European parliament – Workshop on the award of concessions contracts

A lawyer’s view on the Commission proposal for a directive on the award of concessions contracts

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I. There is a need for the proposed directive.

- Transfer of operating risk alone does not guarantee sufficient competition.
- Analyzing ECJ case law comprehensively is beyond the means of small sized authorities. A clear system would reduce risks and improve legal certainty.
I. Requirements:

- Conclusive and consistent
- Margins of flexibility
- Continuity with principles of ECJ case law
II. Definition of scope

- Defining transfer of substantial operating risk by the guarantee to recoup the investments or the costs
  - reduces the scope of public procurement procedures inappropriately
  - does not match ECJ case law

- Better: Sticking to the flexible assessment concept of ECJ
III. Thresholds and duration

1. Thresholds

- 5 Mill. Euro is appropriate
- Aggregated value of an entirety of works or services, even if purchased through different contracts?
  → Difference to calculation of values of public service contracts (only contracts with same content)
  → Recommendation: Aggregation of value merely if concession fulfil same economic and technical function

- Second threshold (2.5 to 5 Mill. Euro) unnecessary
2. Duration

- Art. 16: time to recoup the investments made in operating the works and services

  + reasonable return of invested capital

- More flexibility necessary:
  - stable charges for citizens in a long term perspective
  - amortization of innovations
IV. Further issues

1. Sector exemptions?
   - Rejecting exemptions does not mean liberalization
   - But: Possibly negative effects on the quality of vital services (e.g. water supply)?

2. Transparency rules
   - Compulsory publication in EU Official Journal appropriate
   - Simplification possible
3. Award criteria

- Indicating relative weighting of criteria or listing criteria in descending order of importance is required by the Treaty.

- Criterion of the most economically advantageous tender restricts flexibility.
4. Modification of concessions

▶ Recommendation: All modifications necessary for reaching the original goals of the concession should be admissible without new award procedure.
Thank you for your attention