



EUROPEAN COMMISSION

*Brussels, 31.7.2013
C(2013) 5057 final*

*Ms Laura BOLDRINI
President of the
Camera dei Deputati
Piazza di Montecitorio, 1
IT - 00186 ROMA*

Dear President,

The Commission would like to thank the Camera dei Deputati for its Opinion on the proposal for a directive on the award of concession contracts {COM (2011) 897 final}, and apologises for the delay in replying. The Commission welcomes the support of the Camera dei Deputati and would like to take this opportunity to react to some of the observations made in its Opinion.

The Opinion refers to the compromise proposal negotiated under the Cypriot Presidency of the Council. The general approach based on a compromise text adopted by the Competitiveness Council on 10 December 2012 modifies the provisions of the proposal related to several aspects mentioned by the Camera dei Deputati. As noted by the Camera dei Deputati, the modifications refer, amongst other aspects, to the differences between concessions and agreements for exploitation of public domain or resources, deletion of the mandatory use of electronic means in the award of concessions, duration, and modification of contracts during their term.

A political agreement has been reached on this new directive between the Commission and the co-legislators during the trilogue of 25 June 2013, after an intense series of negotiations. A final agreement is expected for after the summer, under the Lithuanian presidency.

The Commission would however like to make the following specific comments:

- a) The Commission considers that given the wide scope of application of the proposed rules it is not possible to define a maximum duration for all concession contracts. Therefore, in line with the case law of the Court of Justice of the European Union,¹ the Commission proposed to limit the duration of a concession 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. However, the Commission notes that the proposal of the Cypriot Presidency of the Council has made an exception for contracts lasting up to 5 years where the restrictions to the exercise of the freedoms guaranteed by Articles 40 TFEU and 56 TFEU are likely to be very limited.*
- b) The Commission considers that the Cypriot Presidency Compromise solution (Recital 6b and Annex III, paragraph 5) for the use of State-owned goods, which has been agreed during negotiations in the Council, provides for clarity on this issue and sufficiently*

¹ See judgement of 9 September 2010 in case C-64/08, *Engelmann*, points 46-47.

addresses the concerns of the Camera dei Deputati. Agreements related to public domains or resources where the contracting authority or entity establishes only general conditions for their use without acquiring specific works or services do not qualify as concessions under the draft Directive and therefore are not covered by it. Providing for an explicit exclusion of those agreements from the scope of the Directive as suggested by the Camera dei Deputati would have no specific purpose.

c) The rationale behind the provisions on self-cleaning is to provide an incentive for economic operators that desire to correct their behaviour (e.g. replace people who were unreliable or acted against the interest of the economic operator, by enabling them to take part in the award procedure if certain conditions are respected. The positive aspects of such a provision are recognised by several Member States and international organisations fighting corruption (Transparency International). A great number of Member States also supported the Cypriot Presidency compromise proposal on self-cleaning, which is consistent with the approach of the Reform on the General Procurement directives ({COM(2011) 895 final} and {COM(2011) 896 final}.

Please also note, however, that the third paragraph of Article 36 (8) precludes the use of self-cleaning in situations where the economic operator is excluded by a final judgement from participating in procurement or concession award procedure for the period of exclusion resulting from that judgement. The Commission would welcome any further clarifications on the implementation of the principle of the finality of the exclusion grounds in Italian law.

Each Member State has certain discretion as to the implementing conditions for Article 36 (see paragraph 9) which may provide for a targeted approach regarding Member States which need to introduce the provisions on self-cleaning in their national law.

d) The possibility for the contracting authority or entity to require concessionaires to allocate a minimum of 30% of the value of the services or works of the contract to third parties has not been proposed by the Commission as such an obligation was considered to impinge on the concessionaire's freedom to organise the performance of the works and services in the most efficient way.

e) The Commission proposed that the concessions directive would not have retroactive effect and would therefore apply only to contracts awarded after its entering into force. This is now also clear in Recital 39(a) of the Cypriot Presidency compromise text. The concession contracts already in place at its entry into force would not be affected for their entire duration. However, an extension of the duration of a contract after the directive comes into force may qualify as a new concession and may have to comply with the rules of the new Directive.

The Commission hopes that these clarifications address the concerns raised by the Italian Camera dei Diputati and looks forward to continuing our political dialogue in the future.

Yours faithfully,

*Maroš Šefčovič
Vice-President*