

AN EU INITIATIVE ON CONCESSIONS

QUESTIONNAIRE TO SOCIAL PARTNERS, CIVIL SOCIETY AND OTHER STAKEHOLDERS

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 social partners, as well as from their associations on their experience with concessions, hear their views on how the present rules work and to gather suggestions for improvements. In particular, the Commission is hoping to obtain, with the present questionnaire, a valuable input on how the initiative may affect the working and living conditions of the EU citizens. The questionnaire is part of a wider consultation of stakeholders which includes an open consultation and two other specific questionnaires addressed to private and public undertakings and contracting authorities.

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.

The questions below refer only to sectors concerned by "priority services", as listed in Annex IIA of Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts and Annex XVII A of Directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, with the exception of the one but last question which refers instead to "non priority services" (such as social services) which are presently exempt from most of the provisions of EU secondary Public Procurement 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".

Profile:

0.a. Type of organisation

- Trade Union/Association of Trade Unions
- Committee of Employees (in an undertaking)
- NGO
- Consumer's association
- Association of Employers
- Other (please specify)

0.b Scope of activity

- Local/ Regional
- National
- European
- World

0.c Size of the respondent

Please specify the approximate i) total number of employees represented by your organisation or its members and ii) the total number of members of your organisation.

0.d What sector(s) do you operate in / do you represent?

- 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)

0.e Country where your organisation / company is based

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|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|
| 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 |
| | | | | | | | | | | | | | | | |

I - Assessment of the current situation

1. Are you familiar with the case law of the Court of the EU on definition and award of concessions?

If yes, do you consider it sufficient to ensure equal opportunities, to national and foreign companies, on the award of service concessions in the Member States you are familiar with (please specify the Member State(s), if more than one, please respond separately for each Member State concerned)? Please explain your answer.

2. Please describe the advertisement practices for the award of services in the Member States you are familiar with (please specify the Member State(s), if more than one, please respond separately for each Member State concerned) . In particular: at what level does publication take place:

- Local
- Regional
- National
- International

What information is to be included in the call for tender?

- Name and contacts of the contracting authority
- Nature, extent and value of the services and subsidiary works
- Time limit for submission of offers
- Personal, technical and financial conditions to be met by the candidates
- Award procedure chosen
- Criteria which will be applied in the award of the contract
- Name and address of the body responsible for appeal and, where appropriate, mediation procedures

What sectors are concerned (see point 0d)? Please respond separately for each relevant Member State.

3. What is the impact of advertisement practices at local, national and international level and the competition (or lack of it) they generate with reference to jobs:

- a) Job creation or loss
- b) Age and gender groups affected
- c) Transfer of workers and re-training
- d) Other (please specify)

If possible, please distinguish between the likely impact in the short, medium and long term.

4. The Commission explained the definition and the application of the Treaty principles to the award of concessions in its Communication on Concessions² and in the Green paper on Public Private Partnerships.³ Do you consider that the guidance provided by the Commission is sufficient to conduct a procedure for the award of concessions in the Member States you are familiar with? Please respond separately for each relevant Member State and explain your answers.
5. To your knowledge, have any services concessions been awarded to foreign (non-national) companies? In what sector? If not, what could be the reasons for this?
6. What is the social and economic importance of the use of concessions, notably in terms of the number and share of total existing jobs; in the sector you are most concerned with? Please specify the sector(s).

How do you estimate their likely evolution under current public budgetary constraints?

7. If you have specific experience within a company that has been awarded a concession(s) contract, please explain the importance of such (a) contract(s) on the total business of the company? What is the social and economic importance of the contract(s) for the region/city where your company operates?
8. To your knowledge, can companies in the sectors you are familiar with easily secure the renewal of their concession contracts? If yes, under which conditions? Please specify the sector(s) concerned.
9. In your experience, under the national legal framework(s), what are the consequences of non renewal/failure to secure a new concession contract for companies in the sector(s) you are familiar with, in terms of :

- a) Number of jobs
- b) Age and gender groups affected
- c) Other specific consequences, such as collective redundancy, transfer of workers to other companies or services, re-training, early retirement, etc.

Please specify the sector(s) and the Member State(s) concerned, as well as the relevant national legal framework. Where relevant, please also distinguish between the likely impact in the short, medium and long term.

² “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))

³ “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>)

10. The provision of certain services to the public can be either directly performed by the administration (or a public "in-house" entity under its full control and realising with it the majority of its turnover⁴) or conferred to a third party, *i.a.* by means of a concession.

Against this background, what type of labour contracts are the most prevalent in concession holding companies in the sector(s) you are familiar with. Please specify the sector(s):.

- Permanent,
- Fixed-term contracts
- Temporary agency, part-time
- Other

Please compare with labour contracts in public administrations providing services directly to the public or through "in-house" public entities.

- Permanent
- Fixed-term contracts
- Temporary agency, part-time
- Other

11. How would you define the level of wages paid in companies holding concessions in the sector(s) you are familiar with? Please specify the sector(s).

- Above national average
- Level with national average
- Below national average

Please compare with the level of wages in public administrations providing services directly to the public or through "in-house" public entities.

- Above national average
- Level with national average
- Below national average

12. What types of professional qualifications are most prevalent in companies holding concessions in the sector(s) you are familiar with? Please specify the sector(s).

- Non-specialized
- Specialized
- Highly specialized
- Bachelor (Secondary degree)
- Basic university degree
- Further university qualifications (Masters, PhD)

⁴ The conditions of the "in-house" status have been specified by the ECJ in its judgment in the *Teckal* case (C-107/98)

Please compare with the type of qualifications prevalent in public administration providing services directly to the public or through "in-house" public entities.

- Non-specialized
- Specialized
- Highly specialized
- Bachelor (Secondary degree)
- Basic university degree
- Further university qualifications (e.g. Masters, PhD)

13. Are workers generally involved in the corporate decision-making procedures of the companies holding concessions in the sector(s) you are familiar with? Please specify the sector(s).
14. Are new jobs currently being created in companies holding concessions or in the administration / "in-house public entities in relation to provision of services in the sector you are familiar with? If yes, how many, where and by whom?
15. Are jobs presently being lost in such entities in relation to provision of services in the sector you are familiar with? If yes, what are, in your view, the reasons?
16. What impact, if any, may cuts in public budgets have on companies holding concessions or on the administration / "in-house public entities in relation to provision of services in the sector you are familiar with? Please answer in particular with regard to:
- a) Number of jobs, age and gender groups affected, and other specific consequences (e.g. collective redundancy, transfer, re-training, retirement)
 - b) Levels and evolution of wages
 - c) Types of contracts and working conditions

If possible, please distinguish between the likely impact in the short, medium and long term.

17. Do you think that the current level and structure of employment in the companies holding concessions or in the administration / "in-house public entities in relation to provision of services in the sector you are familiar with are optimal (efficient) from an economic point of view? If not, what are the reasons?
18. What is your assessment of the provisions of Directive 2004/18/EC⁵ on works concessions (especially as to what concerns advertisement, time limits, award of complementary works and sub-contracting)?

In particular:

⁵ See in particular Articles 56 to 65 of Directive 2004/18/EC (referred to in footnote 1). 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)).

- 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?

19. What is the impact, if any, of the provisions of Directive 2004/18/EC on works concessions (especially concerning the advertisement and sub-contracting), and the competition they generate, on:

- a) Job creation (by sector, area, type of contracts offered and qualification levels)
- b) Job losses (age and gender groups affected; other specific consequences such as collective redundancy, transfer, re-training, retirement)
- c) Levels and evolution of wages
- d) Types of contracts and working conditions

If relevant, please distinguish between the impact in the short, medium and long term.

II - Expected impacts of new legislation on concessions

A - General issues

20. 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" entities⁶, 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 in the short, medium and long term.

⁶ The conditions of the "in-house" status have been specified by the ECJ in its judgment in the *Teckal* case (C-107/98)

21. What would be the results, in the Member States you are familiar with, of a new legislation providing for compulsory advertisement of services concessions at the European level, with regard to:

- a) Job creation (by sector, area, type of contracts offered and qualification levels)
- b) Job losses (age and gender groups affected; other specific consequences such as collective redundancy, transfer, re-training, retirement)
- c) Levels and evolution of wages
- d) Types of contracts and working conditions

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

22. More specifically, what would be the consequences of a new legislation providing for compulsory advertisement of services concessions at the European level in relation to the renewal of concessions of incumbent operators?

23. In your view, what could be the social impact and the impact on public finances of intensified competition and/or externalisation of services as a result of greater use of concessions, notably with reference to the social protection enjoyed by the employees? Please distinguish between

- a) financial impacts and
- b) social impacts.

24. In your opinion, what would be the social impact of entry of new operators (*e.g. non national companies / SMEs / large utilities companies*) on the concessions market in the Member State you are familiar with? Please explain.

25. In your view, what would be the impact of a new legislation providing for compulsory advertisement of services concessions at the European level on the quality, availability and costs of provision of so-called services of general economic interest? Please explain.

B - Specific questions

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

- 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)⁷;

- 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 Directives⁸?

For each of the above options, please explain your position and indicate what effects you would expect on jobs, qualifications, type of contracts, social protection and levels of wages.

27. With reference to service concessions and public works concessions would you be in favour of/against EU rules providing for:

1. 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 impacts (e.g. on innovation, consumer satisfaction, sustainability of services, public subventions, jobs).
2. 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.
3. The obligation to restrict the admissible award criteria to price and most economically advantageous tender? Alternatively, would you be in favour of

⁷ See Title III, Chapters II-III of Directive 2004/18/CE

⁸ 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>).

introducing basic guarantees of objectivity and non-discrimination while setting award criteria?

4. Provisions on non-discriminatory use of technical specifications, e.g. as provided for in Art. 23 of Directive 2004/18/EC?
5. The limitation (with the exception of the utilities sector) of choice to that between an open procedure, a 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?

For each of the above options, please explain your position and indicate what effects you would expect on jobs, qualifications, type of contracts, social protection and levels of wages.

28. The award of contracts for "non priority services",⁹ such as social services, have been partially excluded from the scope of the rules defined by Directives 2004/18/EC and 2004/17/EC in view of their specific nature and lack of cross-border interest. For these category of services the above Directives merely impose the obligation to set out technical specifications and an ex post requirement of publicity.¹⁰ It must be noted however that the principles of transparency and non discrimination derived from the Treaty also apply to those contracts.

In your view, do the reasons justifying the partial exclusion of non priority services from the scope of the rules on public procurement contracts also apply to services concessions? Are there any non priority services that in your opinion would justify a different treatment when awarded as services concessions?

29. If you are aware of 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 on concessions, please describe them here (specifying whether it concerns works concessions or services concessions).

⁹ Services listed in Annex II B of Directive 2004/18/EC and Annex XVII B of Directive 2004/17/EC

¹⁰ See Case 507/03, COM v/ Ireland, point 25.