



**EUROPEAN COMMISSION**

## **MEMO**

Brussels, 15 January 2014

# **Directive of the European Parliament and of the Council on the award of Concession Contracts – Frequently Asked Questions**

## **1. What are concessions?**

Concessions are partnerships between the public sector and mostly private companies, where the latter exclusively operate, maintain and carry out the development of infrastructure (ports, water distribution, parking garages, toll roads) or provide services of general economic interest (energy, water distribution and waste disposal for example). Concessions are the most common form of Public Private Partnership (PPP) – for more details, see also Question 13.

## **2. What is their economic importance?**

Concession contracts underpin an important share of the economic activity in the EU. However, the fact that Member States use different labelling for concessions and the current lack of transparency on their award makes systematic and precise measuring of their economic and social importance difficult. According to studies, over 60% of all PPP contracts in Europe are to be qualified as concessions.

Where rules exist for the award of these contracts, they are used by public authorities. For example, 6 169 concessions were advertised in the Spanish national Official Journal between 2006 and 2010, 817 in Italy in 2008 alone, while in France approximately 10,000 concessions are presently running.

## **3. Why do concessions need to be regulated at all? Why at EU level?**

Unlike public contracts, which are regulated by Directives [2004/17/EC](#) and [2004/18/EC](#) and public works concessions, which are partially covered in Directive 2004/18/EC (as modified by the present reform), the award of service concessions is not subject to any clear and unambiguous provisions, being guided only by the general principles of transparency and equal treatment of the Treaty on the Functioning of the EU. This loophole gives rise to serious distortions of the Single Market such as direct awards of contracts without any transparency or competition (with associated risks of national favouritism, fraud and corruption) and generates considerable economic inefficiencies.

This effectively means that EU citizens may not always benefit from quality services at best prices. Economic operators (in particular SMEs) may be discriminated against on access to concession contracts and public authorities may fail to guarantee sound management of public money.

The above problems fundamentally affect functioning of the EU Single Market. Therefore, in order to ensure benefits stemming from sound and efficient procurement, elimination of discrepancies and fragmentation among national regimes and homogenous understanding of the Treaty principles across Member States, a European framework is necessary. It is the most appropriate way to overcome existing barriers to the EU-wide concessions market and to ensure convergence and a level playing field in the EU, ultimately guaranteeing the free movement of goods and services in all 28 Member States.

#### **4. What evidence is there of distortions to the Single Market justifying horizontal rules on the award of concessions at the EU level?**

The impact assessment carried out by the Commission services before tabling the legislative proposal for concessions demonstrated that the rules and practices of Member States concerning the award of concessions are very different and that the principles of the Treaty are not understood and applied in the same way everywhere in the EU. Moreover, many EU Member States do not have rules on concessions at all (for example, Germany, Belgium, Estonia, the United Kingdom, Finland, Greece, Ireland, the Netherlands).

The impact assessment has shown that the absence or inadequacy of national rules for awarding concessions undermines the functioning of the Single Market with regard to concessions, increases the risks of national favoritism, fraud and corruption and is also at the source of violations of the principles of the Treaty on the Functioning of the EU.

Furthermore, the public consultation conducted by the Commission services shows that a third of participants (particularly businesses, associations, public authorities) were aware of cases of direct award of concessions to private companies, without any transparency and without competition. Direct award of a concession is a serious violation of the EU Treaty principles.

Additionally, the Court of Auditors has singled out public procurement as the principal source of errors (43%) in the spending of EU cohesion funds which co-finance also concessions contracts. Over the past years, a number of Member States have had significant infrastructure projects delayed or cancelled because of inadequate procedures in the attribution of concessions.

Finally, the multiplication of the EU Court's judgments on concessions (26 since 2000) where, by clarifying several aspects related to the award of concessions, the Court tried to address the legal vacuum in this area, shows that the current situation is far from satisfactory and that the problems cannot be adequately addressed on a case-by-case basis.

#### **5. Why do we need these rules now?**

At a time of pressing demands for efficient spending of public money, there is an urgency in establishing a clear European legislative framework allowing for delivery of works and services under conditions of sound financial management and at best value for money. This will be ensured through a Union-wide competition for high value concessions, where the most efficient providers are given a fair chance of winning the contract by proposing best offers.

The new rules will facilitate the conclusion of concessions and therefore of public-private partnerships (PPP), encouraging new investments, promoting a quicker return to sustainable economic growth and contributing to innovation and long-term structural development of infrastructures and services.

## **6. Will this Directive force public authorities to outsource or even to privatise the provision of services of general economic interest?**

No. According to Article 345 of the Treaty on the Functioning of the EU, "the Treaties shall in no way prejudice the rules in Member States governing the system of property ownership".

This means that under EU law, including the new Directive, public authorities remain entirely free to carry out public tasks assigned to them by using their own means or resources.

However, if a public authority decides to outsource (e.g. to a private company) the provision of a service and concludes a concession with such an entity, the provisions of the new Directive have to be complied with.

For more information on SGEI, see also [MEMO/11/929](#) and [IP/11/106](#).

## **7. Will the Directive affect the freedom of public authorities to organise services of general interest?**

No, public authorities in each Member State retain the possibility to define and enforce public service obligations and to organise the provision of services of general interest. By imposing public service obligations, public authorities remain free to define the characteristics of the service to be provided, including any conditions regarding the quality of the service, in order to pursue their public policy objectives.

## **8. Why a dedicated Directive on concessions on top of the Directives on public procurement?**

Concessions have specific features compared to public contracts which justify a special and more flexible set of rules for their award. Concessions are typically high-value, complex and long-term contracts which require appropriate flexibility during the award procedure to ensure the best possible outcome.

Specific legislation for concessions helps distinguish between the rules applicable to concessions and the more detailed ones applicable to public contracts and therefore makes them simpler to use.

## **9. What are the main elements of the Directive?**

- A clearer and precise definition of concession (building on the Court's case law);
- Coverage of works and services concessions both in the utilities sector and in the classic sector (all other sectors not covered by utilities except for water services; details in Question 17);
- Compulsory publication of concession notices in the Official Journal of the EU, when their value is equal to or greater than € 5 186 000;
- Adequate solution for dealing with changes to concessions contracts during their term, notably when justified by unforeseen circumstances;
- Establishment of certain obligations with respect to the selection and award criteria to be followed by entities awarding concessions. These rules aim at ensuring that such criteria are published in advance, are objective and non-discriminatory. In general, they are simpler and more flexible than similar provisions currently applicable to public contracts;

- No standard mandatory award procedures (negotiations always possible) but instead establishment of certain general guarantees aimed at ensuring transparency and equal treatment (notably, in case of negotiations);
- Application of the [Remedies Directives](#) (Directives 89/665/EEC and 92/13/EC, as amended by Directive 2007/66/EC) to all concessions covered by the Directive.

### **10. Do public authorities have to follow any specific tendering procedure for the award of concessions?**

No, contrary to what has been established for public contracts, the present rules do not set out any specific procedure. It will be for Member States to define the applicable procedures for the award of concessions in observance of general rules concerning selection and award criteria and procedural guarantees. However, public authorities will be obliged to communicate, without any discrimination, to all interested bidders, how they intend to structure the award process.

### **11. Will SMEs benefit from this Directive?**

Yes. Today, the absence of a clear obligation to advertise service concessions across the EU hampers the cross-border access of undertakings, particularly of SMEs, to business opportunities in the Internal Market.

The Directive aims at facilitating such access to all economic operators, including SMEs. While larger companies usually have the means to obtain information on business opportunities in the EU, SMEs find it more difficult. They therefore stand to benefit the most from the publication of a concession notice in the Official Journal of the European Union. They will be able to decide whether and how to organise themselves (group of SMEs, joint venture with local businesses, subcontracting, etc.) to take advantage of the new opportunities. In addition, the light rules proposed for the award of concessions will not impose undue new obligations or excessive costs on SMEs.

### **12. Will the Directive on concessions create red tape and additional costs, in particular for SMEs?**

No, any additional administrative costs are compensated by lower transaction costs in cross-border provision of services, improved efficiency and an increase in the number of business opportunities resulting from the Union wide harmonisation of rules. The net outcome for undertakings and in particular for SMEs is positive.

### **13. What is the relationship between concessions and Public-Private Partnerships?**

Concessions involving private partners are a particular form of Public Private Partnership (PPP). Although PPPs have never been defined in EU Public Procurement legislation, they are usually understood to be cooperation between a public authority and a private partner, where the latter bears risks that are traditionally borne by the public sector and often contributes to financing of the project. Some PPPs are structured as public contracts, but, based on estimations by the Commission services, over 60% of all PPP contracts would qualify as concessions.

#### **14. Will the Directive lead to a deterioration of public services, by promoting the award of concessions on the basis of the lowest price?**

The Directive on concessions does not impose any specific award criteria. However, it requires award criteria to be objective, non-discriminatory and related to the subject of the concession. Contracting authorities may, within these limits, choose the criteria they find most suitable to the award of the concession, notably with reference to the quality of the services or works, their environmental performance or even social considerations.

The Directive requires that award criteria guarantee an overall economic benefit to the public authority and it does not impose the use of the criterion of the lowest price. In practice, given a complex nature of concessions contracts, it is unlikely that the lowest price will be used as a criterion to choose the winning offer.

#### **15. Are licences, authorisations, rent/lease agreements covered by the Directive?**

Recitals provide clarification on this point. As it is explained, while concessions are contracts for the procurement of works or services (where the consideration consists, typically, in the right to exploit those works or services), licences and authorisations are acts, whereby the State or a public authority establishes the conditions for the exercise of an economic activity, without providing for specific and enforceable commitments by the economic operator. The latter do not qualify as concessions and thus their grant is not covered by the Directive on concessions but rather by the Services Directive ([Directive 2006/123/EC](#)). Similarly, rent or lease agreements will not be considered concessions if the consideration for using land or infrastructure by a private operator does not encompass the provision of specific works or services.

#### **16. Why was the water sector excluded from the scope of the Directive?**

During negotiations on the concessions directive, the Commission strived at every stage to make clear that the directive does not aim at privatisation of any services, and to reassure citizens that services, in particular water, were not being privatised. Despite all the changes to the legal text, and the contributions from all political parties in the European Parliament and the Council, the text was not satisfactory for anyone: it did not provide the reassurances that citizens expected and it potentially created fragmentation in the single market with regard to this specific sector. That is why the best solution appeared to be to remove water from the scope of the Directive.

#### **17. What is the exact scope of the "water exclusion"?**

The exclusion concerns concessions awarded by public authorities. It also applies to those awarded by public undertakings and private entities enjoying exclusive rights, if the concession is awarded for purposes of a utility activity (however, water is not a "utility" under the Directive).

In deciding if a concession falls within the scope of the Directive or if it is excluded, what is important is the subject matter of the concession and not of its purpose: if a municipality awards a concession for catering for employees of its water division, even if the concession is awarded for the purpose of operating a water distribution network, such concession remains subject to the rules of the Directive.

The Directive shall also not apply to concessions for the disposal or treatment of sewage, which are connected with the provision or the operation of the above-mentioned water provision networks or with the supply of water to such networks. Thus, concessions for those services can only be excluded if they are incidental to the provision of drinking water through fixed networks. By contrast, concessions for the disposal or treatment of sewage carried out as a principal activity shall be covered by the Directive.

Finally, the Directive shall not apply to concessions concerning hydraulic engineering projects, irrigation or land drainage, provided that the volume of water to be used for the supply of drinking water represents more than 20% of the total volume of water made available by such projects or irrigation or drainage installations.

In any event, the Treaty principles of equal treatment and transparency, as interpreted by the Court of Justice of the EU, remain applicable to the concessions excluded from the scope of the Directive. This means that concessions which could be of interest to economic operators located in other Member States cannot be awarded without transparency or competition.

The Commission will assess the economic effects on the Single Market of the "water exclusion" taking into account the specific structures of the water sector, and report thereon to the European Parliament and the Council 3 years after the time due for transposition of the Directive.

### **18. Does the "water exclusion" apply to a concession covering both the provision of water and electricity?**

A concession which relates both to provision of water and to energy distribution should be qualified as a mixed contract. A reply to this question depends on the determination of the main subject of the contract. If its main subject consists of electricity distribution, the Directive will apply. However, if the main subject of the contract consists of water distribution, the Directive will not apply.

### **19. Will the Directive apply to concessions for the management of electricity distribution networks?**

No, as long as the following conditions are met: (1) the concession is awarded on the basis of an exclusive right enjoyed by the concessionaire; (2) concessionaire enjoys this exclusive right to provide the services which are object of the concession prior to the award of the concession; (3) such exclusive right must have been granted under published national law or administrative act in accordance with the Treaty and Union acts laying down common rules on access to the market applicable to any of the "utilities" activities.

The existence of an exclusive right to provide certain services makes it impossible to award the services in question following a competitive procedure. Additionally, the exclusion is conditional on the existence of a guarantee of transparency, arising from the fact that the prior exclusive right to provide the services must have been granted under published national law or administrative act in accordance with the Treaty. Moreover, this exclusive right must have been granted on the basis of secondary law rules on the opening-up of a "utilities" activity to competition.

As a matter of an example, Directive 2003/54/EC (modified by Directive 2009/72/EC) that has opened up the production and supply of electricity to competition provides for the possibility of Member States to grant exclusive or special rights for the management of electricity distribution networks. Hence, services concessions for the management of such networks can be directly awarded on the basis of a pre-existing exclusive right for the provision of those services. The same applies to gas concessions covered by Directive 2009/73/EC.

## **20. Are gambling concessions covered by the Directive?**

Gambling services fall within the scope of the Directive. However, it should be noted that this type of service may also be provided on the basis of mere authorisations (see also Question 15). Certain national lotteries, conducted on the basis of exclusive rights compliant with EU law, have been excluded from the scope of the Directive.

## **21. Are ambulance services covered by the Directive?**

Ambulance services are excluded from the scope of the Directive provided that they are performed by non-profit organisations or associations. Therefore, in this case, the Directive will not apply to such services. This rule aims at preserving the particular nature of non-profit organisations or associations and should not be extended beyond the strictly necessary. For this reason the Directive shall apply to ambulance services performed by commercial organisations. The Directive shall also apply to the provision of patient transport ambulance services, even if such services are performed by non-profit organisations or associations. However, both transport ambulance services and other ambulance services, where they are not excluded, are covered by the light regime.

## **22. Will the new Directive apply to existing concessions?**

The new Directive will have no retroactive effect. Concession contracts in place at the time of its entry into force will not be affected for their entire duration. However, an extension of their duration or any other substantial modification may qualify as a new concession and therefore will have to comply with the rules of the new Directive, once the latter comes into force.

## **23. What are the rules on modifications of concessions during their term?**

The Directive clarifies, in line with the case-law of the Court of Justice of the European Union, a notion of a substantial modification of a contract during its term. It also stipulates when a modification can be made without a new award procedure.

Notably, it will provide a «safe harbour» for minor changes to the contract (those not exceeding the threshold of the Directive and inferior to 10% of the price of the initial contract) which will always be acceptable. It will also clarify the scope of acceptable contractual clauses and set out the conditions for modification in case of unforeseen circumstances and necessity to award additional works or services.

## **24. When will the new rules come into force?**

Once the Council has formally adopted the new legislation, the new rules will enter into force on the twentieth day following that of the publication of the Directive in the Official Journal of the European Union.

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with the Directive within 24 months after its entry into force. For implementing fully electronic procurement, Member States may extend this period by up to 30 months.

See also Michel Barnier's statement [MEMO/14/18](#) and [MEMO/14/20](#) on public procurement