

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 (Text with EEA relevance)

## TITLE I

### SCOPE, DEFINITIONS AND GENERAL PRINCIPLES

#### CHAPTER III

#### *Material scope*

##### *Section 1*

#### *Thresholds*

##### *Article 15*

#### **Threshold amounts**

Save where they are ruled out by the exclusions in Articles 18 to 23 or pursuant to Article 34, concerning the pursuit of the activity in question, this Directive shall apply to procurements with a value net of value-added tax (VAT) estimated to be equal to or greater than the following thresholds:

- (a) [F1EUR 428 000] for supply and service contracts as well as for design contests;
- (b) [F1EUR 5 350 000] for works contracts;
- (c) EUR 1 000 000 for service contracts for social and other specific services listed in Annex XVII.

#### **Textual Amendments**

- F1** Substituted by [Commission Delegated Regulation \(EU\) 2019/1829 of 30 October 2019 amending Directive 2014/25/EU of the European Parliament and of the Council in respect of the thresholds for supply, service and works contracts, and design contests \(Text with EEA relevance\)](#).

##### *Article 16*

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

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

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

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

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

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

4 That estimated value shall be valid at the moment at which the call for competition is sent or, in cases where such call for competition is not foreseen, at the moment at which the contracting entity commences the contract procurement procedure, for instance, where appropriate, by contacting economic operators in relation to the procurement.

5 With regard to framework agreements and dynamic purchasing systems, the value to be taken into consideration shall be the maximum estimated value net of VAT of all the contracts envisaged for the total term of the agreement or system.

6 In the case of innovation partnerships, the value to be taken into consideration shall be the maximum estimated value net of VAT of the research and development activities to take place during all stages of the envisaged partnership as well as of the supplies, services or works to be developed and procured at the end of the envisaged partnership.

7 For the purposes of Article 15, contracting entities shall include in the estimated value of a works contract both the cost of the works and the total estimated value of any supplies or services that are made available to the contractor by the contracting entities provided that they are necessary for the execution of the works.

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

Where the aggregate value of the lots is equal to or exceeds the threshold laid down in Article 15, this Directive shall apply to the awarding of each lot.

9 Where a proposal for the acquisition of similar supplies may result in contracts being awarded in the form of separate lots, account shall be taken of the total estimated value of all such lots when applying points (b) and (c) of Article 15.

Where the aggregate value of the lots is equal to or exceeds the threshold laid down in Article 15, this Directive shall apply to the awarding of each lot.

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

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

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

12 With regard to supply contracts relating to the leasing, hire, rental or hire purchase of products, the value to be taken as a basis for calculating the estimated contract value shall be as follows:

- a in the case of fixed-term contracts, if that term is less than or equal to 12 months, the total estimated value for the term of the contract or, where the term of the contract is greater than 12 months, the total value including the estimated residual value;
- b in the case of contracts without a fixed term or the term of which cannot be defined, the monthly value multiplied by 48.

13 With regard to service contracts, the basis for calculating the estimated contract value shall, where appropriate, be the following:

- a insurance services: the premium payable, and other forms of remuneration;
- b banking and other financial services: the fees, commissions payable, interest and other forms of remuneration;
- c design contracts: fees, commissions payable and other forms of remuneration.

14 With regard to service contracts which do not indicate a total price, the basis for calculating the estimated contract value shall be the following:

- a in the case of fixed-term contracts, where that term is less than or equal to 48 months: the total value for their full term;
- b in the case of contracts without a fixed term or with a term greater than 48 months: the monthly value multiplied by 48.

### *Article 17*

#### **Revision of the thresholds**

1 Every two years from 30 June 2013, the Commission shall verify that the thresholds set out in points (a) and (b) of Article 15 correspond to the thresholds established in the World Trade Organisation Agreement on Government Procurement (GPA) and shall, where necessary, revise them in accordance with this Article.

In accordance with the calculation method set out in the GPA, the Commission shall calculate the value of those thresholds on the basis of the average daily value of the euro in terms of the special drawing rights (SDRs), over a period of 24 months terminating on 31 August preceding the revision with effect from 1 January. The value of the thresholds thus revised shall, where necessary, be rounded down to the nearest thousand euros so as to ensure that the thresholds in force provided for by the GPA, expressed in SDRs, are observed.

2 Every two years from 1 January 2014, the Commission shall determine the values, in the national currencies of Member States, whose currency is not the euro, of the thresholds referred to in points (a) and (b) of Article 15, revised pursuant to paragraph 1 of this Article.

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At the same time, the Commission shall determine the value, in the national currencies of the Member States, whose currency is not the euro, of the threshold referred to in point (c) of Article 15.

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 euros over the 24 months terminating on 31 August preceding the revision with effect from 1 January.

3 The Commission shall publish the revised thresholds referred to in paragraph 1, their corresponding values 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 103 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 thresholds referred to in points (a) and (b) of Article 15 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 be empowered to adopt delegated acts in accordance with Article 103 to revise the thresholds referred to in points (a) and (b) of Article 15 when necessary.

5 Where it is necessary to revise the thresholds referred to in points (a) and (b) of Article 15 and time constraints prevent the use of the procedure set in Article 103 and therefore imperative grounds of urgency so require, the procedure provided for in Article 104 shall apply to delegated acts adopted pursuant to the second subparagraph of paragraph 4 of this Article.

## *Section 2*

### ***Excluded contracts and design contests; special provisions for procurement involving defence and security aspects***

#### *Subsection 1*

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

#### *Article 18*

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

1 This Directive shall not apply to contracts awarded for purposes of resale or lease to third parties, provided that the contracting entity enjoys no special or exclusive right to sell or lease the subject of such contracts, and other entities are free to sell or lease it under the same conditions as the contracting entity.

2 The contracting entities shall notify the Commission if so requested of all the categories of products or activities which they regard as excluded under paragraph 1. The Commission may periodically publish in the *Official Journal of the European Union*, for

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information purposes, of lists of the categories of products and activities which it considers to be covered by this exclusion. In so doing, the Commission shall respect any sensitive commercial aspects that the contracting entities may point out when forwarding information.

#### *Article 19*

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

1 This Directive shall not apply to contracts which the contracting entities award for purposes other than the pursuit of their activities as described in Articles 8 to 14 or for the pursuit of such activities in a third country, in conditions not involving the physical use of a network or geographical area within the Union nor shall it apply to design contests organised for such purposes.

2 The contracting entities shall notify the Commission, if so requested, of any activities which they regard as excluded under paragraph 1. The Commission may periodically publish in the *Official Journal of the European Union*, for information purposes, lists of the categories of activities which it considers to be covered by this exclusion. In so doing, the Commission shall respect any sensitive commercial aspects that the contracting entities may point out when forwarding this information.

#### *Article 20*

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

1 This Directive shall not apply to contracts or design contests which the contracting entity is obliged to award or organise in accordance with procurement procedures different from those 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 accordance with the Treaties, 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.

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 for Public Contracts referred to in Article 105.

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

3 Article 27 shall apply to contracts and design contests involving defence or security aspects which are awarded or organised pursuant to international rules. Paragraphs 1 and 2 of this Article shall not apply to those contracts and design contests.

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## Article 21

### Specific exclusions for service contracts

This Directive shall not apply to service contracts for:

- (a) the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property or concerning rights thereon;
- (b) arbitration and conciliation services;
- (c) 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>(1)</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;
  - (v) other legal services which in the Member State concerned are connected, even occasionally, with the exercise of official authority;
- (d) financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments within the meaning of Directive 2004/39/EC of the European Parliament and of the Council<sup>(2)</sup> and operations conducted with the European Financial Stability Facility and the European Stability Mechanism;
- (e) loans, whether or not in connection with the issue, sale, purchase or transfer of securities or other financial instruments;
- (f) employment contracts;
- (g) public passenger transport services by rail or metro;
- (h) civil defence, civil protection, and danger prevention 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;

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- (i) contracts for broadcasting time or programme provision that are awarded to audiovisual or radio media service providers. For the purposes of this point, ‘media service providers’ shall have the same meaning as pursuant to point (d) of Article 1(1) of Directive 2010/13/EU of the European Parliament and of the Council<sup>(3)</sup>. ‘Programme’ shall have the same meaning as pursuant to point (b) of 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’.

#### *Article 22*

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

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

#### *Article 23*

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

This Directive shall not apply:

- (a) to contracts for the purchase of water if awarded by contracting entities engaged in one or both of the activities relating to drinking water referred to in Article 10(1);
- (b) to contracts awarded by contracting entities themselves being active in the energy sector by being engaged in an activity referred to in Article 8(1), Article 9(1) or Article 14 for the supply:
- (i) of energy;
  - (ii) of fuels for the production of energy.

#### *Subsection 2*

##### ***Procurement involving defence and security aspects***

#### *Article 24*

##### **Defence and security**

1 In respect of contracts awarded and design contests organised in the fields of defence and security, this Directive shall not apply to:

- a contracts falling within the scope of Directive 2009/81/EC;
- b contracts to which Directive 2009/81/EC does not apply pursuant to Articles 8, 12 and 13 thereof.

2 This Directive shall not apply to contracts and design contests not otherwise exempted under paragraph 1, to the extent that the protection of the essential security interests of a Member

State cannot be guaranteed by less intrusive measures, for instance by imposing requirements aimed at protecting the confidential nature of information which the contracting entity makes available in a contract award procedure as provided for in this Directive.

Furthermore, and in conformity with point (a) Article 346(1) TFEU, this Directive shall not apply to contracts and design contests not otherwise exempted under paragraph 1 of this Article to the extent that the application of this Directive would oblige a Member State to supply information the disclosure of which it considers contrary to the essential interests of its security.

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

#### *Article 25*

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

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

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

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

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

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

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 Point (a) of the third subparagraph of paragraph 2 shall apply to mixed contracts to which both point (a) and point (b) of that subparagraph could otherwise apply.

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



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## Article 26

### **Procurement covering several activities and 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.

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

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

- a subject to Directive 2009/81/EC, or
- b covered by Article 346 TFEU,

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

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

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

## Article 27

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

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

- a an international agreement or arrangement, concluded in accordance with the Treaties, between a Member State and one or more third countries or subdivisions thereof and covering works, supplies or services intended for the joint implementation or exploitation of a project by their signatories;
- b an international agreement or arrangement relating to the stationing of troops and concerning the undertakings of a Member State or a third country;
- c an international organisation.

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All agreements or arrangements referred to in point (a) of the first subparagraph of this paragraph shall be communicated to the Commission, which may consult the Advisory Committee on Public Procurement referred to in Article 105.

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

### *Subsection 3*

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

### *Article 28*

#### **Contracts between contracting authorities**

1 A contract awarded by a contracting authority 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 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 by other legal persons controlled by that contracting authority;
- c there is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.

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

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

3 A contracting authority, which does not exercise over a legal person governed by private or public law control within the meaning of paragraph 1, may nevertheless award a contract to that legal person without applying this Directive, where all of the following conditions are fulfilled:

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- a the contracting authority exercises jointly with other contracting authorities 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 by other legal persons controlled by the same contracting authorities; 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, contracting authorities shall be deemed to 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. Individual representatives may represent several or all of the participating contracting authorities;
- (ii) those contracting authorities are able to jointly exert decisive influence over the strategic objectives and significant decisions of the controlled legal person; and
- (iii) the controlled legal person does not pursue any interests which are contrary to those of the controlling contracting authorities.

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

- a the contract establishes or implements a cooperation between the participating contracting authorities with the aim of ensuring that public services they have to perform are provided with a view to achieving objectives they have in common;
- b the implementation of that cooperation is governed solely by considerations relating to the public interest; and
- c the participating contracting authorities 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 with respect to services, supplies and works for the three years preceding the contract award shall be taken into consideration.

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

## *Article 29*

### **Contracts awarded to an affiliated undertaking**

1 For the purposes of this Article, ‘affiliated undertaking’ means any undertaking the annual accounts of which are consolidated with those of the contracting entity in accordance with the requirements of the Directive 2013/34/EU.

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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 4(2).

3 Notwithstanding Article 28 and provided that the conditions in paragraph 4 of this Article are met, this Directive shall not apply to contracts awarded:

- a by a contracting entity to an affiliated undertaking, or
- b by a joint venture, formed exclusively by a number of contracting entities for the purpose of carrying out activities described in Articles 8 to 14, to an undertaking which is affiliated with one of those contracting entities.

4 Paragraph 3 shall apply to:

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

5 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), (b) or (c) 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, supplies or works, the percentages shall be calculated taking into account the total turnover deriving respectively from the provision of services, supplies or works by those affiliated undertakings.

### *Article 30*

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

Notwithstanding Article 28 and provided that the joint venture has been set up in order to carry out the activity concerned over a period of at least three years and that the instrument setting up the joint venture stipulates that the contracting entities, which form it, will be part thereof for at least the same period, this Directive shall not apply to contracts awarded by any of the following:

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- (a) by a joint venture, formed exclusively by a number of contracting entities for the purpose of carrying out activities within the meaning of Articles 8 to 14, to one of those contracting entities; or
- (b) by a contracting entity to such a joint venture of which it forms part.

#### *Article 31*

### **Notification of information**

Contracting entities shall notify to the Commission, if so requested, the following information regarding the application of Article 29(2) and (3) and Article 30:

- (a) the names of the undertakings or joint ventures concerned,
- (b) the nature and value of the contracts involved,
- (c) proof deemed necessary by the Commission that the relationship between the undertaking or joint venture to which the contracts are awarded and the contracting entity complies with the requirements of Articles 29 or 30.

#### *Subsection 4*

### ***Specific situations***

#### *Article 32*

### **Research and development services**

This Directive shall only apply to service contracts 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 of the following conditions are fulfilled:

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

#### *Article 33*

### **Contracts subject to special arrangements**

1 Without prejudice to Article 34 of this Directive the Republic of Austria and the Federal Republic of Germany shall ensure, by way of the conditions of authorisation or other appropriate measures, that any entity operating in the sectors mentioned in Commission Decision<sup>(4)</sup> 2002/205/EC and Commission Decision 2004/73/EC<sup>(5)</sup>:

- a observes the principles of non-discrimination and competitive procurement in respect of the award of supplies, works and service contracts, in particular as regards the information which the entity makes available to economic operators concerning its procurement intentions;
- b communicates to the Commission, under the conditions defined in Commission Decision 93/327/EEC<sup>(6)</sup>, information relating to the contracts they award.

2 Without prejudice to Article 34, the United Kingdom shall ensure, by way of the conditions of authorisation or other appropriate measures, that any entity operating in the sectors mentioned in Decision 97/367/EEC applies points (a) and (b) of paragraph 1 of this Article in respect of contracts awarded for the pursuit of that activity in Northern Ireland.

3 Paragraphs 1 and 2 shall not apply to contracts awarded for the purpose of exploring for oil or gas.

#### *Subsection 5*

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

#### *Article 34*

### **Activities directly exposed to competition**

1 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 activity concerned may form a part of a larger sector or be exercised only in certain parts of the Member State concerned. The competition assessment referred to in the first sentence of this paragraph, which will be made in the light of the information available to the Commission and for the purposes of this Directive, is without prejudice to the application of competition law. Such assessment shall be made having regard to the market for the activities in question and the geographical reference market within the meaning of paragraph 2.

2 For the purposes of paragraph 1 of this Article, the question of whether an activity is directly exposed to competition shall be decided on the basis of criteria that are in conformity with the provisions on competition of the TFEU. Those may include the characteristics of the products or services concerned, the existence of alternative products or services considered to be substitutable on the supply side or demand side, the prices and the actual or potential presence of more than one supplier of the products or provider of the services in question.

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

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

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

## Article 35

### Procedure for establishing whether Article 34 is applicable

1 Where a Member State or, where the legislation of the Member State concerned provides for it, a contracting entity considers that, on the basis of the criteria set out in Article 34(2) and (3), a given activity is directly exposed to competition on markets to which access is not restricted, it may submit a request to the Commission to establish that this Directive does not apply to the award of contracts or the organisation of design contests for the pursuit of that activity, where appropriate together with the position adopted by an independent national authority that is competent in relation to the activity concerned. Such requests may concern activities which are part of a larger sector or which are exercised only in certain parts of the Member State concerned.

In the request, the Member State or contracting entity concerned shall inform the Commission of all relevant facts, and in particular of any law, regulation, administrative provision or agreement concerning compliance with the conditions set out in Article 34(1).

2 Unless a request coming from a contracting entity is accompanied by a reasoned and substantiated position, adopted by an independent national authority that is competent in relation to the activity concerned, which thoroughly analyses the conditions for the possible applicability of Article 34(1) to the activity concerned in accordance with paragraphs 2 and 3 of that Article, the Commission shall immediately inform the Member State concerned. The Member State concerned shall in such cases inform the Commission of all relevant facts, and in particular of any law, regulation, administrative provision or agreement concerning compliance with the conditions set out in Article 34(1).

3 Upon request submitted in accordance with paragraph 1 of this Article, the Commission may, by means of implementing acts adopted within the periods set out in Annex IV, establish whether an activity referred to in Articles 8 to 14 is directly exposed to competition on the basis of the criteria set out in Article 34. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 105(2).

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

- a The Commission has adopted the implementing act establishing the applicability of Article 34(1) within the period provided for in Annex IV;
- b has not adopted the implementing act within the period provided for in Annex IV.

4 After the submission of a request, the Member State or the contracting entity concerned may, with the Commission's agreement, substantially modify its request, in particular as regards the activities or the geographical areas concerned. In that case, a new period for the adoption of the implementing act shall apply, which shall be calculated in accordance with paragraph 1 of Annex IV, unless a shorter period is agreed on by the Commission and the Member State or contracting entity which has presented the request.

5 Where an activity in a given Member State is already the subject of a procedure under paragraphs 1, 2 and 4, further requests concerning the same activity in the same Member State before the expiry of the period opened in respect of the first request shall not be considered as new procedures and shall be treated in the context of the first request.

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6 The Commission shall adopt an implementing act establishing detailed rules for the application of paragraphs 1 to 5. That implementing act shall include at least rules relating to:

- a the publication in the *Official Journal of the European Union*, for information, of the date on which the period set out in paragraph 1 of Annex IV begins and ends, including any prolongations or suspensions of those periods, as provided for in that Annex;
- b publication of the possible applicability of Article 34(1) in accordance with point (b) of the second subparagraph of paragraph 3 of this Article;
- c implementing provisions concerning the form, content and other details of requests pursuant to paragraph 1 of this Article;

Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 105(2).



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- (1) 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](#)).
- (2) 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](#)).
- (3) 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](#)).
- (4) Commission Decision 2002/205/EC of 4 March 2002 following a request by Austria applying for the special regime provided for in Article 3 of Directive 93/38/EEC ([OJ L 68, 12.3.2002, p. 31](#)).
- (5) Commission Decision 2004/73/EC of 15 January 2004 on a request from Germany to apply the special procedure laid down in Article 3 of Directive 93/38/EEC ([OJ L 16, 23.1.2004, p. 57](#)).
- (6) Commission Decision 93/327/EEC of 13 May 1993 defining the conditions under which contracting entities exploiting geographical areas for the purpose of exploring for or extracting oil, gas, coal or other solid fuels must communicate to the Commission information relating to the contracts they award ([OJ L 129, 27.5.1993, p. 25](#)).