Public Hearing of the Committee on the Internal Market and Consumer Protection „The Award of Concession Contracts“

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Draft Directive on Concessions

Is there need for this directive?

- More legal certainty = maybe
- Elimination of serious Internal Market distortion = no
- Access to „concessions markets“ = no
- Subsidiarity = maybe
- Proportionality = no

= Still looking for a good reason

Some Member States see a need for a Directive, others do not see it at all
Positive elements of the draft directive

- Flexible procedure adapted to complexity
- Thresholds (can be discussed)
- Duration (can be discussed)
- Exclusions (list should be widened)
- Inhouse (with some additional specification good approach, French example)
Draft Directive on Concessions

Critical elements of the draft directive I

**Definition** of service concessions too wide, not precise enough

- Constitutive criteria of service concessions lacking:
  - Remaining responsibility of the authority/entity for the service
  - Granting of exclusive rights
- Most service concessions concern SGI
Critical elements of the draft directive II

Wide definition = very extended application area, e.g.

• Distribution networks in the sectors of electricity, gas and district heating
• The whole value-added chain of water provision
• Sewage water disposal
• Waste disposal
• Harbour and airport services
• Social services (Art. 17)
• Health services
• Cultural services
• Education services
• In principle in all cases where exclusive rights are granted
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Examples:

- Energy distribution networks (France, Germany, etc...)
- Welfare services (Sweden, etc...)
- Water provision (Italy, Austria, Germany, the Netherlands)
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Critical elements of the draft directive III

- Opening up sectors to competition by horizontal legislation without sector-specific legislative frame = competitive jungle
- Negative effects on already regulated sectors
- Additional transaction costs for the contract management of municipalities
- Regulatory bodies needed for those sectors opened up to competition = more additional transaction costs
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Critical elements of the draft directive IV

Application of the remedies directives (independently of the future text of the directive)

• Pressure on authorities by third parties (to externalise services)

• Judge-made law instead of primacy of policy

• Acceleration of market-opening in the sectors concerned

• Roll back of public economy
A directive on concessions should:

- Have a more precise definition of service concessions
- Contain additionally to the existing exceptions clear exemptions concerning
  - Water and sewage water services
  - All social, health, cultural and education services
  - Public passenger transport services, regulation 1370/2007, (the terminology of the draft text on concessions is not identical with that of the regulation)
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A directive on concessions should furthermore:

- Render more precisely the inhouse-definitions, in particular the second criterion (not „90% of the services for the authority“ but carried out „in the concessionary area“, but also the 90% could be discussed)

- Concerning the inhouse-provisions be inspired by regulation 1370/2007 on public transport

- Avoid to open up sectors for competition where no sufficient legislative regulation exist

- Regard public-public co-operation as (inter-) organisational acts and not as procurement
A directive on concessions should finally:

- Respect the principle „freedom of choice“ of local authorities when organising services within their responsibilities and in this context abstain from a mandatory ranking of award criteria

- Refer to Article 4 No 2 TEU, Article 14 TFEU and of Protocoll No 26 on services of general interest

- Restrict its area of application to cases where an externalisation into the private sector is intended
Thank you for your attention!