



EUROPEAN PARLIAMENT

2009 - 2014

Committee on Industry, Research and Energy

2011/0437(COD)

8.11.2012

OPINION

of the Committee on Industry, Research and Energy

for the Committee on Internal Market and Consumer Protection

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))

Rapporteur: Werner Langen

PA_Legam

SHORT JUSTIFICATION

Concessions are a significant part of economic activity in the European Union Member States. Although the current legal situation means that it is difficult to produce exact figures, studies assume that over 60 % of all public-private partnerships in Europe involve concessions.

At present only the award of works concessions is subject to a limited number of secondary law provisions, while service concessions are covered only by the general principles of the TFEU. The proposed Directive is intended to close this loophole.

The current situation is unsatisfactory because it fails to offer sufficient legal certainty either to businesses or to awarding entities, while limiting access by European businesses, in particular small and medium-sized enterprises, to the economic opportunities offered by concession contracts.

In addition, in view of the difficult economic situation in most EU Member States, the efficient use of public funds is extremely important, so that the competition for the highest-performing, most cost-efficient solution can play a key role in the awarding of concession contracts.

Regulation at EU level in no way limits the freedom of public contracting authorities to fulfil their duties independently and with their own resources. If, however, a public contracting authority decides to assign these tasks to third parties, actual market access must be assured for all suitable companies in order to obtain the highest-performing, most cost-efficient solution, while avoiding the risk of corruption.

The benefits of the Directive on Concessions outlined in the working paper published by the Committee on the Internal Market are expressly supported, particularly in terms of the clarification of the existing legal framework, the creation of incentives for more competition and the specifics of individual proposed criteria that are to be changed.

Your rapporteur substantially supports the Commission proposal.

With regard to the thresholds, it is proposed that service concessions should be reduced to EUR 2.5 million, dispensing with the additional mandatory reporting proposed by the Commission.

The proposed changes should also help avoid excessive provisions in relation to the concept of life-cycle and life-cycle costing, as these are associated with the risk of abuse. At the same time, however, awarding entities are to be allowed to add employment condition features to the awarding criteria and to exclude candidates who are known to have committed serious breaches in the area of social, labour and environmental law. Because of the major differences between the thresholds of this Directive and those of the Directive on awarding public contracts, it is also necessary to prevent the risk of avoidance by designing a contract as a concession. A period of five years following the transposition period seems too long for the introduction of the electronic awarding of contracts, particularly in comparison with the much shorter period provided for by the Directive on awarding public contracts. Small-scale private holdings of up to 10% in public undertakings should be permissible by way of derogations.

AMENDMENTS

The Committee on Industry, Research and Energy calls on the Committee on the Internal Market and Consumer Protection, as the committee responsible, to incorporate the following amendments in its report:

Amendment 1

Proposal for a directive

Recital 1

Text proposed by the Commission

(1) The absence of clear rules at Union level governing the award of concession contracts gives rise to legal uncertainty and to obstacles to the free provision of services and causes distortions in the functioning of the Internal Market. As a result, economic operators, in particular Small and Medium Enterprises (SMEs), are being deprived of their rights within the Internal Market and miss out on important business opportunities, while public authorities may not find the best use of public money so that EU citizens benefit from quality services at best prices. An adequate legal framework for the award of concessions would ensure effective and non-discriminatory access to the market to all Union economic operators and legal certainty, favouring public investments in infrastructures and strategic services to the citizen.

Amendment

(1) The absence of clear rules at Union level governing the award of concession contracts gives rise to legal uncertainty and to obstacles to the free provision of services and causes distortions in the functioning of the Internal Market. As a result, economic operators, in particular Small and Medium Enterprises (SMEs), are being deprived of their rights within the Internal Market and miss out on important business opportunities, while public authorities may not find the best use of public money so that EU citizens benefit from quality services at best prices. An adequate, ***balanced and flexible*** legal framework for the award of concessions would ensure effective and non-discriminatory access to the market to all Union economic operators and legal certainty, favouring public investments in infrastructures and strategic services to the citizen.

Amendment 2

Proposal for a directive

Recital 1 a (new)

Text proposed by the Commission

Amendment

(1a) The rules of this legislative framework must be clear and simple and must not create an excessive amount of bureaucracy.

Amendment 3
Proposal for a directive
Recital 1 b (new)

Text proposed by the Commission

Amendment

(1b) The nature of concessions is such that concession award provisions should not be simply equated with the rules for the awarding of public contracts.

Amendment 4
Proposal for a directive
Recital 29

Text proposed by the Commission

Amendment

(29) In technical specifications and in award criteria, contracting authorities and contracting entities should be allowed to refer to a specific production process, a specific mode of provision of services, ***or a specific process for any other stage of the life cycle of a product or service***, provided that they are linked to the subject-matter of the concession. In order to better integrate social considerations in the award of concessions, procurers ***may also*** be allowed to include, in the award criteria, characteristics related to the working conditions. However, where the contracting authorities or contracting entities use the most economically advantageous tender, such criteria may only relate to the working conditions of the persons directly participating in the process of production or provision in question. Those characteristics may only concern the protection of health of the staff involved in the production process or the favouring of social integration of disadvantaged persons or members of vulnerable groups amongst the persons assigned to performing the contract, including accessibility for persons with disabilities. In this case, any award criteria which include those characteristics should ***in any event*** remain limited to

(29) In technical specifications and in award criteria, contracting authorities and contracting entities should be allowed to refer to a specific production process, ***or*** a specific mode of provision of services, provided that they are linked to the subject-matter of the concession. In order to better integrate social considerations in the award of concessions, procurers ***should*** be allowed to include, in the award criteria, characteristics related to the working condition. However, where the contracting authorities or contracting entities use the most economically advantageous tender, such criteria may only relate to the working conditions of the persons directly participating in the process of production or provision in question. Those characteristics may only concern the protection of health of the staff involved in the production process or the favouring of social integration of disadvantaged persons or members of vulnerable groups amongst the persons assigned to performing the contract, including accessibility for persons with disabilities. In this case, any award criteria which include those characteristics should remain limited to characteristics that have immediate consequences on staff members in their working environment.

characteristics that have immediate consequences on staff members in their working environment. They should be applied in accordance with Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services and in a way that does not discriminate directly or indirectly against economic operators from other Member States or from third countries parties to the Agreement or to Free Trade Agreements to which the Union is party. Contracting authorities and contracting entities should, also where they use the criterion of the most economically advantageous tender, be allowed to use as an award criterion the organisation, qualification and experience of the staff assigned to performing the concession in question, as this may affect the quality of concession performance and, as a result, the economic value of the tender.

They should be applied in accordance with Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services and in a way that does not discriminate directly or indirectly against economic operators from other Member States or from third countries parties to the Agreement or to Free Trade Agreements to which the Union is party. Contracting authorities and contracting entities should, also where they use the criterion of the most economically advantageous tender, be allowed to use as an award criterion the organisation, qualification and experience of the staff assigned to performing the concession in question, as this may affect the quality of concession performance and, as a result, the economic value of the tender.

Amendment 5
Proposal for a directive
Article 1 – paragraph 2 – point a

Text proposed by the Commission

a) Contracting authorities whether or not the works or services including the related supplies, are intended for a public purpose;

Amendment

a) Contracting authorities, *pursuant to Article 3 of this Directive*, whether or not the works or services including the related supplies, are intended for a public purpose;

Amendment 6
Proposal for a directive
Article 1 – paragraph 2 a (new)

Text proposed by the Commission

Amendment

2a. Concessions below the threshold value may be awarded by mutual agreement.

Justification

This directive should only apply to concessions affecting the internal market.

Amendment 7

Proposal for a directive

Article 1 – paragraph 2 – point b

Text proposed by the Commission

b) Contracting entities provided that the works or services including the related supplies, are intended for the pursuit of one of the activities referred to in Annex III.

Amendment

b) Contracting entities, ***pursuant to Article 4 of this Directive***, provided that the works or services including the related supplies, are intended for the pursuit of one of the activities referred to in Annex III.

Amendment 8

Proposal for a directive

Article 2 – paragraph 1 – point 8

Text proposed by the Commission

(8) 'candidate' means an economic operator that has sought an invitation ***or has been invited*** to take part in a concession award procedure.

Amendment

(8) 'candidate' means an economic operator that has sought an invitation to take part in a concession award procedure ***or has been invited to do so***.

Amendment 9

Proposal for a directive

Article 2 – paragraph 2 – subparagraph 1

Text proposed by the Commission

The right to exploit the works or services as referred to in points 2, 4 and 7 of the first paragraph shall imply the transfer to the concessionaire of the substantial operating risk. The concessionaire shall be deemed to assume the substantial operating risk where it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services which are the subject-matter of the concession.

Amendment

The right to exploit the works or services as referred to in points 2, 4 and 7 of the first paragraph shall imply the transfer to the concessionaire of the substantial operating risk. The concessionaire shall be deemed to assume the substantial operating risk where it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services which are the subject-matter of the concession, ***except when this lack of return is directly attributable to the***

contracting authority.

Amendment 10

Proposal for a directive

Article 2 – paragraph 2 – subparagraph 2 – introductory part

Text proposed by the Commission

That economic risk may consist in either of the following:

Amendment

That economic risk may, *in particular*, consist in either of the following:

Amendment 11

Proposal for a directive

Article 5 – paragraph 1 – introductory part

Text proposed by the Commission

1. This Directive shall apply to the following concessions the value of which is equal to or greater than EUR 5 000 000:

Amendment

1. This Directive shall apply to the following concessions the value of which is equal to or greater than EUR 5 000 000 *for concessions lasting up to five years:*

Justification

Concessions can have different lifespans. In long-term concessions, a threshold of EUR 5.000.000 might not be enough to affect the internal market. Therefore a time component has to be added to the conditions.

Amendment 12

Proposal for a directive

Article 5 – paragraph 1 a (new)

Text proposed by the Commission

Amendment

1a. This Directive shall apply to the following concessions, the value of which is equal to or greater than EUR 10 000 000 for concessions lasting more than five years:

(a) concessions concluded by contracting entities for the pursuit of one of the activities referred to in Annex III;

(b) concessions concluded by contracting authorities.

Amendment 13
Proposal for a directive
Article 5 – paragraph 2

Text proposed by the Commission

2. Services concessions the value of which is equal to or greater than EUR 2 500 000 but lower than EUR 5 000 000 other than social services and other specific services shall be subject to the obligation to publish a concession award notice in accordance with Articles 27 and 28.

Amendment

2. Services concessions *lasting for up to five years* the value of which is equal to or greater than EUR 2 500 000 but lower than EUR 5 000 000 other than social services and other specific services shall be subject to the obligation to publish a concession award notice in accordance with Articles 27 and 28. *Services concessions lasting more than five years, the value of which is equal to or greater than EUR 5 000 000 but lower than EUR 10 000 000, other than social services and other specific services, shall be subject to the obligation to publish a concession award notice in accordance with Articles 27 and 28.*

Amendment 14
Proposal for a directive
Article 6 – paragraph 1

Text proposed by the Commission

1. The calculation of the estimated value of a concession shall be based on the total amount payable, net of VAT, as estimated by the contracting authority or the contracting entity, *including any form of option and any extension of the duration of the concession.*

Amendment

1. The calculation of the estimated value of a concession shall be based on the total amount payable, net of VAT, as estimated by the contracting authority or the contracting entity.

Amendment 15
Proposal for a directive
Article 6 – paragraph 3

Text proposed by the Commission

3. The choice of the method used to calculate the estimated value of a concession shall not be made with the intention of excluding it from the scope of this Directive. A works project or an entirety of services shall not be subdivided with the effect of preventing it from falling within the scope of this Directive, unless justified by objective reasons.

Amendment

3. The choice of the method used to calculate the estimated value of a concession shall not be made with the intention of excluding it from the scope of this Directive. A works project or an entirety of services shall not be subdivided with the effect of preventing it from falling within the scope of this Directive, unless justified by objective reasons, ***such as taking SMEs into consideration.***

Amendment 16
Proposal for a directive
Article 6 – paragraph 5

Text proposed by the Commission

5. With regard to ***public works concessions and works concessions, calculation of*** the estimated value ***shall take account of both the cost of the works and the total estimated value of the supplies and services that are made available to the contractor by the contracting authorities or entities provided that they are necessary for executing the works.***

Amendment

5. With regard to ***determining the threshold,*** the estimated value ***of the concession shall be equal to the estimated turnover, net of taxes, accumulated over the duration of the contract.***

Justification

Concession contracts very often involve both works and services. Works concessions may include the operation and provision of services. Services concessions may require works to be carried out during the period covered by a contract. The way in which the value of a concession is calculated must be the same for works concessions and services concessions, and should better reflect the remuneration (turnover) of the concession.

Amendment 17
Proposal for a directive
Article 6 – paragraph 7

Text proposed by the Commission

7. Where the aggregate value of the lots is equal to or exceeds the ***threshold*** laid

Amendment

7. Where the aggregate value of the lots is equal to or exceeds the ***thresholds*** laid

down in Article 5, this Directive shall apply to the awarding of each lot.

down in Article 5, this Directive shall apply to the awarding of each lot.

Amendment 18
Proposal for a directive
Article 6 – paragraph 8

Text proposed by the Commission

8. Contracting authorities or contracting entities may award concessions for individual lots without applying the provisions on the award provided for under this Directive, provided that the estimated value net of VAT of the lot concerned is less than EUR **1 million**. However, the aggregate value of the lots thus awarded without applying this Directive shall not exceed 20% of the aggregate value of all the lots into which the proposed work or the proposed purchase of services has been divided.

Amendment

8. Contracting authorities or contracting entities may award concessions for individual lots without applying the provisions on the award provided for under this Directive, provided that the estimated value net of VAT of the lot concerned is less than EUR **500 000**. However, the aggregate value of the lots thus awarded without applying this Directive shall not exceed 20 % of the aggregate value of all the lots into which the proposed work or the proposed purchase of services has been divided.

Amendment 19
Proposal for a directive
Article 7 – paragraph 1 a (new)

Text proposed by the Commission

Amendment

Nor shall it be made with the objective of excluding it from the scope of the Directive on the Awarding of Public Contracts.

Justification

The major differences between the thresholds of this Directive and those of the Directive on the Awarding of Public Contracts give rise to the risk that contracts will be designed as concessions so as to avoid coming under the Directive for the Awarding of Public Contracts.

Amendment 20
Proposal for a directive
Article 7 – paragraph 1 b (new)

Text proposed by the Commission

Amendment

When awarding concessions which are not covered by this Directive because of their value, public contracting entities and awarding entities are required to adhere to the principles of equal treatment, non-discrimination and transparency contained in the TFEU.

Amendment 21
Proposal for a directive
Article 8 – paragraph 1

Text proposed by the Commission

Amendment

1. This Directive shall not apply to services concessions awarded by a contracting authority or by a contracting entity to an economic operator ***which is a contracting entity or an association of thereof***, on the basis of an exclusive right that economic operator enjoys pursuant to applicable and published national law, regulation ***or administrative provision***, and which has been granted in accordance with the Treaty and Union sectoral legislation concerning the management of networks infrastructure related to the activities set out in annex III.

1. This Directive shall not apply to services concessions awarded by a contracting authority or by a contracting entity to an economic operator on the basis of an exclusive right that economic operator enjoys pursuant to applicable and published national law ***or*** regulation, and which has been granted in accordance with the Treaty and Union sectoral legislation concerning the management of networks infrastructure related to the activities set out in annex III.

Justification

It is acknowledged in Article 8(1) and Annex V that activities that are already covered by other sector-specific directives are excluded. Despite this, however, the way in which the proposal is worded suggests that the economic operator must be a contracting entity, which is not the case for all the operators carrying out these activities. This amendment proposes a form of words that fits in with the basic aim of the proposal.

Amendment 22
Proposal for a directive
Article 8 – paragraph 3 – subparagraph 1 – point a

Text proposed by the Commission

Amendment

a) an international agreement concluded in

a) an international agreement concluded in

conformity with the Treaty between a Member State and one or more third countries and covering works, supplies or services intended for the joint implementation or exploitation of a project by the signatory States;

conformity with the Treaty between a Member State and one or more third countries and covering works, supplies or services intended for the joint implementation or exploitation of a project by the signatory States, ***unless European Union funding is granted for this purpose***;

Justification

The principles of this Directive should be adhered to when EU funds are being spent.

Amendment 23

Proposal for a directive

Article 8 – paragraph 3 – subparagraph 3

Text proposed by the Commission

For the purposes of point (d) of the first subparagraph, where a concession is co-financed ***for a considerable part*** by an international organisation or international financing institution the parties decide on applicable concession award procedures which shall be in conformity with the provisions of the Treaty on the Functioning of the European Union.

Amendment

For the purposes of point (d) of the first subparagraph, where ***more than one quarter of*** a concession is co-financed by an international organisation or international financing institution the parties decide on applicable concession award procedures which shall be in conformity with the provisions of the Treaty on the Functioning of the European Union.

Amendment 24

Proposal for a directive

Article 8 – paragraph 3 a (new)

Text proposed by the Commission

Amendment

3a. This Directive shall not apply to agreements through which the State or the contracting authority or entity awards an economic operator the right to exploit certain public domains or resources, when the State or contracting authority or entity establishes only general conditions for their use without becoming a beneficiary of the specific works or services provided by the economic

operator.

Amendment 25

Proposal for a directive

Article 8 – paragraph 5 – subparagraph 1 – introductory part

Text proposed by the Commission

Amendment

This Directive shall not apply to service concessions *for*:

This Directive shall not apply to service concessions ***awarded by a contracting authority to another contracting authority or to an association of contracting authorities on the basis of an exclusive right which they enjoy pursuant to a published law, regulation or administrative provision which is compatible with the Treaty.***

Nor shall it apply in respect of:

Justification

Reflects the wording of Article 18 of the current Directive 2004/18 making it clear that Member States may continue to grant such exclusive rights in accordance with the Treaty.

Amendment 26

Proposal for a directive

Article 8 – paragraph 5 – subparagraph 1 – point d

Text proposed by the Commission

Amendment

(d) financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments within the meaning of Directive 2004/39/EC of the European Parliament and of the Council, central bank services and operations conducted with the European Financial Stability Facility (EFSF);

(d) financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments within the meaning of Directive 2004/39/EC of the European Parliament and of the Council, ***transactions by the contracting authorities to raise money or capital***, central bank services and operations conducted with the European Financial Stability Facility (EFSF) ***and the European Stability Mechanism (ESM)***;

Justification

The concern not to make borrowing too easy inter alia for municipalities is a reasonable one.

However, sufficient safeguards to that end are already in place and there is no need for a new rule at European level. Municipalities must continue to be afforded a degree of flexibility in borrowing, and transactions to raise money or capital should therefore remain outside the Directive's scope.

Amendment 27

Proposal for a directive

Article 8 – paragraph 5 – subparagraph 1 – point e

Text proposed by the Commission

Amendment

e) employment contracts;

deleted

Amendment 28

Proposal for a directive

Article 8 – paragraph 5 – subparagraph 2

Text proposed by the Commission

Amendment

The broadcasting referred to in point (b) of the first paragraph shall include any transmission and distribution using any form of electronic network.

deleted

Justification

The term broadcasting is already defined in paragraph 5 point b).

Amendment 29

Proposal for a directive

Article 10 – paragraph 2

Text proposed by the Commission

Amendment

2. Contracting entities shall notify the Commission or the national oversight body at their request of any activities which they regard as excluded. The Commission **may periodically** publish in the Official Journal of the European Union for information purposes, lists of the categories of activities which it considers to be covered by this exclusion. In so doing, the Commission shall respect any sensitive commercial

2. Contracting entities shall notify the Commission or the national oversight body at their request of any activities which they regard as excluded. **Every six months, beginning on 1 July 2013,** the Commission **shall** publish in the Official Journal of the European Union for information purposes lists of the categories of activities which it considers to be covered by this exclusion. In so doing, the

aspects that the contracting entities may point out when forwarding this information.

Commission shall respect any sensitive commercial aspects that the contracting entities may point out when forwarding this information.

Amendment 30
Proposal for a directive
Article 11 – paragraph 4 – point a

Text proposed by the Commission

a) to service concessions provided that at least **80 %** of the average total turnover of the affiliated undertaking with respect to services in general for the preceding three years derives from the provision of services to undertakings with which it is affiliated;

Amendment

a) to service concessions provided that at least **60 %** of the average total turnover of the affiliated undertaking with respect to services in general for the preceding three years derives from the provision of services to undertakings with which it is affiliated;

Amendment 31
Proposal for a directive
Article 11 – paragraph 4 – point b

Text proposed by the Commission

b) works concessions provided that at least **80 %** of the average total turnover of the affiliated undertaking with respect to works in general for the preceding three years derives from the provision of works to undertakings with which it is affiliated.

Amendment

b) works concessions provided that at least **60 %** of the average total turnover of the affiliated undertaking with respect to works in general for the preceding three years derives from the provision of works to undertakings with which it is affiliated.

Amendment 32
Proposal for a directive
Article 15 – paragraph 1 – subparagraph 1 – point b

Text proposed by the Commission

b) at least **90%** of the activities of that legal person are carried out for the controlling contracting authority or entity or for other legal persons controlled by that contracting authority or entity

Amendment

b) at least **80 %** of the activities of that legal person are carried out for the controlling contracting authority or entity or for other legal persons controlled by that contracting authority or entity

Amendment 33
Proposal for a directive
Article 15 – paragraph 1 – subparagraph 1 – point c

Text proposed by the Commission

Amendment

c) there *is* no private *participation* in the controlled legal person

c) there *are* no private *participations* in the controlled legal person *in excess of 10 %*.

Justification

Greater precision is required because of the Altmark judgment of the European Court of Justice.

Amendment 34
Proposal for a directive
Article 15 – paragraph 3 – subparagraph 1 – point b

Text proposed by the Commission

Amendment

b) at least **90%** of the activities of that legal person are carried out for the controlling contracting authorities or entities as referred to in paragraph 1 subparagraph 1 of Article 4 or other legal persons controlled by the same contracting authority or entity;

b) at least **80 %** of the activities of that legal person are carried out for the controlling contracting authorities or entities as referred to in paragraph 1 subparagraph 1 of Article 4 or other legal persons controlled by the same contracting authority or entity.

Amendment 35
Proposal for a directive
Article 15 – paragraph 3 – subparagraph 1 – point c

Text proposed by the Commission

Amendment

c) there *is* no private *participation* in the controlled legal person.

c) there *are* no private *participations* in the controlled legal person *in excess of 10 %*.

Justification

Greater precision is required because of the Altmark judgment of the European Court of Justice.

Amendment 36
Proposal for a directive
Article 15 – paragraph 4 – point a

Text proposed by the Commission

Amendment

(a) the agreement establishes a genuine co-operation between the participating contracting authorities or entities aimed at carrying out jointly their public service tasks and involving mutual rights and obligations of the parties;

(a) the purpose of the partnership is the provision of a public service task in the public interest conferred on public authorities, or the carrying-out of ancillary purchasing activities within the meaning of Article 2(17), which is necessary in order to perform the public service task in the public interest. A pooling of tasks shall also be considered to exist where a municipality is merely obliged to make payment, provided that cooperation enables the municipality to carry out its own obligations more economically or more effectively;

Amendment 37

Proposal for a directive

Article 15 – paragraph 4 – point b

Text proposed by the Commission

Amendment

(b) the agreement is governed only by considerations relating to the public interest;

(b) the task is carried out solely by the public authorities concerned without the involvement of active private capital;

Amendment 38

Proposal for a directive

Article 15 – paragraph 4 – point c

Text proposed by the Commission

Amendment

(c) the participating contracting authorities or entities shall do not perform on the open market more than 10% in terms of turnover of the activities which are relevant in the context of the agreement;

deleted

Amendment 39

Proposal for a directive

Article 15 – paragraph 5 – subparagraph 1

Text proposed by the Commission

The absence of private **participation** referred to in paragraphs 1 to 4 shall be verified at the time of the award of the concession or of the conclusion of the agreement.

Amendment 40
Proposal for a directive
Article 16

Text proposed by the Commission

The duration of the concession shall be limited to the time estimated to be necessary for the concessionaire to **recoup** the investments made in operating the works or services together with a reasonable return on invested capital.

Amendment

The absence of private **participations in excess of 10 %** referred to in paragraphs 1 to 4 shall be verified at the time of the award of the concession or of the conclusion of the agreement.

Amendment

The duration of the concession shall **only** be limited to the time estimated to be necessary for the concessionaire to **amortise the initial and subsequent** investments made in operating the works or services together with a reasonable return on invested capital.

Justification

Linguistic amendment

Amendment 41
Proposal for a directive
Article 18 – paragraph 1

Text proposed by the Commission

1. **Contracts which have as their object both services and supplies shall be awarded in accordance with** this Directive where the main object of the contract in question are services and where they are concessions within the meaning of point (1) of the first paragraph of Article 2

Amendment

1. This Directive **shall apply with regard to contracts for both services and supplies** where the main object of the contract in question are services and where they are concessions within the meaning of point (1) of the first paragraph of Article 2.

Amendment 42
Proposal for a directive
Article 19 – paragraph 1 – subparagraph 2

Text proposed by the Commission

However, the choice between awarding a single concession and awarding a number of separate concessions **may** not be made with the objective of excluding it from the scope of this Directive.

Amendment 43
Proposal for a directive
Article 20

Text proposed by the Commission

Member States may reserve the right to participate in concession award procedures to sheltered workshops and economic operators whose main aim is the social and professional integration of disabled and disadvantaged workers or provide for such concessions to be performed in the context of sheltered employment programmes provided that more than **30%** of the employees of those workshops, economic operators or programmes are disabled or disadvantaged workers.

Amendment 44
Proposal for a directive
Article 25 – paragraph 7 – subparagraph 1

Text proposed by the Commission

Member States shall ensure that, at the latest **5** years after the date provided for in Article 49 (1), all procedures for the award of concessions under this Directive are performed using electronic means of communication, in particular e-submission, in accordance with the requirements of this Article.

Amendment

However, the choice between awarding a single concession and awarding a number of separate concessions **shall** not be made with the objective of excluding it from the scope of this Directive.

Amendment

Member States may reserve the right to participate in concession award procedures to sheltered workshops and economic operators whose main aim is the social and professional integration of disabled and disadvantaged workers or provide for such concessions to be performed in the context of sheltered employment programmes provided that more than **50 %** of the employees of those workshops, economic operators or programmes are disabled or disadvantaged workers.

Amendment

Member States shall ensure that, at the latest **3** years after the date provided for in Article 49(1), all procedures for the award of concessions under this Directive are performed using electronic means of communication, in particular e-submission, in accordance with the requirements of this Article.

Justification

A period of five years seems too long, particularly in comparison with the much shorter period provided for by the Directive for the Awarding of Public Contracts.

Amendment 45 **Proposal for a directive** **Article 25 – paragraph 8**

Text proposed by the Commission

Amendment

8. Contracting authorities may use the data processed electronically for public procurement procedures in order to prevent, detect and correct errors occurring at each stage by developing appropriate tools.

deleted

Amendment 46 **Proposal for a directive** **Article 26 – paragraph 6 – subparagraph 1 – indent 2**

Text proposed by the Commission

Amendment

– it is **completely** irrelevant to the concession, **being incapable of meeting** the contracting authority or contracting entity's **needs** as specified in the concession documents.

– it is irrelevant to the concession, **failing to meet** the contracting authority or contracting entity's **requirements** as specified in the concession documents.

Amendment 47 **Proposal for a directive** **Article 26 – paragraph 6 – subparagraph 2**

Text proposed by the Commission

Amendment

Tenders shall be considered to be irregular, where they do not comply with the concession documents or where the prices offered are sheltered from normal competitive forces.

deleted

Amendment 48
Proposal for a directive
Article 26 – paragraph 6 – subparagraph 3 – introductory part

Text proposed by the Commission

Amendment

Tenders *shall be* considered *to be* unacceptable in *any of* the following cases:

Tenders *are* considered unacceptable in the following cases:

Amendment 49
Proposal for a directive
Article 26 – paragraph 6 – subparagraph 3 – point b

Text proposed by the Commission

Amendment

b) they have been submitted by tenderers who do not have the requisite qualifications;

b) they have been submitted by tenderers who do not have the requisite *documentary evidence of* qualifications;

Amendment 50
Proposal for a directive
Article 26 – paragraph 6 – subparagraph 3 – point c

Text proposed by the Commission

Amendment

c) their price exceeds the contracting authority or contracting entity's budget as determined prior to the launching of the concession award procedure and documented in writing;

c) their price exceeds the contracting authority or contracting entity's budget as determined prior to the launching of the concession award procedure and documented in writing *by more than 20 %*;

Amendment 51
Proposal for a directive
Article 26 – paragraph 6 – subparagraph 3 – point d

Text proposed by the Commission

Amendment

d) they *have been found to be abnormally low*

d) they *are more than 20 % below the average of the other tenders or the documented budget.*

Amendment 52
Proposal for a directive
Article 27 – paragraph 2

Text proposed by the Commission

2. The obligation referred to in paragraph 1 shall also apply to those services concessions the estimated value of which, as calculated according to the method referred to in Article 6 (5), is equal to or higher than 2 500 000 EUR with the sole exception of social services and other specific services as referred to in Article 17.

Amendment

deleted

Amendment 53
Proposal for a directive
Article 32 – paragraph 1 – subparagraph 2

Text proposed by the Commission

These characteristics may also refer to the specific process of production or provision of the requested works, supplies or services **or of any other stage of its life cycle as referred to in point (14) of Article 2.**

Amendment

These characteristics may also refer to the specific process of production or provision of the requested works, supplies or services.

Amendment 54
Proposal for a directive
Article 35 – paragraph 1

Text proposed by the Commission

1. Contracting authorities and contracting entities shall indicate in the contract notice, in the invitation to submit tenders or in the concession documents a description of the concession, the award criteria and the minimum requirements to be met. This information must allow to identify the nature and scope of the concession, enabling economic operators to decide whether they request to participate in the concession award procedure. **The description, award criteria and minimum**

Amendment

1. Contracting authorities and contracting entities shall indicate in the contract notice, in the invitation to submit tenders or in the concession documents a description of the concession, the award criteria and the minimum requirements to be met. This information must allow to identify the nature and scope of the concession, enabling economic operators to decide whether they request to participate in the concession award procedure. **Contracting authorities may, during the procedure but**

requirements shall not be changed in the course of the negotiations.

before tenders are received, adjust the minimum requirements and the award criteria without publishing a general correction, if the change has no impact on the tenderers. Contracting authorities should inform the tenderers concerned and should provide for a reasonable extension of the deadline for application.

Justification

Concessions rules have to be flexible. Therefore it has to be possible to make additions to the tender during the procedure.

Amendment 55
Proposal for a directive
Article 35 – paragraph 5 – point e

Text proposed by the Commission

(e) they shall establish a **written** record of formal deliberations and any other steps and events relevant for the concession award procedure. **In particular, it shall** ensure, by all appropriate means, the traceability of the negotiations.

Amendment

(e) they shall establish a record of formal deliberations and any other steps and events relevant for the concession award procedure, **in order to** ensure, by all appropriate means, the traceability of the negotiations.

Amendment 56
Proposal for a directive
Article 36 – paragraph 5 – subparagraph 1 – point c

Text proposed by the Commission

c) fraud within the meaning of Article 1 of the Convention on the protection of the financial interests of the European Communities ;

Amendment

c) fraud within the meaning of Article 1 of the Convention on the protection of the financial interests of the European Communities **as well as fraud within the meaning of national legislation for the public contracting entity or tendering authority;**

Amendment 57
Proposal for a directive
Article 36 – paragraph 6

Text proposed by the Commission

6. Any economic operator shall be excluded from participation in a concession where the contracting authority or contracting entity is aware of a decision having the force of res judicata establishing that it has not fulfilled obligations relating to the payment of taxes or social security contributions in accordance with the legal provisions of the country in which it is established or with those of the Member State of the contracting authority or entity.

Amendment

6. Any economic operator shall be excluded from participation in a concession where the contracting authority or contracting entity is aware of a decision having the force of res judicata establishing that it has not fulfilled obligations relating to the payment of taxes or social security contributions in accordance with the legal provisions of the country in which it is established or with those of the Member State of the contracting authority or entity ***or becomes aware of any labour court judgments or legally binding administrative decisions.***

Amendment 58

Proposal for a directive

Article 36 – paragraph 7 – subparagraph 1 – point a

Text proposed by the Commission

a) where it is aware of any other serious violation of provisions of European Union ***or of*** national law aimed at the protection of public interests compatible with the Treaty;

Amendment

a) where it is aware of any other serious violation of provisions of European Union ***law***, national law aimed at the protection of public interests compatible with the Treaty ***or serious breaches in the area of social, labour and environmental law;***

Amendment 59

Proposal for a directive

Article 39 – paragraph 3

Text proposed by the Commission

3. The contracting authority or the contracting entity shall indicate in the concession notice or documents the relative weighting which it gives to each of the criteria set out in paragraph 1 or list those criteria in descending order of importance.

Amendment

3. The contracting authority or the contracting entity shall, ***if it deems it necessary***, indicate in the concession notice or documents the relative weighting which it gives to each of the criteria set out in paragraph 1 or list those criteria in descending order of importance.

Justification

The weighting in itself is no guarantee whatsoever of the impartiality of the procedure, and only serves as a restriction to the contracting authority. It is uncertain what impact this change will have on the renewal procedures required. Weighting or categorising the criteria in order of importance could result in the financial criterion of the awarding authority's remuneration taking precedence over energy and environmental aspects of tenders where hydroelectric concessions are concerned.

Amendment 60

Proposal for a directive

Article 39 – paragraph 3 a (new)

Text proposed by the Commission

Amendment

3a. The contracting authority or the contracting entity shall exclude an economic operator established in a non-EU country from participating in a concession if, by virtue of legislation in the country in which it is established, economic operators established in the Union are prohibited from or restricted in applying for similar concessions.

Justification

This amendment suggests applying the principle of reciprocity, under international trade rules, when it comes to applying for concessions. It excludes any economic operator established in a non-EU country in which there are rules meaning that EU economic operators are prevented from or restricted in applying for concessions.

Amendment 61

Proposal for a directive

Article 39 – paragraph 4 – introductory part

Text proposed by the Commission

Amendment

4. Member States **may** provide that contracting authorities and contracting entities shall base the award of concessions on the criterion of the most economically advantageous tender, in compliance with paragraph 2. Those criteria may include, in addition to price or costs, any of the following criteria

4. Member States **shall** provide that contracting authorities and contracting entities shall base the award of concessions on the criterion of the most economically advantageous tender, in compliance with paragraph 2. Those criteria may include, in addition to price or costs, any of the following criteria

Amendment 62
Proposal for a directive
Article 39 – paragraph 4 – point a

Text proposed by the Commission

a) quality, including technical merit, aesthetic and functional characteristics, accessibility, *design for all users*, environmental characteristics and innovative character.

Amendment

a) quality, including technical merit, aesthetic and functional characteristics, accessibility, *social criteria*, environmental characteristics and innovative character;

Amendment 63
Proposal for a directive
Article 39 – paragraph 4 – point d

Text proposed by the Commission

d) the specific process of production or provision of the requested works, supplies or services *or of any other stage of its life cycle as referred to in point 14 of paragraph 1 of Article 2, to the extent that those criteria concern factors directly involved in these processes and characterise the specific process of production or provision of the requested works, supplies or services.*

Amendment

d) the specific process of production or provision of the requested works, supplies or services.

Amendment 64
Proposal for a directive
Article 39 – paragraph 5 – subparagraph 1

Text proposed by the Commission

In the case referred to in paragraph 4, the contracting authority or entity shall specify in the contract notice, in the invitation to submit a tender, or in the concession documents, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender.

Amendment

In the case referred to in paragraph 4, the contracting authority or entity shall, *where appropriate*, specify in the contract notice, in the invitation to submit a tender, or in the concession documents, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender.

Amendment 65
Proposal for a directive
Article 40 – paragraph 1 – point a

Text proposed by the Commission

(a) internal costs, including costs relating to acquisition (*such as production costs*), use (such as energy consumption, maintenance costs) and end of life (such as collection and recycling costs)

Amendment

(a) internal costs, including costs relating to acquisition, use (such as energy consumption, maintenance costs) and end of life (such as collection and recycling costs);

Justification

When calculating life cycle costs, only those costs incurred by a concession user and external environmental costs based on legal requirements should be taken into consideration.

Amendment 66
Proposal for a directive
Article 40 – paragraph 1 – point b

Text proposed by the Commission

(b) external environmental costs directly linked to the life cycle, provided their monetary value can be determined and verified, which may include the cost of emissions of greenhouse gases and of other pollutant emissions *and other climate change mitigation costs*.

Amendment

(b) external environmental costs directly linked to the life cycle, provided their monetary value can be determined and verified, which may include the cost of emissions of greenhouse gases and of other pollutant emissions.

Amendment 67
Proposal for a directive
Article 41 – paragraph 1

Text proposed by the Commission

1. In the concession documents, the contracting authority or contracting entity may ask *or may be required by a Member State to ask* the tenderer to indicate in its tender any share of the contract it may intend to subcontract to third parties and any proposed subcontractors.

Amendment

1. In the concession documents, the contracting authority or contracting entity may ask the tenderer to indicate in its tender any share of the contract it may intend to subcontract to third parties and any proposed subcontractors. *Member States shall ensure there is no discrimination, in terms of working conditions and wages, between persons employed by subcontractors and persons*

employed by tenderers.

Amendment 68
Proposal for a directive
Article 41 – paragraph 2 a (new)

Text proposed by the Commission

Amendment

2a. Member States can stipulate a binding undertaking pursuant to paragraph 1, and restrict the number of subcontractors in line with the size and complexity of the contract.

Amendment 69
Proposal for a directive
Article 42 – paragraph 2 – point b

Text proposed by the Commission

Amendment

(b) the modification changes the economic balance of the concession in favour of the concessionaire or

(b) the modification changes the economic balance of the concession in favour of the concessionaire ***except if this results from the recovery of the economical and financial equilibrium of the concession after having been upset by the contracting authorities' actions*** or

Amendment 70
Proposal for a directive
Article 42 – paragraph 6 – subparagraph 2

Text proposed by the Commission

Amendment

Contracting authorities or contracting entities shall publish in the Official Journal of the European Union a notice on such modifications. Such notices shall contain the information set out in Annex VII and be published in accordance with the provisions of Article 28.

deleted

Justification

It does not seem to make sense to publish amendments that do not result in a new award procedure.

Amendment 71
Proposal for a directive
Article 43 – title

Text proposed by the Commission

Amendment

Termination of concessions

Termination of concessions and ***new invitation to tender***

Amendment 72
Proposal for a directive
Article 43 – point b a (new)

Text proposed by the Commission

Amendment

(ba) failure to meet the obligations arising from the concession contract;

Amendment 73
Proposal for a directive
Article 43 – point a

Text proposed by the Commission

Amendment

(a) the exceptions provided for in Article 15 cease to apply following a private participation in the legal person awarded the contract pursuant to Article 15 (4);

(a) the exceptions provided for in Article 15 cease to apply following a private participation ***of more than ten per cent*** in the legal person awarded the contract pursuant to Article 15(4);

Justification

Technical amendment, r.

Amendment 74
Proposal for a directive
Article 43 – point c

Text proposed by the Commission

(c) the Court of Justice of the European Union ***finds***, in a procedure pursuant to Article 258 of the Treaty, that a Member State has failed to fulfil its obligations under the Treaties by the fact that a contracting authority or entity belonging to that Member State has awarded the concession in question without complying with its obligations under the Treaties and this Directive.

Amendment

(c) ***in cases in which*** the Court of Justice of the European Union ***determines***, in a procedure pursuant to Article 258 of the Treaty, that a Member State has failed to fulfil its obligations under the Treaties by the fact that a contracting authority or entity belonging to that Member State has awarded the concession in question without complying with its obligations under the Treaties and this Directive, ***tenders must be promptly invited for the concession within six months. Member States must establish the necessary legal prerequisites for this.***

Justification

Technical amendment, new article structure.

Amendment 75

Proposal for a directive

Article 50 – paragraph 1 a (new)

Text proposed by the Commission

Amendment 76

Proposal for a directive

Annex VIII – point 1 – point a

Text proposed by the Commission

a) in the case of public works concessions or works concessions, the totality of the technical prescriptions contained in particular in the concession award documents, defining the characteristics required of a material, product or supply, so that it fulfils the use for which it is

Amendment

The modifications to Directives 89/665/EEC and 92/13/EEC shall be inserted into those texts at the latest by the time this Directive enters into force.

Amendment

a) in the case of public works concessions or works concessions, the totality of the technical prescriptions contained in particular in the concession award documents, defining the characteristics required of a material, product or supply, so that it fulfils the use for which it is

intended by the contracting authority or entity. Those characteristics include levels of environmental and climate performance, **design for all requirements (including accessibility for disabled persons)** and conformity **assessment**, performance, safety or dimensions, including the procedures concerning quality assurance, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions **and production processes and methods at any stage of the life cycle of the works**; those characteristics also include rules relating to design and costing, the test, inspection and acceptance conditions for works and methods or techniques of construction and all other technical conditions which the contracting authority or entity is in a position to prescribe, under general or specific regulations, in relation to the finished works and to the materials or parts which they involve;

Amendment 77
Proposal for a directive
Annex VIII – point 1 – point b

Text proposed by the Commission

b) in the case of service concessions, a specification in a document defining the required characteristics of a product or a service, such as quality levels, environmental and climate performance levels, **design for all requirements (including accessibility for disabled persons)** and conformity **assessment**, performance, use of the product, safety or dimensions, including requirements relevant to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions, **production processes and methods at any stage of the life cycle of the supply or service and**

intended by the contracting authority or entity. Those characteristics include levels of environmental and climate performance, **assurance of accessibility for disabled persons**, and conformity **with European Union law**, performance, safety or dimensions, including the procedures concerning quality assurance, terminology, symbols, testing and test methods, packaging, marking and labelling, **as well as** user instructions; those characteristics also include rules relating to design and costing, the test, inspection and acceptance conditions for works and methods or techniques of construction and all other technical conditions which the contracting authority or entity is in a position to prescribe, under general or specific regulations, in relation to the finished works and to the materials or parts which they involve;

Amendment

b) in the case of service concessions, a **written** specification in a document defining the required characteristics of a product or a service, such as quality levels, environmental and climate performance levels, **assurance of accessibility for disabled persons and conformity with European Union law**, performance, use of the product, safety or dimensions, including requirements relevant to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking and labelling, **as well as** user instructions;

conformity assessment procedures;

PROCEDURE

Title	Award of concession contracts
References	COM(2011)0897 – C7-0004/2012 – 2011/0437(COD)
Committee responsible Date announced in plenary	IMCO 17.1.2012
Opinion by Date announced in plenary	ITRE 17.1.2012
Rapporteur Date appointed	Werner Langen 14.3.2012
Discussed in committee	12.7.2012
Date adopted	5.11.2012
Result of final vote	+: 37 –: 6 0: 3
Members present for the final vote	Gabriele Albertini, Josefa Andrés Barea, Jean-Pierre Audy, Ivo Belet, Jan Březina, Giles Chichester, Pilar del Castillo Vera, Christian Ehler, Vicky Ford, Adam Gierek, Fiona Hall, Jacky Hélin, Kent Johansson, Romana Jordan, Krišjānis Kariņš, Béla Kovács, Angelika Niebler, Rolandas Paksas, Aldo Patriciello, Vittorio Prodi, Miloslav Ransdorf, Herbert Reul, Michèle Rivasi, Amalia Sartori, Salvador Sedó i Alabart, Francisco Sosa Wagner, Britta Thomsen, Evžen Tošenovský, Catherine Trautmann, Claude Turmes, Marita Ulvskog, Adina-Ioana Vălean, Alejo Vidal-Quadras
Substitute(s) present for the final vote	Yves Cochet, Ioan Enciu, Roger Helmer, Jolanta Emilia Hibner, Gunnar Hökmark, Yannick Jadot, Werner Langen, Zofija Mazej Kukovič, Franck Proust, Algirdas Saudargas, Silvia-Adriana Țicău
Substitute(s) under Rule 187(2) present for the final vote	Phil Bennion, Christian Engström