

Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (Text with EEA relevance)

TITLE I

SCOPE, DEFINITIONS AND GENERAL PRINCIPLES

CHAPTER III

Material scope

Section 2

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

Subsection 5

Activities directly exposed to competition and procedural provisions relating thereto

Article 34

Activities directly exposed to competition

1 Contracts intended to enable an activity mentioned in Articles 8 to 14 to be carried out shall not be subject to this Directive if the Member State or the contracting entities having introduced the request pursuant to Article 35 can demonstrate that, in the Member State in which it is performed, the activity is directly exposed to competition on markets to which access is not restricted; nor shall design contests that are organised for the pursuit of such an activity in that geographic area be subject to this Directive. The activity concerned may form a part of a larger sector or be exercised only in certain parts of the Member State concerned. The competition assessment referred to in the first sentence of this paragraph, which will be made in the light of the information available to the Commission and for the purposes of this Directive, is without prejudice to the application of competition law. Such assessment shall be made having regard to the market for the activities in question and the geographical reference market within the meaning of paragraph 2.

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

The geographical reference market, on the basis of which exposure to competition is assessed, shall consist of the area in which the undertakings concerned are involved in

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

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

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