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STATUTORY INSTRUMENTS

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**2016 No. 273**

**The Concession Contracts Regulations 2016**

**PART 2**

**Scope and principles**

**CHAPTER 2**

**Exclusions**

**General exclusions**

*Exclusive rights*

*Exclusive rights*

**10.**—(1) These Regulations do not apply to services concession contracts awarded to a contracting authority or to a utility referred to in regulation 5(1)(a), or to an association of such contracting authorities or utilities, on the basis of an exclusive right.

(2) These Regulations do not apply to services concession contracts awarded to an economic operator on the basis of an exclusive right that has been granted in accordance with the TFEU and EU legal acts laying down common rules on access to the market applicable to activities listed in Schedule 2.

(3) But where the EU legal acts referred to in paragraph (2) do not provide for sector-specific transparency obligations, regulation 32 applies.

*Transport services*

(4) These Regulations do not apply to concession contracts for—

- (a) 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>(1)</sup> as amended from time to time; or
- (b) public passenger transport services within the meaning of Regulation (EC) No 1370/2007 of the European Parliament and of the Council<sup>(2)</sup> as amended from time to time.

*Concession contracts awarded pursuant to international rules*

(5) These Regulations do not apply to concession contracts which the contracting authority or utility is obliged to award in accordance with procedures which are different from those laid down by these Regulations and are established by any of the following—

- (a) a legal instrument creating international law obligations, such as an international agreement, concluded in conformity with the Treaties, between a member State and one or

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<sup>(1)</sup> OJ No L 293, 31.10.2008, p3.

<sup>(2)</sup> OJ No L 315, 3.12.2007, p1.

more third countries (or subdivisions of such countries) and covering works, supplies or services intended for the joint implementation or exploitation of a project by its signatories;

(b) an international organisation.

(6) These Regulations do not apply to concession contracts which the contracting authority or utility awards in accordance with procurement rules provided by an international organisation or international financing institution where the concession contracts concerned are fully financed by that organisation or institution.

(7) In the case of concession contracts co-financed for the most part by an international organisation or international financing institution, the parties shall agree on the applicable procurement procedures.

(8) Paragraphs (5) to (7) do not apply to concession contracts in the fields of defence and security as referred to in Directive 2009/81/EC of the European Parliament and of the Council(3).

#### *Defence and security concession contracts*

(9) These Regulations do not apply to concession contracts in the fields of defence and security as referred to in Directive 2009/81/EC—

- (a) which are governed by specific procedural rules pursuant to an international agreement or arrangement concluded between one or more member States and one or more third countries;
- (b) which are governed by 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) which are governed by specific procedural rules of an international organisation purchasing for its purposes or which must be awarded by a member State in accordance with those rules;
- (d) in relation to which the application of these Regulations would oblige the United Kingdom to supply information the disclosure of which it considers contrary to the essential interests of its security or the procurement and performance of which is classified as secret or must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in any part of the United Kingdom, provided that the United Kingdom has determined that the essential interests concerned cannot be guaranteed by less intrusive measures, such as those referred to in paragraph (10);
- (e) awarded in the framework of a cooperative programme referred to in regulation 7(1)(c) of the Defence and Security Regulations;
- (f) 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 (and in this sub-paragraph “government” means the State, regional or local government of a member State or a State which is not a member State);
- (g) awarded in a third country, to be carried out when forces are deployed outside the territory of the EU where operational needs require those concession contracts to be concluded with economic operators located in the area of operations.

#### *Protection of essential security interests*

(10) These Regulations do not apply to concession contracts not otherwise exempted by paragraph (9)(d) to (g) to the extent that the protection of the essential security interests of the United Kingdom or another member State cannot be guaranteed by less intrusive measures, for example

(3) OJ No L 216, 20.8.2009, p76, last amended by Commission Regulation (EU) 2015/2340 (OJ No L 330, 16.12.2015, p14).

by imposing requirements aimed at protecting the confidential nature of information which the contracting authority or utility makes available in a concession contract award procedure as provided for in these Regulations.

*Other exclusions*

- (11) These Regulations do not apply to services concession contracts for—
- (a) the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property or which concern interests in or rights over any of them;
  - (b)
    - (i) 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 providers, or
    - (ii) broadcasting time or programme provision that are awarded to audiovisual or radio media service providers;
  - (c) arbitration or 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](#)(4), as amended from time to time, in—
      - (aa) an arbitration or conciliation held in a member State, a third country or before an international arbitration or conciliation instance, or
      - (bb) 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—
      - (aa) in preparation of any of the proceedings referred to in paragraph (i), or
      - (bb) 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 Council Directive [77/249/EEC](#) as amended from time to time;
    - (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;
  - (e)
    - (i) 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(5) as amended from time to time,
    - (ii) central bank services, or
    - (iii) operations conducted with the European Financial Stability Facility and the European Stability Mechanism;

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(4) OJ No L 78, 26.3.1977, p17, last amended by Council Directive 2013/25/EU (OJ No L 158, 10.6.2013, p368).

(5) OJ No L 145, 30.4.2004, p1, last amended by Directive 2010/78/EU of the European Parliament and of the Council (OJ No L 331, 15.12.2010, p120).

- (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; or
  - (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.
- (12) In this regulation—
- (a) “audiovisual media services” and “media service providers” have, respectively, the meanings given by Articles 1(1)(a) and 1(1)(d) of Directive 2010/13/EU of the European Parliament and of the Council<sup>(6)</sup> as amended from time to time;
  - (b) “programme” has the meaning given by Article 1(1)(b) of that Directive as amended from time to time, but also includes radio programmes and radio programme materials; and
  - (c) “programme material” has the same meaning as “programme”.

#### *Lottery services*

(13) These Regulations do not apply to services concession contracts for lottery services which are covered by CPV code 92351100-7 and awarded to an economic operator on the basis of an exclusive right granted otherwise than as described in regulation 5(2).

#### *Activities in a third country*

(14) These Regulations do not apply to concession contracts awarded by utilities 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 EU.

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

**11.**—(1) These Regulations do not apply to concession contracts for the principal purpose of permitting contracting authorities to provide or exploit public communications networks, or to provide to the public one or more electronic communication services.

(2) In this regulation, “public communications network” and “electronic communications service” have the meanings given by Directive 2002/21/EC of the European Parliament and of the Council<sup>(7)</sup> as amended from time to time.

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

**12.** These Regulations do not apply to—

- (a) concession contracts awarded to 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) concession contracts awarded to supply drinking water to such networks;
- (c) concession contracts for either or both of the following—
  - (i) 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

<sup>(6)</sup> OJ No L 95, 15.4.2010, p1.

<sup>(7)</sup> OJ No L 108, 24.4.2002, p33, last amended by Directive 2009/140/EC of the European Parliament and of the Council (OJ No L 337, 18.12.2009, p37).

the total volume of water made available by such projects or irrigation or drainage installations, or

(ii) the disposal or treatment of sewage,

when the contracts are connected with an activity referred to in paragraph (a) or (b).

### **Concession contracts awarded to an affiliated undertaking**

**13.—**(1) These Regulations do not apply to concession contracts awarded—

- (a) by a utility to an affiliated undertaking, or
- (b) by a joint venture, formed exclusively by a number of utilities for the purpose of carrying out activities listed in Schedule 2, to an affiliated undertaking of one its members,

provided that the conditions in paragraph (2) are fulfilled.

(2) The conditions are that—

- (a) in respect of services concession contracts, at least 80% of the average total turnover of the affiliated undertaking over the preceding 3 years, taking into account all services provided by that undertaking, derives from the provision of services to the utility or one or more of its affiliated undertakings;
- (b) in respect of works concession contracts, at least 80% of the average total turnover of the affiliated undertaking over the preceding 3 years, taking into account all works provided by that undertaking, derives from the provision of works to the utility or one or more of its affiliated undertakings.

(3) Where, because of the date on which an affiliated undertaking was created or commenced activities, the turnover referred to in paragraph (2) is not available for the preceding 3 years, it shall be sufficient for that undertaking to show that the turnover is credible, in particular by means of business projections.

(4) Where more than one undertaking affiliated with the utility with which they form an economic group provides the same or similar services or works, the percentages referred to in paragraph (2) shall be calculated taking into account the total turnover deriving respectively from the provision of services or works by those affiliated undertakings.

(5) In this regulation, “affiliated undertaking” and any similar expression means—

- (a) any undertaking the annual accounts of which are consolidated with those of the utility in accordance with the requirements of Directive 2013/34/EU of the European Parliament and of the Council<sup>(8)</sup> as amended from time to time;
- (b) in the case of an undertaking which is not subject to that Directive, any undertaking that—
  - (i) may be, directly or indirectly, subject to a dominant influence by the utility,
  - (ii) may exercise a dominant influence over the utility, or
  - (iii) in common with the utility, is subject to the dominant influence of another undertaking by virtue of ownership, financial participation, or the rules which govern it.

(6) For the purposes of paragraph (5)(b), a “dominant influence” shall be presumed on the part of a utility or, as the case may be, an undertaking in the same circumstances in which it is, in accordance with regulation 5(5), presumed on the part of a contracting authority.

(7) This regulation applies despite the provisions of regulation 17.

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<sup>(8)</sup> OJ No L 182, 29.6.2013, p19, last amended by Council Directive 2014/102/EU (OJ No L 334, 21.11.2014, p86).

**Concession contracts awarded to a joint venture or to a utility forming part of a joint venture**

**14.—**(1) These Regulations do not apply to concession contracts awarded—

- (a) by a joint venture, formed exclusively by a number of utilities for the purpose of carrying out activities listed in Schedule 2, to one of those utilities, or
- (b) by a utility to such a joint venture of which it forms part,

provided that the joint venture has been set up in order to carry out the activity concerned over a period of at least 3 years and the instrument setting up the joint venture stipulates that the utilities which form it will be part of the joint venture for at least the same period.

(2) This regulation applies despite the provisions of regulation 17.

**Notification of information by utilities**

**15.** Utilities shall notify to the Commission, if it so requests, the following information—

- (a) the names of the undertakings or joint ventures referred to in regulation 13 or 14;
- (b) the nature and value of the concession contracts referred to in those regulations;
- (c) proof, as considered necessary by the Commission, that the relationship between the undertaking or joint venture to which the concession contracts are awarded and the utility complies with the requirements of those regulations.

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

**16.** These Regulations do not apply to concession contracts awarded by utilities where it has been established that the activity is directly exposed to competition in accordance with regulation 34(2) of the Utilities Contracts Regulations 2016(9).

**Concession contracts between entities within the public sector***Award of contracts to controlled persons**Award of contracts to controlled persons*

**17.—**(1) A concession contract awarded by a contracting authority or a utility referred to in regulation 5(1)(a) to a legal person falls outside the scope of these Regulations where all of the following conditions are fulfilled—

- (a) the contracting authority or utility 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 utility or by other legal persons controlled by that contracting authority or utility; 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.

(2) A concession contract also falls outside the scope of these Regulations where a controlled legal person which is a contracting authority or utility referred to in regulation 5(1)(a) awards a concession contract to—

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(9) S.I. 2016/274.

- (a) its controlling contracting authority or utility, or
- (b) another legal person controlled by the same contracting authority or utility,

provided that there is no direct private capital participation in the legal person being awarded the concession 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 legal person being awarded the contract.

(3) A contracting authority or utility 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 paragraph (1)(a) where—

- (a) it exercises a decisive influence over both strategic objectives and significant decisions of the controlled legal person, or
- (b) that control is exercised by another legal person which is itself controlled in the same way by the contracting authority or utility,

and references to “control”, “controlled” and “controlling” in paragraphs (1) to (3) shall be interpreted accordingly.

*Award of concession contracts where there is joint control*

(4) A contracting authority or utility referred to in regulation 5(1)(a) which does not exercise over a legal person control within the meaning of paragraph (3) may nevertheless award a concession contract to that legal person without applying these Regulations where all of the following conditions are fulfilled—

- (a) the contracting authority or utility exercises jointly with other contracting authorities or utilities 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 utilities or by other legal persons controlled by the same contracting authorities or utilities; 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.

(5) For the purposes of paragraph (4)(a), contracting authorities or utilities exercise joint control over a legal person where all of the following conditions are fulfilled—

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

(6) For the purposes of paragraph (5)(a), individual representatives may represent several or all of the participating contracting authorities or utilities.

*Contracts which establish or implement co-operation between contracting authorities or utilities*

(7) A concession contract concluded exclusively between two or more contracting authorities or utilities referred to in regulation 5(1)(a) falls outside the scope of these Regulations where all of the following conditions are fulfilled—



- (a) the contract establishes or implements a co-operation between the participating contracting authorities or utilities 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 co-operation is governed solely by considerations relating to the public interest; and
- (c) the participating contracting authorities or utilities perform on the open market less than 20% of the activities concerned by the co-operation.

*Determination of percentages*

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

(9) Where, because of—

- (a) the date on which the relevant legal person, contracting authority or utility was created or commenced activities, or
- (b) a reorganisation of its activities,

the turnover, or alternative activity-based measure such as costs, are either not available for the preceding 3 years or no longer relevant, it shall be sufficient to show that the measurement of activity is credible, particularly by means of business projections.