



EUROPEAN COMMISSION

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Dear Presidents,

The Commission would like to thank the Cortes Generales 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 apologises for the delay in replying.

The main objective of the proposal is to ensure legal certainty for contracting authorities and bidders in the process of the award of concession contracts and to provide for a stable and flexible framework, guaranteeing the best value for public money. The lack of such rules today results in entry barriers to the numerous markets concerned, and in an uneven playing field for economic operators across the European Union (EU).

The Commission would like to underline that the objective of any EU legislation regarding the internal market is to address problems which affect its functioning as a whole, irrespective of the fact that certain Member States may have in place national provisions regulating a given area. In the case of concession contracts, the majority of Member States have either incomplete frameworks or do not have any rules, while only some Member States – including Spain - have adopted exhaustive regulation in this respect.

The analysis carried out by the Commission has confirmed that Member States have not uniformly interpreted or sufficiently implemented the relevant Treaty principles of transparency, equal treatment and non-discrimination. The ensuing lack of legal certainty is unlikely to be eliminated without intervention at EU level. Even if Member States were to take legislative action at their level to establish a framework based on the

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Treaty principles, the problem related to the risk of legal uncertainty flowing from possibly diverging (and non-compliant) interpretations of those principles under national law would remain unsolved.

In fact, extensive consultations carried out by the Commission have shown that 37% and 40% of stakeholders, respectively, in the public consultation and in the consultation targeted at the business community, were aware of contracts being awarded without any competition; 45,9% of respondents to the public consultation were informed about confusion between concessions and public contracts resulting in the award of the latter as concessions; while 32% of the respondents in the public consultation and 40.5% of those who responded to this question in the consultation targeted at the business community perceived disparities between national legislations on concessions as an obstacle to cross-border economic activity.

The Commission proposal only seeks to propose rules which are strictly necessary to guarantee transparency and equal and non-discriminatory access to the opportunities stemming from the award of concession contracts, and hence not to interfere with the competence of Member States to structure the awarding procedures according to their cultural and legal traditions. In other words, the proposal does not seek to harmonise the rules on the award of concessions, but aims to render the relevant fundamental Treaty principles clear and unambiguous. The Commission will in this context take the position of the Cortes Generales into due account in the current negotiations with co-legislators.

With regard to the lack of appropriate judicial guarantees for bidders, the Directives on the remedies in the field of Public Procurement (89/665/EEC and 92/13/EEC as amended by Directive 2007/66/EC) are not applicable to service concessions or to concessions in the field of utilities. This means that the aggrieved bidders do not have any possibility to avail themselves of the means of appeal which are available to the bidders competing for other contracts, including works concessions.

Even though several Member States have extended the judicial guarantees provided by the Remedies Directives to services concessions, many of them have not, which implies a lack of effective judicial protection for the participants in the award procedures and an unequal playing field. The Commission is convinced that the extension of the remedies regime by means of legislative action at EU level is the only way to ensure that the rights of the bidders are enforced.

I hope that these clarifications address the concerns expressed by the Cortes Generales and I look forward to continuing our political dialogue in the future.

Yours faithfully,

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Vice-President*