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NOTE

from: General Secretariat
to: Working Party on Public Procurement
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No. Cion prop.: 18960/12 MAP 8 MI 684
Subject: Proposal for a Directive of the European Parliament and of the Council on the award of concession contracts
- Non-paper from the Commission services

In view of Working Party on Public Procurement on 24 February 2012, delegations will find in the Annex a non-paper on the above proposal prepared by the Commission services (DG Internal Market) on articles 2, 4, 5, 6, 8, 16, 17, 26, 27 and 28 with related recitals and Annexes.

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This non-paper explains articles: 2, 4, 5, 6, 8, 16, 17, 26, 27 and 28 of the proposal for a Directive on the award of concession contracts.

New articles and provisions in articles referring specifically to concession contracts and thus either not figuring in the PP Directives or substantially different from the corresponding articles of PP Directives, are highlighted in **bold**. A number of recitals are incorporated where deemed necessary for the understanding of these article and likewise highlighted in **bold**. Articles which are common with the text of the modernised Public Procurement Directives are not included in the document.

TITLE I

DEFINITIONS, GENERAL PRINCIPLES AND SCOPE

1.1. CHAPTER I

Definitions, General Principles and Scope

SECTION I

DEFINITIONS AND SCOPE

*Article 2 and recitals 6, 7, 8, 9 refer to the **definition** of concession contracts and aim to render it more clear and operational. Proposed definition is inspired by the case law of the CJEU.*

Recital 6

Concessions are contracts for pecuniary interest concluded between one or more economic operators and one or more contracting authorities or entities and having as their object the acquisition of works or services where the consideration consists, normally, in the right to exploit the works or services that are the subject of the contract. The execution of these works or services are subject to specific binding obligations defined by the contracting authority or entity which are legally enforceable. By contrast, certain State acts such as authorisations or licences whereby the State or a public authority establishes the conditions for the exercise of an economic activity, should not qualify as concessions. The same applies to certain agreements having as their object the right of an economic operator to exploit certain public domains or resources, such as land lease contracts whereby the State or contracting authority or entity establishes only general conditions for their use without acquiring specific works or services.

Recital 7

Difficulties related to the interpretation of the concepts of concession and public contract have been source of continued legal uncertainty among stakeholders and have given rise to numerous judgments of the Court of Justice of the European Union on this subject. Therefore, the definition of concession should be clarified, in particular by referring to the concept of substantial operating risk. The main feature of a concession, the right to exploit the works or services, always implies the transfer to the concessionaire of an economic risk involving the possibility that it will not recoup the investments made and the costs incurred in operating the works or services awarded. The application of specific rules governing the award of concessions would not be justified if the contracting authority or entity relieved the contractor of any potential loss, by guaranteeing a minimal revenue, equal or higher to the costs that the contractor has to incur in relation with the performance of the contract. At the same time it should be made clear that certain arrangements which are fully paid by a contracting authority or a contracting entity should qualify as concessions where the recoupement of the investments and costs incurred by the operator for execution the work or providing the service depends on the actual demand for or the availability of the service or asset.

Recital 8

Where sector specific regulation provides for a guarantee to the concessionaire on breaking even on investments and costs incurred for operating the contract, such contract should not qualify as a concession within the meaning of this Directive.

Recital 9

(...) The increasingly diverse forms of public action made it necessary to define more clearly the notion of procurement itself. The Union rules on concessions refer to the acquisition of works or services for a consideration consisting in exploitation of those works or services. The notion of acquisition should be understood broadly in the sense of obtaining the benefits of the works or services in question not requiring in all cases a transfer of ownership to contracting authorities or contracting entities. Furthermore, the mere financing of an activity, which is frequently linked to the obligation to reimburse the amounts received where they are not used for the purposes intended, does not usually fall under this Directive.

Article 2

Definitions

1. For the purposes of this Directive the following definitions shall apply:
 - (1) **'concessions' means public works concessions, works concessions or services concessions.**
 - (2) **a 'public works concession' means a contract for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, where the consideration for the works to be carried out consists either solely in the right to exploit the works that are the subject of the contract or in that right together with payment.**
 - (3) **'written' or 'in writing' means any expression consisting of words or figures which can be read, reproduced and subsequently communicated. It may include information which is transmitted and stored by electronic means.**

- (4) **'works concession' means a contract for pecuniary interest concluded in writing between one or more economic operators and one or more contracting entities and having as their object the execution of works, where the consideration for the works to be carried out consists either solely in the right to exploit the works that are the subject of the contract or in that right together with payment;**
- (5) 'execution of works' means the execution, or both the design and execution, of works related to one of the activities referred to in Annex I or of a work, or the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority exercising a decisive influence on the type or design of the work.
- (6) 'work' means the outcome of building or civil engineering works taken as a whole which is sufficient in itself to fulfil an economic or technical function.
- (7) **'services concession' means a contract for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities or contracting entities and having as their object the provision of services other than those referred to in points 2 and 4 where the consideration for the services to be provided consists either solely in the right to exploit the services that are subject of the contract or in that right together with payment.**
- (8) 'candidate' means an economic operator that has sought an invitation or has been invited to take part in a concession award procedure;
- (9) 'concessionaire' means an economic operator which has been awarded a concession.
- (10) 'economic operator' means any natural or legal person, or public entity, or a group of such persons and/or entities which offers the execution of works and/or a work, supplies or services on the market.

- (11) 'tenderer' means an economic operator that has submitted a tender
- (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) 'concession documents' means all documents produced or referred to by the contracting authority or contracting entity to describe or determine elements of the procurement or the procedure, including the contract notice, the technical specifications, proposed conditions of contract, formats for the presentation of documents by candidates and tenderers, information on generally applicable obligations and any additional documents.
- (14) 'life cycle' means all consecutive and/or interlinked stages, including production, transport, use and maintenance, throughout the existence of a product or a works or the provision of a service, from raw material acquisition or generation of resources to disposal, clearance and finalisation.

2. The right to exploit the works or services as referred to in points 2, 4 and 7 of the first paragraph shall imply the transfer to the concessionaire of the substantial operating risk. The concessionaire shall be deemed to assume the substantial operating risk where it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services which are the subject-matter of the concession.

That economic risk may consist in either of the following:

- (a) the risk related to the use of the works or the demand for the provision of the service; or**
- (b) the risk related to the availability of the infrastructure provided by the concessionaire or used for the provision of services to users.**

Art. 2 contains definition of concessions, as well as definitions of some important notions used in the text.

Point (1) defines **concessions** as either public works concessions, works concessions (in the field of utilities) or services concessions.

Point (2) contains a definition of **public works concession**. This definition is identical to the corresponding text of Directive 2004/18/EC. The current definition refers to the notion of "public contract" ("a contract of the same type as a public works contract") and to the notion of the right to exploit the works that are subject of the contract , or in that right together with payment, as a distinctive feature.

As the current text is a stand-alone directive, it was necessary to re-formulate the definition of **public works concession** so as to encompass shared features with the notion of "public works contract" (see point 2). The same approach has been followed in case of points 4 and 7, concerning respectively **works concessions** (in the utilities sector) and **services concessions**.

As explained in **recital 7**, certain notions, either referred to in the current definition ("right to exploit") or quoted by the Court (such as "transfer of risk"), are still quite ambiguous and continue to jeopardize a uniform distinction between public contracts and concessions in all Member States. Therefore, there is a need to better explain these notions in the Directive.

Paragraph 2 explains what is to be understood by the "**right to exploit the works or services**". Along the lines of the case law of the Court of Justice of the European Union (CJEU), it provides that the right to exploit implies the **transfer of a substantial operating risk** to the concessionaire. The level of risk is considered as substantial if the concessionaire **is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services which are the subject-matter of the concession** (contractual clauses or sector specific regulations ensuring minimum return on investments made effectively prevent the transfer of a substantial risk, see **recital 8**).

The transfer of the operating risk is the only element allowing to distinguish between public contracts and concessions which consistently appears in all judgments of the CJEU (e.g C-437/07 *Commission v. Italy*, C-300/07 *Oymanns*, C-206/08 *Eurawasser*, C-247/09,

Stadler). It can be concluded on the basis of this case law that it is a necessary and sufficient criterion for distinction. Although the case law is not clear on the level of the required risk, several of these judgments refer implicitly or explicitly to a possibility of loss. The Commission considered that, in the light of difficulty to assess the substantial character of the risk transferred, reference to the lack of guarantee of "breaking even" is the only way to ensure a certain level of legal certainty.

Furthermore, the second subparagraph of Paragraph 2 specifies the notion of "operating risk". Namely, it must be of an economic nature and can refer either to the variability of demand (demand risk) or to the availability of the asset (availability risk). It is therefore clear that certain risks such as a purely financial risk (related to increase of the cost of the capital borrowed), regulatory risks (related to changes in the regulatory environment), construction risks (common to public works contract), management risks (bad management or errors of judgment by the economic operator) can not be considered as "operating risk".

An important clarification concerning the definition of a concession is included in **recital 6**. Apart from complementing Art. 2, the recital helps distinguishing between concession contracts and other legal instruments, such as authorisations, licenses or a land-lease contract. The clarification refers to features common to all public purchases, namely to the **specificity and enforceability of obligations** stipulated in the contract. In other words, by contrast to authorisations or licenses (where the third party remains free to withdraw from the "provision of services" by returning the license) concessions encompass mutually binding and detailed obligations concerning the services to be provided or the works to be carried out on the basis of which the public authority can enforce (notably by referring to a Court) the obligation to deliver the service or perform the works on the third party.

In this context it is also worth noting **recital 9** which helps to distinguish between, on one hand, concessions (and public contracts) and, on the other hand, grants arrangements by explaining that the mere financing of an activity, which is frequently linked to the obligation to reimburse the amounts received where they are not used for the purposes intended, does not usually fall under this Directive.

*Article 4 defines the **contracting entities** and is crucial to understand the method applied to merge the provisions applicable to "classic" and utilities sectors in one, single Directive (see also Annex III which refers to the same activities as listed in reformed Directive 2004/17)*

Article 4

Contracting entities

1. **For the purposes of this Directive, "Contracting entities" are one of the following:**
 - (1) **state, regional or local authorities, bodies governed by public law, associations formed by one or more such authorities or one or more such bodies governed by public law as defined in paragraphs 2-4 of Article 3.**
 - (2) **public undertakings as defined in paragraph 2 of this Article;**
 - (3) **entities which are not contracting authorities or public undertakings, operating on the basis of special or exclusive rights granted by a competent authority of a Member State when they award a concession for the purpose of pursuing one of the activities as referred to in Annex III.**

2. 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:
 - (a) hold the majority of the undertaking's subscribed capital, or

- (b) control the majority of the votes attaching to shares issued by the undertaking, or
 - (c) can appoint more than half of the undertaking's administrative, management or supervisory body.
3. '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 Annex III to one or more entities, and which substantially affects the ability of other entities to carry out such activity.

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. Such procedure includes:

- (a) procurement procedures with a prior call for competition in conformity with Directive [2004/18/EC or 2004/17/EC] or this Directive
- (b) procedures pursuant to other legislative acts of the Union, listed in Annex XI, ensuring adequate prior transparency for granting authorisations on the basis of objective criteria.

The Commission shall be empowered to adopt delegated acts in accordance with Article 46 to modify the list of the Union legislative acts set out in Annex XI where, due to the adoption of new Union legislation or repeal of Union legislation, such modification proves necessary.

The provision of **Art. 4** is crucial for the definition of the scope of application of the Directive. The Directive applies to concessions both in the "classic" and in the utilities sectors. **Where a provision refers to "concessions awarded by contracting authorities" this means that it only applies to authorities active in the "classic" sector. Where it refers to "concessions awarded by contracting entities" the provision covers only entities carrying out an activity in the utilities sector. If both are mentioned, the provision applies equally to concessions in both sectors.** Thus, by whom the concession is awarded is a major criterion for delimitation between provisions applicable in the "classic" and the utilities sectors.

The definition of **contracting entity** had to be re-formulated for the purposes of this Directive (as compared to the definition in the Directive 2004/17/EC). Firstly, reference to "contracting authorities" (as referred to in the proposal for a Directive replacing Directive 2004/17/EC) needed to be replaced with the catalogue of authorities and bodies mentioned in Art. 3 (1) of the proposal for a Directive on the award of concessions, in order to avoid confusion as to which set of rules applies. This catalogue is followed by references to public undertakings and other entities enjoying special or exclusive rights (Art. 4 Paragraph 1 (2) and (3)).

Secondly, as the status of the awarding body cannot serve as the only criterion for delimiting application of the two sets of provisions (applicable to "classic" and utilities sectors) the definition of a "contracting entity" contains reference to activities carried out on the basis of a concession contract. Namely, bodies enumerated in Art. 4 Paragraph 1 are contracting entities only if they award a concession **for purposes of pursuing one of the activities referred to in Annex III** (where all utilities activities are listed and are the same as the ones included in the proposal for a Directive on the award of public contracts in the utilities sector and in the current Directive).

Articles 5 lays down threshold of € 5 million above which the Directive is applicable as well as an additional, "transparency" one of € 2,5 million (see also Annex V, part II)

Article 5

Thresholds

1. **This Directive shall apply to the following concessions the value of which is equal to or greater than EUR 5 000 000:**
 - (a) **concessions concluded by contracting entities for the pursuit of one of the activities referred to in Annex III;**
 - (b) **concessions concluded by contracting authorities.**

2. **Services concessions the value of which is equal to or greater than EUR 2 500 000 but lower than EUR 5 000 000 other than social services and other specific services shall be subject to the obligation to publish a concession award notice in accordance with Articles 27 and 28.**

Art. 5 delimits the scope of application of the Directive. The **threshold of € 5 million** applies to all concessions awarded either by contracting authorities ("classic" sector) or by contracting entities (utilities sector). The value of a threshold was established on the basis of the studies prepared for purposes of the impact assessment.

Additional threshold of € 2,5 million for service concession (with the exception of social services) is a "transparency" measure and applies to the obligation of publication of a concession award notice (which should contain a detailed description of the methodology used to calculate the estimated value of a concession, see Annex V, part II). The purpose of this obligation is to prevent wrong or even abusive calculation of the value of the contract in borderline cases.

Reference to the € 2,5 million threshold appears in the provision on the scope, so as to make it clear that this is the only obligation of the Directive that applies below the regular threshold of € 5 million.

Articles 6 provides for ways of calculating the estimated value of concessions, introducing a new method for services concessions

Article 6

Methods for calculating the estimated value of concessions

1. The calculation of the estimated value of a concession shall be based on the total amount payable, net of VAT, as estimated by the contracting authority or the contracting entity, including any form of option and any extension of the duration of the concession.

2. The estimated value of a concession shall be calculated as the value of an entirety of works or services, even if purchased through different contracts, where the contracts are part of one single project. Indications for the existence of one single project consist in overall prior planning and conception by the contracting authority or contracting entity, the fact that the different elements purchased fulfil a single economic and technical function or that they are otherwise logically interlinked.

Where the contracting authority or 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 concession.

3. The choice of the method used to calculate the estimated value of a concession shall not be made with the intention of excluding it from the scope of this Directive. A works project or an entirety of services shall not be subdivided with the effect of preventing it from falling within the scope of this Directive, unless justified by objective reasons.
4. This estimate shall be valid at the moment at which the concession notice is sent, or, in cases where such notice is not foreseen, at the moment at which the contracting authority or the contracting entity commences the concession award procedure, in particular by defining the essential characteristics of the intended concession.
5. With regard to public works concessions and works concessions, calculation of the estimated value shall take account of both the cost of the works and the total estimated value of the supplies and services that are made available to the contractor by the contracting authorities or entities provided that they are necessary for executing the works.
6. Where a proposed work or purchase of services may result in concessions 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.
7. Where the aggregate value of the lots is equal to or exceeds the threshold laid down in Article 5, this Directive shall apply to the awarding of each lot.

8. Contracting authorities or contracting entities may award concessions for individual lots without applying the provisions on the award provided for under this Directive, provided that the estimated value net of VAT of the lot concerned is less than EUR 1 million. However, the aggregate value of the lots thus awarded without applying this Directive shall not exceed 20% of the aggregate value of all the lots into which the proposed work or the proposed purchase of services has been divided.
9. **The value of services concessions shall be the estimated total value of services to be provided by the concessionaire during the whole duration of the concession, calculated in accordance with an objective methodology which shall be specified in the concession notice or in the concession documents.**

The basis for calculating the estimated concession value shall, where appropriate, be the following:

- (a) for insurance services: the premium payable and other forms of remuneration;
 - (b) for banking and other financial services: fees, commissions, interest and other forms of remuneration;
 - (c) for design services: fees, commission payable and other forms of remuneration;
10. **The value of concessions shall include both the estimated revenue to be received from third parties and the amounts to be paid by the contracting authority or the contracting entity.**

As provided for in **Art. 6 Paragraph 9**, the value of services is estimated **on the basis of the total value of services to be provided by the concessionaire during the whole duration of the concession**. Therefore, in order to determine the value of a contract for the purpose of Article 6 Paragraph 9, account must be taken of the total value of the services to be provided from the point of view of a potential tenderer (see C-220/05, *Auroux*).

The value will be calculated (**Paragraph 10**) including both revenue from the users or other third parties and possible payment from the contracting authority/entity. The latter may include *i.a.* any compensation for public service obligations resulting from the concession contract.

This means that, in case of a 10 years concession with an yearly average value of services of € 400 000, the total value of such services will amount to € 4 million and therefore will not fall within the scope of the Directive.

Article 8 and recital 13 lay down exceptions applicable to both concessions awarded in the "classic" and utilities sectors. Most of these exceptions are similar to existing ones in the PP Directives.

SECTION II

EXCLUSIONS

Recital 13

It is appropriate to exclude from the scope of this Directive certain services concessions awarded to an economic operator which is itself a contracting entity on the basis of an exclusive right which that operator enjoys under published national law or administrative act and which has been granted in accordance with the Treaty and Union sectoral legislation concerning the management of networks infrastructure related to the activities set out in annex III, since such exclusive right makes it impossible to follow a competitive procedure for the award. By way of derogation and without prejudice to the legal consequences of the general exclusion from the scope of this Directive, concessions as defined in article 8 (1) should be subject to the obligation to publish a concession award notice in view of ensuring basic transparency unless the conditions of such transparency are provided for in sectoral legislation.

Article 8

Exclusions applicable to concessions awarded by contracting authorities and contracting entities

- 1. This Directive shall not apply to services concessions awarded by a contracting authority or by a contracting entity to an economic operator which is a contracting entity or an association of thereof, on the basis of an exclusive right that economic operator enjoys pursuant to applicable and published national law, regulation or administrative provision, and which has been granted in accordance with the Treaty and Union sectoral legislation concerning the management of networks infrastructure related to the activities set out in annex III.**

2. **By way of derogation from paragraph 1 of this Article, where sectoral legislation referred to in paragraph 1 of this Article does not provide for sector specific transparency obligations, the requirements of Article 27 (1) and (3) shall apply**

3. This Directive shall not apply to concessions which the contracting authority or a contracting entity is obliged to award or organise in accordance with procurement procedures set out in:
 - (a) an international agreement concluded in conformity with the Treaty between a Member State and one or more third countries and covering works, supplies or services intended for the joint implementation or exploitation of a project by the signatory States;
 - (b) a concluded international agreement relating to the stationing of troops and concerning the undertakings of a Member State or a third country;
 - (c) the particular procedure of an international organisation.
 - (d) where the concessions are fully financed by an international organisation or international financing institution.

All agreements referred to in point (a) of the first subparagraph shall be communicated to the Commission, which may consult the Advisory Committee for Public Contracts referred to in Article 48.

For the purposes of point (d) of the first subparagraph, where a concession is cofinanced for a considerable part by an international organisation or international financing institution the parties decide on applicable concession award procedures which shall be in conformity with the provisions of the Treaty on the Functioning of the European Union.

4. Subject to Article 346 of the Treaty, this Directive shall not apply to the awarding of concessions in the fields of defence and security to the extent that the protection of the essential security interests of a Member State cannot be guaranteed by the rules provided for in this Directive.

5. This Directive shall not apply to service concessions for:
- (a) the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property or concerning rights thereon; however financial service concessions awarded at the same time as, before or after the contract of acquisition or rental, in whatever form, shall be subject to this Directive;
 - (b) the acquisition, development, production or co-production of programme material intended for broadcasting, defined as transmission and distribution using any form of electronic network, that are awarded by broadcasters, nor to concessions for broadcasting time, that are awarded to broadcasters;
 - (c) arbitration and conciliation services;
 - (d) financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments within the meaning of Directive 2004/39/EC of the European Parliament and of the Council, central bank services and operations conducted with the European Financial Stability Facility (EFSF);
 - (e) employment contracts;
 - (f) **Air transport services based on the grant of an operating licence within the meaning of Regulation (EC) 1008/2008¹⁷ of the European Parliament and of the Council;**
 - (g) **Public passenger transport services within the meaning of Regulation (EC) 1370/2007 of the European Parliament and of the Council.**

The broadcasting referred to in point (b) of the first paragraph shall include any transmission and distribution using any form of electronic network.

Art. 8 Paragraph 1 - most of the exemptions applicable to concessions also apply to public contracts. However, as explained in **recital 13**, given the existence in certain utilities sectors of **exclusive rights** enjoyed by some **contracting entities** on the basis of a **published national legislative, regulatory or administrative measure, in compliance with both primary and secondary EU law** concerning the management of networks infrastructure related to the activities set out in Annex III, it was considered useful to provide for **explicit exclusion from the scope of the proposed Directive of concessions awarded to such entities**

The granting of such exclusive rights (considered as necessary under EU sectoral legislation) precludes any possible competition for the award of a concession for the provision of those services. Thus, submitting such concessions to the present rules would be unjustified and could even be counterproductive, resulting in unintended impacts on the regulation of the relevant sector. However, where the sectoral EU legislation at stake does not provide for transparency measures, the award of such a concession needs to be disclosed by means of a **publication of a concession award notice (Art. 8 Paragraph 2)**.

The exclusion laid down in **Art. 8 Paragraph 5 (f)** is necessary given the existence, of rules governing the grant of *operating licenses* (Reg. 1008/2008). Where such *licences* cover also concession contracts, they should be excluded from the scope of application of the present Directive.

The **exclusion in Art. 8 Paragraph 5 (g)**, applicable to all public passenger transport services covered by the Public Transport Regulation (EC) 1370/2007) has a different scope than a similar one included in the proposal for PP Directives. The exclusion contained therein is limited to public passenger transport services by rail or metro (on the basis of an explicit provision of the Public Transport Regulation). Other contracts, such as public contracts for public passenger transport services by bus or by tram) shall be awarded accordingly to the Directive on public contracts.

By contrast, the award procedures provided for in the Regulation are applicable to **all concession contracts for public passenger transport services**. Thus, the exception in the proposal for this Directive must have a larger scope, so as to avoid confusion.

Works concessions in the transport sector shall be covered by the proposal for a Concessions Directive.

*Article 16 establishes a principle on maximum **duration** of concessions.*

SECTION III GENERAL PROVISIONS

Article 16 Duration of the concession

The duration of the concession shall be limited to the time estimated to be necessary for the concessionaire to recoup the investments made in operating the works or services together with a reasonable return on invested capital.

Given the nature of concessions contracts, which normally foreclose a market for very long periods, it seemed appropriate to establish a principle governing the duration of the contract by requiring proportionality between the term of the contract and the time for the concessionaire to recoup the investments made.

The notion of investments shall cover all investments necessary to carry out the concession (investments in new facilities or maintenance of existing ones, training of staff, intellectual property, licences for carrying out an activity, financing).

Imposing a maximum duration of concession contracts did not seem feasible or even adequate taking into account horizontal nature of the proposal, covering various sectors and implying diverse contractual arrangements (and the associated investments).

This provision is inspired by the case law of the Court of Justice of the EU (see case C-64/08, *Engelmann*)

Recitals 21, 22 and Article 17 concern the regime applicable to social services: different from both, rules applicable to concessions for other services, and rules applicable to public contracts for social services (see also Annex X on services covered, the same as for PP Directives).

Recital 21

In the light of the results of the evaluation conducted by the Commission on the reform of public procurement rules it is appropriate to exclude from the full application of this Directive only those services which have a limited cross-border dimension, namely the so-called services to the person such as certain social, health and educational services. These services are provided within a particular context that varies widely amongst Member States, due to different cultural traditions. A specific regime should therefore be established for concession for these services which takes into account the fact that they are newly regulated. An obligation to publish a prior information notice and a concession award notice of any concession with a value equal to or greater than thresholds established in this Directive is an adequate way to provide information on business opportunities to potential tenderers as well as on the number and type of contracts awarded to all interested parties. Furthermore, Member States should put in place appropriate measures with reference to the award of concession contracts for these services aimed at ensuring compliance with the principles of transparency and equal treatment of economic operators while allowing contracting authorities and contracting entities to take into account the specificities of the services in question. Member States should ensure that contracting authorities and contracting entities may take into account the need to ensure quality, continuity, accessibility, availability and comprehensiveness of the services, the specific needs of different categories of users, the involvement and empowerment of users and innovation.

Recital 22

Given the importance of the cultural context and the sensitivity of these services, Member States should be given wide discretion to organise the choice of the service providers in the way they consider most appropriate. The rules of this Directive do not prevent Member States to apply specific quality criteria for the choice of service providers, such as the criteria set out in the voluntary European Quality Framework for Social Services of the European Union's Social Protection Committee. Member States and/or public authorities remain free to provide these services themselves or to organise social services in a way that does not entail the conclusion of concessions, for example through the mere financing of such services or by granting licences or authorisations to all economic operators meeting the conditions established beforehand by the contracting authority or contracting entity, without any limits or quotas, provided such system ensures sufficient advertising and complies with the principles of transparency and non-discrimination.

Article 17

Social and other specific services

Concessions for social and other specific services listed in Annex X falling within the scope of this Directive shall be subject to the obligation of paragraph 3 of Art. 26 and of paragraph 1 of Article 27.

As explained in the **recital 21**, the impact assessment carried out has shown that it is appropriate to exclude from the full application of this Directive those services which have a limited cross-border dimension, namely the so-called services to the person such as certain social, health and also educational services.

It must be noted that concessions are less prevalent in those sectors. Therefore, it seems appropriate to apply to concessions for the provision of social services a lighter regime which includes an obligation to publish a prior information notice and a concession award notice of any concession with a value equal or above € 5 million. This will provide information on business opportunities to potential tenderers as well as on the number and type of contracts awarded to all interested parties. **Recital 22** explains the rationale for a specific, light regime to be applicable to this kind of services.

The scope of social services covered is the same as for PP Directives.

*Article 26 provides for an obligation to **publish** a concession notice and to applicable exceptions (see also Annexes IV and XIII including some specific information requirements).*

TITLE II

RULES ON THE AWARD OF CONCESSIONS

1.2. CHAPTER I

Publication and Transparency

Article 26
Concession notices

- 1. Contracting authorities and contracting entities wishing to award a concession shall make known their intention by means of a concession notice.**
- 2. Concession notices shall contain the information referred to in part of Annex IV and, where appropriate, any other information deemed useful by the contracting authority or entity, in accordance with the format of standard forms.**
- 3. Contracting authorities and contracting entities wishing to award a concession for social and other specific services shall make known their intention of planned concession award through the publication of a prior information notice as soon as possible after the beginning of the budgetary year. Those notices shall contain the information set out in Annex XIII.**
- 4. The Commission shall establish those standard forms. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 48.**

- 5. By way of derogation from paragraph 1, the contracting authorities and entities shall not be required to publish a concession notice in any of the following cases:**
- (a) where no tenders or no suitable tenders or no applications have been submitted in response to a concession procedure, provided that the initial conditions of the concession contract are not substantially altered and on condition that a report is sent to the Commission or to the national oversight body designated pursuant to Article 84 of Directive [replacing Directive 2004/18/EC] where they so request;**
 - (b) where the works or services can be supplied only by a particular economic operator due to the absence of competition for technical reasons, the protection of patents, copyrights or other intellectual property rights or the protection of other exclusive rights and where no reasonable alternative or substitute exists and the absence of competition is not the result of an artificial narrowing down of the parameters of the concession award;**
 - (c) for new works or services consisting in the repetition of similar works or services entrusted to the economic operator to which the same contracting authorities or contracting entities awarded an original concession subject to the obligation referred to in paragraph 1, provided that such works or services are in conformity with a basic project for which the original concession was awarded. The basic project shall mention the extent of possible additional works or services and the conditions under which they will be awarded.**
- 2. As soon as the first project is put up for tender the total estimated cost of subsequent works or services shall be taken into consideration by the contracting authorities or contracting entities when they apply the provisions of Article 5**
- 6. For the purposes of point (a) of the first subparagraph, a tender shall be considered not to be suitable where:**
- it is irregular or unacceptable, and**
 - it is completely irrelevant to the concession, being incapable of meeting the contracting authority or contracting entity's needs as specified in the concession documents.**

Tenders shall be considered to be irregular, where they do not comply with the concession documents or where the prices offered are sheltered from normal competitive forces.

Tenders shall be considered to be unacceptable in any of the following cases:

- (a) where they have been received late;**
- (b) they have been submitted by tenderers who do not have the requisite qualifications;**
- (c) their price exceeds the contracting authority or contracting entity's budget as determined prior to the launching of the concession award procedure and documented in writing;**
- (d) they have been found to be abnormally low**

Art. 26 introduces, for the first time, the obligation to publish a concession notice in the Official Journal of the EU for both works and services concessions.

Cases where the obligation of publication of a concession notice does not apply are specifically provided for in this article and match the conditions for use of the negotiated procedure without publication of a contract notice. The reasons justifying the lack of publicity in the award of public contracts also seem appropriate in case of concessions.

*Article 27 sets out an obligation to publish concession **award notices** for works and service concessions. In case of services concessions it also covers social services. A specific obligation applies to services concessions (other than those for social services) the value of which ranges between € 5 million and € 2,5 million (see also Annexes V and VI including some specific information requirements).*

Article 27
Concession award notices

- 1. Not later than 48 days after the award of a concession, contracting authorities and contracting entities shall send a concession award notice on the results of the concession award procedure.**
- 2. The obligation referred to in paragraph 1 shall also apply to those services concessions the estimated value of which, as calculated according to the method referred to in Article 6 (5), is equal to or higher than 2 500 000 EUR with the sole exception of social services and other specific services as referred to in Article 17.**
- 3. Such notices shall contain the information set out in Annex V or in relation to concessions for social services and other specific services the information set out in VI and be published in accordance with the provisions of Article 28**

The special threshold of € 2.5 million for service concession award notices (with the exception of social services) is justified by the difficulty in ensuring that the estimated value of a concession will always be calculated correctly (see comment to Art. 5). Thus, in order to permit an ex-post control of the calculations made, contracting authorities and entities shall publish services concession award notices equal to or higher than of € 2.5 million.

As an additional precautionary measure, concession notices shall include detailed information on the method of calculation used to estimate the value of the concession (see Annex V point 17).

Article 28 establishes rules on the form and manner of publication of notices which are similar to the ones provided for in the PP Directives (see also Annexes IV to VI and IX)

Article 28
Form and manner of publication of notices

- 1. The notices referred to in Articles 26 and 27 and the second subparagraph of Article 43(6) shall include the information set out Annexes IV to VI and in the format of standard forms, including standard forms for corrigenda.**

The Commission shall establish those standard forms by implementing acts to be adopted in accordance with the advisory procedure referred to in Article 48.

- 2. The notices shall be drawn up, transmitted by electronic means to the Commission and published in accordance with Annex IX.** Notices shall be published not later than five days after they are sent. The costs of publication of the notices by the Commission shall be borne by the Union.
- 3.** The notices referred to in Article 26 shall be published in full in an official language of the Union as chosen by the contracting authority or contracting entity. That language version shall constitute the sole authentic text. A summary of the important elements of each notice shall be published in the other official languages.
- 4.** Contracting authorities and contracting entities shall be able to supply proof of the dates on which notices are dispatched.

The Commission shall give the contracting authority or contracting entity confirmation of the receipt of the notice and of the publication of the information sent, indicating the date of that publication. Such confirmation shall constitute proof of publication.

5. Contracting authorities and contracting entities may publish notices for concessions that are not subject to the publication requirements laid down in this Directive provided those notices are sent to the Commission by electronic means in accordance with the format and procedures for transmission indicated in Annex IX.

Article 28 follows the logic of equivalent provisions in the PP Directives, with necessary adjustments to concession contracts.

**THE ANNEXES REFERRED TO THE ARTICLES IN
FIRST PART OF THIS DOCUMENT.**

The Annexes reproduced below are referred to in the concessions-specific provisions quoted above.

Annexes III, X, XI are identical with their equivalents in the PP Directives.

Annexes IV-VI, also inspired by the content of the corresponding Annexes in the PP Directives, contain references to certain notions or solutions specific to concessions, reflecting differences of rules on criteria and organisation of the award process between the Concessions Directive and the PP Directives. These fragments have been **bolded** in the reproduced text.

Moreover, Annexes IV-VI as well as Annex IX differ from the corresponding Annexes in the PP Directives by the absence of certain provisions (strictly related to public contracts).

Annex XIII, although inspired by the content of the Annex IV Part H of the classic PP Directive, is concession—specific, as it refers to the content of a Prior Information Notice (and not an *ad hoc* concession notice).

ANNEX III

ACTIVITIES EXERCISED BY CONTRACTING ENTITIES AS REFERRED TO IN ART. 4

The provisions of this Directive governing concessions awarded by contracting entities shall apply to the following activities:

1. As far as gas and heat are concerned:
 - (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;
 - (b) the supply of gas or heat to such networks.

The supply of gas or heat to networks which provide a service to the public by a contracting entity referred to in paragraph 1 subparagraph 2 and subparagraph 3 of Article 4 shall not be considered a relevant activity within the meaning of paragraph 1 where all of the following conditions are met:

- (c) 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 this paragraph or in paragraphs 2 to 4 of this Annex;
- (d) the 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 on the basis of the average for the preceding three years, including the current year.

2. As far as electricity is concerned:

- (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;
- (b) the supply of electricity to such networks.

For the purposes of this Directive, supply of electricity includes generation (production) and wholesale of electricity.

The supply of electricity to networks which provide a service to the public by a contracting entity referred to in paragraph 1 subparagraph 2 and subparagraph 3 of Article 4 shall not be considered a relevant activity within the meaning of paragraph 1 where all of the following conditions are met:

- (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 this paragraph or in paragraphs 1, 3 and 4 of this Annex
- (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, on the basis of the average for the preceding three years, including the current year.

3. As far as water is concerned:

- (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;
- (b) the supply of drinking water to such networks.

This Directive shall also apply to concessions awarded or organised by entities which pursue an activity referred to above and which are connected with one of the following:

- (a) 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) the disposal or treatment of sewage.

The supply of drinking water to networks which provide a service to the public by a contracting entity referred to in paragraph 1 subparagraph 1 and paragraph 2 of Article 4 shall not be considered a relevant activity within the meaning of subparagraph 1 where all of the following conditions are met:

- (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 paragraphs 1 to 4 of this Annex;

(b) the 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, on the basis of the average for the preceding three years, including the current year.

4. 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.

5. Activities relating to the exploitation of a geographical area for the purpose of the provision of airports and maritime or inland ports or other terminal facilities to carriers by air, sea or inland waterway.

6. Activities relating to the provision of :

(a) postal services; on the conditions set out in point (c),

(b) other services than postal services, on condition that such services are provided by an entity which also provides postal services within the meaning of point (b) of subparagraph 2 and provided that the conditions set out in Article 27(1) of Directive [replacing 2004/17/EC] are not satisfied in respect of the services falling within point (b) of subparagraph 2.

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

"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;

(a) "postal services": means services consisting of the clearance, sorting, routing and delivery of postal items. This shall include both services falling within as well as services falling outside the scope of the universal service set up in conformity with Directive 97/67/EC;

- (b) "other services than postal services": means services provided in the following areas:
- (1) mail service management services (services both preceding and subsequent to despatch, including "mailroom management services"),
 - (2) 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),
 - (3) services concerning postal items not included in point (a), such as direct mail bearing no address,
 - (4) financial services, as defined in the CPV under the reference numbers from 66100000-1 to 66720000-3 and in Article 8 (5)(d) and including in particular postal money orders and postal giro transfers,
 - (5) philatelic services,
 - (6) logistics services (services combining physical delivery and/or warehousing with other non-postal functions),
7. 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.

Activities covered in this Annex are the same as for the reformed Utilities Directive (see however explanation provided for exceptions in Article 8 related to the management of network infrastructures).

ANNEX IV

INFORMATION TO BE INCLUDED IN CONCESSION NOTICES

1. Name, identification number (where provided for in national legislation), address including NUTS code, telephone, fax number, email and internet address of the contracting authority or entity and, where different, of the service from which additional information may be obtained.
2. Type of contracting authority or entity and main activity exercised.
3. **If the applications are to contain tenders, email or internet address at which the specifications and any supporting documents will be available for unrestricted and full direct access, free of charge.**
4. Description of the procurement: nature and extent of works, nature and quantity or value of supplies, nature and extent of services, Where the concession is divided into lots, this information shall be provided for each lot. Where appropriate, description of any options.
5. CPV Nomenclature reference No(s). Where the concession is divided into lots, this information shall be provided for each lot.
6. NUTS code for the main location of works in case of works concessions or NUTS code for the main place of performance service concessions; where the concession is divided into lots, this information shall be provided for each lot.
7. **Estimated total value of concession(s); where the concession is divided into lots, this information shall be provided for each lot, together with detailed method of calculation of the estimated total value of the concession, in accordance with Art. 6**
8. Where the concession is to be subdivided into lots, indication of the possibility of tendering for one, for several or for all of the lots; indication of any possible limitation of the number of lots that may be awarded to any one tenderer.
9. Time-frame for delivery or provision of supplies, works or services and, as far as possible, duration of the concession.

10. Conditions for participation, including:
 - (a) where appropriate, indication whether the concession is restricted to sheltered workshops, or whether its execution is restricted to the framework of protected job programmes,
 - (b) where appropriate, indication whether the provision of the service is reserved by law, regulation or administrative provision to a particular profession; reference to the relevant law, regulation or administrative provision,
 - (c) a list and brief description of selection criteria; minimum level(s) of standards possibly required; indication of required information (self-declarations, documentation).

11. **Description of award procedure used, if the procedure is to be conducted in stages, number of candidates to be admitted to a given stage or to be invited to submit tenders and objective criteria to be used to choose the candidates in question.**
 - (a) **Time limit for the submission of applications**
 - (b) Address to which they must be sent
 - (c) Language(s) in which they must be written

12. **Criteria which will be applied in the award of the concession**

13. Date of dispatch of the notice

14. Name and address of the body responsible for appeal and, where appropriate, mediation procedures. Precise information concerning the deadline for lodging appeals or, if need be, the name, address, telephone number, fax number and email address of the service from which this information may be obtained.

15. Where appropriate, particular conditions to which performance of the concession is subject.

16. **Address where applications or tenders shall be transmitted.**

17. In case of one-stage procedures:

- (a) **Time limit for receipt of tenders, if different from the time limit the submission of applications**
- (b) time frame during which the tenderer must maintain its tender,
- (c) date, time and place for the opening of tenders,
- (d) persons authorised to be present at such opening.

18. Where appropriate, indication of requirements and conditions related to the use of electronic means of communication

19. Information whether the concession is related to a project and /or programme financed by European Union funds.

Specific information requirements on the method of calculation of the value of a concession are applicable only to this type of contracts. As the calculation of the value of services may be performed according to different methodologies, such requirements ensure the necessary transparency in this regard.

ANNEX V

INFORMATION TO BE INCLUDED IN CONCESSION AWARD NOTICES

I INFORMATION TO BE INCLUDED IN CONCESSION AWARD NOTICES PUBLISHED IN ACCORDANCE WITH ARTICLE 27 (1)

- 1. Name, identification number (where provided for in national legislation), address including NUTS code, telephone, fax number, email and internet address of the contracting authority or entity and, where different, of the service from which additional information may be obtained.
- 2. Type of contracting authority or entity and main activity exercised.
- 3. CPV Nomenclature reference No(s).

4. NUTS code for the main location of works in case of works concessions or NUTS code for the main place of performance in case of service concessions;
5. Description of the procurement: nature and extent of works, nature and quantity or value of supplies, nature and extent of services. Where the concession is divided into lots, this information shall be provided for each lot. Where appropriate, description of any options.
- 6. Description of award procedure used, in the case of award without prior publication, justification.**
7. Criteria referred to in Article 39 which were used for award of the concession or concessions.
8. Date of concession award decision or decisions;
9. Number of tenders received with respect of each award, including:
 - (a) number of tenders received from economic operators which are small and medium enterprises,
 - (b) number of tenders received from abroad,
 - (c) number of tenders received electronically.
10. For each award, name, address including NUTS code, telephone, fax number, email address and internet address of the successful tenderer(s) including
 - (a) information whether the successful tenderer is small and medium enterprise,
 - (b) information whether the concession was awarded to a consortium.
- 11. Value and main financial terms of the awarded concession, including fees and prices.**
12. Where appropriate, for each award, value and proportion of concession likely to be subcontracted to third parties.
13. Information whether the concession is related to a project and /or programme financed by European Union funds.

14. Name and address of the oversight body and the body responsible for review and, where appropriate, mediation procedures. Precise information concerning the deadline for review procedures, or if need be, the name, address, telephone number, fax number and email address of the service from which this information may be obtained
15. Date(s) and reference(s) of previous publications in the Official Journal of the European Union relevant to the concession(s) advertised in this notice.
16. Date of dispatch of the notice.
17. **Detailed method of calculation of the estimated total value of the concession, in accordance with Article 6.**
18. Any other relevant information.

II. INFORMATION TO BE INCLUDED IN CONCESSION AWARD NOTICES PUBLISHED IN ACCORDANCE WITH ARTICLE 27(2)

1. **Name, identification number (where provided for in national legislation), address including NUTS code, telephone, fax number, email and internet address of the contracting authority or entity and, where different, of the service from which additional information may be obtained.**
2. **Description of the procurement: nature and extent of works, nature and quantity or value of supplies, nature and extent of services, Where the concession is divided into lots, this information shall be provided for each lot. Where appropriate, description of any options.**
3. **CPV Nomenclature reference No(s).**
4. **Type of contracting authority or entity and main activity exercised.**
5. **Date of concession award decision or decisions;**
6. **For each award, name, address including NUTS code, telephone, fax number, email address and internet address of the economic operators to which the concession has been awarded.**

7. **Value and main financial terms of the award, including fees and prices.**
8. **Detailed method of calculation of the estimated total value of the concession, in accordance with Article 6.**

The information to be published in case of award of a concession of a value between 2.5 million and 5 million € is meant to make it possible to identify the contracting authority or entity, the nature of the contract awarded, as well as the detailed method of calculation of its value. Reference to the method of calculation of the estimated total value of the concession contract (otherwise not published) is aimed at permitting to carry out and *ex post* verification and to identify possible abusive practices in this respect.

ANNEX VI

INFORMATION TO BE INCLUDED IN CONCESSION AWARD NOTICES CONCERNING CONCESSIONS FOR SOCIAL AND OTHER SPECIFIC SERVICES (ARTICLE 27 (1))

1. Name, identification number (where provided for in national legislation), address including NUTS code, telephone, fax number, email and internet address of the contracting authority or entity and, where different, of the service from which additional information may be obtained.
2. Type of contracting authority or entity and main activity exercised.
3. CPV Nomenclature reference No(s); where the contract is divided into lots, this information shall be provided for each lot.
4. **At least a summary indication of the nature and quantity of the services and if applicable, works and supplies provided.**
5. Number of tenders received.
6. **Value and main financial terms of the award, including fees and prices.**

7. Name and address including NUTS code, telephone, fax number, email address and internet address of the successful economic operator(s).
8. Any other relevant information.

The content of publication of an award notice for a concession related to social services is subject to less stringent requirements than for other concessions in order to limit any possible burden stemming from such a publication. For the same reason, there is no compulsory disclosure of the detailed method of calculation of the estimated total value of the concession neither an obligation to publish an award notice below the threshold.

ANNEX IX

FEATURES CONCERNING PUBLICATION

1. Publication of notices

The notices referred to in Articles 26 and 27 must be sent by the contracting authorities or entities to the Publications Office of the European Union and published in accordance with the following rules:.

Notices referred to in Articles 26 and 27 shall be published by the Publications Office of the European Union

The Publications Office of the European Union will give the contracting authority or entity the confirmation referred to in Article 28 (5).

2. Publication of complementary or additional information

Contracting authorities and contracting entities shall publish the specifications and the additional documents in their entirety on the Internet.

3. Format and procedures for sending notices electronically

The format and procedure for sending notices electronically as established by the Commission are made accessible at the Internet address '<http://simap.europa.eu>'.

Annex IX is based on the corresponding Annexes in the PP Directives. However, the provisions not relevant for concessions have been deleted.

ANNEX X

SERVICES REFERRED TO IN ARTICLE 17

CPV Code	Description
7511000-4 and from 85000000-9 to 85323000-9 (except 85321000-5 and 85322000-2)	Health and social services
75121000-0, 75122000-7, 75124000-1	Administrative educational, healthcare and cultural services
75300000-9	Compulsory social security services
75310000-2, 75311000-9, 75312000-6, 75313000-3, 75313100-4, 75314000-0, 75320000-5, 75330000-8, 75340000-1	Benefit services
98000000-3	Other community, social and personal services
98120000-0	Services furnished by trade unions
98131000-0	Religious services

Annex X is identical with the corresponding Annexes in the PP Directives.

ANNEX XI

LIST OF EUROPEAN UNION LEGISLATION REFERRED TO IN ARTICLE 4 (3) (b)

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 the provisions of 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).

Annex XI is identical with the corresponding Annexe in the reformed Utilities Directive.

ANNEX XIII

INFORMATION TO BE INCLUDED IN PRIOR INFORMATION NOTICES CONCERNING CONCESSIONS FOR SOCIAL AND OTHER SPECIFIC SERVICES (as referred to in Article 26(3))

1. **Name, identification number (where provided for in national legislation), address including NUTS code, telephone, fax number, email and internet address of the contracting authority or contracting entity and, where different, of the service from which additional information may be obtained.**
2. **Where appropriate, email or internet address at which the specifications and any supporting documents will be available.**
3. **Type of contracting authority or contracting entity and main activity exercised.**
4. **CPV Nomenclature reference No(s); where the contract is divided into lots, this information shall be provided for each lot.**
5. **NUTS code for the main place of delivery or performance of service concessions**
6. **Description of the services and where applicable, incidental works and supplies to be procured**
7. **Estimated total value of concession(s); where the concession is divided into lots, this information shall be provided for each lot.**
8. **Conditions for participation.**
9. **Where applicable, time limit(s) for contacting the contracting authority or contracting entity in view of participation.**
10. **Where applicable, brief description of the main features of the award procedure to be applied.**

11. Any other relevant information.

The content of prior information notice, as in case of a concession award notice for a concession on social services, aims only at the identification of the main features of the concession planned.
