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*Committee on the Internal Market and Consumer Protection*

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**2011/0437(COD)**

5.7.2012

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## **DRAFT REPORT**

on the proposal for a directive of the European Parliament and of the Council  
on the award of concession contracts  
(COM(2011)0897 – C7-0004/2011 – 2011/0437(COD))

Committee on the Internal Market and Consumer Protection

Rapporteur: Philippe Juvin

### ***Symbols for procedures***

- \* Consultation procedure
- \*\*\* Consent procedure
- \*\*\*I Ordinary legislative procedure (first reading)
- \*\*\*II Ordinary legislative procedure (second reading)
- \*\*\*III Ordinary legislative procedure (third reading)

(The type of procedure depends on the legal basis proposed by the draft act.)

### ***Amendments to a draft act***

In amendments by Parliament, amendments to draft acts are highlighted in ***bold italics***. Highlighting in *normal italics* is an indication for the relevant departments showing parts of the draft act which may require correction when the final text is prepared – for instance, obvious errors or omissions in a language version. Suggested corrections of this kind are subject to the agreement of the departments concerned.

The heading for any amendment to an existing act that the draft act seeks to amend includes a third line identifying the existing act and a fourth line identifying the provision in that act that Parliament wishes to amend. Passages in an existing act that Parliament wishes to amend, but that the draft act has left unchanged, are highlighted in **bold**. Any deletions that Parliament wishes to make in such passages are indicated thus: [...].

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## DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

**on the proposal for a directive of the European Parliament and of the Council on the award of concession contracts  
(COM(2011)0897 – C7-0004/2011 – 2011/0437(COD))**

**(Ordinary legislative procedure: first reading)**

*The European Parliament,*

- having regard to the Commission proposal to Parliament and the Council (COM(2011)0897),
  - having regard to Article 294(2) and Articles 53(1), 62 and 114 of the Treaty on the Functioning of the European Union, pursuant to which the Commission submitted the proposal to Parliament (C7-0004/2011),
  - having regard to Article 294(3) of the Treaty on the Functioning of the European Union,
  - having regard to the reasoned opinions submitted, within the framework of Protocol No 2 on the application of the principles of subsidiarity and proportionality, by the German Bundesrat and the Spanish Congress of Deputies, asserting that the draft legislative act does not comply with the principle of subsidiarity,
  - having regard to the opinion of the European Economic and Social Committee of 26 April 2012<sup>1</sup>,
  - having regard to Rule 55 of its Rules of Procedure,
  - having regard to the report of the Committee on the Internal Market and Consumer Protection and the opinions of the Committee on International Trade, the Committee on Employment and Social Affairs, the Committee on Industry, Research and Energy, the Committee on Transport and Tourism, the Committee on Regional Development and Committee on Legal Affairs (A7-0000/2012),
1. Adopts its position at first reading hereinafter set out;
  2. Calls on the Commission to refer the matter to Parliament again if it intends to amend its proposal substantially or replace it with another text;
  3. Instructs its President to forward its position to the Council, the Commission and the national parliaments.

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<sup>1</sup> OJ C 191, 29.6.12, p. 84.

## Amendment 1

### Proposal for a directive

#### Recital 2

##### *Text proposed by the Commission*

(2) Public procurement plays a key role in the Europe 2020 strategy as one of the market-based instruments to be used to achieve a smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. The award of works concessions is presently subject to basic rules of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts while the award of services concessions with a cross-border interest is subject to the principles of the Treaty, and in particular the principle of free movement of goods, freedom of *establishment* and freedom to provide services as well as to the principles deriving therefrom such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. There is a risk of legal uncertainty related to different interpretations of the principles of the Treaty by national legislators and of wide disparities among the legislations of different Member States. Such risk has been confirmed by the extensive case law of the Court of Justice of the European Union but which has only partially addressed certain aspects of the award of concession contracts. Hence, a uniform concretisation of the Treaty principles across all Member States and the elimination of discrepancies in their understanding following therefrom is necessary at the Union level in order to eliminate persisting distortions of the Internal Market.

##### *Amendment*

(2) Public procurement plays a key role in the Europe 2020 strategy as one of the market-based instruments to be used to achieve a smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. The award of works concessions is presently subject to basic rules of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts while the award of services concessions with a cross-border interest is subject to the principles of the Treaty, and in particular the principle of free movement of goods, freedom of *establishment* and freedom to provide services as well as to the principles deriving therefrom such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. There is a risk of legal uncertainty related to different interpretations of the principles of the Treaty by national legislators and of wide disparities among the legislations of different Member States. Such risk has been confirmed by the extensive, ***evolving*** case law of the Court of Justice of the European Union but which has only partially addressed certain aspects of the award of concession contracts. Hence, a uniform concretisation of the Treaty principles across all Member States and the elimination of discrepancies in their understanding following therefrom is necessary at the Union level in order to eliminate persisting distortions of the Internal Market.

*Justification*

*Stressing the evolving nature of ECJ case-law, which contributes to the existing legal uncertainty (25 ECJ decisions on concessions since 2000, of which 13 were on the very definition of a concession).*

**Amendment 2****Proposal for a directive****Recital 3***Text proposed by the Commission*

(3) This Directive should not in any way affect the freedom of Member States *or* public authorities to ***decide on the direct provision of*** works or services to the public or ***on the outsourcing of*** such provision to third parties. Member States or public authorities ***should remain free*** to define the characteristics of the ***service*** to be provided, including any conditions regarding the quality or price of the services, in order to pursue their public policy objectives

*Amendment*

(3) This Directive ***recognises and reaffirms the right of Member States and public authorities to decide the means of administration they judge to be most appropriate for performing the works and providing the services for which they are responsible.*** *This Directive* should not in any way affect the freedom of Member States ***and*** public authorities to ***perform*** works or ***provide*** services ***directly*** to the public or ***to outsource*** such provision ***by delegating it*** to third parties. Member States or public authorities ***shall retain the right*** to define ***and specify*** the characteristics of the ***services*** to be provided, including any conditions regarding the quality or price of the services, in order to pursue their public policy objectives

*Justification*

*Reaffirms the principle of free administration by public authorities freely choosing the means of administration for the missions for which they are responsible (implementation of missions or delegation to a third party). The Directive does not pre-empt the choice of any one means of administration in particular but sets out rules if delegation to a third party (concession) is selected.*

### Amendment 3

#### Proposal for a directive Recital 4

##### *Text proposed by the Commission*

(4) For concessions above a certain value, it is appropriate to provide for a minimum coordination of national procedures for the award of such contracts based on principles of the Treaty so as to guarantee the opening-up of concessions to competition and adequate legal certainty. Those coordinating provisions should not go beyond what is necessary in order to achieve the aforementioned objectives. However, Member States should be allowed to complete and develop further those provisions if they find it appropriate notably to better ensure compliance with the principles above.

##### *Amendment*

(4) For concessions ***equal to or*** above a certain value, it is appropriate to provide for a minimum coordination of national procedures for the award of such contracts based on principles of the Treaty so as to guarantee the opening-up of concessions to competition and adequate legal certainty. Those coordinating provisions should not go beyond what is necessary in order to achieve the aforementioned objectives. However, Member States should be allowed to complete and develop further those provisions if they find it appropriate notably to better ensure compliance with the principles above.

Or. fr

### Amendment 4

#### Proposal for a directive Recital 6

##### *Text proposed by the Commission*

(6) Concessions are contracts for pecuniary interest ***concluded between*** one or more ***economic operators and one or more*** contracting authorities or entities ***and having as their object the acquisition*** of works or services where the consideration consists, ***normally***, in the right to ***exploit*** the works or services ***that*** are the subject of the contract. The execution of these works or services ***are*** subject to specific binding obligations defined by the ***contracting authority or entity*** which are legally enforceable. By contrast, certain State acts such as authorisations or licences whereby

##### *Amendment*

(6) Concessions are contracts for pecuniary interest ***through which*** one or more contracting authorities or entities ***(hereinafter referred to as 'grantors')*** ***awards the performance*** of works or ***the management of*** services ***for which they are responsible to one or more economic operators, and*** where the consideration ***for this delegation*** consists ***either*** in the right to ***execute and manage*** the works or ***provide the*** services ***which*** are the subject of the contract, ***or in that right together with payment***. The execution of these works or services ***shall be*** subject to

the State or a public authority establishes the conditions for the exercise of an economic activity, should not qualify as concessions. The same applies to certain agreements *having as their object* the right *of an economic operator* to exploit certain public domains or resources, such as land lease contracts whereby the State or contracting authority or entity establishes only general conditions for their use without *acquiring* specific works or services.

specific binding obligations defined by the *grantor* which are legally enforceable. By contrast, certain State acts such as authorisations or licences whereby the State or a public authority establishes the conditions for the exercise of an economic activity, should not qualify as concessions. The same applies to certain agreements *through which* the *State or the contracting authority or entity awards an economic operator* the right to exploit certain public domains or resources, such as land lease contracts, *particularly in the maritime or inland ports sector*, whereby the State or contracting authority or entity establishes only general conditions for their use without *becoming a beneficiary of the* specific works or services *provided by the economic operator*.

Or. fr

#### *Justification*

*Clarification of the definition of concession (see Article 2) and of the types of contract not corresponding to concessions within the meaning of this Directive (authorisations, licences, contracts laying down general conditions without a delegation to perform the works or manage the services). The term 'grantor' is used to simplify the text where it refers to the contracting authority and contracting entity in the same way.*

#### **Amendment 5**

##### **Proposal for a directive Recital 7**

###### *Text proposed by the Commission*

(7) Difficulties related to the interpretation of the *concepts* of concession *and public contract* have *been source of* continued legal uncertainty among stakeholders and have given rise to numerous judgments of the Court of Justice of the European Union on this subject. Therefore, the definition of concession should be clarified, in particular by referring to the concept of *substantial*

###### *Amendment*

(7) Difficulties related to the interpretation of the *concept* of concession have *generated* continued legal uncertainty among stakeholders and have given rise to numerous judgments of the Court of Justice of the European Union on this subject. Therefore, the definition of concession should be clarified, in particular by referring to the concept of operating

operating risk. The main feature of a concession, the right to exploit the works or services, always implies the transfer to the concessionaire of an economic risk involving the possibility that it will not recoup the investments made and the costs incurred in operating the works or services awarded. The application of specific rules governing the award of concessions would not be justified if the **contracting authority or entity** relieved the **contractor** of any potential loss, by guaranteeing a minimal revenue, equal or higher to the costs that the contractor has to incur in relation with the performance of the contract. At the same time it should be made clear that certain arrangements which are fully paid by a contracting authority or a contracting entity should qualify as concessions where the *recouplement* of the *investements* and costs incurred by the operator for execution the work or *provididng* the service depends on the actual demand for or the availability of the service or asset.

risk. The main feature of a concession, the right to exploit the works or services, always implies the transfer to the concessionaire of an economic risk involving the possibility that it will not recoup the investments made and the costs incurred in operating the works or services awarded ***under normal operating conditions***. The application of specific rules governing the award of concessions would not be justified if the **grantor** relieved the **concessionaire** of any potential loss, by guaranteeing a minimal revenue, equal or higher to the costs that the contractor has to incur in relation with the performance of the contract. At the same time it should be made clear that certain arrangements which are fully paid by a contracting authority or a contracting entity should qualify as concessions where the *recouping* of the *investments* and costs incurred by the operator for execution the work or *providing* the service depends on the actual demand for or the availability of the service or asset.

Or. fr

## Amendment 6

### Proposal for a directive Recital 9

#### *Text proposed by the Commission*

(9) The notion of special or exclusive rights is central to the definition of the scope of this Directive, since entities which are neither contracting entities pursuant to Article 4 (1) (1) nor public undertakings are subject to ***its*** provisions only to the extent that they exercise one of the activities covered on the basis of such rights. ***It is therefore appropriate to clarify that rights which have been granted by means of a procedure based on objective***

#### *Amendment*

(9) The notion of special or exclusive rights is central to the definition of the scope of this Directive, since entities which are neither contracting entities pursuant to Article 4 (1) (1) nor public undertakings are subject to ***these*** provisions only to the extent that they exercise one of the activities covered on the basis of such rights.

*criteria, notably pursuant to Union legislation, and for which adequate publicity has been ensured do not constitute special or exclusive rights for the purposes of this Directive. This legislation should include Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas, Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity, Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, Directive 94/22/EC of the European Parliament and of the Council of 20 May 1994 on the conditions for granting and using authorisations for the prospection, exploration and production of hydrocarbons and Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70. The increasingly diverse forms of public action made it necessary to define more clearly the notion of procurement itself. The Union rules on concessions refer to the acquisition of works or services for a consideration consisting in exploitation of those works or services. The notion of acquisition should be understood broadly in the sense of obtaining the benefits of the works or services in question not requiring in all cases a transfer of ownership to contracting authorities or contracting entities. Furthermore, the mere financing of an activity, which is frequently linked to the obligation to reimburse the amounts received where they are not used for the purposes intended, does not*

*usually fall under this Directive.*

Or. fr

### *Justification*

*To ensure consistency with the amended version of Article 4(3).*

## **Amendment 7**

### **Proposal for a directive**

#### **Recital 10**

##### *Text proposed by the Commission*

*(10) It has also proven necessary to clarify what should be understood as a single procurement, with the effect that the aggregate value of all concessions concluded for the purpose of this procurement has to be taken into account with regard to the thresholds of this Directive, and that the procurement should be advertised as a whole, possibly split into lots. The concept of single procurement encompasses all supplies, works and services needed to carry out a particular project. Indications for the existence of one single project can for instance consist in overall prior planning and conception by the contracting authority, the fact that the different elements purchased fulfil a single economic and technical function or that they are otherwise logically interlinked.*

##### *Amendment*

*(10) This Directive should only apply to concession contracts whose value is equal to or greater than a certain threshold, which should reflect the clear cross-border interest of concessions to economic operators located in other Member States. Consequently, the method of calculating the estimated value of a concession needs to be defined, and should be identical for works and services concessions, as most contracts are mixed. It should include taking into account the cumulative turnover of the concession concerned, excluding tax, over the duration of the contract estimated by the grantor. The value of a concession should take into account the value of all the works and/or services covered by the contract and forming part of the same concession project. Indications for the existence of one single project can for instance consist in overall prior planning and conception by the grantor, the fact that the different elements of the concession fulfil a single economic and technical function or that they are otherwise logically interlinked.*

Or. fr

## *Justification*

*To ensure consistency with the amended versions of Articles 5 and 6.*

### **Amendment 8**

#### **Proposal for a directive**

##### **Recital 12**

###### *Text proposed by the Commission*

(12) Concessions may be awarded by **contracting entities** for the purpose of meeting the requirements of several activities, possibly subject to different legal regimes. It should be clarified that the legal regime applicable to a single concession intended to cover several activities should be subject to the rules applicable to the activity for which it is principally intended. Determination of the activity for which the concession is principally intended may be based on an analysis of the requirements which the specific concession must meet, carried out by the **contracting entity** for the purposes of estimating the concession value and drawing up the concession **award** documents. In certain cases, it might be objectively impossible to determine for which activity the concession is principally intended. The rules applicable to such cases should be indicated.

###### *Amendment*

(12) Concessions may be awarded by **a grantor** for the purpose of meeting the requirements of several activities, possibly subject to different legal regimes. It should be clarified that the legal regime applicable to a single concession intended to cover several activities should be subject to the rules applicable to the activity for which it is principally intended. Determination of the activity for which the concession is principally intended may be based on an analysis of the requirements which the specific concession must meet, carried out by the **grantor** for the purposes of estimating the concession value and drawing up the concession documents. In certain cases, it might be objectively impossible to determine for which activity the concession is principally intended. The rules applicable to such cases should be indicated.

Or. fr

### **Amendment 9**

#### **Proposal for a directive**

##### **Recital 13**

###### *Text proposed by the Commission*

(13) It is appropriate to exclude from the scope of this Directive certain services concessions awarded to an economic operator which **is itself a contracting**

###### *Amendment*

(13) It is appropriate to exclude from the scope of this Directive certain services concessions awarded to an economic operator which **enjoys** an exclusive right

**authority or a contracting entity on the basis of an exclusive right which that operator enjoys** under published national law or administrative act and which has been granted in accordance with the Treaty and Union sectoral legislation **concerning the management of networks infrastructure related to the activities set out in annex III**, since such exclusive right makes it impossible to follow a competitive procedure for the award. By way of derogation and without prejudice to the legal consequences of the general exclusion from the scope of this Directive, concessions **as defined in article 8 (1)** should be subject to the obligation to publish a concession award notice in view of ensuring basic transparency unless the conditions of such transparency are provided for in sectoral legislation.

under published national law, **regulation** or administrative act and which has been granted in accordance with the Treaty and Union sectoral legislation, since such exclusive right makes it impossible to follow a competitive procedure for the award. **The concessions referred to are those concerning the management of network infrastructure relating to the activities set out in Annex III or those concerning an activity subject to a tariff regulated at national level.** By way of derogation and without prejudice to the legal consequences of the general exclusion from the scope of this Directive, concessions **concerning the management of network infrastructure relating to the activities set out in Annex III** should be subject to the obligation to publish a concession award notice in view of ensuring basic transparency unless the conditions of such transparency are provided for in sectoral legislation.

Or. fr

### *Justification*

*To ensure consistency with the amended version of Article 8.*

## **Amendment 10**

### **Proposal for a directive Recital 15**

*Text proposed by the Commission*

(15) ***This Directive should not apply to*** concessions awarded by contracting entities and intended to permit the performance of an activity referred to in Annex III ***if, in the*** Member State in which ***this*** activity is ***carried out, it is*** directly exposed to competition on markets to which access is not limited, ***as established following a procedure provided for to this***

*Amendment*

(15) Concessions awarded by contracting entities and intended to permit the performance of an activity referred to in Annex III ***in a*** Member State in which ***the*** activity is directly exposed to competition on markets to which access is not limited, ***should not be considered concessions within the meaning of this Directive, and should not therefore be subject to it.***

*purpose* in accordance with Art. 27 and 28 of Directive [current 2004/17/EC]. This procedure should provide legal certainty for the entities concerned, as well as an appropriate decision-making process, ensuring, within short time limits, uniform application of Union law in this area.

***Direct exposure to competition must be analysed*** in accordance with Art. 27 and 28 of ***the*** Directive [current 2004/17/EC]. This procedure should provide legal certainty for the entities concerned, as well as an appropriate decision-making process, ensuring, within short time limits, uniform application of Union law in this area.

Or. fr

### *Justification*

*To ensure consistency with the amended version of Article 14.*

## **Amendment 11**

### **Proposal for a directive**

#### **Recital 17**

##### *Text proposed by the Commission*

(17) There is considerable legal uncertainty as to how far cooperation between public authorities should be covered by concession award rules. The relevant case-law of the Court of Justice of the European Union is interpreted differently between Member States ***and even between contracting authorities or certain contracting entities***. It is therefore necessary to clarify in what cases concessions concluded between such authorities ***are*** not subject to the ***application of public concession award*** rules. Such clarification should be guided by the principles set out in the relevant case-law of the Court of Justice. The sole fact that both parties to an agreement are themselves contracting authorities or contracting entities under Art. 4 (1) (1) does not as such rule out the application of concession award rules. ***However***, the application of concession award rules ***should*** not interfere with the ***freedom*** of

##### *Amendment*

(17) There is considerable legal uncertainty as to how far cooperation between public authorities should be covered by concession award rules. The relevant case-law of the Court of Justice of the European Union is interpreted differently between Member States. It is therefore necessary to clarify in what cases ***the award of concessions*** concluded between such ***public*** authorities ***is*** not subject to the rules ***laid down in this Directive***. Such clarification should be guided by the principles set out in the relevant case-law of the Court of Justice. The sole fact that both parties to an agreement are themselves contracting authorities or contracting entities under Art. 4 (1) (1) does not as such rule out the application of concession award rules. The application of concession award rules ***must*** not interfere with the ***right*** of public authorities to decide ***freely*** how to organise the way they carry out their public service tasks. ***The***

public authorities to decide how to organise the way they carry out their public service tasks. Concessions *awarded* to controlled entities *or cooperation for the joint execution of the public service tasks of the participating contracting authorities or entities* should therefore be exempted from the application of the rules if the conditions set out in this Directive are fulfilled. *This Directive should aim to ensure that any exempted public-public cooperation does not cause a distortion of competition in relation to private economic operators. Neither should* the participation of a contracting authority as a tenderer in a procedure for the award of a *public contract* cause any distortion of competition.

*award of* concessions to controlled entities should therefore be exempted from the application of the rules if the conditions set out in this Directive are fulfilled. The participation of a contracting authority as a tenderer in a procedure for the award of a *concession should not* cause any distortion of competition.

Or. fr

#### *Justification*

*Clarification of the recital. The question of cooperation between public authorities with a view to jointly carrying out a public service mission is covered in a new and separate recital.*

#### **Amendment 12**

##### **Proposal for a directive Recital 17 a (new)**

*Text proposed by the Commission*

*Amendment*

***(17a) Cooperation between local public authorities, or between local public authorities and groups composed exclusively of local public authorities, with a view to jointly carrying out public service missions for a public interest purpose as part of the internal organisation of Member States, should be exempted from the application of the rules laid down in this Directive. Similarly, transfers of powers relating to public service missions involving a global***

*transfer of responsibility between local public authorities, or between local public authorities and groups composed exclusively of local public authorities, as part of the internal organisation Member States, should be exempted from the rules laid down in this Directive.*

Or. fr

*Justification*

*Making the exclusion of a transfer of powers between public authorities for the purpose of carrying out a public service mission explicit.*

**Amendment 13**

**Proposal for a directive  
Recital 18**

*Text proposed by the Commission*

(18) In order to ensure adequate advertisement of works and services concessions above a certain ***value awarded by contracting entities and by the contracting authorities***, the award of such contracts should be preceded by the compulsory publication of a concession notice in the Official Journal of the European Union. ***The thresholds should reflect the clear cross-border interest of concessions to economic operators located in other Member States. To calculate the value of a services concession, account must be taken of the estimated value of all services to be provided by the concessionaire from the point of view of a potential tenderer.***

*Amendment*

(18) In order to ensure adequate advertisement of works and services concessions ***equal to or*** above a certain ***threshold***, the award of such contracts should be preceded by the compulsory publication of a concession notice in the Official Journal of the European Union.

Or. fr

*Justification*

*The notion of a threshold and the calculation method are dealt with and clarified in recital*

10, in accordance with the amended versions of Articles 5 and 6.

## Amendment 14

### Proposal for a directive

#### Recital 19

##### *Text proposed by the Commission*

(19) In view of the detrimental effects on competition, awarding concessions without prior publication should only be permitted in very exceptional circumstances. This exception should be limited to cases where it is clear from the outset that a publication would not trigger more competition, notably because there is objectively only one economic operator who can perform the concession. ***Only situations of objective exclusivity can justify the award of a concession without publication to an economic operator, where the situation of exclusivity has not been created by the contracting authority or contracting entity itself in view of the future award procedure, and where there are no adequate substitutes, the availability of which should be assessed thoroughly.***

##### *Amendment*

(19) In view of the detrimental effects on competition, awarding concessions without prior publication should only be permitted in very exceptional circumstances. This exception should be limited to cases where it is clear from the outset that a publication would not trigger more competition, notably because there is objectively only one economic operator who can perform the concession, ***or where the subject of the concession concerns social services or other specific services with a minimal cross-border impact.***

Or. fr

##### *Justification*

*Clarification of cases where a concession notice is not necessary. This recital is updated particularly with regard to the deletion of the prior information notice for social services and other specific services initially provided for in Article 26(3).*

## Amendment 15

### Proposal for a directive Recital 20

#### *Text proposed by the Commission*

(20) A review of so-called *priority* and *non-priority* services ('A' and 'B' services) by the Commission has shown that it is not justified to restrict the full application of procurement law to a limited group of services. As a result, this Directive should apply to a number of services (such as catering and water distribution services), which both showed a potential for cross-border trade.

#### *Amendment*

(20) ***In the context of the reform of public contract rules***, a review of so-called *priority* and *non-priority* services ('A' and 'B' services) by the Commission has shown that it is not justified to restrict the full application of procurement law to a limited group of services. As a result, this Directive should apply to a number of services (such as catering and water distribution services), which both showed a potential for cross-border trade.

Or. fr

## Amendment 16

### Proposal for a directive Recital 21

#### *Text proposed by the Commission*

(21) In the light of the results of the evaluation conducted by the Commission on the reform of public procurement rules it is appropriate to exclude from the full application of this Directive only those services which have a limited cross-border dimension, namely the so-called services to the person such as certain social, health and educational services. These services are provided within a particular context that varies widely amongst Member States, due to different cultural traditions. A specific regime should therefore be established for concession for these services which takes into account the fact that they are newly regulated. An obligation to publish a ***prior information notice and a concession award notice of***

#### *Amendment*

(21) In the light of the results of the evaluation conducted by the Commission on the reform of public procurement rules it is appropriate to exclude from the full application of this Directive only those services which have a limited cross-border dimension, namely the so-called services to the person such as certain social, health and educational services. These services are provided within a particular context that varies widely amongst Member States, due to different cultural traditions. A specific regime should therefore be established for concession for these services which takes into account the fact that they are newly regulated. An obligation to publish a concession award notice *for any concession with a value*

any concession with a value equal to or greater than thresholds established in this Directive is an adequate way to **provide information on business opportunities to potential tenderers as well as on the number and type of contracts awarded to all interested parties. Furthermore, Member States should put in place appropriate measures with reference to the award of concession contracts for these services aimed at ensuring** compliance with the **principles** of transparency **and equal treatment of economic operators** while allowing **contracting authorities and contracting entities** to take into account the specificities of the services in question. Member States should ensure that **contracting authorities and contracting entities** may take into account the need to ensure quality, **continuity, accessibility, availability and comprehensiveness** of the services, **the specific needs of different categories of users, the involvement and empowerment of users and innovation.**

equal to or greater than **the** thresholds established in this Directive is an adequate way to **ensure** compliance with the **principle** of transparency while allowing **the grantor** to take into account the specificities of the services in question. Member States should ensure that **the grantor** may take into account the need to ensure **innovation and, in accordance with Protocol 26 to the Treaty on the Functioning of the European Union, a high level of quality, safety and affordability, equal treatment and the promotion** of **universal access and of users' rights.**

Or. fr

#### *Justification*

*The proposal for a directive does not prevent the public authorities from laying down an appropriate level of quality, or public service public obligations, in the context of a concession contract. The Directive regulates the award of the contracts, but not the objectives pursued by the public authorities in awarding them.*

#### **Amendment 17**

##### **Proposal for a directive Recital 22**

###### *Text proposed by the Commission*

(22) Given the importance of the cultural context and the sensitivity of these services, Member States **should be given**

###### *Amendment*

(22) Given the importance of the cultural context and the sensitivity of these services, Member States **shall have** wide

wide discretion to organise the choice of the service providers in the way they consider most appropriate. The rules of this Directive do not prevent Member States to apply specific quality criteria for the choice of service providers, such as the criteria set out in the voluntary European Quality Framework for Social Services of the European Union's Social Protection Committee . Member States and/or public authorities remain free to provide these services themselves or to organise **social services** in a way that does not entail the conclusion of concessions, for example through the mere financing of such services or by granting licences or authorisations to all economic operators meeting the conditions established beforehand by the contracting authority or contracting entity, without any limits or quotas, provided such system ensures sufficient advertising and complies with the principles of transparency and non-discrimination.

discretion to organise the choice of the service providers in the way they consider most appropriate. The rules of this Directive do not prevent Member States to apply specific quality criteria for the choice of service providers, such as the criteria set out in the voluntary European Quality Framework for Social Services of the European Union's Social Protection Committee . Member States and/or public authorities remain free to provide these services themselves or to organise them in a way that does not entail the conclusion of concessions, for example through the mere financing of such services or by granting licences or authorisations to all economic operators meeting the conditions established beforehand by the contracting authority or contracting entity, without any limits or quotas, provided such system ensures sufficient advertising and complies with the principles of transparency and non-discrimination.

Or. fr

## Amendment 18

### Proposal for a directive Recital 22 a (new)

*Text proposed by the Commission*

*Amendment*

***(22a) The procedure for awarding concession contracts should comprise several stages, including the publication of a concession notice allowing the grantor wishing to award a concession to make known its intention; the presentation by interested economic operators of their application in response to that notice; verification of the conditions of participation for candidates; the submission of a tender by the candidates; the grantor's right to***

*negotiate with the tenderer on the basis of objective award criteria; the decision on the award by the grantor of the concession contract to the concessionaire and the publication of an award notice. Intermediate stages must be possible, including the selection of certain candidates authorised to submit a tender and the sending of an invitation to tender to the candidates thus selected. The grantor should also be able to approach economic operators who have not responded to the concession notice. In addition, it must be possible to reverse the order of certain stages, including, for example, analysing submitted tenders before verifying compliance with the selection criteria. Subject to compliance with the provisions of this Directive, the grantor should be allowed considerable flexibility to define the procedure leading to the choice of concessionaire, the only two mandatory stages being the publication of a concession notice at the beginning of the procedure, except where this is not required under this Directive, and the publication of an award notice at the end of the procedure. This freedom should be balanced against a requirement for transparency and equal treatment of candidates and tenderers.*

Or. fr

#### *Justification*

*Clarification of the award procedure to improve understanding of the articles on the conduct of the procedure, transparency and the procedural guarantees. Insistence on the grantor's right to opt to add intermediate stages or to reverse the order of stages, in compliance with the provisions of this Directive and subject to mandatory publication of a concession notice at the start of the procedure and an award notice at the end of the procedure.*

## Amendment 19

### Proposal for a directive Recital 23

#### *Text proposed by the Commission*

(23) In order to make it possible for all interested operators to submit applications **and** tenders, **contracting authorities and contracting entities** should be obliged to respect a minimum time limit for the receipt of such applications.

#### *Amendment*

(23) In order to make it possible for all interested operators to submit applications **or** tenders, **the grantor** should be obliged to respect a minimum time limit for the receipt of such applications **or tenders**.

Or. fr

## Amendment 20

### Proposal for a directive Recital 24

#### *Text proposed by the Commission*

(24) The choice and application of proportional, non-discriminatory and fair selection criteria to economic operators is crucial for their effective access to the economic opportunities related to concessions. In particular, the possibility for a candidate to rely on the capacities of other entities can be decisive to enable the participation of small and medium sized enterprises. Therefore, it is appropriate to provide that the selection criteria should relate exclusively to the technical, financial **and economic capacity of operators**, should be announced in the concession notice and cannot preclude **an economic operator** from relying on the capacities of other entities, regardless of the legal nature of its links with those entities, if the latter proves to the **contracting authority or entity** that it will have at its disposal the necessary resources.

#### *Amendment*

(24) The choice and application of proportional, non-discriminatory and fair selection criteria to economic operators is crucial for their effective access to the economic opportunities related to concessions. In particular, the possibility for a candidate to rely on the capacities of other entities can be decisive to enable the participation of small and medium sized enterprises. Therefore, it is appropriate to provide that the selection criteria should relate exclusively to the **professional, technical and financial capacities of candidates**, should be announced in the concession notice and cannot preclude **a candidate** from relying on the capacities of other entities, regardless of the legal nature of its links with those entities, if the latter proves to the **grantor** that it will have at its disposal the necessary resources.

Or. fr

*Justification*

*To ensure consistency with the amended version of Article 36.*

**Amendment 21**

**Proposal for a directive**

**Recital 25**

*Text proposed by the Commission*

(25) In order to ensure transparency and equal treatment, criteria for the award of concessions should always comply with some general standards. These should be disclosed in advance to all *potential* tenderers, be related to the subject matter of the contract *and should not offer to the contracting authority or contracting entity an unrestricted freedom of choice*. They should ensure the possibility of effective competition and be accompanied by requirements that allow the information provided by the tenderers to be effectively verified. *In order to comply with these standards while improving legal certainty, Member States may provide for the use of the criterion of the most economically advantageous tender.*

*Amendment*

(25) In order to ensure transparency and equal treatment, criteria for the award of concessions should always comply with some general standards. These should be disclosed in advance to all *candidates or* tenderers *and* be related to the subject matter of the contract. They should ensure the possibility of effective competition and be accompanied by *minimum* requirements that allow the information provided by the *candidates or* tenderers to be effectively verified *by the grantor*.

Or. fr

*Justification*

*To ensure consistency with Articles 38a and 38b as proposed by the rapporteur (ex Articles 35 and 39 of the amended Commission proposal).*

## Amendment 22

### Proposal for a directive Recital 25 a (new)

*Text proposed by the Commission*

*Amendment*

***(25a) In order to better integrate social considerations in the award of concessions, the grantor should also be able to include characteristics relating to working conditions among the award criteria. Those characteristics shall aim to protect the health of the staff involved in the production process or to promote the social integration of disadvantaged persons or members of vulnerable groups among the persons responsible for performing the contract, including accessibility for persons with disabilities. In this case, the award criteria should be applied in accordance with Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services<sup>1</sup>, in such a way as not to discriminate directly or indirectly against economic operators from other Member States. The grantor should also be allowed to use as award criteria the organisation, qualifications and experience of the staff assigned to the performance of the concession contract, as they may affect the quality of provision and, as a result, the economic value of the tender.***

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

Or. fr

#### *Justification*

*Reorganisation of recitals (logical link between recital 29 and recital 25 on the award criteria). Strengthening of social considerations. Removal of references to the most economically advantageous tender criterion, technical specifications and product life cycle,*

which are not relevant to concessions ('public contract' vocabulary). Nevertheless, the grantor may, should it so wish and in compliance with EU law, apply award criteria relating to social considerations (see new Articles 38a and 38b).

## **Amendment 23**

### **Proposal for a directive Recital 25 b (new)**

*Text proposed by the Commission*

*Amendment*

***(25b) The technical and/or functional requirements shall define the characteristics required of works and/or services covered by the concession, including requirements concerning accessibility for people with disabilities or environmental performance levels. These technical and/or functional requirements shall be included in the concession documents and shall comply with the principles of equal treatment and transparency. They must not be designed to artificially limit competition.***

Or. fr

### *Justification*

*Clarification of technical and/or functional requirements which define the characteristics required of the works and/or services forming the subject matter of the concession. This notion seems more appropriate for concessions than the technical specifications originally proposed in the proposal for a directive (lower level of detail, compliance with the 'spirit' of the concession based on the transfer of the economic risk to the concessionaire, who must be able to retain a certain margin of flexibility, if the grantor so wishes).*

## **Amendment 24**

### **Proposal for a directive Recital 26**

*Text proposed by the Commission*

*Amendment*

***(26) Where contracting authorities and contracting entities choose to award a concession to the most economically***

***deleted***

*advantageous tender, they should determine the economic and quality criteria on the basis of which they assess the tenders in order to identify which one offers the best value for money. The determination of these criteria depends on the object of the concession since they should allow the level of performance offered by each tender to be assessed in the light of the subject-matter of the concession, as defined in the technical specifications and the value for money of each tender to be measured.*

Or. fr

#### *Justification*

*Removal of reference to the most economically advantageous tender criterion as it is not relevant to concession contracts ('public contract' vocabulary).*

#### **Amendment 25**

##### **Proposal for a directive Recital 27**

###### *Text proposed by the Commission*

(27) Concessions are usually **long term**, complex arrangements where the **contractor** assumes responsibilities and risks traditionally **born** by the **contracting authorities** and normally falling within **their** remit **and contracting entities**. For this reason, **contracting authorities or entities should** maintain a margin of flexibility in organising the awarding process, **involving also a possibility to negotiate** the content of the contract with the candidates. **However, in order to ensure** equal treatment and transparency throughout the **awarding** procedure, **it is appropriate to provide for certain requirements as to the structure of the awarding process, including negotiations,**

###### *Amendment*

(27) Concessions are usually **long-term**, complex arrangements where the **concessionaire** assumes **the** responsibilities and risks traditionally **borne** by the **grantor** and normally falling within **its** remit. For this reason, **the grantor must** maintain a **real** margin of flexibility in organising the awarding process **and negotiating** the content of the contract with the candidates **and tenderers, while ensuring respect for the principles of** equal treatment and transparency throughout the procedure.

*the dissemination of information and the availability of written records. It is also necessary to provide that the initial terms of the concession notice should not be deviated from, in order to prevent unfair treatment of any potential candidates.*

Or. fr

#### *Justification*

*To ensure consistency with the new Articles 38a and 38b (ex Articles 35 and 39 of the amended Commission proposal). The negotiation must be the central element of the procedure for awarding concession contracts. The grantor (contracting authority or entity) must have sufficient flexibility to make the most appropriate choice.*

#### **Amendment 26**

##### **Proposal for a directive Recital 28**

*Text proposed by the Commission*

*Amendment*

***(28) The technical specifications drawn up by contracting authorities and contracting entities need to allow concession award to be opened up to competition. To that end, it must be possible to submit tenders that reflect the diversity of technical solutions so as to obtain a sufficient level of competition. Consequently, technical specifications should be drafted in such a way to avoid artificially narrowing down competition through requirements that favour a specific economic operator by mirroring key characteristics of the supplies, services or works habitually offered by that economic operator. Drawing up the technical specifications in terms of functional and performance requirements generally allows this objective to be achieved in the best way possible and favours innovation. Where reference is made to a European standard or, in the absence thereof, to a national standard,***

***deleted***

*tenders based on equivalent arrangements should be considered by contracting authorities or contracting entities. To demonstrate equivalence, tenderers can be required to provide third-party verified evidence; however, other appropriate means of proof such as a technical dossier of the manufacturer should also be allowed where the economic operator concerned has no access to such certificates or test reports, or no possibility of obtaining them within the relevant time limits.*

Or. fr

#### *Justification*

*Removal of the reference to technical specifications because it is not relevant to concession contracts ('public contract' vocabulary). However, functional requirements may be laid down (see amended recital 25 and Articles 38a and 38b (ex amended Articles 35 and 39)).*

#### **Amendment 27**

##### **Proposal for a directive Recital 29**

*Text proposed by the Commission*

*Amendment*

*(29) In technical specifications and in award criteria, contracting authorities and contracting entities should be allowed to refer to a specific production process, a specific mode of provision of services, or a specific process for any other stage of the life cycle of a product or service, provided that they are linked to the subject-matter of the concession. In order to better integrate social considerations in the award of concessions, procurers may also be allowed to include, in the award criteria, characteristics related to the working conditions. However, where the contracting authorities or contracting entities use the most economically advantageous tender, such criteria may*

*deleted*

*only relate to the working conditions of the persons directly participating in the process of production or provision in question. Those characteristics may only concern the protection of health of the staff involved in the production process or the favouring of social integration of disadvantaged persons or members of vulnerable groups amongst the persons assigned to performing the contract, including accessibility for persons with disabilities. In this case, any award criteria which include those characteristics should in any event remain limited to characteristics that have immediate consequences on staff members in their working environment. They should be applied in accordance with Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services and in a way that does not discriminate directly or indirectly against economic operators from other Member States or from third countries parties to the Agreement or to Free Trade Agreements to which the Union is party. Contracting authorities and contracting entities should, also where they use the criterion of the most economically advantageous tender, be allowed to use as an award criterion the organisation, qualification and experience of the staff assigned to performing the concession in question, as this may affect the quality of concession performance and, as a result, the economic value of the tender.*

Or. fr

#### *Justification*

*Removal of references to the most economically advantageous tender criterion, technical specifications and product life cycle, which are not relevant to concessions ('public contract' vocabulary). It is nevertheless important to indicate that the grantor may, should it so wish and in compliance with EU law, apply award criteria relating to social considerations (see*

*new Articles 38a and 38b).*

## **Amendment 28**

### **Proposal for a directive**

#### **Recital 30**

##### *Text proposed by the Commission*

(30) Electronic means of information and communication can greatly simplify the publication of contracts and increase the efficiency and transparency of concession award processes. They should become the standard means of communication and information exchange in concession award procedures. ***The use of electronic means also leads to time savings. As a result, provision should be made for reducing the minimum periods where electronic means are used, subject, however, to the condition that they are compatible with the specific mode of transmission envisaged at Union level. Moreover, electronic means of information and communication including adequate functionalities can enable contracting authorities and contracting entities to prevent, detect and correct errors that occur during procurement procedures.***

##### *Amendment*

(30) Electronic means of information and communication can greatly simplify the publication of contracts and increase the efficiency, ***speed*** and transparency of concession award processes. They should become the standard means of communication and information exchange in concession award procedures. ***It should also be made obligatory to send a concession notice and an award notice and to make the concession documents available electronically.***

Or. fr

##### *Justification*

*To ensure consistency with the amended version of Article 25. As concessions are contracts which are inherently complex and based on negotiation, few procedures can be effectively carried out electronically, except for the sending of the concession and award notices (amended Article 28) and the provision of concession documents (amended Article 30).*

## Amendment 29

### Proposal for a directive Recital 31

*Text proposed by the Commission*

*Amendment*

***(31) Contracting authorities and contracting entities from different Member States may be interested in cooperating and in awarding jointly public concessions in order to take the best benefit of internal market potential in terms of economies of scale and risk-benefit sharing, notably for innovative projects involving a greater amount of risk than reasonably supportable by a single contracting authority or contracting entity. Therefore new rules on cross-border joint concession award designating the applicable law should be established in order to facilitate setting up cross-border joint public concession award. In addition, contracting authorities and contracting entities from different Member States may set up joint legal bodies established under national or Union law. Specific rules should be established for such form of joint concession award.***

*deleted*

Or. fr

*Justification*

*To ensure consistency with the deletion of article 31.*

## Amendment 30

### Proposal for a directive Recital 33

*Text proposed by the Commission*

*Amendment*

***(33) Concessions should not be awarded to economic operators that have participated***

***(33) Concessions should not be awarded to economic operators that have participated***

in a criminal organisation or have been found guilty of corruption, fraud to the detriment of the Union's financial interests or money laundering. ***Non-payment of taxes or social security contributions should also be sanctioned by mandatory exclusion at the level of the Union.***

Furthermore, ***contracting authorities and contracting entities*** should be given the possibility to exclude candidates or tenderers for serious violations of Union or national law aimed at the protection of public interests compatible with the Treaty or where the economic operator has shown significant or persistent deficiencies in the performance of a prior concession or concessions of a similar nature with the same ***contracting authority or contracting entity***.

in a criminal organisation or have been found guilty of corruption, fraud to the detriment of the Union's financial interests or money laundering. Furthermore, ***grantors*** should be given the possibility to exclude candidates or tenderers for serious violations of Union or national law aimed at the protection of public interests compatible with the Treaty or where the economic operator has shown significant or persistent deficiencies in the performance of a prior concession or concessions of a similar nature with the same ***grantor***.

Or. fr

#### *Justification*

*To ensure consistency with the amended version of Article 36.*

### **Amendment 31**

#### **Proposal for a directive**

#### **Recital 34**

##### *Text proposed by the Commission*

(34) It is necessary to clarify the conditions under which modifications of a concession during its execution require a new award procedure, taking into account the relevant case-law of the Court of Justice of the European Union. A new award procedure is required in case of material changes to the initial concession, demonstrating the intention of the parties to renegotiate essential terms or conditions of that concession. This is notably the case if the amended conditions would have had an influence on the outcome of the procedure,

##### *Amendment*

(34) It is necessary to clarify the conditions under which modifications of a concession during its execution require a new award procedure, taking into account the relevant case-law of the Court of Justice of the European Union. ***Any concession in progress may be modified by means of a supplementary agreement. However, a*** new award procedure is required in case of material changes to the initial concession, demonstrating the intention of the parties to renegotiate essential terms or conditions of that concession. This is notably the case

had they been part of the initial procedure. An exceptional and temporary extension of the term of the concession strictly aimed at ensuring the continuity of the provision of the service pending the award of a new concession should not normally qualify as a material change to the initial concession.

if the amended conditions would have had an influence on the outcome of the procedure, had they been part of the initial procedure. An exceptional and temporary extension of the term of the concession strictly aimed at ensuring the continuity of the provision of the service pending the award of a new concession should not normally qualify as a material change to the initial concession.

Or. fr

### *Justification*

*To ensure consistency with the amended version of Article 42.*

## **Amendment 32**

### **Proposal for a directive**

#### **Recital 35**

##### *Text proposed by the Commission*

(35) ***Contracting authorities and contracting entities*** can be faced with external circumstances that they could not foresee when they awarded the concession. In this case, a certain degree of flexibility is needed to adapt the concession to these circumstances without a new award procedure. The notion of circumstances that a diligent ***contracting authority or contracting entity*** could not foresee refers to those circumstances which could not be predicted despite reasonably diligent preparation of the initial award by the ***contracting authority or contracting entity***, taking into account its available means, the nature and characteristics of the specific project, good practice in the field in question and the need to ensure an appropriate relationship between the resources spent in preparing the award and its foreseeable value. However, this cannot apply in cases where a modification results

##### *Amendment*

(35) ***Grantors*** can be faced with external circumstances that they could not foresee when they awarded the concession. In this case, a certain degree of flexibility is needed to adapt the concession to these circumstances without a new award procedure. The notion of circumstances that a diligent ***grantor*** could not foresee refers to those circumstances which could not be predicted despite reasonably diligent preparation of the initial award by the ***grantor***, taking into account its available means, the nature and characteristics of the specific project, good practice in the field in question and the need to ensure an appropriate relationship between the resources spent in preparing the award and its foreseeable value. However, this cannot apply in cases where a modification results in an alteration of the nature of the overall ***concession***, for instance by replacing the works or services ***for which the contract is***

in an alteration of the nature of the overall *procurement*, for instance by replacing the works, *supplies* or services *to be procured* by something different or by *fundamentally changing the type of procurement since, in such a situation, a hypothetical* influence on the outcome may be assumed.

*to be awarded* by something different or by *introducing conditions such that an* influence on the outcome may be assumed.

Or. fr

### Amendment 33

#### Proposal for a directive

#### Recital 36

##### *Text proposed by the Commission*

(36) In line with the principles of equal treatment and transparency, the successful tenderer should not be replaced by another economic operator without reopening the concession to competition. However, the successful tenderer performing the concession may undergo certain structural changes during the performance of the concession, such as purely internal reorganisations, mergers and acquisitions or insolvency or be substituted on the basis of a contractual clause known to all tenderers and in line with the principles of equal treatment and transparency. Such structural changes should not automatically require new award procedures for all concessions performed by that undertaking.

##### *Amendment*

(36) In line with the principles of equal treatment and transparency, the successful tenderer should not be replaced by another economic operator without reopening the concession to competition. However, the successful tenderer performing the concession may undergo certain structural changes during the performance of the concession, such as purely internal reorganisations, mergers and acquisitions, ***transfer of property or assets between companies*** or insolvency or be substituted on the basis of a contractual clause known to all tenderers and in line with the principles of equal treatment and transparency. Such structural changes should not automatically require new award procedures for all concessions performed by that undertaking.

Or. fr

##### *Justification*

*To ensure consistency with the amended version of Article 42.*

## Amendment 34

### Proposal for a directive Recital 37

*Text proposed by the Commission*

(37) **Contracting authorities or contracting entities** should have the possibility to provide for modifications to a concession in the concession contract itself, by way of review clauses which should not give them unlimited discretion. This Directive should therefore set out to what extent modifications may be provided for in the initial concession.

*Amendment*

(37) **Grantors** should have the possibility to provide for modifications to a concession in the concession contract itself, by way of review clauses which should not give them unlimited discretion. This Directive should therefore set out to what extent modifications may be provided for in the initial concession.

Or. fr

## Amendment 35

### Proposal for a directive Recital 38

*Text proposed by the Commission*

(38) In order to adapt to rapid technical and economic developments, the power to adopt acts in accordance with Article 290 *of the Treaty* should be delegated to the Commission *in respect of a number of non-essential elements of this Directive. In fact, the technical details and characteristics of the devices for electronic receipt should be kept up to date with technological developments and administrative needs; it is also necessary to empower the Commission to make mandatory technical standards for electronic communication to ensure the interoperability of technical formats, processes and messaging in concession award procedures conducted using electronic means of communication taking into account technological developments and administrative needs.*

*Amendment*

(38) In order to adapt to rapid technical and economic developments, the power to adopt acts in accordance with Article 290 *TFEU* should be delegated to the Commission *so that CPV reference numbers, including those in Annexes I and X, can be updated if this is necessitated by the changes in the CPV nomenclature. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level. The Commission should, when preparing and drawing up delegated acts, ensure the simultaneous, timely and appropriate transmission of all relevant documents to the European Parliament and to the Council.*

*Furthermore, the list of legislative acts of the Union establishing common methodologies for the calculation of life-cycle costs should be quickly adapted to incorporate the measures adopted on a sectoral basis. In order to satisfy these needs, the Commission should be empowered to keep the list of legislative acts including LCC methodologies up-to date.*

Or. fr

*Justification*

*To ensure consistency with the amendments to Articles 25 and 40.*

**Amendment 36**

**Proposal for a directive  
Recital 41**

*Text proposed by the Commission*

*Amendment*

*(41) The law of the Union on public procurement requires Member States to consistently and systematically monitor the implementation and functioning of those rules in order to ensure the efficient and uniform application of Union law. Hence, where Member States designate a single national authority in charge of monitoring, implementation and control of public procurement, that authority may have the same responsibilities regarding concessions. A single body with overarching tasks should ensure an overview of main difficulties in implementation and suggest appropriate remedies to more structural problems. That body may also provide immediate feedback on the functioning of policy and potential weaknesses in national legislation and practice, thus contributing to the quick identification of solutions and*

*deleted*

*the improvement of concession award procedures.*

Or. fr

*Justification*

*To ensure consistency with the deletion of the reference to the single control authority resulting from the revision of the public procurement directives.*

**Amendment 37**

**Proposal for a directive  
Recital 42**

*Text proposed by the Commission*

*Amendment*

***(42) It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level. The Commission, when preparing and drawing-up delegated acts, should ensure a simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and Council.***

***deleted***

Or. fr

*Justification*

*Integration of these elements concerning the delegated acts into recital 38.*

**Amendment 38**

**Proposal for a directive  
Recital 43**

*Text proposed by the Commission*

*Amendment*

**(43) In order to ensure uniform conditions for the implementation of this Directive; the procedure for drawing up and**

**(43) In order to ensure uniform conditions for the implementation of this Directive; the procedure for drawing up and**

transmission of notices and for sending and publishing data referred to in Annexes IV to VI, the amendment of the thresholds implementing powers should be conferred on the Commission. Those powers should be exercised in accordance with Regulation (EU) 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by the Member States of the Commission's exercise of implementing powers. The advisory procedure should be used for the adoption of implementing acts, which do not have any impact either from the financial point of views or on the nature and scope of obligations stemming from this Directive. On the contrary, these acts characterised by a mere administrative purpose and serve to facilitate the application of the rules set by this Directive.

transmission of notices and for sending and publishing data referred to in Annexes IV to VI, the amendment of the thresholds implementing powers should be conferred on the Commission. Those powers should be exercised in accordance with Regulation (EU) 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by the Member States of the Commission's exercise of implementing powers. The advisory procedure should be used for the adoption of *these* implementing acts, which do not have any impact either from the financial point of *view* or on the nature and scope of obligations stemming from this Directive. On the contrary, these acts are characterised by a mere administrative purpose and serve to facilitate the application of the rules set by this Directive.

Or. fr

#### *Justification*

*The amendment aims to align the recital to the standard formulation on implementing acts. Deletion of the reference to modification of the thresholds, which is not subject to an implementing act.*

### **Amendment 39**

#### **Proposal for a directive Section I – title**

*Text proposed by the Commission*

Definitions *and* scope

*Amendment*

Definitions, scope, *thresholds and ways of calculating the value of a concession*

Or. fr

## Amendment 40

### Proposal for a directive Article 1 – paragraph 1

*Text proposed by the Commission*

1. This Directive establishes rules ***on the procedures for procurement by contracting authorities and by contracting entities with respect to concessions*** whose value is estimated to be not less than the thresholds laid down in Article 5.

*Amendment*

1. This Directive establishes rules ***relating to public procurement which are applicable to the procedures for the award of works or services concession contracts*** whose value is estimated to be not less than the thresholds laid down in Article 6 ***and which are awarded to economic operators by one of the following actors:***

Or. fr

### *Justification*

*Clarification of the scope of the Directive and deletion of terms borrowed from public procurement (award procedures, acquisition of works/services, supplies).*

## Amendment 41

### Proposal for a directive Article 1 – paragraph 2

*Text proposed by the Commission*

***2. This Directive applies to the acquisition of works or services, including supplies which are incidental to the subject matter of a concession, from economic operators chosen by either of the following:***

a) Contracting authorities ***whether or not the works or services including the related supplies, are intended for a public purpose;***

b) Contracting entities provided that the works or services ***including the related supplies,*** are intended for the pursuit of one of the activities referred to in Annex III.

*Amendment*

a) Contracting authorities;

b) Contracting entities provided that the works or services are intended for the pursuit of one of the activities referred to in Annex III.

Or. fr

*Justification*

*Clarification of the scope of the Directive and deletion of terms borrowed from public procurement (award procedures, acquisition of works/services, supplies).*

**Amendment 42**

**Proposal for a directive**  
**Article 1 a (new)**

*Text proposed by the Commission*

*Amendment*

**Article 1a**

***Principle of free administration by public authorities***

***This Directive recognises the principle of free administration by contracting authorities and contracting entities in conformity with the national legislation in force. The latter will be free to decide how best to manage the execution of the work and the provision of the services for which they are responsible, in accordance with the legislative arrangements and the methods which they judge to be the most effective.***

Or. fr

*Justification*

*Reaffirms the principle of free administration by public authorities freely choosing the means of administration for the missions for which they are responsible (implementation of missions or delegation to a third party). The Directive does not pre-empt the choice of any one means of administration in particular but sets out rules if delegation to a third party (concession) is selected.*

## Amendment 43

### Proposal for a directive

#### Article 2 – paragraph 1 – point 1

*Text proposed by the Commission*

(1) 'concessions' means **public** works **concessions, works concessions** or services concessions.

*Amendment*

(1) 'concessions' means works or services concessions.

Or. fr

#### *Justification*

*Removal of the distinction between works concession and public works concession depending on the nature of the grantor (contracting authority or contracting entity), as this adds no value to the text.*

## Amendment 44

### Proposal for a directive

#### Article 2 – paragraph 1 – point 2

*Text proposed by the Commission*

(2) a '**public** works concession' means a contract for pecuniary interest concluded in writing **between one or more economic operators and one or more contracting authorities and having as their object** the execution of works, where the consideration for **the works to be carried out** consists either solely in the right to exploit the works that are the subject of the contract or in that right together with payment.

*Amendment*

(2) (a) a 'works concession' means a contract for pecuniary interest concluded in writing **by means of which one or more contracting authorities or contracting entities entrusts** the execution of works **to one or more economic operators**, where the consideration for **this delegation** 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) a '**services concession**' means a **contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrusts the operation of a service for which they are responsible to one or more economic operators, where the consideration for this delegation consists either solely in**

*the right to exploit the service which is the subject of the contract or in that right together with payment.*

*The right to exploit the works or services shall imply the transfer to the concessionaire of the substantial economic risk in exploiting these works or services, defined as the risk of exposure to the vagaries of the market. The concessionaire shall be deemed to assume the substantial operating risk where, under normal conditions of exploitation, 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.*

Or. fr

#### *Justification*

*Clarification of the notion of 'concession' and its special nature as compared with a public contract: transfer of a mission for which the grantor is responsible to a third economic operator; transfer of risk from the grantor to the concessionaire; transfer to the concessionaire of a right to exploit the works or services concerned by the concession; payment of concessionaire on the basis of exploitation of the works or services. Clarification of the concept of operating risk as an economic risk linked to exposure to the vagaries of the market.*

#### **Amendment 45**

##### **Proposal for a directive**

##### **Article 2 – paragraph 1 – point 2 a (new)**

*Text proposed by the Commission*

*Amendment*

***(2a) 'economic operator' means any natural or legal person, or public entity, or a group of such persons and/or entities which offers the execution of works or the provision of services on the market.***

Or. fr

*Justification*

*Definition moved for a more logical sequence. Originally Article 2 point 10 of the Commission proposal.*

**Amendment 46**

**Proposal for a directive**

**Article 2 – paragraph 1 – point 2 b**

*Text proposed by the Commission*

*Amendment*

***(2b) ‘candidate’ means an economic operator that has sought an invitation or has been invited to take part in a concession award procedure.***

Or. fr

*Justification*

*Definition moved for a more logical sequence. Originally Article 2 point 8 of the Commission proposal.*

**Amendment 47**

**Proposal for a directive**

**Article 2 – paragraph 1 – point 2 c**

*Text proposed by the Commission*

*Amendment*

***(2c) ‘tenderer’ means an economic operator which has submitted a tender.***

Or. fr

*Justification*

*Definition moved for a more logical sequence. Originally Article 2 point 11 of the Commission proposal.*

## **Amendment 48**

### **Proposal for a directive**

#### **Article 2 – paragraph 1 – point 2 d (new)**

*Text proposed by the Commission*

*Amendment*

***(2d) ‘concessionaire’ means an economic operator which has been awarded a concession.***

Or. fr

#### *Justification*

*Definition moved for a more logical sequence. Originally Article 2 point 9 of the Commission proposal.*

## **Amendment 49**

### **Proposal for a directive**

#### **Article 2 – paragraph 1 – point 2 e (new)**

*Text proposed by the Commission*

*Amendment*

***(2e) ‘grantor’ means a contracting authority or a contracting entity which awards a concession to an economic operator.***

Or. fr

#### *Justification*

*Introduction of the idea of ‘grantor’, combining contracting authorities and contracting entities when the two are referred to together. The grantor awards the concession to the concessionaire.*

## Amendment 50

### Proposal for a directive

#### Article 2 – paragraph 1 – point 2 f (new)

*Text proposed by the Commission*

*Amendment*

***(2f) ‘concession documents’ means all documents provided by the grantor to which the grantor refers when describing or defining features of the concession contract and the concession contract award procedure.***

Or. fr

*Justification*

*Removal of the term ‘public contract’; definition simplified and moved for a more logical sequence. Originally Article 2 point 13 of the Commission proposal.*

## Amendment 51

### Proposal for a directive

#### Article 2 – paragraph 1 – point 4

*Text proposed by the Commission*

*Amendment*

***(4) ‘works concession’ means a contract for pecuniary interest concluded in writing between one or more economic operators and one or more contracting entities and having as their object the execution of works, where the consideration for the works to be carried out consists either solely in the right to exploit the works that are the subject of the contract or in that right together with payment;*** ***deleted***

Or. fr

*Justification*

*Definition moved and amended, cf new Article 2 point 2.*

## **Amendment 52**

### **Proposal for a directive**

#### **Article 2 – paragraph 1 – point 7**

*Text proposed by the Commission*

*Amendment*

**(7) 'services concession' means a contract for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities or contracting entities and having as their object the provision of services other than those referred to in points 2 and 4 where the consideration for the services to be provided consists either solely in the right to exploit the services that are subject of the contract or in that right together with payment.** *deleted*

Or. fr

*Justification*

*Definition moved and amended, cf new Article 2 point 2.*

## **Amendment 53**

### **Proposal for a directive**

#### **Article 2 – paragraph 1 – point 8**

*Text proposed by the Commission*

*Amendment*

**(8) 'candidate' means an economic operator that has sought an invitation or has been invited to take part in a concession award procedure;** *deleted*

Or. fr

*Justification*

*Definition moved, cf new Article 2 point 2b.*

## **Amendment 54**

### **Proposal for a directive**

#### **Article 2 – paragraph 1 – point 9**

*Text proposed by the Commission*

*Amendment*

**(9) 'concessionaire' means an economic operator which has been awarded a concession.** *deleted*

Or. fr

*Justification*

*Definition moved, cf new Article 2 point 2e.*

## **Amendment 55**

### **Proposal for a directive**

#### **Article 2 – paragraph 1 – point 10**

*Text proposed by the Commission*

*Amendment*

**(10) "economic operator" means any natural or legal person, or public entity, or a group of such persons and/or entities which offers the execution of works and/or a work, supplies or services on the market.** *deleted*

Or. fr

*Justification*

*Definition moved, cf new Article 2 point 2a.*

## **Amendment 56**

### **Proposal for a directive**

#### **Article 2 – paragraph 1 – point 11**

*Text proposed by the Commission*

*Amendment*

**(11) 'tenderer' means an economic operator that has submitted a tender** *deleted*

Or. fr

*Justification*

*Definition moved, cf new Article 2 point 2c.*

## **Amendment 57**

### **Proposal for a directive**

#### **Article 2 – paragraph 1 – point 13**

*Text proposed by the Commission*

*Amendment*

**(13) 'concession documents' means all documents produced or referred to by the contracting authority or contracting entity to describe or determine elements of the procurement or the procedure, including the contract notice, the technical specifications, proposed conditions of contract, formats for the presentation of documents by candidates and tenderers, information on generally applicable obligations and any additional documents.** *deleted*

Or. fr

*Justification*

*Definition moved and amended, cf new Article 2 point 2f.*

## Amendment 58

### Proposal for a directive

#### Article 2 – paragraph 1 – point 14

*Text proposed by the Commission*

*Amendment*

***(14) ‘life cycle’ means all consecutive and/or interlinked stages, including production, transport, use and maintenance, throughout the existence of a product or a works or the provision of a service, from raw material acquisition or generation of resources to disposal, clearance and finalisation.***

***deleted***

Or. fr

#### *Justification*

*Deletion of the reference to the calculation of life-cycle costs, in keeping with the deletion of the most economically advantageous tender criterion. The grantor is free to use any award criteria that he considers to be appropriate, on condition that they comply with the rules laid down in this directive.*

## Amendment 59

### Proposal for a directive

#### Article 2 – paragraph 2

*Text proposed by the Commission*

*Amendment*

***2. The right to exploit the works or services as referred to in points 2, 4 and 7 of the first paragraph shall imply the transfer to the concessionaire of the substantial operating risk. The concessionaire shall be deemed to assume the substantial operating risk where 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.***

***deleted***

***That economic risk may consist in either of the following:***

***a) the risk related to the use of the works or the demand for the provision of the***

*service; or*

***b) the risk related to the availability of the infrastructure provided by the concessionaire or used for the provision of services to users.***

Or. fr

*Justification*

*Integration of the idea of risk into the definition of concession in order to clarify definition and make it more intelligible. Clarification of the concept of operating risk as an economic risk linked to exposure to the vagaries of the market.*

**Amendment 60**

**Proposal for a directive  
Article 3 – paragraph 3**

*Text proposed by the Commission*

**3.** For the purposes of this Directive ‘Contracting authorities’ are State, regional or local authorities, bodies governed by public law, associations formed by one or more such authorities or one or more such bodies governed by public law, other than those awarding a concession for the purpose of pursuing an activity as referred to in Annex III..

*Amendment*

**1.** For the purposes of this Directive ‘Contracting authorities’ are State, regional or local authorities, bodies governed by public law, associations formed by one or more such authorities or one or more such bodies governed by public law, other than those awarding a concession for the purpose of pursuing an activity as referred to in Annex III..

Or. fr

*Justification*

*Wrong numbering of paragraphs in Article 3 in the French version.*

## **Amendment 61**

### **Proposal for a directive Article 3 – paragraph 4**

*Text proposed by the Commission*

*Amendment*

4. 'Regional authorities' include all authorities of the administrative units falling under NUTS 1 and 2, as referred to by Regulation No. (EC) 1059/2003 of the European Parliament and of the Council.

2. 'Regional authorities' include all authorities of the administrative units falling under NUTS 1 and 2, as referred to by Regulation No. (EC) 1059/2003 of the European Parliament and of the Council.

Or. fr

#### *Justification*

*Wrong numbering of paragraphs in Article 3 in the French version.*

## **Amendment 62**

### **Proposal for a directive Article 3 – paragraph 5**

*Text proposed by the Commission*

*Amendment*

5. 'Local authorities' include all authorities of the administrative units falling under NUTS 3 and smaller administrative units, as referred to by Regulation No. 1059/2003.

3. 'Local authorities' include all authorities of the administrative units falling under NUTS 3 and smaller administrative units, as referred to by Regulation No. 1059/2003.

Or. fr

#### *Justification*

*Wrong numbering of paragraphs in Article 3 in the French version.*

## Amendment 63

### Proposal for a directive

#### Article 3 – paragraph 6 –introductory part

##### *Text proposed by the Commission*

6. 'Bodies governed by public law' means bodies that have all of the following characteristics:

##### *Amendment*

4. 'Bodies governed by public law' means bodies that have all of the following characteristics:

Or. fr

##### *Justification*

*Wrong numbering of paragraphs in Article 3 in the French version.*

## Amendment 64

### Proposal for a directive

#### Article 4 – paragraph 1

##### *Text proposed by the Commission*

1. For the purposes of this Directive , "Contracting entities" are one of the following:

(1) state, regional or local authorities, bodies governed by public law, associations formed by one or more such authorities or one or more such bodies governed by public law as defined in paragraphs 2-4 of Article 3.

(2) public undertakings as defined in paragraph 2 of this Article;

(3) entities which are not contracting authorities or public undertakings, **operating** on the basis of special or exclusive rights granted by a competent authority of a Member State

***when they award a concession for the purpose of pursuing one of the activities***

##### *Amendment*

1. For the purposes of this Directive, 'contracting entities' ***are entities which award a concession for the pursuit of one of the activities referred to in Annex III and which*** are one of the following:

(1) state, regional or local authorities, bodies governed by public law, associations formed by one or more such authorities or one or more such bodies governed by public law as defined in paragraphs 2-4 of Article 3.

(2) public undertakings as defined in paragraph 2 of this Article;

(3) entities which are not contracting authorities or public undertakings ***but which operate*** on the basis of special or exclusive rights granted by a competent authority of a Member State.

*as referred to in Annex III.*

Or. fr

*Justification*

*Clarification of the paragraph to make it more intelligible.*

**Amendment 65**

**Proposal for a directive**  
**Article 4 – paragraph 3**

*Text proposed by the Commission*

3. ‘Special or exclusive rights’ mean rights granted by a competent authority of a Member State by way of any legislative, regulatory or administrative provision the effect of which is to limit the exercise of activities defined in Annex III to one or more entities, and which substantially affects the ability of other entities to carry out such activity.

***Rights which have been granted by means of a procedure in which adequate publicity has been ensured and where the granting of those rights was based on objective criteria shall not constitute "special or exclusive rights" within the meaning of this Directive. Such procedure includes:***

***a) procurement procedures with a prior call for competition in conformity with Directive [2004/18/EC or 2004/17/EC] or this Directive***

***b) procedures pursuant to other legislative acts of the Union, listed in Annex XI, ensuring adequate prior transparency for granting authorisations on the basis of objective criteria.***

***The Commission shall be empowered to adopt delegated acts in accordance with Article 46 to modify the list of the Union***

*Amendment*

3. ‘Special or exclusive rights’ mean rights granted by a competent authority of a Member State by way of any legislative, regulatory or administrative provision the effect of which is to limit the exercise of activities defined in Annex III to one or more entities, and which substantially affects the ability of other entities to carry out such activity.

*legislative acts set out in Annex XI where, due to the adoption of new Union legislation or repeal of Union legislation, such modification proves necessary.*

Or. fr

*Justification*

*It seems unnecessary to specify the provision on exclusive rights in the first subparagraph of Article 4(3). The original formulation does not lack clarity.*

**Amendment 66**

**Proposal for a directive  
Article 5**

*Text proposed by the Commission*

*Amendment*

**Article 5**

**deleted**

**Thresholds**

**1. This Directive shall apply to the following concessions the value of which is equal to or greater than EUR 5 000 000:**

- a) concessions concluded by contracting entities for the pursuit of one of the activities referred to in Annex III;**
- b) concessions concluded by contracting authorities.**

**2. Services concessions the value of which is equal to or greater than EUR 2 500 000 but lower than EUR 5 000 000 other than social services and other specific services shall be subject to the obligation to publish a concession award notice in accordance with Articles 27 and 28.**

Or. fr

## Justification

*Simplification of the text; the concessions referred to have already been defined in Article 1 and the integration of Article 5 has been defined in Article 6. Removal of the intermediate threshold of EUR 2.5-5 million specifying the obligation to publish a concession award notice in order to simplify the Directive and exclude any additional bureaucratic charges.*

### Amendment 67

#### Proposal for a directive Article 6

##### *Text proposed by the Commission*

Methods for calculating the estimated value of concessions

1. The calculation of the estimated value of a concession shall be based on ***the total amount payable***, net of VAT, as estimated by the contracting authority or the contracting entity, including any form of option and any extension of the duration of the concession.

2. The estimated value of a concession shall be calculated as the value of an entirety of works or services, ***even if purchased through different contracts, where the contracts*** are part of one single project. ***Indications for the existence of one single project consist in overall prior planning and conception by the contracting authority or contracting***

##### *Amendment*

***Thresholds and*** methods for calculating the estimated value of concessions

***-1. This Directive shall apply to the concessions the value of which is equal to or greater than EUR 5 000 000.***

1. The calculation of the estimated value of a concession shall be based on ***its turnover***, net of taxes, accumulated over the duration of the contract, as estimated by the grantor.

***This estimate shall be valid at the moment at which the concession notice is sent, or, in cases where such notice is not foreseen, at the moment at which the grantor commences the concession award procedure.***

***If the value is changed as a result of negotiations during the award procedure, the valid estimate shall be the estimate indicated at the time of signature of the contract.***

2. The estimated value of a concession shall be calculated as the value of an entirety of works ***and/or*** services ***which*** are part of one single ***concession*** project, including studies. The ***unique nature of the project can for instance be demonstrated by the existence of*** planning and conception by the ***grantor***, the fact that the different elements purchased fulfil a

*entity*, the fact that the different elements purchased fulfil a single economic and technical function or that they are otherwise logically interlinked.

***Where the contracting authority or 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 concession.***

3. 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 works project or an entirety of services shall not be subdivided with the effect of preventing it from falling within the scope of this Directive, unless justified by objective reasons.***

4. ***This estimate shall be valid at the moment at which the concession notice is sent, or, in cases where such notice is not foreseen, at the moment at which the contracting authority or the contracting entity commences the concession award procedure, in particular by defining the essential characteristics of the intended concession.***

5. ***With regard to public works concessions and works concessions, calculation of the estimated value shall take account of both the cost of the works and the total estimated value of the supplies and services that are made available to the contractor by the contracting authorities or entities provided that they are necessary for executing the works.***

6. ***Where a proposed work or purchase of services may result in concessions being awarded at the same time in the form of***

single economic and technical function or that they are otherwise logically interlinked.

3. The ***estimate of the value*** of a concession shall not be made with the intention of excluding it from the scope of this Directive.

***3a. The estimated value of the concession shall be calculated according to an objective method specified in the concession notice.***

*separate lots, account shall be taken of the total estimated value of all such lots.*

*7. Where the aggregate value of the lots is equal to or exceeds the threshold laid down in Article 5, this Directive shall apply to the awarding of each lot.*

*8. Contracting authorities or contracting entities may award concessions for individual lots without applying the provisions on the award provided for under this Directive, provided that the estimated value net of VAT of the lot concerned is less than EUR 1 million. 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 or the proposed purchase of services has been divided.*

*9. The value of services concessions shall be the estimated total value of services to be provided by the concessionaire during the whole duration of the concession, calculated in accordance with an objective methodology which shall be specified in the concession notice or in the concession documents.*

*The basis for calculating the estimated concession value shall, where appropriate, be the following:*

*a) for insurance services: the premium payable and other forms of remuneration;*

*b) for banking and other financial services: fees, commissions, interest and other forms of remuneration;*

*c) for design services: fees, commission payable and other forms of remuneration;*

*10. The value of concessions shall include both the estimated revenue to be received from third parties and the amounts to be paid by the contracting authority or the contracting entity.*

Or. fr

### *Justification*

*Rewording of Article 6 and integration of Article 5 in order to clarify the Directive. The proposed rules are too complex, lack clarity and introduce an unjustified distinction between works and services concessions. Proposal: to have a simple calculating method which is the same whatever the subject of the concession, as the same rules apply to works concessions as to services concessions and the mixed nature of most contracts (works and services) would make it difficult to determine the threshold applicable.*

### **Amendment 68**

#### **Proposal for a directive Article 7**

*Text proposed by the Commission*

*Amendment*

*Article 7*

*deleted*

#### **General principles**

***Contracting authorities and contracting entities shall treat economic operators equally and shall act in a transparent and proportionate way. The design of the concession award procedure shall not be made with the objective of excluding it from the scope of this Directive or of artificially narrowing competition.***

Or. fr

### *Justification*

*Keeps and integrates this article into the section concerning the rules governing the award procedure (new article – 26a).*

### **Amendment 69**

#### **Proposal for a directive Article 8 - paragraph 1**

*Text proposed by the Commission*

*Amendment*

1. This Directive shall not apply to services

1. This Directive shall not apply to services

concessions awarded by a **contracting authority or by a contracting entity** to an economic operator **which is a contracting entity or an association of thereof**, on the basis of an exclusive right that **economic operator** enjoys pursuant to applicable and published national law, regulation or administrative provision, and which has been granted in accordance with the Treaty and Union sectoral legislation **concerning the management of networks infrastructure related to the activities set out in annex III**.

concessions **concerning the management of networks infrastructure related to the activities set out in Annex III or to services concessions for an activity set out in Annex III which, when this Directive enters into force, are the subject of a nationally regulated tariff laid down in law or regulation where such concessions** are awarded to an economic operator on the basis of an exclusive right that **the latter** enjoys pursuant to applicable and published national law, regulation or administrative provision, and which has been granted in accordance with the Treaty and Union sectoral legislation.

**By way of derogation from the first subparagraph, where sectoral legislation referred to in the first subparagraph does not provide for sector specific transparency obligations, the requirements of Article 27 (1) and (3) shall apply**

Or. fr

#### *Justification*

*Extension of the scope of the exclusion concerning services concessions awarded on the basis of an exclusive right and which are subject to a nationally regulated tariff (beyond just networks infrastructure management for the activities set out in Annex III). Justification: state-regulated tariffs mean that the grantor cannot choose the economic operator and that the concession cannot be awarded via a competitive procedure. These rules shall not apply to activities subject to a regulated tariff when the Directive enters into force.*

#### **Amendment 70**

##### **Proposal for a directive Article 8 - paragraph 2**

*Text proposed by the Commission*

*Amendment*

**2. By way of derogation from paragraph 1 of this Article, where sectoral legislation referred to in paragraph 1 of this Article does not provide for sector specific transparency obligations, the**

**deleted**

*requirements of Article 27 (1) and (3)  
shall apply*

Or. fr

*Justification*

*This paragraph is being incorporated into Article 8(1).*

**Amendment 71**

**Proposal for a directive  
Article 8 - paragraph 2 a (new)**

*Text proposed by the Commission*

*Amendment*

***2 a. 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) 1008/2008 of the European Parliament and of the Council<sup>1</sup> or for public passenger transport services within the meaning of Regulation (EC) 1370/2007 of the European Parliament and of the Council<sup>2</sup>.***

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<sup>1</sup> OJ L 293, 31.10.08, p. 3.

<sup>2</sup> OJ L 315, 03.12.07, p. 1.

Or. fr

*Justification*

*Based on Article 8(5)(f) and (g) of the Commission proposal.*

**Amendment 72**

**Proposal for a directive  
Article 8 - paragraph 3**

*Text proposed by the Commission*

*Amendment*

3. This Directive shall not apply to

3. This Directive shall not apply to

concessions which the **contracting authority or a contracting entity** is obliged to award or organise in accordance with **procurement** procedures set out in:

- a) an international agreement concluded in conformity with the Treaty between a Member State and one or more third countries and covering works, **supplies** or services intended for the joint implementation or exploitation of a project by the signatory States;
- b) a concluded international agreement relating to the stationing of troops and concerning the undertakings of a Member State or a third country;
- c) the particular procedure of an international organisation.
- d) where the concessions are fully financed by an international organisation or international financing institution.

***All agreements referred to in point (a) of the first subparagraph shall be communicated to the Commission, which may consult the Advisory Committee for Public Contracts referred to in Article 48.***

***For the purposes of point (d) of the first subparagraph, where a concession is co-financed for a considerable part by an international organisation or international financing institution the parties decide on applicable concession award procedures which shall be in conformity with the provisions of the Treaty on the Functioning of the European Union.***

concessions which the **grantor** is obliged to award or organise in accordance with procedures **for the award of services concession contracts** set out in:

- a) an international agreement concluded in conformity with the Treaty between a Member State and one or more third countries and covering works or services intended for the joint implementation or exploitation of a project by the signatory States;
- b) a concluded international agreement relating to the stationing of troops and concerning the undertakings of a Member State or a third country;
- c) the particular procedure of an international organisation.
- d) where the concessions are fully financed by an international organisation or international financing institution.

Or. fr

#### *Justification*

*Simplification and streamlining of inessential provisions of the Directive.*

## Amendment 73

### Proposal for a directive

#### Article 8 – paragraph 5 – subparagraph 1 – point a

*Text proposed by the Commission*

a) the acquisition *or* rental, by whatever financial means, of land, existing buildings or other immovable property or concerning rights thereon; ***however financial service concessions awarded at the same time as, before or after the contract of acquisition or rental, in whatever form, shall be subject to this Directive;***

*Amendment*

a) the acquisition, rental ***or lease***, by whatever financial means, of land, existing buildings or other immovable property or concerning rights thereon;

Or. fr

*Justification*

*To the rapporteur's knowledge, there is no provision for a concession for financial services. Leasing is an option that was not initially included in the Directive, but that warrants consideration (link with recital 6).*

## Amendment 74

### Proposal for a directive

#### Article 8 – paragraph 5 – subparagraph 1 – point b

*Text proposed by the Commission*

b) the acquisition, development, production or co-production of programme material ***intended for broadcasting, defined as transmission and distribution using any form of electronic network, that are awarded by broadcasters, nor to concessions for broadcasting time, that are awarded to broadcasters;***

*Amendment*

b) the acquisition, development, production or co-production of programme material ***and related preparatory services for media services that are provided by broadcasters, nor to concessions for broadcasting time that are awarded to broadcasters; media services being defined as including all transmission and distribution using any form of electronic network;***

Or. fr

*Justification*

*This paragraph has been rewritten to take account of technological progress in the media.*

**Amendment 75**

**Proposal for a directive**

**Article 8 – paragraph 5 – subparagraph 1 – point c a (new)**

*Text proposed by the Commission*

*Amendment*

***ca) gambling activities involving a financial risk through investing a sum of money in games of chance (lotteries, betting), run by a single body, which, in accordance with the Treaties, has been awarded exclusive rights by one or more Member States pursuant to applicable and published national laws, regulations or administrative provisions;***

Or. fr

*Justification*

*Exclusion of gambling activities under certain conditions (activities run by a single body awarded exclusive rights by the competent national authorities for betting and lotteries). This exclusion is justified on the grounds that Member States must be allowed to retain oversight of this activity for public-interest reasons (combating illegal gambling, fraud, money laundering and addiction) and therefore need flexibility to be able to act as appropriate.*

**Amendment 76**

**Proposal for a directive**

**Article 8 - paragraph 5 – subparagraph 1 – point d**

*Text proposed by the Commission*

*Amendment*

***d) financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments within the meaning of Directive***

***deleted***

**2004/39/EC of the European Parliament and of the Council, central bank services and operations conducted with the European Financial Stability Facility (EFSF);**

Or. fr

*Justification*

*Simplification of the Directive by removing a passage that is a mere copy-paste from the directives on public procurement. There are no concessions for such services, to the rapporteur's knowledge.*

**Amendment 77**

**Proposal for a directive  
Article 8 - paragraph 5 – subparagraph 1 – point e**

*Text proposed by the Commission*

*Amendment*

**e) employment contracts;**

**deleted**

Or. fr

*Justification*

*Simplification of the Directive by removing a passage that is a mere copy-paste from the directives on public procurement. There are no concessions for such services, to the rapporteur's knowledge.*

**Amendment 78**

**Proposal for a directive  
Article 8 - paragraph 5 – subparagraph 1 – point f**

*Text proposed by the Commission*

*Amendment*

**f) Air transport services based on the grant of an operating licence within the meaning of Regulation (EC) 1008/2008 of the European Parliament and of the Council ;**

**deleted**

*Justification*

*Reorganisation of Article 8 of the Directive to refer to sector-specific exclusions under EU legislation (paragraph 2(a) (new)).*

**Amendment 79**

**Proposal for a directive**

**Article 8 - paragraph 5 – subparagraph 1 – point g**

*Text proposed by the Commission*

*Amendment*

***g) Public passenger transport services within the meaning of Regulation (EC) 1370/2007 of the European Parliament and of the Council.*** ***deleted***

*Justification*

*Reorganisation of Article 8 of the Directive to refer to sector-specific exclusions under EU legislation (paragraph 2(a) (new)). The definition of a services concession enshrined in Regulation (EC) No 1370/2007 applies under Article 50 of this Directive.*

**Amendment 80**

**Proposal for a directive**

**Article 8 – paragraph 5 – subparagraph 2**

*Text proposed by the Commission*

*Amendment*

***The broadcasting referred to in point (b) of the first paragraph shall include any transmission and distribution using any form of electronic network.*** ***deleted***

*Justification*

*This paragraph has been incorporated into Article 8(5)(b).*

**Amendment 81**

**Proposal for a directive  
Article 8 - paragraph 5 a (new)**

*Text proposed by the Commission*

*Amendment*

***5 a. This Directive shall not apply to concessions awarded by contracting entities for purposes other than the pursuit of their activities as described in Annex III 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.***

Or. fr

*Justification*

*Reorganisation and simplification of the Directive (incorporation of Article 10(1) into Article 8(5(a) (new)).*

**Amendment 82**

**Proposal for a directive  
Article 9 - paragraph 1**

*Text proposed by the Commission*

*Amendment*

***I.*** 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.

This Directive shall not apply to concessions for the principal purpose of permitting the contracting authorities to provide or exploit public communications networks ***as defined in Article 2(d) of 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*<sup>1</sup>, or to provide to the public one or more electronic communications services *as defined in Article 2(c) of that directive*.

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<sup>1</sup> OJ L 108, 24.4.2002, p. 33.

Or. fr

### *Justification*

*Simplification of the Directive by replacing the definitions with references to the relevant legislation (Directive 2002/21/EC).*

## **Amendment 83**

### **Proposal for a directive Article 9 - paragraph 2**

*Text proposed by the Commission*

*Amendment*

**2. For the purposes of this Article:**

*deleted*

**(a) 'public communications network' means an electronic communications network used wholly or mainly for the provision of electronic communications services available to the public which support the transfer of information between network termination points;**

**(b) 'electronic communications network' means transmission systems and, where applicable, switching or routing equipment and other resources, including network elements which are not active, which permit the conveyance of signals by wire, radio, optical or other electromagnetic means, including satellite networks, fixed (circuit and packet-switched, including Internet) and mobile terrestrial networks, electricity cable systems, to the extent that they are used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television**

*networks, irrespective of the type of information conveyed ;*

*(c) a ‘network termination point’ (NTP) means the physical point at which a subscriber is provided with access to a public communications network; in the case of networks involving switching or routing, the NTP is identified by means of a specific network address, which may be linked to a subscriber number or name;*

*(d) ‘electronic communications services’ means a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting, but exclude services providing, or exercising editorial control over, content transmitted using electronic communications networks and services; it does not include information society services, as defined in Article 1 of Directive 98/34/EC, which do not consist wholly or mainly in the conveyance of signals on electronic communications networks.*

Or. fr

*Justification*

*Simplification of the Directive replacing the definitions with references to the relevant legislation (Directive 2002/21/EC).*

**Amendment 84**

**Proposal for a directive  
Article 10**

*Text proposed by the Commission*

*Amendment*

*Article 10*

*deleted*

*Exclusions applicable to concessions*

*awarded by contracting entities*

**1. This Directive shall not apply to concessions awarded by contracting entities for purposes other than the pursuit of their activities as described in Annex III 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.**

**2. Contracting entities shall notify the Commission or the national oversight body at their request of any activities which they regard as excluded. 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.**

Or. fr

*Justification*

*Reincorporation of the provisions of Article 10(1) into Article 8, concerning exclusions applicable to concessions awarded by contracting authorities and/or entities, to simplify and clarify the text. Reincorporation of the provisions of Article 10(2) into Article 13, concerning the information provided by contracting entities, to simplify and clarify the text.*

**Amendment 85**

**Proposal for a directive  
Article 11 - paragraph -1 (new)**

*Text proposed by the Commission*

*Amendment*

***-1. Article 15 notwithstanding and provided that the conditions in paragraphs 1 and 4 are met, this Directive shall not apply to the following concessions:***

*a) concessions awarded by a contracting entity to an affiliated undertaking;*

*b) concessions awarded by a joint venture, formed exclusively by a number of contracting entities for the purpose of carrying out activities described in Annex III, to an undertaking which is affiliated to one of those contracting entities.*

Or. fr

### *Justification*

*Reorganisation and clarification of the entire Article with a view to stating unambiguously: (1) the subject of the Article (the exclusion of certain concessions); (2) the definition of an affiliated undertaking (which was previously spread over two paragraphs (11(1) and 11(2) whose relationship was unclear); (3) the conditions governing these exclusions.*

### **Amendment 86**

#### **Proposal for a directive Article 11 - paragraphs 1 and 2**

##### *Text proposed by the Commission*

1. For the purposes of this Article, "affiliated undertaking" means any undertaking the annual *account* of which are consolidated with those of the contracting entity in accordance with the requirements of the Seventh Council Directive 83/349/EEC.

**2. In the case of entities not subject to that Directive, "affiliated undertaking" shall mean any undertaking that :**

**a)** may be, directly or indirectly, subject to a dominant influence by the contracting entity *within the meaning of the second*

##### *Amendment*

1. For the purposes of this Article, "affiliated undertaking" means:

**a)** any undertaking the annual *accounts* of which are consolidated with those of the contracting entity in accordance with the requirements of the Seventh Council Directive 83/349/EEC; **or**

**b) any undertaking finding itself to be in any of the following situations:**

**i) that** may be, directly or indirectly, subject to a dominant influence by the

*paragraph of Article 4 of this Directive;*

*b) may exercise a dominant influence over the contracting entity;*

*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.*

contracting entity

*ii) that may exercise a dominant influence over the contracting entity;*

*iii) that, 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.*

***The notion of dominant influence is defined in the second subparagraph of Article 4(2).***

Or. fr

### *Justification*

*Reorganisation and clarification of the entire Article with a view to stating unambiguously: (1) the subject of the Article (the exclusion of certain concessions); (2) the definition of an affiliated undertaking (which was previously spread over two paragraphs (11(1) and 11(2) whose relationship was unclear); (3) the conditions governing these exclusions. the phrase 'within the meaning of the second paragraph of Article 4 of this Directive' has been deleted and moved so as to make it clear what it refers to ('dominant influence' rather than 'the contracting entity')*

### **Amendment 87**

#### **Proposal for a directive Article 11 - paragraph 3**

*Text proposed by the Commission*

*Amendment*

***3. Article 15 notwithstanding and provided that the conditions in paragraph 4 are met, this Directive shall not apply to the following concessions:***

***deleted***

***a) concessions awarded by a contracting entity to an affiliated undertaking;***

***b) concessions awarded by a joint venture, formed exclusively by a number of contracting entities for the purpose of carrying out activities described in Annex III, to an undertaking which is affiliated with one of those contracting entities.***

*Justification*

*Reorganisation and clarification of the entire Article with a view to stating unambiguously: (1) the subject of the Article (the exclusion of certain concessions); (2) the definition of an affiliated undertaking (which was previously spread over two paragraphs (11(1) and 11(2) whose relationship was unclear); (3) the conditions governing these exclusions.*

**Amendment 88****Proposal for a directive  
Article 11 - paragraph 4***Text proposed by the Commission**Amendment*

4. Paragraph 3 shall apply:

a) to service concessions provided that at least 80 % of the average total turnover of the affiliated undertaking ***with respect to services in general for*** the preceding three years derives from the provision of services to ***undertakings with which it is affiliated***;

b) works concessions provided that at least 80 % of the average total turnover of the affiliated undertaking ***with respect to works in general*** for the preceding three years derives from the provision of works to ***undertakings with which it is affiliated***.

4. Paragraph ***-1*** shall apply:

a) to service concessions provided that at least 80 % of the average total turnover of the affiliated undertaking, ***taking into account all services provided by that undertaking over*** the preceding three years, derives from the provision of services to ***the contracting entity to which the undertaking is affiliated, or to the contracting entity which is itself subject to the dominant influence of another undertaking to which the undertaking granted the concession is affiliated***;

b) to works concessions provided that at least 80 % of the average total turnover of the affiliated undertaking, ***taking into account all works carried out by that undertaking over*** the preceding three years, derives from the provision of works to ***the contracting entity to which the undertaking is affiliated, or to the contracting entity which is itself subject to the dominant influence of another undertaking to which the undertaking granted the concession is affiliated***.

### *Justification*

*Necessary clarification regarding exclusions for affiliated undertakings. All services provided by the affiliated undertaking must be taken into account when calculating this amount of 80% of turnover (services provided to the contracting entity + other services). A link must also be made between this 80% of the affiliated undertaking's turnover and the contracting entity that awarded the concession to the affiliated undertaking, regardless of whether it is directly affiliated or subject to the dominant influence of another undertaking affiliated to the undertaking granted the concession.*

### **Amendment 89**

#### **Proposal for a directive Article 11 - paragraph 5**

*Text proposed by the Commission*

*Amendment*

**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, particularly by means of business projections.** *deleted*

Or. fr

### *Justification*

*Paragraph deleted because its provisions could be open to abuse.*

### **Amendment 90**

#### **Proposal for a directive Article 11 - paragraph 6**

*Text proposed by the Commission*

*Amendment*

**6. Where more than one undertaking affiliated with the contracting entity provides the same or similar services, supplies or works, the above percentages** *deleted*

*referred to in paragraph 4 shall be calculated taking into account the total turnover deriving respectively from the provision of services, supplies or works by those affiliated undertakings.*

Or. fr

*Justification*

*Paragraph deleted to clarify and simplify the Article.*

**Amendment 91**

**Proposal for a directive  
Article 13 – paragraph -1 (new)**

*Text proposed by the Commission*

*Amendment*

***-1. The contracting entities shall notify the Commission or the competent national authority, at their request, of any activities which they regard as excluded pursuant to Article 8(5)(a). The Commission may periodically publish in the Official Journal of the European Union for information purposes, lists of the categories of activities which it deems 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.***

Or. fr

*Justification*

*Reorganisation and simplification of the Directive by incorporating all provisions on information concerning exclusions under the Directive that the contracting entities have to provide (the existing Article 13 is left untouched and Article 10(2) is added).*

## Amendment 92

### Proposal for a directive Article 13

#### *Text proposed by the Commission*

Contracting entities shall notify to the Commission or the national **oversight body**, at their request, the following information regarding the application of paragraphs **2 and 3** of Article 11 and of Article 12.

- 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 or the national **oversight body** that the relationship between the undertaking or joint venture to which the concessions are awarded and the contracting entity complies with the requirements of Articles 11 or 12.

#### *Amendment*

**2.** Contracting entities shall notify to the Commission or the **competent national authority**, at their request, the following information regarding the application of paragraphs **-1 and 1(b)** of Article 11 and of Article 12.

- 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 or the **competent national authority** that the relationship between the undertaking or joint venture to which the concessions are awarded and the contracting entity complies with the requirements of Articles 11 or 12.

Or. fr

#### *Justification*

*Reorganisation and simplification of the Directive by incorporating all provisions on information concerning exclusions under the Directive that the contracting entities have to provide (the existing Article 13 is left untouched and Article 10(2) is added).*

## Amendment 93

### Proposal for a directive Article 14

#### *Text proposed by the Commission*

***This Directive shall not apply to concessions*** awarded by contracting entities ***where, in the Member State in which such concessions are performed*** the activity is directly exposed to competition

#### *Amendment*

***Concessions*** awarded by contracting entities ***and performed in a Member State in which*** the activity is directly exposed to competition in accordance with Article 27 and 28 of Directive [replacing Directive

in accordance with Article 27 and 28 of Directive [replacing Directive 2004/17/EC].

2004/17/EC] **shall not be considered to be concessions within the meaning of this Directive.**

Or. fr

#### *Justification*

*Clarification of the Article. The original wording would appear to suggest that, if there is free competition in the utilities sector, the Directive does not apply to the concession contracts concerned. In fact, in such cases, these contracts are not concessions but contracts under which a public authority or a private undertaking granted special or exclusive rights acts like any other economic operator in the market.*

### **Amendment 94**

#### **Proposal for a directive**

#### **Article 15 - paragraph 1 – subparagraph 1 – point a**

##### *Text proposed by the Commission*

a) such an authority or entity exercises over the legal person concerned a control which is **similar** to that which it exercises over its own departments

##### *Amendment*

a) such an authority or entity exercises over the legal person concerned a control which is **equivalent** to that which it exercises over its own departments, ***i.e. it exercises a decisive influence over both strategic objectives and significant decisions of the controlled legal person. With a view to determining whether such control is being exercised, account may also be taken of factors such as the level of representation on administrative, management or supervisory bodies, the relevant provisions of the articles of association or the ownership arrangements***

Or. fr

#### *Justification*

*Clarification of the criteria which are used to define ‘in-house’ contracts and which justify the exclusion of such contracts from the scope of the Directive. The term ‘equivalent control’ is drawn from the case law of the CJEU and strengthens the criterion relating to the control exercised by the contracting authority over the controlled entity. The concept of equivalent control is also clarified by taking over elements of Regulation (EC) No 1370/2007 (public*

passenger transport) designed to facilitate the identification of cases where such control is being exercised.

## Amendment 95

### Proposal for a directive

#### Article 15 - paragraph 1 – subparagraph 1 – point b

*Text proposed by the Commission*

*Amendment*

b) at least 90% of **the activities** of that legal person **are** carried out for the controlling contracting authority or entity or for other legal persons controlled by that contracting authority or entity

b) at least 90% of the **average total turnover** of that legal person **is generated by means of activities** carried out for the controlling contracting authority or entity or for other legal persons controlled by that contracting authority or entity

Or. fr

#### *Justification*

*Clarification of the criteria which are used to define ‘in-house’: the phrase ‘90 % of the activities’ clarifies one of the terms used in the case law (‘most of the activities’) but not the other, hence the proposal to include the phrase ‘90 % of the turnover’.*

## Amendment 96

### Proposal for a directive

#### Article 15 - paragraph 1 – subparagraph 2

*Text proposed by the Commission*

*Amendment*

***A contracting authority or a contracting entity as referred to in paragraph 1 subparagraph 1 of Article 4 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.***

***deleted***

*Justification*

*Clarification of the criteria which are used to define ‘in-house’ contracts and which justify the exclusion of such contracts from the scope of the Directive. ‘Similar control’ replaced by ‘equivalent control’ and incorporated into Article 15(1)(a).*

**Amendment 97****Proposal for a directive  
Article 15 - paragraph 2***Text proposed by the Commission*

2. Paragraph 1 also applies where a controlled entity which is a contracting authority or contracting entity as referred to in paragraph 1 subparagraph 1 of Article 4 awards a concession to its controlling entity, or to another legal person controlled by the same contracting authority, provided that there is no private participation in the legal person being awarded the public concession.

*Amendment*

2. Paragraph 1 also applies where a controlled entity which is a contracting authority or contracting entity as referred to in paragraph 1 subparagraph 1 of Article 4 awards a concession to its controlling entity, or to another legal person controlled by the same contracting authority **or contracting entity**, provided that there is no private participation in the legal person being awarded the public concession.

*Justification*

*Addition of a reference to the contracting entity which had been left out at this point in the text (reverse in-house).*

**Amendment 98****Proposal for a directive  
Article 15 - paragraph 3 – subparagraph 1 – introductory part***Text proposed by the Commission*

3. A contracting authority or a contracting entity as referred to in paragraph 1 subparagraph 1 of Article 4, which does

*Amendment*

3. A contracting authority or a contracting entity as referred to in paragraph 1 subparagraph 1 of Article 4, which does

not exercise over a legal person control within the meaning of paragraph **I**, may nevertheless award a concession without applying the provisions of the current Directive to a legal person which it controls jointly with other such contracting authorities or entities, where the following conditions are fulfilled:

not exercise over a legal person control within the meaning of paragraph **1(a) of this Article**, may nevertheless award a concession without applying the provisions of the current Directive to a legal person which it controls jointly with other such contracting authorities or entities **within the meaning of Article 4(1)(1)**, where the following conditions are fulfilled:

Or. fr

### *Justification*

*Clarification of the criteria which are used to define joint 'in-house' contracts and which justify the exclusion of such contracts from the scope of the Directive.*

## **Amendment 99**

### **Proposal for a directive**

#### **Article 15 - paragraph 3 – subparagraph 1 – point a**

##### *Text proposed by the Commission*

a) the contracting authorities or entities as referred to in paragraph 1 subparagraph 1 of Article 4 exercise jointly over the legal person a control which is **similar** to that which it exercises over its own departments.

##### *Amendment*

a) the contracting authorities or entities as referred to in paragraph 1 subparagraph 1 of Article 4 exercise jointly over the legal person a control which is **equivalent** to that which it exercises over its own departments, ***i.e. they exercise a decisive influence over both strategic objectives and significant decisions of the controlled legal person. With a view to determining whether such control is being exercised, account may also be taken of factors such as the level of representation on administrative, management or supervisory bodies, the relevant provisions of the articles of association or the ownership arrangements;***

Or. fr

### *Justification*

*Clarification of the criteria which are used to define joint ‘in-house’ contracts and which justify the exclusion of such contracts from the scope of the Directive. The term ‘equivalent control’ is drawn from the case law of the CJEU and strengthens the criterion relating to the control exercised by the contracting authority over the controlled entity. The concept of equivalent control is also clarified by taking over elements of Regulation (EC) No 1370/2007 (public passenger transport) designed to facilitate the identification of cases where such control is being exercised.*

### **Amendment 100**

#### **Proposal for a directive**

#### **Article 15 - paragraph 3 – subparagraph 1 – point b**

##### *Text proposed by the Commission*

b) at least 90% of the **activities** of that legal person **are carried out** for the controlling contracting authorities or entities as referred to in paragraph 1 subparagraph 1 of Article 4 or other legal persons controlled by the same contracting authority or entity;

##### *Amendment*

b) at least 90% of the **average total turnover** of that legal person **is generated by means of activities** for the controlling contracting authorities or entities as referred to in paragraph 1 subparagraph 1 of Article 4 or other legal persons controlled by the same contracting authority or entity;

Or. fr

### *Justification*

*Clarification of the criteria which are used to define joint ‘in-house’ contracts and which justify the exclusion of such contracts from the scope of the Directive. The phrase ‘90 % of the activities’ clarifies one of the terms used in the case law (‘most of the activities’) but not the other, hence the proposal to include the phrase ‘90 % of the turnover’.*

### **Amendment 101**

#### **Proposal for a directive**

#### **Article 15 - paragraph 3 – subparagraph 2 – point d**

##### *Text proposed by the Commission*

d) the controlled legal person does not draw any gains other than the

##### *Amendment*

d) the controlled legal person does not draw any gains other than the

reimbursement of actual costs from the **public contracts** with the contracting authorities.

reimbursement of actual costs from the **concessions** with the contracting authorities **or the contracting entities within the meaning of paragraph 1, subparagraph 1 of Article 4.**

Or. fr

*Justification*

*Harmonisation of the terminology with the rest of the Directive and reference to the contracting entities, which had been omitted from the commission proposal.*

**Amendment 102**

**Proposal for a directive  
Article 15 - paragraph 4 – introductory part**

*Text proposed by the Commission*

4. An agreement concluded between two or more contracting authorities or contracting entities as referred to in paragraph 1 subparagraph 1 of Article 4 shall not be deemed to be a concession ***within the meaning of point 1 of paragraph 1 of Article 2 of this Directive***, where the following cumulative conditions are fulfilled:

*Amendment*

4. An agreement concluded between two or more contracting authorities or contracting entities as referred to in paragraph 1 subparagraph 1 of Article 4 shall not be deemed to be a concession where the following cumulative conditions are fulfilled:

Or. fr

*Justification*

*Deletion of the reference to the definition of a concession, this is superfluous as the definition made in Article 2 applies each time the term ‘concession’ is used.*

## Amendment 103

### Proposal for a directive Article 15 - paragraph 4 – point a

*Text proposed by the Commission*

*Amendment*

**(a)** the agreement establishes a genuine co-operation between the participating contracting authorities or entities aimed at carrying out jointly their public service tasks and involving mutual rights and obligations of the parties;

*Does not apply to English text.*

Or. fr

## Amendment 104

### Proposal for a directive Article 15 - paragraph 4 a (new)

*Text proposed by the Commission*

*Amendment*

***4a. This Directive shall not apply to agreements concluded between several contracting authorities or contracting entities as defined in Article 4(1)(1), or groupings of contracting authorities or contracting entities as defined in Article 4(1)(1) which make provision, in the context of the internal organisation of a Member State, for the transfer of powers between the parties with a view to the performance of a public service task.***

***There shall be no private participation in any of the contracting authorities or entities involved.***

Or. fr

### *Justification*

*The explicit exclusion of horizontal cooperation (Article 15(4)) raises doubts as to the status under the directive of arrangements for the transfer of powers between public authorities ('intercommunality' under French law), which are not explicitly excluded. Accordingly, a*

*new paragraph is being proposed which would exclude such arrangements.*

## **Amendment 105**

### **Proposal for a directive Article 15 - paragraph 5**

*Text proposed by the Commission*

5. The absence of private participation referred to in paragraphs 1 to 4 shall be verified at the time of the award of the concession or of the conclusion of the agreement.

*Amendment*

5. The absence of private participation referred to in paragraphs 1 to **4(a)** shall be verified at the time of the award of the concession or of the conclusion of the agreement.

Or. fr

## **Amendment 106**

### **Proposal for a directive Article 16**

*Text proposed by the Commission*

The duration of *the concession* shall be limited *to the time estimated to be necessary for the concessionaire to recoup the investments made in operating* the works or services *together with* a *reasonable* return on invested capital.

*Amendment*

**1. The duration of concessions** shall be limited. **The grantor shall estimate the duration on the basis of** the works or services **requested.**

***When the cost of investments must be met by the concessionaire, the duration of a concession shall reflect the nature and amount of the investments involved and may not, under these circumstances, exceed the normal amortisation period.***

***If the concessionaire is not required to make investments, the duration of the concession shall reflect the amount of time deemed necessary to meet the objectives set in the contract, in particular as regards the provision of the service in question.***

**2. The normal amortisation period shall correspond to the time that concessionaires could reasonably be expected to take to recoup their operating and investment costs and secure a reasonable return on invested capital.**

Or. fr

*Justification*

*This amendment stresses that the concession is for a limited time period. The original wording also failed to take account of the fact that the 'the investments made in operating the works or services' referred neither to initial investments nor to concessions without material investments likely to be amortised (which is why other criteria such as performance of the contract have been added).*

**Amendment 107**

**Proposal for a directive  
Article 17**

*Text proposed by the Commission*

Concessions for social and other specific services listed in Annex X ***falling within the scope*** of this Directive shall be subject to the obligation of ***paragraph 3 of Art. 26 and of paragraph 1*** of Article 27.

*Amendment*

Concessions for social and other specific services listed in Annex X of this Directive shall be subject ***only*** to the obligation of ***paragraphs 1 and 3*** of Article 27.

Or. fr

*Justification*

*This amendment stresses that concessions for social and other specific services are subject only to provisions requiring the publication of a contract award notice (transparency). The original wording was ambiguous as to whether other provisions applied to such services. The prior information notice has also been deleted in order to cut red tape in the procedure that adds no value for this type of service.*

**Amendment 108**

**Proposal for a directive  
Article 18 - title**

*Text proposed by the Commission*

*Amendment*

Mixed *concessions*

Mixed *contracts*

Or. fr

**Amendment 109**

**Proposal for a directive  
Article 18 – paragraph 1**

*Text proposed by the Commission*

*Amendment*

**1. *Contracts which have as their object both services and supplies shall be awarded in accordance with this Directive where the main object of the contract in question are services and where they are concessions within the meaning of point (1) of the first paragraph of Article 2***

**1. *Where contracts have as their object concessions covered by this Directive as well as procurement or other elements not covered by it, the part of the contract which constitutes a concession covered by this Directive shall be awarded in accordance with the provisions thereof.***

***Where the different parts of the contract in question are not separable, the application of this Directive shall be determined by the main subject of that contract, established on the basis of the respective values of the concession, the items to be procured or other elements not covered by the Directive.***

Or. fr

*Justification*

*Clarification and simplification of the Article, which refers to a set of specific cases of mixed contracts that can be summed up in a new paragraph 1 (contracts for concessions covered by this Directive as well as procurement or other elements not covered by it, such as public procurement), with a course of action to follow if the various parts of the contract cannot be separated (application of the rule of primacy of the main subject of the contract).*

## Amendment 110

### Proposal for a directive Article 18 - paragraph 2

*Text proposed by the Commission*

2. **Concessions which have as *their* object both services within the meaning of Article 17 and other services *shall be awarded in accordance with* the provisions *applicable to* the type of service that characterises the main object of the contract in question.**

*Amendment*

2. **Where a services concession contract falling within the scope of this Directive has as *its* object both services within the meaning of Article 17 and other services, the provisions *of this Directive shall apply in the basis of* the type of service that characterises the main object of the contract in question, *determined by reference to the respective costs of the services concerned.***

Or. fr

#### *Justification*

*Clarification of the paragraph on mixed contracts for social specific and other types of services, and arrangements to determine which provision should apply.*

## Amendment 111

### Proposal for a directive Article 18 - paragraph 3

*Text proposed by the Commission*

3. **In the case of mixed contracts referred to in paragraphs 1 and 2, the main object shall be determined by a comparison of the values of the respective services or supplies.**

*Amendment*

*deleted*

Or. fr

#### *Justification*

*Provisions incorporated into paragraphs 1 and 2 of Article 18.*

## Amendment 112

### Proposal for a directive Article 18 - paragraph 4

*Text proposed by the Commission*

*Amendment*

**4. Where contracts have as their object concessions covered by this Directive as well as procurement or other elements not covered by it nor by Directives [replacing 2004/17/EC and Directive 2004/18] or 2009/81/EC, the part of the contract which constitutes a concession covered by this Directive shall be awarded in accordance with this Directive. However, when the different parts of the contract are objectively not separable, the application of this Directive shall be determined on the basis of the main subject of that contract.** *deleted*

Or. fr

#### *Justification*

*Clarification and simplification of the Article, which refers to a set of specific cases of mixed contracts that can be summed up in a new paragraph 1 (contracts for concessions covered by this Directive as well as procurement or other elements not covered by it, such as public procurement), with a course of action to follow if the various parts of the contract cannot be separated (application of the rule of primacy of the main subject of the contract).*

## Amendment 113

### Proposal for a directive Article 18 - paragraph 5

*Text proposed by the Commission*

*Amendment*

**5. In the case of concessions subject to this Directive and contracts subject to [Directive 2004/18/EC or 2004/17/EC] or 2009/81/EC, the part of the contract which constitutes a concession covered by this Directive shall be awarded in** *deleted*

*accordance with the provisions thereof.*

*Where the different parts of such contracts are not objectively separable, the application of this Directive shall be determined on the basis of the main subject of that contract.*

Or. fr

#### *Justification*

*Clarification and simplification of the Article, which refers to a set of specific cases of mixed contracts that can be summed up in a new paragraph 1 (contracts for concessions covered by this Directive as well as procurement or other elements not covered by it, such as public procurement), with a course of action to follow if the various parts of the contract cannot be separated (application of the rule of primacy of the main subject of the contract).*

#### **Amendment 114**

##### **Proposal for a directive Article 19 - paragraph 1**

###### *Text proposed by the Commission*

1. A concession which is intended to cover several activities shall be subject to the rules applicable to the activity for which it is principally intended.

**However, the** choice between awarding a single concession and awarding a number of separate concessions may not be made with the objective of excluding **it** from the scope of this Directive.

###### *Amendment*

1. A concession which is intended to cover several activities shall be subject to the rules applicable to the activity for which it is principally intended.

**The** choice between awarding a single concession and awarding a number of separate concessions may not be made with the objective of excluding **the concession** from the scope of this Directive.

Or. fr

#### **Amendment 115**

##### **Proposal for a directive Article 19 - paragraph 2**

###### *Text proposed by the Commission*

2. Where one of the activities for which the

###### *Amendment*

2. Where one of the activities for which the

concession **subject to the provisions of** this Directive is intended is listed in Annex III and the other is not listed therein and where it is objectively impossible to determine for which activity the concession is principally intended, the concession shall be awarded in accordance with the provisions applicable to concessions awarded by contracting authorities.

concession **coming under** this Directive is intended is listed in Annex III and the other is not listed therein and where it is objectively impossible to determine for which activity the concession is principally intended, the concession shall be awarded in accordance with the provisions applicable to concessions awarded by contracting authorities.

Or. fr

### **Amendment 116**

#### **Proposal for a directive Article 19 – paragraph 3**

##### *Text proposed by the Commission*

3. If one of the activities for which **the contract or** the concession is intended is subject to this Directive and the other is not subject to **either** this Directive **or [Directive 2004/18/EC or 2004/17/EC] or 2009/81/EC** and if it is objectively impossible to determine for which activity **the contract or** the concession is principally intended, **the contract or** the concession shall be awarded in accordance with this Directive.

##### *Amendment*

3. If one of the activities for which the concession is intended is subject to this Directive and the other is not subject to this Directive and if it is objectively impossible to determine for which activity the concession is principally intended, the concession shall be awarded in accordance with this Directive.

Or. fr

### **Amendment 117**

#### **Proposal for a directive Article 21 – paragraph 1**

##### *Text proposed by the Commission*

**1. This Directive shall apply to service concessions for research and development services with CPV reference numbers 73000000-2 to 73436000-7, except**

##### *Amendment*

**deleted**

**7320000-4, 7321000-7 or 7322000-0, provided that the following conditions are both fulfilled:**

**a) the benefits accrue exclusively to the contracting authority or contracting entity for use in the conduct of its own affairs,**

**b) the service provided is wholly remunerated by the contracting authority or contracting entity**

Or. fr

*Justification*

*Clarification and simplification of the article, which in its French version, at least, was unreadable.*

**Amendment 118**

**Proposal for a directive  
Article 21 - paragraph 2**

*Text proposed by the Commission*

2. This Directive shall not apply to public service concessions for research and development services with CPV reference numbers 73000000-2 to 73436000-7, except 73200000-4, 73210000-7 or 73220000-0 **where one of the above conditions is not met.**

*Amendment*

2. This Directive shall not apply to public service concessions for research and development services with CPV reference numbers 73000000-2 to 73436000-7, except 73200000-4, 73210000-7 or 73220000-0.

Or. fr

*Justification*

*Clarification and simplification of the article, which in its French version, at least, was unreadable.*

## Amendment 119

### Proposal for a directive Article 22 – paragraph -1 (new)

*Text proposed by the Commission*

*Amendment*

***-1. The legal personality of the economic operators shall not constitute a valid ground for rejection in the framework of a concession contract award procedure.***

Or. fr

*Justification*

*Simplification of the paragraph stating simply that the legal personality of the economic operators (natural persons, legal persons) cannot be a ground for rejection in the context of a concession award procedure.*

## Amendment 120

### Proposal for a directive Article 22 - paragraph 1

*Text proposed by the Commission*

*Amendment*

***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 concession is awarded, they would be required to be either natural or legal persons.*** ***deleted***

Or. fr

*Justification*

*Incorporation of this paragraph into the previous paragraph (Article 22(-1)) due to the logical link between the two provisions.*

## Amendment 121

### Proposal for a directive Article 22 - paragraph 2

*Text proposed by the Commission*

2. However, legal persons may be required to indicate in the **tender or the application**, the names and relevant professional qualifications of the staff to be responsible for the performance of the concession in question.

*Amendment*

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

Or. fr

## Amendment 122

### Proposal for a directive Article 22 - paragraph 3

*Text proposed by the Commission*

3. Groups of economic operators may **submit tenders or** put themselves forward as candidates.

*Amendment*

2. Groups of economic operators may put themselves forward as candidates **or submit tenders. Their participation in a concession award procedure may not be subject to additional conditions that are not imposed on individual candidates.**

Or. fr

## Amendment 123

### Proposal for a directive Article 22 - paragraph 3 a (new)

*Text proposed by the Commission*

*Amendment*

**3a. Grantors may establish specific conditions for the performance of the concession by a group of economic operators, provided that those conditions are justified by objective reasons and**

*proportionate.*

Or. fr

**Amendment 124**

**Proposal for a directive  
Article 22 - paragraph 4**

*Text proposed by the Commission*

*Amendment*

**4. Contracting authorities and contracting entities shall not establish specific conditions for participation of such groups in concession award procedures which are not imposed on individual candidates. In order to submit an application or a tender, these groups shall not be required by the contracting authorities or contracting entities to assume a specific legal form.** *deleted*

*Contracting authorities and contracting entities may establish specific conditions for the performance of the concession by a group, provided that those conditions are justified by objective reasons and proportionate. Those conditions may require a group to assume a specific legal form once it has been awarded the contract, to the extent that this change is necessary for the satisfactory performance of the concession.*

Or. fr

*Justification*

*Incorporation of the first part of the paragraph into the previous paragraph (Article 22(2) new) due to the logical link between the two provisions (authorisation for groups to present applications or submit tenders and impossibility of imposing specific conditions on these groups which are not imposed on individual candidates or tenderers).*

## Amendment 125

### Proposal for a directive Article 24 - paragraph 1

#### *Text proposed by the Commission*

1. Unless otherwise provided in this Directive or in the national law concerning access to information, and without prejudice to the obligations relating to the advertising of awarded contracts and to the information to candidates and tenderers set out in Articles 27 and 35 of this Directive, the **contracting authority** 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.**

#### *Amendment*

1. Unless otherwise provided in this Directive or in the national law 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 27 and 35 of this Directive, the **grantor** shall not disclose information forwarded to it by economic operators, **in particular** technical or trade secrets.

***Failure to comply with this requirement shall render the grantor liable.***

Or. fr

#### *Justification*

*Reinforcement of the provisions on the confidentiality of the information supplied by candidates or tenderers to the grantor during the award procedure. These obligations apply to both contracting authorities and contracting entities. The grantor is rendered liable if sensitive information, such as technical or trade secrets, is disclosed.*

## Amendment 126

### Proposal for a directive Article 24 - paragraph 2

#### *Text proposed by the Commission*

2. **Contracting authorities or contracting entities** may impose on economic operators requirements aimed at protecting the confidential nature of information which **the contracting authorities or contracting entities make** available throughout the

#### *Amendment*

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

concession award procedure.

Or. fr

#### **Amendment 127**

##### **Proposal for a directive**

##### **Article 25 - paragraph 1 – subparagraph 1 – introductory part**

###### *Text proposed by the Commission*

1. Except where use of electronic means is mandatory pursuant to Articles 28 (2) and 30 of this Directive ***contracting authorities and contracting entities*** may choose between the following means of communication for all communication and information exchange:

###### *Amendment*

1. Except where use of electronic means is mandatory pursuant to Articles 28 (2) and 30 of this Directive ***the grantor*** may choose between the following means of communication for all communication and information exchange:

Or. fr

#### **Amendment 128**

##### **Proposal for a directive**

##### **Article 25 - paragraph 1 – subparagraph 1 – point a**

###### *Text proposed by the Commission*

a) electronic means ***in accordance with paragraphs 3, 4 and 5***;

###### *Amendment*

a) electronic means;

Or. fr

###### *Justification*

*Simplification of the provisions relating to electronic communications and adaptation to the specific nature of concessions, for which, unlike with public contracts, widespread use is not necessarily made of electronic procedures given the significant element of negotiation involved in this type of contract. On the other hand, the electronic transmission of concession notices and award notices, and the electronic availability of concession documents, are mandatory in order to facilitate the process.*

## Amendment 129

### Proposal for a directive

#### Article 25 - paragraph 1 – subparagraph 1 – point c

*Text proposed by the Commission*

*Amendment*

c) telephone in the cases and circumstances referred to in paragraph 6, or

c) telephone, ***subject to transmission of written confirmation;***

Or. fr

#### *Justification*

*Simplification of the provisions relating to electronic communications and adaptation to the specific nature of concessions, for which, unlike with public contracts, widespread use is not necessarily made of electronic procedures given the significant element of negotiation involved in this type of contract. On the other hand, the electronic transmission of concession notices and award notices, and the electronic availability of concession documents, are mandatory in order to facilitate the process.*

## Amendment 130

### Proposal for a directive

#### Article 25 - paragraph 1 – subparagraph 1 – point c a (new)

*Text proposed by the Commission*

*Amendment*

***c a) hand delivery certified by an acknowledgement of receipt;***

Or. fr

#### *Justification*

*This amendment takes into account another possible means of communication (hand delivery with acknowledgement of receipt)*

## Amendment 131

### Proposal for a directive Article 25 - paragraph 2

*Text proposed by the Commission*

2. The means of communication chosen must be generally available and not restrict economic operators' access to the concession award procedure.

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

*Amendment*

2. The means of communication chosen must be generally available **and non-discriminatory**, and not restrict economic operators' access to the concession award procedure. ***In the case of electronic means, they must also be interoperable with the information and communication technology products in general use.***

In all communication, exchange and storage of information, **the grantor** 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.

Or. fr

### *Justification*

*Simplification of the provisions relating to electronic communications and adaptation to the specific nature of concessions, for which, unlike with public contracts, widespread use is not necessarily made of electronic procedures given the significant element of negotiation involved in this type of contract. On the other hand, the electronic transmission of concession notices and award notices, and the electronic availability of concession documents, are mandatory in order to facilitate the process.*

## Amendment 132

### Proposal for a directive Article 25 - paragraph 3

*Text proposed by the Commission*

**3. The tools to be used for communicating by electronic means, as well as their**

*Amendment*

**deleted**

*technical characteristics, shall be non-discriminatory, generally available and interoperable with the information and communication technology products in general use and shall not restrict economic operators' access to the concession award procedure. The technical details and characteristics of the devices for the electronic receipts to be deemed in compliance with the first subparagraph of this paragraph are set out in Annex XII*

*The Commission shall be empowered to adopt delegated acts in accordance with Article 46 to amend the technical details and characteristics set out in Annex XII due to technical developments or administrative reasons.*

*To ensure the interoperability of technical formats as well as of process and messaging standards, especially in a cross-border context, the Commission shall be empowered to adopt delegated acts in accordance with Article 46 to establish the mandatory use of specific technical standards, at least with regard to the use of e-submission, electronic catalogues and means for electronic authentication.*

Or. fr

#### *Justification*

*Simplification of the provisions relating to electronic communications and adaptation to the specific nature of concessions, for which, unlike with public contracts, widespread use is not necessarily made of electronic procedures given the significant element of negotiation involved in this type of contract. On the other hand, the electronic transmission of concession notices and award notices, and the electronic availability of concession documents, are mandatory in order to facilitate the process.*

## Amendment 133

### Proposal for a directive Article 25 - paragraph 4

*Text proposed by the Commission*

*Amendment*

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

**Contracting authorities and contracting entities shall be deemed to offer suitable alternative means of access in any of the following situations:**

**(a) They offer unrestricted and full direct access by electronic means to these tools from the date of publication of the notice in accordance with Annex IX or from the date when the invitation to confirm interest is sent; the text of the notice or the invitation to confirm interest shall specify the internet address at which these tools are accessible;**

**(b) ensure that tenderers established in other Member States than the contracting authority's may access the concession award procedure through the use of provisional tokens made available online at no extra cost;**

**(c) support an alternative channel for electronic submission of tenders.**

Or. fr

#### *Justification*

*Simplification of the provisions relating to electronic communications and adaptation to the specific nature of concessions, for which, unlike with public contracts, widespread use is not necessarily made of electronic procedures given the significant element of negotiation involved in this type of contract. On the other hand, the electronic transmission of concession notices and award notices, and the electronic availability of concession documents, are mandatory in order to facilitate the process.*

## Amendment 134

### Proposal for a directive Article 25 - paragraph 5

*Text proposed by the Commission*

*Amendment*

**5. The following rules shall apply to devices for the electronic transmission and receipt of tenders and for the electronic transmission and receipt of applications:**

*deleted*

**a) information on specifications for the electronic submission of tenders and requests to participate, including encryption and time-stamping, shall be available to interested parties;**

**b) devices, methods for authentication and electronic signatures shall comply with the requirements of Annex XII;**

**c) contracting authorities and contracting entities shall specify the level of security required for the electronic means of communication in the various stages of the concession award procedure followed. The level shall be proportionate to the risks attached.**

**d) where advanced Electronic Signatures as defined by Directive 1999/93/EC of the European Parliament and of the Council are required, contracting authorities and contracting entities shall accept signatures supported by a qualified electronic certificate referred to in the Trusted List provided for in the European Commission Decision 2009/767/EC, created with or without a secure signature creation device, subject to compliance with the following conditions:**

**i) they must establish the required advanced signature format on the basis of formats established in Commission Decision 2011/130/EU and put in place necessary measures to be able to process these formats technically;**

*ii) where a tender is signed with the support of a qualified certificate that is included in the Trusted list, they must not apply additional requirements that may hinder the use of those signatures by tenderers.*

Or. fr

#### *Justification*

*Simplification of the provisions relating to electronic communications and adaptation to the specific nature of concessions, for which, unlike with public contracts, widespread use is not necessarily made of electronic procedures given the significant element of negotiation involved in this type of contract. On the other hand, the electronic transmission of concession notices and award notices, and the electronic availability of concession documents, are mandatory in order to facilitate the process.*

#### **Amendment 135**

##### **Proposal for a directive Article 25 - paragraph 6**

*Text proposed by the Commission*

*Amendment*

**6. The following rules shall apply to the transmission of applications to participate:** *deleted*

*(a) applications to participate in a procedure for the award of a concession may be made in writing or by telephone; in the latter case, a written confirmation must be sent before expiry of the time limit set for their receipt;*

*(b) contracting authorities or contracting entities may require that applications for participation made by fax must be confirmed by post or by electronic means, where this is necessary for the purposes of legal proof.*

*For the purposes of point (b), the contracting authority or entity shall indicate in the concession notice or in the invitation to confirm interest that it*

*requires applications to participate made by fax to be confirmed by post or by electronic means and the time limit for sending such confirmation*

Or. fr

*Justification*

*Simplification of the provisions relating to electronic communications and adaptation to the specific nature of concessions, for which, unlike with public contracts, widespread use is not necessarily made of electronic procedures given the significant element of negotiation involved in this type of contract. On the other hand, the electronic transmission of concession notices and award notices, and the electronic availability of concession documents, are mandatory in order to facilitate the process.*

**Amendment 136**

**Proposal for a directive  
Article 25 - paragraph 7**

*Text proposed by the Commission*

*Amendment*

*7. Member States shall ensure that, at the latest 5 years after the date provided for in Article 49 (1), all procedures for the award of concessions under this Directive are performed using electronic means of communication, in particular e-submission, in accordance with the requirements of this Article.*

*deleted*

*This obligation shall not apply where the use of electronic means would require specialised tools or file formats that are not generally available in all the Member States within the meaning of paragraph 3. It is the responsibility of the contracting authorities or contracting entities using other means of communication for submission of tenders to demonstrate in the concession documents that the use of electronic means, due to the particular nature of the information to be exchanged with the economic operators, would require specialised tools or file formats*

*that are not generally available in all the Member States.*

*Contracting authorities and contracting entities shall be deemed to have legitimate reasons not to request electronic means of communication in the submission process in the following cases:*

*(a) the description of the technical specifications, due to the specialised nature of the concession award, cannot be rendered using file formats that are generally supported by commonly used applications;*

*(b) the applications supporting file formats that are suitable for the description of the technical specifications are under a proprietary licensing schema and cannot be made available for downloading or remote use by the contracting authority;*

*(c) the applications supporting file formats that are suitable for the description of the technical specifications use file formats that cannot be handled by any other open or downloadable applications.*

Or. fr

#### *Justification*

*Simplification of the provisions relating to electronic communications and adaptation to the specific nature of concessions, for which, unlike with public contracts, widespread use is not necessarily made of electronic procedures given the significant element of negotiation involved in this type of contract. On the other hand, the electronic transmission of concession notices and award notices, and the electronic availability of concession documents, are mandatory in order to facilitate the process.*

## Amendment 137

### Proposal for a directive Article 25 - paragraph 8

*Text proposed by the Commission*

*Amendment*

**8. Contracting authorities may use the data processed electronically for public procurement procedures in order to prevent, detect and correct errors occurring at each stage by developing appropriate tools.**

*deleted*

Or. fr

#### *Justification*

*Simplification of the provisions relating to electronic communications and adaptation to the specific nature of concessions, for which, unlike with public contracts, widespread use is not necessarily made of electronic procedures given the significant element of negotiation involved in this type of contract. On the other hand, the electronic transmission of concession notices and award notices, and the electronic availability of concession documents, are mandatory in order to facilitate the process.*

## Amendment 138

### Proposal for a directive Titre II – title

*Text proposed by the Commission*

*Amendment*

RULES ON THE AWARD OF  
CONCESSIONS

RULES ON THE AWARD OF  
CONCESSIONS: **GENERAL  
PRINCIPLES, TRANSPARENCY AND  
PROCEDURAL GUARANTEES**

Or. fr

#### *Justification*

*Reorganisation of Title II on rules on the award of concessions in order to simplify and clarify the text. Addition of a new chapter on general principles, followed by the chapter on transparency and a chapter on procedural guarantees.*

**Amendment 139**

**Proposal for a directive  
Titre II – Chapter -I (new)**

*Text proposed by the Commission*

*Amendment*

***Chapter -I***

***General principles***

***Article -26***

***Freedom of the grantor to organise the procedure***

***The grantor shall have the freedom to organise the procedure leading to the choice of concessionaire subject to compliance with the provisions of this Directive, the only two mandatory stages being the publication of a concession notice at the beginning of the procedure, except in the cases provided for in Article 17 and Article 26(5), and the publication of an award notice at the end of the procedure.***

***Intermediate stages may be provided for during the award procedure by the grantor, such as the sending of an invitation to submit an offer to the candidates who have responded where appropriate to the concession notice.***

***Article - 26 a***

***General principles***

***1. Concessions shall be awarded on the basis of the criteria set out by the grantor in accordance with Article 38a provided that the following cumulative conditions are fulfilled:***

***a) the tender complies with the requirements, conditions and criteria set out in the concession notice or in the invitation to submit a tender and in the concession documents;***

***b) the tender comes from a tenderer who  
i) is not excluded from participating in the***

*award procedure in accordance with paragraphs 5 and 7 of Article 36, and subject to paragraph 8 of Article 39, and*

*ii) meets the selection criteria set out by the grantor in accordance with paragraphs 2 and 3 of Article 36.*

*2. During the concession award procedure, the grantor shall treat economic operators equally and shall act in a transparent and proportionate way. In particular, it shall not provide information in a discriminatory manner which may give some candidates or tenderers an advantage over others. The design of the concession award procedure shall not be made with the objective of excluding it from the scope of this Directive or of artificially narrowing competition.*

Or. fr

#### *Justification*

*Clarification of the award procedure in order to make the articles in the subsequent chapters more comprehensible. Insistence on the grantor's right to opt to add intermediate stages or to reverse the order of stages, in compliance with the directive and subject to mandatory publication of the concession notice, and of the award notice at the end of the procedure. New Article -26a has wording taken over from the initial Article 34, together with an added paragraph taken over from the original Article 7.*

#### **Amendment 140**

##### **Proposal for a directive Article 26 – paragraph 1**

###### *Text proposed by the Commission*

**1. Contracting authorities and contracting entities** wishing to award a concession shall make known **their** intention by means of a concession notice.

###### *Amendment*

**1. A grantor** wishing to award a concession shall make known **its** intention by means of a concession notice **in accordance with the procedures laid down in Article 28. The concession notice shall contain the information referred to in Annex IV and, where appropriate, any**

*other information deemed useful by the grantor.*

Or. fr

*Justification*

*Merger of paragraphs 1, 2 and 4 to simplify and clarify the Directive. As regards the manner of publication, reference is made to Article 28 in order to simplify the text and avoid unnecessary repetition.*

**Amendment 141**

**Proposal for a directive  
Article 26 – paragraph 2**

*Text proposed by the Commission*

*Amendment*

***2. Concession notices shall contain the information referred to in part of Annex IV and, where appropriate, any other information deemed useful by the contracting authority or entity, in accordance with the format of standard forms.***

***deleted***

Or. fr

*Justification*

*Merger of paragraphs 1, 2 and 4 to simplify and clarify the Directive. As regards the manner of publication, reference is made to Article 28 in order to simplify the text and avoid unnecessary repetition.*

**Amendment 142**

**Proposal for a directive  
Article 26 – paragraph 3**

*Text proposed by the Commission*

*Amendment*

***3. Contracting authorities and contracting entities wishing to award a concession for***

***deleted***

*social and other specific services shall make known their intention of planned concession award through the publication of a prior information notice as soon as possible after the beginning of the budgetary year. Those notices shall contain the information set out in Annex XIII.*

Or. fr

*Justification*

*The prior information notice has been deleted in order to cut red tape in the procedure that adds no value for this type of service.*

**Amendment 143**

**Proposal for a directive  
Article 26 – paragraph 4**

*Text proposed by the Commission*

*Amendment*

*4. The Commission shall establish those standard forms. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 48.*

*deleted*

Or. fr

*Justification*

*Merger of paragraphs 1, 2 and 4 to simplify and clarify the Directive. As regards the manner of publication, reference is made to Article 28 in order to simplify the text and avoid unnecessary repetition.*

## Amendment 144

### Proposal for a directive Article 26 – paragraph 5

#### *Text proposed by the Commission*

5. By way of derogation from paragraph 1, the ***contracting authorities and entities*** shall not be required to publish a concession notice ***in any of the following cases:***

***a) where no tenders or no suitable tenders or no applications have been submitted in response to a concession procedure, provided that the initial conditions of the concession contract are not substantially altered and on condition that a report is sent to the Commission or to the national oversight body designated pursuant to Article 84 of Directive [replacing Directive 2004/18/EC] where they so request;***

***b) where the works or services can be supplied only by a particular economic operator due to the absence of competition for technical reasons, the protection of patents, copyrights or other intellectual property rights or the protection of other exclusive rights and where no reasonable alternative or substitute exists and the absence of competition is not the result of an artificial narrowing down of the parameters of the concession award;***

***c) for new works or services consisting in the repetition of similar works or services entrusted to the economic operator to which the same contracting authorities or***

#### *Amendment*

5. By way of derogation from paragraph 1, the ***grantor*** shall not be required to publish a concession notice where the works or services can be supplied only by a particular economic operator due to the absence of competition for technical reasons, the protection of patents, copyrights or other intellectual property rights or *the* protection of other exclusive rights and where no reasonable alternative or substitute exists and the absence of competition is not the result of an artificial narrowing down of the parameters of the concession award;

*contracting entities awarded an original concession subject to the obligation referred to in paragraph 1, provided that such works or services are in conformity with a basic project for which the original concession was awarded. The basic project shall mention the extent of possible additional works or services and the conditions under which they will be awarded.*

*As soon as the first project is put up for tender the total estimated cost of subsequent works or services shall be taken into consideration by the contracting authorities or contracting entities when they apply the provisions of Article 5*

Or. fr

#### *Justification*

*Distinction between two different types of case described, though not explicitly, in this paragraph resulting in non-publication of a concession notice: cases where no concession notice has yet been published (initial Article 26(5)(b) and cases where a concession notice has already been published but no new notice is required (initial Article 26(5)(a) and (c)).*

#### **Amendment 145**

##### **Proposal for a directive Article 26 – paragraph 5 a (new)**

*Text proposed by the Commission*

*Amendment*

***5a. By way of derogation from paragraph 1, the grantor shall not be required to publish a new concession notice in any of the following cases:***

***a) where no applications or no tenders or no suitable tenders have been submitted in response to an initial concession procedure, provided that the initial conditions of the concession contract are not substantially altered and that a report is sent to the Commission or the***

*competent national authority where they so request;*

*b) for new works or services consisting in the repetition of similar works or services entrusted to the original concessionaire to which the same grantor awarded an original concession subject to the obligation referred to in paragraph 1, provided that such works or services are in conformity with a basic project for which the original concession was awarded. The basic project shall mention the extent of possible additional works or services and the conditions under which they will be awarded.*

*As soon as the first project is put up for tender the total estimated cost of subsequent works or services shall be taken into consideration by the grantor when it applies the provisions of Article 6.*

Or. fr

#### *Justification*

*Distinction between two different types of case described, though not explicitly, in this paragraph resulting in non-publication of a concession notice: cases where no concession notice has yet been published (initial Article 26(5)(b) and cases where a concession notice has already been published but no new notice is required (initial Article 26(5)(a) and (c)). Points (a) and (b) of the new paragraph 5a are based on paragraph 5(a) and 5(c) of the Commission proposal.*

#### **Amendment 146**

##### **Proposal for a directive Article 26 – paragraph 6**

###### *Text proposed by the Commission*

6. For the purposes of **point (a)** of the first subparagraph, a tender shall be considered not to be suitable where:

###### *Amendment*

6. For the purposes of **paragraph 2**, a tender shall be considered not to be suitable where:

**a) it is completely irrelevant to the concession, being incapable of meeting**

*the grantor's needs as specified in the concession documents;*

- it is irregular *or unacceptable, and*

*b) it is irregular, i.e. it does not comply with the concession documents;*

*- it is completely irrelevant to the concession, being incapable of meeting the contracting authority or contracting entity's needs as specified in the concession documents.*

*Tenders shall be considered to be irregular, where they do not comply with the concession documents or where the prices offered are sheltered from normal competitive forces.*

*Tenders shall be considered to be unacceptable in any of the following cases:*

*c) it is unacceptable where:*

*(a) where they have been received late;*

*i) it has been received late;*

*b) they have been submitted by tenderers who do not have the requisite qualifications;*

*ii) it has been submitted by a tenderer who does not have the requisite qualifications;*

*c) their price exceeds the contracting authority or contracting entity's budget as determined prior to the launching of the concession award procedure and documented in writing;*

*iii) its value by far exceeds the grantor's budget as determined prior to the launching of the concession award procedure and documented in writing; or*

*d) they have been found to be abnormally low*

*iv) its value has been found to be abnormally low.*

Or. fr

### *Justification*

*Distinction between 3 possible cases where a tender is unsuitable: tender irrelevant to the concession, irregular tender or unacceptable tender. A tender that is unsuitable may not always be irrelevant to the subject of the concession (e.g. it may be relevant to the subject of the concession, but is received after the deadline; in this case it is unacceptable). The initial second subparagraph is deleted because it is already covered by points (c) and (d) which explain when a tender is unacceptable (over-budget or abnormally low).*

## Amendment 147

### Proposal for a directive Article 27 – paragraph 1

*Text proposed by the Commission*

1. Not later than 48 days after the award of a concession, **contracting authorities and contracting entities** shall send a concession award notice on the results of the concession award procedure.

*Amendment*

1. Not later than 48 days after the award of a concession, the **grantor shall in accordance with the procedures laid down in Article 28** send a concession award notice on the results of the concession award procedure.

Or. fr

## Amendment 148

### Proposal for a directive Article 27 – paragraph 2

*Text proposed by the Commission*

**2. The obligation referred to in paragraph 1 shall also apply to those services concessions the estimated value of which, as calculated according to the method referred to in Article 6 (5), is equal to or higher than 2 500 000 EUR with the sole exception of social services and other specific services as referred to in Article 17.**

*Amendment*

**deleted**

Or. fr

*Justification*

*The intermediate thresholds and the provisions relating to them are deleted in order to simplify and clarify the directive.*

## Amendment 149

### Proposal for a directive Article 27 – paragraph 3

*Text proposed by the Commission*

3. **Such** notices shall contain the information set out in Annex V or in relation to concessions for social services and other specific services the information set out in VI and be published in accordance with the provisions of Article 28

*Amendment*

3. **Concession award** notices shall contain the information set out in Annex V or in relation to concessions for social services and other specific services the information set out in VI and be published in accordance with the provisions of Article 28.

Or. fr

## Amendment 150

### Proposal for a directive Article 28 - paragraph 1 –subparagraph 1

*Text proposed by the Commission*

1. **The notices referred to in Articles 26 and 27** and the second subparagraph of Article 43(6) shall include the information set out Annexes IV to VI and in the format of standard forms, including standard forms for corrigenda.

*Amendment*

1. **Concession notices and concession award notices and the notice** referred to in the second subparagraph of Article 42(6) shall include the information set out Annexes IV to VI and in the format of standard forms, including standard forms for corrigenda.

Or. fr

## Amendment 151

### Proposal for a directive Article 28 - paragraph 2

*Text proposed by the Commission*

2. The notices shall be drawn up, transmitted by electronic means to the Commission and published in accordance with Annex IX. Notices shall be published

*Amendment*

2. The notices **referred to in paragraph 1** shall be drawn up, transmitted by electronic means to the Commission and published in accordance with Annex IX.

not later than five days after they are sent. The costs of publication of the notices by the Commission shall be borne by the Union.

***The Commission shall give the grantor confirmation of the receipt of the notice and of the publication of the information sent, indicating the date of that publication and constituting proof of publication.*** Notices shall be published not later than five days after they are sent. The costs of publication of the notices by the Commission shall be borne by the Union.

Or. fr

#### *Justification*

*Merger and simplification of Articles 28 and 29. Article 28(4) is being incorporated into this paragraph.*

### **Amendment 152**

#### **Proposal for a directive Article 28 - paragraph 3**

##### *Text proposed by the Commission*

3. ***The*** notices ***referred to in Article 26*** shall be published in full in an official language of the Union as chosen by the ***contracting authority or contracting entity***. That language version shall constitute the sole authentic text. A summary of the important elements of each notice shall be published in the other official languages.

##### *Amendment*

3. ***Concession*** notices shall be published in full in an official language of the Union as chosen by the ***grantor***. That language version shall constitute the sole authentic text. A summary of the important elements of each notice shall be published in the other official languages.

Or. fr

**Amendment 153**

**Proposal for a directive  
Article 28 - paragraph 3 a (new)**

*Text proposed by the Commission*

*Amendment*

***3a. Concession notices and concession award notices shall not be sent for publication at national level before the date on which they are dispatched to the Commission. Concession notices and concession award notices published at national level shall not contain information other than that contained in the notices dispatched to the Commission but shall indicate the date of dispatch of the notice to the Commission.***

Or. fr

*Justification*

*This new paragraph 3a is based on Article 29 of the Commission's proposal. It merges Articles 28 and 29 in order to simplify the directive.*

**Amendment 154**

**Proposal for a directive  
Article 28 - paragraph 4**

*Text proposed by the Commission*

*Amendment*

***4. Contracting authorities and contracting entities shall be able to supply proof of the dates on which notices are dispatched.***

*deleted*

***The Commission shall give the contracting authority or contracting entity confirmation of the receipt of the notice and of the publication of the information sent, indicating the date of that publication. Such confirmation shall constitute proof of publication.***

Or. fr

*Justification*

*Paragraph 4 is being incorporated into Article 28(2) in order to simplify the directive.*

**Amendment 155**

**Proposal for a directive  
Article 28 - paragraph 5**

*Text proposed by the Commission*

*Amendment*

**5. Contracting authorities and contracting entities may publish notices for concessions that are not subject to the publication requirements laid down in this Directive provided those notices are sent to the Commission by electronic means in accordance with the format and procedures for transmission indicated in Annex IX.** *deleted*

Or. fr

*Justification*

*This paragraph has been deleted to simplify and clarify the directive.*

**Amendment 156**

**Proposal for a directive  
Article 29**

*Text proposed by the Commission*

*Amendment*

**Article 29**

*deleted*

**Publication at national level**

**1. Notices referred to in Articles 26 and 27 and the information contained therein shall not be published at national level before the publication pursuant to Article 28.**

**2. Notices published at national level shall not contain information other than that contained in the notices dispatched to the**

***Commission but shall indicate the date of dispatch of the notice to the Commission.***

Or. fr

*Justification*

*Article 29 has been incorporated into Article 28 (cf. new paragraph 3a). Merger and simplification of Articles 28 and 29. Concession notices and award notices are not to be published at national level before the date of their dispatch to the Commission (rather than before the date of their publication by the Commission) since publication at national level is often faster than at European level.*

**Amendment 157**

**Proposal for a directive  
Article 30 - paragraph 1**

*Text proposed by the Commission*

*Amendment*

1. ***Contracting authorities and contracting entities*** shall offer unrestricted and full direct access free of charge by electronic means to the concession documents from the date of publication of the notice ***in accordance with Article 28*** or the date on which the invitation to submit tenders is sent. The text of the notice or of these invitations shall specify the internet address at which this documentation is accessible.

1. ***The grantor*** shall offer unrestricted and full direct access free of charge by electronic means to the concession documents from the date of publication of the ***concession*** notice or the date on which the invitation to submit tenders is sent. The text of the ***concession*** notice or of these invitations shall specify the internet address at which this documentation is accessible.

Or. fr

*Justification*

*The concession documents must be made available by electronic means as soon as the concession notice is published (erroneous reference to Article 28 in the initial text) or the invitation to submit a tender is sent.*

## Amendment 158

### Proposal for a directive Article 30 - paragraph 2

*Text proposed by the Commission*

2. Provided that it has been requested in good time, the ***contracting authorities and contracting entities or competent departments*** shall supply additional information relating to the concession documents not later than six days before the deadline fixed for the receipt of tenders.

*Amendment*

2. Provided that it has been requested in good time, the ***grantor*** shall supply additional information relating to the concession documents not later than six days before the deadline fixed for the receipt of tenders.

Or. fr

*Justification*

*The reference to 'competent departments' is too vague. It is the grantor's job to forward information to candidates and tenderers.*

## Amendment 159

### Proposal for a directive Article 30 a (new)

*Text proposed by the Commission*

*Amendment*

***Article 30a***

***Combating corruption and preventing conflicts of interest***

***Member States shall adopt rules combating favouritism and corruption and preventing conflicts of interest, aimed at ensuring the transparency of the award procedure and the equal treatment of all candidates and tenderers.***

***With regard to conflicts of interest the measures adopted shall not go beyond what is strictly necessary to prevent a potential conflict of interest or eliminate a conflict of interest that has been***

*identified. In particular, they shall allow for the exclusion of a tenderer or candidate from the procedure only where the conflict of interests cannot be effectively remedied by other means.*

Or. fr

*Justification*

*This wording has been taken from Article 36(4) and made into a new article, in order to give it greater prominence.*

**Amendment 160**

**Proposal for a directive  
Chapter II – title**

*Text proposed by the Commission*

*Amendment*

CHAPTER II

CHAPTER II

*Conduct of the procedure*

*Procedural guarantees*

Or. fr

*Justification*

*Taken over from Section II (Choice of participants and award of concessions) of Chapter II of the proposal, with modifications. Section I of Chapter II is deleted.*

**Amendment 161**

**Proposal for a directive  
Section I - title**

*Text proposed by the Commission*

*Amendment*

*Section I*

*deleted*

*Joint concessions, time limits and  
technical specifications*

Or. fr

**Amendment 162**

**Proposal for a directive  
Article 31**

*Text proposed by the Commission*

*Amendment*

**Article 31**

*deleted*

***Joint concessions between contracting  
authorities or contracting entities from  
different Member States***

***1. Without prejudice to Article 15,  
contracting authorities or contracting  
entities from different Member States may  
jointly award public concessions by using  
one of the means described in this Article.***

***2. Several contracting authorities or  
contracting entities from different  
Member States may jointly award a  
concession. In that case, the participating  
contracting authorities or contracting  
entities shall conclude an agreement that  
determines***

***(a) which national provisions shall apply  
to the concession award procedure.***

***(b) the internal organisation of the  
concession award procedure, including  
the management of the procedure, the  
sharing of responsibilities, the distribution  
of the works, supplies or services to be  
procured and the conclusion of  
concessions.***

***When determining the applicable national  
law in accordance with point (a),  
contracting authorities or contracting  
entities may choose the national  
provisions of any Member State in which  
at least one of the participating  
authorities is located.***

***3. Where several contracting authorities  
or contracting entities from different  
Member States have set up a joint legal  
entity, including European Groupings of***

*territorial cooperation under Regulation (EC) N° 1082/2006 of the European Parliament and of the Council, the participating contracting authorities or participating contracting entities shall, by a decision of the competent body of the joint legal entity, agree on the applicable national concession award rules of one of the following Member States:*

*(a) the national provisions of the Member State where the legal body has its registered office;*

*(b) the national provisions of the Member State where the legal body is carrying out its activities.*

*This agreement may either apply for an undetermined period, when fixed in the constitutive act of the joint legal body, or may be limited to a certain period of time, certain types of concessions or to one or more individual concession awards.*

*4. In the absence of an agreement determining the applicable concession rules, the national legislation governing the concession award shall be determined following the rules set out below:*

*(a) where the procedure is conducted or managed by one participating contracting authority or participating contracting entity on behalf of the others, the national provisions of the Member State of that contracting authority or entity shall apply;*

*(b) where the procedure is not conducted or managed by one participating contracting authority or participating contracting entity on behalf of the others, and*

*(i) concerns a public works or works concession, contracting authorities or entities shall apply the national provisions of the Member State where most of the works are located;*

*(ii) concerns a service concession,*

*contracting authorities or entities shall apply the national provisions of the Member State where the major part of the services is provided.;*

*(c) where it is not possible to determine the applicable national law pursuant to points (a) or (b), contracting authorities or entities shall apply the national provisions of the Member State of the contracting authority which bears the biggest share of the costs.*

*5. In the absence of an agreement determining the applicable concession award law under paragraph 3, the national legislation governing concession award procedures conducted by joint legal bodies set up by several contracting authorities or contracting entities from different Member States shall be determined following the following rules:*

*(a) where the procedure is conducted or managed by the competent organ of the joint legal body, the national provisions of the Member State where the legal body has its registered office shall apply.*

*(b) where the procedure is conducted or managed by a member of the legal body on behalf of that legal body, the rules set out in points (a) and (b) of paragraph 4 shall apply.*

*(c) where it is not possible to determine the applicable national law pursuant to points (a) or (b) of paragraph 4, the contracting authorities or contracting entities shall apply the national provisions of the Member State where the legal body has its registered office.*

*6. One or more contracting authorities or one or more contracting entities may award individual concessions under a framework agreement concluded by or jointly with a contracting authority located in another Member State, provided that the framework agreement contains specific provisions enabling the*

*respective contracting authority or contracting authorities or to award contracting entity or contracting entities the individual concessions.*

*7. Decisions on the award of concessions in cross-border concession award shall be subject to the ordinary review mechanisms available under the national law applicable.*

*8. In order to enable the effective operation of review mechanisms, Member States shall allow the decisions of review bodies within the meaning of Council Directive 89/665/EEC and of Council Directive 92/13/EEC located in other Member States to be fully executed in their domestic legal order, where such decisions involve contracting authorities or contracting entities established on their territory participating in the relevant cross-border concession award procedure.*

Or. fr

*Justification*

*This article has been deleted in order to simplify and clarify the directive.*

**Amendment 163**

**Proposal for a directive  
Article 32**

*Text proposed by the Commission*

*Amendment*

*Article 32*

*deleted*

*Technical specifications*

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

*These characteristics may also refer to the*

*specific process of production or provision of the requested works, supplies or services or of any other stage of its life cycle as referred to in point (14) of Article 2.*

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

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

*Where mandatory accessibility standards are adopted by a legislative act of the Union, technical specifications shall, as far as accessibility criteria are concerned, be defined by reference thereto.*

*2. Technical specifications shall guarantee equal access of economic operators to the concession award procedure and not have the effect of creating unjustified obstacles to the opening up of concession award to competition.*

*3. Without prejudice to mandatory national technical rules, to the extent that they are compatible with Union law, the technical specifications shall be formulated in one of the following ways:*

*(a) in terms of performance or functional requirements, including environmental characteristics, provided that the parameters are sufficiently precise to allow tenderers to determine the subject-matter of the contract and to allow contracting authorities or contracting entities to award the contract;*

*(b) by reference to technical specifications defined in Annex VIII and, in order of preference, to national standards*

*transposing European standards, European technical approvals, common technical specifications, international standards, other technical reference systems established by the European standardisation bodies or — when those do not exist — national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the supplies; each reference shall be accompanied by the words 'or equivalent';*

*(c) in terms of performance or functional requirements as referred to in point (a), with reference to the technical specifications referred to in point (b) as a means of presuming conformity with such performance or functional requirements;*

*(d) by reference to the technical specifications referred to in point (b) for certain characteristics, and by reference to the performance or functional requirements referred to in point (a) for other characteristics.*

*4. Unless justified by the subject-matter of the contract, technical specifications shall not refer to a specific make or source, or a particular process, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products. Such reference shall be permitted on an exceptional basis, where a sufficiently precise and intelligible description of the subject-matter of the contract pursuant to paragraph 3 is not possible; such reference shall be accompanied by the words "or equivalent".*

*5. Where a contracting authority or contracting entity uses the option of referring to the specifications referred to in point (b) of paragraph 3, it shall not reject a tender on the grounds that the works, supplies and services tendered for*

*do not comply with the specifications to which it has referred, once the tenderer proves in its tender by whatever appropriate means including the means of proof referred to in Article 33 that the solutions it proposes satisfy in an equivalent manner the requirements defined by the technical specifications.*

*6. Where a contracting authority or contracting entity uses the option laid down in point (a) of paragraph 3 to formulate technical specifications in terms of performance or functional requirements, it shall not reject a tender for works, supplies or services which comply with a national standard transposing a European standard, a European technical approval, a common technical specification, an international standard or a technical reference system established by a European standardisation body, where these specifications address the performance or functional requirements which it has laid down.*

*In its tender, the tenderer must prove by any appropriate means including the means of proof referred to in Article 33 that the work, supply or service in compliance with the standard meets the performance or functional requirements of the contracting authority or contracting entity.*

Or. fr

#### *Justification*

*This article has been deleted because it takes a 'public procurement' approach to concessions. Given that the economic risk is transferred from the grantor to the concessionaire, the latter must be given a certain amount of leeway in meeting the objectives and criteria laid down by the grantor. However, technical and/or functional requirements may be laid down by any grantors wishing to keep a tighter control over the technical aspects of the concession (see justification for Article 38b).*

## Amendment 164

### Proposal for a directive Article 33

*Text proposed by the Commission*

*Amendment*

#### *Article 33*

*deleted*

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

**1. Contracting authorities or contracting entities may require that economic operators provide a test report from a recognised body or a certificate issued by such a body as means of proof of conformity with the technical specifications.**

*Where contracting authorities require the production of certificates drawn up by recognised bodies attesting conformity with a particular technical specification, certificates from equivalent other recognised bodies shall also be accepted by the contracting authorities.*

**2. Contracting authorities or contracting entities shall also accept other appropriate means of proof such as a technical dossier of the manufacturer where the economic operator concerned has no access to the certificates or test reports referred to in paragraph 1, or no possibility of obtaining them within the relevant time limits.**

**3. Recognised bodies, within the meaning of this Article, are test and calibration laboratories and any certification and inspection bodies accredited in accordance with Regulation (EC) No 765/2008 of the European Parliament and of the Council<sup>1</sup>.**

**4. Member States shall make available to other Member States, upon request, any information related to the evidence and documents produced to prove compliance with the technical requirements referred**

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<sup>1</sup> [OJ L 218, 13.08.08, p. 30.](#)

*to in Article 32 and this Article. The competent authorities of the Member State of establishment shall provide this information in accordance with provisions on governance as referred to in Article 88 of (Directive replacing Directive 2004/18/EC).*

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<sup>1</sup> OJ L 218, 13.08.08, p. 30.

Or. fr

*Justification*

*This article has been deleted because it takes a 'public procurement' approach to concessions. Given that the economic risk is transferred from the grantor to the concessionaire, the latter must be given a certain amount of leeway in meeting the objectives and criteria laid down by the grantor. However, functional requirements may be laid down by any grantors wishing to keep a tighter control over the technical aspects of the concession (see Article 38a - Award criteria).*

**Amendment 165**

**Proposal for a directive**  
**Section II - title**

*Text proposed by the Commission*

*Amendment*

**Section II**

**deleted**

**Choice of participants and award of concessions**

Or. fr

*Justification*

*Structural simplification.*

## Amendment 166

### Proposal for a directive Article 34

*Text proposed by the Commission*

*Amendment*

#### *Article 34*

*deleted*

#### *General principles*

*Concessions shall be awarded on the basis of the criteria set out by the contracting authority or contracting entity in accordance with Article 39 provided that the following cumulative conditions are fulfilled:*

- a) the tender complies with the requirements, conditions and criteria set out in the concession notice or in the invitation to confirm interest and in the concession award documents;*
- b) the tender comes from a tenderer who*
  - i) is not excluded from participating in the award procedure in accordance with paragraphs 4 to 8 of Article 36 and*
  - ii) meets the selection criteria set out by the contracting authority or contracting entity in accordance with paragraphs 1 to 3 of Article 36.*

Or. fr

*Justification*

*Taken over into new Article -26a.*

## Amendment 167

### Proposal for a directive Article 35

*Text proposed by the Commission*

*Amendment*

#### *Article 35*

*deleted*

#### *Procedural guarantees*

*Contracting authorities and contracting entities shall indicate in the contract notice, in the invitation to submit tenders or in the concession documents a description of the concession, the award criteria and the minimum requirements to be met. This information must allow to identify the nature and scope of the concession, enabling economic operators to decide whether they request to participate in the concession award procedure. The description, award criteria and minimum requirements shall not be changed in the course of the negotiations.*

*2. During the concession award, contracting authorities and contracting entities shall ensure the equal treatment of all tenderers. In particular, they shall not provide information in a discriminatory manner which may give some tenderers an advantage over others.*

*3. Whenever the contracting authority or contracting entity limits the number of applicants to an appropriate level, this shall be done in a transparent manner and on the basis of objective criteria which are available to all interested economic operators.*

*4. The rules on the organisation of the concession award procedure, including rules on communication, on the stages of the procedure and on timing, shall be established in advance and communicated to all participants*

*5. Where the concession award involves negotiation, contracting authorities or contracting entities shall comply with the following rules:*

*(a) where the negotiation takes place after the submission of tenders they shall negotiate with tenderers the tenders submitted by them in order to adapt them to the criteria and requirements indicated in accordance with paragraph 1.*

*(b) they shall not reveal to the other*

*participants solutions proposed or other confidential information communicated by a candidate participating in the negotiations without its agreement. This agreement shall not take the form of a general waiver but must be given with reference to the intended communication of specific solutions or other confidential information;*

*(c) they may conduct the negotiation in successive stages in order to reduce the number of tenders to be negotiated by applying the award criteria in the contract notice, in the invitation to submit tenders or in the concession documents. In the contract notice, the invitation to submit tenders or the concession documents, the contracting authority shall indicate whether it has had recourse to this option.*

*(d) they shall assess the tenders as negotiated on the basis of the initially indicated award criteria;*

*(e) they shall establish a written record of formal deliberations and any other steps and events relevant for the concession award procedure. In particular, it shall ensure, by all appropriate means, the traceability of the negotiations.*

*6. Contracting authorities and contracting entities shall as soon as possible inform each candidate and tenderer of decisions reached concerning the award of a concession including the grounds for any decision not to award a contract for which there has been publication of a concession notice or to recommence the procedure.*

*7. On request from the party concerned, the contracting authority shall as quickly as possible, and in any case within 15 days from receipt of a written request, inform:*

*(a) any unsuccessful candidates of the reasons for the rejection of their application,*

*(b) any unsuccessful tenderers of the reasons for the rejection of their tender, including, for the cases referred to in Article 32 (5) and (6), the reasons for its decision of non-equivalence or its decision that the works, supplies or services do not meet the performance or functional requirements,*

*(c) any tenderers that have made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer or the parties to the framework agreement,*

*(d) any tenderers that have made an admissible tender of the conduct and progress of negotiations and dialogue with tenderers.*

*8. However, contracting authorities may decide to withhold certain information referred to in paragraph 6, regarding the contract where the release of such information would impede law enforcement, would otherwise be contrary to the public interest, would prejudice the legitimate commercial interests of economic operators, whether public or private, or might prejudice fair competition between them.*

Or. fr

*Justification*

*Deleted for the purposes of simplification. Taken over in part into Articles 36, 38b and 38c.*

## **Amendment 168**

### **Proposal for a directive Article 36 –title**

*Text proposed by the Commission*

Article 36

*Amendment*

Article 36

Selection of *and qualitative assessment* of candidates

Selection of candidates *and tenderers and grounds for exclusion*

Or. fr

*Justification*

*This article combines various provisions from existing Articles 35 and 36, arranged as follows: (1) verification of the conditions for participation by candidates or tenderers (technical and professional ability and financial standing); (2) possibility of placing a limit on the number of candidates (in such cases, an invitation to submit a tender will be forwarded to the candidates selected); (3) grounds for exclusion from the procedure and possibility for a candidate or tenderer nevertheless to prove to the grantor that he may be relied on.*

**Amendment 169**

**Proposal for a directive  
Article 36 – paragraph -1**

*Text proposed by the Commission*

*Amendment*

***-1. The grantor shall include in the concession notice, in the invitation to submit tenders or in the concession documents a description of the concession, the conditions for participation and the award criteria.***

Or. fr

*Justification*

*Based on Article 35(1) of the Commission proposal.*

**Amendment 170**

**Proposal for a directive  
Article 36 – paragraph 1**

*Text proposed by the Commission*

*Amendment*

***1. Contracting authorities shall specify, in the concession notice the conditions for participation relating to:***

***1. The grantor shall verify the conditions for participation relating to the professional and technical ability and***

*financial standing of candidates or tenderers and the reference or references to be submitted as proof in accordance with the requirements specified in the concession notice. Those conditions shall be both related to and proportionate to the subject-matter of the contract, shall be non-discriminatory and may be accompanied by minimum requirements, wherever necessary.*

*(a) suitability to pursue the professional activity;*  
*(b) economic and financial standing;*  
*(c) technical and professional ability.*  
*Contracting authorities shall limit any conditions for participation to those that are appropriate to ensure that a candidate or tenderer has the legal and financial capacities and the commercial and technical abilities to perform the concession to be awarded. All requirements shall be related and strictly proportionate to the subject-matter of the contract, taking into account the need to ensure genuine competition.*  
*Contracting authorities and contracting entities shall also indicate in the concession notice the reference or references to be submitted as proof of the economic operator's capacities. The requirements in respect of those references shall be non-discriminatory and proportionate to the subject-matter of the concession.*

Or. fr

#### *Justification*

*Combines various provisions of Articles 35 and 36 in a new wording of the provisions relating to the conditions for participation by candidates or tenderers (professional and technical ability and financial standing).*

## Amendment 171

### Proposal for a directive Article 36 – paragraph 2

*Text proposed by the Commission*

2. With **regard to the criteria referred to** in paragraph 1, an economic operator may, where appropriate and for a particular concession, rely on the capacities of other entities, regardless of the legal nature of its links with them. It shall, in that case, prove to the **contracting authority or the contracting entity** that it will have at its disposal, throughout the period of the concession, the necessary resources, for example, by producing an undertaking by those entities to that effect. With regard to **economic and** financial standing, **contracting authorities and contracting entities** may require that the economic operator and those entities are jointly liable for the execution of the contract.

*Amendment*

2. With **a view to meeting the conditions for participation laid down** in paragraph 1, an economic operator may, where appropriate and for a particular concession, rely on the capacities of other entities, regardless of the legal nature of its links with them. It shall, in that case, prove to the **grantor** that it will have at its disposal, throughout the period of the concession, the necessary resources, for example, by producing an undertaking by those entities to that effect. With regard to financial standing, **the grantor** may require that the economic operator and those entities are jointly liable for the execution of the contract.

Or. fr

## Amendment 172

### Proposal for a directive Article 36 – paragraph 3

*Text proposed by the Commission*

3. **Under the same conditions, a group of economic operators as referred to in Article 22 may rely on the capacities of participants in the group or of other entities.**

*Amendment*

**deleted**

Or. fr

*Justification*

*Deleted for purposes of simplification.*

## Amendment 173

### Proposal for a directive Article 36 – paragraph 3 a (new)

*Text proposed by the Commission*

*Amendment*

***3a. The grantor may limit the number of candidates or tenderers to an appropriate level, on condition that this is done in a transparent manner and on the basis of objective criteria.***

Or. fr

*Justification*

*Takes over part of Article 35 for a new wording on the possibility of placing a limit on the number of candidates (in such cases, an invitation to submit a tender will be forwarded to the candidates selected).*

## Amendment 174

### Proposal for a directive Article 36 – paragraph 4

*Text proposed by the Commission*

*Amendment*

***4. Member States shall adopt rules combating favouritism, corruption and preventing conflicts of interest, aimed at ensuring the transparency of the award procedure and the equal treatment of all tenderers.***

***deleted***

***With regard to conflicts of interest the measures adopted shall not go beyond what is strictly necessary to prevent or eliminate the conflict identified. In particular, they shall allow for the exclusion of a tenderer or candidate from the procedure only where the conflict of interests cannot be effectively remedied by other means.***

*Justification*

*The provisions on conflicts of interest have been fleshed out and incorporated into new Article 30a.*

**Amendment 175**

**Proposal for a directive  
Article 36 – paragraph 6**

*Text proposed by the Commission*

*Amendment*

**6. Any economic operator shall be excluded from participation in a concession where the contracting authority or contracting entity is aware of a decision having the force of res judicata establishing that it has not fulfilled obligations relating to the payment of taxes or social security contributions in accordance with the legal provisions of the country in which it is established or with those of the Member State of the contracting authority or entity.** *deleted*

*Justification*

*Deleted for purposes of simplification.*

**Amendment 176**

**Proposal for a directive  
Article 36 – paragraph 7 – subparagraph 2**

*Text proposed by the Commission*

*Amendment*

**In order to apply the ground for exclusion referred to in point (c) of the first subparagraph, contracting authorities and contracting entities shall provide a** *deleted*

*method for the assessment of contractual performance that is based on objective and measurable criteria and applied in a systematic, consistent and transparent way. Any performance assessment has to be communicated to the economic operator in question, which must be given the opportunity to object to the findings and to obtain judicial protection.*

Or. fr

*Justification*

*Deleted for purposes of simplification.*

#### **Amendment 177**

#### **Proposal for a directive Article 36 – paragraph 9**

*Text proposed by the Commission*

*Amendment*

**9. Member States shall specify the implementing conditions for this article. They shall make available to other Member States, upon request, any information related to the exclusion grounds listed in this Article. The competent authorities of the Member State of establishment shall provide this information in accordance with the provisions of Article 88 of Directive [replacing Directive 2004/18/EC].**

*deleted*

Or. fr

*Justification*

*Deleted for purposes of simplification.*

## Amendment 178

### Proposal for a directive Article 37 – paragraph 1

*Text proposed by the Commission*

1. When fixing the time limits for the submission of applications **for the concession and submission** of tenders, **contracting authorities or contracting entities** shall take account in particular of the complexity of the concession and the time required for drawing up tenders, **without prejudice to the minimum time limits set out in Article 37.**

*Amendment*

1. When fixing the time limits for the submission of applications **or** of tenders, **the grantor** shall take account in particular of the complexity of the concession and the time required for drawing up tenders **or applications.**

Or. fr

*Justification*

*The provisions on setting time limits previously spread over Articles 37 and 38 are now brought together in Article 37 for simplification purposes.*

## Amendment 179

### Proposal for a directive Article 37 – paragraph 2

*Text proposed by the Commission*

**2. Where applications or tenders can be made only after a visit to the site or after on-the-spot inspection of the documents supporting the concession award documents, the time limits for the submission of applications for the concession shall be extended so that all economic operators concerned may be aware of all the information needed to produce applications or tenders.**

*Amendment*

**deleted**

Or. fr

*Justification*

*The provisions on setting time limits previously spread over Articles 37 and 38 are now brought together in Article 37 for simplification purposes.*

**Amendment 180**

**Proposal for a directive  
Article 37 –paragraph 2 a (new)**

*Text proposed by the Commission*

*Amendment*

***2a. The time limit for the submission of applications or for the submission of tenders shall be not less than 30 days from the date on which the concession notice was sent or the date on which candidates received notification of the invitation to submit a tender, respectively.***

Or. fr

*Justification*

*The provisions on setting time limits previously spread over Articles 37 and 38 are now brought together in Article 37 for simplification purposes.*

**Amendment 181**

**Proposal for a directive  
Article 38**

*Text proposed by the Commission*

*Amendment*

***Article 38***

***deleted***

***Time limits for submission of applications for the concession***

- 1. Where contracting authorities and contracting entities resort to a concession, the time limit for the submission of applications for the concession shall be not less than 52 days from the date on which the concession notice was sent.***
- 2. The time limit for receipt of tenders may be reduced by five days where the contracting entity accepts that tenders***

*may be submitted by electronic means in conformity with Article 25.*

Or. fr

*Justification*

*Merged with Article 37 in order to simplify and clarify the directive's provisions.*

**Amendment 182**

**Proposal for a directive  
Article 38 a (new)**

*Text proposed by the Commission*

*Amendment*

*Article 38a*

*Award criteria*

***1. The grantor may hold negotiations with candidates and tenderers. Concessions shall be awarded by the grantor on the basis of objective award criteria which comply with the principles set out in Article -26a(2).***

***2. The subject matter of the concession, the award criteria and the minimum requirements shall not be changed in an arbitrary or discriminatory manner during the course of the negotiations. Any changes shall be immediately brought to the notice of the candidates and tenderers concerned.***

***3. The award criteria shall be linked to the subject matter of the concession. They may include environmental, social or innovation-related criteria. The grantor shall verify whether tenders properly meet the award criteria.***

***4. The grantor shall indicate in the concession notice or the invitation to submit a tender his ranking order, if any, for the criteria referred to in paragraph 1.***

Or. fr

## *Justification*

*Formerly Article 39. New article on award criteria, arranged as follows: (1) reference to the importance of negotiations in the procedure for awarding concessions; (2) stipulation that no arbitrary changes may be made to award criteria during the course of the procedure; (3) specification of scope of award criteria; (4) option for the grantor to rank the criteria. The weighting approach has been discarded, as it does not provide the necessary flexibility. Ranking should be optional, so as to enable any innovative solutions not previously provided for to be included.*

## **Amendment 183**

### **Proposal for a directive Article 38 b (new)**

*Text proposed by the Commission*

*Amendment*

#### *Article 38b*

#### ***Technical and/or functional requirements***

***1. Technical and/or functional requirements define the characteristics required of the works and/or services that are the subject matter of the concession. They shall be set out in the concession documents.***

***2. Technical and/or functional requirements shall comply with the principle of equal access of economic operators to the concession award procedure and shall not have the effect of creating unjustified obstacles to the opening up of concessions to competition. In particular, unless justified by the subject-matter of the contract, technical and/or functional requirements shall not refer to a specific make or source, or a particular process, or to trade marks, patents, types or a specific production with the effect of favouring or eliminating certain undertakings or certain products. Such reference shall be permitted, on an exceptional basis, where a sufficiently precise and intelligible description of the subject-matter of the contract is not possible; such reference shall be***

*accompanied by the words "or equivalent".*

Or. fr

*Justification*

*Article 38b = Article 32(1) and (3)(b) of the Commission proposal. Inclusion of provisions enabling grantors to lay down technical and/or functional requirements for the works or services that are the subject of concessions. This will enable grantors to clarify the subject matter of concessions or lay down more specific requirements (e.g. for disabled access or environmental performance). The technical specifications provided for in Article 32 were too detailed and were at odds with the principle of risk transfer, which calls for a degree of leeway for concessionaires.*

**Amendment 184**

**Proposal for a directive  
Article 38 c (new)**

*Text proposed by the Commission*

*Amendment*

**Article 38c**

***Provision of information to candidates  
and tenderers***

***1. The grantor shall as soon as possible inform each candidate and tenderer of decisions reached concerning the award of a concession, including the grounds for any decision to reject his application or tender and the grounds for any decision not to award a contract for which there has been publication of a concession notice or to recommence the procedure.***

***2. The grantor may decide to withhold certain information referred to in paragraph 1, regarding the contract, where the release of such information would impede law enforcement, would otherwise be contrary to the public interest, would prejudice the legitimate commercial interests of economic operators, whether public or private, or might prejudice fair competition between***

*them.*

Or. fr

*Justification*

*Based on Article 35(6) and (8) of the Commission proposal.*

**Amendment 185**

**Proposal for a directive  
Article 39**

*Text proposed by the Commission*

*Amendment*

*Article 39*

*deleted*

*Concession award criteria*

***1. Concessions shall be awarded on the basis of objective criteria which ensure compliance with the principles of transparency, non-discrimination and equal treatment and which ensure that tenders are assessed in conditions of effective competition permitting to identify an overall economic advantage for the contracting authority or the contracting entity.***

***2. The award criteria shall be linked to the subject matter of the concession, and shall not confer an unrestricted freedom of choice on the contracting authority or the contracting entity.***

***Those criteria shall ensure effective competition and shall be accompanied by requirements which allow the information provided by the tenderers to be effectively verified. Contracting authorities and contracting entities shall verify effectively on the basis of the information and proof provided by the tenderers, whether the tenders meet the award criteria.***

***3. The contracting authority or the contracting entity shall indicate in the***

*concession notice or documents the relative weighting which it gives to each of the criteria set out in paragraph 1 or list those criteria in descending order of importance.*

*4. Member States may provide that contracting authorities and contracting entities shall base the award of concessions on the criterion of the most economically advantageous tender, in compliance with paragraph 2. Those criteria may include, in addition to price or costs, any of the following criteria*

*(a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, environmental characteristics and innovative character.*

*(b) for service concessions and concessions involving the design of works, the organisation, qualification and experience of the staff assigned to performing the concession in question may be taken into consideration, with the consequence that, following the award of the concession, such staff may only be replaced with the consent of the contracting authority or the contracting entity, which must verify that replacements ensure equivalent organisation and quality;*

*(c) after-sales service and technical assistance, delivery date and delivery period or period of completion;*

*(d) the specific process of production or provision of the requested works, supplies or services or of any other stage of its life cycle as referred to in point 14 of paragraph 1 of Article 2, to the extent that those criteria concern factors directly involved in these processes and characterise the specific process of production or provision of the requested works, supplies or services.*

***5. In the case referred to in paragraph 4, the contracting authority or entity shall specify in the contract notice, in the invitation to submit a tender, or in the concession documents, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender.***

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

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

Or. fr

*Justification*

*See new Article 38a.*

## **Amendment 186**

### **Proposal for a directive Article 40**

*Text proposed by the Commission*

*Amendment*

#### ***Article 40***

***deleted***

#### ***Life-cycle costing***

***1. Life-cycle costing shall to the extent relevant cover all of the following costs over the life cycle of a product, service or works as defined in point 14 of paragraph 1 of Article 2:***

***(a) internal costs, including costs relating to acquisition (such as production costs), use (such as energy consumption, maintenance costs) and end of life (such as collection and recycling costs)***

*(b) external environmental costs directly linked to the life cycle, provided their monetary value can be determined and verified, which may include the cost of emissions of greenhouse gases and of other pollutant emissions and other climate change mitigation costs.*

*2. Where contracting authorities assess the costs using a life-cycle costing approach, they shall indicate in the concession award documents the methodology used for the calculation of the life-cycle costs. The methodology used must fulfil all of the following conditions:*

*(a) It has been drawn up on the basis of scientific information or is based on other objectively verifiable and non-discriminatory criteria;*

*(b) It has been established for repeated or continuous application;*

*(c) It is accessible to all interested parties.*

*Contracting authorities and contracting entities shall allow economic operators to apply a different methodology for establishing the life-cycle costs of their offer, provided that they prove that this methodology complies with the requirements set out in points a, b and c and is equivalent to the methodology indicated by the contracting authority or contracting entity.*

*3. Whenever a common methodology for the calculation of life-cycle costs is adopted as part of a legislative act of the Union, including by delegated acts pursuant to sector specific legislation, it shall be applied where life-cycle costing is included in the award criteria referred to in Article 39 paragraph (4).*

*A list of such legislative and delegated acts is set out in Annex II. The Commission shall be empowered to adopt delegated acts in accordance with Article 46 concerning the update of this list,*

*when on the basis of the adoption of new legislation, repeal or modification of such legislation, such amendments prove necessary.*

Or. fr

*Justification*

*This article has been deleted in line with the deletion of the most economically advantageous tender criterion. The grantor should be free to use any award criteria that he considers appropriate, on condition that they comply with the rules laid down in this directive.*

**Amendment 187**

**Proposal for a directive  
Article 41 – paragraph 1**

*Text proposed by the Commission*

1. In the concession documents, the ***contracting authority or contracting entity*** may ask or may be required by a Member State to ask the tenderer to indicate in its tender any share of the contract it may intend to subcontract to third parties and any proposed subcontractors.

*Amendment*

1. In the concession documents, the ***grantor*** may ask or may be required by a Member State to ask the tenderer to indicate in its tender any share of the contract it may intend to subcontract to third parties and any proposed subcontractors.

Or. fr

**Amendment 188**

**Proposal for a directive  
Article 42 - paragraph 1**

*Text proposed by the Commission*

1. ***A substantial modification of the provisions of a concession during its term shall be considered as a new award for the purposes of this Directive and shall require a new concession award procedure in accordance with this Directive.***

*Amendment*

1. A concession ***may be modified*** during its term ***by means of a supplementary agreement unless the modifications are substantial.***

*Justification*

*Introduction of a new paragraph to make the article clear, by specifying that a concession may be modified during its term (general principle), unless the modifications are substantial (exclusions).*

**Amendment 189****Proposal for a directive  
Article 42 - paragraph 2***Text proposed by the Commission*

2. A modification of a concession during its term shall be considered substantial ***within the meaning of paragraph 1, where it renders the concession substantially different from the one initially concluded. In any case, without prejudice to paragraph 3 and 4, a modification shall be considered substantial where*** one of the following conditions is met:

- (a) the modification introduces conditions which, had they been part of the initial concession award procedure, would have allowed for the selection of other applicants than those initially selected, or would have allowed for awarding the concession to another applicant or tenderer;
- (b) the modification changes the economic balance of the concession in favour of the concessionaire or
- (c) the modification extends the scope of the concession considerably ***to encompass*** supplies, services or works not initially covered.

*Amendment*

**2. Substantial** modification of a concession during its term shall ***require a new award procedure in accordance with this Directive. A modification shall*** be considered substantial where one of the following conditions is met:

- (-a) the modification changes the nature of the concession;***
- (-aa) the modification entails replacement of the concessionaire;***
- (a) the modification introduces conditions which, had they been part of the initial concession award procedure, would have allowed for the selection of other applicants than those initially selected, or would have allowed for awarding the concession to another applicant or tenderer;
- (b) the modification changes the economic balance of the concession in favour of the concessionaire or
- (c) the modification extends the scope of the concession considerably ***in that it encompasses*** supplies, services or works not initially covered.

*Justification*

*The term 'substantial modification' which entails the launching of a new award procedure is clarified and Article 42(3), which also covers a case of substantial modification (replacement of the concessionaire), is included here. This makes the text clearer and simplifies it.*

**Amendment 190****Proposal for a directive  
Article 42 - paragraph 3***Text proposed by the Commission**Amendment*

***3. The replacement of the concessionaire shall be considered a substantial modification within the meaning of paragraph 1.***

***However, the first subparagraph*** shall not apply in the event of universal or partial succession into the position of the initial contractor, following corporate restructuring operations, insolvency or on the basis of a contractual clause of another economic operator that fulfils the criteria for qualitative selection initially established provided that this does not entail other substantial modifications to the concession and is not aimed at circumventing the application of this Directive.

***Paragraph 2(-aa)*** shall not apply in the event of universal or partial succession into the position of the initial contractor, following corporate restructuring operations, ***transfer of assets between undertakings, takeover of a concessionaire after the latter's*** insolvency or on the basis of a contractual clause of another economic operator that fulfils the criteria for qualitative selection initially established provided that this does not entail other substantial modifications to the concession and is not aimed at circumventing the application of this Directive.

*Justification*

*This paragraph is moved into Article 42(2) so as to clarify and simplify the directive.*

## Amendment 191

### Proposal for a directive Article 42 - paragraph 2 a (new)

*Text proposed by the Commission*

*Amendment*

**2a. *Provided the overall nature of the concession remains the same, modification of the concession shall not be considered substantial where:***

**a) *the modification has been provided for in the original concession contract in clear, precise and unequivocal review clauses or options which state the scope and nature of possible modifications as well as the conditions under which they may be used.***

**b) *the value thereof does not exceed the threshold set in Article 6 and is below 5 % of the updated value of the original contract.***

***Where several successive modifications are made, the value shall be assessed on the basis of the updated cumulative value of the successive modifications.***

Or. fr

#### *Justification*

*Rearrangement of existing Articles 42(4) and 42(5) which concern two cases where the modification is not considered to be substantial if it does not change the nature of the concession (review clauses or options; threshold of 5 % of the initial value). The 'public procurement' terminology ('price') has been changed. The new updated value of the original contract, which is a more accurate value, is taken into account. The second subparagraph is taken from Article 42(4).*

## Amendment 192

### Proposal for a directive Article 42 - paragraph 5

*Text proposed by the Commission*

*Amendment*

**5. Concession modifications shall not be considered substantial within the meaning of paragraph 1, where they have been provided for in the concession documents in clear, precise and unequivocal review clauses or options. Such clauses shall state the scope and nature of possible modifications or options as well as the conditions under which they may be used. They shall not provide for modifications or options that would alter the overall nature of the concession.**

*deleted*

Or. fr

## Amendment 193

### Proposal for a directive Article 42 – paragraph 6 – subparagraph 1 – point a

*Text proposed by the Commission*

*Amendment*

(a) the need for modification has been brought about by circumstances which a diligent **contracting authority or entity** could not foresee

(a) the need for modification has been brought about by circumstances which a diligent **grantor** could not foresee;

Or. fr

#### *Justification*

*Modification of the existing Article 42(6) which sets out the situation in which, even though the modification is substantial, a new award procedure is not required.*

## Amendment 194

### Proposal for a directive

#### Article 42 - paragraph 6 – subparagraph 1 – point c

*Text proposed by the Commission*

(c) in case of concessions awarded by contracting authorities where **any increase in price** is **not** higher than 50% of the value of the **original** concession.

*Amendment*

(c) in case of concessions awarded by contracting authorities where **the value of the intended modification** is higher than 50% of the **updated initial** value of the concession;

Or. fr

#### *Justification*

*Modification of the existing Article 42(6), which sets out the situation in which, even though the modification is substantial, a new award procedure is not required. The new updated value of the original contract, which is a more accurate value, has been taken into account. In addition, the ‘public procurement’ terminology (‘price’) has been changed.*

## Amendment 195

### Proposal for a directive

#### Article 42 - paragraph 6 - subparagraph 2

*Text proposed by the Commission*

**Contracting authorities or contracting entities** shall publish in the Official Journal of the European Union a notice on such modifications. Such notices shall contain the information set out in Annex VII and be published in accordance with the provisions of Article 28.

*Amendment*

**The grantor** shall publish in the Official Journal of the European Union a notice on such modifications. Such notices shall contain the information set out in Annex VII and be published in accordance with the provisions of Article 28.

Or. fr

## Amendment 196

### Proposal for a directive Article 42 - paragraph 7

*Text proposed by the Commission*

**7. Contracting authorities and contracting entities shall not have recourse to modifications of the concession** in the following cases:

(a) where the modification would aim at remedying deficiencies in the performance of the concessionaire or the consequences thereof, which can be remedied through the enforcement of contractual obligations;

(b) where the modification would aim at **compensating risks of price increases that are the result of price fluctuations that could substantially impact the performance of a contract and that have been hedged** by the concessionaire.

*Amendment*

**7. The grantor may not invoke this article** in the following cases:

(a) where the modification would aim at remedying deficiencies in the performance of the concessionaire or the consequences thereof, which can be remedied through the enforcement of contractual obligations;

(b) where the modification would aim at **lessening the operating risks assumed** by the concessionaire.

Or. fr

### *Justification*

*Clarification of existing Article 42(7), which refers to two modification cases where the grantor may not rely upon the clauses of this article, in order to avoid possible abuses (claims that changes which should in reality require a new contract award procedure are only modifications and thus may benefit from potentially less stringent provisions such as the new Articles 42(3) and (4)).*

## Amendment 197

### Proposal for a directive Article 43 – introductory part

*Text proposed by the Commission*

Member States shall ensure that **contracting authorities and contracting entities have** the possibility, under the conditions determined by the applicable national **contract** law, to terminate a

*Amendment*

Member States shall ensure that **the grantor has** the possibility, under the conditions determined by the applicable national law, to terminate a concession during its term, where one of the following

concession during its term, where one of the following conditions is fulfilled:

conditions is fulfilled:

Or. fr

## Amendment 198

### Proposal for a directive Article 43 – point a

#### *Text proposed by the Commission*

(a) the exceptions provided for in Article 15 cease to apply following a private participation in the legal person awarded the contract pursuant to Article 15 (4);

#### *Amendment*

(a) the exceptions provided for in Article 15 cease to apply following a private participation in the legal person awarded the contract pursuant to Article 15;

Or. fr

#### *Justification*

*Restricting the provisions of this paragraph solely to Article 15(4) (horizontal cooperation) is not logical. They should apply to all the cases cited in Article 15(4) where no private participation is a criterion.*

## Amendment 199

### Proposal for a directive Article 43 – point c

#### *Text proposed by the Commission*

(c) the Court of Justice of the European Union finds, in a procedure pursuant to Article 258 of the Treaty, that a Member State has failed to fulfil its obligations under the Treaties by the fact that a **contracting authority or entity** belonging to that Member State has awarded the concession in question without complying with its obligations under the Treaties and this Directive.

#### *Amendment*

(c) the Court of Justice of the European Union finds, in a procedure pursuant to Article 258 of the Treaty, that a Member State has failed to fulfil its obligations under the Treaties by the fact that a **grantor** belonging to that Member State has awarded the concession in question without complying with its obligations under the Treaties and this Directive.

Or. fr

## Amendment 200

### Proposal for a directive Article 46 – paragraph 2

#### *Text proposed by the Commission*

2. The **delegation of** power referred to in Articles **4 (3), 21 (3), 23 (2), 25 (3), 40 (3) and 52 (2)** shall be conferred on the Commission for an indeterminate period of time from the [date of entry into force of the present Directive].

#### *Amendment*

2. The power **to adopt delegated acts** referred to in Articles 21(3) **and** 23(2) shall be conferred on the Commission for an indeterminate period of time from the [date of entry into force of this Regulation].

Or. fr

#### *Justification*

*This deletes an incorrect reference that does not exist (Article 52(2)) and brings the provisions on delegated acts up to date.*

## Amendment 201

### Proposal for a directive Article 46 – paragraph 3

#### *Text proposed by the Commission*

3. The delegation of power referred to in Articles **4 (3), 21 (3), 23 (2), 25 (3), 40 (3) and 52 (2)**, may be revoked at any time by the European Parliament or **by** the Council. **A** revocation decision shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the Official Journal of the European Union or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.

#### *Amendment*

3. The delegation of power referred to in Articles 21(3) **and** 23(2) may be revoked at any time by the European Parliament or the Council. **The** revocation decision shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the Official Journal of the European Union or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.

Or. fr

*Justification*

*This deletes an incorrect reference that does not exist (Article 52(2)) and brings the provisions on delegated acts up to date.*

**Amendment 202**

**Proposal for a directive  
Annex II**

*Text proposed by the Commission*

*Amendment*

**ANNEX II**

***deleted***

**LIST OF EU LEGISLATION  
REFERRED TO IN ARTICLE 40 (3)**

**1. Directive 2009/33/EC.**

Or. fr

*Justification*

*This simplifies the information required in concession notices and deals with the repercussions of deleting Article 40 on life-cycle costing.*

**Amendment 203**

**Proposal for a directive  
Annex III – paragraph 1**

*Text proposed by the Commission*

*Amendment*

1. As far as gas and heat are concerned:
- (a) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of gas or heat;
  - (b) the supply of gas or heat to such networks.

The supply of gas or heat to networks which provide a service to the public by a contracting entity referred to in paragraph 1 subparagraph 2 and subparagraph 3 of

- As far as gas, heat ***and cold*** are concerned:
- (a) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of gas or heat ***and cold***;
  - (b) the supply of gas or heat ***and cold*** to such networks.

The supply of gas or heat ***and cold*** to networks which provide a service to the public by a contracting entity referred to in paragraph 1 subparagraph 2 and

Article 4 shall not be considered a relevant activity within the meaning of paragraph 1 where all of the following conditions are met:

(c) the production of gas or *heat* by the entity concerned is the unavoidable consequence of carrying out an activity other than those referred to in this paragraph or in paragraphs 2 to 4 of this Annex;

(d) the supply to the public network is aimed only at the economic exploitation of such production and amounts to not more than 20 % of the entity's turnover on the basis of the average for the preceding three years, including the current year.

subparagraph 3 of Article 4 shall not be considered a relevant activity within the meaning of paragraph 1 where all of the following conditions are met:

(c) the production of gas or heat *and cold* by the entity concerned is the unavoidable consequence of carrying out an activity other than those referred to in this paragraph or in paragraphs 2 to 4 of this Annex;

(d) the supply to the public network is aimed only at the economic exploitation of such production and amounts to not more than 20 % of the entity's turnover on the basis of the average for the preceding three years, including the current year.

Or. fr

#### *Justification*

*Addition of activities linked to cold as this involves the same system as for heat.*

#### **Amendment 204**

#### **Proposal for a directive Annex III – paragraph 2 – subparagraph 2**

##### *Text proposed by the Commission*

For the purposes of this Directive, supply of electricity includes generation (production) and wholesale of electricity.

##### *Amendment*

For the purposes of this Directive, supply of electricity includes generation (production) and wholesale of electricity *as well as the retail sale thereof.*

Or. fr

#### *Justification*

*Supply of electricity also covers the retail sale (to individuals) thereof and not just its wholesaling.*

## Amendment 205

### Proposal for a directive Annex IV – title

*Text proposed by the Commission*

*Amendment*

INFORMATION TO BE INCLUDED IN  
CONCESSION NOTICES

*(Does not affect English version)*

Or. fr

## Amendment 206

### Proposal for a directive Annex IV – paragraph 4

*Text proposed by the Commission*

*Amendment*

4. Description of the **procurement**: nature and extent of works, **nature and quantity or value of supplies**, nature and extent of services. **Where the concession is divided into lots, this information shall be provided for each lot. Where appropriate, description of any options.**

4. Description of the **contract**: nature and extent of works, nature and extent of services.

Or. fr

### *Justification*

*This simplifies the information required in concession notices and removes information linked to public procurement (such as lots, supply of goods, etc.).*

## Amendment 207

### Proposal for a directive Annex IV – paragraph 5

*Text proposed by the Commission*

*Amendment*

5. CPV Nomenclature reference No(s). **Where the concession is divided into lots, this information shall be provided for**

5. CPV Nomenclature reference No(s).

*each lot.*

Or. fr

*Justification*

*This simplifies the information required in concession notices and removes information linked to public procurement (such as lots, supply of goods, etc.).*

**Amendment 208**

**Proposal for a directive  
Annex IV – paragraph 6**

*Text proposed by the Commission*

*Amendment*

6. NUTS code for the main location of works in case of works concessions or NUTS code for the main place of performance service concessions; ***where the concession is divided into lots, this information shall be provided for each lot.***

6. NUTS code for the main location of works in case of works concessions or NUTS code for the main place of performance service concessions.

Or. fr

*Justification*

*This simplifies the information required in concession notices and removes information linked to public procurement (such as lots, supply of goods, etc.).*

**Amendment 209**

**Proposal for a directive  
Annex IV – paragraph 7**

*Text proposed by the Commission*

*Amendment*

7. Estimated total value of concession(s); ***where the concession is divided into lots, this information shall be provided for each lot, together with detailed method of calculation of the estimated total value of the concession, in accordance with Art. 6***

7. Estimated total value of concession(s).

*Justification*

*This simplifies the information required in concession notices and removes information linked to public procurement (such as lots, supply of goods, etc.).*

**Amendment 210**

**Proposal for a directive  
Annex IV – paragraph 8**

*Text proposed by the Commission*

*Amendment*

**8. Where the concession is to be subdivided into lots, indication of the possibility of tendering for one, for several or for all of the lots; indication of any possible limitation of the number of lots that may be awarded to any one tenderer.**      **deleted**

*Justification*

*This simplifies the information required in concession notices and removes information linked to public procurement (such as lots, supply of goods, etc.).*

**Amendment 211**

**Proposal for a directive  
Annex IV – paragraph 9**

*Text proposed by the Commission*

*Amendment*

**9. Time-frame for *delivery or provision of supplies, works or services and, as far as possible*, duration of the concession.**

**9. Time frame for *implementation of the concession*; duration of the concession.**

*Justification*

*This simplifies the information linked to public procurement (such as lots, supply of goods, etc.).*

**Amendment 212**

**Proposal for a directive  
Annex IV – paragraph 10 – point b**

*Text proposed by the Commission*

b) where appropriate, indication whether **the provision** of the service is reserved by law, regulation or administrative provision to a particular profession; reference to the relevant law, regulation or administrative provision,

*Amendment*

where appropriate, indication whether **management** of the service is reserved by law, regulation or administrative provision to a particular profession; reference to the relevant law, regulation or administrative provision,

Or. fr

**Amendment 213**

**Proposal for a directive  
Annex IV – paragraph 11 – introductory part**

*Text proposed by the Commission*

11. Description of award procedure used, **if the procedure is to be conducted in stages, number of candidates to be admitted to a given stage or to be invited to submit tenders and objective criteria to be used to choose the candidates in question.**

*Amendment*

11. Description of award procedure used:

Or. fr

*Justification*

*This simplifies the information required in concession notices and removes information linked to public procurement (such as lots, supply of goods, etc.).*

## Amendment 214

### Proposal for a directive Annex IV – paragraph 11 – point a

*Text proposed by the Commission*

a) Time limit for the submission of applications

*Amendment*

a) Time limit for the submission of applications ***or receipt of tenders;***

Or. fr

## Amendment 215

### Proposal for a directive Annex IV – paragraph 17

*Text proposed by the Commission*

***17. In case of one-stage procedures:***

***a) Time limit for receipt of tenders, if different from the time limit the submission of applications***

***b) time frame during which the tenderer must maintain its tender,***

***c) date, time and place for the opening of tenders,***

***d) persons authorised to be present at such opening.***

*Amendment*

***deleted***

Or. fr

*Justification*

*This simplifies the information required in concession notices and removes information linked to public procurement (such as lots, supply of goods, etc.).*

## Amendment 216

### Proposal for a directive Annex V – paragraph 5

*Text proposed by the Commission*

5. Description of the **procurement**: nature and extent of works, **nature and quantity or value of supplies**, nature and extent of services. **Where the concession is divided into lots, this information shall be provided for each lot. Where appropriate, description of any options.**

*Amendment*

5. Description of the **contract**: nature and extent of works, nature and extent of services.

Or. fr

## Amendment 217

### Proposal for a directive Annex V – paragraph 7

*Text proposed by the Commission*

7. Criteria referred to in Article 39 which were used for award of the concession or concessions.

*Amendment*

7. Criteria referred to in Article **38a** which were used for award of the concession or concessions.

Or. fr

## Amendment 218

### Proposal for a directive Annex V – paragraph 9

*Text proposed by the Commission*

**9. Number of tenders received with respect of each award, including:**  
**a) number of tenders received from economic operators which are small and medium enterprises,**  
**b) number of tenders received from**

*Amendment*

**deleted**

*abroad,*

*c) number of tenders received electronically.*

Or. fr

*Justification*

*This simplifies the information required in concession award notices and removes information linked to public procurement (such as lots, supply of goods, etc.). Where no prior notice has been published, some information is not relevant.*

**Amendment 219**

**Proposal for a directive  
Annex V – paragraph 10**

*Text proposed by the Commission*

10. For each award, name, address including NUTS code, telephone, fax number, email address and internet address of the successful tenderer(s) ***including***

***a) information whether the successful tenderer is small and medium enterprise,***

***b) information whether the concession was awarded to a consortium.***

*Amendment*

10. For each award, name, address including NUTS code, telephone, fax number, email address and internet address of the successful tenderer(s).

Or. fr

*Justification*

*This simplifies the information required in concession award notices and removes information linked to public procurement (such as lots, supply of goods, etc.). Where no prior notice has been published, some information is not relevant.*

## Amendment 220

### Proposal for a directive Annex V – paragraph 11

*Text proposed by the Commission*

*Amendment*

11. Value and main financial terms of the awarded concession, ***including fees and prices.***

11. Value and main financial terms of the awarded concession.

Or. fr

#### *Justification*

*This simplifies the information required in concession award notices and removes information linked to public procurement (such as lots, supply of goods, etc.). Where no prior notice has been published, some information is not relevant.*

## Amendment 221

### Proposal for a directive Annex V – paragraph 12

*Text proposed by the Commission*

*Amendment*

***12. Where appropriate, for each award, value and proportion of concession likely to be subcontracted to third parties.***

***deleted***

Or. fr

#### *Justification*

*This simplifies the information required in concession award notices and removes information linked to public procurement (such as lots, supply of goods, etc.). Where no prior notice has been published, some information is not relevant.*

## Amendment 222

### Proposal for a directive Annex V – paragraph 14

*Text proposed by the Commission*

*Amendment*

14. Name and address of the **oversight body and the** body responsible for review and, where appropriate, mediation procedures. Precise information concerning the deadline for review procedures, or if need be, the name, address, telephone number, fax number and email address of the service from which this information may be obtained.

14. Name and address of the body responsible for review and, where appropriate, mediation procedures. Precise information concerning the deadline for review procedures, or if need be, the name, address, telephone number, fax number and email address of the service from which this information may be obtained.

Or. fr

*Justification*

*Alignment with the rest of the draft report, deletion of references to the oversight body.*

## Amendment 223

### Proposal for a directive Annex V – part II

*Text proposed by the Commission*

*Amendment*

**II. INFORMATION TO BE INCLUDED  
IN CONCESSION AWARD NOTICES  
PUBLISHED IN ACCORDANCE WITH  
ARTICLE 27(2)**

*deleted*

**1. Name, identification number (where provided for in national legislation), address including NUTS code, telephone, fax number, email and internet address of the contracting authority or entity and, where different, of the service from which additional information may be obtained.**

**2. Description of the procurement: nature and extent of works, nature and quantity or value of supplies, nature and extent of services. Where the concession is divided**

*into lots, this information shall be provided for each lot. Where appropriate, description of any options.*

**3. CPV Nomenclature reference No(s).**

**4. Type of contracting authority or entity and main activity exercised.**

**5. Date of concession award decision or decisions;**

**6. For each award, name, address including NUTS code, telephone, fax number, email address and internet address of the economic operators to which the concession has been awarded.**

**7. Value and main financial terms of the award, including fees and prices.**

**8. Detailed method of calculation of the estimated total value of the concession, in accordance with Article 6.**

Or. fr

*Justification*

*Deletion of this part referring to concession notices for intermediate thresholds (as a result of deleting Article 27(2)).*

## **Amendment 224**

### **Proposal for a directive Annex VI – paragraph 3**

*Text proposed by the Commission*

*Amendment*

**3. CPV Nomenclature reference No(s);  
*where the contract is divided into lots, this information shall be provided for each lot.***

**3. CPV Nomenclature reference No(s).**

Or. fr

*Justification*

*This simplifies the information required in award notices for the concession of social and*

*other specific services, notably the reference to lots and deletion of information linked to public procurement.*

#### **Amendment 225**

##### **Proposal for a directive Annex VI – paragraph 4**

*Text proposed by the Commission*

*Amendment*

4. ***At least a*** summary indication of the ***nature and quantity of the services and if applicable, works and supplies provided.***

4. Summary indication of the ***subject of the concession.***

Or. fr

#### *Justification*

*This simplifies the information required in award notices for the concession of social and other specific services, and deletes information linked to public procurement.*

#### **Amendment 226**

##### **Proposal for a directive Annex VI – paragraph 6**

*Text proposed by the Commission*

*Amendment*

6. Value and main financial terms of the award, ***including fees and prices.***

6. Value and main financial terms of the award.

Or. fr

#### *Justification*

*This simplifies the information required in award notices for the concession of social and other specific services, and deletes information linked to public procurement.*

## Amendment 227

### Proposal for a directive Annex VII – paragraph 3

*Text proposed by the Commission*

*Amendment*

3. NUTS code for the main location of works in case of **public works concessions** **or** works concessions or NUTS code for the main place of **delivery** **or** performance in service concessions;

3. NUTS code for the main location of works in case of works concessions or NUTS code for the main place of performance in service concessions;

Or. fr

#### *Justification*

*This simplifies the information required in concession modification notices, and deletes information linked to public procurement.*

## Amendment 228

### Proposal for a directive Annex VII – paragraph 4

*Text proposed by the Commission*

*Amendment*

4. Description of the concession before and after the modification: nature and extent of the works, **nature and quantity or value of supplies**, nature and extent of services.

4. Description of the concession before and after the modification: nature and extent of the works, nature and extent of services.

Or. fr

#### *Justification*

*This simplifies the information required in concession modification notices, and deletes information linked to public procurement.*

## Amendment 229

### Proposal for a directive Annex VII – paragraph 5

*Text proposed by the Commission*

5. Where applicable, modification of financial terms of the concession, ***including increase in prices or fees caused by the modification.***

*Amendment*

5. Where applicable, modification of financial terms of the concession.

Or. fr

*Justification*

*This simplifies the information required in concession modification notices, and deletes information linked to public procurement.*

## Amendment 230

### Proposal for a directive Annex VII – paragraph 10

*Text proposed by the Commission*

10. Name and address of the ***oversight body and the*** body responsible for review and, where appropriate, mediation procedures. Precise information concerning the deadline for review procedures, or if need be, the name, address, telephone number, fax number and email address of the service from which this information may be obtained.

*Amendment*

10. Name and address of the body responsible for review and, where appropriate, mediation procedures. Precise information concerning the deadline for review procedures, or if need be, the name, address, telephone number, fax number and email address of the service from which this information may be obtained.

Or. fr

*Justification*

*Alignment with the rest of the draft report, deletion of references to the oversight body.*

## Amendment 231

### Proposal for a directive Annex VIII

*Text proposed by the Commission*

*Amendment*

#### **ANNEX VIII**

*deleted*

#### **DEFINITION OF CERTAIN TECHNICAL SPECIFICATIONS**

*For the purposes of this Directive:*

*1. technical specification", " means one of the following:*

*a) in the case of public works concessions or works concessions, the totality of the technical prescriptions contained in particular in the concession award documents, defining the characteristics required of a material, product or supply, so that it fulfils the use for which it is intended by the contracting authority or entity. Those characteristics include levels of environmental and climate performance, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, safety or dimensions, including the procedures concerning quality assurance, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions and production processes and methods at any stage of the life cycle of the works; those characteristics also include rules relating to design and costing, the test, inspection and acceptance conditions for works and methods or techniques of construction and all other technical conditions which the contracting authority or entity is in a position to prescribe, under general or specific regulations, in relation to the finished works and to the materials or parts which they involve;*

*b) in the case of service concessions, a specification in a document defining the*

*required characteristics of a product or a service, such as quality levels, environmental and climate performance levels, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, use of the product, safety or dimensions, including requirements relevant to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions, production processes and methods at any stage of the life cycle of the supply or service and conformity assessment procedures;*

*2. "standard" means a technical specification approved by a recognised standardising body for repeated or continuous application, compliance with which is not compulsory and which falls into one of the following categories:*

*a) international standard: a standard adapted by an international standards organisation and made available to the general public,*

*b) European standard: a standard adopted by a European standards organisation and made available to the general public,*

*c) national standard: a standard adopted by a national standards organisation and made available to the general public;*

*3. "European technical approval" means a favourable technical assessment of the fitness for use of a product for a particular purpose, based on the fulfilment of the essential requirements for building works, by means of the inherent characteristics of the product and the defined conditions of application and use. European technical approvals are issued by an approval body designated for this purpose by the Member State;*

*4. "Common technical specification" means a technical specification laid down*

*in accordance with a procedure recognised by the Member States which has been published in the Official Journal of the European Union;*

*5. "Technical reference" means any deliverable produced by European standardisation bodies, other than European standards, according to procedures adapted to the development of market needs.*

Or. fr

*Justification*

*This deletes this annex concerning technical specifications (following on from the deletion of Article 32).*

**Amendment 232**

**Proposal for a directive  
Annex IX – paragraph 1 – subparagraphs 2 and 3**

*Text proposed by the Commission*

*Amendment*

Notices referred to in Articles 26 and 27 shall be published by the Publications Office of the European Union

– Notices referred to in Articles 26 and 27 shall be published by the Publications Office of the European Union

The Publications Office of the European Union will give the contracting authority or entity the confirmation referred to in Article 28 (5).

– The Publications Office of the European Union will give the contracting authority or entity the confirmation referred to in Article 28(2).

Or. fr

*Justification*

*Dashes added at the start of the second and third subparagraphs.*

**Amendment 233**

**Proposal for a directive  
Annex X, column 1.**

| <i>Text proposed by the Commission</i>   | <i>Amendment</i>   |
|--|--|
| CPV Code<br><b>7511000-4</b> and<br>from 85000000-9 to 85323000-9<br>(except 85321000-5 and 85322000-2)          | CPV Code<br><b>79611000-0</b> and<br>from 85000000-9 to 85323000-9<br>(except 85321000-5 and 85322000-2)   |
| 75121000-0, 75122000-7, 75124000-1   | 75121000-0, 75122000-7, 75124000-1;<br><b>from 79995000-5 to 79995200-7; from<br/>80100000-5 to 80660000-8 (except<br/>80533000-9, 80533100-0, 80533200-1);<br/>from 92000000-1 to 92700000-8 (except<br/>92230000-2, 92231000-9 92232000-6)</b> |
| 75300000-9   | 75300000-9   |
| 75310000-2, 75311000-9, 75312000-6,<br>75313000-3, 75313100-4, 75314000-0,<br>75320000-5, 75330000-8, 75340000-1 | 75310000-2, 75311000-9, 75312000-6,<br>75313000-3, 75313100-4, 75314000-0,<br>75320000-5, 75330000-8, 75340000-1   |
| 98000000-3   | 98000000-3   |
| 98120000-0   | 98120000-0   |
| 98131000-0   | 98131000-0   |

Or. fr

*Justification*

*This updates the list of social and other specific services benefiting from less stringent requirements based on the list provided in the revised proposals for public procurement directives.*

**Amendment 234**

**Proposal for a directive  
Annex XI**

| <i>Text proposed by the Commission</i>           | <i>Amendment</i> |
|--|------------------|
| <b>ANNEX XI</b><br><b>LIST OF EUROPEAN UNION</b> | <b>deleted</b>   |

**LEGISLATION REFERRED TO IN  
ARTICLE 4 (3) (b)**

***Rights which have been granted by means of a procedure in which adequate publicity has been ensured and where the granting of those rights was based on objective criteria shall not constitute "special or exclusive rights" within the meaning of this Directive. The following lists procedures, ensuring adequate prior transparency, for granting authorisations on the basis of other legislative acts of the European Union which do not constitute "special or exclusive rights" within the meaning of this Directive:***

***(a) Granting authorisation to operate natural gas installations in accordance with the procedures laid down in Article 4 of Directive 98/30/EC.***

***(b) Authorisation or an invitation to tender for the construction of new electricity production installations in accordance with the provisions of Directive 96/92/EC.***

***(c) The granting in accordance with the procedures laid down in Article 9 of Directive 97/67/EC of authorisations in relation to a postal service which is not or shall not be reserved.***

***(d) A procedure for granting an authorisation to carry on an activity involving the exploitation of hydrocarbons in accordance with Directive 94/22/EC.***

***(e) Public service contracts within the meaning of Regulation (EC) No 1370/2007 which have been awarded on the basis of a competitive tendering procedure in accordance with its Article 5(3).***

Or. fr

*Justification*

*This deletes this annex which refers to Article 4(3)(b) which has also been deleted.*

**Amendment 235**

**Proposal for a directive  
Annex XII**

*Text proposed by the Commission*

*Amendment*

**ANNEX XII**

*deleted*

**REQUIREMENTS RELATING TO  
DEVICES FOR THE ELECTRONIC  
RECEIPT OF TENDERS, AND  
APPLICATIONS**

***1. Devices for the electronic receipt of tenders and applications must at least guarantee, through technical means and appropriate procedures, that:***

***(a) the exact time and date of the receipt of tenders and applications can be determined precisely;***

***(b) it may be reasonably ensured that, before the time limits laid down, no-one can have access to data transmitted under these requirements;***

***(c) where that access prohibition is infringed, it may be reasonably ensured that the infringement is clearly detectable;***

***(d) only authorised persons may set or change the dates for opening data received;***

***(e) during the different stages of the concession award procedure access to all data submitted, or to part thereof, must be possible only through simultaneous action by authorised persons;***

***(f) simultaneous action by authorised persons must give access to data***

*transmitted only after the prescribed date;*

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

*(h) authentication of tenders must conform to the requirements set out in this Annex.*

Or. fr

*Justification*

*This deletes this annex which refers to clauses deleted from Article 25.*

**Amendment 236**

**Proposal for a directive  
Annex XIII**

*Text proposed by the Commission*

*Amendment*

**ANNEX XIII**

*deleted*

**INFORMATION TO BE INCLUDED IN  
PRIOR INFORMATION NOTICES  
CONCERNING CONCESSIONS FOR  
SOCIAL AND OTHER SPECIFIC  
SERVICES**

*(as referred to in Article 26(3))*

*1. Name, identification number (where provided for in national legislation), address including NUTS code, telephone, fax number, email and internet address of the contracting authority or contracting entity and, where different, of the service from which additional information may be obtained.*

*2. Where appropriate, email or internet address at which the specifications and any supporting documents will be available.*

- 3. Type of contracting authority or contracting entity and main activity exercised.**
- 4. CPV Nomenclature reference No(s); where the contract is divided into lots, this information shall be provided for each lot.**
- 5. NUTS code for the main place of delivery or performance of service concessions**
- 6. Description of the services and where applicable, incidental works and supplies to be procured**
- 7. Estimated total value of concession(s); where the concession is divided into lots, this information shall be provided for each lot.**
- 8. Conditions for participation.**
- 9. Where applicable, time limit(s) for contacting the contracting authority or contracting entity in view of participation.**
- 10. Where applicable, brief description of the main features of the award procedure to be applied.**
- 11. Any other relevant information.**

Or. fr

*Justification*

*Deletion of this annex referring to prior information notices for social and other specific services (as a result of the deletion of Article 26(3)).*

## EXPLANATORY STATEMENT

Public procurement makes up a very large portion of economic activity within the EU. Most often, it takes the form of public contracts or concessions. There are clear rules governing public contracts. By contrast, works concessions are subject only to the basic provisions of the current Public Procurement Directives (directives 2004/17/EC and 2004/18/EC), and service concessions are governed solely by the general principles laid down in the Treaty and by a substantial body of case law. A legislative initiative on concessions would have the advantage of clarifying the existing legislative framework, bearing in mind that the Court of Justice is producing more and more case law, and would make for greater legal stability and certainty, as opposed to the present state of play in the EU, in which the failure to apply Treaty principles in the same way has created a patchwork of laws. Clear rules governing the award of service and works concessions would also provide public authorities, if they were so minded, with additional means of developing and modernising public services. They would stimulate competition within the EU. Greater procedural transparency would, finally, offer a more effective weapon against favouritism in public procurement awards.

In view of the complexity of the subject, the rapporteur made a firm declaration of intent at the start of the procedure, namely to carry out an in-depth analysis and ensure that all stakeholders could be consulted on as broad a basis as possible. This approach has found expression in a working document<sup>1</sup>, in a public hearing held on 31 March 2012, in a workshop held on 10 May 2012, and in several meetings with the shadow rapporteurs, as well as in the requests for briefing papers on specific points (the legal framework, definition of the term ‘concession’, transparency, etc.).

The exhaustive prior discussion with a wide range of players gave rise to **two key guiding principles** which have formed the basis of this draft report:

- an initiative is needed at European level if only to produce a common definition of concessions and the manner of awarding them, as well as for the reasons mentioned above;

- the approach needs to be ‘light’ and based on a legislative framework that should be sufficiently robust to avert interpretations but should neither regulate the award of concession contracts down to the minutest detail nor entail extra administrative costs.

**2. Proceeding from those premises, the rapporteur is pursuing the four aims summarised below:**

- the directive must be clarified, reworked, and simplified so as to provide an effective, intelligible, coherent, and pragmatic legislative framework;

- instead of equating concessions with public contracts, the provisions must be tailored to their characteristics; concessions are akin to what lawyers call ‘incomplete contracts’;

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<sup>1</sup> PE483.644v01-00.

- public authorities must be completely independent when it comes to choosing the legal framework for their action, organising themselves to perform their tasks, and laying down quality criteria for service concessions;
- a fair balance has to be maintained between, on the one hand, the flexibility and discretion which public authorities must exercise when taking decisions and, secondly, the transparency needed to place economic operators on an equal footing.

### **1. Definition of a concession and performance rules: specific features of an ‘incomplete contract’**

The **definition of a concession** (the subject of 13 out of the 25 rulings on concessions to have been handed down by the Court of Justice since 2000) is essential in order to do away with the present vagueness of the law and the legal patchwork spanning the 27 Member States.

A concession is a form of management that is clearly distinct from administrative authorisation, a licence, or a public contract to the extent that:

- (a) a contracting authority or entity assigns a task (carrying out works or running a service), and in so doing transfers the responsibility for performing it, to an outside economic operator; and
- (b) there is an economic risk entailed in the operation of the works or services, and that has to be assumed by the concessionaire.

Some of the amendments tabled aim to dispel the misconception that a concession is just another kind of public contract: the definition of the term ‘concession’ has been rewritten; the vocabulary has been changed, and concepts borrowed from public contracts (splitting into lots, framework contracts, technical specifications, etc.) have been removed.

Calculation of the **value** of concessions is crucial, since it determines which contracts the text has to cover (threshold). The rules proposed in the directive are excessively complex and not very clear, and they distinguish unnecessarily between works and service concessions. It would be preferable to have one simple method of calculation, whatever the purpose of the concession, given that the same rules apply to works and service concessions and many concessions are mixtures of works and services, making the applicable threshold difficult to determine. The new method proposed is based essentially on the aggregate concession turnover, exclusive of tax, over the entire life of the contract. It has the merit of being clear and applying equally to works and service concessions.

In the interests of simplification, the rapporteur is doing away with the **intermediate thresholds** and the related provisions, which he considers to be needlessly cumbersome and of no real added value.

The provisions on the **duration of concessions** have been amended so as to stress the point that concessions are limited in time and to cover cases in which there is no investment to be financed by the concessionaire. The duration of a concession must, in that event, be determined according to criteria other than the time taken to recoup the investment outlay (e.g. the fact of achieving the aims laid down in the contract).

Concessions bear some resemblance to the economic concept of an ‘incomplete contract’ to the extent that they involve complex contracts of fairly long duration, a need for renegotiation, substantial investment, economic vicissitudes (operating risk), and uncertainty (contingencies that might arise while a concession was being operated). A degree of flexibility is therefore required both in the award procedure and as regards the contract **performance rules**. That notwithstanding, the rapporteur is opposed to ‘perpetual’ renewals brought about by ‘last-minute’ investment just before a contract expires.

## 2. Maintaining the quality of public services

The removal of the distinction made in directives 2004/17/EC and 2004/18/EC between priority and non-priority services stems from a Commission analysis (see the impact assessment for the revision of the Public Procurement Directives). Annex X of the directive on concessions has been updated in the light of the proposals put forward in the revision of the Public Procurement Directives.

The rapporteur has noted the anxieties expressed about the quality of public services put out to concession, as opposed to being managed in-house. He categorically rejects headlong **privatisation** of public services. Concessions are merely one of several forms of management that public authorities are free to choose. The rapporteur, like the Commission, believes that works and services managed in-house and, to some extent, the activities of ‘affiliated undertakings’ should be excluded from the scope of the directive.

The directive allows authorities, assuming that they are anxious to offer a high standard of service to their fellow citizens, to lay down **quality criteria or public service obligations** which any concessionaires would have to fulfil. The rapporteur is, in this connection, reaffirming the right that public authorities have to provide for a given level of quality or public service obligations in accordance with Protocol (No 26) annexed to the Treaty on the Functioning of the EU.

## 3. Procedural safeguards: a fair balance between flexibility and transparency

In procedural terms, the concept of an ‘incomplete contract’ implies that contracting authorities and entities have to be allowed a degree of **flexibility** and **latitude** to enable them to make the best possible choices. The proposal for a directive, however, based as it is on the rules applicable to public contracts, over-regulates the award of concession contracts.

The rapporteur is therefore proposing a slimmed-down version of the procedural provisions, stressing the central importance of negotiation, eliminating excessive regulation (e.g. publication of stages or weighting of criteria) – bearing in mind that negotiation has to retain the freedom in which its strength and interest lie – and confining regulation of the award criteria to the requirement to observe general principles such as transparency, non-discrimination, and equal treatment.

Freedom of negotiation, however, does not detract from the need to ensure that information supplied by candidates and tenderers is treated **confidentially**.

The rapporteur nevertheless maintains that flexibility has to go hand in hand with a guarantee of procedural **transparency**, taking into account the principle of equal treatment and the often

considerable investment required (in terms of financial, human, and other resources) in order to submit a tender. Economic operators have to be fully and equally informed about the award criteria, any changes in the course of negotiations, and so on.

On the other hand, the necessary transparency should be achieved without creating needless **red tape**: that is the reason for the proposals to do away with prior information notices for social services and other services of a specific nature, change the advertising arrangements, so that a concession notice would be sent out after being sent to the Commission (instead of being published in the Official Journal), and simplify the standard forms.

Finally, the rapporteur fully agrees that the provisions of the ‘**Review**’ Directive should also apply to concession contracts.

#### **4. Taking public policy aims into account**

If the public policy objectives laid down by contracting authorities or entities are to be taken into account, the need for flexibility must also imply that a concession provider should be allowed to award a concession on the basis of **environmental, social, or innovation-related criteria**.

The concession provider should likewise be free to determine the technical and practical requirements on which the characteristics of the concession will be based. These could include, for example, the requirement to allow for the needs of people with disabilities, the decision to use devices compatible with a sustainable development approach, or the recognition of social considerations.

#### **5. Exclusions**

The rapporteur agrees that public-public cooperation should, by definition, be excluded from the scope of the directive. The codification of the Court of Justice’s *Teckal*<sup>1</sup> and *Coditel*<sup>2</sup> case law on **in-house** and **joint in-house** arrangements is to be welcomed, since it serves to clarify criteria that have been left too vague (Article 15(1) and (3)). The rapporteur is nevertheless proposing to spell out the concept of ‘similar control’ more explicitly, following the model of Regulation (EC) No 1307/2007 on public passenger transport, thus making it easier to establish whether such control exists. In addition, the partial clarification brought by the language of the case law (‘90% of the activities’ instead of ‘the essential part’ thereof) has to be completed by a more explicit description of the term ‘activities’ (i.e. turnover) in order to take this reasoning to its logical conclusion.

The explicit exclusion of horizontal cooperation (intermunicipal cooperation, Article 15(4)) raises doubts about the status to be accorded to transfers of responsibilities between public authorities that are not explicitly excluded. A new paragraph is therefore being proposed in order to exclude agreements on transfers of responsibilities between public authorities.

The rapporteur supports the exclusion of concessions awarded by contracting entities to **affiliated undertakings**, since these arise from the particularly close relations between

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<sup>1</sup> Case C-107/98, 1999.

<sup>2</sup> Case C-324/07, 2008.

entities belonging to the same group (consolidated accounts or exercise of a dominant influence). The article has been reworded more explicitly and reorganised. In addition, the 80% criterion has been clarified to prevent this exclusion being misused; the figure is to be calculated in relation to all of the services provided by an affiliated undertaking in the three preceding years, that is to say, those performed for the contracting entity to which the undertaking is affiliated and those performed outside that relationship (and not just all services performed for the contracting entity, which might make up only a fraction of the whole). The 80% must, moreover, be accounted for by services or works that are the subject of the concession and provided to the contracting entity as such, which means either the entity to which the concessionaire undertaking is affiliated (Article 11(2)(a) and (b)) or an entity subject to the dominant influence of another undertaking to which the concessionary undertaking is linked (Article 11(2)(c)).

As regards **sector-specific exclusions**, the rapporteur is reworking and simplifying the directive (merger of Articles 8 and 10, deletion of the references to services not covered by concessions, for example employment contracts, and so on). He is also proposing that the exclusion applying to concessions awarded on the basis of an exclusive right should be widened to encompass the activities falling under Annex III if these are subject to a tariff regulated at national level at the time of entry into force of the directive; this provision should not be confined solely to network infrastructure management for the purposes of the activities listed in Annex III (Article 8(1)). The fact that there is a tariff regulated by the State implies that there is no choice of economic operator and hence no reason to carry out a competitive procedure of the type concerned here.

Gaming has, in addition, been excluded on account of the highly specific nature of the activities concerned and the need to ensure that Member States can continue to exercise oversight in order to pursue aims in the general interest (combating illegal gambling, fraud, and money laundering; preventing addiction). If gaming were subject to the rules of the directive, Member States would be deprived of flexibility and consequently impeded in their ability to act. National lotteries and similar games will therefore be excluded.

## **Conclusion**

The rapporteur is convinced of the need for a European legislative initiative on concessions. Given the lack of legal certainty, the fact that contracts are continuing to be concluded privately, in defiance of the major principles on which the EU internal market has been built, and the patchwork of Member States' laws in this field, a legislative framework has to be established at European level. That framework, however, has to be consistent with a 'light' approach making for clear, coherent, intelligible, and effective rules. The rapporteur hopes that he has achieved that aim.