

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 35

Procedure for establishing whether Article 34 is applicable

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

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

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

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of any law, regulation, administrative provision or agreement concerning compliance with the conditions set out in Article 34(1).

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

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

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

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

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

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

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

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