Proposal for an EU Directive
on the award of concession contracts
# Scope of EU secondary public procurement legislation

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<th>Public contracts – works</th>
<th>Concessions – works</th>
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What is the proposal about?

• **Efficient spending of public money**

• **Improved access to (concessions) market**

• **Facilitating PPPs (mobilisation of private capital) leading to improved investment opportunities & innovation**
What is the proposal **NOT** about:

- Privatisation of services
- Forced externalisation of public tasks
- Setting quality standards for the provision of services (for example water distribution)
- Conditions of access to an economic activity
Preparatory works

- Study by PWC: « Study in the Field of Public Private Partnerships » of January 2007
- Study by CSES: « Analysis of Sectors concerned by Service Concessions » of December 2009
- Study by the College of Europe « Identification of sources of information on services concessions and analysis of identified calls for tenders » of May 2010
- Public online consultation (12th May – 9th July 2010)
- Targeted stakeholders consultation (5th August – 30th September 2010)
Some information from public consultations

• 41% of respondents declared existence of **entry barriers** to the market due to the fragmented national frameworks on concessions

• 37,3% of the respondents are aware of concession contracts being awarded without any publication or transparency

• 44% of the business community declared being aware of **direct awards** of concession contracts

• 32,4% of the respondents considered that diverging rules and practices regarding concessions constituted an **obstacle to the cross-border** award of the contracts

• 61,6% of the respondents considered that publication of the concessions notice in OJEU would **increase transparency**
Impact Assessment Report revealed the following distortions:

• **Lack of legal certainty** (with regard to the definition and award of concessions)

• **Existence of entry barriers** (stemming from the disparity of national rules and unlawful practices of contracting authorities/entities)

• **Insufficient legal protection of tenderers** (not available for services concessioners)
Options considered

- **Basic rules** – (definition of concession, publication in the OJ, deadline for applications, remedies)

- **Detailed rules** – as applicable to public contracts (with technical adjustments)

- **Mixed rules** – (basic rules + procedural guarantees, technical specifications, selection and exclusion criteria, adjusted award criteria, *ex post* transparency, rules on public-public, modifications).
Who will benefit?

• **Contracting authorities/entities** – legal certainty, sound financial management (82% of respondents)

• **Users** – better value for money & innovative services (72% of respondents)

• **Businesses** – better access to information, level playing ground, legal certainty (83% of respondents)
Approach

- Single «rulebook» for concessions
- Based on Court’s case law
- One set of rules for both classic and utilities sector
- Flexibility
Scope of the instrument

- Threshold of 5 million € for all concessions (works, services, classic + utilities)
- Exemption of public-public cooperation
- Exemption of:
  - concessions regulated by sectoral provisions (public passenger transport Reg. (EC) 1370/2007; air transport Reg. (EC) 1008/2008),
  - certain concessions awarded to contracting entities on the basis of an exclusive right
- Lighter regime for social services (no compulsory publication of ad hoc concession notice)
Contents – main elements (I)

• Definition of concessions

- Clearer distinction between concessions and public contracts:
  - reference to and definition of the transfer of substantial operating risk (no guarantee to break even on investments and costs incurred)
  - definition of operating risk (demand and availability risk)

- Clearer distinction between concessions and authorisations & licences
Contents – main elements (II)

- Publication of notices in the OJEU (ex post & ex ante)
- Duration of concessions proportionate to investments made
- Rules on modification of contracts
Contents – main elements (III)

• Procedural guarantees

• General requirements on criteria of selection & exclusion of candidates

• Extension of Remedies Directives to service concessions and concessions in the utilities sector
Contents – main elements (IV)

• **General requirements on award criteria**
  
  - Option to use economically most advantageous tender (MEAT) or award criteria, meeting only general requirements
  
  - **General requirements:**
    - objective
    - linked to the subject matter of the concession,
    - no unrestricted freedom of the contracting authority

  **However:**
  - may encompass references to experience of the tenderers, financial soundness as well as to certain policies (personnel, environment) or internal organisation of the undertaking
More flexible approach (I)

• **No rules on:**

  - mandatory procedures
  - contracts awarded by concessionnaires (as is the case today)
  - quotas on sub-contracting
  - other aspects, such as «apply or explain» obligation on division of contracts into lots, labels, occasional joint procurement etc.
More flexible approach (II)

- **Flexibility** on:
  - selection criteria
  - exclusion criteria
  - award criteria

- **Possibility of delayed phasing-in of compulsory e-procurement** (5 years instead of 2 years for public contracts)

- **Lighter rules on conflicts of interest**
In a nutshell, the proposal:

- Addresses problems of insufficient access to the market and inadequate legal certainty
- Is applicable only when public authorities decide to confer their tasks to the third party
- Essentially, obliges to publish a notice and to ensure fairness of procedures designed by contracting authorities in line with enumerated guarantees
- Puts all the bidders on equal footing
- Ensures accountability for spending of public money