

Directive 2004/17/EC of the European Parliament and of the Council  
of 31 March 2004 coordinating the procurement procedures of entities  
operating in the water, energy, transport and postal services sectors (repealed)

TITLE I

**GENERAL PROVISIONS APPLICABLE TO  
CONTRACTS AND DESIGN CONTESTS**

CHAPTER I

**Basic terms**

*Article 1*

**Definitions**

- 1 For the purposes of this Directive, the definitions set out in this Article shall apply.
- 2
- a ‘Supply, works and service contracts’ are contracts for pecuniary interest concluded in writing between one or more of the contracting entities referred to in Article 2(2), and one or more contractors, suppliers, or service providers.
- b ‘Works contracts’ are contracts having as their object either the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex XII or a work, or the realisation by whatever means of a work corresponding to the requirements specified by the contracting entity. A ‘work’ means the outcome of building or civil engineering works taken as a whole which is sufficient of itself to fulfil an economic or technical function.
- c ‘Supply contracts’ are contracts other than those referred to in (b) having as their object the purchase, lease, rental or hire-purchase, with or without the option to buy, of products.
- A contract having as its object the supply of products, which also covers, as an incidental matter, siting and installation operations shall be considered to be a ‘supply contract’;
- d ‘Service contracts’ are contracts other than works or supply contracts having as their object the provision of services referred to in Annex XVII.
- A contract having as its object both products and services within the meaning of Annex XVII shall be considered to be a ‘service contract’ if the value of the services in question exceeds that of the products covered by the contract.
- A contract having as its object services within the meaning of Annex XVII and including activities within the meaning of Annex XII that are only incidental to the principal object of the contract shall be considered to be a service contract.
- 3
- a A ‘works concession’ is a contract of the same type as a works contract except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the work or in that right together with payment;

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- b A ‘service concession’ is a contract of the same type as a service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in that right together with payment.

4 A ‘framework agreement’ is an agreement between one or more contracting entities referred to in Article 2(2) and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantities envisaged.

5 A ‘dynamic purchasing system’ is a completely electronic process for making commonly used purchases, the characteristics of which, as generally available on the market, meet the requirements of the contracting entity, which is limited in duration and open throughout its validity to any economic operator which satisfies the selection criteria and has submitted an indicative tender that complies with the specification.

6 An ‘electronic auction’ is a repetitive process involving an electronic device for the presentation of new prices, revised downwards, and/or new values concerning certain elements of tenders, which occurs after an initial full evaluation of the tenders, enabling them to be ranked using automatic evaluation methods. Consequently, certain service contracts and certain works contracts having as their subject-matter intellectual performances, such as the design of works, may not be the object of electronic auctions.

7 The terms ‘contractor’, ‘supplier’ or ‘service provider’ mean either a natural or a legal person, or a contracting entity within the meaning of Article 2(2)(a) or (b), or a group of such persons and/or entities which offers on the market, respectively, the execution of works and/or a work, products or services.

The terms ‘economic operator’ shall cover equally the concepts of contractor, supplier and service provider. It is used merely in the interests of simplification.

A ‘tenderer’ is an economic operator who submits a tender, and ‘candidate’ means one who has sought an invitation to take part in a restricted or negotiated procedure.

8 A ‘central purchasing body’ is a contracting authority within the meaning of Article 2(1)(a) or a contracting authority within the meaning of Article 1(9) of Directive 2004/18/EC which:

- acquires supplies and/or services intended for contracting entities or
- awards public contracts or concludes framework agreements for works, supplies or services intended for contracting entities.

9 ‘Open, restricted and negotiated procedures’ are the procurement procedures applied by contracting entities, whereby:

- a in the case of open procedures, any interested economic operator may submit a tender;
- b in the case of restricted procedures, any economic operator may request to participate and only candidates invited by the contracting entity may submit a tender;
- c in the case of negotiated procedures, the contracting entity consults the economic operators of its choice and negotiates the terms of the contract with one or more of these.

10 ‘Design contests’ are those procedures which enable the contracting entity to acquire, mainly in the fields of town and country planning, architecture, engineering or data processing, a plan or design selected by a jury after having been put out to competition with or without the award of prizes.

11 'Written' or 'in writing' means any expression consisting of words or figures that can be read, reproduced and subsequently communicated. It may include information transmitted and stored by electronic means.

12 'Electronic means' means using electronic equipment for the processing (including digital compression) and storage of data which is transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means.

13 'Common Procurement Vocabulary (CPV)' means the reference nomenclature applicable to public contracts as adopted by Regulation (EC) No 2195/2002 of 5 November 2002 of the European Parliament and of the Council on the Common Procurement Vocabulary (CVP)<sup>(1)</sup> while ensuring equivalence with the other existing nomenclatures.

In the event of varying interpretations of the scope of this Directive, owing to possible differences between the CPV and NACE nomenclatures listed in Annex XII or between the CPV and CPC (provisional version) nomenclatures listed in Annex XVII, the NACE or the CPC nomenclature respectively shall take precedence.

## CHAPTER II

### Definition of the activities and entities covered

#### Section 1

#### Entities

#### Article 2

#### Contracting entities

- 1 For the purposes of this Directive,
- a 'Contracting authorities' are State, regional or local authorities, bodies governed by public law, associations formed by one or several such authorities or one or several of such bodies governed by public law.

'A body governed by public law' means any body:

- established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character,
- having legal personality and
- financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law;

- b a 'public undertaking' is any undertaking over which the contracting authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it.

A dominant influence on the part of the contracting authorities shall be presumed when these authorities, directly or indirectly, in relation to an undertaking:

- hold the majority of the undertaking's subscribed capital, or

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- control the majority of the votes attaching to shares issued by the undertaking, or
  - can appoint more than half of the undertaking's administrative, management or supervisory body.
- 2 This Directive shall apply to contracting entities:
- a which are contracting authorities or public undertakings and which pursue one of the activities referred to in Articles 3 to 7;
  - b which, when they are not contracting authorities or public undertakings, have as one of their activities any of the activities referred to in Articles 3 to 7, or any combination thereof and operate on the basis of special or exclusive rights granted by a competent authority of a Member State.
- 3 For the purposes of this Directive, '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 Articles 3 to 7 to one or more entities, and which substantially affects the ability of other entities to carry out such activity.

## Section 2

### Activities

#### Article 3

#### **Gas, heat and electricity**

- 1 As far as gas and heat are concerned, this Directive shall apply to the following activities:
- 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; or
  - b the supply of gas or heat to such networks.
- 2 The supply of gas or heat to networks which provide a service to the public by a contracting entity other than a contracting authority shall not be considered a relevant activity within the meaning of paragraph 1 where:
- a 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 paragraphs 1 or 3 of this Article or in Articles 4 to 7; and
  - b 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 having regard to the average for the preceding three years, including the current year.
- 3 As far as electricity is concerned, this Directive shall apply to the following activities:
- 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 electricity; or
  - b the supply of electricity to such networks.
- 4 The supply of electricity to networks which provide a service to the public by a contracting entity other than a contracting authority shall not be considered a relevant activity within the meaning of paragraph 3 where:

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- a the production of electricity by the entity concerned takes place because its consumption is necessary for carrying out an activity other than those referred to in paragraphs 1 or 3 of this Article or in Articles 4 to 7; and
- b supply to the public network depends only on the entity's own consumption and has not exceeded 30 % of the entity's total production of energy, having regard to the average for the preceding three years, including the current year.

#### *Article 4*

#### **Water**

- 1 This Directive shall apply to the following activities:
  - 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 drinking water; or
  - b the supply of drinking water to such networks.
- 2 This Directive shall also apply to contracts or design contests awarded or organised by entities which pursue an activity referred to in paragraph 1 and which:
  - a are connected with hydraulic engineering projects, irrigation or land drainage, provided that the volume of water to be used for the supply of drinking water represents more than 20 % of the total volume of water made available by such projects or irrigation or drainage installations, or
  - b are connected with the disposal or treatment of sewage.
- 3 The supply of drinking water to networks which provide a service to the public by a contracting entity other than a contracting authority shall not be considered a relevant activity within the meaning of paragraph 1 where:
  - a the production of drinking water by the entity concerned takes place because its consumption is necessary for carrying out an activity other than those referred to in Articles 3 to 7; and
  - b supply to the public network depends only on the entity's own consumption and has not exceeded 30 % of the entity's total production of drinking water, having regard to the average for the preceding three years, including the current year.

#### *Article 5*

#### **Transport services**

1 This Directive shall apply to activities relating to the provision or operation of networks providing a service to the public in the field of transport by railway, automated systems, tramway, trolley bus, bus or cable.

As regards transport services, a network shall be considered to exist where the service is provided under operating conditions laid down by a competent authority of a Member State, such as conditions on the routes to be served, the capacity to be made available or the frequency of the service.

2 This Directive shall not apply to entities providing bus transport services to the public which were excluded from the scope of Directive 93/38/EEC pursuant to Article 2(4) thereof.

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## *Article 6*

### **Postal services**

1 This Directive shall apply to activities relating to the provision of postal services or, on the conditions set out in paragraph 2(c), other services than postal services.

2 For the purpose of this Directive and without prejudice to Directive 97/67/EC:

- (a) ‘postal item’ : means an item addressed in the final form in which it is to be carried, irrespective of weight. In addition to items of correspondence, such items also include for instance books, catalogues, newspapers, periodicals and postal packages containing merchandise with or without commercial value, irrespective of weight;
- (b) ‘postal services’ : means services consisting of the clearance, sorting, routing and delivery of postal items. These services comprise:
- ‘reserved postal services’: postal services which are or may be reserved on the basis of Article 7 of Directive 97/67/EC,
  - ‘other postal services’: postal services which may not be reserved on the basis of Article 7 of Directive 97/67/EC; and
- (c) ‘other services than postal services’ : means services provided in the following areas:
- mail service management services (services both preceding and subsequent to despatch, such as ‘mailroom management services’),
  - added-value services linked to and provided entirely by electronic means (including the secure transmission of coded documents by electronic means, address management services and transmission of registered electronic mail),
  - services concerning postal items not included in point (a), such as direct mail bearing no address,
  - financial services, as defined in category 6 of Annex XVII A and in Article 24(c) and including in particular postal money orders and postal giro transfers,
  - philatelic services, and
  - logistics services (services combining physical delivery and/or warehousing with other non-postal functions),

on condition that such services are provided by an entity which also provides postal services within the meaning of point (b), first or second indent, and provided that the conditions set out in Article 30(1) are not satisfied in respect of the services falling within those indents.

## *Article 7*

### **Exploration for, or extraction of, oil, gas, coal or other solid fuels, as well as ports and airports**

This Directive shall apply to activities relating to the exploitation of a geographical area for the purpose of:

- (a) exploring for or extracting oil, gas, coal or other solid fuels, or

- (b) the provision of airports and maritime or inland ports or other terminal facilities to carriers by air, sea or inland waterway.

#### *Article 8*

### **Lists of contracting entities**

The non-exhaustive lists of contracting entities within the meaning of this Directive are contained in Annexes I to X. Member States shall notify the Commission periodically of any changes to their lists.

#### *Article 9*

### **Contracts covering several activities**

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

However, the choice between awarding a single contract and awarding a number of separate contracts may not be made with the objective of excluding it from the scope of this Directive or, where applicable, Directive 2004/18/EC.

2 If one of the activities for which the contract is intended is subject to this Directive and the other to the abovementioned Directive 2004/18/EC and if it is objectively impossible to determine for which activity the contract is principally intended, the contract shall be awarded in accordance with the abovementioned Directive 2004/18/EC.

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

## CHAPTER III

### **General principles**

#### *Article 10*

### **Principles of awarding contracts**

Contracting entities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.

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## TITLE II

### RULES APPLICABLE TO CONTRACTS

#### CHAPTER I

##### General provisions

###### *Article 11*

##### **Economic operators**

1 Candidates or tenderers who, under the law of the Member State in which they are established, are entitled to provide the relevant service, shall not be rejected solely on the ground that, under the law of the Member State in which the contract is awarded, they would be required to be either natural or legal persons.

However, in the case of service and works contracts as well as supply contracts covering in addition services and/or siting and installation operations, legal persons may be required to indicate, in the tender or the request to participate, the names and relevant professional qualifications of the staff to be responsible for the performance of the contract in question.

2 Groups of economic operators may submit tenders or put themselves forward as candidates. In order to submit a tender or a request to participate, these groups may not be required by the contracting entities to assume a specific legal form; however, the group selected may be required to do so when it has been awarded the contract, to the extent to which this change is necessary for the satisfactory performance of the contract.

###### *Article 12*

##### **Conditions relating to agreements concluded within the World Trade Organisation**

For the purposes of the award of contracts by contracting entities, Member States shall apply in their relations conditions as favourable as those which they grant to economic operators of third countries in implementation of the Agreement. Member States shall, to this end, consult one another within the Advisory Committee for Public Contracts on the measures to be taken pursuant to the Agreement.

###### *Article 13*

##### **Confidentiality**

1 In the context of provision of technical specifications to interested economic operators, of qualification and selection of economic operators and of award of contracts, contracting entities may impose requirements with a view to protecting the confidential nature of information which they make available.

2 Without prejudice to the provisions of this Directive, in particular those concerning the obligations relating to the advertising of awarded contracts and to the information to candidates and tenderers set out in Articles 43 and 49, and in accordance with the national law to which the



contracting entity is subject, the contracting authority shall not disclose information forwarded to it by economic operators which they have designated as confidential; such information includes, in particular, technical or trade secrets and the confidential aspects of tenders.

#### *Article 14*

### **Framework agreements**

1 Contracting entities may regard a framework agreement as a contract within the meaning of Article 1(2) and award it in accordance with this Directive.

2 Where contracting entities have awarded a framework agreement in accordance with this Directive, they may avail themselves of Article 40(3)(i) when awarding contracts based on that framework agreement.

3 Where a framework agreement has not been awarded in accordance with this Directive, contracting entities may not avail themselves of Article 40(3)(i).

4 Contracting entities may not misuse framework agreements in order to hinder, limit or distort competition.

#### *Article 15*

### **Dynamic purchasing systems**

1 Member States may provide that contracting entities may use dynamic purchasing systems.

2 In order to set up a dynamic purchasing system, contracting entities shall follow the rules of the open procedure in all its phases up to the award of the contracts to be concluded under this system. All tenderers who satisfy the selection criteria and have submitted an indicative tender which complies with the specification and any possible additional documents shall be admitted to the system; indicative tenders may be improved at any time provided that they continue to comply with the specification. With a view to setting up the system and to the award of contracts under that system, contracting entities shall use solely electronic means in accordance with Article 48(2) to (5).

3 For the purposes of setting up the dynamic purchasing system, contracting entities shall:

- a publish a contract notice making it clear that a dynamic purchasing system is involved;
- b indicate in the specification, amongst other matters, the nature of the purchases envisaged under that system, as well as all the necessary information concerning the purchasing system, the electronic equipment used and the technical connection arrangements and specifications;
- c offer by electronic means, on publication of the notice and until the system expires, unrestricted, direct and full access to the specification and to any additional documents and shall indicate in the notice the internet address at which such documents may be consulted.

4 Contracting entities shall give any economic operator, throughout the entire period of the dynamic purchasing system, the possibility of submitting an indicative tender and of being admitted to the system under the conditions referred to in paragraph 2. They shall complete evaluation within a maximum of 15 days from the date of submission of the indicative tender.

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However, they may extend the evaluation period provided that no invitation to tender is issued in the meantime.

Contracting entities shall inform the tenderer referred to in the first subparagraph at the earliest possible opportunity of its admittance to the dynamic purchasing system or of the rejection of its indicative tender.

5 Each specific contract shall be the subject of an invitation to tender. Before issuing the invitation to tender, contracting entities shall publish a simplified contract notice inviting all interested economic operators to submit an indicative tender, in accordance with paragraph 4, within a time limit that may not be less than 15 days from the date on which the simplified notice was sent. Contracting entities may not proceed with tendering until they have completed evaluation of all the indicative tenders received within that time limit.

6 Contracting entities shall invite all tenderers admitted to the system to submit a tender for each specific contract to be awarded under the system. To that end, they shall set a time limit for the submission of tenders.

They shall award the contract to the tenderer which submitted the best tender on the basis of the award criteria set out in the contract notice for the establishment of the dynamic purchasing system. Those criteria may, if appropriate, be formulated more precisely in the invitation referred to in the first subparagraph.

7 A dynamic purchasing system may not last for more than four years, except in duly justified exceptional cases.

Contracting entities may not resort to this system to prevent, restrict or distort competition.

No charges may be billed to the interested economic operators or to parties to the system.

## CHAPTER II

### Thresholds and exclusion provisions

#### Section 1

#### Thresholds

#### Article 16

#### Contract thresholds

Save where they are ruled out by the exclusions in Articles 19 to 26 or pursuant to Article 30, concerning the pursuit of the activity in question, this Directive shall apply to contracts which have a value excluding value-added tax (VAT) estimated to be no less than the following thresholds:

- (a) [F1EUR 400 000] in the case of supply and service contracts;
- (b) [F1EUR 5 000 000] in the case of works contracts.

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### Textual Amendments

- F1** Substituted by [Commission Regulation \(EU\) No 1251/2011 of 30 November 2011 amending Directives 2004/17/EC, 2004/18/EC and 2009/81/EC of the European Parliament and of the Council in respect of their application thresholds for the procedures for the awards of contract \(Text with EEA relevance\).](#)

## Article 17

### Methods of calculating the estimated value of contracts, framework agreements and dynamic purchasing systems

1 The calculation of the estimated value of a contract shall be based on the total amount payable, net of VAT, as estimated by the contracting entity. This calculation shall take account of the estimated total amount, including any form of option and any renewals of the contract.

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

2 Contracting entities may not circumvent this Directive by splitting works projects or proposed purchases of a certain quantity of supplies and/or services or by using special methods for calculating the estimated value of contracts.

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

4 For the purposes of Article 16, contracting entities shall include in the estimated value of a works contract both the cost of the works and the value of any supplies or services necessary for the execution of the works, which they make available to the contractor.

5 The value of supplies or services which are not necessary for the performance of a particular works contract may not be added to the value of the works contract when to do so would result in removing the procurement of those supplies or services from the scope of this Directive.

6

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

Where the aggregate value of the lots is equal to or exceeds the threshold laid down in Article 16, this Directive shall apply to the awarding of each lot.

However, the contracting entities may waive such application in respect of lots the estimated value of which, net of VAT, is less than EUR 80 000 for services or EUR 1 million for works, provided that the aggregate value of those lots does not exceed 20 % of the aggregate value of the lots as a whole.

- b Where a proposal for the acquisition of similar supplies may result in contracts being awarded at the same time in the form of separate lots, account shall be taken of the total estimated value of all such lots when applying Article 16.

Where the aggregate value of the lots is equal to or exceeds the threshold laid down in Article 16, this Directive shall apply to the awarding of each lot.

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However, the contracting entities may waive such application in respect of lots, the estimated value of which, net of VAT, is less than EUR 80 000, provided that the aggregate cost of those lots does not exceed 20 % of the aggregate value of the lots as a whole.

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

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

8 The basis for calculating the estimated value of a contract including both supplies and services shall be the total value of the supplies and services, regardless of their respective shares. The calculation shall include the value of the siting and installation operations.

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

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

10 For the purposes of calculating the estimated contract value of service contracts, the following amounts shall, where appropriate, be taken into account:

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

11 In the case of service contracts which do not indicate a total price, the value to be used as the basis for calculating the estimated contract value shall be:

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

## Section 2

### **Contracts and concessions and contracts subject to special arrangements**

#### SUBSECTION 1

##### *Article 18*

#### **Works and service concessions**

This Directive shall not apply to works and service concessions which are awarded by contracting entities carrying out one or more of the activities referred to in Articles 3 to 7, where those concessions are awarded for carrying out those activities.

#### SUBSECTION 2

### **Exclusions applicable to all contracting entities and to all types of contract**

##### *Article 19*

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

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

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

##### *Article 20*

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

1 This Directive shall not apply to contracts which the contracting entities award for purposes other than the pursuit of their activities as described in Articles 3 to 7 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 Community.

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

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### Article 21

#### **Contracts which are secret or require special security measures**

This Directive shall not apply to contracts when they are declared to be secret by a Member State, when their performance must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in the Member State concerned, or when the protection of the basic security interests of that Member State so requires.

### Article 22

#### **Contracts awarded pursuant to international rules**

This Directive shall not apply to contracts governed by different procedural rules and awarded:

- (a) pursuant to an international agreement concluded in accordance with the Treaty between a Member State and one or more third countries and covering supplies, works, services or design contests intended for the joint implementation or exploitation of a project by the signatory States; all agreements shall be communicated to the Commission, which may consult the Advisory Committee for Public Contracts referred to in Article 68;
- (b) pursuant to a concluded international agreement relating to the stationing of troops and concerning the undertakings of a Member State or a third country;
- (c) pursuant to the particular procedure of an international organisation.

### *F2* Article 22a

#### **Contracts in the fields of defence and security**

This Directive shall not apply to contracts to which Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security<sup>(2)</sup> applies, nor to contracts to which that Directive does not apply pursuant to Articles 8, 12 and 13 thereof.]

#### **Textual Amendments**

- F2** Inserted by [Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC \(Text with EEA relevance\)](#).

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### Article 23

#### **Contracts awarded to an affiliated undertaking, to a joint venture or to a contracting entity forming part of a joint venture**

1 For the purposes of this Article, ‘affiliated undertaking’ means any undertaking the annual accounts of which are consolidated with those of the contracting entity in accordance with the requirements of the Seventh Council Directive 83/349/EEC of 13 June 1983 based on the Article 44(2)(g) of the Treaty on consolidated accounts<sup>(3)(4)</sup>, or, in the case of entities not subject to that Directive, any undertaking over which the contracting entity may exercise, directly or indirectly, a dominant influence within the meaning of Article 2(1)(b) hereof or which may exercise a dominant influence over the contracting entity or which, 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.

2 Provided that the conditions in paragraph 3 are met, this Directive shall not apply to contracts awarded:

- a by a contracting entity to an affiliated undertaking, or
- b by a joint venture, formed exclusively by a number of contracting entities for the purpose of carrying out activities within the meaning of Articles 3 to 7, to an undertaking which is affiliated with one of these contracting entities.

3 Paragraph 2 shall apply:

- a to service contracts provided that at least 80 % of the average turnover of the affiliated undertaking with respect to services for the preceding three years derives from the provision of such services to undertakings with which it is affiliated;
- b to supplies contracts provided that at least 80 % of the average turnover of the affiliated undertaking with respect to supplies for the preceding three years derives from the provision of such supplies to undertakings with which it is affiliated;
- c to works contracts provided that at least 80 % of the average turnover of the affiliated undertaking with respect to works for the preceding three years derives from the provision of such works to undertakings with which it is affiliated.

When, 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 will be sufficient for that undertaking to show that the turnover referred to in points (a), (b) or (c) is credible, particularly by means of business projections.

Where more than one undertaking affiliated with the contracting entity provides the same or similar services, supplies or works, the above percentages shall be calculated taking into account the total turnover deriving respectively from the provision of services, supplies or works by those affiliated undertakings.

4 This Directive shall not apply to contracts awarded:

- a by a joint venture, formed exclusively by a number of contracting entities for the purpose of carrying out activities within the meaning of Articles 3 to 7, to one of these contracting entities, or
- b by a contracting entity to such a joint venture of which it forms part, provided that the joint venture has been set up in order to carry out the activity concerned over a period of at least three years and that the instrument setting up the joint venture stipulates that the contracting entities, which form it, will be part thereof for at least the same period.

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5 Contracting entities shall notify to the Commission, at its request, the following information regarding the application of paragraphs 2, 3 and 4:

- a the names of the undertakings or joint ventures concerned,
- b the nature and value of the contracts involved,
- c such proof as may be deemed necessary by the Commission that the relationship between the undertaking or joint venture to which the contracts are awarded and the contracting entity complies with the requirements of this Article.

### SUBSECTION 3

#### **Exclusions applicable to all contracting entities, but to service contracts only**

##### *Article 24*

#### **Contracts relating to certain services excluded from the scope of this Directive**

This Directive shall not apply to service contracts for:

- (a) the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property or concerning rights thereon; nevertheless, financial service contracts concluded at the same time as, before or after the contract of acquisition or rental, in whatever form, shall be subject to this Directive;
- (b) arbitration and conciliation services;
- (c) financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments, in particular transactions by the contracting entities to raise money or capital;
- (d) employment contracts;
- (e) research and development services other than those where the benefits accrue exclusively to the contracting entity for its use in the conduct of its own affairs, on condition that the service provided is wholly remunerated by the contracting entity.

##### *Article 25*

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

This Directive shall not apply to service contracts awarded to an entity which is itself a contracting authority within the meaning of Article 2(1)(a) or to an association of contracting authorities on the basis of an exclusive right which they enjoy pursuant to a published law, regulation or administrative provision which is compatible with the Treaty.



## SUBSECTION 4

### **Exclusions applicable to certain contracting entities only**

#### *Article 26*

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

This Directive shall not apply:

- (a) to contracts for the purchase of water if awarded by contracting entities engaged in one or both of the activities referred to in Article 4(1).
- (b) to contracts for the supply of energy or of fuels for the production of energy, if awarded by contracting entities engaged in an activity referred to in Article 3(1), Article 3(3) or Article 7(a).

## SUBSECTION 5

### **Contracts subject to special arrangements, provisions concerning central purchasing bodies and the general procedure in case of direct exposure to competition**

#### *Article 27*

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

Without prejudice to Article 30 the Kingdom of the Netherlands, the United Kingdom, the Republic of Austria and the Federal Republic of Germany shall ensure, by way of the conditions of authorisation or other appropriate measures, that any entity operating in the sectors mentioned in Decisions 93/676/EEC, 97/367/EEC, 2002/205/EC and 2004/73/EC:

- (a) observes the principles of non-discrimination and competitive procurement in respect of the award of supplies, works and service contracts, in particular as regards the information which the entity makes available to economic operators concerning its procurement intentions;
- (b) communicates to the Commission, under the conditions defined in Commission Decision 93/327/EEC defining the conditions under which contracting entities exploiting geographical areas for the purpose of exploring for or extracting oil, gas, coal or other solid fuels must communicate to the Commission information relating to the contracts they award<sup>(5)</sup>.

#### *Article 28*

#### **Reserved contracts**

Member States may reserve the right to participate in contract award procedures to sheltered workshops or provide for such contracts to be performed in the context of sheltered employment programmes where most of the employees concerned are

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handicapped persons who, by reason of the nature or the seriousness of their disabilities, cannot carry on occupations under normal conditions.

The notice used to make the call for competition shall make reference to this Article.

#### *Article 29*

### **Contracts and framework agreements awarded by central purchasing bodies**

1 Member States may prescribe that contracting entities may purchase works, supplies and/or services from or through a central purchasing body.

2 Contracting entities which purchase works, supplies and/or services from or through a central purchasing body in the cases set out in Article 1(8) shall be deemed to have complied with this Directive insofar as the central purchasing body has complied with it or, where appropriate, with Directive 2004/18/EC.

#### *Article 30*

### **Procedure for establishing whether a given activity is directly exposed to competition**

1 Contracts intended to enable an activity mentioned in Articles 3 to 7 to be carried out shall not be subject to this Directive if, in the Member State in which it is performed, the activity is directly exposed to competition on markets to which access is not restricted.

2 For the purposes of paragraph 1, the question of whether an activity is directly exposed to competition shall be decided on the basis of criteria that are in conformity with the Treaty provisions on competition, such as the characteristics of the goods or services concerned, the existence of alternative goods or services, the prices and the actual or potential presence of more than one supplier of the goods or services in question.

3 For the purposes of paragraph 1, access to a market shall be deemed not to be restricted if the Member State has implemented and applied the provisions of Community legislation mentioned in Annex XI.

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

4 When a Member State considers that, in compliance with paragraphs 2 and 3, paragraph 1 is applicable to a given activity, it shall notify the Commission and inform it of all relevant facts, and in particular of any law, regulation, administrative provision or agreement concerning compliance with the conditions set out in paragraph 1, where appropriate together with the position adopted by an independent national authority that is competent in relation to the activity concerned.

Contracts intended to enable the activity concerned to be carried out shall no longer be subject to this Directive if the Commission:

- has adopted a Decision establishing the applicability of paragraph 1 in accordance with paragraph 6 and within the period it provides for, or
- has not adopted a Decision concerning such applicability within that period.

However, where free access to a given market is presumed on the basis of the first subparagraph of paragraph 3, and where an independent national authority that is

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competent in the activity concerned has established the applicability of paragraph 1, contracts intended to enable the activity concerned to be carried out shall no longer be subject to this Directive if the Commission has not established the inapplicability of paragraph 1 by a Decision adopted in conformity with paragraph 6 and within the period it provides for.

5 When the legislation of the Member State concerned provides for it, the contracting entities may ask the Commission to establish the applicability of paragraph 1 to a given activity by a Decision in conformity with paragraph 6. In such a case, the Commission shall immediately inform the Member State concerned.

That Member State shall, taking account of paragraphs 2 and 3, inform the Commission of all relevant facts, and in particular of any law, regulation, administrative provision or agreement concerning compliance with the conditions set out in paragraph 1, where appropriate together with the position adopted by an independent national authority that is competent in the activity concerned.

The Commission may also begin the procedure for adoption of a Decision establishing the applicability of paragraph 1 to a given activity on its own initiative. In such a case, the Commission shall immediately inform the Member State concerned.

If, at the end of the period laid down in paragraph 6, the Commission has not adopted a Decision concerning the applicability of paragraph 1 to a given activity, paragraph 1 shall be deemed to be applicable.

6 For the adoption of a Decision under this Article, in accordance with the procedure under Article 68(2), the Commission shall be allowed a period of three months commencing on the first working day following the date on which it receives the notification or the request. However, this period may be extended once by a maximum of three months in duly justified cases, in particular if the information contained in the notification or the request or in the documents annexed thereto is incomplete or inexact or if the facts as reported undergo any substantive changes. This extension shall be limited to one month where an independent national authority that is competent in the activity concerned has established the applicability of paragraph 1 in the cases provided for under the third subparagraph of paragraph 4.

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

The Commission shall adopt detailed rules for applying paragraphs 4, 5 and 6 in accordance with the procedure under Article 68(2).

These rules shall include at least:

- a the publication in the Official Journal, for information, of the date on which the three-month period referred to in the first subparagraph begins, and, in case this period is prolonged, the date of prolongation and the period by which it is prolonged;
- b publication of the possible applicability of paragraph 1 in accordance with the second or third subparagraph of paragraph 4 or in accordance with the fourth subparagraph of paragraph 5; and
- c the arrangements for forwarding positions adopted by an independent authority that is competent in the activity concerned, regarding questions relevant to paragraphs 1 and 2.

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## CHAPTER III

### **Rules applicable to service contracts**

#### *Article 31*

#### **Service contracts listed in Annex XVII A**

Contracts which have as their object services listed in Annex XVII A shall be awarded in accordance with Articles 34 to 59.

#### *Article 32*

#### **Service contracts listed in Annex XVII B**

Contracts which have as their object services listed in Annex XVII B shall be governed solely by Articles 34 and 43.

#### *Article 33*

#### **Mixed service contracts including services listed in Annexes XVII A and services listed in Annex XVII B**

Contracts which have as their subject-matter services listed both in Annex XVII A and in Annex XVII B shall be awarded in accordance with Articles 34 to 59 where the value of the services listed in Annex XVII A is greater than the value of the services listed in Annex XVII B. In other cases, contracts shall be awarded in accordance with Articles 34 and 43.

## CHAPTER IV

### **Specific rules governing specifications and contract documents**

#### *Article 34*

#### **Technical specifications**

1 Technical specifications as defined in point 1 of Annex XXI shall be set out in the contract documentation, such as contract notices, contract documents or additional documents. Whenever possible these technical specifications should be defined so as to take into account accessibility criteria for people with disabilities or design for all users.

2 Technical specifications shall afford equal access for tenderers and not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.

3 Without prejudice to legally binding national technical rules, to the extent that they are compatible with Community law, the technical specifications shall be formulated:

- a either by reference to technical specifications defined in Annex XXI 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 these 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 products. Each reference shall be accompanied by the words ‘or equivalent’;

- b or in terms of performance or functional requirements; the latter may include environmental characteristics. However, such parameters must be sufficiently precise to allow tenderers to determine the subject-matter of the contract and to allow contracting entities to award the contract;
- c or in terms of performance or functional requirements as mentioned in subparagraph (b), with reference to the specifications mentioned in subparagraph (a) as a means of presuming conformity with such performance or functional requirements;
- d or by referring to the specifications mentioned in subparagraph (a) for certain characteristics, and by referring to the performance or functional requirements mentioned in subparagraph (b) for other characteristics.

4 Where a contracting entity makes use of the option of referring to the specifications mentioned in paragraph 3(a), it cannot reject a tender on the ground that the products and services tendered for do not comply with the specifications to which it has referred, once the tenderer proves in his tender to the satisfaction of the contracting entity, by whatever appropriate means, that the solutions which he proposes satisfy in an equivalent manner the requirements defined by the technical specifications.

An appropriate means might be constituted by a technical dossier from the manufacturer or a test report from a recognised body.

5 Where a contracting entity uses the option provided for in paragraph 3 of laying down performance or functional requirements, it may not reject a tender for products, services or works which comply with a national standard transposing a European standard, with a European technical approval, a common technical specification, an international standard, or a technical reference system established by a European standardisation body, if these specifications address the performance or functional requirements which it has laid down.

In his tender, the tenderer shall prove to the satisfaction of the contracting entity and by any appropriate means that the product, service or work in compliance with the standard meets the performance or functional requirements of the contracting entity.

An appropriate means might be constituted by a technical dossier from the manufacturer or a test report from a recognised body.

6 Where contracting entities lay down environmental characteristics in terms of performance or functional requirements as referred to in paragraph 3(b) they may use the detailed specifications, or, if necessary, parts thereof, as defined by European or (multi-) national eco-labels, or by any other eco-label, provided that:

- those specifications are appropriate to define the characteristics of the supplies or services that are the object of the contract,
- the requirements for the label are drawn up on the basis of scientific information,
- the eco-labels are adopted using a procedure in which all stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations can participate, and
- they are accessible to all interested parties.

Contracting entities may indicate that the products and services bearing the eco-label are presumed to comply with the technical specifications laid down in the contract

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documents; they must accept any other appropriate means of proof, such as a technical dossier from the manufacturer or a test report from a recognised body.

7 ‘Recognised bodies’, within the meaning of this Article, are test and calibration laboratories, and certification and inspection bodies which comply with applicable European standards.

Contracting entities shall accept certificates from recognised bodies established in other Member States.

8 Unless justified by the subject-matter of the contract, technical specifications shall not refer to a specific make or source, or to 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 paragraphs 3 and 4 is not possible; such reference shall be accompanied by the words ‘or equivalent’.

#### *Article 35*

### **Communication of technical specifications**

1 Contracting entities shall make available on request to economic operators interested in obtaining a contract the technical specifications regularly referred to in their supply, works or service contracts, or the technical specifications which they intend to apply to contracts covered by periodic indicative notices within the meaning of Article 41(1).

2 Where the technical specifications are based on documents available to interested economic operators, the inclusion of a reference to those documents shall be sufficient.

#### *Article 36*

### **Variants**

1 Where the criterion for the award of the contract is that of the most economically advantageous tender, contracting entities may take account of variants which are submitted by a tenderer and meet the minimum requirements specified by the contracting entities.

Contracting entities shall indicate in the specifications whether or not they authorise variants and, if so, the minimum requirements to be met by the variants and any specific requirements for their presentation.

2 In procedures for awarding supply or service contracts, contracting entities which have authorised variants pursuant to paragraph 1 may not reject a variant on the sole ground that it would, if successful, lead either to a service contract rather than a supply contract or to a supply contract rather than a service contract.

#### *Article 37*

### **Subcontracting**

In the contract documents, the contracting entity may ask, or may be required by a Member State to ask, the tenderer to indicate in his tender any share of the contract he

intends to subcontract to third parties and any proposed subcontractors. This indication shall be without prejudice to the question of the principal economic operator's liability.

#### *Article 38*

### **Conditions for performance of contracts**

Contracting entities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the notice used as a means of calling for competition or in the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations.

#### *Article 39*

### **Obligations relating to taxes, environmental protection, employment protection provisions and working conditions**

1 A contracting entity may state in the contract documents, or be required by a Member State so to state, the body or bodies from which a candidate or tenderer may obtain the appropriate information on the obligations relating to taxes, to environmental protection, to protection provisions and to the working conditions which are in force in the Member State, region or locality in which the services are to be provided and which shall be applicable to the works carried out on site or to the services provided during the performance of the contract.

2 A contracting entity which supplies the information referred to in paragraph 1 shall request the tenderers or candidates in the contract award procedure to indicate that they have taken account, when drawing up their tender, of the obligations relating to employment protection provisions and the working conditions which are in force in the place where the service is to be provided.

The first subparagraph shall be without prejudice to the application of Article 57.

## CHAPTER V

### **Procedures**

#### *Article 40*

### **Use of open, restricted and negotiated procedures**

1 When awarding supply, works or service contracts, contracting entities shall apply the procedures adjusted for the purposes of this Directive.

2 Contracting entities may choose any of the procedures described in Article 1(9)(a), (b) or (c), provided that, subject to paragraph 3, a call for competition has been made in accordance with Article 42.

3 Contracting entities may use a procedure without prior call for competition in the following cases:

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- a when no tenders or no suitable tenders or no applications have been submitted in response to a procedure with a prior call for competition, provided that the initial conditions of contract are not substantially altered;
- b where a contract is purely for the purpose of research, experiment, study or development, and not for the purpose of securing a profit or of recovering research and development costs, and insofar as the award of such contract does not prejudice the competitive award of subsequent contracts which do seek, in particular, those ends;
- c when, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the contract may be executed only by a particular economic operator;
- d insofar as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the contracting entities, the time limits laid down for open procedures, restricted procedures and negotiated procedures with a prior call for competition cannot be adhered to;
- e in the case of supply contracts for additional deliveries by the original supplier which are intended either as a partial replacement of normal supplies or installations or as the extension of existing supplies or installations, where a change of supplier would oblige the contracting entity to acquire material having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance;
- f for additional works or services which were not included in the project initially awarded or in the contract first concluded but have, through unforeseen circumstances, become necessary to the performance of the contract, on condition that the award is made to the contractor or service provider executing the original contract:
  - when such additional works or services cannot be technically or economically separated from the main contract without great inconvenience to the contracting entities, or
  - when such additional works or services, although separable from the performance of the original contract, are strictly necessary to its later stages;
- g in the case of works contracts, for new works consisting in the repetition of similar works assigned to the contractor to which the same contracting entities awarded an earlier contract, provided that such works conform to a basic project for which a first contract was awarded after a call for competition; as soon as the first project is put up for tender, notice shall be given that this procedure might be adopted and the total estimated cost of subsequent works shall be taken into consideration by the contracting entities when they apply the provisions of Articles 16 and 17;
- h for supplies quoted and purchased on a commodity market;
- i for contracts to be awarded on the basis of a framework agreement, provided that the condition referred to in Article 14(2) is fulfilled;
- j for bargain purchases, where it is possible to procure supplies by taking advantage of a particularly advantageous opportunity available for a very short time at a price considerably lower than normal market prices;
- k for purchases of supplies under particularly advantageous conditions from either a supplier definitively winding up his business activities or the receivers or liquidators of a bankruptcy, an arrangement with creditors or a similar procedure under national laws or regulations;
- l when the service contract concerned is part of the follow-up to a design contest organised in accordance with the provisions of this Directive and shall, in accordance with the relevant rules, be awarded to the winner or to one of the winners of that contest; in the latter case, all the winners shall be invited to participate in the negotiations.



## CHAPTER VI

### Rules on publication and transparency

#### Section 1

#### Publication of notices

##### Article 41

#### Periodic indicative notices and notices on the existence of a system of qualification

1 Contracting entities shall make known, at least once a year, by means of a periodic indicative notice as referred to in Annex XV A, published by the Commission or by themselves on their ‘buyer profile’, as described in point 2(b) of Annex XX:

- a where supplies are concerned, the estimated total value of the contracts or the framework agreements by product area which they intend to award over the following 12 months, where the total estimated value, taking into account the provisions of Articles 16 and 17, is equal to or greater than EUR 750 000.

The product area shall be established by the contracting entities by reference to the CPV nomenclature:

- b where services are concerned, the estimated total value of the contracts or the framework agreements in each of the categories of services listed in Annex XVII A which they intend to award over the following 12 months, where such estimated total value, taking into account the provisions of Articles 16 and 17, is equal to or greater than EUR 750 000;
- c where works are concerned, the essential characteristics of the works contracts or the framework agreements which they intend to award over the following 12 months, whose estimated value is equal to or greater than the threshold specified in Article 16, taking into account the provisions of Article 17.

The notices referred to in subparagraphs (a) and (b) shall be sent to the Commission or published on the buyer profile as soon as possible after the beginning of the budgetary year.

The notice referred to in subparagraph (c) shall be sent to the Commission or published on the buyer profile as soon as possible after the decision approving the planning of the works contracts or the framework agreements that the contracting entities intend to award.

Contracting entities which publish a periodic indicative notice on their buyer profiles shall transmit to the Commission, electronically, a notice of the publication of the periodic indicative notice on a buyer profile, in accordance with the format and procedures for the electronic transmission of notices indicated in point 3 of Annex XX.

The publication of the notices referred to in subparagraphs (a), (b) and (c) shall be compulsory only where the contracting entities take the option of reducing the time limits for the receipt of tenders as laid down in Article 45(4).

This paragraph shall not apply to procedures without prior call for competition.

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2 Contracting entities may, in particular, publish or arrange for the Commission to publish periodic indicative notices relating to major projects without repeating information previously included in a periodic indicative notice, provided that it is clearly pointed out that these notices are additional ones.

3 Where contracting entities choose to set up a qualification system in accordance with Article 53, the system shall be the subject of a notice as referred to in Annex XIV, indicating the purpose of the qualification system and how to have access to the rules concerning its operation. Where the system is of a duration greater than three years, the notice shall be published annually. Where the system is of a shorter duration, an initial notice shall suffice.

#### *Article 42*

### **Notices used as a means of calling for competition**

1 In the case of supply, works or service contracts, the call for competition may be made:

- a by means of a periodic indicative notice as referred to in Annex XV A; or
- b by means of a notice on the existence of a qualification system as referred to in Annex XIV; or
- c by means of a contract notice as referred to in Annex XIII A, B or C.

2 In the case of dynamic purchasing systems, the system's call for competition shall be by contract notice as referred to in paragraph 1(c), whereas calls for competition for contracts based on such systems shall be by simplified contract notice as referred to in Annex XIII D.

3 When a call for competition is made by means of a periodic indicative notice, the notice shall:

- a refer specifically to the supplies, works or services which will be the subject of the contract to be awarded;
- b indicate that the contract will be awarded by restricted or negotiated procedure without further publication of a notice of a call for competition and invite interested economic operators to express their interest in writing; and
- c have been published in accordance with Annex XX not more than 12 months prior to the date on which the invitation referred to in Article 47(5) is sent. Moreover, the contracting entity shall meet the time limits laid down in Article 45.

#### *Article 43*

### **Contract award notices**

1 Contracting entities which have awarded a contract or a framework agreement shall, within two months of the award of the contract or framework agreement, send a contract award notice as referred to in Annex XVI under conditions to be laid down by the Commission in accordance with the procedure referred to in Article 68(2).

In the case of contracts awarded under a framework agreement within the meaning of Article 14(2), the contracting entities shall not be bound to send a notice of the results of the award procedure for each contract based on that agreement.

Contracting entities shall send a contract award notice based on a dynamic purchasing system within two months after the award of each contract. They may, however, group

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such notices on a quarterly basis. In that case, they shall send the grouped notices within two months of the end of each quarter.

2 The information provided in accordance with Annex XVI and intended for publication shall be published in accordance with Annex XX. In this connection, the Commission shall respect any sensitive commercial aspects which the contracting entities may point out when forwarding this information, concerning the number of tenders received, the identity of economic operators, or prices.

3 Where contracting entities award a research-and-development service contract ('R&D contract') by way of a procedure without a call for competition in accordance with Article 40(3)(b), they may limit to the reference 'research and development services' the information to be provided in accordance with Annex XVI concerning the nature and quantity of the services provided.

Where contracting entities award an R&D contract which cannot be awarded by way of a procedure without a call for competition in accordance with Article 40(3)(b), they may, on grounds of commercial confidentiality, limit the information to be provided in accordance with Annex XVI concerning the nature and quantity of the services supplied.

In such cases, contracting entities shall ensure that any information published under this paragraph is no less detailed than that contained in the notice of the call for competition published in accordance with Article 42(1).

If they use a qualification system, contracting entities shall ensure in such cases that such information is no less detailed than the category referred to in the list of qualified service providers drawn up in accordance with Article 53(7).

4 In the case of contracts awarded for services listed in Annex XVII B, the contracting entities shall indicate in the notice whether they agree to publication.

5 Information provided in accordance with Annex XVI and marked as not being intended for publication shall be published only in simplified form and in accordance with Annex XX for statistical purposes.

#### *Article 44*

### **Form and manner of publication of notices**

1 Notices shall include the information mentioned in Annexes XIII, XIV, XV A, XV B and XVI and, where appropriate, any other information deemed useful by the contracting entity in the format of standard forms adopted by the Commission in accordance with the procedure referred to in Article 68(2).

2 Notices sent by contracting entities to the Commission shall be sent either by electronic means in accordance with the format and procedures for transmission indicated in point 3 of Annex XX, or by other means.

The notices referred to in Articles 41, 42 and 43 shall be published in accordance with the technical characteristics for publication set out in point 1(a) and (b) of Annex XX.

3 Notices drawn up and transmitted by electronic means in accordance with the format and procedures for transmission indicated in point 3 of Annex XX, shall be published no later than five days after they are sent.

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Notices which are not transmitted by electronic means in accordance with the format and procedures for transmission indicated in point 3 of Annex XX shall be published not later than 12 days after they are transmitted. However, in exceptional cases, the contract notices referred to in Article 42(1)(c) shall be published within five days in response to a request by the contracting entity, provided that the notice has been sent by fax.

4 Contract notices shall be published in full in an official language of the Community as chosen by the contracting entity, this original language version constituting the sole authentic text. A summary of the important elements of each notice shall be published in the other official languages.

The costs of publication of notices by the Commission shall be borne by the Community.

5 Notices and their contents may not be published at national level before the date on which they are sent to the Commission.

Notices published at national level shall not contain information other than that contained in the notices dispatched to the Commission or published on a buyer profile in accordance with the first subparagraph of Article 41(1), but shall mention the date of dispatch of the notice to the Commission or its publication on the buyer profile.

Periodic indicative notices may not be published on a buyer profile before the dispatch to the Commission of the notice of their publication in that form; they shall mention the date of that dispatch.

6 Contracting entities shall ensure that they are able to supply proof of the dates on which notices are dispatched.

7 The Commission shall give the contracting entity confirmation of the publication of the information sent, mentioning the date of that publication. Such confirmation shall constitute proof of publication.

8 Contracting entities may publish in accordance with paragraphs 1 to 7 contract notices which are not subject to the publication requirements laid down in this Directive.

## Section 2

### Time limits

#### Article 45

#### **Time limits for the receipt of requests to participate and for the receipt of tenders**

1 When fixing the time limits for requests to participate and the receipt of tenders, contracting entities shall take particular account of the complexity of the contract and the time required for drawing up tenders, without prejudice to the minimum time limits set by this Article.

2 In the case of open procedures, the minimum time limit for the receipt of tenders shall be 52 days from the date on which the contract notice was sent.

3 In restricted procedures and in negotiated procedures with a prior call for competition, the following arrangements shall apply:

- a the time limit for the receipt of requests to participate, in response to a notice published under Article 42(1)(c), or in response to an invitation by the contracting entities under

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Article 47(5), shall, as a general rule, be fixed at no less than 37 days from the date on which the notice or invitation was sent and may in no case be less than 22 days if the notice is sent for publication by means other than electronic means or fax, and at no less than 15 days if the notice is transmitted by such means;

- b the time limit for the receipt of tenders may be set by mutual agreement between the contracting entity and the selected candidates, provided that all candidates have the same time to prepare and submit their tenders;
- c where it is not possible to reach agreement on the time limit for the receipt of tenders, the contracting entity shall fix a time limit which shall, as a general rule, be at least 24 days and shall in no case be less than 10 days from the date of the invitation to tender.

4 If the contracting entities have published a periodic indicative notice as referred to in Article 41(1) in accordance with Annex XX, the minimum time limit for the receipt of tenders in open procedures shall, as a general rule, not be less than 36 days, but shall in no case be less than 22 days from the date on which the notice was sent.

These reduced time limits are permitted, provided that the periodic indicative notice has included, in addition to the information required by Annex XV A, part I, all the information required by Annex XV A, part II, insofar as the latter information is available at the time the notice is published, and that the notice has been sent for publication between 52 days and 12 months before the date on which the contract notice referred to in Article 42(1)(c) is sent.

5 Where notices are drawn up and transmitted by electronic means in accordance with the format and procedures for transmission indicated in point 3 of Annex XX the time-limits for the receipt of requests to participate in restricted and negotiated procedures, and for receipt of tenders in open procedures, may be reduced by seven days.

6 Except in the case of a time limit set by mutual agreement in accordance with paragraph 3(b), time limits for the receipt of tenders in open, restricted and negotiated procedures may be further reduced by five days where the contracting entity offers unrestricted and full direct access to the contract documents and any supplementary documents by electronic means from the date on which the notice used as a means of calling for competition is published, in accordance with Annex XX. The notice should specify the internet address at which this documentation is accessible.

7 In open procedures, the cumulative effect of the reductions provided for in paragraphs 4, 5 and 6 may in no case result in a time limit for the receipt of tenders of less than 15 days from the date on which the contract notice is sent.

However, if the contract notice is not transmitted by fax or electronic means, the cumulative effect of the reductions provided for in paragraphs 4, 5 and 6 may in no case result in a time limit for receipt of tenders in an open procedure of less than 22 days from the date on which the contract notice is transmitted.

8 The cumulative effect of the reductions provided for in paragraphs 4, 5 and 6 may in no case result in a time limit for receipt of requests to participate, in response to a notice published under Article 42(1)(c), or in response to an invitation by the contracting entities under Article 47(5), of less than 15 days from the date on which the contract notice or invitation is sent.

In restricted and negotiated procedures, the cumulative effect of the reductions provided for in paragraphs 4, 5 and 6 may in no case, except that of a time limit set by mutual agreement in accordance with paragraph 3(b), result in a time limit for the receipt of tenders of less than 10 days from the date of the invitation to tender.

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9 If, for whatever reason, the contract documents and the supporting documents or additional information, although requested in good time, have not been supplied within the time limits set in Articles 46 and 47, or where tenders can be made only after a visit to the site or after on-the-spot inspection of the documents supporting the contract documents, the time limits for the receipt of tenders shall be extended accordingly, except in the case of a time-limit set by mutual agreement in accordance with paragraph 3(b), so that all economic operators concerned may be aware of all the information needed for the preparation of a tender.

10 A summary table of the time limits laid down in this Article is given in Annex XXII.

#### *Article 46*

### **Open procedures: specifications, additional documents and information**

1 In open procedures, where contracting entities do not offer unrestricted and full direct access by electronic means in accordance with Article 45(6) to the specifications and any supporting documents, the specifications and supporting documents shall be sent to economic operators within six days of receipt of the request, provided that the request was made in good time before the time limit for the submission of tenders.

2 Provided that it has been requested in good time, additional information relating to the specifications shall be supplied by the contracting entities or competent departments not later than six days before the time limit fixed for the receipt of tenders.

#### *Article 47*

### **Invitations to submit a tender or to negotiate**

1 In restricted procedures and negotiated procedures, contracting entities shall simultaneously and in writing invite the selected candidates to submit their tenders or to negotiate. The invitation to the candidates shall include either:

- a copy of the specifications and any supporting documents, or
- a reference to accessing the specifications and the supporting documents indicated in the first indent, when they are made directly available by electronic means in accordance with Article 45(6).

2 Where the specifications and/or any supporting documents are held by an entity other than the contracting entity responsible for the award procedure, the invitation shall state the address from which those specifications and documents may be requested and, if appropriate, the closing date for requesting such documents, the sum payable for obtaining them and any payment procedures. The competent department shall send that documentation to the economic operator immediately upon receipt of the request.

3 The additional information on the specifications or the supporting documents shall be sent by the contracting entity or the competent department not less than six days before the final date fixed for the receipt of tenders, provided that it is requested in good time.

4 In addition, the invitation shall include at least the following:

- a where appropriate, the time limit for requesting additional documents, as well as the amount and terms of payment of any sum to be paid for such documents;
- b the final date for receipt of tenders, the address to which they are to be sent, and the language or languages in which they are to be drawn up;
- c a reference to any published contract notice;

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- d an indication of any documents to be attached;
- e the criteria for the award of the contract, where they are not indicated in the notice on the existence of a qualification system used as a means of calling for competition;
- f the relative weighting of the contract award criteria or, where appropriate, the order of importance of such criteria, if this information is not given in the contract notice, the notice on the existence of a qualification system or the specifications.

5 When a call for competition is made by means of a periodic indicative notice, contracting entities shall subsequently invite all candidates to confirm their interest on the basis of detailed information on the contract concerned before beginning the selection of tenderers or participants in negotiations.

This invitation shall include at least the following information:

- a nature and quantity, including all options concerning complementary contracts and, if possible, the estimated time available for exercising these options for renewable contracts, the nature and quantity and, if possible, the estimated publication dates of future notices of competition for works, supplies or services to be put out to tender;
- b type of procedure: restricted or negotiated;
- c where appropriate, the date on which the delivery of supplies or the execution of works or services is to commence or terminate;
- d the address and closing date for the submission of requests for tender documents and the language or languages in which they are to be drawn up;
- e the address of the entity which is to award the contract and the information necessary for obtaining the specifications and other documents;
- f economic and technical conditions, financial guarantees and information required from economic operators;
- g the amount and payment procedures for any sum payable for obtaining tender documents;
- h the form of the contract which is the subject of the invitation to tender: purchase, lease, hire or hire-purchase, or any combination of these; and
- i the contract award criteria and their weighting or, where appropriate, the order of importance of such criteria, if this information is not given in the indicative notice or the specifications or in the invitation to tender or to negotiate.

### Section 3

## **Communication and information**

### *Article 48*

## **Rules applicable to communication**

1 All communication and information exchange referred to in this Title may be carried out by post, by fax, by electronic means in accordance with paragraphs 4 and 5, by telephone in the cases and circumstances referred to in paragraph 6, or by a combination of those means, according to the choice of the contracting entity.

2 The means of communication chosen shall be generally available and thus not restrict economic operators' access to the tendering procedure.

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3 Communication and the exchange and storage of information shall be carried out in such a way as to ensure that the integrity of data and the confidentiality of tenders and requests to participate are preserved, and that the contracting entities examine the content of tenders and requests to participate only after the time limit set for submitting them has expired.

4 The tools to be used for communicating by electronic means, as well as their technical characteristics, shall be non-discriminatory, generally available and interoperable with the information and communication technology products in general use.

5 The following rules are applicable to devices for the electronic transmission and receipt of tenders and to devices for the electronic receipt of requests to participate:

- a information regarding the specifications necessary for the electronic submission of tenders and requests to participate, including encryption, shall be available to interested parties. Moreover, the devices for the electronic receipt of tenders and requests to participate shall conform to the requirements of Annex XXIV;
- b Member States may, in compliance with Article 5 of Directive 1999/93/EC, require that electronic tenders be accompanied by an advanced electronic signature in conformity with paragraph 1 thereof;
- c Member States may introduce or maintain voluntary accreditation schemes aiming at enhanced levels of certification service provision for these devices;
- d tenderers or candidates shall undertake to submit, before expiry of the time limit laid down for the submission of tenders or requests to participate, the documents, certificates and declarations mentioned in Articles 52(2), 52(3), 53 and 54 if they do not exist in electronic format.

6 The following rules shall apply to the transmission of requests to participate:

- a requests to participate in procedures for the award of contracts may be made in writing or by telephone;
- b where requests to participate are made by telephone, a written confirmation must be sent before expiry of the time limit set for their receipt;
- c contracting entities may require that requests for participation made by fax should be confirmed by post or by electronic means, where this is necessary for the purposes of legal proof. Any such requirement, together with the time limit for sending confirmation by post or electronic means, should be stated by the contracting entity in the notice used as a means of calling for competition or in the invitation referred to in Article 47(5).

#### *Article 49*

### **Information to applicants for qualification, candidates and tenderers**

1 Contracting entities shall as soon as possible inform the economic operators involved of decisions reached concerning the conclusion of a framework agreement, the award of the contract, or admission to a dynamic purchasing system, including the grounds for any decision not to conclude a framework agreement or award a contract for which there has been a call for competition or to recommence the procedure, or not to implement a dynamic purchasing system; this information shall be provided in writing if the contracting entities are requested to do so.

2 On request from the party concerned, contracting entities shall, as soon as possible, inform:

- any unsuccessful candidate of the reasons for the rejection of his application,
- any unsuccessful tenderer of the reasons for the rejection of his tender, including, for the cases referred to in Article 34(4) and (5), the reasons for their decision of



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- non-equivalence or their decision that the works, supplies or services do not meet the performance or functional requirements,
- any tenderer who has 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.

The time taken to do so may under no circumstances exceed 15 days from receipt of the written enquiry.

However, contracting entities may decide that certain information on the contract award or the conclusion of the framework agreement or on admission to a dynamic purchasing system, referred to in the paragraph 1, is to be withheld where release of such information would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of a particular economic operator, public or private, including the interests of the economic operator to whom the contract has been awarded, or might prejudice fair competition between economic operators.

3 Contracting entities which establish and operate a system of qualification shall inform applicants of their decision as to qualification within a period of six months.

If the decision will take longer than four months from the presentation of an application, the contracting entity shall inform the applicant, within two months of the application, of the reasons justifying the longer period and of the date by which his application will be accepted or refused.

4 Applicants whose qualification is refused shall be informed of this decision and the reasons for refusal as soon as possible and under no circumstances more than 15 days later than the date of the decision. The reasons shall be based on the criteria for qualification referred to in Article 53(2).

5 Contracting entities which establish and operate a system of qualification may bring the qualification of an economic operator to an end only for reasons based on the criteria for qualification referred to in Article 53(2). Any intention to bring qualification to an end shall be notified in writing to the economic operator beforehand, at least 15 days before the date on which qualification is due to end, together with the reason or reasons justifying the proposed action.

#### *Article 50*

#### **Information to be stored concerning awards**

1 Contracting entities shall keep appropriate information on each contract which shall be sufficient to permit them at a later date to justify decisions taken in connection with:

- a the qualification and selection of economic operators and the award of contracts;
- b the use of procedures without a prior call for competition by virtue of Article 40(3);
- c the non-application of Chapters III to VI of this Title by virtue of the derogations provided for in Chapter II of Title I and in Chapter II of this Title.

Contracting entities shall take appropriate steps to document the progress of award procedures conducted by electronic means.

2 The information shall be kept for at least four years from the date of award of the contract so that the contracting entity will be able, during that period, to provide the necessary information to the Commission if the latter so requests.

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## CHAPTER VII

### Conduct of the procedure

#### Article 51

##### General provisions

- 1 For the purpose of selecting participants in their award procedures:
  - a contracting entities having provided rules and criteria for the exclusion of tenderers or candidates in accordance with Article 54(1), (2) or (4) shall exclude economic operators which comply with such rules and meet such criteria;
  - b they shall select tenderers and candidates in accordance with the objective rules and criteria laid down pursuant to Article 54;
  - c in restricted procedures and in negotiated procedures with a call for competition, they shall where appropriate reduce in accordance with Article 54 the number of candidates selected pursuant to subparagraphs (a) and (b).
- 2 When a call for competition is made by means of a notice on the existence of a qualification system and for the purpose of selecting participants in award procedures for the specific contracts which are the subject of the call for competition, contracting entities shall:
  - a qualify economic operators in accordance with the provisions of Article 53;
  - b apply to such qualified economic operators those provisions of paragraph 1 that are relevant to restricted or negotiated procedures.
- 3 Contracting entities shall verify that the tenders submitted by the selected tenderers comply with the rules and requirements applicable to tenders and award the contract on the basis of the criteria laid down in Articles 55 and 57.

#### Section 1

### Qualification and qualitative selection

#### Article 52

##### **Mutual recognition concerning administrative, technical or financial conditions, and certificates, tests and evidence**

- 1 When selecting participants for a restricted or negotiated procedure, in reaching their decision as to qualification or when the criteria and rules are being updated, contracting entities shall not:
  - a impose administrative, technical or financial conditions on certain economic operators which would not be imposed on others;
  - b require tests or evidence which would duplicate objective evidence already available.
- 2 Where they request the production of certificates drawn up by independent bodies attesting the compliance of the economic operator with certain quality assurance standards, contracting entities shall refer to quality assurance systems based on the relevant European standards series certified by bodies conforming to the European standards series concerning certification.

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Contracting entities shall recognise equivalent certificates from bodies established in other Member States. They shall also accept other evidence of equivalent quality assurance measures from economic operators.

3 For works and service contracts, and only in appropriate cases, the contracting entities may require, in order to verify the economic operator's technical abilities, an indication of the environmental management measures which the economic operator will be able to apply when carrying out the contract. In such cases, should the contracting entities require the production of certificates drawn up by independent bodies attesting the compliance of the economic operator with certain environmental management standards, they shall refer to the EMAS or to environmental management standards based on the relevant European or international standards certified by bodies conforming to Community law or the relevant European or international standards concerning certification.

Contracting entities shall recognise equivalent certificates from bodies established in other Member States. They shall also accept other evidence of equivalent environmental management measures from economic operators.

### *Article 53*

#### **Qualification systems**

1 Contracting entities which so wish may establish and operate a system of qualification of economic operators.

Contracting entities which establish or operate a system of qualification shall ensure that economic operators are at all times able to request qualification.

2 The system under paragraph 1 may involve different qualification stages.

It shall be operated on the basis of objective criteria and rules for qualification to be established by the contracting entity.

Where those criteria and rules include technical specifications, the provisions of Article 34 shall apply. The criteria and rules may be updated as required.

3 The criteria and rules for qualification referred to in paragraph 2 may include the exclusion criteria listed in Article 45 of Directive 2004/18/EC on the terms and conditions set out therein.

Where the contracting entity is a contracting authority within the meaning of Article 2(1)(a), those criteria and rules shall include the exclusion criteria listed in Article 45(1) of Directive 2004/18/EC.

4 Where the criteria and rules for qualification referred to in paragraph 2 include requirements relating to the economic and financial capacity of the economic operator, the latter may where necessary rely on the capacity of other entities, whatever the legal nature of the link between itself and those entities. In this case the economic operator must prove to the contracting entity that these resources will be available to it throughout the period of the validity of the qualification system, for example by producing an undertaking by those entities to that effect.

Under the same conditions, a group of economic operators as referred to in Article 11 may rely on the capacity of participants in the group or of other entities.

5 Where the criteria and rules for qualification referred to in paragraph 2 include requirements relating to the technical and/or professional abilities of the economic operator, the

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latter may where necessary rely on the capacity of other entities, whatever the legal nature of the link between itself and those entities. In this case the economic operator must prove to the contracting entity that those resources will be available to it throughout the period of the validity of the qualification system, for example by producing an undertaking by those entities to make the necessary resources available to the economic operator.

Under the same conditions, a group of economic operators referred to in Article 11 may rely on the abilities of participants in the group or of other entities.

6 The criteria and rules for qualification referred to in paragraph 2 shall be made available to economic operators on request. The updating of these criteria and rules shall be communicated to interested economic operators.

Where a contracting entity considers that the qualification system of certain other entities or bodies meets its requirements, it shall communicate to interested economic operators the names of such other entities or bodies.

7 A written record of qualified economic operators shall be kept; it may be divided into categories according to the type of contract for which the qualification is valid.

8 When establishing or operating a qualification system, contracting entities shall in particular observe the provisions of Article 41(3) concerning notices on the existence of a system of qualification, of Article 49(3), (4) and (5) concerning the information to be delivered to economic operators having applied for qualification, of Article 51(2) concerning the selection of participants when a call for competition is made by means of a notice on the existence of a qualification system as well as the provisions of Article 52 on mutual recognition concerning administrative, technical or financial conditions, certificates, tests and evidence.

9 When a call for competition is made by means of a notice on the existence of a qualification system, tenderers in a restricted procedure or participants in a negotiated procedure shall be selected from the qualified candidates in accordance with such a system.

#### *Article 54*

### **Criteria for qualitative selection**

1 Contracting entities which establish selection criteria in an open procedure shall do so in accordance with objective rules and criteria which are available to interested economic operators.

2 Contracting entities which select candidates for restricted or negotiated procedures shall do so according to objective rules and criteria which they have established and which are available to interested economic operators.

3 In restricted or negotiated procedures, the criteria may be based on the objective need of the contracting entity to reduce the number of candidates to a level which is justified by the need to balance the particular characteristics of the procurement procedure with the resources required to conduct it. The number of candidates selected shall, however, take account of the need to ensure adequate competition.

4 The criteria set out in paragraphs 1 and 2 may include the exclusion criteria listed in Article 45 of Directive 2004/18/EC on the terms and conditions set out therein.

Where the contracting entity is a contracting authority within the meaning of Article 2(1) (a), the criteria and rules referred to in paragraphs 1 and 2 of this Article shall include the exclusion criteria listed in Article 45(1) of Directive 2004/18/EC.

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5 Where the criteria referred to in paragraphs 1 and 2 include requirements relating to the economic and financial capacity of the economic operator, the latter may where necessary and for a particular contract rely on the capacity of other entities, whatever the legal nature of the link between itself and those entities. In this case the economic operator shall prove to the contracting entity that the necessary resources will be available to it, for example by delivering an undertaking by those entities to that effect.

Under the same conditions, a group of economic operators as referred to in Article 11 may rely on the capacities of participants in the group or of other entities.

6 Where the criteria referred to in paragraphs 1 and 2 include requirements relating to the technical and/or professional abilities of the economic operator, the latter may where necessary and for a particular contract rely on the abilities of other entities, whatever the legal nature of the link between itself and those entities. In this case the economic operator must prove to the contracting entity that for the performance of the contract those resources will be available to it, for example by delivering an undertaking by those entities to make the necessary resources available to the economic operator.

Under the same conditions, a group of economic operators as referred to in Article 11 may rely on the abilities of participants in the group or of other entities.

## Section 2

### **Award of the contract**

#### *Article 55*

### **Contract award criteria**

1 Without prejudice to national laws, regulations or administrative provisions on the remuneration of certain services, the criteria on which the contracting entities shall base the award of contracts shall:

- a where the contract is awarded on the basis of the most economically advantageous tender from the point of view of the contracting entity, be various criteria linked to the subject-matter of the contract in question, such as delivery or completion date, running costs, cost-effectiveness, quality, aesthetic and functional characteristics, environmental characteristics, technical merit, after-sales service and technical assistance, commitments with regard to parts, security of supply, and price or otherwise
- b the lowest price only.

2 Without prejudice to the provisions of the third subparagraph, in the case referred to in paragraph 1(a), the contracting entity shall specify the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender.

Those weightings can be expressed by providing for a range with an appropriate maximum spread.

Where, in the opinion of the contracting entity, weighting is not possible for demonstrable reasons, the contracting entity shall indicate the criteria in descending order of importance.

The relative weighting or order of importance shall be specified, as appropriate, in the notice used as a means of calling for competition, in the invitation to confirm the

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interest referred to in Article 47(5), in the invitation to tender or to negotiate, or in the specifications.

### Article 56

#### Use of electronic auctions

1 Member States may provide that contracting entities may use electronic auctions.

2 In open, restricted or negotiated procedures with a prior call for competition, the contracting entities may decide that the award of a contract shall be preceded by an electronic auction when the contract specifications can be established with precision.

In the same circumstances, an electronic auction may be held on the opening for competition of contracts to be awarded under the dynamic purchasing system referred to in Article 15.

The electronic auction shall be based:

- a either solely on prices when the contract is awarded to the lowest price,
- b or on prices and/or on the new values of the features of the tenders indicated in the specification, when the contract is awarded to the most economically advantageous tender.

3 Contracting entities which decide to hold an electronic auction shall state that fact in the notice used as a means of calling for competition.

The specifications shall include, *inter alia*, the following details:

- a the features whose values will be the subject of electronic auction, provided that such features are quantifiable and can be expressed in figures or percentages;
- b any limits on the values which may be submitted, as they result from the specifications relating to the subject of the contract;
- c the information which will be made available to tenderers in the course of the electronic auction and, where appropriate, when it will be made available to them;
- d the relevant information concerning the electronic auction process;
- e the conditions under which the tenderers will be able to bid and, in particular, the minimum differences which will, where appropriate, be required when bidding;
- f the relevant information concerning the electronic equipment used and the arrangements and technical specifications for connection.

4 Before proceeding with the electronic auction, contracting entities shall make a full initial evaluation of the tenders in accordance with the award criterion/criteria set and with the weighting fixed for them.

All tenderers who have submitted admissible tenders shall be invited simultaneously by electronic means to submit new prices and/or new values; the invitation shall contain all relevant information concerning individual connection to the electronic equipment being used and shall state the date and time of the start of the electronic auction. The electronic auction may take place in a number of successive phases. The electronic auction may not start sooner than two working days after the date on which invitations are sent out.

5 When the contract is to be awarded on the basis of the most economically advantageous tender, the invitation shall be accompanied by the outcome of a full evaluation

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of the relevant tender carried out in accordance with the weighting provided for in the first subparagraph of Article 55(2).

The invitation shall also state the mathematical formula to be used in the electronic auction to determine automatic rerankings on the basis of the new prices and/or new values submitted. That formula shall incorporate the weighting of all the criteria established to determine the most economically advantageous tender, as indicated in the notice used as a means of calling for competition or in the specifications; for that purpose, any ranges shall, however, be reduced beforehand to a specified value.

Where variants are authorised, a separate formula shall be provided for each variant.

6 Throughout each phase of an electronic auction the contracting entities shall instantaneously communicate to all tenderers sufficient information to enable them to ascertain their relative rankings at any moment. They may also communicate other information concerning other prices or values submitted, provided that that is stated in the specifications. They may also at any time announce the number of participants in that phase of the auction. In no case, however, may they disclose the identities of the tenderers during any phase of an electronic auction.

7 Contracting entities shall close an electronic auction in one or more of the following manners:

- a in the invitation to take part in the auction they shall indicate the date and time fixed in advance;
- b when they receive no more new prices or new values which meet the requirements concerning minimum differences. In that event, the contracting entities shall state in the invitation to take part in the auction the time which they will allow to elapse after receiving the last submission before they close the electronic auction;
- c when the number of phases in the auction, fixed in the invitation to take part in the auction, has been completed.

When the contracting entities have decided to close an electronic auction in accordance with subparagraph (c), possibly in combination with the arrangements laid down in subparagraph (b), the invitation to take part in the auction shall indicate the timetable for each phase of the auction.

8 After closing an electronic auction the contracting entities shall award the contract in accordance with Article 55 on the basis of the results of the electronic auction.

9 Contracting entities may not have improper recourse to electronic auctions nor may they use them in such a way as to prevent, restrict or distort competition or to change the subject-matter of the contract, as defined in the notice used as a means of calling for competition and in the specification.

#### *Article 57*

#### **Abnormally low tenders**

1 If, for a given contract, tenders appear to be abnormally low in relation to the goods, works or services, the contracting entity shall, before it may reject those tenders, request in writing details of the constituent elements of the tender which it considers relevant.

Those details may relate in particular to:

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- a the economics of the manufacturing process, of the services provided and of the construction method;
  - b the technical solutions chosen and/or any exceptionally favourable conditions available to the tenderer for the supply of the goods or services or for the execution of the work;
  - c the originality of the supplies, services or work proposed by the tenderer;
  - d compliance with the provisions relating to employment protection and working conditions in force at the place where the work, service or supply is to be performed;
  - e the possibility of the tenderer obtaining State aid.
- 2 The contracting entity shall verify those constituent elements by consulting the tenderer, taking account of the evidence supplied.
- 3 Where a contracting entity establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender can be rejected on that ground alone only after consultation with the tenderer where the latter is unable to prove, within a sufficient time limit fixed by the contracting entity, that the aid in question was granted legally. Where the contracting entity rejects a tender in these circumstances, it shall inform the Commission of that fact.

### Section 3

#### **Tenders comprising products originating in third countries and relations with those countries**

##### *Article 58*

#### **Tenders comprising products originating in third countries**

1 This Article shall apply to tenders covering products originating in third countries with which the Community has not concluded, whether multilaterally or bilaterally, an agreement ensuring comparable and effective access for Community undertakings to the markets of those third countries. It shall be without prejudice to the obligations of the Community or its Member States in respect of third countries.

2 Any tender submitted for the award of a supply contract may be rejected where the proportion of the products originating in third countries, as determined in accordance with Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code<sup>(6)</sup>, exceeds 50 % of the total value of the products constituting the tender. For the purposes of this Article, software used in telecommunications network equipment shall be regarded as products.

3 Subject to the second subparagraph, where two or more tenders are equivalent in the light of the contract award criteria defined in Article 55, preference shall be given to those tenders which may not be rejected pursuant to paragraph 2. The prices of those tenders shall be considered equivalent for the purposes of this Article, if the price difference does not exceed 3 %.

However, a tender shall not be preferred to another pursuant to the first subparagraph where its acceptance would oblige the contracting entity to acquire equipment having technical characteristics different from those of existing equipment, resulting in incompatibility, technical difficulties in operation and maintenance, or disproportionate costs.



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4 For the purposes of this Article, those third countries to which the benefit of the provisions of this Directive has been extended by a Council Decision in accordance with paragraph 1 shall not be taken into account for determining the proportion, referred to in paragraph 2, of products originating in third countries.

5 The Commission shall submit an annual report to the Council, commencing in the second half of the first year following the entry into force of this Directive, on progress made in multilateral or bilateral negotiations regarding access for Community undertakings to the markets of third countries in the fields covered by this Directive, on any result which such negotiations may have achieved, and on the implementation in practice of all the agreements which have been concluded.

The Council, acting by a qualified majority on a proposal from the Commission, may amend the provisions of this Article in the light of such developments.

#### *Article 59*

##### **Relations with third countries as regards works, supplies and service contracts**

1 Member States shall inform the Commission of any general difficulties, in law or in fact, encountered and reported by their undertakings in securing the award of service contracts in third countries.

2 The Commission shall report to the Council before 31 December 2005, and periodically thereafter, on the opening up of service contracts in third countries and on progress in negotiations with these countries on this subject, particularly within the framework of the WTO.

3 The Commission shall endeavour, by approaching the third country concerned, to remedy any situation whereby it finds, on the basis either of the reports referred to in paragraph 2 or of other information, that, in the context of the award of service contracts, a third country:

- a does not grant Community undertakings effective access comparable to that granted by the Community to undertakings from that country; or
- b does not grant Community undertakings national treatment or the same competitive opportunities as are available to national undertakings; or
- c grants undertakings from other third countries more favourable treatment than Community undertakings.

4 Member States shall inform the Commission of any difficulties, in law or in fact, encountered and reported by their undertakings and which are due to the non-observance of the international labour law provisions listed in Annex XXIII when these undertakings have tried to secure the award of contracts in third countries.

5 In the circumstances referred to in paragraphs 3 and 4, the Commission may at any time propose that the Council decide to suspend or restrict, over a period to be laid down in the decision, the award of service contracts to:

- a undertakings governed by the law of the third country in question;
- b undertakings affiliated to the undertakings specified in point (a) and having their registered office in the Community but having no direct and effective link with the economy of a Member State;
- c undertakings submitting tenders which have as their subject-matter services originating in the third country in question.

The Council shall act, by qualified majority, as soon as possible.

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The Commission may propose these measures on its own initiative or at the request of a Member State.

6 This Article shall be without prejudice to the commitments of the Community in relation to third countries ensuing from international agreements on public procurement, particularly within the framework of the WTO.

### TITLE III

## RULES GOVERNING SERVICE DESIGN CONTESTS

### Article 60

#### General provision

1 The rules for the organisation of a design contest shall be in conformity with paragraph 2 of this Article and with Articles 61 and 63 to 66 and shall be made available to those interested in participating in the contest.

2 The admission of participants to design contests shall not be limited:

- a by reference to the territory or part of the territory of a Member State;
- b on the ground that, under the law of the Member State in which the contest is organised, they would have been required to be either natural or legal persons.

### Article 61

#### Thresholds

1 This Title shall apply to design contests organised as part of a procurement procedure for services whose estimated value, net of VAT, is equal to or greater than [<sup>F1</sup>EUR 400 000]. For the purposes of this paragraph, ‘threshold’ means the estimated value net of VAT of the service contract, including any possible prizes and/or payments to participants.

2 This Title shall apply to all design contests where the total amount of contest prizes and payments to participants is equal to or greater than [<sup>F1</sup>EUR 400 000].

For the purposes of this paragraph, ‘threshold’ means the total amount of the prizes and payments, including the estimated value net of VAT of the service contract which might subsequently be concluded under Article 40(3) if the contracting entity does not exclude such an award in the contest notice.

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#### Textual Amendments

- F1** Substituted by [Commission Regulation \(EU\) No 1251/2011 of 30 November 2011 amending Directives 2004/17/EC, 2004/18/EC and 2009/81/EC of the European Parliament and of the Council in respect of their application thresholds for the procedures for the awards of contract \(Text with EEA relevance\).](#)

## Article 62

### Design contests excluded

This Title shall not apply to:

- (1) contests which are organised in the same cases as referred to in Articles 20, 21 and 22 for service contracts;
- (2) design contests organised for the pursuit, in the Member State concerned, of an activity to which the applicability of paragraph 1 of Article 30 has been established by a Commission decision or has been deemed applicable pursuant to paragraph 4, second or third subparagraph, or to paragraph 5, fourth subparagraph, of that Article.

## Article 63

### Rules on advertising and transparency

1 Contracting entities which wish to organise a design contest shall call for competition by means of a contest notice. Contracting entities which have held a design contest shall make the results known by means of a notice. The call for competition shall contain the information referred to in Annex XVIII and the notice of the results of a design contest shall contain the information referred to in Annex XIX in accordance with the format of standard forms adopted by the Commission in accordance with the procedure in Article 68(2).

The notice of the results of a design contest shall be forwarded to the Commission within two months of the closure of the design contest and under conditions to be laid down by the Commission in accordance with the procedure referred to in Article 68(2). In this connection, the Commission shall respect any sensitive commercial aspects which the contracting entities may point out when forwarding this information, concerning the number of projects or plans received, the identity of the economic operators and the prices tendered.

- 2 Article 44(2) to (8) shall also apply to notices relating to design contests.

## Article 64

### Means of communication

- 1 Article 48(1), (2) and (4) shall apply to all communications relating to contests.

- 2 Communications, exchanges and the storage of information shall be such as to ensure that the integrity and the confidentiality of all information communicated by the participants in a contest are preserved and that the jury ascertains the contents of plans and projects only after the expiry of the time-limit for their submission.

- 3 The following rules shall apply to the devices for the electronic receipt of plans and projects:

- a the information relating to the specifications which is necessary for the presentation of plans and projects by electronic means, including encryption, shall be available to the parties concerned. In addition, the devices for the electronic receipt of plans and projects shall comply with the requirements of Annex XXIV;

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- b Member States may introduce or maintain voluntary accreditation schemes aiming at enhanced levels of certification service provision for such devices.

#### *Article 65*

#### **Rules on the organisation of design contests, the selection of participants and the jury**

- 1 When organising design contests, contracting entities shall apply procedures which are adapted to the provisions of this Directive.
- 2 Where design contests are restricted to a limited number of participants, contracting entities shall establish clear and non-discriminatory selection criteria. In any event, the number of candidates invited to participate shall be sufficient to ensure genuine competition.
- 3 The jury shall be composed exclusively of natural persons who are independent of participants in the contest. Where a particular professional qualification is required of participants in a contest, at least a third of the jury members shall have the same qualification or an equivalent qualification.

#### *Article 66*

#### **Decisions of the jury**

- 1 The jury shall be autonomous in its decisions or opinions.
- 2 It shall examine the plans and projects submitted by the candidates anonymously and solely on the basis of the criteria indicated in the contest notice.
- 3 It shall record its ranking of projects in a report, signed by its members, made according to the merits of each project, together with its remarks and any points which may need clarification.
- 4 Anonymity must be observed until the jury has reached its opinion or decision.
- 5 Candidates may be invited, if need be, to answer questions which the jury has recorded in the minutes to clarify any aspects of the projects.
- 6 Complete minutes shall be drawn up of the dialogue between jury members and candidates.

#### TITLE IV

#### **STATISTICAL OBLIGATIONS, EXECUTORY POWERS AND FINAL PROVISIONS**

#### *Article 67*

#### **Statistical obligations**

- 1 Member States shall ensure, in accordance with the arrangements to be laid down under the procedure provided for in Article 68(2), that the Commission receives every year a statistical report concerning the total value, broken down by Member State and by category of activity to which Annexes I to X refer, of the contracts awarded below the thresholds set out in Article 16 but which would be covered by this Directive were it not for those thresholds.

2 As regards the categories of activity to which Annexes II, III, V, IX and X refer, Member States shall ensure that the Commission receives a statistical report on contracts awarded no later than 31 October 2004 for the previous year, and before 31 October of each year thereafter, in accordance with arrangements to be laid down under the procedure provided for in Article 68(2). The statistical report shall contain the information required to verify the proper application of the Agreement.

The information required under the first subparagraph shall not include information concerning contracts for the R & D services listed in category 8 of Annex XVII A, for telecommunications services listed in category 5 of Annex XVII A whose CPV positions are equivalent to the CPC reference numbers 7524, 7525 and 7526, or for the services listed in Annex XVII B.

3 The arrangements under paragraphs 1 and 2 shall be laid down in such a way as to ensure that:

- a in the interests of administrative simplification, contracts of lesser value may be excluded, provided that the usefulness of the statistics is not jeopardised;
- b the confidential nature of the information provided is respected.

### *[F3 Article 68*

#### **Committee procedure**

1 The Commission shall be assisted by the Committee established by Council Decision 71/306/EEC<sup>(7)</sup>.

2 Where reference is made to this paragraph, Articles 3 and 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

3 Where reference is made to this paragraph, Article 5a(1) to (4) and Article 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

4 Where reference is made to this paragraph, Article 5a(1) to (4) and (5)(b) and Article 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

The time-limits laid down in Article 5a(3)(c), (4)(b) and (4)(e) of Decision 1999/468/EC shall be set at four, two and six weeks respectively.

5 Where reference is made to this paragraph, Article 5a(1), (2), (4) and (6) and Article 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.]

#### **Textual Amendments**

- F3** Substituted by [Regulation \(EC\) No 596/2009 of the European Parliament and of the Council of 18 June 2009 adapting a number of instruments subject to the procedure referred to in Article 251 of the Treaty to Council Decision 1999/468/EC with regard to the regulatory procedure with scrutiny Adaptation to the regulatory procedure with scrutiny — Part Four.](#)

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## Article 69

### Revision of the thresholds

1 <sup>[F3]</sup>The Commission shall verify the thresholds established in Article 16 every two years from 30 April 2004, and shall, if necessary, with regard to the second subparagraph, revise them. Those measures, designed to amend non-essential elements of this Directive, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 68(4). On imperative grounds of urgency, the Commission may have recourse to the urgency procedure referred to in Article 68(5).]

The calculation of the value of these thresholds shall be based on the average daily value of the euro, expressed in SDR, over the 24 months terminating on the last day of August preceding the revision with effect from 1 January. The value of the thresholds thus revised shall, where necessary, be rounded down to the nearest thousand euro so as to ensure that the thresholds in force provided for by the Agreement, expressed in SDR, are observed.

2 <sup>[F3]</sup>At the same time as performing the revision under paragraph 1, the Commission shall align the thresholds laid down in Article 61 (design contests) with the revised threshold applicable to service contracts. Those measures, designed to amend non-essential elements of this Directive, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 68(4). On imperative grounds of urgency, the Commission may have recourse to the urgency procedure referred to in Article 68(5).]

The values of the thresholds laid down in accordance with paragraph 1 in the national currencies of Member States not participating in Monetary Union shall, in principle, be revised every two years from 1 January 2004. The calculation of such values shall be based on the average daily values of those currencies, expressed in euro, over the 24 months terminating on the last day of August preceding the revision with effect from 1 January.

3 The revised thresholds referred to in paragraph 1, their values in national currencies and the aligned thresholds referred to in paragraph 2 shall be published by the Commission in the *Official Journal of the European Union* at the beginning of the month of November following their revision.

#### Textual Amendments

- F3** Substituted by [Regulation \(EC\) No 596/2009 of the European Parliament and of the Council of 18 June 2009 adapting a number of instruments subject to the procedure referred to in Article 251 of the Treaty to Council Decision 1999/468/EC with regard to the regulatory procedure with scrutiny](#)  
Adaptation to the regulatory procedure with scrutiny — Part Four.

## <sup>[F3]</sup>Article 70

### Amendments

1 The Commission may amend, in accordance with the advisory procedure referred to in Article 68(2):

- a the procedure for sending and publishing data referred to in Annex XX, on grounds of technical progress or for administrative reasons;
  - b the procedures for the drawing-up, transmission, receipt, translation, collection and distribution of the notices referred to in Articles 41, 42, 43 and 63;
  - c in the interests of administrative simplification as provided for in Article 67(3), the procedures for the use, drawing-up, transmission, receipt, translation, collection and distribution of the statistical reports referred to in Article 67(1) and (2).
- 2 The Commission may amend the following:
- a the list of contracting entities in Annexes I to X so that they fulfil the criteria set out in Articles 2 to 7;
  - b the procedures for specific references to particular positions in the CPV nomenclature in the notices;
  - c the reference numbers in the nomenclature set out in Annex XVII, in so far as this does not change the material scope of the Directive, and the procedures for reference in the notices to particular positions in that nomenclature within the categories of services listed in the Annex;
  - d the reference numbers in the nomenclature set out in Annex XII, insofar as this does not change the material scope of the Directive, and the procedures for reference to particular positions of that nomenclature in the notices;
  - e Annex XI;
  - f the technical details and characteristics of the devices for electronic receipt referred to in points (a), (f) and (g) of Annex XXIV;
  - g the technical procedures for the calculation methods set out in the second subparagraph of Article 69(1) and the second subparagraph of Article 69(2).

Those measures, designed to amend non-essential elements of this Directive, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 68(3). On imperative grounds of urgency, the Commission may have recourse to the urgency procedure referred to in Article 68(5).]

#### **Textual Amendments**

- F3** Substituted by [Regulation \(EC\) No 596/2009 of the European Parliament and of the Council of 18 June 2009 adapting a number of instruments subject to the procedure referred to in Article 251 of the Treaty to Council Decision 1999/468/EC with regard to the regulatory procedure with scrutiny Adaptation to the regulatory procedure with scrutiny — Part Four.](#)

### *Article 71*

#### **Implementation of the Directive**

1 Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 31 January 2006 at the latest. They shall forthwith inform the Commission thereof.

Member States may avail themselves of an additional period of up to 35 months after expiry of the time limit provided for in the first subparagraph for the application of the provisions necessary to comply with Article 6 of this Directive.

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When Member States adopt those measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. The methods of making such references shall be laid down by Member States.

The provisions of Article 30 are applicable from 30 April 2004.

2 Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

#### *Article 72*

### **Monitoring mechanisms**

In conformity with Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors<sup>(8)</sup>, Member States shall ensure implementation of this Directive by effective, available and transparent mechanisms.

For this purpose they may, among other things, appoint or establish an independent body.

#### *Article 73*

### **Repeal**

Directive 93/38/EEC is hereby repealed, without prejudice to the obligations of the Member States concerning the time limits for transposition into national law set out in Annex XXV.

References to the repealed Directive shall be construed as being made to this Directive and shall be read in accordance with the correlation table in Annex XXVI.

#### *Article 74*

### **Entry into force**

This Directive shall enter into force on the day of its publication in the *Official Journal of the European Union*.

#### *Article 75*

### **Addressees**

This Directive is addressed to the Member States.



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- (1) [OJ L 340, 16.12.2002, p. 1.](#)
- (2) [<sup>F2</sup>[OJ L 217, 20.8.2009, p. 76.](#)]
- (3) [OJ L 193, 18.7.1983, p. 1.](#) Directive as last amended by Directive 2001/65/EC of the European Parliament and of the Council ([OJ L 283, 27.10.2001, p. 28.](#))
- (4) Editorial Note: The title of the Directive has been adjusted to take account of the renumbering of the Articles of the Treaty in accordance with Article 12 of the Treaty of Amsterdam; the original reference was to Article 54(3)(g) of the Treaty.
- (5) [OJ L 129, 27.5.1993, p. 25.](#)
- (6) [OJ L 302, 19.10.1992, p. 1.](#) Regulation as last amended by Regulation (EC) No 2700/2000 of the European Parliament and of the Council ([OJ L 311, 12.12.2000, p. 17.](#))
- (7) [<sup>F3</sup>[OJ L 185, 16.8.1971, p. 15.](#)]
- (8) [OJ L 76, 23.03.1992, p. 14.](#) Directive amended by the 1994 Act of Accession ([OJ L 241, 29.8.1994, p. 228.](#))

#### **Textual Amendments**

- F2** Inserted by [Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC \(Text with EEA relevance\).](#)
- F3** Substituted by [Regulation \(EC\) No 596/2009 of the European Parliament and of the Council of 18 June 2009 adapting a number of instruments subject to the procedure referred to in Article 251 of the Treaty to Council Decision 1999/468/EC with regard to the regulatory procedure with scrutiny Adaptation to the regulatory procedure with scrutiny — Part Four.](#)