EUROPEAN PARLIAMENT 2009 - 2014

Committee on Legal Affairs

7.3.2012

NOTICE TO MEMBERS

(28/2012)

Subject: Reasoned opinion by the German Bundesrat on the proposal for a Directive of the European Parliament and of the Council on the award of concession contracts (COM(2011)0897 – C7-0004/2012 – 2011/0437(COD))

Under Article 6 of the Protocol (No 2) on the application of the principles of subsidiarity and proportionality, any national parliament may, within eight weeks from the date of transmission of a draft legislative act, send the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity.

Under Parliament's Rules of Procedure the Committee on Legal Affairs is responsible for compliance with the subsidiarity principle.

Please find attached, for information, a reasoned opinion by the German Bundesrat on the above-mentioned proposal.

ANNEX

Bundesrat publication 874/11 (Decision)

02.03.12

Decision
of the Bundesrat

Proposal for a Directive of the European Parliament and of the Council on the award of concession contracts

COM(2011) 897 final; Council document 18960/11

At its 893rd sitting on 2 March 2012 the Bundesrat adopted the following opinion pursuant to Article 12(b) of the EU Treaty:

1. The Bundesrat is of the opinion that the proposal does not comply with the principle of subsidiarity. According to Article 5(3) TEU, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but rather, by reason of the scale of effects of the proposed action, be better achieved at Union level.

2. The Bundesrat considers that its reservations about the Single Market Act, last set out in its opinion of 11 February 2011 (Bundesrat publication 698/10 (Decision)), are not resolved by the proposal for a Directive, which it therefore rejects.

3. Service concessions are currently exempted from the scope of procurement law, pursuant to Article 17 of Directive 2004/18/EC (the Directive on the coordination of procedures for the award of public contracts) and Article 18 of Directive 2004/17/EC (the Utilities Directive), following a conscious decision by the European legislator. This was undertaken in particular in order to take into account the specific characteristics of service concessions in the individual Member States and to allow the contracting authorities and contractors a certain amount of flexibility.

4. The Commission gives insufficient explanation for the need for secondary legislation on service concessions at European level. There is so far insufficient evidence of the serious distortions of competition or market foreclosure with which the Commission justifies its proposal for a Directive. It presents no evidence for a negative development in the proportion of service concessions granted to public-private partnerships in recent years and for this development

5. In its Decisions – most recently of 25 October 2011 (2011/2048(INI)) – the European Parliament has also noted specifically that no serious distortions of competition or market foreclosure have so far taken place. It therefore saw no need for legislation on service concessions.

6. Service concessions are not – even today – awarded out of reach of the law. The

principles by which they are governed, derived from the basic freedoms laid down in primary law, have been defined in more detail by the case-law of the European Court of Justice and by communications of the Commission. Consequently the basic principles for awarding service concessions are laid down for contracting authorities. Equal treatment, freedom from discrimination and transparency must accordingly be guaranteed. Legislation at European level would, moreover, run counter to the efforts of the EU to simplify the European procurement rules and reduce red tape and the administrative burden.

7. The principles derived from primary law regulations are equally valid in all Member States. They are upheld by the European Court of Justice, which has the task of ensuring that the law is observed in the interpretation and application of the Treaties, in accordance with the second sentence of Article 19(1) TEU.

8. The EU's scope for establishing general rules for service concessions, applicable also to municipalities, was further restricted by the Treaty of Lisbon, which entered into force on 1 December 2009. Pursuant to the first sentence of Article 4(2) TEU, the Union shall respect the national identity of each Member State which is inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. In addition, Article 14 TFEU and Protocol 26 of the Treaty of Lisbon establish the important role and wide discretion of local authorities in particular in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users. Account must be taken of the need to protect local self-administration with regard to awarding service concessions by safeguarding municipalities' room for manoeuvre and scope for action and in particular municipal provision of services of general interest.

9. Even if the case is made for a regulatory framework for awarding service concessions for basic economic reasons, as it is by the Commission, it is incomprehensible that the density of regulation in the proposal for a Directive should exceed that of the existing rules for building concessions. The Commission's proposed rules for technical specifications, selection criteria, award criteria and publication requirements would result in a disproportionate amount of bureaucracy. In view of the Commission's objective of promoting public-private partnerships, as pursued in its proposal for a Directive, the rules are counter-productive. Rules at national or regional level are sufficient, in the light of Article 5(3) TEU.

10. The rescue services fall under the exclusive competence of the Länder. Traditionally the rules by which they are governed vary greatly across the federal system. In some Länder there is an unbreakable link between rescue services and civil protection which is logical, conceptionally sound and systemic. It is essential that this integrated system be maintained in order to safeguard internal security. This can, however, only be guaranteed if rescue services are exempted from general invitations to tender, including service concessions which in the past did not have to be put to tender.

    The maintenance of internal security by the rescue services and civil protection organisations is a central task of the provision of services of general interest. An open call for tenders for reasons of minimising costs and other aspects of the award of public

contracts would result in the interface between the rescue services and civil protection also becoming commercialised. This in turn would lead to a drastic reduction in quality. Moreover, the voluntary element of this integrated system of civil protection, which is of great importance in Germany, would be called into question.

We therefore ask that every effort is made to include the rescue services in the list of exemptions in Article 8(5) of the proposed Directive.