



Modernisation of EU public procurement rules

Proposal for a Directive on the award of concession contracts

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NB: The information contained in this presentation is not binding for the European Commission and does not present an official position of the European Commission

Why we need clear rules on concessions...

- Important share of the economic activity in the EU
- Mobilisation of private capital and know-how for large projects of long duration
- Ensure efficient spending of taxpayers' money
- Services concessions in general and works concessions in the Utilities sector are subject to Treaty Principles only
- Single Market Act I Agenda

Coming a long way...

1989

- *a number of provisions were adopted on the award of works concessions (Directive 89/440/EEC)*



1991

- *the Commission proposed to include «public service concessions» within the scope of Directive 92/50 covering public service contracts*



2000, 2005, 2009

- *several Communications of the Commission on concessions and public-private partnerships*

2004

- *works concessions in the classical sector partially covered (Directive 2004/18/EC)*



In 2011, the Impact Assessment concluded...

The current situation is not satisfactory

- **Lack of legal certainty** (with regard to the definition and award of concessions).
- **Existence of entry barriers** (stemming from the disparity of national rules and unlawful practices of contracting authorities/entities).
- **Insufficient legal protection of tenderers.**

! As a consequence - no real EU single market in the area of concessions.



Filling the Existing Gaps...

- **Proposal for a directive on concessions 20.12.2011**
 - Clear definition of "concessions"
 - Both classic and utilities sectors are covered
 - Threshold of 5 million € for all concessions
 - Exemptions: "in-house", affiliated undertakings, joint ventures and cooperation between public authorities

Filling the Existing Gaps...

- Publication of notices in the Official Journal of the EU (ex post & ex ante)
- Procedural guarantees when conducting a procedure (e.g. general requirements on criteria on selection/exclusion of candidates)
- Extension of judicial protection → Remedies Directives
- Clear regime on modifications of contracts

Filling the Existing Gaps...

- Transfer of operating risk as main defining feature
- Risk – no guarantee on recouping investments made or costs incurred in operating the works or the services
- Demand or supply risk or both
- Exposure to the vagaries of the market

Filling the Existing Gaps...

➤ **Modifications**

- Clarification of notion of substantial
- Safe harbour for minor ones
- Possibility of review clauses (step-in rights)
- Flexibility for changes justified by unforeseen circumstances



Making it Happen...

➤ **Council and Parliament**

- Council "general approach": 10th December 2012
- Parliament IMCO committee report: 24th January 2013
- Trilogues: started on 12 March 2013
- With a view to adoption in Summer 2013

Making it Happen...

- **Scope and definition** preserved
- **Thresholds and method of calculation** –
estimated turnover of the concessionaire;
transparency threshold of 2,5 mln € disappears;
IMCO: 8 mln € threshold
- **Exemptions** – IMCO: exclusion of gambling,
broader exclusion for contracting entities holding
exclusive rights
- **Modifications** – IMCO: suppression of absolute
threshold of 5 mln € for minor modifications



Thank you for your attention!