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WORKING DOCUMENT

on the award of concession contracts

Committee on the Internal Market and Consumer Protection

Rapporteur: Philippe Juvin

PROPOSAL FOR A DIRECTIVE ON CONCESSION CONTRACTS COM(2011)897 FINAL
2011/0437(COD)

At present, works concessions are awarded in accordance with basic provisions in Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. Service concessions are only covered by the general principles of the Treaty on the Functioning of the European Union (economic freedoms, non-discrimination, transparency, equal treatment, proportionality, mutual recognition). This proposal goes hand in hand with the revision of Directives 2004/17/EC and 2004/18/EC on public procurement, which is currently underway, and will result in the adoption of a separate legal instrument regulating the award of works and services concessions in the traditional sector and the **utilities sector**.

This document forms part of the preliminary review of this proposal and aims to define the added value provided by the initiative, to decide what type of rules are needed and to identify the key issues for consideration in the draft report.

1. What is the added value?

Following are the four reasons why the Rapporteur is convinced that this initiative has added value:

- To clarify the existing legal framework. The increasing size of ECJ case-law (25 judgments since 2000) bears witness to the existing legal uncertainty. Several basic concepts need to be clearly defined, although the business community has less firmly held positions than the contracting authorities[1] (concession, risk, distinction between service concessions and works concessions, between concessions and other types of contracts - permits or licences - or between concessions and public contracts).

- To ensure legal stability and certainty. Developments in case-law, the fact that principles in the Treaty are not applied uniformly, and the legal patchwork existing within the EU all create a legal uncertainly that could be damaging for the various stakeholders. While the ECJ has stated that contracting authorities ought to comply with the fundamental principles of the Treaty[2], it has not however sufficiently clarified what the latter entail.in

- To uphold the action of public authorities to develop and modernise economic infrastructure and promote public services

- To boost competition within the EU and encourage the emergence of EU players (safeguard the transparency and fairness of procedures, penalise misuse of private contracts). 40 % of the firms consulted in 2010 said they were aware of the existence of private contracts[3] . The lack of clear rules placing all candidates on an equal footing can penalise

[1] SEC(2011) 1588 final, 20.12.2011, Annex I B
[2] Case C-324/98, *Telaustria*, 2000
[3] SEC(2011) 1588 final, 20.12.2011, Annex I B, p. 68

SMEs, which are reduced to the role of subcontractors[1]. Opening up to competition does not mean accelerated privatisation of public services.

The question of ***the rationale for an initiative that is separate from public contracts*** has been raised. Justification for this lies in the fact that a concession is fundamentally different from a public contract: responsibility is transferred from the public authority to the concessionaire and there is an economic risk in operating the works/services. A concession is not simply another type of public contract; its specificities must therefore be taken into account.

2. What rules do we need?

The rapporteur considers that:

- the definition of a concession is a key issue, in view of the multiplicity of national definitions (defining the scope)

- the rules for concessions must not be a copy-paste of the rules on public contracts

- the rules must be clear, simple and must not create an excessive amount of bureaucracy

- the freedom of public authorities to decide how to organise the way they carry out their public service tasks must be clearly recognised

- the right of public authorities and economic operators to negotiate and enter into contracts must be respected. If the former must be allowed a certain degree of flexibility and discretion in their choices, the latter must be able to benefit from objective and transparent criteria given the financial and time constraints entailed in submitting applications.

- respect for tenderers' rights must be guaranteed (right to appeal, confidentiality of information, etc.)

3. Key issues

Here is an overview of the subject and the main issues the rapporteur would like to address in more detail.

(a) Definition of a concession

The definition of a concession is a key issue that has regularly featured in Court of Justice case-law (i.e. in 13 of the 25 judgments since 2000). The distinction between a concession and a public contract is still unclear at EU level (Directive 2004/18/EC provides definitions

[1] SEC(2011) 1588 final, 20.12.2011, p. 17

for concessions and public contracts).

→ ***The definition of a concession needs to be clarified*** (level/type of risk, relevance of more specific criteria, e.g. percentage of the turnover)

→ ***Distinction between works concessions and service concessions; definition of, and legal order applicable to, mixed concessions.*** As most works concessions include service concessions, it is hard to tell which category this type of contract falls into

→ ***Clarification of the distinction between a concession and a public contract*** (use of public contract terminology to refer to concessions)

(b) Scope and sector-specific exclusions

The proposal applies to contracts worth EUR 5 million or more (Article 5), with a simplified procedure for service concessions worth between EUR 2.5 million and EUR 5 million (Article 5(2)). Provision is made for exclusions (Articles 8-15) and derogations (Article 17).

Removal of the notion of 'non-priority services'

The removal of the distinction made in Directives 2004/18/EC and 2004/17/EC between priority and non-priority services means that there is some uncertainty surrounding the status of services hitherto categorised as non-priority services. It is stated in recital 21 that *'only those services which have a limited cross-border dimension'* are excluded from the full application of the directive.

→ ***Determine exactly which services are involved***

→ ***Is it appropriate to restrict the list of services hitherto categorised as non-priority services under Directive 2004/18/EC (Annex II B)?***

→ ***Clarify that provisions other than those relating to publication do not apply to social and other specific services (Article 17)***

Energy

Activities related to the management of network infrastructure based on an exclusive right enjoyed by an economic operator are excluded (Article 8(1)). This exemption might seem obvious (there is no competition because an exclusive right is granted by the state), but it does not cover energy supply activities that are subject to state-regulated tariffs under a tariff averaging scheme. This is based on principles of social and territorial solidarity (i.e. everyone pays the same price for their energy regardless of where in the country they live). The public authority cannot choose the operator.

→ ***Consider excluding energy supply activities that are subject to state-regulated tariffs***

Water

Many objections have been expressed in relation to this sector, with fears of a possible rush to privatise.

→ ***Discussions on this sector must not boil down to a simple ideological debate on the pros and cons of privatisation***

→ ***There is a need to assert the freedom that public authorities enjoy when it comes to deciding how their public service obligations are organised***

Other exclusions

The proposal would be ambiguous for other sectors (e.g. port services, public transport).

→ ***There is a need to clarify the provisions concerned***

(c) Exclusions in principle: public-public cooperation and affiliated undertakings

In-house ('vertical') cooperation

Concessions awarded by a contracting authority/entity to another legal person are excluded subject to certain conditions: the control exercised over the legal person concerned must be comparable to that exercised by the contracting authority/entity over its own departments; at least 90% of the activities of the legal person concerned must be carried out for the contracting authority/entity; there is no private participation whatsoever (Article 15(1)). This kind of cooperation, which is not currently provided for in Directives 2004/17/EC and 2004/18/EC, stems from a codification of European Court of Justice case-law (the *Teckal* judgment[1]). It is a notion that has since been extended to cover control that is exercised jointly by several contracting authorities (the *Coditel* judgment[2]) (Article 15(3) of the proposal).

The main criticisms raised here include: inappropriate codification of the case-law; the arbitrary choice of 90% (the case-law merely states that 'most' of the activities of the legal person concerned must be carried out for the controlling contracting authority/authorities); the

[1] Case C-107/98, 1999
[2] Case C-324/07, 2008

need for case-by-case analysis; the perception of the development of 'in-house' cooperation as a source of unfair competition between the public and private sectors.

The blanket ban on private participation has also been criticised, with attention drawn to the need to look beyond simply whether there is any such participation and evaluate the objective being pursued (commercial/industrial aim or public service obligation), or the need to allow minority private participation.

→ There is a need to acknowledge the right of contracting authorities/bodies to decide how they should be organised and to exclude 'in-house' cooperation from the scope of the directive

→ Is 90% a sensible choice? What about the arrangements for checking compliance with that threshold?

→ There is a need to clarify the notion of 'activity carried out by the legal person for the contracting authorities/entities' (number of contracts? turnover?)

→ Similar questions arise when it comes to control over a legal person exercised jointly by several contracting authorities/bodies under 'in-house' conditions (Article 15(3))

→ Is it appropriate to ban all private participation?

Horizontal cooperation

Horizontal co-operation between public authorities is excluded from the scope of the proposal (Article 15(4)). The proposal codifies ECJ case law (*Hamburg* Judgment[1]) in making that exclusion conditional on several criteria (no private participation, genuine co-operation between public authorities or entities aimed at carrying out jointly their public service tasks, agreement governed only by considerations relating to the public interest).

Other cumulative conditions not provided for in case law are also included, such as that of participating contracting authorities or entities not performing on the open market more than 10% in terms of turnover of the activities which are relevant in the context of the agreement (Article 15(4)(c)) and that of there being no financial transfers between the participating contracting authorities or entities, other than those corresponding to the reimbursement of the actual cost of the works, services or supplies (Article 15(4)(d)).

→ Need to assess the relevance of the criteria proposed, and notably those not deriving from case law

→ Question mark over the concept of 'carrying out jointly' (idea that the contracting authorities must be fulfilling their tasks together, when it may be that one of them is carrying

[1] Case C-480/06, 2009:

out that task for the others)

Connected undertakings

Concessions awarded by a contracting entity to an affiliated undertaking are not covered (Article 11.3). This has sometimes been perceived as an unjustified extension of 'in-house' contracting in specialist sectors, for which less stringent criteria are applied (80% criteria).

→ Question mark over the rationale for that provision and the potential consequences on opening to competition

→ Need to assess the impact that provision will have on SMEs

d) Procedural guarantees:

Publication and Transparency

The contracting authorities/entities are to transmit to the Commission by electronic means a concession notice (expression of the wish to award a concession) and a concession award notice (results of the award procedure) based on standard forms and sent for publication to the Publications Office of the Europe Union, prior to their publication by the national authorities. The award notice obligation also applies to the services concessions of a value of EUR 2.5 to 5 million (with the exception of social services and other specific services).

→ Relevance of that procedure, which seems needlessly complicated and unwieldy?

→ Relevance of the prohibition on publication at national scale prior to publication at European scale? Possibility of providing for simultaneous transmission?

Contract award procedures

The proposal sets out a framework for procedures for the award of concession contracts.

→ Question mark over the hierarchy and weighting of the criteria. While the former (Article 39(3)) provides tenderers with a clear and transparent framework for preparing their tenders, the latter (obligatory in the case of 'more economically advantageous' tenders) limits public authorities' leeway and may result in the best tenderer not being selected (Articles 39(3) and (5)).

→ The clear linking of the award criteria to the subject matter of the contract (Article 39(2)) rules out the possibility of potentially relevant criteria (e.g. proximity, social and

environmental standards) ***being taken into account***.

→ Limiting the criteria to that of the most economically advantageous tender (Article 39.4) seems inappropriate (the corresponding clause in the proposal amending Directive 2004/18/EC (Article 66) is not limitative in nature).

→ The provisions on the confidentiality of the information transmitted by tenderers to the contracting authorities are ambiguous. Only the solutions and information transmitted by economic operators to the contracting authorities on an expressly confidential basis seem to enjoy protection (Articles 24 and 35.5b).

e) Procedures for the performance of concession contracts

Duration

The proposal for a directive sets out the duration of the concession, which is based on the time needed to recoup the investments made in operating the works or services (Article 16).

→ Need to clarify this definition, which only takes into account the operational phase of the work/services, and not the setting-up phase or that of initial pre-performance investments

→ Adaptation of the definition to include concessions already operative, and with a lesser investment component

→ Possible inclusion of other criteria in the case of services concessions (e.g. performance)?

Modification of contracts during their term

The proposal establishes that a new procedure for the award of concessions is needed where there is 'substantial modification' of the provisions of the contract during its term (Article 42).

→ Clarification of the concept of 'substantial modification'

→ Establishing of hard and fast criteria for that term

Conclusion

Despite the criticism aroused by this proposal, the Rapporteur firmly believes it will bring added value as it provides a response to the current legal vacuum at European level, which ECJ case law has only partially filled.

The final provisions should meet the objectives of simplification and legal certainty on the one hand and respect for the principle of local authorities' freedom of administration on the other. The Rapporteur acknowledges that this document may not cover all the issues exhaustively, and would like to see genuine discussions being launched that go beyond a simple 'yes or no' idealogical debate on a European initiative on concessions.