

Brussels, 20 December 2011

Proposal for a Directive of the European Parliament and of the Council on the award of Concession Contracts – Frequently Asked Questions

1. What are concessions?

Concessions are partnerships between the public sector and mostly private companies, where the latter exclusively operate, maintain and carry out the development of infrastructure (ports, water distribution, parking garages, toll roads) or provide services of general economic interest (energy, water and waste disposal for example). Concessions are the most common form of Public Private Partnership (PPP) – for more details, see also question 16.

2. What is their economic importance?

Concession contracts underpin an important share of the economic activity in the EU. However, the fact that Member States use different labelling for concessions and the current lack of transparency on their award makes systematic and precise measuring of their economic and social importance difficult. According to studies carried out in 7 Member States on 4 main sectors (water, waste, health and transport), concessions awarded were estimated to be worth €138 billion annually. Other studies estimate that over 60% of all PPP contracts in Europe are to be qualified as concessions.

What we observe is that where clear rules exist, they are commonly used by contracting authorities. 50% of waste management services in the EU are concessions. 6,169 concessions advertised in the Spanish national Official Journal between 2006 and 2010, 817 in Italy in only in 2008, while in France there is a stock of approximately 10,000 concessions contracts running.

3. Why do concessions need to be regulated at all? Why at EU level?

Unlike public contracts, which are regulated by Directives [2004/17/EC](#) and [2004/18/EC](#) and public works concessions, which are partially covered Directive 2004/18/EC, the award of service concessions is not subject to any clear and unambiguous provisions, being guided only by the general principles of transparency and equal treatment of the Treaty on the Functioning of the EU. This loophole gives rise to potentially serious distortions of the Internal Market such as direct awards of contracts without any competition (with associated risks of national favouritism, fraud and corruption) and generates considerable inefficiencies.

This effectively means that EU citizens may not be benefitting from quality services at best prices. Economic operators (in particular SMEs) may be discriminated against on access to concession contracts and public authorities may fail to guarantee the efficient spending of public money.

The above problems fundamentally affect the efficient functioning of the EU Internal Market. Therefore, in order to eliminate discrepancies among national regimes and ensure homogenous understanding of the Treaty principles across Member States, a European framework is necessary. It is the most appropriate way to overcome existing barriers to the EU-wide concession market and to ensure convergence and a level playing field in the EU, ultimately guaranteeing the free movement of goods and services in all 27 Member States.

4. What evidence is there of distortions to the internal market justifying rules on the award of concessions?

The impact assessment carried out by the Commission shows that rules and practices of Member States concerning the award of concessions are very different and that the principles of the Treaty are not understood and applied in the same way everywhere (for example, Germany, Belgium, Estonia, the United Kingdom, Finland, Greece, Ireland, the Netherlands have no rules on concessions).

The impact assessment has shown that the absence or inadequacy of national rules for awarding concessions prevents the integration of national markets with regard to concessions, increases the risks of national favoritism, fraud and corruption and is also at the source of violations of the principles of the Treaty.

Furthermore, the public consultation conducted by the Commission shows that a third of participants (particularly businesses, associations, public authorities) were aware of cases of direct award of concessions, without any transparency and without competition. Direct award of a concession is a serious violation of the Treaty principles.

The Court of auditor has also singled out public procurement as the principal source of errors (43%) in the spending of EU's cohesion funds, of which concessions contracts represent a significant share. Over the last years, a number of Member states have had significant infrastructure projects delayed or cancelled because of inadequate procedures in the attribution of concession.

Finally, the multiplication of the Court's judgments on concessions (25 since 2000 mostly on the definition of a concession) shows that the current situation is far from satisfactory and that the problems cannot be adequately addressed on a case-by-case basis.

5. Why do we need these rules now?

At a time of pressing demands for efficient spending of public money there is an urgency in establishing a clear European legislative framework allowing for delivery of works and services under conditions of sound financial management and at best value for money. This will be ensured through a Union wide competition for high value concessions where the most efficient providers are given a fair chance of winning the contract.

The new rules will facilitate the conclusion of concessions and therefore of PPP, encouraging new investments, promoting a quicker return to sustainable economic growth and contributing to innovation and long-term structural development of infrastructures and services.

6. Will this proposal force public authorities to outsource the provision of services of general economic interest?

No. Under EU law, including the new proposal for a directive on concessions, public authorities will remain entirely free to carry out public tasks assigned to them by using their own means or resources.

However, if a public authority decides to outsource (e.g. to a private company) and concludes a contract with such an entity, the provisions of the new directive would have to be complied with.

For more information on SGEI, see also [IP/11/157](#) and [MEMO/11/929](#) published today and also [IP/11/106](#).

7. Will the proposal affect the freedom of public authorities to organise services of general interest?

No, public authorities in each Member State must retain the possibility to define and enforce public service obligations and to organise the provision of services of general interest. By imposing public service obligations, public authorities remain free to define the characteristics of the service to be provided, including any conditions regarding the quality of the service, in order to pursue their public policy objectives.

Public service obligations are defined as «specific requirements that are imposed by public authorities on the provider of the service in order to ensure that certain public interest objectives are met, for instance, in the matter of air, rail and road transport and energy. These obligations can be applied at Community, national or regional level.»

8. Why new EU rules on concessions instead of an Interpretative Communication?

Our judgment is that simply relying on the Court's existing case law is insufficient as it does not address many of the problems related to the award of concessions.

An interpretative communication would state the Commission's understanding of the applicable EU law and the Court's case law on concessions, but could not establish new rules. This clarification of the Treaty principles would commit the Commission only and would not bind third parties. Already in 2000 and 2008, the Commission adopted communications on concession contracts. Neither of these Communications has improved the persisting situation of legal uncertainty or tackled existing entry barriers in Member States to the award of concessions. That is why EU level legislation is necessary.

9. Why is a separate proposal on concessions necessary on top of the wider proposals on public procurement?

Concessions have specific features compared to public contracts which justify a special and more flexible set of rules for their award. Concessions are typically high-value, complex and long-term contracts which require appropriate flexibility during the award procedure to ensure the best possible outcome.

A specific proposal for concessions helps distinguish between the rules applicable to concessions and those applicable to public contracts and therefore makes them simpler to use.

In addition, a proposal on concessions is addressed to contracting authorities and economic operators particularly concerned by the concession market (which are not necessarily also active also in the public contracts market).

10. What are the main elements of the proposal?

- A clearer and more precise definition of a concession (building on the Court's case law);
- Coverage of award of works and services concessions both in the classic sector (all other sectors not covered by utilities) and in the utilities sector (Directives 2004/18/EC and 2004/17/EC respectively);
- Compulsory publication of concessions in the Official Journal of the EU, when their value is equal to or greater than €5,000,000;
- Pragmatic solution for dealing with changes to concessions contracts during their term notably when justified by unforeseen circumstances;
- Establishment of a minimum deadline of 52 days for the submission of applications for the concession;
- Establishment of certain obligations with respect to the selection and award criteria to be applied by the contracting authorities and contracting entities when awarding concessions. These rules aim at ensuring that such criteria are published in advance, are objective and not discriminatory. In general, they are less rigid than similar provisions currently applicable to public contracts;
- No specific award procedures but instead definition of certain general guarantees aimed at ensuring transparency and equal treatment with particular reference to negotiation;
- Application of the [Remedies Directives](#) (Directives 89/665/EEC and 92/13/EC, as amended by Directive 2007/66/EC) to all concessions above the threshold.

11. Will contracting authorities need to follow a specific tendering procedure for the award of concessions?

No, contrary to what has been established for public contracts, the present rules do not set out any specific procedure. It will be for Member States to define the applicable procedures for the award of concessions in observance of certain general rules concerning selection and award criteria and procedural guarantees.

12. Will SMEs benefit from this proposal?

Today, the absence of a clear obligation to advertise service concessions in Europe hampers the cross-border access of undertakings, particularly of SMEs, to business opportunities in the Internal Market.

The proposal aims at facilitating such access to all economic operators, including SMEs. Larger companies usually have the means to obtain information on business opportunities in the EU. It is precisely SMEs which do not have the same means that stand to benefit the most from the publication of a concession notice in the Official Journal of the European Union. They will be able to decide whether and how to organise themselves (group of SMEs, joint venture with local businesses, subcontracting, etc.) to take advantage of the new opportunities. In addition, the light rules proposed for the award of concessions will not impose undue new obligations or excessive costs on SMEs.

13. Will the proposal on concessions increase complexity and transaction costs, in particular for SMEs?

No, according to studies available on the economic impact of Public Procurement legislation, it appears that although detailed rules necessarily provoke certain additional costs (e.g. costs of publication, processing and evaluation of a higher number of bids), more intense competition and greater legal certainty improve the value for money for purchasers (on average by 5%). In particular, any additional costs are compensated by lower transaction costs in cross-border provision of services, improved efficiency and an increase in the number of business opportunities resulting from the Union wide harmonisation of rules. The net effect for undertakings and in particular for SMEs is positive. The same phenomenon with regard to economic value can be expected in the case of concessions.

14. What is the relationship between concessions and Public-Private Partnerships?

Concessions involving private partners are a particular form of Public Private Partnership (PPP). Although PPPs have never been defined in EU Public Procurement legislation, they are usually understood to be cooperation between a public authority and a private partner, where the latter bears risks that are traditionally borne by the public sector and often contributes to financing the project. Some PPPs are structured as public contracts, but most PPPs take the form of concessions. Based on estimations carried out by the Commission services, over 60 % of all PPP contracts would qualify as concessions.

15. Will the proposed directive result in a deterioration of public service, by promoting the award of concessions on the basis of the lowest price?

The proposal on concessions does not impose any specific award criteria. It only requires award criteria to be objective, non-discriminatory and related to the subject of the concession. Contracting authorities may, within these limits, choose the criteria they find most suitable to the award of the concession notably with reference to the quality of the services or works, their environmental performance or even social considerations.

While the proposal requires that award criteria deliver an overall economic benefit to the public authority, it does not impose the use of the criterion of the lowest price, which in most cases does not permit to take into account the complexity of such contracts.

16. Will the new Directive apply to existing concessions?

The new Directive will have no retroactive effect. Concession contracts in place at its entry into force will not be affected for their entire duration. However, an extension of their duration may qualify as a new concession and therefore will have to comply with the rules of the new Directive, once the latter comes into force.

17. What are the rules on modifications of concessions during their term?

The proposal will clarify, in line with the case-law of the Court of Justice of the European Union what is a substantial modification of a contract during its term and when such a modification will correspond to the award of a new contract.

It will provide a «safe harbour» for minor changes to the contract (those not exceeding the threshold of the proposal and inferior to 5% of the price of the initial contract) which will always be acceptable.

Finally it will clarify the scope of acceptable contractual clauses and set out the conditions to substantially modify the contract to take into account unforeseen circumstances.

18. What are the next steps?

The Commission's proposal is now sent to the European Parliament and Council of Ministers for adoption under the co-decision procedure.

More information on concessions and public private partnerships is available at:

http://ec.europa.eu/internal_market/publicprocurement/partnerships/public-private/index_en.htm