



EUROPEAN COMMISSION

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C(2012) 6062 final

Dear President,

*The Commission would like to thank the Bundesrat for its reasoned Opinion on the proposal for a Directive of the European Parliament and of the Council on the award of concession contracts {COM(2011) 897 final} and apologizes for the delay in replying.*

*The main objective of the proposal is to ensure legal certainty for contracting authorities and bidders. Such legal certainty is not being achieved by the current legal framework, which is incomplete and unstable. This results, on the one hand, in a lack of appropriate judicial guarantees for both contracting authorities and bidders, and on the other hand, in barriers to market entry and an uneven playing field for economic operators.*

*Rules on concession contracts do not aim at the liberalisation or privatisation of any sector of economic activity. They will only apply where a public authority autonomously decides to have recourse to a third party. In that case only, these rules will enable such authority to make the best choice of the available opportunities.*

*The proposal aims at clarifying the obligations derived from the application of the EU fundamental freedoms in the field of public procurement, especially the free movement of goods and services and the right of establishment. Secondary legislation already exists for public contracts, and partially for works concessions. The remaining loophole concerns the award of service concessions.*

*Until now, Member States have not uniformly interpreted or sufficiently implemented the relevant Treaty provisions. The ensuing lack of legal certainty and foreclosure of markets is unlikely to be eliminated without intervention at the appropriate level. However, even if Member States were to take legislative action at national level to establish a legal framework based on the Treaty principles of transparency and equal treatment, at least two problems would remain unsolved: the risk of legal uncertainty flowing from possibly diverging interpretations of those principles under national law, and the risk of wide disparities among legislations in different Member States, resulting from the lack of precision of applicable EU standards.*

*Legal uncertainty affects both the definition of a concession and the applicable legal regime. The Commission considers that the case-law of the Court of Justice of the EU is not sufficient by itself to provide the required legal certainty for operators in their day-to-day activities. To date, the Court of Justice has rendered 26 judgments on concessions, 18 of which concerned the definition of such contracts. Moreover, this limited case-law of the Court is not yet stabilised. As an example, it is difficult to draw a comprehensive answer from the case-law of*

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*the Court of Justice concerning the level of risk to be transferred to the concessionaire (see the judgments of the Court of Justice in cases Oymanns, C-300/07, Eurawasser, C-206/08 and Stadler, C-274/09).*

*Furthermore, the precise content of the obligations of transparency and non-discrimination arising from the Treaty remains unclear. Although the Court of Justice made an attempt to clarify the content of the principle of transparency, referring in a couple of judgments to the notion of "adequate advertisement", the specific obligations resulting therefrom have never been concretely defined. Similarly, up to now there was no need for the Court of Justice to define the concrete procedural requirements for respecting the principle of equal treatment.*

*Therefore, it is for the European Parliament and the Council of the EU, in their capacity as European legislators, to define such a framework, instead of leaving this task for the Court of Justice, whose judgments are by nature linked to specific factual situations and therefore are not the right tool to remedy the absence of comprehensive secondary legislation.*

*Services concessions may concern the provision of services of general economic interest ("SGEIs") at regional or local level. In this context, it should be emphasised that this proposal should under no circumstances result in the forced privatisation of economic activities concerning the provision of SGEIs. Most importantly, public authorities would remain free to pursue such activities themselves (by using their own resources), confer it to a fully public in-house entity or, alternatively, assign them to a third party if they wish. The decision as to whether the task should be conferred to a third party or whether the service provision should be kept in public hands (especially municipal or regional) would fully remain with the public authorities of the Member States.*

*Similarly, the decision on the characteristics of the service to be provided would be determined, as is the case today, by the competent authority. In light of the above, the proposal fully respects the principle of municipal and local self-government, as well as the particular importance of SGEIs, as recognised by the Treaties. In fact, the proposal guarantees the aforementioned autonomy by including provisions (Article 15) relating to public-public co-operation, providing public authorities with legal certainty that they will retain all the abovementioned possibilities of performing the public tasks without being in any way obliged to resort to outside private entities.*

*It is only in cases where these authorities take a decision to externalise the provision of a service that the proposed Directive would have to be respected, and only with regard to those concession contracts that are advertised after the date in which the proposal may come into force.*

*The proposed rules fully respect the economic specificities of certain sectors covered by the proposal, such as those referred to in the reasoned Opinion (e.g. water). In particular, these rules do not in any way prevent the exercise "of the democratic influence of the State" on these sectors, for example with regard to local water management, by forcing their liberalisation. If a Member State decides that the provision of certain services should not be left to the free market and therefore opts to assume responsibilities in a specific domain, the proposed rules do not prevent or limit such a choice. As explained above, in such a case, the public authorities would remain competent to determine the structure of the provision of services in such sectors.*

*If, as stated in the reasoned Opinion, the conditions on a given market are not conducive to the introduction of competition-like structures, a contracting authority may opt for in-house*

*provision of the service. However, if it is decided to confer the exercise of an economic activity (recognised as a public task) on a third party, the proposed rules on the award of concessions allow the public authorities to play a decisive role in determining the conditions of providing such services, for example with regard to their specifications, quality and prices.*

*As far as the administrative burden is concerned, it should be pointed out that the proposal does not seek to harmonise the rules on the awarding of concessions, but merely aims to set some basic standards for ensuring the respect of the Treaty principles: for example, there are no standard procedures proposed, as indeed the obligation to follow a specific procedure could be counterproductive and therefore reduce the uptake of concessions. Therefore, Member States retain their competence with regard to award procedures.*

*Concerning the obligation to publish a concession notice in the Official Journal of the EU ("OJEU"), it concerns only works or services concessions with an estimated value above the threshold of 5 million euros. This requirement is expected to reduce the number of direct awards, contribute to better information on concessions, eliminate legal uncertainty as to whether the standards of 'adequate advertisement' are met, and reduce the cost of bidding for concessions, especially for small and medium enterprises ("SMEs").*

*With regard to the requirement to publish an award notice in the OJEU, it only concerns works concessions above the threshold of 5 million euro, as well as services concessions worth more than 2.5 million euro (with the exception of specific services such as social services). The objective of such a requirement is to bring more transparency with regard to the awarded contracts.*

*The aforementioned obligations are well-known to public authorities and are the simplest means for ensuring that contract notices are published at EU level.*

*The requirement concerning selection criteria seeks to ensure equal treatment of candidates. More importantly, it will help improve the situation of SMEs, in particular, by providing certain guarantees to consortia, so that selection criteria would apply jointly to all members of a consortium and prohibit the exclusion of candidates for the sole reason that they rely on a third party.*

*Provisions on technical specifications play an important role in preventing distortions to the free movement of goods and services. These specifications can be formulated in terms of performance or functional requirements and thus their use should not be problematic even in case of complex concession contracts.*

*I hope these elements help to clarify concerns raised in your reasoned Opinion and look forward to continuing the political dialogue with the Bundesrat on this important issue.*

*Yours faithfully,*

*Maroš Šefčovič  
Vice-President*