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Creating Change Together

SIGMA

Public Procurement

Training Manual

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Module D

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SECTION 1 – INTRODUCTION

1.5 LEGAL INFORMATION HELPFUL TO HAVE AT HAND

In 2014 Directive (2014/24/EU), please look at article 2(1) to (4)

Deleted: In Directive 2004/18, please look at Article 1(9).

SECTION 2 – NARRATIVE

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2.1. Introduction

The major distinction that must be made is between the two main categories of public or contracting authority, as defined in Directive 2014/24/EU (the 2014 Directive), namely:

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Contracting authorities may also be made up of associations formed by one or more such authorities or one or more such bodies governed by public law.

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The 2014 Directive introduced the distinction between:

- central government authorities – contracting authorities listed in Annex I and, in so far as corrections or amendments have been made at national level, their successor entities; and
- sub-central contracting authorities – all contracting authorities that are not central government authorities.

This distinction is relevant because sub-central contracting authorities enjoy a slightly more relaxed procurement regime under the 2014 Directive. In particular:

- sub-central contracting authorities can use a prior information notice as a means for calling for competition (in the case of the restricted procedure and competitive procedure with negotiation) – this provision is optional for Member States,
- sub-central contracting authorities may establish the time period for receipt of tenders (initial tenders) by mutual agreement between the contracting authority and selected candidates (in the case of the restricted procedure and competitive procedure with negotiation) – this provision is optional for Member States.

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2.3 BODIES GOVERNED BY PUBLIC LAW

∇ The main question centres around three cumulative conditions∇

These conditions, as now set out in article 2(1)(4) of the 2014 Directive, are that a body governed by public law is a body:

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- financed, for the most part, by the state or regional or local authorities or by other bodies governed by public law; or subject to management supervision by those authorities or bodies;

The concept of a body governed by public law must be interpreted as having a broad meaning and its legal and factual situation must thus be determined in each individual case in order to assess whether or not it meets, for example, a need in the general interest.

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2.3.1.1 Needs in the general interest

Insert this additional example at end of page PDF D-7

- An entity that was a company wholly owned by the city of Vienna and had responsibility for providing heating for an urban area by means of an environmentally friendly process (disposal of waste) was established with an aim in the general interest. The ECJ confirmed that needs might be considered to be in the general interest even though the activities were also undertaken by private companies. (Case C-393/06 Inq. Aigner)

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2.3.1.2 General interest needs not having an industrial or commercial character

It is unlikely that the needs that the body aims to meet are not of an industrial or commercial nature.

In the preamble, the 2014 Directive refers to the rich case law of the ECJ. Recital 10 stipulates: “The notion of ‘contracting authorities’ and in particular that of ‘bodies governed by public law’ have been examined repeatedly in the case law of the Court of Justice of the European Union. To clarify that the scope of this Directive *ratione personae* should remain unaltered, it is appropriate to maintain the definitions on which the Court based itself and to incorporate a certain number of clarifications given by that case law as a key to the understanding of the definitions themselves, without the intention of altering the understanding of the concepts as elaborated by the case law. For that purpose, it should be clarified that a body that operates in normal market conditions, aims to make a profit, and bears the losses resulting from the exercise of its activity should not be considered as being a ‘body governed by public law’ since the needs in the general interest, that it has been set up to meet or been given the task of meeting, can be deemed to have an industrial or commercial character.”

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2.3.3 Condition 3: dependency on the state

This third condition is contained in article 2(1)(4)(c) of the 2014 Directive:

Article 2(1)(4)(c) of the 2014 Directive: “...they are financed, for the most part, by the state,

Deleted: Annex III of the Directive includes a list of entities in each EU Member State that are considered to fall within the definition of ‘body governed by public law’. The lists are intended to be as comprehensive as possible and are to contain the names of those bodies that the member state considers to fall within the definition at the time of adoption of the Directive. They are not exhaustive, however. Even if a body is not listed, it will nonetheless be covered if it meets all of the three conditions referred to above.

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regional or local authorities, or by other bodies governed by public law; or are subject to management supervision by those authorities or bodies; or 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.”

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2.3.3.1 Financial dependency

Example from case law:

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In a case concerning a public broadcasting authority, the ECJ concluded that direct financing by the state was not required, since the Directive did not lay down this rule and it was not a relevant condition in light of the purpose of the rules. When the activities of public broadcasting bodies were financed indirectly through the payment of fees by persons who possessed television receivers, the ECJ concluded that there was financing, for the most part, by the state. In that circumstance the fee was imposed, calculated and collected in accordance with rules of public law rather than through contractual arrangements with customers. The ECJ referred to the purpose of the rules, which was to cover bodies that were dependent on the state.

(Case C-337/06 Bayerischer Rundfunk and Others)

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2.4 CENTRAL AND JOINT PURCHASING

The 2014 Directive has now strengthened the provisions on centralised purchasing techniques increasingly used in a number of EU Member States,

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In some cases, the task of making such bulk purchases may be entrusted to a single purchaser, with either one of the group of purchasers acting as agent for the others, or to a specially created contracting authority established with that function on a permanent basis in mind: a central purchasing body.

For the purposes of the 2014 Directive, a central purchasing body is a “contracting authority providing centralised purchasing activities and possibly ancillary purchasing activities”.

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The 2014 Directive (article 2(1)(14)) defines centralised purchasing activities as “activities conducted on a permanent basis, in one of the following forms:

- a) the acquisition of supplies and/or services intended for contracting authorities;
- b) the award of public contracts or the conclusion of framework agreements for works, supplies or services intended for contracting authorities.”

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Ancillary purchasing activities are defined in the 2014 Directive [article 2(1)(15)] as “activities consisting of the provision of support to purchasing activities, in particular in the following forms:

- a) technical infrastructure enabling contracting authorities to award public contracts or to conclude framework agreements for works, supplies or services;
- b) advice on the conduct or design of public procurement procedures;
- c) preparation and management of procurement procedures on behalf and for the account of the contracting authority concerned”.

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To ensure that a central purchasing body passes on the costs of its procurement to other contracting authorities, the 2014 Directive (article 37) also provides that:

(i) “Member States may provide that contracting authorities may acquire supplies and/or services from a central purchasing body offering the centralised purchasing activity referred to in point (a) of point (14) of article 2(1).” – In this case, the central purchasing body acts as wholesaler by buying, stocking and reselling.

(ii) “Member States may also provide that contracting authorities may acquire works, supplies and services by using contracts awarded by a central purchasing body, by using dynamic purchasing systems operated by a central purchasing body or, (...), by using framework agreements concluded by a central purchasing body offering the centralised purchasing activity referred to in point (b) of point 14 of article 2(1).” – In this case, the central purchasing body acts as intermediary.

(iii) “Member States may provide that a specific procurement is to be made by having recourse to central purchasing bodies or to one or more specific central purchasing bodies.”

The 2014 Directive also lays down the rules for allocating responsibility for the observance of the obligations pursuant to the Directive between the central purchasing body and the contracting authorities procuring from or through it. Where the central purchasing body has sole responsibility for the conduct of the procurement procedures, it is also solely and directly responsible for the legality of the procedures. Where a contracting authority conducts certain parts of the procedure, for instance the reopening of competition under a framework agreement or the award of individual contracts based on a dynamic purchasing system, it should be responsible for the stages of procedure it conducts.

Contracting authorities are allowed to award a public service contract for the provision of centralised purchasing activities to a central purchasing body without applying the procedures provided for in the Directive. It is also permitted for such public service contracts to include the provision of ancillary purchasing activities.

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In Italy, for example, Consip (originally the abbreviation of Concessionaria Servizi Informatici Pubblici) operates as a central purchasing body by running the Programme for the Rationalisation of Public Administration Purchases of goods and services. CONSIP utilises ICT and innovative tools for public administration purchases (contract agreements, Public Administration e-Marketplace, framework agreements, Dynamic Purchasing System, calls for tenders). For information on how CONSIP operates, see: http://www.consip.it/en/about_us/

It is also possible that a number of contracting authorities will simply choose to aggregate their requirements and agree to perform specific procurement jointly. This form of joint purchasing could be carried out (1) in its entirety and jointly in the name and on behalf of all of the contracting authorities concerned, or (2) by one contracting authority acting on its own behalf and on the behalf of the other contracting authorities concerned, or (3) for only parts of the procurement procedure, in the name and on behalf of the contracting authorities concerned.

The 2014 Directive has explicit rules as regards the responsibility in case of joint procurement. In the first two scenarios, all contracting authorities are jointly responsible for fulfilling their obligations pursuant to the Directive. In the third scenario, contracting authorities are jointly responsible for only those parts of the procurement procedure carried out jointly; in respect of the other parts – those that each contracting authority conducts in its own name and on its own behalf, each contracting authority shall have sole responsibility for fulfilling its obligations pursuant to the Directive.

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2.5 CONTRACTING AUTHORITIES AND THE WTO'S GOVERNMENT PROCUREMENT AGREEMENT (GPA)

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Note: On 30 March 2012 the GPA Parties reached an agreement and adopted a Protocol amending the 1994 GPA. The revised WTO GPA entered into force on 6 April 2014. The revised GPA opens up the public procurement markets of each of the parties.

▽ Since the Directives will apply in any event, no further action needs to be taken in respect of compliance with the procedural rules. ▽ The only obvious difference in applicationlisted in Annex 1 and in the differential treatment accorded to certain defence products and services.

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In the United Kingdom, for example, the Office of Government Commerce operates a centralised procurement system for particular common-use goods and services. It does so through its commercial arm, known as 'Buying Solutions'. This body offers a range of products and services, often available on the basis of a number of framework agreements, that have been procured in accordance with the procedures of the Directive. Information on how this system operates can be downloaded from www.buyingsolutions.gov.uk.

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Deleted: To the extent that these contracting authorities simply act jointly, without the benefit of a special purpose vehicle or without nominating one of their number as agent for the others, they will be acting as an association of contracting authorities. This association, as we have seen, has only a residual function and would have no capacity itself to conduct the contract award procedure. The procedure would necessarily be conducted by all of the contracting authorities or by one or more acting on their behalf.

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2014 Directive – specifically excludes from its scope of application all public contracts that, under the 2014 Utilities Directive (Directive 2014/25/EU), are awarded by contracting authorities exercising one or more of the defined activities in the utilities sector (in the fields of water, energy, transport and postal services) and that are awarded for the pursuit of those activities (see article 7 of the 2014 Directive).

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2.2.2 Public undertakings

Public undertakings are defined in article 4(2) of the 2014 Utilities Directive as any undertaking over which contracting authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of the undertaking, their financial participation therein, or the rules that govern it. A dominant influence on the part of the contracting authorities is to be presumed when these authorities, directly or indirectly, in relation to an undertaking:

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2.2.3.2 Existence of special or exclusive rights

Articles 3 and 4 of the 2014 Utilities Directive identifies the contracting entities that are covered and group the contracting entities in three categories, namely contracting authorities as the first category, public undertakings (as above) as the second category, and undertakings operating on the basis of special or exclusive rights as the third category.

Article 4(1)(b) provides that the provisions of the 2014 Utilities Directive are to apply to:

- contracting entities that are not contracting authorities or public undertakings; and
- that have as *one* of their activities any of those referred to in articles 8 to 14 (discussed below) or any combination thereof; and
- that operate on the basis of special or exclusive rights granted by a competent authority of a member state.

Article 4(3) of the 2014 Utilities Directive states that, for the purpose of the directive, special or exclusive rights are to mean rights granted by a competent authority of the member state, by way of any legislative, regulatory or administrative provision, the effect of which is to limit the exercise of activities defined in articles 8 to 14 to one or more entities, and which substantially affects the ability of other entities to carry out such activity.

No ‘special or exclusive rights’ exist where they have been conferred upon the undertaking as a member of a class of undertakings carrying on an economic activity that is open to anyone. Indeed, the 2014 Utilities Directive in article 4(3) clarifies that rights that have been granted by means of a procedure (1) in which adequate publicity has been ensured; and (2) where the granting of those rights was based on objective criteria, shall not constitute special or exclusive rights within the meaning of article 4. Such procedures include:

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The Directive also provides, in annexes I-X, an illustrative (and non-exhaustive) list of entities in each of the EU Member States that are considered to fulfil the criteria discussed here. [Localisation possible: In (XXX), this might/will include entities such as (xxx)] ¶
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- Deleted: exclusive or special rights must generally be taken to mean rights that are granted by the authorities of a member state to an undertaking or to a limited number of undertakings in a way other than the application of objective, proportional and non-discriminatory criteria, and this special or exclusive status substantially affects the ability of

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[\(a\) procurement procedures with a prior call for competition, in conformity with the 2014 Directive, the Defence Directive, the 2014 Concessions Directive or the 2014 Utilities Directive;](#)

[\(b\) procedures pursuant to other legal acts of the Union listed in Annex II, ensuring adequate prior transparency for granting authorisations on the basis of objective criteria.](#)

Note: Annex II

[Annex II lists procedures based on other EU legal acts which do not constitute ‘special or exclusive rights’ within the meaning of Article 4 of the 2014 Utilities Directive:](#)

[\(a\) granting authorisation to operate natural gas installations in accordance with the procedures laid down in Article 4 of Directive 2009/73/EC;](#)

[\(b\) authorisation or an invitation to tender for the construction of new electricity production installations in accordance with Directive 2009/72/EC;](#)

[\(c\) the granting in accordance with the procedures laid down in Article 9 of Directive 97/67/EC of authorisations in relation to a postal service which is not or shall not be reserved;](#)

[\(d\) a procedure for granting an authorisation to carry on an activity involving the exploitation of hydrocarbons in accordance with Directive 94/22/EC;](#)

[\(e\) public service contracts within the meaning of Regulation \(EC\) No 1370/2007 for the provision of public passenger transport services by bus, tramway, rail or metro which have been awarded on the basis of a competitive tendering procedure in accordance with Article 5\(3\) thereof, provided that its length is in conformity with Article 4\(3\) or \(4\) of that Regulation.](#)

[The Commission is empowered to modify the list of legal acts set out in Annex II, when new legal acts are adopted, repealed or modified.](#)

Note: Grant of rights

[Compare this approach to the approach taken by the regulator under the general exemption mechanism found in article 34 of the 2014 Utilities Directive and discussed below in section 2.3.6.](#)

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For further explanation [in the context of the previous Utilities Directive](#), see the Commission’s *Explanatory note – Utilities Directive: definition of exclusive or special rights* (Document CC/2004/33 of 18 June 2004).

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2.3 DEFINITION OF RELEVANT ACTIVITIES

Unless exempted under article [34](#) (see section 2.3.6), contracting entities falling within the above definitions are covered by the [2014 Utilities Directive](#),

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Note: Definitions of ‘relevant activities’ – changes in the previous directive
Until the adoption of the 2004 Utilities Directive, telecommunications was a relevant activity, but it was removed from the list. Following the success of the Union’s telecommunications liberalisation initiative to introduce effective competition into the sector, the Commission no longer considered it necessary to regulate purchases by entities operating in this sector. With the adoption of the 2004 Utilities Directive, postal services were also included as a relevant activity.

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2.3.1 Water

The relevant activity consists of the provision or operation of a fixed network intended to provide a service to the public in connection with the production, transport or distribution of drinking water, or the supply of drinking water to such networks.

Note: The term ‘supply’
The 2014 Utilities Directive in article 7 clarified that the term ‘supply’ included generation/production, wholesale and retail sale.

In the case of a contracting ‘authority’, the supply of drinking water to networks that provide a service to the public is always a relevant activity for the purposes of the 2014 Utilities Directive. As for other contracting entities, whenever the supply of drinking water to such networks is one of their principal activities, only then is it covered by the 2014 Utilities Directive.

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The supply of drinking water to fixed networks is not considered as a principal activity and is not covered where:

- the production of drinking water by that entity takes place because its consumption is necessary for carrying out an activity other than a relevant activity; and
- the supply to public networks depends only on the entity's own consumption of drinking water and has not exceeded 30% of the entity's total production of drinking water on average for the preceding three years, including the current year.

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Exclusion
Contracts for the purchase of water awarded by contracting entities engaged in one or both of the activities relating to drinking water referred to above are not covered since procurement rules are inappropriate for the purchase of water, given the need to procure water from sources near the area where it will be used.

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2.3.2 Energy

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- the exploitation of a geographical area for the purpose of ~~extracting oil or gas~~ and exploring for, or extracting, coal or other solid fuels.

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2.3.2.1 Electricity, gas or heat

This activity consists of the provision or operation of a fixed network intended to provide a service to the public in connection with the production, transport or distribution of electricity, gas or heat, or the supply of electricity, gas or heat to such networks.

Note: The term ‘supply’
The 2014 Utilities Directive in article 7 clarified that the term ‘supply’ included generation/production, wholesale and retail sale.

In the case of a contracting authority, the supply of electricity, gas or heat to networks that provide a service to the public is always a relevant activity for the purposes of the 2014 Utilities Directive.

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In the case of other contracting entities that supply electricity to fixed networks, this supply is not covered, where:

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- the production of electricity by that entity takes place because its consumption is necessary for carrying out an activity other than a relevant activity; and
- the supply to public networks depends only on the entity's own consumption of electricity.....

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Exclusion
The 2014 Utilities Directive does not apply to contracts awarded by contracting entities themselves that are active in the energy sector by being engaged in an activity relating to electricity, gas or heat, as referred to above for the supply of energy or fuel for the production of energy. This exemption was included in the 2004 Utilities Directive and retained in the 2014 Utilities Directive because of the lack of liberalisation in the Union energy market, which meant that

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2.3.2.2 Exploitation of a geographical area

The 2014 Utilities Directive applies to contracting entities that exploit a geographical area for the purpose of ~~extracting oil or gas,~~ or exploring for and extracting coal or other solid fuels.

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Note: Exploring for oil or gas
Under the 2004 Utilities Directive, exploring for oil or gas was a relevant activity. It is excluded from the 2014 Utilities Directive because that sector has consistently been found to be subject to such competitive pressure that the procurement discipline brought about by the Union procurement rules is no longer needed.

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[The extraction of oil and gas continues to fall within the scope of the 2014 Utilities Directive.](#)

[‘Exploration’ should be considered to include the activities that are undertaken in order to verify whether oil and gas is present in a given zone, and, if so, whether it is commercially exploitable, whereas ‘extraction’ should be considered as the ‘production’ of oil and gas. In line with established practice in merger cases, ‘production’ should be considered to also include ‘development’, i.e. the setting up of adequate infrastructure for future production \(oil platforms, pipelines, terminals, etc.\).](#)

Exclusion

As with the energy sector in general, the [2014 Utilities Directive](#) does not apply to contracts awarded by contracting entities [that are themselves active in the energy sector by being engaged in an activity relating to extraction and exploration, as referred to above](#) for the supply of energy or of fuels for the production of energy.

Deleted: In addition, a specific exemption was provided in the previous utilities directive for activities concerning the exploration and extraction of hydrocarbons. This exemption has not been retained in the current Utilities Directive, and no new exemption will be granted under this procedure, although the exemptions already granted under the procedure remain valid. Exemption will now be considered under the new general exemption mechanism of article 30 (see section 2.3.6 below).

2.3.3.1 Transport networks

This activity consists of the [provision or the](#) operation of networks providing a service to the public in the field of transport by railway, automated systems, tramway, trolleybus, bus or cable.

∇Previously, the provision of bus services was not covered.∇ In practice, this meant that other [entities were obliged not only to be authorised to operate in the market for the services in question, without any legal barriers to entry for the provision of those services, but they also had to be in a position to actually provide those services under the same conditions as provided by the contracting entity. This exemption has been removed from the 2014 Utilities Directive with the result that bus transport services are covered, unless the Commission adopts a decision exempting them with regard to a specific Member State, in accordance with article 34.](#)

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2.3.4 Postal services

Prior to the adoption of the [2004 Utilities Directive](#) (2004/17/EC),

Deleted: The transport sector is now also subject to the general exemption procedure under article 30. Bus transport services that are not already subject to an exemption are required to seek an explicit exemption under article 30 (see section 2.3.6 below).

The difference [which arose with the adoption of the 2004 Utilities Directive and is retained in 2014 Utilities Directive](#), is that these entities [became](#) subject to the more flexible regime of the Utilities Directive and are also in a position to benefit from the general [exclusion](#) procedure (see section 2.3.6 below), which could apply where postal services are provided in a competitive market.

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The [2014](#) Utilities Directive applies to [activities relating to the provision of](#):

- ~~postal services [services consisting of the clearance, sorting, routing and delivery of postal items]; and~~
- ~~'other services than postal services' [mail service management services (services both preceding and subsequent to despatch, [including](#) 'mailroom management services') and services concerning postal items not included in the main definition, [such as direct mail bearing no address](#)].~~

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Note: Some categories of 'other services than postal services' are removed from the scope of the 2014 Utilities Directive:

[Philatelic services, logistic services, added-value services linked to and provided entirely by electronic means, and financial services were removed from the 2014 Utilities Directive, with the effect they are now not covered by that directive.](#)

[Additionally, the 2014 Directive clarifies that public contracts intended for the pursuit of these \(removed\) activities are also excluded from the scope of the 2014 Directive when they are awarded by a contracting authority that provides postal services.](#)

This second category of services is covered only to the extent that the entity in question also provides 'postal services' and that the conditions provided for in the general [exclusion of article 34](#) are not satisfied in respect of those 'postal services'. As a result, the [2014](#) Utilities Directive applies only where the services are not provided on a competitive basis.

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2.3.5 Scope and necessity of 'relevant activities'

Exclusion

The [2014](#) Utilities Directive does not apply to [contracts that contracting entities award for purposes other than the pursuit of the relevant activities or for the pursuit of such relevant activities in a third country, in conditions that do not involve the physical use of a network or geographical area within the \[Union\]\(#\)](#). Such activities must be notified to the European Commission for information purposes.

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Article [6](#) of the [2014](#) Utilities Directive provides a mechanism for distinguishing between various situations, [in the case of contracts intended to cover several activities, contracting entities may choose to award separate contracts for the purpose of each separate activity. In this case, 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. A contracting entity may also choose to award a single contract. This article describes essentially \[four\]\(#\) situations in the case where a contracting authority chooses to award a single contract:](#)

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- If one of the activities for which the contract is intended is subject to the [2014](#) Utilities Directive and the other to the [2014](#) Directive, and if it is objectively

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impossible to determine for which activity the contract is principally intended, the contract is to be awarded in accordance with the [2014 Directive](#),

- [If one of the activities for which the contract is intended is subject to the 2014 Utilities Directive and the other to the 2014 Concessions Directive, and if it is objectively impossible to determine for which activity the contract is principally intended, the contract is to be awarded in accordance with the 2014 Utilities Directive.](#)
- If one of the activities for which the contract is intended is subject to the [2014 Utilities Directive](#) and the other is not subject to either the [2014 Utilities Directive](#), the [2014 Directive](#) ~~or the 2014 Concessions Directive~~, and if it is objectively impossible to determine for which activity the contract is principally intended, the contract is to be awarded in accordance with the [2014 Utilities Directive](#).

Article [6\(1\)](#) of the [2014 Utilities Directive](#) also includes an anti-avoidance provision. It provides that the choice between awarding a single contract and awarding a number of separate contracts may not be made with the objective of excluding the contract(s) from the scope of [either the 2014 Utilities Directive](#) or, where applicable, the [2014 Directive](#) ~~or the 2014 Concessions Directive~~.

For further explanation [on this issue in the context of the previous Utilities Directive](#), see the Commission's *Explanatory note – Utilities Directive: contracts involving more than one activity* (Document CC/2004/34 of 18 June 2004).

2.3.6 General [exclusion](#) of Article [34](#)

[Given the degree of liberalisation in various sectors, the 2014 Utilities Directive contains a more general exclusion provision, which grants an exclusion from the provisions of the directive to those contracting entities carrying out an activity that, in the Member State in which it is performed, is:](#)

[PDF D-32](#)

2.3.6.1 Existence of competitive markets

[When looking at the question of whether an activity is directly exposed to competition, ..., the existence of alternative goods or services considered to be substitutable on the supply side or the demand side, the prices and the actual or potential presence of more than one supplier of the goods or services in question. This indicates very clearly whether the tests to be applied are the same as those applied when making the market analyses required by articles \[101\]\(#\) and \[102\]\(#\), as well as article \[106\]\(#\), of the Treaty.](#)

Access to a market is therefore deemed to not be restricted if the EU Member State has implemented and applied the provisions of [Union](#) legislation mentioned in Annex [III](#) of the [2014 Utilities Directive](#), which contains a list of [Union](#) legislation designed to liberalise various utility sectors.

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Deleted: As indicated above, the previous utilities directive included a series of exemptions in specific sectors where the entities concerned were supplying services in competitive markets, either because that was the reality of the specific market or because competition had been introduced by means of Community market liberalisation. ¶

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Commission Decision 2005/15 sets out the more detailed requirements for applications under article 30. Annex I of the Decision sets out all of the information that would be necessary for the market analysis to be conducted, not all of which would be relevant to each specific situation. ...

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D	PUBLIC PROCUREMENT LAW – SCOPE OF APPLICATION	PART 2	CONTRACTING ENTITIES IN THE UTILITIES SECTOR
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Currently the list refers to legislation in the following sectors: transport or distribution of gas or heat (Directive [2009/73](#)); production, transmission or distribution of electricity (Directive [2009/72](#)); [contracting entities in the field of rail services \(Directive 2012/34 for rail freight and international rail passenger transport\)](#), contracting entities in the field of postal services (Directive 97/67); and [extraction of oil or gas \(Directive 94/22\)](#).

No liberalisation legislation is currently listed for the production, transport or distribution of drinking water; contracting entities in the field of rail [passenger transport](#);

Insert at the end of 2.3.6.1

[If free access to a given market cannot be presumed on the basis of the liberalisation legislation, it must be demonstrated that access to the market in question is free *de facto* and *de jure*.](#)

2.3.6.2 [Exclusion procedure under Article 35](#)

The [exclusion](#) is granted by means of an [implementing act](#) by the European Commission, which is prompted by an application by an EU Member State [or](#) a contracting entity.

Application by an EU Member State

When an EU Member State intends to apply for an [exclusion](#) for a given activity, it must [submit a request to](#) the Commission and inform it of all relevant facts,

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The [exclusion](#) becomes effective.....

- adopted [the implementing act](#) establishing the applicability of the conditions for [exclusion](#) within the [set](#) time limit; or
- not adopted [the implementing act](#) concerning such applicability within that period.

The Commission is given a period of [90 working days](#) to [adopt the implementing act where free access is presumed on the basis of the liberalisation legislation. In other cases, the time period for a decision is 130 working days](#), commencing on the first working day following the date on which it receives the [request or, where the request is incomplete, on the working day following the receipt of the complete information. Those periods may be extended by 15 working days](#) where the request is [not accompanied by a reasoned and substantiated position of an independent national authority. Those periods may also be extended by the Commission, with the agreement of the Member State.](#)

Application by a contracting entity

When the legislation of the EU Member State concerned so provides, contracting entities may also submit a request to the Commission for an [exclusion. Unless a request by a contracting entity is accompanied by a reasoned and substantiated position, adopted by an independent national authority, the Commission shall immediately inform the Member](#)

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- Deleted: , or the Commission itself on its own initiative
- Deleted: The procedure of article 30 is supplemented by Decision 2005/15 ('the Decision'), which covers, among other issues, publication requirements, extensions, and procedures for forwarding decisions.
- Deleted: exemption
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- Deleted: exemption
- Deleted: a
- Deleted: Decision
- Deleted: exemption
- Deleted: appropriate
- Deleted: a Decision
- Deleted: If the exemption is sought on the basis of compliance with the EU liberalisation directives *and* if a competent independent national authority has established that the activity in question is directly exposed to competition in markets to which access is not restricted, the exemption will apply to the extent (...)
- Deleted: three months
- Deleted: come to a Decision
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- Deleted: once only and for a (...)
- Deleted: the information (...)
- Deleted: or in the annexed (...)
- Deleted: incomplete or inexact (...)
- Deleted: However, where a (...)
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D	PUBLIC PROCUREMENT LAW – SCOPE OF APPLICATION	PART 2	CONTRACTING ENTITIES IN THE UTILITIES SECTOR
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State concerned. The Member State shall in such cases inform the Commission of all relevant facts and in particular of any law, regulation, administrative provision or agreement that demonstrates that the activity in question is directly exposed to competition in markets to which access is not restricted. The same procedure for adopting the implementing act and the same time limits apply.

Note:

All Commission Decisions adopted prior to the entry into force of the 2014 Utilities Directive concerning the applicability of the corresponding provisions set out in article 30 of Directive 2004/17/EC continue to be applicable.

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2.4 CONTRACTING ENTITIES AND THE WTO'S GOVERNMENT PROCUREMENT AGREEMENT

Insert at the start of 2.4

On 30 March 2012 the GPA Parties reached an agreement and adopted a Protocol amending the 1994 GPA. The revised WTO GPA entered into force on 6 April 2014. The revised GPA opens up the public procurement markets of each of the parties.

▽ In the case of the utility sectors in the EU, ▽ In the case of the EU, the revised GPA does not apply to activities in the fields of gas and heat, extraction of oil, gas and solid fuels.

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SECTION 3 - EXERCISES

Note on amendments to Exercises: the Trainer's Manual has not been updated to reflect the amendments below.

EXERCISE 3

Delete all of exercise 3 as it is no longer relevant. Deleted text not shown below

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SECTION 4 - CHAPTER SUMMARY

SELF-TEST QUESTIONS

Note on amendments to Self-Test Questions: the Trainer's Manual has not been updated to reflect the amendments below.

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Deleted: If, at the end of the time period laid down in paragraph 6 of article 30 of the Utilities Directive, the Commission has not adopted a Decision concerning the applicability of paragraph 1 to a given activity, the exemption becomes applicable.

Deleted: Procedure at the Commission's initiative]

The Commission may also begin, on its own initiative, the procedure for adoption of a Decision establishing the existence of competitive markets. In that event, the Commission immediately informs the member state concerned. There is no requirement for the member state to provide information, and there appears to be no time limit in respect of the Decision in this case.

Deleted: , transport by railway (other than urban railway), and telecommunications (also now excluded from the Utilities Directive itself)

Deleted: 14. . If an exclusion was granted before the adoption of Directive 2004/17, does it remain in force or is it replaced by the general exemption of article 30?

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SECTION 1 - INTRODUCTION

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2.1. Introduction

▼ A number of contracts are entirely excluded from the scope of the directives (but not necessarily the Treaty).... ▼ Some contracts, like the ‘reserved contracts’, receive special treatment.....

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When not excluded, contracts will only be subject to the provisions of the directives where their value exceeds the relevant monetary value set out in the directives – the EU financial threshold.

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One important distinction made by the directives is between “contracts” and “concessions”, the latter being treated differently from contracts. Special rules apply to the award of works and services concessions. The 2014 Directive no longer contains provisions governing the award of public works concessions, as a new directive covers the award of both works and services concession contracts - the 2014 Concessions Directive (2014/23/EU).

Deleted: in the Public Sector Directive, while services concessions are excluded from the scope of both the Public Sector Directive and the Utilities Directive

Finally, it should be mentioned that the 2014 Directive also regulates framework agreements, which -

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2.2 ‘PROCUREMENT’ CONTRACTS

The 2014 Directive includes a definition of a ‘procurement’ in article 1(2). Procurement, within the meaning of the 2014 Directive, is “the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose”. The definition of ‘procurement’ in the 2014 Utilities Directive differs in that the contracts are intended for the pursuit of one of the relevant activities.

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2.2.1. Internal arrangements within the contracting entity

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Based on the extensive case law of the ECJ, which is described below, the 2014 Directive introduces an explicit exclusion in article 12 concerning “in-house” or public-public contracts. The contracts covered by this exclusion are collectively referred to in the Directive as “public contracts between entities within the public sector” and are described in detail in Module D4.

First, the exclusion covers the situation where a contracting authority sets up a separate legal person and then awards contracts to that legal person – the controlled legal person. For the exclusion to apply, three requirements must be satisfied:

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- Control: the controlling authority must exercise sufficient control over the controlled legal person;
- Activity: the controlled legal person must carry out the essential part of its activities for its owner authority;
- Private capital: there is no direct private capital participation in the controlled legal person.

Second, the 2014 Directive permits the establishment, in certain circumstances, of co-operation arrangements between contracting authorities without the need to follow EU procurement rules. The arrangements must be genuinely co-operative and non-commercial in nature.

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A similar situation has been explicitly recognised in the utilities sector for a number of years,where it is often the case that a contracting entity owns a number of subsidiaries.

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There was no equivalent provision in the 2004 Public Sector Directive prior to the adoption of the 2014 Directive. This meant that, under the 2004 Public Sector Directive, where there was a contract, the award of that contract, whether or not it was to a wholly-owned company, would be subject to the procedural rules.

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Background to the new provisions in article 12 of the 2014 Directive: In order to understand the new provisions in article 12, it is helpful to know some of the background as well as the thinking of the ECJ. The ECJ first considered the issuing of an “in-house” award in detail in the Teckal case. The ECJ held that it was sufficient to apply the arrangements set out in the directive “if the contract was concluded between, on the one hand, a local authority and, on the other, a person legally distinct from that local authority”.

Deleted: This situation has been confirmed by the European Court of Justice (ECJ). The ECJ also provides an exemption, however. In the rather important case of *Teckal*

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2.2.2 When does a contract arise?

▼When a new contract is awarded, there is normally little difficulty in identifying it. Sometimes, however, it is not obvious.▼ For example, an existing contract might be modified during its execution. As a result, new obligations arise between the parties and may change the terms of the original contract.

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If the result of the modifications is so extensive that the modified contract is fundamentally different from the original contract,.....

Therefore a simple extension, renewal or other modification might not be permitted if it is made without competition.

The practical difficulty will be to determine when a modification in the contract will give rise to a new contract, thus resulting in an obligation to apply the directives, and when it will not. The directives were silent on the issue until the adoption of the 2014 directives. The 2014 directives codified ECJ case law, as described below, concerning modifications of public

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[contracts and introduced provisions directly governing existing contracts and framework agreements. The purpose of the provisions is to describe the changes that require a new contract award procedure \(substantial modifications\) and the changes that do not require such a new procedure \(permitted modifications\). For more information on modifications of contracts during their term, see Module G1.](#)

In some cases, the Directives [also allow the use of options](#).

Deleted: do provide a solution

The case of contract [modifications](#) (i.e. where the contract needs to be [modified](#) during its execution) is less clear. Even where [modifications](#) are anticipated, as is often the case with works contracts, there will still be a question of whether those [modifications](#) are acceptable as part of the original contract or whether they go beyond the terms of the original contract and become, in effect, a new contract.

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The issue came before the ECJ in the case of *Presstext* (Case C-454/06 *Presstext v Austria* [2008] ECR I-4401), where the ECJ provided a number of indicators:

- Amendments [\(the text of the judgement uses the term amendment and the 2014 Directive uses the term modification\)](#) to the provisions of a public contract

2.2.3 Contracts and concessions

A concession is

- [a contract for pecuniary interest concluded in writing;](#)
- [the means by which one or more contracting authorities or contracting entities entrust the execution of works or the provision and management of services to one or more economic operators;](#)
- [the consideration for which consists either solely of the right to exploit the works or services that are the subject of the contract or of that right together with payment.](#)

Deleted: of the same type as the contracts defined in the Directives except that consideration for the works or services to be carried out, for example, consists either solely in the right to exploit the work or service or in this right together with payment

[Both works and services concessions are dealt with comprehensively in the 2014 Concessions Directive. The 2004 Public Sector Directive, however, dealt with works concessions only, while services concessions, even though subject to general principles of the Treaty, were explicitly excluded from its scope.](#)

Deleted: Only public works concessions are dealt with comprehensively in the Public Sector Directive. Article 17 of the Public Sector Directive now explicitly excludes coverage of public services concessions. The general principles of the Treaty continue to apply, however.

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2.2.4 Framework agreements and contracts

Deleted: Case note: ¶ The general Treaty principles, including the principles of non-discrimination and transparency, must be applied to the award of public services concessions. ¶ (ECJ Case C-275/98 *Unitron* [1999] ECR I-8291)

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Under article [33\(1\)](#), a framework agreement is an agreement between [one or more](#) contracting [authorities](#) and one or more [economic operators](#), the purpose of which is to establish the terms – in particular with regard to prices and, where appropriate, the quantity envisaged – governing the contracts to be awarded during a given period, [in particular with regard to price and, where appropriate, the quantity envisaged](#).

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∇ Whether there is a contract or not will depend on national law. ∇ [Indeed, the 2014 Directive in recital 61 confirms this position by stating that contracting authorities should not be obliged under that framework agreement, pursuant to this directive, to procure works, supplies or services that are covered by a framework agreement.](#)

∇ The Directives further provide that contracting entities may not misuse framework agreements..... ∇ The duration of framework agreements is limited to four years, [or eight years in the case of utilities](#), except in exceptional circumstances justified by the subject of the framework agreement.

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2.3 WORKS CONTRACTS

Works contracts are defined as those contracts that [have as their object](#):

- [either the execution or both the execution and design of works related to one of the activities referred to in Annex II](#); or
- [the execution or both the design and execution of a work](#); or
- the realisation, by whatever means, of work corresponding to the requirements specified by the contracting [authority exercising a decisive influence on the type or design of the work](#).

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Where design and construction are awarded separately, the design services would be a [service contract](#) or could, alternatively, be awarded by means of a design contest.

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For the second [and third](#) part of the definition, a ‘work’ is the outcome of

2.3.1 Building and civil engineering activities

Annex [II](#) of the [2014 Directive](#) (Annex [I](#) of the [2014 Utilities Directive](#), [Annex I of the 2014 Concessions Directive](#)) gives a list of professional activities as set out in the general industrial classification of economic activities within the European Communities (NACE). The Common Procurement Vocabulary (CPV) is often recommended for use in the contract award notices, and the annexes to the [2014 Directives](#) provide for each NACE code a corresponding reference to the relevant CPV code, even though the CPV is not binding. [Annex II](#) of the [2014 Directive](#) explicitly provides that, in the event of any difference of interpretation between the CPV and the NACE, the NACE nomenclature will apply.

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2.3.2 Realisation of a work by whatever means

The management contractor would be obliged to follow the procurement rules when awarding contracts for works since it would be providing work corresponding to the requirements specified by the contracting authority [exercising a decisive influence on the type or design of the work](#). The contracting entity would obtain such work “by whatever means”.

This provision concerning the realisation, by whatever means, of work corresponding to the requirements specified by the contracting authority [exercising a decisive influence on the type or design of the work](#) also covers other arrangements that are common among developers,

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2.3.3 Works and services concessions

As indicated above, [both works and services concessions](#) are covered by the [2014 Concessions Directive](#).

2.3.3.1 Definition

A ‘works concession’ is [“a contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrust the execution of works to one or more economic operators the consideration for which consists either solely of the right to exploit the works that are the subject of the contract or of that right together with payment”](#).

A ‘services concession’ is [“a contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrust the provision and the management of services other than the execution of works to one or more economic operators, the consideration for which consists either solely of the right to exploit the services that are the subject of the contract or of that right together with payment.”](#)

In considering ‘exploitation’, significant weight will be given to the element of risk transfer between the public authority and the concessionaire. The absence of risk transfer will suggest the existence of a contract subject to the full rigour of the [2014 Directive or the 2014 Utilities Directive](#) rather than a concession subject to the [2014 Concessions Directive](#).

The [2014 Concessions Directive](#) clarifies that the concept of a concession requires the transfer of an operating risk to the concessionaire in exploiting those works or services, encompassing demand risk or supply risk or both. 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 that are the subject matter of the concession.

The [2014 Concessions Directive](#) does not define what is to be understood as “normal operating conditions”. However, the part of the risk transferred to the concessionaire must result in the concessionaire being exposed to the vagaries of the market. The operating risk must stem from factors that are beyond the control of the parties. Risks linked to bad management, contractual defaults by the concessionaire, or instances of *force majeure* are

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[not decisive for the purpose of classifying the works/services as a concession, since those risks are inherent in every contract.](#)

[As a consequence, where sector-specific regulations eliminate the risk by providing a guarantee to the concessionaire of breaking even in terms of the investments and costs incurred for operating the concession, the contract cannot qualify as a concession. Equally, a contract where the contractor is remunerated on the basis of regulated tariffs that are calculated in such a way as to cover all costs and investments borne by the contractor for providing the service does not qualify as a concession but rather as a public contract.](#)

Delete all of the text in this box. Deleted text not shown.

[The 2014 Concessions Directive stipulates that the duration of a concession must be limited, although it does not lay down a maximum duration. It does clarify that the contract period is not to be unduly lengthy, with a view to preventing market closure and restriction of competition. Concessions of a very long duration are likely to result in the closure of the market and may thereby hinder the free movement of services and the freedom of establishment. Therefore, for concessions lasting more than five years, the maximum duration of the concession must not exceed the estimated time that a concessionaire could reasonably be expected to take in order to recoup the investments made in operating the works or services together with a return on invested capital, taking into account total investment, the asset's capacity to generate revenue, user tariffs, and the asset's operation and maintenance costs.](#)

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2.3.3.2 Procedure for the award of [works and services concessions](#)

[Unlike the 2014 Directive, the 2014 Concessions Directive does not set out specific procedures to be followed when awarding a concession. Member States are not hindered from making use of the procedures allowed by the 2014 Directive. The 2014 Concessions Directive establishes a basic framework reflecting the general principles and procedural guarantees derived from ECJ case law aimed at ensuring transparency and equal treatment. Minimum co-ordination should be sufficient, from the view of the EU legislator, to achieve the objectives pursued by the 2014 Concessions Directive. In whatever way or form contracting authorities or contracting entities choose to organise the procedure leading to the choice of the concessionaire, they are bound to respect at all times the principles of equal treatment, non-discrimination and transparency *vis-à-vis* economic operators.](#)

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Deleted: The Directive sets out a special procedure for the award of a works concession contract by a contracting authority. The special procedure imposes fewer detailed requirements on the contracting authority than does any of the four main competitive procedures.

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2.3.3.3 Subcontracting by concessionaires

[The 2014 Concessions Directive contains specific rules on subcontracting, which are similar to those provided in the 2014 Directive. It allows or requires contracting authorities to ask a tenderer to indicate any share of the concession that it may intend to subcontract and any proposed subcontractors. The concessionaire is required to provide information concerning the subcontractors \(name, contact details, legal representative\) and of any changes in subcontractors working at a facility under the direct oversight of the contracting authority. This requirement, which applies for works concessions and services concessions, must be fulfilled following the award of the contract and at the latest at the beginning of the](#)

Deleted: The Directive contains specific rules on subcontracting, and contracting authorities have the option of either requiring a concessionaire to subcontract a specified percentage of the contract to a third party or of requesting information from economic operators participating in the tender process to specify the percentage of the contract that they would subcontract if awarded the contract.¶

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execution of the contract. Contracting authorities have discretion to extend these requirements, for example to subcontractors further down the subcontracting chain.

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Note: Directive 2014/24/EU no longer contains provisions governing the award of contracts by concessionaires to third parties, and this is not covered in the Directive 2014/23/EU or elsewhere.

Delete all of section 2.3.3.4. Deleted text not shown below.

2.3.4 Subsidised works or services contracts

The 2014 Directive makes special provision in respect of works or services contracts that are subsidised by contracting authorities for more than 50%.

2.3.4.1 Contracts subsidised by more than half

In such cases, contracting authorities providing subsidies are required to ensure compliance with the directive whenever the contract is awarded by one or more entities other than themselves or where they award that contract for and on behalf of other entities.

This provision only applies to certain contracts:

- works contracts (falling within the definition of the civil engineering activities contained in Annex I to the 2014 Directive)

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Deleted: ; second, in respect of design and construction contracts concluded in the context of a public housing scheme

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Note: Directive 2014/24/EU no longer contains provisions governing the award of subsidised housing schemes.

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2.4 SUPPLIES CONTRACTS

‘Public supply contracts’ are defined in article 2(1)(8) of the 2014 Directive as contracts having as their object the purchase, lease, rental or hire purchase of products, with or without the option to buy. In addition, the delivery of such products may include siting and installation operations, as an incidental matter.

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2.5 SERVICES CONTRACTS

The term ‘services contracts’ essentially refers to contracts other than works contracts that have as their object the provision of services. A number of services are specifically excluded, mainly because they are not amenable to purchase through the rules provided by the directives. These services are described in Module D4.

Deleted: However, further distinction is made in the relevant annexes between what may be called ‘priority services’ (Annex IIA of the Public Sector Directive) and ‘non-priority’ services (Annex IIB). A distinction is therefore made in the 2014 Directive between “light regime services” (social and other specific services regulated in Articles 74 to 76 of the 2014 Directive and fully regulated services

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The 2014 Directives abolished the distinction between priority (Part A) and non-priority (Part B) services. All services are fully regulated unless they are ‘light regime services’ or fall within one of the exclusions.

The light regime services are listed in Annex XIV of the 2014 Directive by reference to the relevant CPV code. See section 2.5.3 below.

2.5.1 Light regime

*Delete all of text in 2.5.1 and replace with new text below.
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The results of the 2011 ‘Evaluation Report: Impact and Effectiveness of EU Public Procurement Legislation’ suggested that the exclusion of certain services from the full application of Directive 2004/18/EC should be reviewed. As a result, the full application of the 2014 directives has been extended to a number of services.

Certain categories of services, namely services known as services to the person, such as specific social, health and educational services, are provided within a particular context that varies widely amongst Member States due to different cultural traditions and by their very nature they have a limited cross-border dimension.

A specific light regime was therefore established in the 2014 directives for awarding contracts for those services, with the threshold of 750 000 EUR and above (1 000 000 EUR in the case of utilities), which is higher than the threshold that applies to fully regulated services.

The way in which the procurement process is run is not regulated in detail in the directive. Given the importance of the cultural context and the sensitivity of these services, Member States are given wide discretion to organise the choice of the service providers in the way that they consider to be the most appropriate. Member States are nevertheless required, in implementing their own rules on procurement processes for light regime services contracts, to comply with transparency and equal treatment principles and some other limited provisions. These provisions are established in articles 74 to 76 of the directive:

- Light regime services contracts equal or above the threshold must be advertised in the Official Journal of the European Union (OJEU), using standard form notices.
- All contracting authorities may use either a Contract Notice to advertise in the OJEU or an enhanced Prior Information Notice, which can be published a year or more in advance and which can cover multiple contracts.
- Contracting authorities must publish a contract award notice in the OJEU by using a standard form. They have the option to group notices together and publish them quarterly within 30 days of the end of each quarter.
- Rules must allow contracting authorities to take into account the specificities of the services in question.
- Rules shall ensure that contracting authorities take into account the need to ensure the quality, continuity, accessibility, affordability, availability and

Deleted: The services covered are defined by reference to the United Nations' Central Product Classification (CPC), and the annexes referred to above set out the services by name, together with the relevant CPC category. See section 2.5.3 below.

Deleted: Other classifications are also used for various purposes: for example, the Classification of Products by Activity (CPA) and, more recently, the Common Procurement Vocabulary (CPV). Only the CPC reference is binding. Furthermore, the annexes state that in the event of any difference of interpretation between the CPV and the CPC, the CPC nomenclature will apply.

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comprehensiveness of the services, the specific needs of various categories of users including disadvantaged and vulnerable groups, the involvement and empowerment of users, and innovation.

Member States may provide that the choice of the service provider shall be made on the basis of the tender presenting the best price-quality ratio, taking into account quality and sustainability criteria for light regime services.

Such services with values below the threshold will typically not be of interest to providers from other Member States, unless there are concrete indications to the contrary, such as Union financing for cross-border projects.

PDF D-54

2.5.2 Not used

Note: The 2014 Directive does not refer to priority services (Part A services).
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2.5.2 Light regime services

Note: The 2014 Directive does not refer to non-priority services.
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The light regime services are listed in Annex XIV of the 2014 Directive by reference to the relevant CPV codes (Annex XVII of the 2014 Utilities Directive, Annex XIV of the 2014 Concessions Directive). The light regime services described in Annex XIV are as follows:

- Health, social and related services
- Administrative social, educational, health care and cultural services
- Compulsory social security services
- Benefit services
- Other community, social and personal services, including services furnished by trade unions, political organisations, youth associations and other membership organisation services
- Religious services
- Hotel and restaurant services
- Legal services, to the extent that they are not excluded pursuant to point (d) of article 10 [of the 2014 Directive]
- Other administrative services and government services
- Provision of services to the community
- Prison-related services, public security and rescue services, to the extent that they are not excluded pursuant to point (h) of article 10 [of the 2014 Directive]
- Investigation and security services
- International services
- Postal services
- Miscellaneous services

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Note: It is important to look very carefully at the individual CPV codes used in Annex XIV. These codes provide a detailed list of the light regime services falling under the general headings above. The CPV codes must be consulted in order to establish precisely which services are, or are not, classified as light regime services.

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2.5.3 Mixed contracts containing fully regulated services and light regime services

The 2014 Directives apply an explicit value test to services contracts that contain both fully regulated services and light regime services.

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In the case of mixed contracts consisting partly of fully regulated services and partly of light regime services, the main subject shall be determined in accordance with which of the estimated values of the respective services is the highest.

A contract will therefore be classified as a fully regulated services contract where the value of the fully regulated services contained in the contract is greater than the value of the light regime services.

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In other cases, it will be a light regime services contract, so that a contract in which the share of light regime services is equal to or greater in value than the share of fully regulated services will be a light regime services contract.

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There is no obligation to separate out the fully regulated and light regime services and to award them as separate contracts, which could lead to a contract for largely light regime services, even if it contained a large proportion (say 49%) of fully regulated services, being awarded as a contract for light regime services. Such a separation of services could also turn out in the opposite way, so that the value of fully regulated services would be greater than the value of light regime services. The result would be the full application of the procedures of the 2014 Directives to even the light regime services.

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This provision cannot be used, however, to avoid the application of the Directives.

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Therefore, when assessing whether fully regulated and light regime services have been packaged together correctly or split up,

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2.7 MIXED CONTRACTS

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The distinctions are relevant in the case of mixed supplies and services contracts, notably where the services included are light regime services. If the contract can be categorised as a light regime services contract, then it would be only lightly regulated, in accordance with the light regime provisions, even if it also contained supplies.

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[Contracts that have as their subject two or more types of procurement \(works, services or supplies\) shall be awarded in accordance with the provisions applicable to the type of procurement that characterises the main subject of the contract in question.](#)

PDF D-56

2.7.1 Supplies/services

▼The contract will be considered a services contract where the value of the services performed is greater than the value of the products supplied. ▼ Where the value is equal, [the contract shall be awarded in accordance with provisions applicable to the type of procurement that characterises the main subject of the contract in question.](#)

The definition makes no distinction between [fully regulated services](#) and [light regime services](#), with the effect that, where the value of [light regime services](#) in a mixed contract is greater than the value of supplies, the whole contract will be treated as a contract for [light regime services](#).

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2.7.2 Works/services

In the case of works and services, the [directives](#) do not provide for a value test, as above, but include a test based on the [type of procurement that characterises the main subject of the contract](#), as opposed to considerations that are merely incidental to that [subject](#).

A contract having as its [subject](#) services (either [fully regulated](#) or [light regime services](#)) and including activities within the definition of 'works', [where the works are not the main subject of the contract](#), is to be considered to be a service contract.

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[The requirement of the 2014 Directive to identify the type of contract in accordance with the provisions applicable to the type of procurement that characterises the main subject of the contract in question is derived from the 'principal object' test used in the 2004 Directive.](#)

Insert new Paragraph 2.7.3 below after paragraph 2.7.2

[2.7.3. Mixed contracts that have as their subject matter procurement covered by the 2014 Directive and procurement covered by other legal regimes](#)

[Article 3 of the 2014 Directive introduces new rules governing the award of mixed contracts where the subject matter is covered by the 2014 Directive as well as other legal regimes \(other directives, or outside the scope of any directive\). Here everything depends on whether the different parts of a given contract are objectively separable or not.](#)

[If the different parts of a given contract are objectively separable, the contracting authority has two options:](#)

- [\(1\) to award separate contracts for separate parts, or](#)
- [\(2\) to award a single contract.](#)

[When the contracting authority 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.](#)

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When the contracting authority chooses to award a single contract, the 2014 Directive is applicable to such a mixed contract, irrespective of the value of the parts that would otherwise fall under a different legal regime and irrespective of which legal regime those parts would otherwise have been subject to.

In the case of a mixed contract containing elements of supply, works and services contracts and of concessions, such a contract shall be awarded in accordance with the 2014 Directive. This application of the directive, however, is provided that the estimated value of the part of the contract that constitutes a contract covered by that directive is equal to or greater than the relevant threshold set out in the directive (article 4).

In the case of a contract that has as its subject both procurement covered by the 2014 Directive and procurement for the pursuit of an activity that is subject to the 2014 Utilities Directive, the applicable rules are determined, notwithstanding the rules described above, pursuant to the 2014 Utilities Directive (see note below).

If the different parts of a given contract are objectively not separable, the applicable legal regime should be determined on the basis of the main subject of that contract.

Article 16 of the 2014 Directive applies in the case of mixed contracts that have as their subject matter procurement covered by that directive as well as procurement covered by article 346 TFEU or by the Defence Directive (2009/81/EC).

In the case of such mixed contracts, once again everything depends on whether the different parts of a given contract are objectively separable or not. If they are objectively separable, the contracting authority has two options:

- (1) to award separate contracts for the separate parts, or
- (2) to award a single contract.

If the contracting authority decides to award separate contracts for the separate parts, the application of the relevant legal regime depends on the characteristics of a given part.

On the other hand, if the contracting authority opts for one single contract, then the applicable legal regime is determined on the basis of the following criteria:

- part of contract is subject to article 346 TFEU – the contract may be awarded without applying the 2014 Directive, provided that the award of a single contract is justified for objective reasons;
- part of a contract is covered by the Defence Directive – the contract may be awarded in accordance with the provisions of the Defence Directive, provided that the award of a single contract is justified for objective reasons.

The decision to award a single contract shall not, however, be taken for the purpose of excluding contracts from the application of either the 2014 Directive or the Defence Directive.

If the parts of the mixed contract are objectively not separable, then it depends on whether the contract includes elements that are subject to article 346 TFEU – if so, then it may be awarded without the application of the 2014 Directive. If there are no elements subject to article 346 TFEU, the Defence Directive may be applicable. In either case, the 2014 Directive is not applied.

Note: Mixed contracts – 2014 Utilities Directive

Mixed procurement covering the same activity

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Article 5 of the 2014 Utilities Directive establishes rules governing the award of mixed contracts where the subject matter is covered by the 2014 Utilities Directive as well as other legal regimes (other directives, or outside the scope of any directive). Here, everything depends on whether the different parts of a given contract are objectively separable or not.

If the different parts of a given contract are objectively separable, the contracting entity has two options:

- (1) to award separate contracts for the separate parts, or
- (2) to award a single contract.

Where the contracting entity chooses to award separate contracts for the 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.

Where the contracting entity chooses to award a single contract, the 2014 Utilities Directive is applicable to such a mixed contract, irrespective of the value of the parts that would otherwise fall under a different legal regime and irrespective of which legal regime those parts would otherwise have been subject to.

In the case of a mixed contract containing elements of supplies, works and services contracts and of concessions, such a contract shall be awarded in accordance with the 2014 Utilities Directive, but provided that the estimated value of the part of the contract that constitutes a contract covered by that directive is equal to or greater than the relevant threshold set out in the directive (article 15).

If the different parts of a given contract are objectively not separable, the applicable legal regime should be determined on the basis of the main subject of that contract.

Procurement covering several activities

The 2014 Utilities Directive in article 6 establishes rules governing the award of mixed contracts that are intended to cover several activities.

In such cases, contracting entities may choose:

- 1. to award separate contracts for the purposes of each separate activity, or
- 2. to award a single contract.

Where contracting entities choose to award separate contracts, 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.

Where contracting entities choose to award a single contract, the following rules apply:

- 1. A contract that is intended to cover several activities shall be subject to the rules applicable to the activity for which it is principally intended.
- 2. In the case of a contract for which it is objectively impossible to determine the activity for which the contract is principally intended, the applicable rules shall be determined in the following way:

(a) the contract shall be awarded in accordance with the 2014 Directive, if one of the activities for which the contract is intended is subject to the 2014 Utilities Directive and the other activity to the 2014 Directive;

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[\(b\) the contract shall be awarded in accordance with the 2014 Utilities Directive, if one of the activities for which the contract is intended is subject to the 2014 Utilities Directive and the other activity to the 2014 Concessions Directive;](#)

[\(c\) the contract shall be awarded in accordance with the 2014 Utilities Directive, if one of the activities for which the contract is intended is subject to the 2014 Utilities Directive and the other activity is not subject to the 2014 Utilities Directive, the 2014 Directive or the 2014 Concessions Directive.](#)

[However, the choice between awarding a single contract or awarding a number of separate contracts must not be made with the objective of excluding the contract or contracts from the scope of application of the 2014 Utilities Directive or, where applicable, the 2014 Directive or the 2014 Concessions Directive.](#)

2.7.4 Works/supplies

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SECTION 3 - EXERCISES

Note on amendments to Exercises: the Trainer’s Manual has not been updated to reflect the amendments below.

Delete all of EXERCISE 3. Deleted text not shown below

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SECTION 4 - CHAPTER SUMMARY

SELF-TEST QUESTIONS

Note on amendments to Self-Test Questions: the Trainer’s Manual has not been updated to reflect the amendments below.

Self-test questions

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14. . In the case of public works concessions, does the Directive apply only to the award of the concession?

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18. . What is the significance of the separation of services into priority and non-priority services? ¶
19. . Does the categorisation of non-priority services mean that competition is never possible for such services? ¶
20. . What rules apply when a services contract includes both priority and non-priority services?

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SECTION 2 - NARRATIVE

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2.1. INTRODUCTION

In addition, article 7 of the 2014 Directive provides an exclusion for those public contracts that are otherwise covered by the Utilities Directive or for public contracts that, although covered by the 2014 Utilities Directive in principle, are excluded from the provisions of that directive.

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2.2.1 Defence procurement

The 2014 Directive applies to “public contracts awarded in the fields of defence and security, with the exception of contracts to which Directive 2009/81/EC applies and of contracts to which Directive 2009/81/EC does not apply”. This provision does not change, however, the substance of the exclusion. Directive 2009/81 applies essentially the same definitions to the contracts that are excluded from the 2014 Directive. It merely provides an alternative procurement regime so that the procurement of such products is no longer entirely excluded from the scope of EU procurement rules and principles.

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The exclusion thus applies (and Directive 2009/81 now applies) to contracts awarded by contracting authorities in the field of defence, where the products to be supplied are subject to the provisions of article 346(1)(b) [formerly article 296(1)(b)] of the Treaty.

The provision does not apply to works or services, although it probably applies to such activities as repair and maintenance services *connected with* the procurement in question, and only to those products that are specifically subject to article 346(1)(b).

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In addition, article JII of the GPA states that the agreement does not prevent a party from....
“

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2.2.2 Contracts requiring secrecy measures

Where the contracts are not otherwise exempted under Directive 2009/81, the 2014 Directives do not apply to public contracts to the extent that the protection of the essential security interests of a Member State cannot be guaranteed by less intrusive measures. Such measures may include, for instance, imposing on economic operators requirements aimed at protecting the confidential nature of information that the contracting authority makes available in a contract award procedure.

- Deleted: The Directives do not apply to public contracts (i) that are declared secret, or (ii) the execution of which must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in the member state concerned, or (iii) when the protection of the essential interests of that state's security so requires.

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[Furthermore, in conformity with article 346\(1\)\(a\) TFEU, the 2014 directives do not apply to public contracts that are not otherwise exempted under Directive 2009/81, to the extent that the application of the 2014 directives would oblige a Member State to provide information the disclosure of which it considers to be contrary to the essential interests of its security.](#)

[According to that Treaty article, no Member State shall be obliged to provide information the disclosure of which it considers to be contrary to the essential interests of its security.](#)

[Finally, where the procurement and performance of the public contract are declared to be secret or must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in a Member State, the 2014 directives do not apply. This exclusion is allowed only in the case where the Member State has determined that the essential interests concerned cannot be guaranteed by less intrusive measures. Such measures may include, for instance, imposing on economic operators requirements aimed at protecting the confidential nature of information that the contracting authority makes available in a contract award procedure.](#)

2.2.3 Contracts governed by other rules

The [2014 directives and the 2014 Concessions Directive](#) do not apply to contracts [that the contracting authority or entity is obliged to award in accordance with various procurement procedures established by any of the following:](#)

- [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 their subdivisions](#) and covering works, supplies or services intended for the joint implementation or exploitation of a project by the signatory states;
- [an international organisation.](#)

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[The 2014 directives and the 2014 Concessions Directive do not apply to contracts that are awarded in accordance with procurement rules provided by an international organisation or an international financial institution where the contracts are fully financed by that organisation or institution. In the case of public contracts co-financed for the most part by an international organisation or an international financial institution, the parties shall agree on applicable procurement procedures.](#)

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In the case of defence procurement, the public contracts [subject to Directive 2009/81 benefit from this exclusion](#) by virtue of article [12](#) of that [directive](#).

2.3 EXEMPTIONS DUE TO THE NATURE OF THE CONTRACT

2.3.1 Contracts for the acquisition of land

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The [2014 directives and the 2014 Concessions Directive](#) cover any other associated services, such as contracts for the sale of land or property on a fee basis (estate agency contracts).

In the case of defence procurement, the public contracts subject to Directive 2009/81 benefit from this [exclusion](#) by virtue of article [13\(e\)](#) of that directive.

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- Programme material and broadcasting time**

The [2014 Directive and the 2014 Concessions Directive](#) (which is not relevant in the utilities sector) excludes contracts for the acquisition, development, production or co-production of programme material [intended for audio-visual media services or radio media services that are awarded by audio-visual or radio media service providers](#).

The purpose of this exclusion is explained in recital 23 of the 2014 Directive.

“The awarding of public contracts for certain audio-visual and radio media services by media providers should allow aspects of cultural or social significance to be taken into account, which renders the application of procurement rules inappropriate. For those reasons, an exception should therefore be made for public service contracts, awarded by the media service providers themselves, for the purchase, development, production or co-production of off-the-shelf programmes and other preparatory services, such as those relating to scripts or artistic performances necessary for the production of the programme. It should also be clarified that the exclusion should apply equally to broadcast media services and on-demand services (non-linear services). However, that exclusion should not apply to the supply of technical equipment necessary for the production, co-production and broadcasting of such programmes.”

In principle, the contracting-out of audio-visual production, for example for information, training or advertising purposes, would be covered, but it is granted an exemption insofar as it is connected with the activities of audio-visual or radio media service providers that are public authorities.

The [2014 directives](#) (in this case it is relevant for the utilities sector as well) and the [2014 Concessions Directive](#) also [exclude contracts for broadcasting time or programme provision that are awarded to audio-visual or radio media service providers](#).

The provision of [broadcasting time or programmes](#) is also, in principle, covered by the [directives](#), but it is again excluded from the scope of the [directives insofar as it is assumed by audio-visual or radio media service providers](#), since the need to obtain broadcasting may have implications [with regard to](#) public security or health protection.

Insert at end of paragraphs on Broadcasting material and time

Note: Definitions provided by the 2014 Directive
For the purpose of this exclusion, the following definitions apply.

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- Deleted:** also
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- Deleted:** This covers the production of audio-visual works, such as films, videos and sound recording, including for advertising purposes, and the purchase of services for the purchase, development, production or co-production of off-the-shelf programmes as well as other preparatory services, such as those relating to the preparation of scripts or to artistic performances necessary for the production of programmes.
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- Deleted:** broadcasting time (transmission by air, satellite or cable, now defined as any transmission and distribution using a form of electronic network)
- Deleted:** In principle, the contracting-out of audio-visual production, for example for information, training or advertising purposes, would be covered, but it is granted an exemption *insofar* as it is connected with the broadcasting activities of broadcasting organisations that are public authorities. ¶
The exemption is justified on the grounds of the cultural and social significance of programming material, so that national broadcasters remain...
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'Audio-visual media services' means:

(i) a service, as defined by articles 56 and 57 of the Treaty on the Functioning of the European Union, that is under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programmes to the general public, in order to inform, entertain or educate, by means of electronic communication networks, within the meaning of point (a) of article 2 of Directive 2002/21/EC. Such an audio-visual media service is either a television broadcast, as defined in point (e) of this paragraph, or an on-demand audio-visual media service, as defined in point (g) of this paragraph;

(ii) audio-visual commercial communication.

'Media service provider' means the natural or legal person having editorial responsibility for the choice of the audio-visual content of the audio-visual media service and determining the manner in which it is organised.

'Programme' means a set of moving images with or without sound constituting an individual item within a schedule or catalogue established by a media service provider, the form and content of which are comparable to the form and content of television broadcasting. Examples of programmes include feature-length films, sports events, situation comedies, documentaries, children's programmes and original drama.

'Programme' shall also include radio programmes and radio programme materials.

'Programme material' has the same meaning as 'programme'."

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- **Arbitration and conciliation services**

The recitals of the 2014 directives state that arbitration and conciliation services and other similar forms of alternative dispute resolution are usually provided by bodies or individuals agreed on, or selected, in a manner that cannot be governed by procurement rules. The 2014 directives and the 2014 Concessions Directive do not apply to service contracts for the provision of such services, whatever their denomination under national law. The parties to such disputes would, in any event, want to select arbitrators and conciliators on the basis of their competence and experience and within relatively short time frames.

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*Insert new bullet point after **Arbitration and conciliation services** on page PDF D-70 and before **Certain financial services** on page PDF D-71*

- **Certain legal services**

Recital 25 of the 2014 Directive states that "a certain number of legal services are rendered by service providers that are designated by a court or tribunal of a Member State, involve representation of clients in judicial proceedings by lawyers, must be provided by notaries or are connected with the exercise of official authority. Such legal services are usually provided by bodies or individuals designated or selected in a manner which cannot be governed by procurement rules, such as for instance the designation of State Attorneys in certain Member States."

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As a result, the following legal services are excluded from the 2014 directives and the 2014 Concessions Directive:

(i) legal representation of a client by a lawyer in:

– an arbitration or conciliation held in a Member State, a third country or before an international arbitration or conciliation instance; or

– 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 in preparation of any of the proceedings referred to in point (i) of this point or 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;

(iii) document certification and authentication services that 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 in the Member State concerned that are connected, even occasionally, with the exercise of official authority.

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- **Certain financial services**

The 2014 directives and the 2014 Concessions Directive exclude contracts for financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments, central bank services, and operations concluded with the European Financial Stability Facility and the European Stability Mechanism. This exclusion refers to contracts that constitute transactions concerning government bonds, for example, and activities related to public debt management.

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'Financial instrument' means those instruments specified in Section C of Annex I of Directive 2004/39/EC (please refer to that directive for the list of specified instruments).

Note: The European Financial Stability Facility and the European Stability Mechanism

The European Financial Stability Facility (EFSF) was created as a temporary crisis resolution mechanism by the euro area Member States in June 2010. The EFSF has provided financial assistance to Ireland, Portugal and Greece. The assistance was financed by the EFSF through the issuance of bonds and other debt instruments on capital markets.

A permanent rescue mechanism, the European Stability Mechanism (ESM), started its operations on 8 October 2012. The ESM is currently the sole mechanism for responding to new requests for financial assistance by euro area Member States. It has provided loans to Spain and Cyprus.

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The EFSF will not provide financial assistance to any additional countries. The final, ongoing EFSF assistance programme (for Greece) has been extended to 28 February 2015. However, even after this date, the EFSF will continue to operate in order to:

- receive loan repayments from beneficiary countries;
- make interest and principal payments to holders of EFSF bonds;
- roll over outstanding EFSF bonds, as the maturity of loans provided to Ireland, Portugal and Greece is longer than the maturity of bonds issued by the EFSF.

The mission of both the EFSF and ESM is to safeguard financial stability in Europe by providing financial assistance to countries in the euro area. The two institutions share the same staff and offices, located in Luxembourg.

Also excluded are loans, whether or not they are in connection with the issue, sale, purchase or transfer of securities or other financial instruments.

- **Research and development contracts**

The 2014 directives and the 2014 Concessions Directive apply only to service contracts for research and development services that are covered by CPV codes 73000000-2 to 73120000-9, 73300000-5, 73420000-2 and 73430000-5, provided that both of the following conditions are fulfilled:

- the benefits accrue exclusively to the contracting authority for its use in the conduct of its own affairs, and
- the service provided is wholly remunerated by the contracting authority.

All other research and development services contracts are excluded from the directives. This provision means that research and development contracts of an altruistic nature, which are for the benefit of society as a whole, are excluded. The directive will apply, on the other hand, where the benefits accrued exclusively to the contracting authorities themselves.

The recitals to the directives state that the co-financing of research and development (R&D) programmes by industry sources should be encouraged. Recital 35 to the 2014 Directive states: "It should consequently be clarified that this Directive applies only where there is no such co-financing and where the outcome of the R&D activities go to the contracting authority concerned. This should not exclude the possibility that the service provider, having carried out those activities, could publish an account thereof as long as the contracting authority retains the exclusive right to use the outcome of the R&D in the conduct of its own affairs. However, fictitious sharing of the results of the R&D or purely symbolic participation in the remuneration of the service provider should not prevent the application of this Directive." The same explanation is provided in recital 42 to the 2014 Utilities Directive.

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Deleted: Also included in the derogation are contracts awarded to financial intermediaries to arrange the above financial transactions, as these services are specifically excluded from the scope of investment services (category 6 of the list of priority services – see module D3 for an explanation of priority and non-priority services). The exclusion is based on the fact that such services are closely connected with national monetary policies, tend to be heavily regulated, and are generally reserved to a small number of qualified and registered undertakings. Transactions are also carried out within very short time-limits. ¶

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The negotiated procedure without publication of a contract notice may be used [with regard to](#) supply contracts when the products involved are manufactured solely for the purpose of research, experimentation, study or development. See [Module C4](#) for further information on the availability and use of [this](#) procedure.

Deleted: The negotiated procedure may be used with prior publication of a contract notice in respect of works that are performed solely for the purpose of research, testing or development and not with the aim of ensuring profitability or recovering research and development costs.

Insert after research and development contracts and before paragraph 2.4. Reserved contracts

- **[Electronic communications](#)**

[The 2014 Directive and the 2014 Concessions Directive, which is not relevant in the utilities sector, excludes contracts for the principal purpose of permitting the contracting authorities to provide or exploit public communications networks or to provide to the public one or more electronic communication services.](#)

[Following the liberalisation of the electronic communication sector and effective market competition in that sector, public contracts in that area are excluded from the scope of the Directives insofar as they are intended primarily to allow contracting authorities to exercise certain activities in the electronic communication sector.](#)

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[Note: Definitions](#)

[For the purpose of this exclusion, the following definitions apply.](#)

[‘Public communication network’ means an electronic communication network used wholly or mainly for the provision of publicly available electronic communication services.](#)

[‘Electronic communication service’ means a service normally provided for remuneration that consists wholly or mainly in the conveyance of signals on electronic communication networks, including telecommunication services and transmission services in networks used for broadcasting, but excludes services providing, or exercising editorial control over, content transmitted by using electronic communication networks and services; it does not include information society services, as defined in article 1 of Directive 98/34/EC, that do not consist wholly or mainly in the conveyance of signals on electronic communication networks.](#)

- **[Civil defence, civil protection and danger prevention services](#)**

[The 2014 directives and the 2014 Concessions Directive do not apply to contracts for civil defence, civil protection, and danger prevention services that are provided by non-profit organisations or associations. The services that are excluded are covered by the following CPV codes:](#)

- [75250000-3 \(fire brigade and rescue services\),](#)
- [75251000-0 \(fire brigade services\),](#)
- [75251100-1 \(firefighting services\),](#)
- [75251110-4 \(fire prevention services\),](#)

D	PUBLIC PROCUREMENT LAW – SCOPE OF APPLICATION	PART 4	EXEMPTIONS
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- [75251120-7 \(forest firefighting services\)](#),
- [75252000-7 \(rescue services\)](#),
- [75222000-8 \(civil defence services\)](#),
- [98113100-9 \(nuclear safety services\)](#),
- [85143000-3 \(ambulance services\)](#), except patient transport ambulance services.

[The particular nature of non-profit organisations or associations would be difficult to preserve if the service providers had to be chosen in accordance with the procurement procedures set out in the directives. However, the exclusion should not be extended beyond what is strictly necessary. It is therefore explicitly set out that patient transport ambulance services are not excluded. Services that are covered by CPV code 85143000-3, consisting exclusively of patient transport ambulance services, are subject to the special regime set out for social and other specific services \(the ‘light regime’\). Consequently, mixed contracts for the provision of ambulance services in general would also be subject to the light regime if the value of the patient transport ambulance services were greater than the value of other ambulance services \(see Module D3 on mixed contracts\).](#)

- **[Public passenger transport services by rail or metro](#)**

[The 2014 directives generally do not apply to public passenger transport services by rail or metro.](#)

[Those services are excluded from the scope of the 2014 directives due to the fact that Regulation \(EC\) No. 1370/2007 of the European Parliament and the European Council covers public service contracts for public passenger transport by rail or metro. Insofar as the regulation leaves it to national law to depart from the rules laid down in that regulation, Member States are able to provide in their national law that public service contracts for public passenger transport services by rail or metro are to be awarded by a contract award procedure in accordance with their general public procurement rules.](#)

- **[Political campaign services](#)**

[The 2014 Directive and the 2014 Concessions Directive do not apply to political campaign services covered by CPV codes 79341400-0 \(advertising campaign services\), 92111230-3 \(propaganda film production\), and 92111240-6 \(propaganda videotape production\) when awarded by a political party in the context of an election campaign.](#)

[It should be noted that this exclusion by no means signifies that political parties have become contracting authorities under the directives. Quite the contrary, as clarified in recital 29 of the 2014 Directive:](#)

[It is appropriate to recall that the 2014 Directive applies only to contracting authorities of Member States. Consequently, political parties in general, not being contracting authorities, are not subject to its provisions. However, political parties in some Member States might fall under the category of bodies governed by public law.](#)

[The directives are applicable to political parties only to the extent that they are bodies](#)

D	PUBLIC PROCUREMENT LAW – SCOPE OF APPLICATION	PART 4	EXEMPTIONS
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governed by public law. In the overwhelming majority of Member States this is probably not the case.

In those Member States where political parties are bodies governed by public law and therefore subject to the rules of public procurement, the exclusion for certain services may be useful. Services such as propaganda film and videotape production are so inextricably connected to the political views of the service provider, when provided in the context of an election campaign, that the service providers are normally selected in a manner that cannot be governed by procurement rules.

2.3A Public contracts between entities within the public sector

Over a number of years the ECJ has developed two “in-house” or “public-public” exclusions to the EU procurement rules. Where these exclusions apply, contracting authorities are able to award contracts directly to other legal persons without following an EU procurement process. The two exclusions are often referred to as the “Teckal” and “Hamburg” exclusions, referring to the ECJ cases in which they were first established.

The 2014 directives and the 2014 Concessions Directive codified the Teckal and Hamburg exclusions. These exclusions are now covered by:

- Article 12 of the 2014 Directive, under the heading “Public contracts between entities within the public sector”;
- Article 28 of the 2014 Utilities Directive, under the heading “Contracts between contracting authorities”; and
- Article 17 of the 2014 Concessions Directive, under the heading “Concessions between entities within the public sector”.

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Situation 1 – “In-house” with sole control

The first situation is where a contracting authority sets up a separate legal person governed by private or public law and then awards contracts to that legal person – referred to as the “controlled legal person”. For the exception to apply, three requirements must be satisfied.

1. Control: The contracting authority must exercise over the legal person concerned a control that is similar to the control exercised by the contracting authority over its own departments.

Such control is deemed to exist where the contracting authority exercises a “decisive influence over both strategic objectives and significant decisions” of the controlled legal person. Such control may also be exercised by another legal person that is itself controlled in the same way by the contracting authority.

2. Activity: The controlled legal person must carry out the major part of its activities for its controlling contracting authority.

More than 80% of the activities of the controlled legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority. Sometimes a contracting authority will own more than one controlled legal person. The calculation of the

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+80% figure in that case also includes activities undertaken by a controlled legal person for another legal person(s) controlled by the same contracting authority.

3. Private capital participation: There must not be any “direct private capital participation” in a controlled legal person.

An exception to this general rule permits “non-controlling and non-blocking forms of private capital participation” (1) where it is required by national legislation, in conformity with the Treaty; and (2) where those participants do not exert a decisive influence on the controlled body.

Situation 2 – Contracts between controlled legal persons and “reverse in-house”

A specific provision permits one controlled legal person to award a contract to another controlled legal person where both are controlled by the same contracting authority.

The same provision also permits a controlled legal person to award a contract to its controlling contracting authority.

Situation 3 – “In-house” with joint control

New provisions also confirm the principle established in case law that there can be more than one controlling contracting authority. For the exclusion to apply, three requirements have to be satisfied:

1. Control: the contracting authority exercises jointly with other contracting authorities a control over the legal person concerned that is similar to the control that they exercise over their own departments.

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The exercise of joint control is deemed to exist where all of the following conditions are fulfilled:

- The decision-making bodies of the controlled legal person are composed of representatives of all participating contracting authorities. Individual representatives may represent several or all of the participating contracting authorities.
- The participating contracting authorities are able to jointly exert decisive influence over the strategic objectives and significant decisions of the controlled legal person.
- The controlled legal person does not pursue any interests that are contrary to those of the controlling contracting authorities.

2. Activity: The controlled legal person must carry out the major part of its activities for its controlling authorities.

The provisions on joint control mean that where there is more than one controlling contracting authority the levels of activity can vary for each authority. The requirement for more than 80% activity is satisfied by calculating the activity carried out for all of the controlling authorities. Sometimes several contracting authorities will own more than one controlled legal person. In such cases, the calculation of the +80% figure also includes activities undertaken by a controlled legal person for another controlled legal person(s).

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3. Private capital participation: There must not be direct private capital participation in a controlled legal person.

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An exception to this general rule permits “non-controlling and non-blocking forms of private capital participation” (1) where it is required by national legislation, in conformity with the Treaty; and (2) where those participants do not exert a decisive influence on the controlled body.

The exclusion for contracts between controlled legal persons and “reverse in-house” do not seem to apply to controlled legal persons that are jointly controlled by more than one contracting authority.

Situation 4 – Inter-authority co-operation (the Hamburg exception)

The “Hamburg” exclusion, developed by the CJEU, permits the establishment, in certain circumstances, of co-operation arrangements between contracting authorities, without the need to follow EU procurement rules. The arrangements must be genuinely co-operative and non-commercial in nature.

The directives have clarified the circumstances where this exclusion will apply. First, the arrangements must be concluded exclusively between two or more contracting authorities; no private participation is permitted. Further, there are three conditions that must all be satisfied:

1. The contract establishes or implements co-operation between the participating contracting authorities, with the aim of ensuring that the public services that they have to perform are provided with a view to achieving objectives that they have in common;
2. The implementation of that co-operation is governed solely by considerations relating to the public interest; and
3. The participating contracting authorities perform on the open market less than 20% of the activities concerned by the co-operation.

Calculation of activity levels

The directives also contain provisions concerning the calculation of the required +80%/-20% activity levels. The calculations are to be based on average total turnover or “an appropriate alternative activity-based measure” over the three years preceding the contract award.

There are also provisions covering the situation where data for the preceding three years is not available or is no longer relevant because the organisation concerned had not yet been created, was not active or had been reorganised. In these cases “it shall be sufficient to show that the measurement of activity is credible, particularly by means of business projections”. These rather vague provisions leave considerable room for interpretation of precisely what evidence is needed to establish the required levels of activity.

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2.4 RESERVED CONTRACTS

The 2014 directives and the 2014 Concessions Directive regulate a specific category of ‘reserved’ contracts, which are not excluded from the scope of the directives but are subject to the imposition of specific conditions of eligibility on the participants.

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EU Member States may reserve the right to participate in public contract award procedures to sheltered workshops and economic operators that have as their main aim the social and professional integration of disabled or disadvantaged persons or that may provide for such 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. For further details, see Module C5.

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Insert before section on Utilities

The 2014 directives introduced a new category of reserved contracts for certain services.

Member States may provide that contracting authorities may reserve the right for organisations to participate in procedures for the award of public contracts exclusively for the health, social and cultural services that are listed by reference to CPV codes in article 77 of the 2014 Directive.

The maximum duration of the reserved contracts shall not be longer than three years.

Organisations eligible to participate in the reserved contract procedure must fulfil all of the following conditions:

- (a) Their objective is the pursuit of a public service mission linked to the delivery of the services listed above;
- (b) The profits are reinvested with a view to achieving the organisation’s objective; any distribution or redistribution of the profits should be based on participatory considerations;
- (c) The structures of management or ownership of the organisations performing the contract are based on employee ownership or participatory principles, or require the active participation of employees, users or stakeholders; and
- (d) The organisations have not been awarded a contract for the relevant services by the contracting authority concerned pursuant to this procedure within the past three years.

Utilities	<p><u>Exclusions specific to the utilities sector</u></p> <p>The <u>2014 Utilities Directive</u> provides for sector-specific <u>exclusions</u> in a number of utility sectors, based essentially on the degree of competition in these markets. Such <u>exclusions</u> apply in respect of the purchase of fuel and energy for the production of energy <u>and</u> purchases of water. The <u>2014 Utilities Directive</u> has also <u>a</u> general <u>exclusion</u> mechanism for activities exposed to competition in markets to which access is not restricted. These <u>exclusions</u> are discussed in <u>Module D2</u>.</p> <p>The <u>2014 Utilities Directive</u> also contains a series of other <u>exclusions that are</u> specific to the utilities sector:</p> <ul style="list-style-type: none"> • <u>Non-relevant activities and activities in a third country</u> <p>The <u>2014 Utilities Directive</u> does not apply to contracts awarded by contracting entities for purposes other than the pursuit of their relevant activities, or the pursuit of such activities in a third country, in conditions that do not involve the physical use of a network or</p>
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geographical area within the [European Union](#).

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• **Affiliated undertakings [and joint venture exclusion](#)**

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Where ‘undertakings’ are made up of a number of mutually owned or mutually dependant companies, the [2014 Utilities Directive](#) provides for a specific [exclusion](#) for purchases made between these companies under certain conditions. These purchases are treated as ‘in-house’ contracts, known as intra-group transactions.

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The [2014 Utilities Directive](#) excludes two categories of contracts. The [first category concerns](#) contracts [that](#) are awarded:

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- by a contracting entity to an affiliated undertaking; or
- by a joint venture, formed exclusively by a number of contracting entities, for the purpose of carrying out relevant activities, with an undertaking that is affiliated to one of these contracting entities.

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This [exclusion](#) is subject, however, to two conditions:

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the economic operator must be an undertaking affiliated to the contracting entity: an affiliated undertaking, for the purposes of [article 29](#) of the Utilities Directive, is one in which the annual accounts are consolidated with those of the contracting entity, in accordance with the requirements of the [Accounting Directive 2013/34/EU](#).

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Insert at end of paragraphs on Affiliated undertakings and joint ventures exclusion

[The second category of contracts excluded from the 2014 Utilities Directive concerns contracts awarded:](#)

- [by a joint venture, formed exclusively by a number of contracting entities for the purpose of carrying out relevant activities, to one of those contracting entities; or](#)
- [by a contracting entity to such a joint venture of which it forms a part.](#)

[This exclusion is subject to the condition requiring that the joint venture has been set up in order to carry out the activity concerned over a period of at least three years and that the instrument setting up the joint venture stipulates that each of the contracting entities forming the joint venture will be part thereof for at least the same period.](#)

[It has to be noted that both categories of exclusion may be applied notwithstanding the exclusion provided in article 28 of the Utilities Directive \(contracts between contracting authorities – see section 2.3A above\).](#)

The Commission is empowered by [article 31](#) to monitor the application of this article and to require the notification of certain information:

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D	PUBLIC PROCUREMENT LAW <u>—</u> SCOPE OF APPLICATION	PART 4	EXEMPTIONS
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- such proof as may be deemed necessary by the Commission that the relationship between the undertaking(s) or joint venture to which the contracts are awarded and the contracting entity meet the required conditions of the exclusion.

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Concessions

Exclusions specific to the 2014 Concessions Directive

The 2014 Concessions Directive provides for some specific exclusions in a number of sectors, based essentially on the specific features of the services concerned.

- Services concessions awarded on the basis of exclusive rights
- Concessions for air transport and public passenger transport service
- Concessions for lottery services
- Exclusions in the field of water services

See Articles 10 to 17 of the 2014 Concessions Directive for further details.

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**SECTION 4 - SUMMARY
SELF-TEST QUESTIONS**

Note on amendments to Self-Test Questions: the Trainer’s Manual has not been updated to reflect the amendments below.

7. ▼

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SECTION 1 - INTRODUCTION

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1.5 LEGAL INFORMATION HELPFUL TO HAVE AT HAND

The legal requirements relating to thresholds are set out in [the 2014 Directive \(2014/24/EU\)](#) in chapter 1, articles [4](#) to [6](#) and [13](#):

- Article [4](#)
- [Article 5 sets out the methods for calculating the estimated value of public contracts, framework agreements, dynamic purchasing systems and innovation partnerships;](#)
- [Article 6 contains provisions on the revision of the thresholds;](#)
- Article [13](#) contains provisions relating to the application of financial thresholds for contracts that are subsidised by contracting authorities at a level in excess of 50%.

Commission Regulations are also published regularly to amend the [2014 Directive](#), updating the financial threshold levels each time that they change (see [narrative section](#)). See, for example, Commission Regulation ([EU](#)) No. [1336/2013](#), which entered into force on 1 January [2014](#).

[Utilities and concessions](#)

A short note on the key similarities and differences applying to utilities [and concessions](#) is set out at the end of [section 2](#) of this module.

SECTION 2 - NARRATIVE

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Note: Except where specified otherwise, the narrative in [Module D5](#) discusses the rules applying to contracts that are of a certain type and value, which means that they are subject to the full application of Directive [2014/24/EU](#) ('the [2014 Directive](#)'), and the term 'contract' should be interpreted accordingly.

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2.1 Introduction

There are also specific provisions covering the calculation of the value of framework agreements, dynamic purchasing systems, design contests, and [innovation partnerships](#).

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2.2.1 Setting the financial thresholds

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The financial thresholds are listed in article [4](#) and are expressed in euros (EUR). The financial thresholds are generally fixed for a period of two years and are amended every two years, with effect from 1 January. The amendments are made by means of European Commission Regulations.

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Alignment with GPA thresholds

The re-alignment involves rounding some of the EUR equivalents to the SDR down to the nearest 1,000 EUR.

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The European Commission publishes in the OJEU the revised thresholds and their corresponding values in the national currencies at the beginning of October.

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2.2.2 General thresholds for works, supplies and services contracts

The table below shows the current general thresholds for work, supply and service contracts (amounts shown are as at 1 January 2014 – they may need to be updated to reflect revised thresholds).

Type of contract (see note 2)	Type of contracting authority (see note 1)	
	Central government authorities	Sub-central authorities
Works	EUR 5 186 000	EUR 5 186 000
Supplies	EUR 134 000 (with some exceptions for defence purchasers – see note 3)	EUR 207 000 (and defence purchasers for certain supplies – see note 3)
Services (for full regulated services – see note 4)	EUR 134 000	EUR 207 000
Light regime services (– see note 5)	EUR 750 000	EUR 750 000

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Note 1: Type of contracting authority: There are two types of contracting authority for the purposes of the financial thresholds.

Central government authorities: Contracting authorities that are classified as central government authorities are listed in Annex I of the 2014 Directive.

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The financial thresholds are generally lower for these central government authorities than for other contracting authorities.

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Sub-central contracting authorities: The 'sub-central contracting authorities' are contracting authorities, as defined by the 2014 Directive, that are not central government authorities, as listed in Annex I. This category normally includes regional and local authorities and bodies governed by public law.

Note 2: Types of contract: The thresholds are referred to in article 4(a), (b), (c) and (d) of the 2014 Directive.

Note 3: Supply contracts in the defence sector: Where a central government authority is operating in the field of defence.....

Where a central government authority is operating in the field of defence and is purchasing supplies that are listed in Annex III, then the lower supply threshold applies, as these types of supplies are subject to the GPA. See article 4(b) and (c).

Note 4: Delete all of text in note 4 and replace with the paragraphs below. Deleted text is not shown

Note 4:

Fully regulated services: The thresholds referred to in the table for service contracts apply to all fully regulated services. See Module D3 for further information on fully regulated services and light regime services.

Note 5: Light regime services: Module D3 explains that the 2014 Directive applies fully to all fully regulated service contracts but only partially to the services listed in Annex XIV ('light regime services').

The limited provisions relating to light regime services are triggered by the same threshold for both central government authorities and sub-central contracting authorities. See article 4(d) of the 2014 Directive.

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2.2.3 Subsidised contracts (article 13)

The thresholds for subsidised work contracts are the same for central government authorities and sub-central contracting authorities. See Modules C4 and D3 for further information on these types of contracts.

For subsidised service contracts, the higher threshold applies for both central government authorities and sub-central contracting authorities. See Modules C4 and D3 for further information on subsidised service contracts.

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Type of contract	Type of contracting authority	
	Central government authorities	Sub-central authorities
Subsidised work contracts	EUR 5 186 000	EUR 5 186 000
Subsidised services contracts	EUR 207 000	EUR 207 000

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2.2.4 Not used

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PDF D-88

Summary table of thresholds

Type of contract	Type of contracting authority	
	Central government authorities	Sub-central authorities
Works	EUR 5 186 000	EUR 5 186 000
Supplies	EUR 134 000 (with some exceptions for defence purchasers)	EUR 207 000 (and defence purchasers for certain supplies)
Services (for full regulated services)	EUR 134 000	EUR 207 000
Light regime services	EUR 750 000	EUR 750 000
Subsidised work contracts	EUR 5 186 000	EUR 5 186 000
Subsidised services contracts	EUR 207 000	EUR 207 000

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2.3 CALCULATING THE FINANCIAL THRESHOLDS – BASIC PRINCIPLES (article 5)

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The methods for calculating the estimated value of public contracts, framework agreements, dynamic purchasing systems, and innovation partnerships are set out in article 5 of the 2014 Directive.

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Insert new Paragraph 2.3.1.A after paragraph 2.3.1 and before paragraph 2.3.2.

2.3.1A Separate operational units within one contracting authority

Where a contracting authority is comprised of separate operational units, for example various departments within a ministry, account must be taken of the total estimated value for all of the individual operational units.

However, where a separate operational unit is independently responsible for its procurement or certain categories of procurement, the value may be estimated at the level of the individual unit. This estimation of value can be assumed where the separate operational unit:

- independently runs the procurement procedures and makes the buying decisions,
- has a separate budget line at its disposal for the procurement concerned,
- concludes the contract independently, and
- finances the contract from a budget at its disposal.

A subdivision is not justified where the contracting authority merely organises procurement in a decentralised way.

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2.3.4 Options and renewals

The estimated value of the contract must take into account the estimated total amount, including any form of options and renewals of the contract, as explicitly set out in the procurement documents, even if those options or renewals are not subsequently exercised [article 5(1)].

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2.3.5 Value-added tax excluded

∇The estimated value of the contract∇ (article 5(1) of the directive).

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2.3.6 Prizes and other payments

∇The estimated value of the contract∇ [article 5(1)].

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2.3.7 Timing

The estimate must be valid at the moment when the call for competition is sent to the Office of the *Official Journal of the European Union (OJEU)* or, where a call for competition is not foreseen, at the moment when the contracting authority commences the contract award procedure, for example, by contacting economic operators in relation to procurement [article 5(4)].

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2.3.8 No subdivision to avoid application of the directive

No procurement may be subdivided in order to prevent that procurement from entering into the scope of the directive, unless the subdivision is justified by objective reasons [article 5(3)]. Possible objective reasons justifying the subdivision are provided in section 2.3.1A above.

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2.4.1 Work contracts – works and related supplies and services must both be taken into account

When calculating the estimated value of a work contract, the contracting authority must take into account both the cost of the works plus the estimated value of the supplies and services necessary for executing the works that are placed at the economic operator’s disposal by the contracting authority [article 5(7)].

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2.4.2 Contracts awarded in lots – works, supplies and services (article 5 (8) and (9))

Works: Where a proposal for a particular work may result in a number of related work contracts being awarded in the form of separate lots,.....

Supplies: Where a proposal for the acquisition of similar supplies may result in a number of supply contracts being awarded in the form of separate lots,.....

Services: Where a proposal for the acquisition of services may result in a number of service contracts being awarded in the form of separate lots,.....

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2.4.3 The small-lot exemption [article 5(10)]

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Good practice note
Example
The total value of the works is EUR 5,300,000 and the works are split into two lots; one

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contract for EUR 4,800,000

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2.4.4 Calculating the value of supply contracts [article 5(11) and (12)]

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2.4.5 Calculating the value of specific types of service contracts [article 5(13)]

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2.4.6 Calculating the value of service contracts [article 5(11) and (14)]

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- For service contracts that are regular in nature or intended to be renewed within a given period, the calculation is based on one of two possible approaches. The contracting authority has the option to take into account:
- Either the total actual value of the successive contracts of the same type awarded during the preceding 12 months or financial year, such value being adjusted if possible to take account of the changes in quantity or value that might occur in the course of the 12 months following the initial contract;

Note
This method is only available if the contracting authority has actually had a requirement for this type of service in the previous 12 months.

- Or the total estimated value of the successive contracts awarded during the first 12 months following the first delivery or during the financial year if that period is longer than 12 months.

Comment: Contracts for similar supplies or for the same type of supplies and services
Article 5 refers to the requirement to aggregate contracts that are for 'similar' supplies [article 5(9)] or for the 'same type' of supplies or services [article 5(11)].
Recital 19 of the directive clarifies that, for the purpose of estimating the thresholds, the notion of similar supplies should be understood as products that are intended for identical or similar uses, such as supplies of a range of foods or of various items of office furniture. Typically, an economic operator active in the field concerned would be likely to include such supplies as part of its normal product range.

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Indeed, a sensible approach would be to consider

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2.4.7 Calculating the value of framework agreements and dynamic purchasing systems [article 5 (5)]

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Insert new Paragraph 2.4.7.A after paragraph 2.4.7

2.4.7A Calculating the value of innovation partnerships [article 5(6)]

The total value to be taken into account in the case of innovation partnerships is the maximum estimated value of the research and development activities to take place during all stages of the envisaged partnership as well as the maximum estimated value of the supplies, services or works to be developed and procured at the end of the envisaged partnership. The total value excludes value-added tax (VAT).

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Deleted: 2.4.8 - Calculating the value of works concessions¶
The value of a works concession contract is calculated using the same principles as those applying to other works contracts, in particular the requirement to take into account all sources of funding, including third-party sources.

Utilities

The main legal requirements relating to financial thresholds are set out in articles 15, 16 and 17 of Directive 2014/25/EU (2014 Utilities Directive).

Article 15 confirms that, subject to the exclusions in articles 18 to 23 or the provisions of article 34, the 2014 Utilities Directive applies to contracts that have a total value (excluding VAT) that is equal to or exceeds the specified thresholds.

Article 16 sets out the rules governing the calculation of thresholds.

Article 17 contains provisions for the revision of thresholds.

1. Thresholds

There are three thresholds for utilities, which are shown in the table below.

The financial thresholds are listed in article 15 and are expressed in euros (EUR).

The amendments are made by means of European Commission Regulations.

Utilities

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Type of contract	
Work contracts	EUR 5 186 000
Supply and fully regulated service contracts	EUR 414 000
Light regime services	EUR 1 000 000

Delete table on Indicative Notices. Deleted table is not shown below.

[PDF D-99](#)

2. General principles applying to the calculation of thresholds

Timing: the rules for utilities relating to the time when the estimated value is calculated are set out in [article 16\(4\) of the 2014 Utilities Directive](#). These rules are the same as the rules under the [2014 Directive](#).

No avoidance: [Procurement](#) may not be subdivided in order to prevent it from entering into the scope of the [2014 Utilities Directive](#), unless justified by objective reasons [([article 16\(3\)](#)).

3. Calculation of thresholds

3.1 Works contracts – works and related supplies and services must all be taken into account

When calculating the estimated value of a work contract ([article 16\(7\) of the 2014 Utilities Directive](#)).

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3.3 Not used

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3.2 Aggregation of lots

[Article 16\(8\) and \(9\) of the 2014 Utilities Directive](#) confirms that where proposed contracts for

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works or services or similar supplies may result in contracts being awarded in separate lots, then the value of those lots must be aggregated.

Where the total value is equal to or exceeds the EU financial thresholds, then the directive will apply to the award of each lot.

3.3 The small-lot exemption

There is a waiver in article 16(10) of the 2014 Utilities Directive to the general aggregation rule for ‘small’ contracts in the context of lots. The provisions of the 2014 Utilities Directive can be waived for one or more individual lots on the same basis and for the same financial values as under article 5(10) of the 2014 Directive (2014/24/EU).

3.4 Calculating the value of supply and service contracts [article 16(11) and (12)]

For supply or services contracts that are regular in nature or intended to be renewed within a given period, the calculation is based on one of two possible approaches.

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In the case of fixed-term contracts, the total value is expressed in the 2014 Utilities Directive

3.5 Calculating the value of specific types of service contracts [article 16(13)]

3.6 Calculating the value of service contracts [article 16(14)]

3.7 Calculating the value of framework agreements and dynamic purchasing systems [article 16(5)]

3.8 Calculating the value of innovation partnerships [article 16(5)]

The total value to be taken into account in the case of innovation partnerships is the maximum estimated value of the research and development activities to take place during all stages of the envisaged partnership as well as the maximum estimated value of the supplies, services or works to be developed and procured at the end of the envisaged partnership. The total value excludes value-added tax (VAT).

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Concessions

This short note highlights some of the major differences and similarities in the requirements

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[applying to concessions in relation to the applicable threshold.](#)

[Adapt all of this section for local use – using relevant local legislation, processes and terminology.](#)

[The main legal requirements relating to the financial threshold are set out in articles 8 and 9 of the 2014 Concessions Directive.](#)

[Article 8 states that the Concessions Directive applies to works and services concessions that have a total value \(excluding VAT\) that is equal to or exceeds the specified threshold and sets out the rules governing the calculation of that threshold.](#)

[Article 9 contains provisions on the revision of the threshold.](#)

[1 Thresholds](#)

[There is a single threshold for both works and services concessions, which is shown in the table below. The financial threshold is listed in article 8\(1\) and is expressed in euros. The financial threshold is generally fixed for a period of two years and is revised every two years, with effect as from 1 January. Amendments to the threshold are made by means of European Commission Regulations. Up until 1 January 2016 the threshold is EUR 5 186 000.](#)

[2 General principles applying to the calculation of the threshold](#)

[Timing: The estimate must be valid at the moment when the concession-specific notice is sent to the Office of the *Official Journal of the European Union \(OJEU\)* or, where such a notice is not required, at the moment when the contracting authority or contracting entity commences the concession award procedure, for instance by contacting economic operators in relation to the concession \[article 8\(2\)\].](#)

[However, for the purpose of the application of the Concessions Directive, if the value of the concession at the time of the award is more than 20 % higher than its estimated value, the valid estimate shall be the value of the concession at the time of the award \[article 8\(2\)\]. This provision aims to make it more difficult to circumvent the regulations. It seems to apply, however, only in cases where the value of the concessions contract at the time of the award not only exceeds its originally estimated value by more than 20% but also at the same time exceeds the threshold of EUR 5 186 000. Unless the concessions award notice has been published in accordance with the terms of the Concessions Directive, the award procedure will have to be withdrawn and the concessions notice will have to be published, but in conformity with the Concessions Directive.](#)

[The value of a concession: The value of a concession is the total turnover of the concessionaire generated over the duration of the contract, taking into consideration the works and services that are the subject of the concession, as well as the supplies incidental to such works and services. The total turnover excludes VAT \[Article 8\(2\)\].](#)

[No avoidance: A concession may not be subdivided, with the intention of excluding it from the scope of the Concessions Directive, unless that subdivision is justified by objective reasons \[article 8\(4\)\].](#)

[3 Calculation of the threshold](#)

[3.1 Method](#)

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When calculating the estimated value of a concession, the contracting authority must use an objective method and specify that method in the concession documents [article 8(3)]. The choice of the method used to calculate the estimated value of a concession shall not be made with the intention of excluding it from the scope of the Concessions Directive [article 8(4)].

3.2 Calculating the value of works and services concession

Article 8(3) of the Concessions Directive states that, when calculating the estimated value of the concession, contracting authorities and contracting entities 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;
- (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 contracting authority or contracting entity;
- (c) payments or any financial advantage in any form whatsoever made by the contracting authority or contracting entity 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;
- (e) revenue from the sale of any assets that are part of the concession;
- (f) the value of all of the supplies and services that are made available to the concessionaire by the contracting authorities or contracting entities, provided that they are necessary for executing the works or providing the services;
- (g) any prizes or payments to candidates or tenderers.

3.3 Aggregation of lots

Article 8(5) and (6) of the 2014 Concessions Directive confirms that where proposed works or services may result in contracts being awarded in the form of separate lots, then the total estimated value of all such lots shall be taken into account. Where the aggregate value of the lots is equal to or exceeds the EU financial threshold, then the Directive will apply to the awarding of each lot.

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SECTION 4 - CHAPTER SUMMARY

SELF-TEST QUESTIONS

Note on amendments to Self-Test Questions: The Trainer's Manual has not been updated to reflect the amendments below.

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