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NOTE

from: General Secretariat
to: Working Party on Public Procurement

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Subject: Proposal for a Directive of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors
- Issues which are specific to the Utilities Directive

Delegations will find in the Annex a Presidency compromise proposal on issues specific to Utilities Directive.

Changes compared to previous text (doc. 11884/12) are underlined, deletions are marked [...].

Issues which are specific to the Utilities Directive

1. Special and exclusive rights

- (8) The notion of special or exclusive rights is central to the definition of the scope of this Directive, since entities which are neither contracting authorities nor public undertakings within the meaning of this Directive are subject to its provisions only to the extent that they exercise one of the activities covered on the basis of such rights. It is therefore appropriate to clarify that rights which have been granted by means of a procedure based on objective criteria, notably pursuant to Union legislation, and for which adequate publicity has been ensured do not constitute special or exclusive rights for the purposes of this Directive. This legislation should include Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas¹, Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity², Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service³, Directive 94/22/EC of the European Parliament and of the Council of 20 May 1994 on the conditions for granting and using authorisations for the prospection, exploration and production of hydrocarbons⁴ and Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70⁵.

¹ OJ L 204, 21.7.1998, p. 1

² OJ L 27, 30.1.1997, p. 20.

³ OJ L 15, 21.1.1998, p. 14.

⁴ OJ L 164, 30.6.1994, p. 3.

⁵ OJ L 315, 3.12.2007, p. 1.

It should also be clarified that this list of legislation is not exhaustive and that rights in any form, including by way of acts of concession, which have been granted by means of other procedures based on objective criteria and for which adequate publicity has been ensured do not constitute special or exclusive rights for the purposes *of defining the scope* of this Directive *rationae personae*. The concept of exclusive rights should also be used in the context of determining whether use of a negotiated procedure without prior call for competition would be justified because the works, supplies or services can be supplied only by a particular economic operator because of the protection of certain exclusive rights. However, bearing in mind the different *ratio legis* behind these provisions, it should be clarified that the notion of exclusive rights does not need to have the same meaning in the two contexts. It should thus be clarified that an entity, which has won the exclusive right to provide a given service in a given geographic area following a procedure based on objective criteria for which adequate transparency has been ensured would not, if a private body, be a contracting entity itself, but would, nevertheless, be the only entity that could provide the service concerned in that area.

Article 4

Contracting entities

[Directive 2004/17/EC: Article 2(1)(b), Article 2(2(and (3), Recital 25]

1. A dominant influence within the meaning of point 5 of Article 2 on the part of the contracting authorities shall be presumed in any of the following cases in which those authorities, directly or indirectly:
 - (a) hold the majority of the undertaking's subscribed capital;
 - (b) control the majority of the votes attaching to shares issued by the undertaking;
 - (c) can appoint more than half of the undertaking's administrative, management or supervisory body.

2. For the purposes of this Article, "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 5 to 11 to one or more entities, and which substantially affects the ability of other entities to carry out such activity. [Definition moved from Article 2(6) without change]

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

Such procedures include:

- (a) procurement procedures with a prior call for competition in conformity with Directive [2004/18/EC], Directive 2009/81/EC, [Directive ... (concessions)] or this Directive;
- (b) procedures pursuant to other legislative acts of the Union listed in Annex II, ensuring adequate prior transparency for granting authorisations on the basis of objective criteria.
3. 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 5 to 11;
- (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 5 to 11, or any combination thereof and operate on the basis of special or exclusive rights within the meaning of paragraph 2 granted by a competent authority of a Member State.
4. The Commission shall be empowered to adopt delegated acts in accordance with Article 98 concerning the amendment of the list of Union legislation set out in Annex II, when on the basis of the adoption of new legislation, repeal or modification of such legislation, such amendments prove necessary.

ANNEX II

LIST OF UNION LEGISLATION REFERRED TO IN ARTICLE 4(2)

[New]

Rights which have been granted by means of a procedure in which adequate publicity has been ensured and where the granting of those rights was based on objective criteria shall not constitute "special or exclusive rights" within the meaning of this Directive. The following lists procedures, ensuring adequate prior transparency, for granting authorisations on the basis of other legislative acts of the European Union which do not constitute "special or exclusive rights" within the meaning of this Directive:

- (a) granting authorisation to operate natural gas installations in accordance with the procedures laid down in Article 4 of Directive 98/30/EC;
- (b) authorisation or an invitation to tender for the construction of new electricity production installations in accordance with Directive 96/92/EC;
- (c) the granting in accordance with the procedures laid down in Article 9 of Directive 97/67/EC of authorisations in relation to a postal service which is not or shall not be reserved;
- (d) a procedure for granting an authorisation to carry on an activity involving the exploitation of hydrocarbons in accordance with Directive 94/22/EC;
- (e) public service contracts within the meaning of Regulation (EC) No 1370/2007 which have been awarded on the basis of a competitive tendering procedure in accordance with its Article 5(3), provided that its length is in conformity with Article 4(3) or 4(4) of the Regulation.

2. Changes to the scope of the Directive: Exclusion of exploration for oil and gas

It is appropriate to exclude procurement made for the purpose of exploring for oil and gas as that sector has consistently been found to be subject to such competitive pressure that the procurement discipline brought about by the EU procurement rules is no longer needed. As extraction of oil and gas continues to fall within the scope of this Directive, there might be a need to distinguish between exploration and extraction. In doing so, "exploration" should be considered to include the activities that are undertaken in order to verify whether (commercially exploitable) oil and gas is present in a given zone, whereas "extraction" should be considered as the "production" of oil and gas. In line with established practice in merger cases, "production" should be taken to include also 'development', i.e. the setting up of adequate infrastructure for future production (oil platforms, pipelines, terminals, etc.).

Article 11

Extraction of oil and gas and exploration for, or extraction of, coal or other solid fuels

[Directive 2004/17/EC: Article 7(a)]

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

- (a) extracting oil or gas;

- (b) exploring for or extracting coal or other solid fuels.

3. Changes to the scope of the Directive:
Deletion of Article 5(2) of Directive 2004/17/EC

Article 8

Transport services

[Directive 2004/17/EC: Article 5]

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. An exhaustive list of such entities and the geographical areas concerned is set out in Annex IIA. Member States shall notify the Commission of changes to the list where the names of the entities concerned change or they cease their activity.

The Commission shall be empowered to adopt delegated acts in accordance with Article 98 to update Annex IIA following such notifications.

ANNEX IIA

Exhaustive list of entities referred to in Article 8(2)

[New]

[Information to be notified by Member States before adoption of the Directive:

Belgium

...

Bulgaria

None

Czech Republic

...

Denmark

...

Germany

...

Estonia

...

Ireland

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Greece

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Spain

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France

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Italy

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Cyprus

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Latvia

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Lithuania

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Luxembourg

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Hungary

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Malta

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Netherlands

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Austria

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Poland

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Portugal

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Romania

None

Slovenia

...

Finland

...

Sweden

...

United Kingdom

...

4. Activities directly exposed to competition

- (22) This Directive should apply neither to contracts intended to permit the performance of an activity that is subject to this Directive nor to design contests organised for the pursuit of such an activity if, in the Member State in which this activity is carried out, it is directly exposed to competition on markets to which access is not limited. It is therefore appropriate to maintain the procedure, applicable to all sectors, or parts thereof, covered by this Directive that will enable the effects of current or future opening up to competition to be taken into account. Such a procedure should provide legal certainty for the entities concerned, as well as an appropriate decision-making process, ensuring, within short time limits, uniform application of Union law in this area.
- (23) Direct exposure to competition should be assessed on the basis of objective criteria, taking account of the specific characteristics of the sector concerned or of the concerned parts thereof. This assessment is, however, limited by the applicable short deadlines and by having to be based on the information available to the Commission – either from already available sources or from the information obtained in the context of the application pursuant to Article 28 - which can not be supplemented by more time consuming methods, including notably public inquiries of economic operators concerned. The assessment of direct exposure to competition that can be carried out in the context of this directive is consequently without prejudice to the full-fledged application of competition law.

New Recital 23a

- (23a) Assessing whether a given sector, or parts thereof, are directly exposed to competition should be examined in respect of the specific area in which the activity, or the parts thereof concerned, are carried out by the relevant economic operators, the so-called relevant geographical market. As this notion is crucial for the assessment, it should be given an appropriate definition, based on existing notions in Union law. It should also be clarified that the relevant geographical market might not coincide with the territory of the Member State concerned; consequently, decisions concerning the applicability of the exemption could be limited to parts of the territory of the Member State concerned.
- (24) The implementation and application of appropriate Union legislation opening a given sector, or a part of it, will be considered to provide sufficient grounds for assuming that there is free access to the market in question. Such appropriate legislation should be identified in an annex which can be updated by the Commission. [...]

New Recital 24a

- (24a) Where free access to a given market does not result from the implementation of appropriate Union legislation, it should be demonstrated that, de jure and de facto, such access is free. Where a Member State extends the application of a Union legal act opening up a given sector to competition to situations falling outside the scope of that legal act, for instance by applying Directive 94/22/EC to the coal sector or Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways⁶ to passenger service at the national level, this circumstance should be taken into account when assessing whether access to the sector concerned is free, de jure and de facto.

⁶ OJ L 237, 24.8.1991, p. 25.

Subsection 4

Activities directly exposed to competition and procedural provisions relating thereto

Article 27

Activities directly exposed to competition

[Directive 2004/17/EC: Article 30(1),(2) and (3), Article 62(2), Commission Decision 2005/15/EC⁷]

1. Contracts intended to enable an activity mentioned in Articles 5 to 11 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 28 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. Such competition assessment, 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.
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 provisions on competition of the Treaty; those may include 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 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. This 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.

⁷ Commission Decision of 7 January 2005 on the detailed rules for the application of the procedure provided for in Article 30 of Directive 2004/17/EC

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 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.

ANNEX III

LIST OF UNION LEGISLATION REFERRED TO IN ARTICLE 27(3)

[Directive 2004/17/EC: Annex XI]

A. TRANSPORT OR DISTRIBUTION OF GAS OR HEAT

Directive 2009/73/EC

B. PRODUCTION, TRANSMISSION OR DISTRIBUTION OF ELECTRICITY

Directive 2009/72/EC

C. PRODUCTION, TRANSPORT OR DISTRIBUTION OF DRINKING WATER

None

D. CONTRACTING ENTITIES IN THE FIELD OF RAIL SERVICES

Rail Freight transport

Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways⁸

Rail passenger transport

None

⁸ OJ L 237, 24.8.1991, p. 25

E. CONTRACTING ENTITIES IN THE FIELD OF URBAN RAILWAY, TRAMWAY,
TROLLEYBUS OR MOTOR BUS SERVICES

None

F. CONTRACTING ENTITIES IN THE FIELD OF POSTAL SERVICES

Directive 97/67/EC

G. EXTRACTION OF OIL OR GAS

Directive 94/22/EC

H. EXPLORATION FOR AND EXTRACTION OF COAL OR OTHER SOLID FUELS

None

I. CONTRACTING ENTITIES IN THE FIELD OF SEAPORT OR INLAND PORT OR OTHER
TERMINAL EQUIPMENT

None

J. CONTRACTING ENTITIES IN THE FIELD OF AIRPORT INSTALLATIONS

None

New Recitals 24b, 24c and 24d

(24b) Independent national authorities, such as sectoral regulators or competition authorities, normally possess specialised know-how, information and knowledge that would be pertinent when assessing whether a given activity or parts thereof are directly exposed to competition on markets to which access is not limited. Requests for exemption should therefore where appropriate be accompanied by, or incorporate, a recent position on the competitive situation in the sector concerned, adopted by an independent national authority that is competent in relation to the activity concerned.

In the absence of a reasoned and substantiated position adopted by an independent national authority that is competent in relation to the activity concerned, more time would be needed for the assessment of a request for exemption. The periods of which the Commission dispose for its assessments of such requests should therefore be modulated accordingly.

(24c) The Commission should always be obliged to examine requests, which are in conformity with the detailed rules for the application of the procedures for establishing whether a given activity, or parts thereof, are directly exposed to competition on markets to which access is not restricted. It should, however, also be clarified that the complexity of such requests may be such that it might not always be possible to ensure the adoption within the applicable deadlines of implementing decisions establishing whether a given activity or parts thereof are directly exposed to competition on markets to which access is not restricted.

(24d) It should be clarified that the Commission should have the possibility to require Member States, contracting entities or national authorities to provide or to supplement or clarify information. The Commission should set an appropriate time limit for so doing which, having due regard also to the need to meet the deadlines set for the Commission's adoption of its implementing decision, should take into account factors such as the complexity of the information requested and whether the information is readily accessible.

Article 28

Procedure for establishing whether Article 27 is applicable

[Directive 2004/17/EC: Article 30(4),(5)(6), Article 62(2), Commission Decision 2005/15/EC]

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 27(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.

[...]

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 27(1). [...]

- 1a. In the case of requests coming from a contracting entity, the Commission shall immediately inform the Member State concerned.

Except where the request 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 27(1) to the activity concerned in accordance with its paragraphs 2 and 3, the Member State 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 27(1).

2. Upon request submitted in accordance with paragraph 1 of this Article, the Commission may, by way of an implementing decision adopted within the periods set out in paragraph 4 of this Article, establish whether an activity referred to in Articles 5 to 11 is directly exposed to competition on the basis of the criteria set out in Article 27. Those implementing decisions shall be adopted in accordance with the advisory procedure referred to in Article 100(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 decision referred to in the first subparagraph of this paragraph establishing the applicability of Article 27(1) within the period provided for in paragraph 3 of this Article;

- (b) has not adopted the implementing decision referred to in the first subparagraph of this paragraph within the period provided for in paragraph 3 of this Article.
3. The implementing decisions referred to in paragraph 2 shall be adopted within the following periods:
- (a) 90 working days where free access to a given market is presumed on the basis of the first subparagraph of Article 27(3);
 - (b) 130 working days in cases other than those referred to in point (a).

The periods set out in points a and b of this paragraph shall be prolonged by 15 working days where the request is not 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 27(1) to the activity concerned in accordance with its paragraphs 2 and 3.

Those deadlines shall commence on the first working day following the date on which the Commission receives the request referred to in paragraph 1 or, where the information to be supplied with the request is incomplete, on the working day following the receipt of the complete information.

The periods set out in the first subparagraph may be extended by the Commission with the agreement of the Member State or contracting entity which has presented the request.

The Commission may require the Member State or the contracting entity concerned or the independent national authority referred to under paragraph 1 of this Article or any other competent national authority [...] to provide all necessary information or to supplement or clarify information given within an appropriate time limit. In the event of late or incomplete answers, the periods set out in the first subparagraph shall be suspended for the period between the expiry of the time limit set in the request for information, and the receipt of the complete and correct information.

- 3a. 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. If so, a new period for the adoption of the implementing decision shall apply, which shall be calculated in accordance with the first and second subparagraph of paragraph 3, unless a shorter period is agreed on by the Commission and the Member State or contracting entity which has presented the request.
4. Where an activity in a given Member State is already the subject of a procedure under paragraphs 1, 2 and 3, 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.
5. The Commission shall adopt an implementing act establishing detailed rules for the application of paragraphs 1 to 4. That implementing act shall include at least:
- (a) The publication in the *Official Journal of the European Union*, for information, of the date on which the period set out in the first subparagraph of paragraph 3 begins and ends, including prolongations or suspensions of those periods, if any, as provided for in paragraph 3 of this Article;
 - (b) publication of the possible applicability of Article 27(1) in accordance with point b of the second subparagraph of paragraph 2 of this Article;
 - (c) implementing provisions concerning the form, content and other details of requests pursuant to paragraph 1 of this Article;
 - (d) rules concerning the periods set out in paragraph 3 of this Article.

Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 100(2).

5. [...] **Increasing transparency in respect of contracts awarded on the basis of framework agreements [...]**

(29) The instrument of framework agreements can be an efficient procurement technique throughout Europe; however, there is a need to enhance competition by improving transparency of and access to procurement carried out by means of framework agreements. It is therefore appropriate to revise the provisions applicable to those agreements, notably by providing for the award of specific contracts based on the agreement to be awarded on the basis of objective rules and criteria, for instance following a mini-competition, and by providing for a maximum duration of the framework agreement. In this context, it should be clarified that contracts based on a framework agreement are to be awarded before the end of the term of the framework agreement itself. Consequently, the duration of the individual contracts based on the framework agreement does not need to coincide with the duration of that framework agreement.

Article 45

Framework agreements

[Directive 2004/17/EC: Article 1(4), Article 14, Article 40(3)(i)]

1. Contracting entities may conclude framework agreements, provided that they apply the procedures provided for in this Directive.

A framework agreement means an agreement between one or more contracting entities 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.

The term of a framework agreement shall not exceed eight years, save in exceptional cases duly justified, in particular by the subject of the framework agreement.

2. Contracts based on a framework agreement shall be awarded [...] on the basis of objective rules and criteria, which may include reopening the competition among those economic operators party to the framework agreement as concluded. These rules and criteria shall be set out in the procurement documents for the framework agreement.

[...]

Contracting entities shall not use framework agreements improperly or in such a way as to prevent, restrict or distort competition.

[...]

Article 47

Electronic auctions

1. ...
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 tender specifications can be established with precision.

In the same circumstances, an electronic auction may be held on the reopening of competition among the parties to a framework agreement as provided for in [...] Article 45(2) and on the opening for competition of contracts to be awarded under the dynamic purchasing system referred to in Article 46.