an international agreement or arrangement concluded between one or more Member States and one or more third countries;
- b specific procedural rules pursuant to a concluded international agreement or arrangement relating to the stationing of troops and concerning the undertakings of a Member State or a third country;
- c specific procedural rules of an international organisation purchasing for its purposes, or to concessions which must be awarded by a Member State in accordance with those rules.

6 This Directive shall apply to the awarding of concessions in the fields of defence and security as referred to in Directive 2009/81/EC with the exception of the following:

- a concessions for which 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; or where the procurement and performance of the concession 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 provided that the Member State has determined that the essential interests concerned cannot be guaranteed by less intrusive measures, such as those referred to in paragraph 7;
- b concessions awarded in the framework of a cooperative programme referred to in point (c) of Article 13 of Directive 2009/81/EC;



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- c concessions awarded by a government to another government relating to works and services directly linked to military equipment or sensitive equipment, or works and services specifically for military purposes, or sensitive works and sensitive services;
- d concessions awarded in a third country, carried out when forces are deployed outside the territory of the Union where operational needs require those concessions to be concluded with economic operators located in the area of operations; and
- e concessions otherwise exempted under this Directive.

7 This Directive shall not apply to concessions not otherwise exempted under paragraph 6 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 authority or contracting entity makes available in a concession award procedure as provided for in this Directive.

8 This Directive shall not apply to service concessions for:

- a the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property or concerning rights thereon;
- b the acquisition, development, production or co-production of programme material intended for audiovisual media services or radio media services, that are awarded by audiovisual or radio media service providers, or concessions for broadcasting time or programme provision, that are awarded to audiovisual or radio media service providers. For the purposes of this point, ‘audiovisual media services’ and ‘media service providers’ shall, respectively, have the same meaning as in points (a) and (d) of Article 1(1) of Directive 2010/13/EU of the European Parliament and of the Council<sup>(4)</sup>. ‘Programme’ shall have the same meaning as in point (b) Article 1(1) of that Directive, 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’;
- c arbitration and conciliation services;
- d any of the following legal services:
  - (i) legal representation of a client by a lawyer within the meaning of Article 1 of Council Directive 77/249/EEC<sup>(5)</sup> in:
    - an arbitration or conciliation held in a Member State, a third country or before an international arbitration or conciliation instance, or
    - judicial proceedings before the courts, tribunals or public authorities of a Member State or a third country or before international courts, tribunals or institutions;
  - (ii) legal advice given in preparation of any of the proceedings referred to in point (i) of this point 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 or 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;

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- (v) other legal services which in the Member State concerned are connected, even occasionally, with the exercise of official authority;
- e 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>(6)</sup>, central bank services and operations conducted with the European Financial Stability Facility and the European Stability Mechanism;
- f loans, whether or not in connection with the issue, sale, purchase or transfer of securities or other financial instruments;
- g civil defence, civil protection, and danger prevention services that are provided by non-profit organisations or associations, and which are covered by CPV codes: 75250000-3, 75251000-0, 75251100-1, 75251110-4, 75251120-7, 75252000-7, 75222000-8, 98113100-9 and 85143000-3 except patient transport ambulance services;
- h political campaign services, which are covered by CPV codes 79341400-0, 92111230-3 and 92111240-6, when awarded by a political party in the context of an election campaign.

9 This Directive shall not apply to service concessions for lottery services, which are covered by CPV code 92351100-7, awarded by a Member State to an economic operator on the basis of an exclusive right. For the purpose of this paragraph, the notion of exclusive right does not cover exclusive rights as referred to in Article 7(2).

The grant of such an exclusive right shall be subject to publication in the *Official Journal of the European Union*.

10 This Directive shall not apply to concessions awarded by contracting entities for the pursuit of their activities in a third country, in conditions not involving the physical use of a network or geographical area within the Union.

#### *Article 11*

#### **Specific exclusions in the field of electronic communications**

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

For the purposes of this Article, ‘public communications network’ and ‘electronic communications service’ shall have the same meaning as in Directive 2002/21/EC of the European Parliament and of the Council<sup>(7)</sup>.

#### *Article 12*

#### **Specific exclusions in the field of water**

- 1 This Directive shall not apply to concessions awarded to:
- a provide or operate fixed networks intended to provide a service to the public in connection with the production, transport or distribution of drinking water;
  - b supply drinking water to such networks.

2 This Directive shall also not apply to concessions with one, or both of the following subject-matters when they are connected with an activity referred to in paragraph 1:

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

### *Article 13*

#### **Concessions 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 Directive 2013/34/EU.

2 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.

For the purposes of this paragraph, ‘dominant influence’ shall have the same meaning as in the second subparagraph of Article 7(4).

3 Notwithstanding Article 17 and provided that the conditions in paragraph 4 of this Article are met, this Directive shall not apply to concessions 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 referred to in Annex II, to an undertaking which is affiliated with one of those contracting entities.

4 Paragraph 3 shall apply to:

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

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

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

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#### Article 14

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

Notwithstanding Article 17, and provided that the joint venture has been set up in order to carry out the activity concerned over a period of at least three years and that the instrument setting up the joint venture stipulates that the contracting entities, which form it, will be part thereof for at least the same period, this Directive shall not apply to concessions awarded by any of the following:

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

#### Article 15

##### **Notification of information by contracting entities**

Contracting entities shall notify to the Commission, if so requested, the following information regarding the application of Article 13(2) and (3) and Article 14:

- (a) the names of the undertakings or joint ventures concerned;
- (b) the nature and value of the concessions involved;
- (c) proof, deemed necessary by the Commission, that the relationship between the undertaking or joint venture to which the concessions are awarded and the contracting entity complies with the requirements of Article 13 or Article 14.

#### Article 16

##### **Exclusion of activities which are directly exposed to competition**

This Directive shall not apply to concessions awarded by contracting entities where, for the Member State in which such concessions are to be performed, it has been established pursuant to Article 35 of Directive 2014/25/EU that the activity is directly exposed to competition in accordance with Article 34 of that Directive.

#### Article 17

##### **Concessions between entities within the public sector**

1 A concession awarded by a contracting authority or a contracting entity as referred to in point (a) of Article 7(1) to a legal person governed by private or public law shall fall outside the scope of this Directive where all of the following conditions are fulfilled:

- a the contracting authority or contracting entity 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 the controlled legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority or

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- contracting entity or by other legal persons controlled by that contracting authority or contracting entity; and
- 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 national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.

A contracting authority or contracting entity as referred to in point (a) of Article 7(1) 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 of this paragraph, where it exercises a decisive influence over both strategic objectives and significant decisions of the controlled legal person. That control may also be exercised by another legal person, which is itself controlled in the same way by the contracting authority or contracting entity.

2 Paragraph 1 also applies where a controlled legal person which is a contracting authority or contracting entity as referred to in point (a) of Article 7(1) awards a concession to its controlling contracting authority or contracting entity, or to another legal person controlled by the same contracting authority or contracting entity, provided that there is no direct private capital participation in the legal person being awarded the concession with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.

3 A contracting authority or a contracting entity as referred to in point (a) of Article 7(1), which does not exercise over a legal person governed by private or public law control within the meaning of paragraph 1 of this Article, may nevertheless award a concession to that legal person without applying this Directive where all of the following conditions are fulfilled:

- a the contracting authority or contracting entity as referred to in point (a) of Article 7(1) exercises jointly with other contracting authorities or contracting entities a control over that legal person 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 contracting entities or by other legal persons controlled by the same contracting authorities or contracting entities; and
- 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 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 of this paragraph, contracting authorities or contracting entities as referred to in point (a) of Article 7(1) exercise joint control over a legal person where all of the following conditions are fulfilled:

- (i) the decision-making bodies of the controlled legal person are composed of representatives of all participating contracting authorities or contracting entities. Individual representatives may represent several or all of the participating contracting authorities or contracting entities;
- (ii) those contracting authorities or contracting entities are able to jointly exert decisive influence over the strategic objectives and significant decisions of the controlled legal person; and

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(iii) the controlled legal person does not pursue any interests which are contrary to those of the controlling contracting authorities or contracting entities.

4 A contract concluded exclusively between two or more contracting authorities or contracting entities as referred to in point (a) of Article 7(1) shall fall outside the scope of this Directive where all of the following conditions are fulfilled:

- a the contract establishes or implements a cooperation between the participating contracting authorities or contracting entities 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; and
- c the participating contracting authorities or contracting entities perform on the open market less than 20 % of the activities concerned by the cooperation;

5 For the determination of the percentage of activities referred to in point (b) of the first subparagraph of paragraph 1, point (b) of the first subparagraph of paragraph 3 and point (c) of paragraph 4, the average total turnover or an appropriate alternative activity based measure such as costs incurred by the relevant legal person, contracting authority or contracting entity as referred to point (a) of Article 7(1) with respect to services, supplies and works for the three years preceding the concession award shall be taken into consideration.

Where, because of the date on which the relevant legal person, contracting authority or contracting entity 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 shall be sufficient to show that the measurement of activity is credible, particularly by means of business projections.

### *Section III*

#### ***General provisions***

#### *Article 18*

#### **Duration of the concession**

1 The duration of concessions shall be limited. The contracting authority or contracting entity shall estimate the duration on the basis of the works or services requested.

2 For concessions lasting more than five years, the maximum duration of the concession shall not exceed the time that a concessionaire could reasonably be expected to take to recoup the investments made in operating the works or services together with a return on invested capital taking into account the investments required to achieve the specific contractual objectives.

The investments taken into account for the purposes of the calculation shall include both initial investments and investments during the life of the concession.

## Article 19

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

Concessions for social and other specific services listed in Annex IV falling within the scope of this Directive shall be subject only to the obligations arising from Article 31(3) and Articles 32, 46 and 47.

## Article 20

### **Mixed contracts**

1 Concessions which have as their subject-matter both works and services shall be awarded in accordance with the provisions applicable to the type of concession that characterises the main subject-matter of the contract in question.

In the case of mixed concessions consisting partly of social and other specific services listed in Annex IV and partly of other services, the main subject-matter shall be determined according to which of the estimated values of the respective services is the higher.

2 Where the different parts of a given contract are objectively separable, paragraphs 3 and 4 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 Article 346 TFEU or Directive 2009/81/EC, Article 21 of this Directive shall apply.

In the case of contracts intended to cover several activities, one of them being subject either to Annex II of this Directive or to Directive 2014/25/EU, the applicable provisions shall be established in accordance with Article 22 of this Directive and Article 6 of Directive 2014/25/EU, respectively.

3 In the case of contracts which have as their subject-matter elements covered by this Directive as well as other elements, contracting authorities and contracting entities may choose to award separate contracts for the separate parts. Where contracting authorities or contracting entities choose to award separate contracts for separate parts, the decision as to 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 authorities or contracting entities choose to award a single contract, this Directive shall, unless otherwise provided in paragraph 4 of this Article or in Article 21, 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 those parts would otherwise have been subject to.

4 In the case of mixed contracts containing elements of concessions as well as elements of public contracts covered by Directive 2014/24/EU or contracts covered by Directive 2014/25/EU, the mixed contract shall be awarded in accordance with Directive 2014/24/EU or Directive 2014/25/EU, respectively.

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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-matter of that contract.

In the event such contracts involve both elements of a services concession and of a supply contract, the main subject-matter shall be determined according to which of the estimated values of the respective services or supplies is the higher.

#### *Article 21*

### **Mixed procurement contracts involving defence or security aspects**

1 In the case of mixed contracts which have as their subject-matter elements of a concession covered by this Directive and procurement or other elements covered by Article 346 TFEU or Directive 2009/81/EC this Article shall apply.

In the case of contracts intended to cover several activities, one of them being subject either to Annex II of this Directive or to Directive 2014/25/EU, and another being covered by Article 346 TFEU or Directive 2009/81/EC, the applicable provisions shall be established in accordance with, Article 23 of this Directive and Article 26 of 2014/25/EU, respectively.

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

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

Where contracting authorities or 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, or different parts are covered by Article 346 TFEU and Directive 2009/81/EC respectively, 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 this Directive or in accordance with Directive 2009/81/EC, provided that the award of a single contract is justified for objective reasons.

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

3 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 the contracting authority or contracting entity may choose to award a contract in accordance with this Directive or in accordance with this Directive or in accordance with Directive 2009/81/EC.



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## Article 22

### **Contracts covering both activities referred to in Annex II and other activities**

1 By way of derogation from Article 20, 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 a separate contract, 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.

Notwithstanding Article 20, where contracting entities choose to award a single contract, paragraphs 2 and 3 of this Article shall apply. However, where one of the activities concerned is covered by Article 346 TFEU or Directive 2009/81/EC, Article 23 of this Directive shall apply.

The choice between awarding a single contract or awarding a number of separate contracts shall not be made with the objective of excluding the contract or contracts from the scope of this Directive or, where applicable, from the scope of Directive 2014/24/EU or 2014/25/EU.

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 the following:

- a the concession shall be awarded in accordance with the provisions of this Directive applicable to concessions awarded by contracting authorities, if one of the activities for which the contract is intended is subject to the provisions of this Directive applicable to concessions awarded by contracting authorities and the other is subject to the provisions of this Directive applicable to concessions awarded by contracting entities;
- b the contract shall be awarded in accordance with Directive 2014/24/EU, if one of the activities for which the contract is intended is subject to this Directive and the other to Directive 2014/24/EU;
- 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 2014/24/EU or Directive 2014/25/EU.

## Article 23

### **Concessions covering both activities referred to in Annex II and activities involving defence or 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.

Notwithstanding Article 21, where contracting entities choose to award a single contract, paragraph 2 of this Article shall apply.

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The choice between awarding a single contract or awarding a number of separate contracts shall not, however, be made with the objective of excluding the contract or contracts from the scope of application either 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) covered by Article 346 TFEU; or
- (b) subject to Directive 2009/81/EC,

the contracting entity may:

- (i) award a contract without applying this Directive in the cases set out under point (a); or
- (ii) award a contract either in accordance with this Directive or in accordance with Directive 2009/81/EC, in the cases set out under point (b). The first subparagraph of this paragraph is without prejudice to the thresholds and exclusions provided for by Directive 2009/81/EC.

Contracts referred to in point (b), which also include procurement or other elements which are covered by Article 346 TFEU, may be awarded without applying this Directive.

However, it shall be a condition for the application of this paragraph 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.

#### *Section IV*

#### ***Specific situations***

#### *Article 24*

#### **Reserved concessions**

Member States may reserve the right to participate in concession award procedures to sheltered workshops and economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons or may provide for such concessions 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. The concession notice or, in the case of services concessions as defined in Article 19, prior information notice shall make reference to this Article.

#### *Article 25*

#### **Research and development services**

This Directive shall only apply to service concessions for research and development services which are covered by CPV codes 73000000-2 to 73120000-9, 73300000-5, 73420000-2 and 73430000-5 provided that both the following conditions are fulfilled:

- (a) the benefits accrue exclusively to the contracting authority or contracting entity for its use in the conduct of its own affairs; and
- (b) the service provided is wholly remunerated by the contracting authority or contracting entity.

## CHAPTER II

### *Principles*

#### *Article 26*

#### **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.

Legal persons may be required to indicate, in the tender or in the application, the names and relevant professional qualifications of the staff to be responsible for the performance of the contract in question.

2 Groups of economic operators, including temporary associations, may participate in concession award procedures. They shall not be required by contracting authorities or contracting entities to have a specific legal form in order to submit a tender or a request to participate.

Where necessary, contracting authorities or contracting entities may clarify in the concession documents how groups of economic operators shall meet the requirements as to economic and financial standing or technical and professional ability referred to in Article 38 provided that this is justified by objective reasons and is proportionate. Member States may establish standard terms for how groups of economic operators are to meet those requirements. Any conditions for the performance of a concession by such groups of economic operators, which are different from those imposed on individual participants, shall also be justified by objective reasons and shall be proportionate.

3 Notwithstanding paragraphs 1 and 2, contracting authorities or contracting entities may require groups of economic operators to assume a specific legal form once they have been awarded the contract, to the extent that that change is necessary for the satisfactory performance of the contract.

#### *Article 27*

#### **Nomenclatures**

1 Any references to nomenclatures in the context of the award of concessions shall be made using the 'Common Procurement Vocabulary (CPV)' as adopted by Regulation (EC) No 2195/2002 of the European Parliament and of the Council<sup>(8)</sup>.

2 The Commission shall be empowered to adopt delegated acts in accordance with Article 48 to adapt the CPV codes referred to in this Directive, where changes in the CPV

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nomenclature must be reflected in this Directive and they do not imply a modification of the scope of this Directive.

### *Article 28*

#### **Confidentiality**

1 Unless otherwise provided in this Directive or in the national law to which the contracting authority is subject, in particular legislation concerning access to information, and without prejudice to the obligations relating to the advertising of awarded concession contracts and to the information to candidates and tenderers set out in Articles 32 and 40, the contracting authority or 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.

This Article shall not prevent public disclosure of non-confidential parts of concluded contracts, including any subsequent changes.

2 The contracting authority or contracting entity may impose on economic operators requirements aimed at protecting the confidential nature of information which it makes available throughout the concession award procedure.

### *Article 29*

#### **Rules applicable to communication**

1 Except where use of electronic means is mandatory pursuant to Article 33(2) and Article 34, Member States or contracting authorities and contracting entities may choose one or more of the following means of communication for all communication and information exchange:

- a electronic means;
- b post or fax;
- c oral communication, including telephone, in respect of communications other than the essential elements of a concession award procedure, and provided that the content of the oral communication is documented to a sufficient degree on a durable medium;
- d hand delivery certified by an acknowledgement of receipt.

Member States may make mandatory the use of electronic means of communication for concessions, going beyond the obligations established in Article 33(2) and Article 34.

2 The means of communication chosen shall be generally available and non-discriminatory, and shall not restrict economic operators' access to the concession award procedure. The tools and devices to be used for communicating by electronic means, as well as their technical characteristics shall be interoperable with the information and communication technology products in general use.

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

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- (1) Regulation (EC) No 1059/2003 of the European Parliament and of the Council of 26 May 2003 on the establishment of a common classification of territorial units for statistics (NUTS) ([OJ L 154, 21.6.2003, p. 1](#)).
- (2) Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement (see page 65 of this Official Journal).
- (3) Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community ([OJ L 293, 31.10.2008, p. 3](#)).
- (4) 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) ([OJ L 95, 15.4.2010, p. 1](#)).
- (5) Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services ([OJ L 78, 26.3.1977, p. 17](#)).
- (6) Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC ([OJ L 145, 30.4.2004, p. 1](#)).
- (7) Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) ([OJ L 108, 24.4.2002, p. 33](#)).
- (8) Regulation (EC) No 2195/2002 of the European Parliament and of the Council of 5 November 2002 on the Common Procurement Vocabulary (CPV) ([OJ L 340, 16.12.2002, p. 1](#)).