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STATUTORY INSTRUMENTS

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**2016 No.**

**PUBLIC PROCUREMENT**

**The Concession Contracts Regulations 2016**

*Made* - - - - - \*\*\*  
*Laid before Parliament* \*\*\*  
*Coming into force* - - - 18th April 2016

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The Minister for the Cabinet Office is designated(a) for the purposes of section 2(2) of the European Communities Act 1972(b) in relation to public procurement.

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(a) S.I. 2010/2473.

(b) 1972 c.68; section 2(2) was amended by the Legislative and Regulatory Reform Act 2006 (c.51), section 27(1)(a), and by the European Union (Amendment) Act 2008 (c.7), Part 1 of the Schedule.

The Minister for the Cabinet Office makes these Regulations in exercise of the powers conferred by section 2(2) of, as read with paragraph 1A(a) of Schedule 2 to, that Act.

These Regulations make provision for a purpose mentioned in section 2(2) of that Act and it appears to the Minister for the Cabinet Office that it is expedient for certain references to provisions of EU instruments to be construed as references to those provisions as amended from time to time.

## PART 1

### General

#### Citation, commencement and application

1.—(1) These Regulations may be cited as the Concession Contracts Regulations 2016 and come into force on 18th April 2016.

(2) [*Note: these Regulations are intended to extend to and apply in Scotland in relation to implementation which is for the UK Government. Drafting to be adjusted to give effect to that intention*].

#### Interpretation

2.—(1) In these Regulations—

“bodies governed by public law” means bodies that have all of the following characteristics—

- (a) they are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;
- (b) they have legal personality; and
- (c) they have any of the following characteristics—
  - (i) they are financed, for the most part, by the State, regional or local authorities, or by other bodies governed by public law;
  - (ii) they are subject to management supervision by those authorities or bodies; or
  - (iii) they have an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law;

“candidate” means an economic operator that has sought an invitation or has been invited to take part in a concession contract award procedure;

“the Commission” means the European Commission;

“concessionaire” means an economic operator that has been awarded a concession contract;

“concession award notice” means the notice referred to in regulation 31;

“concession contract” has the meaning given by regulation 3;

“concession document” means any document produced or referred to by the concession granter to describe or determine elements of the concession contract or the procedure, including the concession notice, the technical and functional requirements, proposed conditions of concession contract, formats for the presentation of documents by candidates and tenderers, information on generally applicable obligations and any additional documents;

“concession granters” (except in regulation 16) means contracting authorities or utilities;

“concession notice” has the meaning given by regulation 6;

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(a) Paragraph 1A was inserted by the Legislative and Regulatory Reform Act 2006, section 28, and was amended by the European Union (Amendment) Act 2008, Part 1 of the Schedule and by S.I. 2007/1388.

“Concessions Directive” means Directive 2014/23/EU of the European Parliament and of the Council(a);

“contracting authorities” has the meaning given by regulation 4;

“CPV” means the Common Procurement Vocabulary as adopted by Regulation (EC) No 2195/2002 of the European Parliament and of the Council(b), as amended from time to time;

“Defence and Security Regulations” means the Defence and Security Public Contracts Regulations 2011(c);

“disabled”, in relation to a person, means a disabled person within the meaning of the Equality Act 2010(d) and, in relation to a worker, means a disabled person who is a worker;

“economic operator” means any person or public entity or group of such persons and entities, including any temporary association of undertakings, which offers the execution of works or a work, the supply of products or the provision of services on the market;

“electronic means” means 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;

“exclusive right” means a right granted by a competent authority by means of any law, regulation or published administrative provision which is compatible with the Treaties, the effect of which is to limit the exercise of an activity to a single economic operator and which substantially affects the ability of other economic operators to carry out such an activity;

“execution of works” means—

- (a) the execution, or both the design and execution, of works related to one of the activities listed in Schedule 1;
- (b) the execution, or both the design and execution, of a work;
- (c) the realisation, by whatever means, of a work corresponding to the requirements specified by the concession granter exercising a decisive influence on the type or design of the work;

“legal person” means a person, whether governed by private or public law, other than a natural person;

“Official Journal” means the Official Journal of the European Union;

“prior information notice” means the notice referred to in regulation 30(3);

“services concession contract” has the meaning given by regulation 3(3);

“tenderer” means an economic operator that has submitted a tender;

“TFEU” means the Treaty on the Functioning of the European Union(e);

“the Treaties” means the Treaty on European Union(f) and TFEU;

“utilities” has the meaning given by regulation 5;

“a 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; but “works” shall be interpreted in accordance with paragraph (2);

“works concession contract” has the meaning given by regulation 3(2); and

“in writing” means any expression consisting of words or figures which can be read, reproduced and subsequently communicated, including information which is transmitted and stored by electronic means.

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(a) OJ No L 94, 28.3.2014, p.1.

(b) OJ No L 340, 16.12.2002, p1, last amended by Regulation (EC) No 596/2009 of the European Parliament and of the Council (OJ No L 188, 18.7.2009, p14).

(c) S.I. 2011/1848, amended by S.I. 2011/2053, 2013/1431, 2015/102 and SSI 2012/ 88 and 89.

(d) 2010 c. 15.

(e) OJ No C 115, 9.5.2008, p.47.

(f) OJ No C 115, 9.5.2008, p13.

(2) Any other expression used both in these Regulations (other than in Part 5) and in the Concessions Directive has the meaning that it bears in that Directive.

(3) In these Regulations (except regulation 32(3)), any reference to a period of time, however expressed, shall be interpreted subject to the requirement that where the period—

- (a) is to be calculated by counting forwards in time from a given date or event, and
- (b) would (but for this paragraph) have ended on a day which is not a working day,

the period is to end at the end of the next working day; and for these purposes “working day” means a day other than a Saturday, Sunday, Christmas Day, Good Friday or bank holiday within the meaning of the Banking and Financial Dealings Act 1971(a).

(4) Any reference in Part 3 to a period of time, however expressed, shall be interpreted subject to the following additional requirements—

- (a) the period must include at least 2 working days;
- (b) where the period is to be calculated from the moment at which an action takes place or other event occurs, the day during which that action takes place or that event occurs is not to be counted in the calculation of that period.

### **Meaning of “concession contract”**

**3.**—(1) In these Regulations, “concession contract” means a works concession contract or a services concession contract within the meaning of this regulation.

(2) A “works concession contract” means a contract—

- (a) for pecuniary interest concluded in writing by means of which one or more concession granters entrust the execution of works 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; and
- (b) that meets the requirements of paragraph (4).

(3) A “services concession contract” means a contract—

- (a) for pecuniary interest concluded in writing by means of which one or more concession granters entrust the provision and the management of services (other than the execution of works) to one or more economic operators, the consideration of which consists either solely in the right to exploit the services that are the subject of the contract or in that right together with payment; and
- (b) that meets the requirements of paragraph (4).

(4) The requirements are—

- (a) the award of the contract involves the transfer to the concessionaire of an operating risk in exploiting the works or services encompassing demand or supply risk or both; and
- (b) the part of the risk transferred to the concessionaire involves real exposure to the vagaries of the market, such that any potential estimated loss incurred by the concessionaire is not merely nominal or negligible.

(5) For the purposes of paragraph (4)(a), the concessionaire shall be deemed to assume operating risk where, under normal operating conditions, 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 contract.

### **Meaning of “contracting authorities”**

**4.** In these Regulations, “contracting authorities” means State, regional or local authorities (including the Crown but not including Her Majesty in her private capacity), bodies governed by public law or associations formed by one or more such authorities or one or more such bodies

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(a) 1971 c. 80.

governed by public law other than those authorities, bodies or associations which pursue one of the activities listed in Schedule 2 and award a concession contract for the pursuit of one of those activities.

### **Meaning of “utilities”**

**5.—**(1) In these Regulations, “utilities” means entities which pursue one of the activities listed in Schedule 2 and award a concession contract for the pursuit of one of those activities, and which are one of the following—

- (a) State, regional or local authorities (including the Crown but not including Her Majesty in her private capacity), bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law;
- (b) a public undertaking;
- (c) any other entities which operate on the basis of special rights or exclusive rights, granted for the exercise of one of the activities listed in Schedule 2.

(2) But any such entities are not utilities within the meaning of paragraph (1) if they have been granted special rights or exclusive rights by means of a procedure in which adequate publicity has been ensured and where the granting of those rights was based on objective criteria.

(3) The procedures referred to in paragraph (2) include—

- (a) procurement procedures with a prior call for competition in conformity with these Regulations, the Public Contracts Regulations 2015(a), the Utilities Contracts Regulations 2016(b) or the Defence and Security Regulations;
- (b) procedures pursuant to the legal acts of the European Union listed in Annex III to the Concessions Directive, as amended from time to time, ensuring adequate prior transparency for granting authorisations on the basis of objective criteria.

(4) In this regulation—

- (a) “public undertaking” means any undertaking over which contracting authorities may exercise, directly or indirectly, a dominant influence by virtue of—
  - (i) their ownership of that undertaking,
  - (ii) their financial participation in that undertaking, or
  - (iii) the rules which govern that undertaking;
- (b) “special right” means a right granted by a competent authority by means of any law, regulation or published administrative provision which is compatible with the Treaties, the effect of which is to limit the exercise of an activity to two or more economic operators and which substantially affects the ability of other economic operators to carry out such an activity.

(5) For the purposes of the definition of “public undertaking” in paragraph (4), a dominant influence on the part of the contracting authorities shall be presumed where those authorities, directly or indirectly—

- (a) hold the majority of the undertaking’s subscribed capital;
- (b) control the majority of the votes attached to shares issued by the undertaking; or
- (c) can appoint more than half of the undertaking’s administrative, management or supervisory body.

### **Meaning of “concession notice”**

**6.—**(1) In these Regulations, subject to paragraph (2), “concession notice” means the notice referred to in regulation 30(1).

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(a) S.I. 2015/102.  
(b) S.I. 2016/\*\*.\*

- (2) In Part 5 of these Regulations, “concession notice”—
- (a) in relation to a concession contract awarded by a utility, includes a prior information notice; and
  - (b) in relation to a concession contract awarded by a contracting authority, has the same meaning that “contract notice” has in relation to it in Council Directive 89/665/EEC<sup>(a)</sup>.

## PART 2

### Scope and principles

#### CHAPTER 1

Concession contracts to which these Regulations apply

#### **Subject-matter and scope of these Regulations**

7.—(1) These Regulations establish rules on the procedures for procurement by concession granters by means of a concession contract—

- (a) the value of which is estimated to be not less than the threshold mentioned in regulation 8; and
- (b) which is not excluded from the scope of these Regulations by any other provision of this Part.

(2) These Regulations apply to the award of works concession contracts or services concession contracts to economic operators by—

- (a) contracting authorities; or
- (b) utilities, provided that the works or services are intended for the pursuit of one of the activities listed in Schedule 2.

(3) These Regulations are subject to Article 346 of TFEU.

#### **Threshold amounts and methods for calculating the estimated value of concession contracts**

##### *Threshold amounts*

8.—(1) These Regulations apply to concession contracts the value of which are equal to or greater than the sum specified in Article 8(1) of the Concessions Directive, as amended from time to time.

(2) The value in pounds sterling of any amount expressed in euro in Article 8(1) of the Concessions Directive, as amended from time to time, shall be taken to be the value for the time being determined by the Commission for the purpose of that Article and published from time to time in the Official Journal in accordance with Article 9(3) of that Directive.

##### *Calculating the value of the concession contract*

(3) For the purposes of paragraph (1), the value of a concession contract shall be the total turnover of the concessionaire generated over the duration of the contract, net of value added tax, as estimated by the concession granter, in consideration for the works and services which are the object of the concession contract and the supplies incidental to such works and services.

(4) That estimate shall be calculated as at the moment at which the concession notice is sent for publication in accordance with regulation 32 or, in cases where such notice is not provided for, at the moment at which the concession granter commences the concession contract award procedure, for example by contacting economic operators in relation to the concession contract.

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(a) OJ No L 395, 30.12.1989, p33, last amended by Directive 2007/66/EC of the European Parliament and of the Council (OJ No L 335, 20.12.2007, p31)



(5) But if the value as estimated at the time of the award is more than 20% higher than the estimate calculated in accordance with paragraph (4), the former shall be used for the purposes of this regulation.

(6) The estimated value of the concession contract shall be calculated using an objective method specified in the concession documents.

(7) When calculating the estimated value of the concession contract, concession granters shall, where applicable, take into account in particular—

- (a) the value of any form of option and any extension of the duration of the concession contract;
- (b) revenue from the payment of fees and fines by the users of the works or services other than those collected on behalf of the concession granter;
- (c) payments or any other financial advantages, in any form, from the concession granter or any other public authority to the concessionaire, including compensation for compliance with a public service obligation and public investment subsidies;
- (d) the value of grants or any other financial advantages, in any form, from third parties for the performance of the concession contract;
- (e) revenue from sales of any assets which are part of the concession contract;
- (f) the value of all the supplies and services that are made available to the concessionaire by the concession granters, provided that they are necessary for executing the works or providing the services;
- (g) any prizes or payments to candidates or tenderers.

(8) The choice of the method used to calculate the estimated value of a concession contract shall not be made with the intention of excluding it from the scope of these Regulations.

(9) A concession contract shall not be subdivided with the effect of preventing it from falling within the scope of these Regulations, unless justified by objective reasons.

#### *Treatment of lots*

(10) Where a proposed work or proposed provision of services may result in a concession contract being awarded in the form of separate lots, account shall be taken of the total estimated value of all such lots.

(11) Where the aggregate value of the lots is equal to or greater than the threshold in paragraph (1), these Regulations shall apply to the awarding of each lot.

## CHAPTER 2

### Exclusions

#### **General exclusions**

##### *Exclusive rights*

**9.**—(1) These Regulations do not apply to services concession contracts awarded to a contracting authority or utility referred to in regulation 5(1)(a), or to an association of such contracting authorities or utilities, on the basis of an exclusive right.

(2) These Regulations do not apply to services concession contracts awarded to an economic operator on the basis of an exclusive right that has been granted in accordance with the TFEU and European Union legal acts laying down common rules on access to the market applicable to an activity listed in Schedule 2.

(3) But where the European Union sectoral legislation referred to in paragraph (2) does not provide for sector-specific transparency obligations, regulation 31 shall apply.

##### *Transport services*

(4) These Regulations do not apply to concession contracts for—

- (a) air transport services based on the granting of an operating licence within the meaning of Regulation (EC) No 1008/2008 of the European Parliament and of the Council<sup>(a)</sup>, as amended from time to time; or
- (b) public passenger transport services within the meaning of Regulation (EC) No 1370/2007 of the European Parliament and of the Council<sup>(b)</sup>, as amended from time to time.

*Concession contracts awarded pursuant to international rules*

(5) These Regulations do not apply to concession contracts which the concession granter is obliged to award in accordance with procedures which are different from those laid down by these Regulations and are established by any of the following—

- (a) a legal instrument creating international law obligations, such as an international agreement, concluded in conformity with the Treaties, between a member State and one or more third countries (or subdivisions of such countries) and covering works, supplies or services intended for the joint implementation or exploitation of a project by its signatories;
- (b) an international organisation.

(6) These Regulations do not apply to concession contracts which the concession granter awards in accordance with procurement rules provided by an international organisation or international financing institution where the concession contracts concerned are fully financed by that organisation or institution.

(7) In the case of concession contracts co-financed for the most part by an international organisation or international financing institution, the parties shall agree on the applicable procurement procedures.

(8) Paragraphs (5) to (7) do not apply to concession contracts in the fields of defence and security as referred to in Directive 2009/81/EC of the European Parliament and of the Council<sup>(c)</sup>.

*Defence and security concession contracts*

(9) These Regulations do not apply to concession contracts in the fields of defence and security as referred to in Directive 2009/81/EC—

- (a) 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;
- (b) which are governed by specific procedural rules pursuant to a concluded international agreement or arrangement relating to the stationing of troops and concerning the undertakings of a member State or a third country;
- (c) which are governed by specific procedural rules of an international organisation purchasing for its purposes or which must be awarded by a member State in accordance with those rules;
- (d) in relation to which the application of these Regulations would oblige the United Kingdom to supply information the disclosure of which it considers contrary to the essential interests of its security or the procurement and performance of which is classified as secret or must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in any part of the United Kingdom, provided that the United Kingdom has determined that the essential interests concerned cannot be guaranteed by less intrusive measures, such as those referred to in paragraph (10);
- (e) awarded in the framework of a cooperative programme referred to in regulation 7(c) of the Defence and Security Regulations;

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(a) OJ No L 293, 31.10.2008, p. 3.

(b) OJ No L 315, 3.12.2007, p. 1.

(c) OJ No L 216, 20.8.2009, p76, last amended by Commission Regulation (EU) No 1336/2103 (OJ No L 335, 14.12.2013, p17).

- (f) awarded by a government to another government relating to works and services directly linked to military equipment or sensitive equipment, or works and services specifically for military purposes, or sensitive works and sensitive services (and in this sub-paragraph “government” means the State, regional or local government of a member State or a State which is not a member State);
- (g) awarded in a third country, to be carried out when forces are deployed outside the territory of the European Union where operational needs require those concession contracts to be concluded with economic operators located in the area of operations.

*Protection of essential security interests*

(10) These Regulations do not apply to concession contracts not otherwise exempted under paragraph (9)(d) to (g) to the extent that the protection of the essential security interests of the United Kingdom or another member State cannot be guaranteed by less intrusive measures, for example by imposing requirements aimed at protecting the confidential nature of information which the concession granter makes available in a concession contract award procedure as provided for in these Regulations.

*Other exclusions*

(11) These Regulations do not apply to services concession contracts for—

- (a) the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property or which concern interests in or rights over any of them;
- (b) (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 providers, or
  - (ii) broadcasting time or programme provision that are awarded to audiovisual or radio media service providers;
- (c) arbitration or conciliation services;
- (d) any of the following legal services—
  - (i) legal representation of a client by a lawyer within the meaning of Article 1 of Council Directive 77/249/EEC(a), as amended from time to time, in—
    - (aa) an arbitration or conciliation held in a member State, a third country or before an international arbitration or conciliation instance, or
    - (bb) judicial proceedings before the courts, tribunals or public authorities of a member State or a third country, or before international courts, tribunals or institutions;
  - (ii) legal advice given—
    - (aa) in preparation of any of the proceedings referred to in paragraph (i), or
    - (bb) where there is a tangible indication and high probability that the matter to which the advice relates will become the subject of such proceedings, provided that the advice is given by a lawyer within the meaning of Article 1 of Directive 77/249/EEC as amended from time to time;
  - (iii) document certification and authentication services which must be provided by notaries;
  - (iv) legal services provided by trustees or appointed guardians or other legal services the providers of which are designated by a court or tribunal in the member State concerned or are designated by law to carry out specific tasks under the supervision of such tribunals or courts;
  - (v) other legal services which in the member State concerned are connected, even occasionally, with the exercise of official authority;

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(a) OJ No L 078, 26.3.1977, p.17, last amended by Council Directive 2013/25/EU (OJ No L 158, 10.6.2013, p368).

- (e) (i) 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<sup>(a)</sup>, as amended from time to time,
  - (ii) central bank services, or
  - (iii) operations conducted with the European Financial Stability Facility and the European Stability Mechanism;
  - (f) loans, whether or not in connection with the issue, sale, purchase or transfer of securities or other financial instruments;
  - (g) civil defence, civil protection, and danger prevention services that are provided by non-profit organisations or associations, and which are covered by CPV codes: 75250000-3, 75251000-0, 75251100-1, 75251110-4, 75251120-7, 75252000-7, 75222000-8, 98113100-9 and 85143000-3 except patient transport ambulance services; or
  - (h) political campaign services which are covered by CPV codes 79341400-0, 92111230-3 and 92111240-6, when awarded by a political party in the context of an election campaign.
- (12) In this regulation—
- (a) “audiovisual media services” and “media service providers” have, respectively, the meanings given by Articles 1(1)(a) and 1(1)(d) of Directive 2010/13/EU of the European Parliament and of the Council<sup>(b)</sup>, as amended from time to time;
  - (b) “programme” has the meaning given by Article 1(1)(b) of that Directive, as amended from time to time, but also includes radio programmes and radio programme materials; and
  - (c) “programme material” has the same meaning as “programme”.

*Lottery services*

(13) These Regulations do not apply to services concession contracts for lottery services which are covered by CPV code 92351100-7 and awarded to an economic operator on the basis of an exclusive right granted otherwise than as described in regulation 5(2).

*Activities in a third country*

(14) These Regulations do not apply to concession contracts awarded by utilities for the pursuit of their activities in a third country, in conditions not involving the physical use of a network or geographical area within the European Union.

**Specific exclusions in the field of electronic communications**

**10.**—(1) These Regulations do not apply to concession contracts for the principal purpose of permitting contracting authorities to provide or exploit public communications networks, or to provide to the public one or more electronic communication services.

(2) In this regulation, “public communications network” and “electronic communications service” have the meanings given by Directive 2002/21/EC of the European Parliament and of the Council<sup>(c)</sup>, as amended from time to time.

**Specific exclusions in the field of water**

**11.** These Regulations do not apply to—

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(a) OJ No L 145, 30.4.2004, p.1, last amended by Directive 2010/78/EU of the European Parliament and of the Council (OJ No L 331, 15.12.2010, p120).

(b) OJ No L 95, 15.4.2010, p.1.

(c) OJ No L 108, 24.4.2002, p.33, last amended by Directive 2009/140/EC of the European Parliament and of the Council (OJ No L337, 18.12.2009, p37).

- (a) concession contracts awarded to 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) concession contracts awarded to supply drinking water to such networks;
- (c) concession contracts for either or both of the following—
  - (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,
 when the contracts are connected with an activity referred to in paragraph (a) or (b).

### **Concession contracts awarded to an affiliated undertaking**

**12.—**(1) These Regulations do not apply to concession contracts awarded—

- (a) by a utility to an affiliated undertaking, or
- (b) by a joint venture, formed exclusively by a number of utilities for the purpose of carrying out activities listed in Schedule 2, to an affiliated undertaking of one its members,

provided that the conditions in paragraph (2) are met.

(2) The conditions are that—

- (a) in respect of services concession contracts, at least 80% of the average total turnover of the affiliated undertaking over the preceding 3 years, taking into account all services provided by that undertaking, derives from the provision of services to the utility or one or more of its affiliated undertakings;
- (b) in respect of works concession contracts, at least 80% of the average total turnover of the affiliated undertaking over the preceding 3 years, taking into account all works provided by that undertaking, derives from the provision of works to the utility or one or more of its affiliated undertakings.

(3) Where, because of the date on which an affiliated undertaking was created or commenced activities, the turnover referred to in paragraph (2) is not available for the preceding 3 years, it shall be sufficient for that undertaking to show that the turnover is credible, in particular by means of business projections.

(4) Where more than one affiliated undertaking provides the same or similar services or works to the utility with which they form an economic group, the percentages referred to in paragraph (2) shall be calculated taking into account the total turnover deriving respectively from the provision of services or works by those affiliated undertakings.

(5) In this regulation, “affiliated undertaking” means —

- (a) any undertaking the annual accounts of which are consolidated with those of the utility in accordance with the requirements of Directive 2013/34/EU of the European Parliament and of the Council<sup>(a)</sup>, as amended from time to time;
- (b) in the case of an undertaking which is not subject to that Directive, any undertaking that—
  - (i) may be, directly or indirectly, subject to a dominant influence by the utility,
  - (ii) may exercise a dominant influence over the utility, or
  - (iii) in common with the utility, is subject to the dominant influence of another undertaking by virtue of ownership, financial participation, or the rules which govern it.

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(a) OJ No L 182, 29.6.2013, p.19, last amended by Council Directive 2014/102/EU (OJ No L 334, 21.11.2014, p86).

(6) For the purposes of paragraph (5)(b), a “dominant influence” shall be presumed on the part of a utility or, as the case may be, an undertaking in the same circumstances in which it is, in accordance with regulation 5(5), presumed on the part of a contracting authority.

(7) This regulation applies despite the provisions of regulation 16.

### **Concession contracts awarded to a joint venture or to a utility forming part of a joint venture**

**13.**—(1) These Regulations do not apply to concession contracts awarded—

- (a) by a joint venture, formed exclusively by a number of utilities for the purpose of carrying out activities listed in Schedule 2, to one of those utilities, or
- (b) by a utility to such a joint venture of which it forms part,

provided that the joint venture has been set up in order to carry out the activity concerned over a period of at least 3 years and the instrument setting up the joint venture stipulates that the utilities which form it will be part of the joint venture for at least the same period.

(2) This regulation applies despite the provisions of regulation 16.

### **Notification of information by utilities**

**14.** Utilities shall notify to the Commission, if it so requests, the following information—

- (a) the names of the undertakings or joint ventures referred to in regulation 12 or 13;
- (b) the nature and value of the concession contracts referred to in those regulations;
- (c) proof, as considered necessary by the Commission, that the relationship between the undertaking, joint venture or utility to which the concession contracts are awarded and the utility complies with the requirements of those regulations.

### **Exclusion of activities which are directly exposed to competition**

**15.** These Regulations do not apply to concession contracts awarded by utilities where it has been established that the activity is directly exposed to competition in accordance with regulation 34(2) of the Utilities Contracts Regulations 2016.

### **Concession contracts between entities within the public sector**

#### *Award of contracts to controlled persons*

**16.**—(1) A concession contract awarded by a concession granter to a legal person falls outside the scope of these Regulations where all of the following conditions are fulfilled—

- (a) the concession granter exercises over the legal person concerned a control which is similar to that which it exercises over its own departments;
- (b) more than 80% of the activities of the controlled legal person are carried out in the performance of tasks entrusted to it by the concession granter or by other legal persons controlled by that concession granter; and
- (c) there is no direct private capital participation in the controlled legal person, with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.

(2) A concession contract also falls outside the scope of these Regulations where a controlled legal person which is a concession granter awards a concession contract to—

- (a) its controlling contracting authority or utility, or
- (b) another legal person controlled by the same contracting authority or utility,

provided that there is no direct private capital participation in the legal person being awarded the concession contract, with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the legal person being awarded the contract.

(3) A concession granter shall be deemed to exercise over a legal person a control similar to that which it exercises over its own departments within the meaning of paragraph (1)(a) where—

- (a) it exercises a decisive influence over both strategic objectives and significant decisions of the controlled legal person, or
- (b) that control is exercised by another legal person which is itself controlled in the same way by the contracting authority or utility,

and references to “control”, “controlled” and “controlling” in paragraphs (1) to (3) shall be interpreted accordingly.

*Award of concession contracts where there is joint control*

(4) A concession granter which does not exercise over a legal person control within the meaning of paragraph (3) may nevertheless award a concession contract to that legal person without applying these Regulations where all of the following conditions are fulfilled—

- (a) the concession granter exercises jointly with other contracting authorities or utilities a control over that legal person which is similar to that which they exercise over their own departments;
- (b) more than 80% of the activities of that legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authorities or utilities or by other legal persons controlled by the same contracting authorities or utilities; and
- (c) there is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.

(5) For the purposes of paragraph (4)(a), concession granters exercise joint control over a legal person where all of the following conditions are fulfilled—

- (a) the decision-making bodies of the controlled legal person are composed of representatives of all participating contracting authorities or utilities;
- (b) those contracting authorities or utilities are able to jointly exert decisive influence over the strategic objectives and significant decisions of the controlled legal person; and
- (c) the controlled legal person does not pursue any interests which are contrary to those of the controlling contracting authorities or utilities.

(6) For the purposes of paragraph (5)(a), individual representatives may represent several or all of the participating contracting authorities or utilities.

*Contracts which establish or implement co-operation between contracting authorities or utilities*

(7) A concession contract concluded exclusively between two or more concession granters falls outside the scope of these Regulations where all of the following conditions are fulfilled—

- (a) the contract establishes or implements a co-operation between the participating concession granters with the aim of ensuring that public services they have to perform are provided with a view to achieving objectives they have in common;
- (b) the implementation of that co-operation is governed solely by considerations relating to the public interest; and
- (c) the participating concession granters perform on the open market less than 20% of the activities concerned by the co-operation.

*Determination of percentages*

(8) For the determination of the percentage of activities referred to in paragraphs (1)(b), (4)(b) and (7)(c), the average total turnover, or an appropriate alternative activity-based measure such as costs incurred by the relevant legal person or concession granter with respect to services, supplies

and works for the 3 years preceding the concession contract award shall be taken into consideration.

(9) Where, because of—

- (a) the date on which the relevant legal person, contracting authority or utility was created or commenced activities, or
- (b) a reorganisation of its activities,

the turnover, or alternative activity-based measure such as costs, are either not available for the preceding 3 years or no longer relevant, it shall be sufficient to show that the measurement of activity is credible, particularly by means of business projections.

(10) In this regulation, “concession granter” means a contracting authority or a utility referred to in regulation 5(1)(a).

## CHAPTER 3

### General Provisions

#### **Duration of the concession contract**

17.—(1) The duration of concession contracts shall be limited.

(2) The concession granter shall estimate the duration on the basis of the works or services requested.

(3) For concession contracts lasting more than 5 years, the maximum duration of the concession contract 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 taking into account the investments required to achieve the specific contractual objectives.

(4) The investments taken into account for the purposes of the calculation of the time period referred to in paragraph (3) shall include both initial investments and investments during the life of the concession contract.

#### **Social and other specific services**

18. Concession contracts for social and other specific services listed in Schedule 3 falling within the scope of these Regulations shall be subject only to the obligations arising from regulations 23(2), 30(3) to (5), 31 and 45 to 63.

#### **Mixed contracts**

19.—(1) Concession contracts which have as their subject-matter both works and services shall be awarded in accordance with the provisions applicable to the type of concession contract that characterises the main subject-matter of the contract in question.

(2) In the case of mixed concession contracts consisting partly of social and other specific services listed in Schedule 3 and partly of other services, the main subject-matter shall be determined in accordance with which of the estimated values of the respective services is the highest.

(3) Where the different parts of a given contract are objectively separable—

- (a) in the case of contracts which have as their subject-matter elements covered by these Regulations as well as other elements, concession granters may choose to award separate contracts for the separate parts or to award a single contract;
- (b) where concession granters choose to award separate contracts for separate parts, the decision as to which legal regime applies to any one of such separate contracts shall be taken on the basis of the characteristics of the separate part concerned;
- (c) where concession granters choose to award a single contract, these Regulations, unless otherwise provided in sub-paragraph (d), apply to the ensuing mixed contract, irrespective of—



- (i) the value of the parts that would otherwise fall under a different legal regime,
  - (ii) which legal regime those parts would otherwise have been subject to;
- (d) in the case of a mixed contract containing elements of concession contracts as well as elements of public contracts covered by the Public Contracts Regulations 2015 or contracts covered by the Utilities Contracts Regulations 2016, the mixed contract shall be awarded in accordance with the Public Contracts Regulations 2015 or the Utilities Contracts Regulations 2016, respectively.
- (4) Where the different parts of a given contract are objectively not separable—
- (a) the applicable legal regime shall be determined on the basis of the main subject-matter of that contract; and
  - (b) where that contract involves both elements of a services concession contract and of a supply contract, the main subject-matter shall be determined according to which of the estimated values of the respective services or supplies is the highest.
- (5) But where part of a given contract is covered by Article 346 of TFEU or the Defence and Security Regulations, regulation 20 applies instead of paragraphs (1) to (4).
- (6) In the case of contracts intended to cover several activities, one of them being an activity listed in Schedule 2 or subject to the Utilities Contracts Regulations 2016, the applicable provisions shall be established in accordance with regulation 21 of these Regulations and regulation 7 of the Utilities Contracts Regulations 2016, respectively.
- (7) This regulation is subject to regulation 21.

#### **Mixed procurement contracts involving defence or security aspects**

**20.**—(1) This regulation applies in the case of mixed contracts which have as their subject-matter elements of a concession contract covered by these Regulations and procurement or other elements covered by Article 346 of TFEU or the Defence and Security Regulations.

(2) In the case of contracts intended to cover several activities, one of them being listed in Schedule 2 or covered by the Utilities Contracts Regulations 2016, and another being covered by Article 346 of TFEU or the Defence and Security Regulations, the applicable provisions shall be established in accordance with regulation 22 of these Regulations and regulation 26 of the Utilities Contracts Regulations 2016, respectively

(3) Where the different parts of a given contract are objectively separable, concession granters may choose to award separate contracts for the separate parts or to award a single contract.

(4) The decision to award a single contract shall not, however, be taken for the purpose of excluding contracts from the application of these Regulations or the Defence and Security Regulations.

(5) Where a concession granter chooses to award separate contracts for separate parts, the decision as to which legal regime applies to any one of such separate contracts shall be taken on the basis of the characteristics of the separate part concerned.

(6) Where concession granters choose to award a single contract, the following criteria shall apply to determine the applicable legal regime—

- (a) where part of a given contract is covered by Article 346 of TFEU, or different parts are covered by Article 346 of TFEU and the Defence and Security Regulations respectively, the contract may be awarded without applying these Regulations, provided that the award of a single contract is justified by objective reasons;
- (b) where part of a given contract is covered by the Defence and Security Regulations, the contract may be awarded in accordance with these Regulations or in accordance with the Defence and Security Regulations, provided that the award of a single contract is justified by objective reasons.

(7) Paragraph (6)(b) is without prejudice to the thresholds and exclusions for which the Defence and Security Regulations provide.

(8) Where the different parts of a given contract are objectively not separable, the contract may be awarded without applying these Regulations where it includes elements to which Article 346 of TFEU applies; otherwise it may be awarded in accordance with these Regulations or in accordance with the Defence and Security Regulations.

(9) This regulation is subject to regulation 22.

### **Contracts covering both activities listed in Schedule 2 and other activities**

**21.**—(1) This regulation applies in the case of contracts intended to cover several activities where one of those activities is listed in Schedule 2.

(2) Utilities may choose to award separate contracts for the purposes of the separate activities or to award a single contract for the purposes of all the activities.

(3) The choice between awarding a single contract or separate contracts shall not be made with the objective of excluding the contract or contracts from the scope of these Regulations or, where applicable, the Public Contracts Regulations 2015 or the Utilities Contracts Regulations 2016.

(4) Where utilities choose to award a separate contract, the decision as to which rules apply to any one of such separate contracts shall be taken on the basis of the characteristics of the separate activity concerned.

(5) Where utilities choose to award a single contract—

(a) a contract which is intended to cover several activities shall be subject to the rules applicable to the activity for which it is principally intended;

(b) in the case of a contract where it is objectively impossible to determine for which activity the contract is principally intended, the applicable rules shall be determined in accordance with the following—

(i) the contract shall be awarded in accordance with the provisions of these Regulations applicable to concession contracts awarded by contracting authorities, if one of the activities for which the contract is intended is subject to the provisions of these Regulations applicable to concession contracts awarded by contracting authorities and the other is subject to the provisions of these Regulations applicable to concession contracts awarded by utilities,

(ii) the contract shall be awarded in accordance with the Public Contracts Regulations 2015, if one of the activities for which the contract is intended is subject to these Regulations and the other to the Public Contracts Regulations 2015,

(iii) the contract shall be awarded in accordance with these Regulations, if one of the activities for which the contract is intended is subject to these Regulations and the other is not subject to these Regulations, the Public Contracts Regulations 2015 or the Utilities Contracts Regulations 2016.

(6) But where one of the activities concerned is covered by Article 346 of TFEU or the Defence and Security Regulations, regulation 22 applies instead of paragraph (5).

### **Contracts covering both activities listed in Schedule 2 and activities involving defence or security aspects.**

**22.**—(1) This regulation applies in the case of contracts intended to cover several activities, one of them being listed in Schedule 2 and another being covered by Article 346 of TFEU or the Defence and Security Regulations.

(2) Utilities may choose to award separate contracts for the purposes of the separate activities or to award a single contract for the purposes of all the activities.

(3) The choice between awarding a single contract or awarding separate contracts shall not, however, be made with the objective of excluding the contract or contracts from the scope of these Regulations or the Defence and Security Regulations and a decision to award a single contract shall be justified by objective reasons.

(4) Where utilities choose to award separate contracts for separate parts, the decision as to which legal regime applies to any one of the separate contracts shall be taken on the basis of the characteristics of the separate activity concerned.

(5) Where utilities choose to award a single contract, the following shall apply—

- (a) in the case of a contract intended to cover an activity which is covered by these Regulations and another which is covered by Article 346 of TFEU, the utility may award the contract without applying these Regulations;
- (b) in the case of a contract intended to cover an activity which is covered by these Regulations and another which is covered by the Defence and Security Regulations, the utility may award the contract either in accordance with these Regulations or in accordance with the Defence and Security Regulations.

(6) Paragraph (5)(b) is without prejudice to the thresholds and exclusions for which the Defence and Security Regulations provide.

(7) Contracts referred to in paragraph (5)(b) which also include procurement or other elements which are covered by Article 346 of TFEU may be awarded without applying these Regulations.

## CHAPTER 4

### Specific Situations

#### **Reserved concession contracts**

**23.**—(1) Concession granters may—

- (a) reserve the right to participate in concession contract award procedures to sheltered workshops and economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons, or
- (b) provide for such concession contracts to be performed in the context of sheltered employment programmes,

provided that at least 30% of the employees of those workshops, economic operators or programmes are disabled or disadvantaged workers.

(2) In such a case, the concession contract notice or, in the case of a concession contract for social and other specific services listed in Schedule 3, the prior information notice, shall make reference to Article 24 of the Concessions Directive.

#### **Research and development services**

**24.** These Regulations apply to services concession contracts for research and development services which are covered by CPV codes 73000000-2 to 73120000-9, 73300000-5, 73420000-2 and 73430000-5 only if—

- (a) the benefits accrue exclusively to the concession granter for its use in the conduct of its own affairs; and
- (b) the service provided is wholly remunerated by the concession granter.

## CHAPTER 5

### Principles

#### **General principles**

**25.**—(1) Concession granters shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

(2) The design of the concession contract award procedure, including the estimate of the value, shall not be made with the intention of excluding it from the scope of these Regulations or of

unduly favouring or disadvantaging certain economic operators or certain works, supplies or services.

(3) Concession granters shall aim to ensure the transparency of the concession contract award procedure and of the performance of the contract, while complying with regulation 28.

(4) During the concession contract award procedure, a concession granter shall not provide information in a discriminatory manner which may give some candidates or tenderers an advantage over others.

### **Economic operators**

**26.**—(1) Economic operators that, under the law of the member State in which they are established, are entitled to provide the relevant service, shall not be rejected solely on the ground that under the law of England and Wales or, as the case may be, Northern Ireland, they would be required to be either natural or legal persons.

(2) Legal persons may be required to indicate, in the tender or in the application, the names and relevant professional qualifications of the staff to be responsible for the performance of the contract in question.

#### *Groups of economic operators*

(3) Groups of economic operators, including temporary associations, may participate in concession contract award procedures and shall not be required by concession granters to have a specific legal form in order to submit a tender or an application.

(4) Where necessary, concession granters may clarify in the concession documents how groups of economic operators are to meet the requirements as to economic and financial standing or technical and professional ability referred to in regulation 38 provided that this is justified by objective reasons and is proportionate.

(5) Any conditions for the performance of a concession contract by such groups of economic operators which are different from those imposed on individual participants shall also be justified by objective reasons and shall be proportionate.

(6) Concession granters may require groups of economic operators to assume a specific legal form once they have been awarded the contract, to the extent that such a change is necessary for the satisfactory performance of the contract.

### **Nomenclatures**

**27.** Any references to nomenclatures in the context of the award of concession contracts shall be made using the CPV.

### **Confidentiality**

**28.**—(1) A concession granter shall not disclose information which has been forwarded to it by an economic operator and designated by that economic operator as confidential, including, but not limited to, technical or trade secrets and the confidential aspects of tenders.

(2) Paragraph (1) is without prejudice to—

- (a) any other provisions of these Regulations, including the obligations relating to the advertising of awarded concession contracts and the provision of information to candidates and tenderers set out in regulations 31 and 40 respectively;
- (b) the Freedom of Information Act 2000(a);
- (c) any other requirement, or permission, for the disclosure of information that is applicable under the law of England and Wales or, as the case may be, Northern Ireland.

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(a) 2000 c. 36.

(3) Concession granters may impose on economic operators requirements aimed at protecting the confidential nature of information which they make available throughout the concession contract award procedure.

### **Rules applicable to communication**

**29.**—(1) Concession granters may choose one or more of the following means of communication for all communication and information exchange—

- (a) electronic means,
- (b) post or fax,
- (c) oral communication, including telephone, in respect of communications other than the essential elements of a concession contract award procedure, and provided that the content of the oral communication is documented to a sufficient degree on a durable medium,
- (d) hand delivery certified by an acknowledgement of receipt,

except where the use of electronic means is mandatory in accordance with regulations 32 and 33.

(2) The means of communication chosen shall be generally available and non-discriminatory, and shall not restrict economic operators' access to the concession contract award procedure.

(3) The tools and devices to be used for communicating by electronic means, and their technical characteristics, shall be interoperable with information and communication technology products in general use.

(4) In all communication, exchange and storage of information, concession granters shall ensure that the integrity of data and the confidentiality of applications and tenders are preserved.

(5) Concession granters shall examine the content of applications and tenders only after the time limit set for submitting them has expired.

## **PART 3**

### **RULES ON THE AWARD OF CONCESSION CONTRACTS**

#### **CHAPTER 6**

##### **General principles**

### **Concession notices**

**30.**—(1) Concession granters wishing to award a concession contract, other than a concession contract for social and other specific services listed in Schedule 3, shall make known their intention through the publication of a concession notice.

(2) Such a concession notice shall contain—

- (a) the information set out in Annex V to the Concessions Directive, and
- (b) any other information that the concession granter considers useful,

and shall be in the format of the standard forms set out in [*Commission legislation yet to be adopted pursuant to Article 33(1) of the Concessions Directive*].

(3) Concession granters wishing to award a concession contract for social and other specific services listed in Schedule 3 shall make known their intention of a planned concession award through the publication of a prior information notice.

(4) Such a prior information notice shall contain the information set out in Annex VI to the Concessions Directive and shall be in the format of the standard forms set out in [*Commission legislation yet to be adopted pursuant to Article 33(1) of the Concessions Directive*].

(5) Concession granters wishing to publish a concession notice or prior information notice shall send it for publication in accordance with regulation 32.

- (6) This regulation does not apply in any of the following cases—
- (a) where no applications, no suitable applications, no tenders or no suitable tenders have been submitted in response to a prior concession contract procedure, provided that the initial conditions of the concession contract are not substantially altered and that a report is sent to the Commission where it so requests;
  - (b) where the works or services can be supplied only by a particular economic operator for any of the following reasons—
    - (i) the aim of the concession contract is the creation or acquisition of a unique work of art or artistic performance,
    - (ii) competition is absent for technical reasons,
    - (iii) the existence of an exclusive right,
    - (iv) the protection of intellectual property rights and exclusive rights other than exclusive rights as defined in regulation 2,
 but only, in the case of sub-paragraphs (ii) to (iv), 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 contract award.
- (7) For the purposes of paragraph (6)(a)—
- (a) a tender shall be considered not to be suitable where it is irrelevant to the concession contract, being manifestly incapable, without substantial changes, of meeting the concession granter’s needs and requirements as specified in the concession documents;
  - (b) an application shall be considered not to be suitable where—
    - (i) the applicant concerned is to be or may be excluded under regulation 37 or does not meet the selection criteria set out by the concession granter in accordance with regulation 38(1) to (3),
    - (ii) the application includes tenders which are considered not to be suitable as described in sub-paragraph (a).

### **Concession award notices**

**31.**—(1) Not later than 48 days after the award of a concession contract, the concession granters shall send a concession award notice for publication in accordance with regulation 32.

(2) But concession contract award notices for social and other specific services listed in Schedule 3 may be grouped for publication on a quarterly basis, in which case the concession granter shall send the grouped notices for publication within 48 days of the end of each quarter.

(3) A concession award notice shall contain the information set out in Annex VII to the Concessions Directive, or in the case of a concession contract for social and other specific services listed in Schedule 3, the information set out in Annex VIII to that Directive.

### **Form and manner of publication of notices**

**32.**—(1) The notices required by regulations 30, 31 and 43(3) to be sent for publication in accordance with this regulation (and any corrigenda to those notices)—

- (a) shall be sent by electronic means to the Publications Office of the European Union (“the EU Publications Office”) for publication; and
- (b) shall be in the format of the standard forms set out in [*Commission legislation yet to be adopted pursuant to Article 33(1) of the Concessions Directive*].

(2) Where the EU Publications Office has given the concession granter confirmation of the receipt of the notice and of the publication of the information sent, indicating the date of that publication, that confirmation shall constitute proof of publication.

(3) The notices referred to in regulations 30, 31 and 43(3) shall not be published at national level before they are published by the EU Publications Office unless publication by that Office does not

take place within 48 hours after it confirms receipt in accordance with Article 33(2) of the Concessions Directive.

(4) Notices published at national level shall not contain information other than that contained in the notices sent to the EU Publications Office but shall indicate the date of sending of the notice to that Office.

### **Electronic availability of concession documents**

**33.**—(1) Concession granters shall, by means of the internet, offer unrestricted and full direct access free of charge to the concession documents from the date of the publication in the Official Journal of a concession notice or, where the concession notice does not include the invitation to submit tenders, from the date on which the invitation to submit tenders was sent.

(2) The text of the concession notice or of the invitation to submit tenders shall specify the internet address at which the concession documents are accessible.

(3) Paragraph (4) applies where, in duly justified circumstances due to—

- (a) exceptional security reasons,
- (b) technical reasons, or
- (c) the particularly sensitive nature of commercial information requiring a very high level of protection,

unrestricted and full direct access free of charge to certain concession documents cannot be offered by means of the internet.

(4) In those circumstances concession granters shall indicate in the notice or the invitation to submit a tender that the concession documents concerned will be transmitted by means other than the internet and the time limit for the receipt of tenders shall be prolonged.

(5) Provided that it has been requested in good time, concession granters shall supply to all applicants or tenderers taking part in the concession contract award procedure additional information relating to the concession documents not later than 6 days before the deadline fixed for the receipt of tenders.

### **Combating corruption and preventing conflicts of interest**

**34.**—(1) Concession granters shall 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 contract award procedures, so as to avoid any distortion of competition and to ensure the transparency of the award procedure and the equal treatment of all candidates and tenderers.

(2) The measures adopted in relation to conflicts of interest shall not go beyond what is strictly necessary to prevent a potential conflict of interest or eliminate a conflict of interest that has been identified.

(3) For the purposes this regulation, the concept of conflicts of interest shall at least cover any situation where relevant staff members have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the concession contract award procedure.

(4) In paragraph (3), “relevant staff members” means staff members of the concession granter who are involved in the conduct of the concession contract award procedure or may influence the outcome of that procedure.

## CHAPTER 7

### Procedural guarantees

#### Technical and functional requirements

**35.**—(1) Technical and functional requirements shall be set out in the concession documents and shall lay down the characteristics required of the works or services that are the subject-matter of the concession contract.

(2) Those characteristics may also refer to the specific process of production or provision of the requested works or services provided that they are linked to the subject-matter of the contract and proportionate to its value and its objectives.

(3) The characteristics may, for example, include quality levels, environmental and climate performance levels, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, safety or dimensions, terminology, symbols, testing and test methods, marking and labelling, or user instructions.

(4) Unless justified by the subject-matter of the concession contract, technical and functional requirements shall not refer to a specific make or source, or a particular process which characterises the products or services provided by a specific economic operator or to trade marks, patents, types or a specific production with the effect of favouring or eliminating certain undertakings or certain products.

(5) But such a reference is permitted, on an exceptional basis, where a sufficiently precise and intelligible description of the subject-matter of the contract is not possible, in which case the reference shall be accompanied by the words “or equivalent”.

(6) A concession granter shall not reject a tender on the grounds that the works and services tendered for do not comply with the technical and functional requirements to which it has referred, once the tenderer proves in its tender, by any appropriate means, that the solutions it has proposed satisfy in an equivalent manner the technical and functional requirements.

#### Procedural guarantees

##### *Concession contract award*

**36.**—(1) Concession contracts shall be awarded on the basis of the award criteria, provided that all of the following conditions are fulfilled—

- (a) the tender complies with any minimum requirements set by the concession granter;
- (b) the tenderer complies with the conditions for participation set out in regulation 38(1) to (3); and
- (c) the tenderer is not excluded from participating in the concession contract award procedure in accordance with regulation 37(1) to (9), as read with regulation 37(14) to (18).

##### *Limitation of candidates or tenderers*

(2) The concession granter may limit the number of candidates or tenderers to an appropriate level, on condition that this is done in a transparent manner and on the basis of objective criteria.

(3) The number of candidates or tenderers invited shall be sufficient to ensure genuine competition.

(4) The concession granter shall communicate the following to all participants—

- (a) the description of the envisaged organisation of the procedure and an indicative completion deadline; and
- (b) any modification to that procedure or completion deadline.

(5) To the extent that any modification referred to in paragraph (4)(b) concerns elements disclosed in the concession notice, the concession granter shall advertise it to all economic operators.



(6) The concession granter shall provide for appropriate recording of the stages of the procedure using the means it considers appropriate, subject to regulation 28(1) and (2).

(7) The concession granter may hold negotiations with candidates and tenderers but the subject-matter of the concession contract, the award criteria and the minimum requirements shall not be changed during the course of any negotiations.

(8) In this regulation—

- (a) “the award criteria” means the award criteria set out by the concession granter in accordance with regulation 41;
- (b) “minimum requirements” mean the conditions and characteristics (in particular any technical, physical, functional and legal conditions and characteristics) that any tender must meet or possess.

## Exclusion grounds

### *Mandatory exclusion*

**37.**—(1) Contracting authorities and utilities referred to in regulation 5(1)(a) shall exclude an economic operator from participation in a concession contract award procedure where they have established that that economic operator has been convicted of any of the following offences—

- (a) conspiracy within the meaning of section 1 or 1A of the Criminal Law Act 1977(a) or article 9 or 9A of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983(b) where that conspiracy relates to participation in a criminal organisation as defined in Article 2 of Council Framework Decision 2008/841/JHA on the fight against organised crime(c);
- (b) corruption within the meaning of section 1(2) of the Public Bodies Corrupt Practices Act 1889(d) or section 1 of the Prevention of Corruption Act 1906(e);
- (c) the common law offence of bribery;
- (d) bribery within the meaning of sections 1, 2 or 6 of the Bribery Act 2010(f), or section 113 of the Representation of the People Act 1983(g);
- (e) where the offence relates to fraud affecting the European Communities’ financial interests as defined by Article 1 of the Convention on the protection of the financial interests of the European Communities(h)—
  - (i) the common law offence of cheating the Revenue;
  - (ii) the common law offence of conspiracy to defraud;
  - (iii) fraud or theft within the meaning of the Theft Act 1968(i), the Theft Act (Northern Ireland) 1969(j), the Theft Act 1978(k) or the Theft (Northern Ireland) Order 1978(l);

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(a) 1977 c. 45; section 1 was amended by the Criminal Attempts Act 1981 (c.47), section 5(1), by the Criminal Justice (Terrorism and Conspiracy) Act 1998 (c. 40), Schedule 2, Part 2, and by the Trade Union and Labour Relations (Consolidation) Act 1992 (c. 52), Schedule 1; section 1A was inserted by the Criminal Justice (Terrorism and Conspiracy) Act 1998, section 5(1), and was amended by the Coroners and Justice Act 2009 (c. 25), section 72(1)(a).

(b) S.I. 1983/1120 (N.I. 13); article 9 was amended by Part 2 of Schedules 1 and 2 to the Criminal Justice (Terrorism and Conspiracy) Act 1998 (c. 40), and article 9A was inserted by section 6(1) of that Act; there are other amendments but none is relevant.

(c) OJ No L 300, 11.11.2008, p42.

(d) 1889 c. 69; this Act was repealed by the Bribery Act 2010 (c. 23), Schedule 2.

(e) 1906 c. 34; this Act was repealed by the Bribery Act 2010 (c. 23), Schedule 2.

(f) 2010 c. 23.

(g) 1983 c.2; section 113 was amended by the Greater London Authority Act 1999 (c. 29), Schedule 3, paragraph 30(2).

(h) OJ No C 316, 27.11.1995, p48.

(i) 1968 c. 60.

(j) 1969 c. 16 (N.I.).

(k) 1978 c. 31.

(l) S.I. 1978/1407 (N.I.23).

- (iv) fraudulent trading within the meaning of section 458 of the Companies Act 1985(a), article 451 of the Companies (Northern Ireland) Order 1986(b) or section 993 of the Companies Act 2006(c);
- (v) fraudulent evasion within the meaning of section 170 of the Customs and Excise Management Act 1979(d) or section 72 of the Value Added Tax Act 1994(e);
- (vi) an offence in connection with taxation in the European Union within the meaning of section 71 of the Criminal Justice Act 1993(f);
- (vii) destroying, defacing or concealing of documents or procuring the execution of a valuable security within the meaning of section 20 of the Theft Act 1968(g) or section 19 of the Theft Act (Northern Ireland) 1969(h);
- (viii) fraud within the meaning of section 2, 3 or 4 of the Fraud Act 2006(i); or
- (ix) the possession of articles for use in frauds within the meaning of section 6 of the Fraud Act 2006, or the making, adapting, supplying or offering to supply articles for use in frauds within the meaning of section 7 of that Act;
- (f) any offence listed—
  - (i) in section 41 of the Counter Terrorism Act 2008(j); or
  - (ii) in Schedule 2 to that Act where the court has determined that there is a terrorist connection;
- (g) any offence under sections 44 to 46 of the Serious Crime Act 2007(k) which relates to an offence covered by sub-paragraph (f);
- (h) money laundering within the meaning of sections 340(11) and 415 of the Proceeds of Crime Act 2002(l);
- (i) an offence in connection with the proceeds of criminal conduct within the meaning of section 93A, 93B or 93C of the Criminal Justice Act 1988(m) or article 45, 46 or 47 of the Proceeds of Crime (Northern Ireland) Order 1996(n);
- (j) an offence under section 4 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004(o);
- (k) an offence under section 59A of the Sexual Offences Act 2003(p);

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- (a) 1985 c. 6; section 458 was modified by S.I. 2001/1090 and repealed by the Companies Act 2006 (c. 46), Schedule 16.
  - (b) S.I. 1986/1032 (N.I. 6), amended by S.R. (NI) 2004/307 (and other instruments that were not relevant) and revoked by the Companies Act 2006 (c. 46), Schedule 16.
  - (c) 2006 c. 46; section 993 is applied (with modifications) by S.I. 2009/1804, regulation 47, and by S.I. 2009/2436, regulation 3 and Schedule 1.
  - (d) 1979 c. 2; section 170 was amended by the Forgery and Counterfeiting Act 1981 (c. 45), section 23(3); by the Police and Criminal Evidence Act 1984 (c. 60), section 114(1); by the Finance Act 1988 (c.39), section 12; by the Finance (No 2) Act 1992 (c. 48), Schedule 2; by the Criminal Justice Act 2003 (c.44), section 293; by the Criminal Justice and Immigration Act 2008 (c.4), Schedule 17; by the Anti-social Behaviour, Crime and Policing Act 2014 (c.12), section 111; and by S.I. 1996/2686 and 2015/664; S.I. 2004/702 (N.I.3) and S.I. 2005/1966 (N.I.16).
  - (e) 1994 c. 23; section 23 was amended by the Finance Act 2007 (c. 11), Schedule 22; by the Finance Act 2003 (c.14), section 17 and by S.I. 2015/664.
  - (f) 1993 c. 36, amended by S.I. 2011/1043.
  - (g) 1968 c. 60; section 20 was amended by the Fraud Act 2006 (c. 35), Schedules 1 and 3.
  - (h) 1969 c. 16 (N.I.); section 19 was amended by the Fraud Act 2006 (c. 35), Schedules 1 and 3.
  - (i) 2006 c. 35.
  - (j) 2008 c.28
  - (k) 2007 c. 27.
  - (l) 2002 c. 29; sections 340(11) and 415 were modified by the Serious Crime Act 2007 (c. 27), section 63(1) and Schedule 6, paragraph 44(a); section 415 was amended by the Serious Organised Crime and Police Act 2005 (c. 15), section 107(4).
  - (m) 1988 c. 33; sections 93A, 93B and 93C were inserted by sections 29, 30 and 31 of the Criminal Justice Act 1993 (c. 36) and repealed by the Proceeds of Crime Act 2002 (c. 29), Schedule 11, paragraph 17(2).
  - (n) S.I. 1996/1299 (N.I. 9); articles 45, 46 and 47 were repealed by the Proceeds of Crime Act 2002 (c. 29), Schedule 11, paragraph 31(2).
  - (o) 2004 c. 19; section 4 was amended by the Human Tissue Act 2004 (c. 30), Schedule 6, paragraph 7, by the UK Borders Act 2007 (c.30), section 31(1), by the Borders, Citizenship and Immigration Act 2009 (c. 11), section 54, by the Criminal Justice and Licensing (Scotland) Act 2010 (c. ), section 46, by the Protection of Freedoms Act 2012 (c. 9), section 110, by the Criminal Justice Act (Northern Ireland) 2013 (c. 7 (N.I.)), section 7(2) to (5) and Schedule 4, Part 2, and by SSI 2008/259, article 2 and extended to the Isle of Man with modifications by S.I. 2008/680, article 18 and Schedule 8.
  - (p) 2003 c. 42; section 59A was inserted by the Protection of Freedoms Act 2012 (c. 9), section 109(2) and repealed by the Modern Slavery Act 2015 (c.30), Schedule 5, paragraph 5.

- (l) an offence under section 71 of the Coroners and Justice Act 2009<sup>(a)</sup>;
- (m) an offence under section 2 or section 4 of the Modern Slavery Act 2015<sup>(b)</sup>;
- (n) an offence in connection with the proceeds of drug trafficking within the meaning of section 49, 50 or 51 of the Drug Trafficking Act 1994<sup>(c)</sup>; or
- (o) any other offence within the meaning of Article 38(4) of the Concessions Directive —
  - (i) as defined by the law of any jurisdiction outside England and Wales and Northern Ireland, or
  - (ii) created, after the day on which these Regulations were made, in the law of England and Wales or Northern Ireland.

(2) The obligation to exclude an economic operator also applies where the person convicted is a member of the administrative, management or supervisory body of that economic operator, or has powers of representation, decision or control in the economic operator.

*Mandatory and discretionary exclusions for non-payment of taxes etc.*

(3) A contracting authority or a utility referred to in regulation 5(1)(a) shall exclude an economic operator from participation in a concession contract award procedure where—

- (a) it is aware that the economic operator is in breach of its obligations relating to the payment of taxes or social security contributions; and
- (b) the breach has been established by a judicial or administrative decision having final and binding effect in accordance with the legal provisions of the country in which the economic operator is established or with those of any of the jurisdictions of the United Kingdom.

(4) A contracting authority or a utility referred to in regulation 5(1)(a) may exclude an economic operator from participation in a concession contract award procedure where it can demonstrate by any appropriate means that the economic operator is in breach of its obligations relating to the payment of taxes or social security contributions.

(5) Paragraphs (3) and (4) cease to apply when the economic operator has fulfilled its obligations by paying, or entering into a binding arrangement with a view to paying, the taxes or social security contributions due, including, where applicable, any interest accrued or fines.

*Exceptions to mandatory exclusion*

(6) A concession granter may disregard any of the prohibitions imposed by paragraphs (1) to (3), on an exceptional basis, for overriding reasons relating to the public interest such as public health or protection of the environment.

(7) A concession granter may also disregard the prohibition imposed by paragraph (3) where an exclusion would be clearly disproportionate, in particular—

- (a) where only minor amounts of taxes or social security contributions are unpaid; or
- (b) where the economic operator was informed of the exact amount due following its breach of its obligations relating to the payment of taxes or social security contributions at such time that it did not have the possibility of fulfilling its obligations in a manner described in paragraph (5) before expiration of the deadline for submitting its application.

*Discretionary exclusion*

(8) A utility other than one referred to in regulation 5(1)(a) may exclude an economic operator from participation in a concession contract award procedure where it is aware that that economic operator has been convicted of any offence in paragraph (1).

(9) A concession granter may exclude from participation in a concession contract award procedure any economic operator if one of the following conditions is fulfilled—

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(a) 2009 c. 25; section 71 was repealed by the Modern Slavery Act 2015, Schedule 5, paragraph 8.  
 (b) 2015 c. 30.  
 (c) 1994 c. 37; sections 49, 50 and 51 were repealed by the Proceeds of Crime Act 2002 (c. 29), Schedule 11, paragraphs 1 and 25(1) and (2)(a) and by Schedule 12.

- (a) where it can demonstrate by any appropriate means a violation of applicable obligations in the fields of environmental, social and labour law established by European Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X to the Concessions Directive, as amended from time to time;
- (b) where the economic operator is bankrupt or is the subject of insolvency or winding-up proceedings, where its assets are being administered by a liquidator or by the court, where it is in an arrangement with creditors, where its business activities are suspended or it is in any analogous situation arising from a similar procedure under the laws and regulations of any State;
- (c) where the concession granter can demonstrate by any appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable;
- (d) where a conflict of interest within the meaning of regulation 34 cannot be effectively remedied by any other, less intrusive, measures;
- (e) where the concession granter has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition;
- (f) where the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior concession contract or a prior contract with a contracting authority or a utility as defined under these Regulations or under the Public Contracts Regulations 2015 or the Utilities Contracts Regulations 2016 which led to early termination of that prior contract, damages or other comparable sanctions;
- (g) where the economic operator—
  - (i) has been guilty of serious misrepresentation in supplying the information required for the verification of the absence of grounds for exclusion or the fulfilment of the selection criteria set out by the concession granter in accordance with regulation 38(1) to (3), or
  - (ii) has withheld such information or is unable to submit the required documents supporting such information;
- (h) where the economic operator has—
  - (i) undertaken to—
    - (aa) unduly influence the decision-making process of the concession granter, or
    - (bb) obtain confidential information that may confer upon it undue advantages in the concession contract award procedure; or
  - (ii) negligently provided misleading information that may have a material influence on decisions concerning exclusion, selection or award;
- (i) in the case of a concession contract in the fields of defence and security as referred to in Directive 2009/81/EC, where the economic operator has been found, on the basis of any means of evidence, including protected data sources, not to possess the reliability necessary to exclude risks to the security of the United Kingdom.

*Exclusion during procedure*

(10) Contracting authorities and utilities referred to in regulation 5(1)(a) shall exclude an economic operator where they become aware, at any time during a concession contract procedure, that the economic operator is, in view of acts committed or omitted either before or during the procedure, in one of the situations referred to in paragraphs (1) to (3).

(11) Concession granters may exclude an economic operator where they become aware, at any time during a concession contract procedure, that the economic operator is, in view of acts committed or omitted either before or during the procedure, in one of the situations referred to in paragraphs (4), (8) or (9).

#### *Duration of exclusion*

(12) In the cases referred to in paragraphs (1) and (2) the period during which the economic operator shall (subject to paragraphs (6) and (15)) be excluded is 5 years from the date of the conviction.

(13) In the cases referred to in paragraphs (8) and (9), the period during which the economic operator may (subject to paragraph (15)) be excluded is 3 years from the date of the relevant event.

#### *Self-cleaning*

(14) Any economic operator that is in one of the situations referred to in paragraph (1), (8) or (9) may provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of the relevant ground for exclusion.

(15) If the concession granter considers such evidence to be sufficient, the economic operator concerned shall not be excluded from the procedure.

(16) For that purpose, the economic operator shall prove that it has—

- (a) paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct;
- (b) clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities; and
- (c) taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.

(17) The measures taken by the economic operator shall be evaluated taking into account the gravity and particular circumstances of the criminal offence or misconduct.

(18) Where the concession granter considers such measures to be insufficient, it shall give the economic operator a statement of the reasons for that decision.

#### **Selection of and qualitative assessment of candidates**

**38.**—(1) Concession granters shall verify the conditions for participation relating to the professional and technical ability and the financial and economic standing of candidates or tenderers on the basis of self-declarations or references submitted as proof in accordance with the requirements specified in the concession notice.

(2) Those requirements shall be non-discriminatory and proportionate to the subject-matter of the concession contract.

(3) The conditions for participation shall be related and proportionate to the need to ensure the ability of the concessionaire to perform the concession contract, taking into account the subject-matter of the concession contract and the purpose of ensuring genuine competition.

#### *Reliance on the capacities of other entities*

(4) For the purpose of meeting the conditions for participation, an economic operator may, where appropriate and for a particular concession contract, rely on the capacities of other entities, regardless of the legal nature of its links with them, subject to the following provisions of this regulation.

(5) Where an economic operator wants to rely on the capacities of other entities, it shall prove to the concession granter that it will have at its disposal, throughout the period of the concession contract, the necessary resources, for example, by producing a commitment by those entities to that effect.

(6) With regard to financial standing, the concession granter may require that the economic operator and those entities on which it relies are jointly liable for the execution of the contract.

(7) A group of economic operators within the meaning of regulation 26 may rely on the capacities of participants in the group or of other entities, and paragraphs (4) to (6) apply in relation to such as group in the same way that they apply in relation to an economic operator.

### **Time limits for receipt of applications and tenders for the concession contract**

**39.**—(1) When fixing the time limits for the receipt of applications or of tenders, concession granters shall take account, in particular, of the complexity of the concession contract and the time required for drawing up tenders or applications, without prejudice to the minimum time limits set out in this regulation.

(2) Where applications or tenders can be made only after a visit to the site or after on-the-spot inspection of the documents supporting the concession documents, the time limits for the receipt of applications for the concession contract or for the receipt of tenders shall be fixed so that all economic operators concerned may be aware of all the information needed to produce applications or tenders and in any event shall be longer than the minimum time limits set out in paragraphs (3) and (4).

(3) The minimum time limit for the receipt of applications (whether or not including tenders for the concession contract) shall be 30 days from the date on which the concession notice was sent for publication in accordance with regulation 32.

(4) Where the procedure takes place in successive stages the minimum time limit for the receipt of initial tenders shall be 22 days from the date on which the invitation to tender is sent.

(5) The time limits for receipt of tenders may be reduced by 5 days where the concession granter allows the submission of tenders by electronic means in accordance with regulation 29.

### **Informing candidates and tenderers**

**40.**—(1) The concession granter shall as soon as possible inform each candidate and tenderer of decisions reached concerning the award of a concession contract, including—

- (a) the name of the successful tenderer; and
- (b) the grounds for any decision—
  - (i) to reject its application or tender,
  - (ii) not to award a contract for which there has been publication of a concession notice, or
  - (iii) to recommence the procedure.

(2) On request from the party concerned, the concession granter shall as quickly as possible, and in any event within 15 days from receipt of a request in writing, inform any tenderers that have submitted an admissible tender of the characteristics and relative advantages of the tender selected.

(3) The concession granter may decide to withhold certain information referred to in this regulation where the release of such information—

- (a) would impede law enforcement or would otherwise be contrary to the public interest;
- (b) would prejudice the legitimate commercial interests of a particular economic operator, whether public or private; or
- (c) might prejudice fair competition between economic operators.

### **Award criteria**

**41.**—(1) Concession contracts shall be awarded on the basis of objective criteria which comply with the principles set out in regulation 25 and which ensure that tenders are assessed in conditions of effective competition so as to identify an overall economic advantage for the concession granter (“the award criteria”).

(2) The award criteria—

- (a) shall be linked to the subject-matter of the concession contract;
- (b) shall not confer an unrestricted freedom of choice on the concession granter; and
- (c) may include one or more of the following—

- (i) environmental criteria,
- (ii) social criteria, or
- (iii) criteria related to innovation.

(3) The award criteria shall be accompanied by requirements which allow the information provided by the tenderers to be effectively verified.

(4) The concession granter shall verify whether tenders properly meet the award criteria.

(5) The concession granter shall list the award criteria in descending order of importance.

(6) Where the concession granter receives a tender which proposes an innovative solution with an exceptional level of functional performance which could not have been foreseen by a diligent concession granter, the concession granter may, exceptionally, modify the ranking order of the award criteria to take into account that innovative solution.

(7) Where paragraph (6) applies the concession granter shall—

- (a) inform all tenderers about the modification of the order of importance and issue a new invitation to submit tenders in compliance with the minimum time limit referred to in regulation 39(4) for the receipt of tenders;
- (b) where the award criteria have been published in or at the same time as the concession notice, publish a new concession notice in compliance with the minimum time limit referred to in regulation 39(3) for the receipt of applications.

(8) The concession granter shall ensure that a modification of the ranking order referred to in paragraph (6) does not result in discrimination.

(9) In this regulation, “innovation” means the implementation of a new or significantly improved product, service or process, including but not limited to production, building or construction processes, a new marketing method, or a new organisational method in business practices, workplace organisation or external relations, including with the purpose of helping to solve societal challenges or to support the Europe 2020 strategy for smart, sustainable and inclusive growth.

## PART 4

### Rules on the performance of concession contracts

#### **Subcontracting**

##### *Giving information to concession granter*

**42.—**(1) In the concession documents, the concession granter may ask the tenderer to indicate in its tender any share of the concession contract that it may intend to subcontract to third parties and any proposed subcontractors.

(2) Paragraph (1) is without prejudice to the question of the concessionaire’s liability.

(3) In the case of a works concession contract and in respect of services to be provided at a facility under the oversight of the concession granter, after the award of the concession contract and at the latest when the performance of the concession contract commences, the concession granter shall require the concessionaire to notify to the concession granter the name, contact details and legal representatives of its subcontractors involved in such works or services, in so far as known at the time.

(4) The concession granter shall require the concessionaire to notify it of—

- (a) any changes to the information notified under paragraph (3) during the course of the concession contract; and
- (b) the name, contact details and legal representatives of any new subcontractors which it subsequently involves in such works or services.

(5) Paragraphs (3) and (4) do not apply to suppliers.

(6) Concession granters may extend the obligations provided for in paragraphs (3) and (4) to, for example—

- (a) services concession contracts (other than those concerning services to be provided at the facilities under the oversight of the concession granter) or suppliers involved in works concession contracts or services concession contracts;
- (b) subcontractors of the concessionaire's subcontractors or subcontractors further down the subcontracting chain.

*Excluding subcontractors*

(7) Concession granters may verify whether there are grounds for exclusion of subcontractors under regulation 37.

(8) In such cases, the concession granter—

- (a) shall require that the economic operator replaces a subcontractor in respect of which the verification has shown that there are compulsory grounds for exclusion; and
- (b) may require that the economic operator replaces a subcontractor in respect of which the verification has shown that there are non-compulsory grounds for exclusion.

**Modification of concession contracts during their term**

**43.**—(1) Concession contracts may be modified without a new concession contract award procedure in accordance with these Regulations in any of the following cases—

- (a) where the modifications, irrespective of their monetary value, have been provided for in the initial concession documents in clear, precise and unequivocal review clauses, which may include value revision clauses or options, provided that such clauses—
  - (i) state the scope and nature of possible modifications or options as well as the conditions under which they may be used, and
  - (ii) do not provide for modifications or options that would alter the overall nature of the concession contract;
- (b) for additional works or services by the original concessionaire that have become necessary and were not included in the initial concession contract where a change of concessionaire—
  - (i) cannot be made for economic or technical reasons such as requirements of interchangeability or interoperability with existing equipment, services or installations procured under the initial concession contract, or
  - (ii) would cause significant inconvenience or substantial duplication of costs for the concession granter,

provided, in the case of a concession contract awarded by a contracting authority, that any increase in value does not exceed 50% of the value of the original concession contract;

- (c) where all of the following conditions are fulfilled—
  - (i) the need for modification has been brought about by circumstances which a diligent concession granter could not have foreseen,
  - (ii) the modification does not alter the overall nature of the concession contract,
  - (iii) in the case of a concession contract awarded by a contracting authority, any increase in value does not exceed 50 % of the value of the original concession contract;
- (d) where a new concessionaire replaces the one to which the concession granter had initially awarded the concession contract as a consequence of—
  - (i) an unequivocal review clause or option in conformity with sub-paragraph (a),
  - (ii) universal or partial succession into the position of the initial concessionaire, following corporate restructuring, including takeover, merger, acquisition or insolvency, of another economic operator that fulfils the criteria for qualitative selection initially established, provided that this does not entail other substantial



modifications to the contract and is not aimed at circumventing the application of these Regulations;

- (e) where the modifications, irrespective of their value, are not substantial within the meaning of paragraph (8);
- (f) where paragraph (5) applies.

(2) Where several successive modifications are made—

- (a) the limitations imposed by the proviso at the end of paragraph (1)(b) and by paragraph (c)(iii) shall apply to the value of each modification; and
- (b) such successive modifications shall not be aimed at circumventing these Regulations.

(3) Concession granters which have modified a concession contract in either of the cases described in paragraph (1)(b) and (c) shall send a notice to that effect for publication in accordance with regulation 32.

(4) Such a notice shall contain the information set out in Annex XI to the Concessions Directive.

(5) This paragraph applies where the value of the modification is below both of the following values—

- (a) the threshold mentioned in regulation 8, and
- (b) 10% of the value of the initial concession contract,

provided that the modification does not alter the overall nature of the concession contract.

(6) For the purposes of paragraph (5), where several successive modifications are made, the value shall be the net cumulative value of the successive modifications.

(7) For the purpose of the calculation of the values mentioned in paragraphs (1)(b) and (c) and (5)(b), the updated value shall be the reference value when the concession contract includes an indexation clause but if the concession contract does not contain an indexation clause, the updated value shall be calculated taking into account [the average inflation in the United Kingdom].

(8) A modification of a concession contract during its term shall be considered substantial for the purposes of paragraph 1(e), where one or more of the following conditions is met—

- (a) the modification renders the concession contract materially different in character from the one initially concluded;
- (b) the modification introduces conditions which, had they been part of the initial concession contract award procedure, would have—
  - (i) allowed for the admission of other applicants than those originally selected,
  - (ii) allowed for the acceptance of a tender other than that originally accepted, or
  - (iii) attracted additional participants in the concession contract award procedure;
- (c) the modification changes the economic balance of the concession contract in favour of the concessionaire in a manner which was not provided for in the initial concession contract;
- (d) the modification extends the scope of the concession contract considerably;
- (e) a new concessionaire replaces the one to which the concession granter had initially awarded the concession contract in cases other than those provided for in paragraph (1)(d).

(9) A new concession contract award procedure in accordance with these Regulations shall be required for modifications of the provisions of a concession contract during its term other than those provided for in this regulation.

#### **Termination of concession contracts**

**44.**—(1) Concession granters shall ensure that every concession contract which they award contains provisions enabling them to terminate the concession contract where—

- (a) a modification of the concession contract has taken place, which would have required a new concession contract award procedure in accordance with regulation 43(9);

- (b) the concessionaire has, at the time of the concession contract award, been in one of the situations referred to in regulation 37(1), including as a result of the application of regulation 37(2), and should therefore have been excluded from the concession contract award procedure; or
- (c) the Court of Justice of the European Union finds, in a procedure pursuant to Article 258 of TFEU, that the United Kingdom has failed to fulfil its obligations under the Treaties by virtue of the fact that the concession granter has awarded the concession contract without complying with its obligations under the Treaties and the Concessions Directive.

(2) Those provisions may address the basis on which the power is to be exercisable in those circumstances, for example by providing for notice of termination to be given and by addressing consequential matters that will or might arise from the termination.

(3) To the extent that a concession contract does not contain provisions enabling the concession granter to terminate the contract on any of the grounds mentioned in paragraph (1), a power for the concession granter to do so on giving reasonable notice to the concessionaire shall be an implied term of that concession contract.

## PART 5

### Remedies

#### CHAPTER 8

##### Facilitation of remedies

#### **Scope of Chapter 8**

**45.** This Chapter applies to concession contracts falling within the scope of Parts 1 to 4.

#### **Notices of decisions to award a concession contract**

**46.—**(1) Subject to paragraphs (5) and (6), a concession granter shall send to each candidate and tenderer a notice communicating its decision to award the concession contract.

##### *Content of notices*

(2) Where it is to be sent to a tenderer, the notice referred to in paragraph (1) shall include—

- (a) the criteria for the award of the concession contract;
- (b) the reasons for the decision, including the characteristics and relative advantages of the successful tender, the score (if any) obtained by—
  - (i) the tenderer which is to receive the notice, and
  - (ii) the tenderer to be awarded the concession contract,
 and anything required by paragraph (3);
- (c) the name of the tenderer to be awarded the concession contract; and
- (d) a precise statement of either—
  - (i) when, in accordance with regulation 47, the standstill period is expected to end and, if relevant, how the timing of its ending might be affected by any and, if so what, contingencies, or
  - (ii) the date before which the concession granter will not, in conformity with regulation 47 enter into the concession contract.

(3) The reasons referred to in paragraph (2)(b) shall include the reason for any decision by the concession granter that the economic operator did not meet the technical and functional requirements in an equivalent manner as mentioned in regulation 35(6).

(4) Where it is to be sent to a candidate, the notice referred to in paragraph (1) shall include—

- (a) the reasons why the candidate was unsuccessful; and

- (b) the information mentioned in paragraph (2), but as if the words “and relative advantages” were omitted from sub-paragraph (b).

#### *Exemptions*

- (5) A concession granter need not comply with paragraph (1) in any of the following cases—
  - (a) where the concession contract is permitted by these Regulations to be awarded without prior publication of a concession notice in the Official Journal;
  - (b) where the only tenderer is the one who is to be awarded the concession contract, and there are no candidates.
- (6) A concession granter may withhold any information to be provided in accordance with the preceding requirements of this regulation where the release of such information—
  - (a) would impede law enforcement or would otherwise be contrary to the public interest;
  - (b) would prejudice the legitimate commercial interests of a particular economic operator, whether public or private; or
  - (c) might prejudice fair competition between economic operators.

#### *Meaning of “candidate” and “tenderer”*

- (7) In this regulation,—
  - (a) “candidate” means a candidate, as defined in regulation 2(1), which—
    - (i) is not a tenderer, and
    - (ii) has not been informed of the rejection of its application and the reasons for it;
  - (b) “tenderer” means a tenderer, as defined in regulation 2(1), which has not been definitively excluded.
- (8) For the purposes of paragraph (7)(b), an exclusion is definitive if, and only if, the tenderer has been notified of the exclusion and either—
  - (a) the exclusion has been held to be lawful in proceedings under Chapter 9; or
  - (b) the time limit for starting such proceedings has expired even on the assumption that the Court would have granted the maximum extension permitted by regulation 52(4) and (5).

#### **Standstill period**

47.—(1) Where regulation 46(1) applies, the concession granter must not enter into the concession contract before the end of the standstill period.

(2) Where the concession granter sends a regulation 46 notice to all the relevant economic operators by facsimile or electronic means, the standstill period ends at midnight at the end of the 10th day after the relevant sending date.

(3) Where the concession granter sends a regulation 46 notice to all the relevant economic operators only by other means, the standstill period ends at whichever of the following occurs first—

- (a) midnight at the end of the 15th day after the relevant sending date;
- (b) midnight at the end of 10th day after the date on which the last of the economic operators to receive such a notice receives it.

(4) In paragraphs (2) and (3), “the relevant sending date” means the date on which the regulation 46 notice is sent to the relevant economic operators, and if the notices are sent to different relevant economic operators on different dates, the relevant sending date is the date on which the last of the notices is sent.

(5) Where the concession granter sends the regulation 46 notice to one or more of the relevant economic operators by facsimile or electronic means and to the others by other means, the standstill period ends at whichever of the following two times occurs latest—

- (a) midnight at the end of the 10th day after the date on which the last notice is sent by facsimile or electronic means;

- (b) the time when whichever of the following occurs first—
  - (i) midnight at the end of the 15th day after the date on which the last notice is sent by other means;
  - (ii) midnight at the end of the 10th day after the date on which the last of the economic operators to receive a notice sent by any such other means receives it.
- (6) In this regulation—
  - (a) “regulation 46 notice” means a notice given in accordance with regulation 46; and
  - (b) “relevant economic operators” means economic operators to which regulation 46 requires a notice to be sent.

## CHAPTER 9

### Applications to the court

#### **Interpretation of Chapter 9**

**48.**—(1) In this Chapter—

“claim form” includes, in Northern Ireland, the originating process by which the proceedings are commenced;

“declaration of ineffectiveness” means a declaration made under regulation 58(2)(a);

“economic operator” has the meanings given by paragraph (2);

“grounds for ineffectiveness” has the meaning given by regulation 59;

“proceedings” means court proceedings taken for the purposes of regulation 51; and

“standstill period”, and references to its end, have the same meaning as in regulation 47.

(2) In regulations 49 and 50, “economic operator” has its usual meaning (in accordance with regulation 2(1)), but in the other provisions of this Chapter “economic operator” has the narrower meaning of an economic operator (as defined by regulation 2(1)) to which a duty is owed in accordance with regulation 49 or 50.

#### **Duty owed to economic operators from EEA states**

**49.**—(1) This regulation applies to the obligation on a concession granter to comply with—

(a) these Regulations; and

(b) any enforceable EU obligation in the field of procurement in respect of a concession contract falling within the scope of these Regulations.

(2) That obligation is a duty owed to an economic operator from an EEA state.

#### **Duty owed to economic operators from certain other states**

**50.**—(1) The duty owed in accordance with regulation 49 is a duty owed also to—

(a) an economic operator from a GPA state, but only where the GPA applies to the procurement concerned; and

(b) an economic operator which is not from an EEA state or a GPA state, but only if a relevant bilateral agreement applies.

(2) For the purposes of paragraph (1)(a), the GPA applies to a procurement if—

(a) the procurement may result in the award of a concession contract of any description; and

(b) at the relevant time—

(i) a GPA State has agreed with the EU that the GPA shall apply to a concession contract of that description, and

(ii) the economic operator is from that GPA state.

(3) For the purposes of paragraph (1)(b), a relevant bilateral agreement applies if—

- (a) there is an international agreement, other than the GPA, by which the EU is bound; and
  - (b) in accordance with that agreement, the economic operator is, in respect of the procurement concerned, to be accorded remedies no less favourable than those accorded to economic operators from the EU in respect of matters falling within the scope of the duty owed in accordance with regulation 49.
- (4) In this regulation—
- (a) “GPA” means the Agreement on Government Procurement between certain parties to the World Trade Organisation signed in Marrakesh on 15th April 1994 as amended<sup>(a)</sup>;
  - (b) “GPA state” means any country, other than an EEA state, which at the relevant time is a signatory to the GPA; and
  - (c) “relevant time” means the date on which the concession granter sent a concession notice in respect of the concession contract to the Publications Office of the European Union or would have done so if it had been required by these Regulations to do so.

**Enforcement of duties through the Court**

**51.**—(1) A breach of the duty owed in accordance with regulation 49 or 50 is actionable by any economic operator which, in consequence, suffers, or risks suffering, loss or damage.

(2) Proceedings for that purpose must be started in the High Court, and regulations 52 to 63 apply to such proceedings.

**General time limits for starting proceedings**

**52.**—(1) This regulation limits the time within which proceedings may be started where the proceedings do not seek a declaration of ineffectiveness.

(2) Subject to paragraphs (3) to (5), such proceedings must be started within 30 days beginning with the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen.

(3) Paragraph (2) does not require proceedings to be started before the end of any of the following periods—

- (a) where the proceedings relate to a decision which is sent to the economic operator by facsimile or electronic means, 10 days beginning with—
  - (i) the day after the date on which the decision is sent, if the decision is accompanied by a summary of the reasons for the decision;
  - (ii) if the decision is not so accompanied, the day after the date on which the economic operator is informed of a summary of those reasons;
- (b) where the proceedings relate to a decision which is sent to the economic operator by other means, whichever of the following periods ends first—
  - (i) 15 days beginning with the day after the date on which the decision is sent, if the decision is accompanied by a summary of the reasons for the decision;
  - (ii) 10 days beginning with—
    - (aa) the day after the date on which the decision is received, if the decision is accompanied by a summary of the reasons for the decision; or
    - (bb) if the decision is not so accompanied, the day after the date on which the economic operator is informed of a summary of those reasons;
- (c) where sub-paragraphs (a) and (b) do not apply but the decision is published, 10 days beginning with the day on which the decision is published.

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(a) All the substantive provisions of the Agreement were substituted by the Protocol which was approved, on behalf of the EU, by Council Decision 2014/115/EU (OJ No L 68, 7.3.2014, p1), to which the text of the Protocol is attached (at OJ No L 68, 7.3.2014, p2). In accordance with Article 3 of the Protocol, the Protocol has entered into force for the EU.

(4) Subject to paragraph (5), the Court may extend the time limits imposed by this regulation (but not any of the limits imposed by regulation 53) where the Court considers that there is a good reason for doing so.

(5) The Court must not exercise its power under paragraph (4) so as to permit proceedings to be started more than 3 months after the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen.

(6) For the purposes of this regulation, proceedings are to be regarded as started when the claim form is issued.

### **Special time limits for seeking a declaration of ineffectiveness**

**53.**—(1) This regulation limits the time within which proceedings may be started where the proceedings seek a declaration of ineffectiveness.

(2) Such proceedings must be started—

- (a) where paragraph (3) or (5) applies, within 30 days beginning with the relevant date mentioned in that paragraph;
- (b) in any event, within 6 months beginning with the day after the date on which the concession contract was entered into.

(3) This paragraph applies where a relevant concession award notice has been published in the Official Journal, in which case the relevant date is the day after the date on which the notice was published.

(4) For that purpose, a concession award notice is relevant if, and only if—

- (a) the concession contract was awarded without prior publication of a concession notice in the Official Journal; and
- (b) the concession award notice includes justification of the decision of the concession granter to award the concession contract without prior publication of a concession notice in the Official Journal.

(5) This paragraph applies where the concession granter has informed the economic operator of—

- (a) the conclusion of the concession contract, and
- (b) a summary of the relevant reasons,

in which case the relevant date is the day after the date on which the economic operator was informed of the award or, if later, was informed of a summary of the relevant reasons.

(6) In paragraph (5), “the relevant reasons” means the reasons which the economic operator would have been entitled to receive in response to a request under regulation 40(2).

(7) For the purposes of this regulation, proceedings are to be regarded as started when the claim form is issued.

### **Starting proceedings**

**54.**—(1) Where proceedings are started, the economic operator must serve the claim form on the concession granter within 7 days after the date of issue.

(2) Paragraph (3) applies where proceedings are started—

- (a) seeking a declaration of ineffectiveness; or
- (b) alleging a breach of regulation 47, 55 or 56(1)(b) where the concession contract has not been fully performed.

(3) In those circumstances, the economic operator must, as soon as practicable, send a copy of the claim form to each person, other than the concession granter, who is a party to the concession contract in question.

(4) The concession granter must, as soon as practicable, comply with any request from the economic operator for any information that the economic operator may reasonably require for the purpose of complying with paragraph (3).

(5) In this regulation, “serve” means serve in accordance with rules of court, and for the purposes of this regulation a claim form is deemed to be served on the day on which it is deemed by rules of court to be served.

### **Concession contract-making suspended by challenge to award decision**

**55.**—(1) Where—

- (a) a claim form has been issued in respect of a concession granter’s decision to award the concession contract,
- (b) the concession granter has become aware that the claim form has been issued and that it relates to that decision, and
- (c) the concession contract has not been entered into,

that concession granter is required to refrain from entering into the concession contract.

(2) The requirement continues until any of the following occurs—

- (a) the Court brings the requirement to an end by interim order under regulation 56(1)(a);
- (b) the proceedings at first instance are determined, discontinued or otherwise disposed of and no order has been made continuing the requirement (for example in connection with an appeal or the possibility of an appeal).

(3) This regulation does not affect the obligations imposed by regulation 47.

### **Interim orders**

**56.**—(1) In proceedings, the Court may, where relevant, make an interim order—

- (a) bringing to an end the requirement imposed by regulation 55(1);
- (b) restoring or modifying that requirement;
- (c) suspending the procedure leading to the award of the concession contract in relation to which the breach of the duty owed in accordance with regulation 49 or 50 is alleged;
- (d) suspending the implementation of any decision or action taken by the concession granter in the course of following such a procedure.

(2) When deciding whether to make an order under paragraph (1)(a)—

- (a) the Court must consider whether, if regulation 55(1) were not applicable, it would be appropriate to make an interim order requiring the concession granter to refrain from entering into the concession contract; and
- (b) only if the Court considers that it would not be appropriate to make such an interim order may it make an order under paragraph (1)(a).

(3) If the Court considers that it would not be appropriate to make an interim order of the kind mentioned in paragraph (2)(a) in the absence of undertakings or conditions, it may require or impose such undertakings or conditions in relation to the requirement in regulation 55(1).

(4) The Court may not make an order under paragraph (1)(a) or (b) or (3) before the end of the standstill period.

(5) This regulation does not prejudice any other powers of the Court.

### **Remedies where the concession contract has not been entered into**

**57.**—(1) Paragraph (2) applies where—

- (a) the Court is satisfied that a decision or action taken by a concession granter was in breach of the duty owed in accordance with regulation 49 or 50; and

- (b) the concession contract has not yet been entered into.
- (2) In those circumstances, the Court may do one or more of the following—
  - (a) order the setting aside of the decision or action concerned;
  - (b) order the concession granter to amend any document;
  - (c) award damages to an economic operator which has suffered loss or damage as a consequence of the breach.
- (3) This regulation does not prejudice any other powers of the Court.

**Remedies where the concession contract has been entered into**

- 58.**—(1) Paragraph (2) applies if—
- (a) the Court is satisfied that a decision or action taken by a concession granter was in breach of the duty owed in accordance with regulation 49 or 50; and
  - (b) the concession contract has already been entered into.
- (2) In those circumstances, the Court—
- (a) must, if it is satisfied that any of the grounds for ineffectiveness applies, make a declaration of ineffectiveness in respect of the concession contract unless regulation 60 requires the Court not to do so;
  - (b) must, where required by regulation 62, impose penalties in accordance with that regulation;
  - (c) may award damages to an economic operator which has suffered loss or damage as a consequence of the breach, regardless of whether the Court also acts as described in subparagraphs (a) and (b);
  - (d) must not order any other remedies.
- (3) Paragraph (2)(d) does not prejudice any power of the Court under regulation 61(3) or 62(12) (orders which supplement a declaration of ineffectiveness or a contract-shortening order).

**Grounds for ineffectiveness**

- 59.**—(1) There are two grounds for ineffectiveness.

*The first ground*

(2) Subject to paragraph (3), the first ground applies where the concession contract has been awarded without prior publication of a concession notice in the Official Journal in any case in which these Regulations required the prior publication of a concession notice.

- (3) The first ground does not apply if all the following apply—
- (a) the concession granter considered the award of the concession contract without prior publication of a concession notice in the Official Journal to be permitted by these Regulations;
  - (b) the concession granter has had published in the Official Journal a voluntary transparency notice expressing its intention to enter into the concession contract; and
  - (c) the concession contract has not been entered into before the end of a period of at least 10 days beginning with the day after the date on which the voluntary transparency notice was published in the Official Journal.

(4) In paragraph (3), “voluntary transparency notice” means a notice which contains the following information—

- (a) the name and contact details of the concession granter;
- (b) a description of the object of the concession contract;
- (c) a justification of the decision of the concession granter to award the concession contract without prior publication of a concession notice in the Official Journal;



- (d) the name and contact details of the economic operator to be awarded the concession contract; and
- (e) where appropriate, any other information which the concession granter considers it useful to include.

*The second ground*

- (5) The second ground applies where all the following apply—
- (a) the concession contract has been entered into in breach of any requirement imposed by—
    - (i) regulation 47 (the standstill period),
    - (ii) regulation 55 (concession contract-making suspended by challenge to award), or
    - (iii) regulation 56(1)(b) (interim order restoring or modifying a suspension originally imposed by regulation 55);
  - (b) there has also been a breach of the duty owed to the economic operator in accordance with regulation 49 or 50 in respect of obligations other than those imposed by regulation 47 (the standstill period) and this Chapter;
  - (c) the breach mentioned in sub-paragraph (a) has deprived the economic operator of the possibility of starting proceedings in respect of the breach mentioned in sub-paragraph (b), or pursuing them to a proper conclusion, before the concession contract was entered into; and
  - (d) the breach mentioned in sub-paragraph (b) has affected the chances of the economic operator obtaining the concession contract.

**General interest grounds for not making a declaration of ineffectiveness**

**60.**—(1) Where the Court is satisfied that either of the grounds for ineffectiveness applies, the Court must not make a declaration of ineffectiveness if—

- (a) the concession granter or another party to the proceedings raises an issue under this regulation; and
- (b) the Court is satisfied that overriding reasons relating to a general interest require that the effects of the concession contract should be maintained.

(2) For that purpose, economic interests in the effectiveness of the concession contract may be considered as overriding reasons only if in exceptional circumstances ineffectiveness would lead to disproportionate consequences.

(3) However, economic interests directly linked to the concession contract cannot constitute overriding reasons relating to a general interest.

- (4) For that purpose, economic interests directly linked to the concession contract include—
- (a) the costs resulting from the delay in the execution of the concession contract;
  - (b) the costs resulting from the commencement of a new procurement procedure;
  - (c) the costs resulting from change of the economic operator performing the concession contract; and
  - (d) the costs of legal obligations resulting from the ineffectiveness.

(5) For the purposes of paragraph (1)(b), overriding reasons may be taken to require that the effects of the concession contract should be maintained even if they do not require the Court to refrain from shortening the duration of the concession contract by an order under regulation 62(3)(a).

**The consequences of ineffectiveness**

**61.**—(1) Where a declaration of ineffectiveness is made, the concession contract is to be considered to be prospectively, but not retrospectively, ineffective as from the time when the declaration is made and, accordingly, those obligations under the concession contract which at that time have yet to be performed are not to be performed.

(2) Paragraph (1) does not prevent the exercise of any power under which the orders or decisions of the Court may be stayed, but at the end of any period during which a declaration of ineffectiveness is stayed, the concession contract is then to be considered to have been ineffective as from the time when the declaration had been made.

(3) When making a declaration of ineffectiveness, or at any time after doing so, the Court may make any order that it thinks appropriate for addressing—

- (a) the implications of paragraph (1) or (2) for the particular circumstances of the case;
- (b) any consequential matters arising from the ineffectiveness.

(4) Such an order may, for example, address issues of restitution and compensation as between those parties to the concession contract who are parties to the proceedings so as to achieve an outcome which the Court considers to be just in all the circumstances.

(5) Paragraph (6) applies where the parties to the concession contract have, at any time before the declaration of ineffectiveness is made, agreed by contract any provisions for the purpose of regulating their mutual rights and obligations in the event of such a declaration being made.

(6) In those circumstances, the Court must not exercise its power to make an order under paragraph (3) in any way which is inconsistent with those provisions, unless and to the extent that the Court considers that those provisions are incompatible with the requirement in paragraph (1) or (2).

#### **Penalties in addition to, or instead of, ineffectiveness**

**62.—**(1) Where the Court makes a declaration of ineffectiveness, it must also order that the concession granter pay a civil financial penalty of the amount specified in the order.

(2) Paragraph (3) applies where—

- (a) in proceedings for a declaration of ineffectiveness, the Court is satisfied that either of the grounds for ineffectiveness applies but does not make a declaration of ineffectiveness because regulation 60 requires it not to do so; or
- (b) in any proceedings, the Court is satisfied that the concession contract has been entered into in breach of any requirement imposed by regulation 47, 55 or 56(1)(b), and does not make a declaration of ineffectiveness (whether because none was sought or because the Court is not satisfied that either of the grounds for ineffectiveness applies).

(3) In those circumstances, the Court must order at least one, and may order both, of the following penalties—

- (a) that the duration of the concession contract be shortened to the extent specified in the order;
- (b) that the concession granter pay a civil financial penalty of the amount specified in the order.

(4) When the Court is considering what order to make under paragraph (1) or (3), the overriding consideration is that the penalties must be effective, proportionate and dissuasive.

(5) In determining the appropriate order, the Court must take account of all the relevant factors, including—

- (a) the seriousness of the relevant breach of the duty owed in accordance with regulation 49 or 50;
- (b) the behaviour of the concession granter;
- (c) where the order is to be made under paragraph (3), the extent to which the concession contract remains in force.

(6) Where more than one economic operator starts proceedings in relation to the same concession contract, paragraph (4) applies to the totality of penalties imposed in respect of the concession contract.

*Civil financial penalties*

(7) Subject to paragraph (8), where a concession grantor is ordered by the High Court of England and Wales to pay a civil financial penalty under this regulation—

- (a) the Court's order must state that the penalty is payable to the Minister for the Cabinet Office;
- (b) the Court must send a copy of the order to the Minister;
- (c) the concession grantor must pay the penalty to the Minister; and
- (d) the Minister must, on receipt of the penalty, pay it into the Consolidated Fund.

(8) Where the Minister for the Cabinet Office, or the Cabinet Office, is ordered to pay a civil financial penalty under this regulation—

- (a) paragraph (7) does not apply; and
- (b) the Minister for the Cabinet Office must pay the penalty into the Consolidated Fund.

(9) Subject to paragraph (10), where a concession grantor is ordered by the High Court of Northern Ireland to pay a civil financial penalty under this regulation—

- (a) the Court's order must state that the penalty is payable to the Department of Finance and Personnel;
- (b) the Court must send a copy of the order to the Department;
- (c) the concession grantor must pay the penalty to the Department; and
- (d) the Department must, when it receives the penalty, pay it into the Consolidated Fund of Northern Ireland.

(10) Where the Department of Finance and Personnel is ordered to pay a civil financial penalty under this regulation—

- (a) paragraph (9) does not apply; and
- (b) the Department must pay the penalty into the Consolidated Fund of Northern Ireland.

(11) Where a concession grantor is a non-Crown body—

- (a) any payment due under paragraph (7) may be enforced by the Minister for the Cabinet Office as a judgment debt due to the Minister; and
- (b) any payment due under paragraph (9) may be enforced by the Department of Finance and Personnel as a judgment debt due to it.

*Concession contract shortening*

(12) When making an order under paragraph (3)(a), or at any time after doing so, the Court may make any order that it thinks appropriate for addressing the consequences of the shortening of the duration of the concession contract.

(13) Such an order may, for example, address issues of restitution and compensation as between those parties to the concession contract who are parties to the proceedings so as to achieve an outcome which the Court considers to be just in all the circumstances.

(14) Paragraph (15) applies where the parties to the concession contract have, at any time before the order under paragraph (3)(a) is made, agreed by contract any provisions for the purpose of regulating their mutual rights and obligations in the event of such an order being made.

(15) In those circumstances, the Court must not exercise its power to make an order under paragraph (12) in any way which is inconsistent with those provisions, unless and to the extent that the Court considers that those provisions are incompatible with the primary order that is being made, or has been made, under paragraph (3)(a).

(16) In paragraph (3)(a), "duration of the concession contract" refers only to its prospective duration as from the time when the Court makes the order.

## **Injunctions against the Crown**

**63.** In proceedings against the Crown, the Court has power to grant an injunction despite section 21 of the Crown Proceedings Act 1947(a).

## **PART 6**

### **Reports and review**

#### **Reporting requirements**

**64.** Concession granters shall send to the Cabinet Office a report containing such information as the Cabinet Office may from time to time request in respect of concession contracts within the scope of these Regulations for the purpose of enabling the Cabinet Office to provide the Commission with information.

#### **Review of these Regulations**

**65.—**(1) The Minister for the Cabinet Office must from time to time—

- (a) carry out a review of these Regulations;
- (b) set out the conclusions of the review in a report; and
- (c) publish the report.

(2) In carrying out the review the Minister for the Cabinet Office must, so far as is reasonable, have regard to how the Concessions Directive is implemented in other member States.

(3) The report must in particular—

- (a) set out the objectives intended to be achieved by the regulatory system established by these Regulations;
- (b) assess the extent to which those objectives are achieved; and
- (c) assess whether those objectives remain appropriate and, if so, the extent to which they could be achieved with a system that imposes less regulation.

(4) The first report under this regulation must be published before the end of the period of 5 years beginning on 18th April 2015.

(5) Reports under this regulation are afterwards to be published at intervals not exceeding 5 years.

## **PART 7**

### **Consequential amendments, savings and transitional provisions**

*[To be inserted]*

*Name*  
Minister for the Cabinet Office

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(a) 1947 c. 44.

## SCHEDULE 1

Regulation 2(1)

### ACTIVITIES CONSTITUTING WORKS

*[This Schedule will reproduce the content of Annex I to the Concessions Directive]*

## SCHEDULE 2

Regulation 4

### ACTIVITIES EXERCISED BY UTILITIES

#### **Gas and heat**

1.—(1) In the case of gas and heat, the following activities—

- (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.

(2) The supply by a utility referred to in regulation 5(1)(b) or (c) of gas or heat to fixed networks which provide a service to the public does not fall within the scope of sub-paragraph (1) where all of the following conditions are met—

- (a) the production of gas or heat by that utility is the unavoidable consequence of carrying out an activity other than those referred to in this paragraph or in paragraphs 2 and 3;
- (b) the supply to the public network is aimed only at the economic exploitation of such production and amounts to not more than 20% of that utility's turnover on the basis of the average for the preceding three years, including the current year.

(3) In this paragraph, "supply" includes the generation/production, wholesale and retail sale of gas, other than the production of gas in the form of extraction which, instead, falls within the scope of paragraph 6.

#### **Electricity**

2.—(1) In the case of electricity, the following activities—

- (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.

(2) The supply by a utility referred to in regulation 5(1)(b) or (c) of electricity to fixed networks which provide a service to the public does not fall within the scope of sub-paragraph (1) where all of the following conditions are met—

- (a) the production of electricity by that utility takes place because its consumption is necessary for carrying out an activity other than those referred to in this paragraph or paragraphs 1 and 3;
- (b) the supply to the public network depends only on that utility's own consumption and has not exceeded 30% of that utility's total production of energy, on the basis of the average for the preceding three years, including the current year.

(3) In this paragraph, "supply" includes generation/production, wholesale and retail sale of electricity.

#### **Transport services**

3.—(1) Activities relating to the provision or operation of networks providing a service to the public in the field of transport by—

- (a) railway;
- (b) automated systems;

- (c) tramway;
- (d) trolley bus;
- (e) bus; or
- (f) cable.

(2) For the purposes of this paragraph, a network shall be considered to exist where the service is provided under operating conditions laid down by a competent authority, such as—

- (a) conditions on the routes to be served;
- (b) the capacity to be made available; or
- (c) the frequency of the service.

### **Ports and airports**

4. 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.

### **Postal services activities**

5.—(1) Activities relating to the provision of—

- (a) postal services;
- (b) services other than postal services, on condition that such services are provided by an entity which also provides postal services and provided that the conditions set out in regulation 34(1) of the Utilities Contracts Regulations 2016 are not satisfied in respect of postal services.

(2) In this paragraph—

- (a) “postal item” means an item addressed in the final form in which it is to be carried, irrespective of weight, which includes—
  - (i) correspondence,
  - (ii) books,
  - (iii) catalogues,
  - (iv) newspapers,
  - (v) periodicals, and
  - (vi) postal packages containing merchandise with or without commercial value;
- (b) “postal services” means services consisting of the clearance, sorting, routing and delivery of postal items, including both services falling within as well as services falling outside the scope of the universal service set up in accordance with the Postal Services Act 2011(a);
- (c) “services other than postal services” means services provided in the following areas—
  - (i) mail service management services (services both preceding and subsequent to despatch, including mailroom management services);
  - (ii) services concerning postal items not included in the definition of “postal item” in paragraph (a), such as direct mail bearing no address.

### **Oil and gas**

6. Activities relating to the exploitation of a geographical area for the purpose of—

- (a) extracting oil or gas;

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(a) 2011 c. 5.

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

### SCHEDULE 3

Regulation 18

### SOCIAL AND OTHER SPECIFIC SERVICES

*[This Schedule will reproduce the content of Annex IV to the Concessions Directive]*