


# Procedure file

Basic information	
COD - Ordinary legislative procedure (ex-codecision procedure) Directive	2011/0437(COD) Procedure completed
Award of concession contracts	
Subject 2.10.02 Public procurement	

Key players			
European Parliament	Committee responsible	Rapporteur	Appointed
	<b>IMCO</b> Internal Market and Consumer Protection		29/11/2011
		PPE <a href="#">JUVIN Philippe</a>	
		Shadow rapporteur	
		S&D <a href="#">PANZERI Pier Antonio</a>	
		ALDE <a href="#">BUȘOI Cristian-Silviu</a>	
		Verts/ALE <a href="#">RÜHLE Heide</a>	
		ECR <a href="#">HARBOUR Malcolm</a>	
		ECR <a href="#">KOŽUŠNÍK Edvard</a>	
		EFD <a href="#">SALVINI Matteo</a>	
	Committee for opinion	Rapporteur for opinion	Appointed
	<b>AFET</b> Foreign Affairs	The committee decided not to give an opinion.	
	<b>INTA</b> International Trade		25/01/2012
		S&D <a href="#">SUSTA Gianluca</a>	
<b>ECON</b> Economic and Monetary Affairs	The committee decided not to give an opinion.		
<b>EMPL</b> Employment and Social Affairs			
<b>ENVI</b> Environment, Public Health and Food Safety	The committee decided not to give an opinion.		
<b>ITRE</b> Industry, Research and Energy		14/03/2012	
	PPE <a href="#">LANGEN Werner</a>		
<b>TRAN</b> Transport and Tourism			
<b>REGI</b> Regional Development		26/01/2012	
	Verts/ALE <a href="#">RÜHLE Heide</a>		
<b>CULT</b> Culture and Education	The committee decided not to give an opinion.		
<b>JURI</b> Legal Affairs		01/03/2012	
	PPE <a href="#">BALDASSARRE Raffaele</a>		
<b>LIBE</b> Civil Liberties, Justice and Home Affairs	The committee decided not to give an opinion.		
Council of the European Union	Council configuration	Meeting	Date
	<a href="#">General Affairs</a>	<a href="#">3292</a>	11/02/2014

European Commission	<a href="#">Competitiveness (Internal Market, Industry, Research and Space) 3208</a>	10/12/2012
	<a href="#">Competitiveness (Internal Market, Industry, Research and Space) 3169</a>	30/05/2012
	<a href="#">Competitiveness (Internal Market, Industry, Research and Space) 3147</a>	20/02/2012
European Economic and Social Committee	Commission DG	Commissioner
	<a href="#">Financial Stability, Financial Services and Capital Markets Union</a>	BARNIER Michel

Key events			
17/01/2012	Committee referral announced in Parliament, 1st reading		
20/02/2012	Debate in Council	<a href="#">3147</a>	
30/05/2012	Debate in Council	<a href="#">3169</a>	Summary
10/12/2012	Debate in Council	<a href="#">3208</a>	
24/01/2013	Vote in committee, 1st reading		
01/02/2013	Committee report tabled for plenary, 1st reading	<a href="#">A7-0030/2013</a>	Summary
14/01/2014	Debate in Parliament		
15/01/2014	Results of vote in Parliament		
15/01/2014	Decision by Parliament, 1st reading	<a href="#">T7-0024/2014</a>	Summary
11/02/2014	Act adopted by Council after Parliament's 1st reading		
26/02/2014	Final act signed		
26/02/2014	End of procedure in Parliament		
28/03/2014	Final act published in Official Journal		

Technical information	
Procedure reference	2011/0437(COD)
Procedure type	COD - Ordinary legislative procedure (ex-codecision procedure)
Procedure subtype	Legislation
Legislative instrument	Directive
Legal basis	Treaty on the Functioning of the EU TFEU 053-p1; Treaty on the Functioning of the EU TFEU 114-p1; Treaty on the Functioning of the EU TFEU 062
Mandatory consultation of other institutions	<a href="#">European Economic and Social Committee</a>
Stage reached in procedure	Procedure completed
Committee dossier	IMCO/7/08518

Documentation gateway			

Legislative proposal		<a href="#">COM(2011)0897</a>	20/12/2011	EC	Summary
Document attached to the procedure		<a href="#">SEC(2011)1588</a>	20/12/2011	EC	
Document attached to the procedure		<a href="#">SEC(2011)1589</a>	20/12/2011	EC	
Committee draft report		<a href="#">PE492.669</a>	05/07/2012	EP	
Committee of the Regions: opinion		<a href="#">CDR0100/2012</a>	19/07/2012	CofR	
Committee opinion	<b>EMPL</b>	<a href="#">PE486.119</a>	16/10/2012	EP	
Amendments tabled in committee		<a href="#">PE496.581</a>	23/10/2012	EP	
Amendments tabled in committee		<a href="#">PE497.782</a>	23/10/2012	EP	
Amendments tabled in committee		<a href="#">PE497.783</a>	23/10/2012	EP	
Committee opinion	<b>ITRE</b>	<a href="#">PE492.572</a>	08/11/2012	EP	
Committee opinion	<b>INTA</b>	<a href="#">PE492.632</a>	08/11/2012	EP	
Committee opinion	<b>TRAN</b>	<a href="#">PE492.848</a>	21/11/2012	EP	
Committee opinion	<b>REGI</b>	<a href="#">PE496.425</a>	29/11/2012	EP	
Committee opinion	<b>JURI</b>	<a href="#">PE494.668</a>	03/12/2012	EP	
Committee report tabled for plenary, 1st reading/single reading		<a href="#">A7-0030/2013</a>	01/02/2013	EP	Summary
Text adopted by Parliament, 1st reading/single reading		<a href="#">T7-0024/2014</a>	15/01/2014	EP	Summary
Commission response to text adopted in plenary		<a href="#">SP(2014)167</a>	19/02/2014	EC	
Draft final act		<a href="#">00073/2013/LEX</a>	26/02/2014	CSL	
Follow-up document		<a href="#">COM(2021)0245</a>	20/05/2021	EC	

### Additional information

National parliaments	<a href="#">IPEX</a>
European Commission	<a href="#">EUR-Lex</a>

### Final act

[Directive 2014/23](#)

[OJ L 094 28.03.2014, p. 0001](#) Summary

[Corrigendum to final act 32014L0023R\(01\)](#)

[OJ L 114 05.05.2015, p. 0024](#) Summary

[Corrigendum to final act 32014L0023R\(03\)](#)

[OJ L 082 26.03.2017, p. 0017](#)

Final legislative act with provisions for delegated acts

### Delegated acts

<a href="#">2015/2992(DEA)</a>	Examination of delegated act
<a href="#">2019/2904(DEA)</a>	Examination of delegated act
<a href="#">2017/3028(DEA)</a>	Examination of delegated act

## Award of concession contracts

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**PURPOSE:** to guarantee transparency, fairness and legal certainty in the award of concession contracts.

**PROPOSED ACT:** Directive of the European Parliament and of the Council.

**BACKGROUND:** public procurement plays a key role in the Europe 2020 strategy. The award of works concessions is presently subject to basic rules of Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts while the award of services concessions with a cross-border interest is subject to the principles of the Treaty, and in particular the principle of free movement of goods, freedom of establishment and freedom to provide services as well as to the principles deriving therefrom such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency.

There is a risk of legal uncertainty related to different interpretations of the principles of the Treaty by national legislators and of wide disparities among the legislations of different Member States. Such risk has been confirmed by the extensive case law of the Court of Justice of the European Union but which has only partially addressed certain aspects of the award of concession contracts.

The absence of clear rules at Union level governing the award of concession contracts gives rise to legal uncertainty and to obstacles to the free provision of services and causes distortions in the functioning of the Internal Market. As a result, economic operators, in particular Small and Medium Enterprises (SMEs), are being deprived of their rights within the Internal Market and miss out on important business opportunities. An adequate legal framework for the award of concessions would ensure effective and non-discriminatory access to the market to all Union economic operators and legal certainty, favouring public investments in infrastructures and strategic services to the citizen. Hence, a uniform concretisation of the Treaty principles across all Member States and the elimination of discrepancies in their understanding following therefrom is necessary at the Union level in order to eliminate persisting distortions of the Internal Market.

The Commission announced the intention to adopt a legislative initiative on concessions in its communication [The Single Market Act Twelve levers to boost growth and strengthen confidence](#) of 13 April 2011.

This draft is being put forward in tandem with the revision of Public Procurement Directives ([COD/2011/0438](#) and [COD/2011/0439](#)). It will result in the adoption of a separate legal instrument regulating the award of concessions which, together with the two proposals to revise Public Procurement Directives (2004/17/EC and 2004/18/EC), aims at creating a modern public procurement legislative framework.

**IMPACT ASSESSMENT:** the final impact assessment report confirmed the need for new legislation. It found that economic operators are faced with an unlevel playing field, which often leads to missed business opportunities. The optimal solution identified was legislation based on the current provisions on public works concessions, adequately adjusted and supplemented with certain specific provisions. A more restrictive approach, would be to extend to concessions the provisions that apply to public contracts. This approach was considered counter-productive in that it could potentially discourage contracting authorities from using concessions.

**LEGAL BASIS:** Article 53 (1), Article 62 and Article 114 of the TFEU.

**CONTENT:** the proposed Directive is expected to guarantee transparency, fairness and legal certainty in the award of concession contracts, and thereby contribute to improved investment opportunities and ultimately to more and better quality of works and services. It will apply to concessions awarded after its entry into force. This provision is in line with rulings by the Court of Justice of the European Union on modifying contracts.

(1) Legal certainty: the main objective of the Directive is to provide for clarity on the legal framework applicable to the award of concessions, but another is to clearly delimit the scope of application of this framework.

- **Definition:** the present proposal for a Directive on the award of concession contracts provides for a more precise definition of concession contracts with reference to the notion of operational risk. It makes clear what types of risk are to be considered operational and how to define significant risk. It also provides references as to the maximum duration of concessions.
- **Incorporation of Treaty obligations into secondary law:** the proposal extends the majority of the obligations which currently apply to the award of public works concessions to all services concessions. It also lays down a number of concrete and more precise requirements, applicable at different stages of the award process on the basis of the Treaty principles, as interpreted in the case law of the Court of Justice of the European Union. Moreover, it extends the application of secondary law to the award of concession contracts in the utilities sector, which is currently exempt from such legislation.
- **Public-public cooperation:** there is considerable legal uncertainty as to how far cooperation between public authorities should be covered by public procurement rules. The relevant case-law of the Court of Justice of the European Union is interpreted differently between Member States and even between contracting authorities. Hence the present proposal clarifies the cases in which contracts concluded between contracting authorities are not subject to the application of concession award rules. Such clarification is guided by the principles set out in the relevant case law of the Court of Justice.
- **Modifications:** a specific provision on modifying concessions incorporates the basic solutions developed in the case law and provides a pragmatic solution for dealing with unforeseen circumstances requiring an a concession to be modified during its term.

(2) Better access to the concessions markets: the proposal provides for a fundamental improvement economic operators' access to the concessions markets. The provisions are primarily designed to increase the transparency and fairness of award procedures by restricting the arbitrariness of contracting authorities and contracting entities' decisions on such issues as prior and post-publication, procedural safeguard, selection and award criteria and the deadlines imposed on tenderers. Furthermore, they provide for a better access to justice in order to prevent or to address violations of those provisions.

- **Publication in the Official Journal:** in order to ensure transparency and equal treatment to all economic operators, the present proposal provides for compulsory publication of concession contracts with a value equal to or greater than EUR 5 000 000.
- **Deadlines:** this proposal also sets a minimum deadline for the submission of interest in any concession award procedure, amounting to 52 days, as this is currently the case for public works concessions. It has been decided to provide for concessions a longer deadline than in case of public contracts, given that concession contracts are usually more complex.
- **Selection and exclusion criteria:** the rules are less restrictive than similar provisions currently applicable to public contracts. However, they restrict the selection criteria to those related to the economic, financial and technical capacity of the bidder and limit the scope of the acceptable exclusion criteria.

- Award criteria: the proposal provides for an obligation to apply objective criteria linked to the subject matter of the concession, ensuring compliance with the principles of transparency, non-discrimination and equal treatment, guaranteeing that tenders are assessed in conditions of effective competition allowing an overall economic advantage for the contracting authority or the contracting entity to be determined. These criteria should prevent arbitrary decisions by contracting authorities and contracting entities and must be published in advance and listed in descending order of importance. Member States or contracting authorities or contracting entities which so wish, may also provide for or apply the most economically advantageous tender criterion for the award of concessions.
- Procedural guarantees: unlike the Public Procurement Directives, the proposed rules do not contain a fixed catalogue of award procedures. This solution allows contracting authorities and contracting entities to follow more flexible procedures when awarding concessions notably reflecting national legal traditions and permitting the award process to be organised in the most efficient way. However, the proposal establishes a number of clear procedural safeguards to be applied to the award of concessions notably during negotiations. These safeguards aim at ensuring that the process is fair and transparent.
- Remedies: this proposal provides for an extension of the scope of application of the Remedies Directives (Directives 89/665/EEC and 92/13/EC, as amended by Directive 2007/66/EC) to all concession contracts above the threshold in order to guarantee effective channels for challenging the award decision in court and provide minimal judicial standards which have to be observed by contracting authorities or entities.

BUDGETARY IMPLICATION: the proposal has no budgetary implications for the EU.

DELEGATED ACTS: the Commission shall be empowered to adopt delegated acts in accordance with Article 290 of the Treaty on the Functioning of the European Union (TFEU).

## Award of concession contracts

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The Council held an orientation debate on the modernisation of public procurement policy. It was the first ministerial debate since the presentation by the Commission, in December 2011, of the proposals for a major overhaul of public procurement rules across the EU.

The outcome of the debate provides guidance for the continuation of technical work. The intermediate target is to reach an agreement on the main principles of the reform at the Competitiveness Council in May, with the final purpose of getting the reform approved in co legislation with the European Parliament before the end of 2012.

The three proposals for modernising public procurement are:

- a draft [directive](#) setting up the new legislative framework (replacing directive 2004/18/EC);
- a draft [directive](#) on procurement by entities operating in the water, energy, transport and postal services (replacing directive 2004/17/EC);
- a draft directive on the award of concession contracts.

The debate focused on the new general legal framework. More specifically, it concentrated on two aspects put forward by the Presidency:

1. The degree of flexibility that should apply in the use of competitive procedures with negotiation: compared to the current rules, the Commission proposes to increase the list of cases in which member states may allow for the competitive procedure with negotiation, but not so as to allow unrestricted access to this procedure.

Ministers are invited to comment on the following questions:

- Does the Commission's proposal provide procuring entities sufficient access to the competitive procedure with negotiation? If not, should access be as unrestricted as possible?
- How can it be secured that more flexibility does not lead to unequal treatment?

A majority of delegations stated that a wider use of negotiated procedures in public contracts should be possible and that certain safeguards should also be put in place to ensure equal treatment for tenders. Some other delegations would prefer a limited use for this procedure, in line with the Commission proposal.

2. Rules for certain categories of services: social, cultural, health, etc: the Commission proposes abolishing the current distinction applying to certain services that can be externalised under simpler regimes (social, cultural, health, education, etc.), so that standard rules would apply to all services unless explicitly exempted.

Ministers are invited to comment on the following questions:

- Is the Commission right in proposing a lighter regime for certain social, cultural, educational and health services?
- Should other services also benefit from the special regime?
- Has the Commission struck the right balance between promoting efficiency through competition and delivering on the objective of lighter public procurement rules?

Many delegations emphasised that the new system should strike the right balance between promoting efficiency through competition in contract awards and delivering on the objective of lighter public procurement rules for certain services.

## Award of concession contracts

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The Committee on the Internal Market and Consumer Protection adopted the report by Philippe JUVIN (EPP, FR) on the proposal for a directive of the European Parliament and of the Council on the award of concession contracts.

The parliamentary committee recommended that the European Parliament's position adopted at first reading under the ordinary legislative procedure should amend the Commission's proposal as follows:

Simplification of the legal framework: in Members' view, the award of concession contracts should be clear, simple and not create an excessive

amount of bureaucracy. A number of amendments were introduced with this in view.

**Principle of free administration by public authorities:** Members reaffirmed the principle that public authorities should be completely independent when it comes to choosing the legal framework for their action, organising themselves to perform their tasks, and laying down quality criteria for service concessions. This Directive should be without prejudice to the Member States power to award, define and organise the provision of a public service task.

**Specific nature of concessions:** given the specific nature of concessions, Members considered that concession award provisions should not be simply equated with the rules for the awarding of public contracts.

The report clarified the definition of a concession and its special nature as compared with a public contract: (i) transfer of a mission for which the grantor is responsible to a third economic operator; (ii) transfer of risk from the grantor to the concessionaire; (iii) transfer to the concessionaire of a right to exploit the works or services concerned by the concession; (iv) payment of concessionaire on the basis of exploitation of the works or services; (v) the existence of an economic risk in regard to the operation of works or services by the concessionaire.

The term grantor was introduced to simplify the text where it refers to the contracting authority and contracting entity in the same way.

**Thresholds:** to simplify the text, the report removed the intermediate threshold of EUR 2.5 5 million specifying the obligation to publish a concession award notice.

**Calculation of the value of a concession:** Members judged it to be preferable to have a simple calculating method which is the same whatever the subject of the concession, as the same rules apply to works concessions as to services concessions and the mixed nature of most contracts (works and services) would make it difficult to determine the threshold applicable. The proposed new calculation method would be based on the pre-tax turnover of the concession for the whole of the contractual period.

**Duration of the concession:** the provisions concerning the duration of the concession have been amended so as to stress the point that concessions are limited in time and to cover cases in which there is no investment to be financed by the concessionaire. The duration of a concession should, in that event, be determined according to criteria other than the time taken to recoup the investment outlay (e.g. achieving the aims laid down in the contract).

**Exclusions:** Members proposed that the exclusion applying to concessions awarded on the basis of an exclusive right should be widened to encompass the activities falling under Annex III if these are subject to a tariff regulated at national level at the time of entry into force of the proposed directive. This provision should not be confined solely to network infrastructure management for the purposes of the activities listed in Annex III.

The gaming sector has also been excluded because of the very specific nature of its activities, as have civil defence, civil protection, and hazard prevention.

The report clarified the exclusions relating to affiliated undertakings stipulating that the calculation of 80% of its average turnover should take into account all services provided by that undertaking.

An amendment was also proposed with a view to excluding agreements relating to transfers of powers between public authorities.

**Water sector:** Members accepted the exclusion of the water sector from the scope of the Directive. They did, however, propose a new provision introducing a transitional period, applicable until 2020, for affiliated undertakings operating in the water sector to allow them a reasonable period of time to adapt their internal organisation to the rules in force.

**Award procedure:** this has been clarified in order to improve understanding of the articles on the conduct of the procedure, transparency and the procedural guarantees. The provisions on the confidentiality of the information supplied by candidates or tenderers to the grantor during the award procedure were strengthened.

**Taking public policy aims into account:** for the public policy objectives laid down by contracting authorities or entities to be taken into account, Members have provided for the possibility for the concession provider to award a concession on the basis of environmental, social, or innovation-related criteria.

**Electronic communications:** the report has simplified the provisions regarding electronic communications so as to take into account the specific nature of concessions for which, unlike with public contracts, widespread use is not necessarily made of electronic procedures given the significant element of negotiation involved in this type of contract.

## Award of concession contracts

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The European Parliament adopted by 598 votes to 60 with 18 abstentions, a legislative resolution on the proposal for a directive of the European Parliament and of the Council on the award of concession contracts.

Parliament adopted its position in first reading following the ordinary legislative procedure. The amendments adopted in plenary are the result of an agreement between Parliament and Council. They amend the proposal as follows:

**A clear legislative framework applicable to the award of concessions:** Parliament states that such a framework afford greater legal certainty to economic operators and could be a basis for and means of further opening up international public procurement markets and boosting world trade.

The rules of the legislative framework applicable to the award of concessions should be clear and simple. They should duly reflect the specificity of concessions as compared to public contracts and should not create an excessive amount of bureaucracy.

**Principle of free administration by public authorities:** the Directive should not in any way affect the freedom of Member States and public authorities to perform works or provide services directly to the public or to outsource such provision by delegating it to third parties.

It does not affect the freedom of Member States to define, what they consider to be services of general economic interest. Non-economic services of general interest shall fall outside the scope of this Directive.

Specificity of concessions: Parliament clarified the definition of concession and its specificity in relation to public procurement. It means a contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrust the execution of works or the provision and the management of services to one or more economic operators the consideration for which consists either solely in the right to exploit the works or services that are the subject of the contract or in that right together with payment.

The award of a works or services concession shall involve the transfer to the concessionaire of an operating risk in exploiting those works or services. The part of the risk transferred to the concessionaire shall involve real exposure to the vagaries of the market, such that any potential estimated loss incurred by the concessionaire shall not be merely nominal or negligible.

Threshold and methods for calculating the estimated value of concessions: the Directive shall apply to concessions the value of which is equal to or greater than EUR 5 186 000.

Every two years from 30 June 2013, the Commission shall verify that the threshold corresponds to the threshold established in the World Trade Organisation Agreement on Government Procurement (the GPA) for works concessions and shall, where necessary, revise that threshold.

The value of a concession shall be the total turnover of the concessionaire generated over the duration of the contract, net of VAT, as estimated by the contracting authority or the contracting entity, in consideration for the works and services being the object of the concession, as well as for the supplies incidental to such works and services.

Duration of the concession: the duration of concessions shall be limited. The contracting authority or contracting entity shall estimate the duration on the basis of the works or services requested. For concessions lasting more than five years, the maximum duration of the concession shall not exceed the time that a concessionaire could reasonably be expected to take to recoup the investments made in operating the works or services together with a return on invested capital.

Exclusions: the Directive will not apply to:

- concessions which the contracting authority or contracting entity awards in accordance with procurement rules provided by an international organisation or international financing institution, where the concessions concerned are fully financed by that organisation or institution;
- concessions in the fields of defence and security as referred to in Directive 2009/81/EC which are governed by specific procedural rules pursuant to an international agreement or arrangement concluded between one or more Member States and one or more third countries;
- service concessions for:
  - i. the acquisition, development, production or co-production of programme material intended for audiovisual media services or radio media services that are awarded by audiovisual or radio media service providers, or concessions for broadcasting time or programme provision, that are awarded to audiovisual or radio media service providers;
  - ii. civil defence, civil protection, and danger prevention services that are provided by non-profit organisations or associations
  - iii. political campaign services
- service concessions for lottery services, which are covered by CPV code 92351100-7, awarded by a Member State to an economic operator on the basis of an exclusive right.

Specific exclusions in the field of water: the Directive shall not apply to concessions awarded to: (a) provide or operate fixed networks intended to provide a service to the public in connection with the production, transport or distribution of drinking water; (b) supply drinking water to such networks.

Concessions for the disposal or treatment of sewage and for 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) should also be excluded in so far as they are connected with an excluded activity.

General principles: the contracting authority or contracting entity shall have the freedom to organise the procedure leading to the choice of concessionaire subject to compliance with the Directive. The award procedure shall respect the principles of equal treatment, non-discrimination and transparency. Award criteria may include inter alia environmental, social or innovation-related criteria.

In the performance of concession contracts economic operators must comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X.

Combating corruption and preventing conflicts of interest: contracting authorities must take appropriate measures to combat fraud, favouritism and corruption and to effectively prevent, identify and remedy conflicts of interest arising in the conduct of concession award procedures.

Subcontracting: the observance by subcontractors of applicable obligations in the fields of environmental, social and labour law, must be ensured through appropriate actions by the competent national authorities within the scope of their responsibilities and remit, such as labour inspection agencies or environmental protection agencies.

The amended text stipulates that the conditions relating to the enforcement of observance of applicable obligations in the fields of environmental, social and labour law, must be applied whenever the national law of a Member State provides for a mechanism of joint liability between subcontractors and the concessionaire.

## Award of concession contracts

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Corrigendum to Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts ([Official Journal of the European Union L94 of 28 March 2014.](#))

Article 31(5) point (a) of the third subparagraph (concession notices):



- instead of: where the applicant concerned shall or may be excluded pursuant to Article 38(5) to (9) or does not meet the selection criteria set out by the contracting authority or the contracting entity pursuant to Article 38(1);
- read: where the applicant concerned shall or may be excluded pursuant to Article 38(4) to (9) or does not meet the selection criteria set out by the contracting authority or the contracting entity pursuant to Article 38(1).

Article 33(1), first subparagraph (form and manner of publication of notices):

- instead of: 1. Concession notices, concession award notices and the notice referred to in the second subparagraph of Article 43(1) shall include the information set out in Annexes V, VII and VIII and in the format of standard forms, including standard forms for corrigenda.
- read: 1. Concession notices, concession award notices and the notice referred to in the second subparagraph of Article 43(1) shall include the information set out in Annexes V, VI, VII, VIII and XI and in the format of standard forms, including standard forms for corrigenda.

Annex II, (Activities exercised by contracting entities), the introductory wording of the second subparagraph of paragraph 1:

- instead of : The supply by a contracting entity referred to in points (b) and (c) of Article 7(1) of gas or heat to fixed networks which provide a service to the public shall not be considered to be a relevant activity within the meaning of paragraph 1 where all of the following conditions are met:
- read : The supply by a contracting entity referred to in points (b) and (c) of Article 7(1) of gas or heat to fixed networks which provide a service to the public shall not be considered to be a relevant activity within the meaning of the first subparagraph of this paragraph where all of the following conditions are met:

Annex II, (Activities exercised by contracting entities), the introductory wording of the third subparagraph of paragraph 2:

- instead of: The supply by a contracting entity referred to in points (b) and (c) of Article 7(1) of electricity to networks which provide a service to the public shall not be considered to be a relevant activity within the meaning of paragraph 1 where all of the following conditions are met:
- read: The supply by a contracting entity referred to in points (b) and (c) of Article 7(1) of electricity to networks which provide a service to the public shall not be considered to be a relevant activity within the meaning of the first subparagraph of this paragraph where all of the following conditions are met:.

## Award of concession contracts

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PURPOSE: to ensure better access to the market for all economic operators and ensure legal certainty in the award of concessions contracts.

LEGISLATIVE ACT: Directive 2014/23/EU on the award of concession contracts.

CONTENT: the Directive is part of a legislative package for modernisation of public procurement in the EU, which is also made up of:

- [a Directive on public procurement](#) (replacing Directive 2004/18/EC) ; and
- [a Directive on procurement](#) by entities operating in the utilities sectors: water, energy, transport and postal services (replacing directive 2004/17/EC).

Ensure legal certainty: public authorities have more and more recourse to public-private cooperation instruments, such as concessions, so that they might provide people with crucial services such as waste collection, motorways, airports and ports, under the best possible conditions.

The absence of clear rules at Union level governing the award of concession contracts gives rise to legal uncertainty and to obstacles to the free provision of services and causes distortions in the functioning of the internal market. The new Directive establishes a clear and transparent framework for awarding concessions in order to ensure effective and non-discriminatory access to the market for all EU economic operators, as well as legal certainty. At the same time, Member States will retain the freedom to define and specify the characteristics of the services to be provided.

Specificity of concessions: the definition of concession and specificity of concessions as compared to public contracts is clarified: a concession means a contract for pecuniary interest concluded in writing by means of which one or more contracting authorities entrust the execution of works or provision of services to one or more economic operators the consideration for which consists either solely in the right to exploit the works that are the subject of the contract or in that right together with payment.

The award of a works or services concession shall involve the transfer to the concessionaire of an operating risk in exploiting those works or services encompassing demand or supply risk or both.

Threshold and methods for calculating the estimated value of concessions: the Directive shall apply to concessions the value of which is equal to or greater than EUR 5 186 000.

The value of a concession shall be the total turnover of the concessionaire generated over the duration of the contract, net of VAT, as estimated by the contracting authority.

That estimate shall be valid at the moment at which the concession notice is sent or, in cases where such notice is not provided for, at the moment at which the contracting authority commences the concession award procedure.

Specific exclusions in the field of water: the Directive shall not apply to concessions awarded to: (a) provide or operate fixed networks intended to provide a service to the public in connection with the production, transport or distribution of drinking water; (b) supply drinking water to such networks.

It shall also not apply to concessions on: (i) 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 (ii) the disposal or treatment of sewage.



The Commission should assess the economic effects on the internal market resulting from the application of the thresholds and from the exclusion on water taking into account the specific structures of the water sector and report to the European Parliament and the Council by 18 April 2019.

Limited duration: the Directive provides that the duration of concessions will be limited, estimated on the duration on the basis of the works or services requested.

For concessions lasting more than five years, the maximum duration of the concession shall not exceed the time that a concessionaire could reasonably be expected to take to recoup the investments made in operating the works or services together with a return on invested capital.

General principles and procedural guarantees: the Directive affords freedom of choice to contracting authorities and also gives them considerable choice with regard to award criteria. The procedure for awarding contracts must observe the principles of equality of treatment, non-discrimination and transparency. The award criteria may include, amongst other things, environmental, and social criteria, or criteria relating to innovation.

In the performance of concession contracts economic operators must comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X.

Contracting authorities must offer by electronic means unrestricted and full direct access free of charge to the concession documents from the date of publication of a concession notice.

Contracting authorities must also take appropriate measures to combat fraud, favouritism and corruption and to effectively prevent, identify and remedy conflicts of interest arising in the conduct of concession award procedures.

Sub-contracting: the Directive aims to ensure some transparency in the subcontracting chain.

It also provides that the observance by subcontractors of applicable obligations in the fields of environmental, social and labour law must be ensured through appropriate actions by the competent national authorities within the scope of their responsibilities and remit, such as labour inspection agencies or environmental protection agencies.

ENTRY INTO FORCE: 17/04/2014.

TRANSPOSITION: 18/04/2016.

DELEGATED ACTS: the Commission is empowered to adopt delegated acts in order to adapt to rapid technical, economic and regulatory developments. The power to adopt such acts is conferred on the Commission for an indeterminate period from 17 April 2014. The European Parliament or the Council may object to a delegated act within two months from the date of notification (which may be extended by two months.) If the European Parliament or Council express objections, the delegated act will not enter into force.