

AN EU INITIATIVE ON CONCESSIONS

QUESTIONNAIRE TO CONTRACTING AUTHORITIES

The Commission is presently assessing the need for and impact of an initiative on concessions¹ with a view to improving the current legal framework. In this context, the Commission has prepared the present questionnaire the aim of which is to learn from public authorities awarding concessions as well as from their associations on their experience, hear their views on how the present rules on concessions work and to gather suggestions for improvements. The questionnaire is part of a wider consultation of stakeholders which includes an open consultation and two other specific questionnaires addressed to social partners and to private and public undertakings.

An initiative on concessions would aim to facilitate the use of concessions and ensure best value for money for both users and contracting authorities, by providing all interested parties with legal security and guaranteeing transparency and equal treatment for economic operators. It would also enhance competition and the internal market in concessions contracts, and contribute to EU policy goals in the field of Public-Private Partnerships, as explained in the Commission's Communication on «Mobilising private and public investment for recovery and long term structural change: developing Public Private Partnerships».

In line with the Lisbon Treaty provisions and, in particular, the principle of proportionality, and taking into due account of the Commission's guidelines on «Better Regulation» as well as the European Parliament's report on new developments in public procurement (2009/2175(INI)), the Commission will seek to establish the most appropriate way to meet those objectives without making the legal framework too complex or burdensome while ensuring the necessary legal certainty.

Profile:

0.a. Type of organisation

- State authority
- Regional authority
- Local authority
- Association of regional or local authorities
- Body governed by public law (e.g. public institutions or foundations)
- Association of bodies governed by public law

¹ According to the current definition of concessions set out in art. 1 (3) and (4) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0018:EN:NOT>), concessions are contracts similar to public contracts, with a difference that the contractor bears the economic risk of the exploitation of the work or service at stake. In light of the resulting case law of the EU Court of Justice, "the essential characteristic of the concession is that it is the concessionaire himself who bears the main, or at least the substantial, operating risk".

- Other contracting entity in the meaning of Directive 2004/17/EC²
- Other (please specify)

0.b Scope of activity

- National
- Regional/local
- Sectoral (please specify)

0.c Size of the respondent

Please specify the approximate i) total number of beneficiaries of your activity³ and ii) total budget of your organisation.

If you respond as an association, please specify the approximate aggregate a) total number of beneficiaries and b) total budget of the Members of your association.

0.d What sector(s) are you responsible for?

- Water distribution
- Waste water and sewage processing
- Waste treatment
- Energy or heating services
- Transport (railway, tramway, bus, automated systems, cable)
- Port services
- Airport services
- Postal services
- Education (administration of schools, specialised education, training or catering)
- Health services
- Social services (kindergartens, employment coaching, care of the elderly)
- Road & Motorway operation
- Sports and leisure facilities (administration sports halls, library services)
- Catering
- Car parking
- Judiciary systems (administration of Courts or prisons)
- Research & laboratory services
- Other (please specify)

² See Title I, Chapter II of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0017:EN:NOT>)

³ E.g. total numbers of inhabitants in case of a municipality, total number of users in case of an utility operator etc.

0.e Country

AT	BE	BG	CY	CZ	DE	DK	EE	EL	ES	FI	FR	HU	IE	IT	LT
LU	LV	MT	NL	PL	PT	RO	SE	SI	SK	UK		IS	LI	NO	CH

0.f Experience with concessions

- Have you awarded a concession within the last 10 years?
- Are you considering to award a concession in the future?

0.f.1 If not, why not?

- Direct provision of these services by contracting authorities
- Use of other public contracts which cannot be defined as concessions.
- Other please specify

0.f.2 If yes, in what sector?

- Water distribution
- Waste water and sewage processing
- Waste treatment
- Energy or heating services
- Transport (railway, tramway, bus, automated systems, cable)
- Port services
- Airport services
- Postal services
- Education (administration of schools, specialised education, training or catering)
- Health services
- Social services (kindergartens, employment coaching, care of the elderly)
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- Car parking
- Judiciary systems (administration of Courts or prisons)
- Research & laboratory services
- Other (please specify)

Assessment of the current situation

1. Are concessions a frequently used type of contract in your Member State? If possible, please elaborate, quote relevant statistics and explain the reasons.

2. What is – according to your estimation - the economic importance (by number and value of contracts) of the use of concessions in the market(s) on which you procure works and/or services? What is their increase potential? Please respond to the above questions for each market separately.
3. Are you familiar with the jurisprudence of the Court of the EU on concessions? Do you consider it to provide sufficient guidance on the award of concessions? Please explain your answer.
4. The Commission explained the definition and the application of the Treaty principles to the award of concessions in its Communication on Concessions⁴ and in the Green paper on PPPs⁵.
Do you consider that the guidance provided by the Commission is sufficient for you to conduct a procedure for the award of concessions? Please explain your answer.
5. In your view, what are the possible shortcomings and operational downsides, if any, associated with the present definition of concession in EU law⁶?
6. Do you consider it difficult distinguishing between public contracts and concessions⁷?
If yes, please explain with reference to one or more of the responses below.
 - a) It is difficult to define "substantial" or "significant part" of the operating risk
 - b) It is not clear what categories of risks are to be taken into account to this effect
 - c) It is not clear how much of the consideration can be paid by the contracting authority
 - c) Other reasons (please specify)
7. With reference to your national law or national practice, how do you differentiate between a public contract and a concession? And between a works concession and a services concession? Please provide the relevant references.
8. How would you explain, under EU law, the relation between the notions of an exclusive right and a concession? How do you differentiate between a concession and a licence? Please explain.

⁴ “Commission interpretative communication on concessions under Community law”, Official Journal C 121 , 29/04/2000

[http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000Y0429\(01\):EN:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000Y0429(01):EN:NOT)

⁵ “Green Paper on public-private partnerships and Community law on public contracts and concessions”, COM/2004/0327 final

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52004DC0327:EN:NOT>

⁶ See Article 1 (3) and (4) of Directive 2004/18/EC (referred to in footnote 1)

⁷ According to the ECJ judgment in Helmut Mueller case (C_451/08), "the essential characteristic of the concession is that it is the concessionaire himself who bears the main, or at least the substantial, operating risk"

9. What procedure do you follow for the award of a service concession? Please describe the procedure with reference, in particular to services covered, level of publication, method for calculating the value of the contract, applicable thresholds, technical specifications and selection and award criteria.
10. Whenever you resort to a negotiated procedure⁸ to award a concession contract, what guarantees and arrangements do you apply to preserve transparency and fairness of the procedure?
11. In case of existing national legislation on the award of services concessions please indicate the relevant references and its scope:
- National rules
 - Regional rules
 - Local rules

Are there any sectoral specificities? Please describe.

12. Do you apply the same procedures for the award of concessions to a mixed entity (public-private undertaking) as to any other third parties? If not, please explain.
13. What are the costs and benefits of the procedure you presently follow for the award of concession contracts? Please explain with reference to compliance and enforcement costs and the price and quality of the services awarded.
14. What is the average duration of service concessions you have awarded and which services were concerned? Is the duration limited by any concerns on competition for the contract or on the efficiency of the services to be provided?
15. What is the average number of tenderers in the procedures for the award of concessions you have launched?
Were there any tenderers from other Member States? (please distinguish between tenderers established in your MS and those tendering directly from another MS) Were there any consortia composed of SMEs?
16. Have you ever awarded a concession to a tenderer from another MS (please specify as above)?
What about to a consortium composed of SMEs?
17. Are you aware, in tendering procedures you have launched of any practices of tenderers or of market structures restricting competition between tenderers (*i.e.* collusion or other unfair methods of competition, oligopolies, etc.)? Please explain.

⁸ According to Art. 1.11 (d) of Directive 2004/18/EC, "‘Negotiated procedures’ means those procedures whereby the contracting authorities consult the economic operators of their choice and negotiate the terms of contract with one or more of these".

18. In your opinion what are the most important reasons favouring the direct provision of a service?
19. In your opinion what are the most important reasons favouring the use of concessions?
20. In your view and taking into account the present circumstances, how will the above reasons play into your future decision on whether to opt for direct provision of a service or for the award of a service concession contract?
21. What is your assessment of the provisions of Directive 2004/18/EC⁹ on works concessions (especially concerning the advertisement, time limits, award of complementary works and sub-contracting)? In particular:
- a) Do they ensure a sufficient degree of transparency and equal treatment of the award procedure?
 - b) Do they ensure sufficient degree of legal clarity?
 - c) Do they involve important costs? If yes, what categories of costs (compliance cost? enforcement cost?) and what is their importance in relation to the contract value?
 - d) What are their benefits?
 - e) What is their impact on prices and quality?

Expected impacts of new legislation on concessions

General issues

22. In your opinion, what would be the results of new legislation providing for compulsory advertisement of concessions at the European level services concessions in your Member State with regard to:
- a) Consumers
 - b) Companies

⁹ See in particular Articles 56 to 65 of Directive 2004/18/EC. The award of services concessions are presently not subject to any provisions of this Directive (with the exception of the definition itself, see Article 1 (4)).

- c) Incumbent operators
- d) Jobs and wages
- e) Investments and innovation
- f) The market structure
- g) Public subventions (associated with the provision of the service)

23. Under EU law public authorities are free to provide services (including services of general economic interest) directly or to externalise provision of those services to third parties (*i.a.* by means of concessions). Without prejudice to this freedom, what could be the impact, if any, of a new legislation providing for compulsory advertisement of concessions at the European level in relation to services which are at present:

a) Directly provided by public authorities or public "in-house"¹⁰ entities (notably in terms of possible incentives for shift towards concession-based provision of services)?

b) Provided on the basis of concessions (notably in terms of possible incentives for shift towards direct provision of services by administration or public "in-house" entities?

Please distinguish between the likely impact on short, medium and long term.

24. In case of EU a new legislation providing for compulsory advertisement of services concessions at the European level, do you expect to see new entrants to the market?

If yes, please indicate the categories of entrants below which are likely to enter the market

- Foreign (non-national) companies
- Domestic companies extending activities to new business areas (e.g. multi-utility companies)
- Joint ventures between national and foreign companies
- Small and Medium Enterprises

Specific questions

25. With reference to service concessions would you be in favour of EU rules providing for the

¹⁰ The conditions of the "in-house" status have been specified by the ECJ in its judgment in the *Teckal* case (C-107/98)

- a) The obligation for the contracting authority to publish a concession notice in the Official Journal of the European Union? What should the thresholds for publication and which method should be used to calculate them?
- b) The obligation to respect minimal deadlines for the presentation of applications for the concession (*e.g.* not less than 52 days);
- c) The obligation for a concession holder to respect the principle of non-discrimination while selecting holders of sub-contracts (if possible, please also give your assessment of the relevant provision presently applicable to works concession holders)¹¹;
- d) The possibility for direct award of additional services to the original concession holder only if these services, through unforeseen circumstances, have become necessary for the performance of the originally stipulated services and if such additional services are technically or economically inseparable from or strictly necessary for the completion of the original services;
- e) The possibility for the contracting authority to require the concession holder to award a minimum of 30% of sub-contracts to the third parties, or to request the concession holder to specify the percentage of services to be sub-contracted to the third parties;
- f) Effective remedies for aggrieved bidders with the same guarantees as those provided under the Remedies Directives¹²?

Please explain your answers above.

For each of the above options, please indicate what effects you would expect on access to the market and competition in the sector as well as other specific positive/negative impact you might see (*e.g.* on innovation, consumer satisfaction, sustainability of services, public subventions, jobs, etc.)

26. With reference to service concessions and works concessions would you be in favour of EU rules providing for:

¹¹ See Title III, Chapters II-III of Directive 2004/18/CE

¹² Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32007L0066:EN:NOT>), Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31989L0665:EN:NOT>), Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31992L0013:EN:NOT>).

- a) The obligation to clearly announce qualification criteria restricted to issues related to financial, economic and technical capacity of a tenderer? Please justify indicating possible effects on access to the market and competition in the sector and other specific positive/negative impact (e.g. on innovation, consumer satisfaction, sustainability of services, public subventions, jobs,).
- b) The possibility for an EU operator (such as a SME) to prove it meets qualification criteria for participation in a tendering procedure, in particular by relying on the standing of other entities (other members of the consortium, sub-contractors), regardless of the legal nature of the links which it has with them, provided that it is able to show that it actually has at its disposal the resources of those entities.
- c) The obligation to restrict the admissible award criteria to price and economically most advantageous tender? Alternatively, would you be in favour of introducing basic guarantees of objectivity and non-discrimination while setting award criteria? With regard to each of the aforementioned options.
- d) Provisions on non-discriminatory use of technical specifications, e.g. as provided for in Art. 23 of Directive 2004/18/EC?
- e) The limitation (with the exception of the utilities sector) of the choice between an open procedure, restricted procedure or competitive dialogue, as described in Directive 2004/18/EC, and admitting negotiated procedure only in exceptional situations, e.g. those currently provided for in Art. 30 of Directive 2004/18/EC?

Alternatively, would you be in favour of introducing basic requirements of standards and arrangements guaranteeing equal treatment and transparency in the conduct of award procedures (notably negotiated procedures)? Which requirements would you consider as the most relevant?

Please explain your answers above.

For each of the above options, please indicate what effects you would expect on access to the market and competition in the sector as well as other specific positive/negative impact you might see (e.g. on innovation, consumer satisfaction, sustainability of services, public subventions, jobs, etc.)

27. Do you consider that the current legal framework of modifications of concessions, as established by the European Court of Justice in its *Succhi di Frutta*, *Pressetext*, *Acoset* and *Wall AG* judgments¹³, is sufficiently clear and allows to take into account the evolving nature of concessions? Please explain.

28. If you encountered any problem in relation with the award of concessions other than those referred to in the questions above, or you wish to make any other remarks on a EU initiative

¹³ Respectively, cases C-496/99, C-454/06, C-196/08 and C-91/08.

on concessions, please describe them here (specifying whether it concerns works concessions and services concessions).