



EUROPEAN COMMISSION  
IMPACT ASSESSMENT BOARD

28 JAN. 2011

Brussels,  
D(2011)

## Opinion

**Title**                    **DG MARKT - Impact Assessment on a Legislative initiative  
on concessions**

**(draft version of 17 December 2010)**

### **(A) Context**

The two so-called "Procurement Directives" (the "Classic Directive" 2004/18/EC and the "Utilities Directive" 2004/17/EC) do not cover the award process of service concessions and of work concessions in the energy sector. Awarding these concessions must nevertheless respect the four Treaty-based principles of equal treatment, non-discrimination, transparency and proportionality, and may be subject to national legislation of varying scope and content.

Aiming to foster the use of public-private partnerships and to facilitate an efficient use of public resources in the current economic situation, the Commission is considering whether to extend parts of the EU secondary legislation on public procurement to these types of concessions. A revision of the two procurement directives themselves is foreseen for 2012.

### **(B) Overall assessment**

**The report needs to be significantly improved in several respects. It should strengthen the case for both the action proposed and its timing by providing greater evidence on the magnitude and evolution of the problems and by showing that the identified legal shortcomings are among their key underlying drivers. The presentation of the problems should also go beyond the legal dimension by highlighting their economic potential (in terms of opportunities for more efficient public spending) rather than simply their legal dimension. The report should also better explain the scope of the initiative, in particular relative to the planned revision of the public procurement directives, and clarify the reasons for the choice of options analysed. Finally, the report should provide a more quantitative and comprehensive analysis of the options, notably with respect to compliance, transposition, the impact on existing arrangements and the effectiveness of the "mixed rules" options.**

**Given the nature of these recommendations, the Board asks DG MARKT to resubmit a revised version of the report, on which it will issue a new opinion.**

**(C) Main recommendations for improvements**

**(1) Provide greater evidence of problems' size, highlight their economic importance and establish the relevance of the identified drivers.** The report should provide more data and examples on the existence, magnitude and evolution of the problems presented (single market distortions, under-utilisation of concessions, circumvention of public contracts rules through concessions etc.). In so doing, the analysis should bring to the fore the importance of opportunities in terms of public spending efficiency. Relying on strengthened evidence, the report should also assess the relevance of the targeted legal shortcomings relative to other problem drivers that will not be addressed, for instance in the case of limited use of concessions by some Member States. Enhanced evidence and a greater focus on the economic dimensions of the problem should be used to strengthen the case for both the action proposed and its planned timing.

**(2) Better justify the scope of the initiative and the choice of options.** The report should better explain how the scope of the initiative relates to the envisaged 2012 revision of the "procurement directives". In this context, the report should clarify the reasons for the proposed continuation of the "transitional" exclusion of non-priority sectors and should provide evidence that this would not significantly affect the objective of fostering more efficient public spending. Finally, the report should better illustrate how the set of options analysed was determined, including by clarifying how the fields to be subject to less detailed provisions under the "mixed rules" option were identified and by discussing more precisely the choice of the suggested threshold level.

**(3) Strengthen the impact analysis and the comparison of options.** Relying on enhanced information on the size of the problems and the relevance of drivers, the report should provide more quantitative evidence or examples on the size of impacts. The analysis of the latter should also be extended to include impacts on existing arrangements in Member States and considerations in terms of transposition and compliance. The discussion on employment impacts should be clarified. In addition, the report should provide a more comprehensive comparison of the pros and cons of the detailed and "mixed" rules and should discuss further the choice of the legal instrument. To this end, the report should complement stakeholders' views on these options with all other available evidence. Finally, it should better substantiate the rationale for the different treatment of public contracts and concessions and assess the risks that different national interpretations of the general requirements envisaged under the "mixed rules" would pose for the effectiveness of this option.

*Some more technical comments have been transmitted directly to the author DG and are expected to be incorporated in the final version of the impact assessment report.*

**(D) Procedure and presentation.**

Written in clear and accessible language, the report can be read as a stand-alone document and does not exceed the suggested length. The scope of legislative options should be discussed in § 8 ("policy options") rather than § 9 ("Impact analysis of the legislative options").

**(E) IAB scrutiny process**

Reference number	<b>2010/MARKT/043</b>
External expertise used	No
Date of Board Meeting	26 January 2011