

# AN EU INITIATIVE ON CONCESSIONS

## QUESTIONNAIRE TO BUSINESS

The Commission is presently assessing the need for and impact of an initiative on concessions<sup>1</sup> 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 private and public undertakings, 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. 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 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.

### **Profile:**

#### **0.a. Type of organisation**

- Private company
- Mixed capital company
- Public company
- Industry or Professional Association

#### **0.b Scope of activity**

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<sup>1</sup> 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".



## **0.f Experience with concessions**

- Does your company currently hold a concession?
- Have you ever participated in a concession tendering procedure in a Member State other than the one you are established in? If not, please indicate the reasons.

### **Assessment of the current situation**

1. What is – according to your estimation - the economic importance (by number and value of contracts) of the use of concessions in the market(s) where you presently operate and/or you are familiar with?

What is their increase potential?

Please respond to the aforementioned questions for each market separately.

2. Are you familiar with the jurisprudence of the Court of the EU on definition and award of concessions? Do you consider it to provide sufficient clarification as to your rights and guarantees under EU law on the award of concessions in the Member States where you presently operate and/or 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.

3. The Commission explained the definition and the application of the Treaty principles to the award of concessions in its Communication on Concessions<sup>2</sup> and on the Green paper on PPPs<sup>3</sup>.

Do you consider that the guidance provided by the Commission is sufficient to ensure equal access to the award of concessions in the Member States where you operate and/or you are familiar with?

Please respond separately for each relevant Member State and explain your answer.

4. In your view, are there any entry barriers to concession markets in EU Member States? If so, please name them and explain.

5. Please describe the advertisement practices for the award of services concessions in the Member States where you presently operate and/or 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?

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<sup>2</sup> “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)

<sup>3</sup> “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>

- 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.

6. Are you aware of any practices of direct award of concessions in the EU? If yes, please provide, if possible, concrete examples.
7. Do you consider that the advertisement practice of service concessions in the EU Member States where you presently operate and/or you are familiar with is usually fair and transparent and ensures effective access to the market?  
Is the information easily available to a normally vigilant non-national EU economic operator? Please respond separately for each relevant Member State.
8. If you consider that there are no clear rules at EU level governing
  - publication (in case of service concessions) and
  - award procedure of concessions,

does this situation bring about any additional costs (such as, *e.g.*, the cost of legal advice or paid sources of information) for EU economic operators? If yes, please explain, with reference to each of the cases above.

9. Do you consider the diversity of national rules and practices related to the award of concessions to be an obstacle to the cross-border provision of services?  
Does it generate any additional costs and administrative burden? Please explain your answer.
10. Can you estimate the average number of tenderers in services concessions award procedures you have participated in?  
Were there any tenderers from other Member States?

11. With regard to your experience, which are the procedures normally used for the award of concessions in the Member States where you presently operate and/or you are familiar with? Please respond separately for each relevant Member State.
12. In your view, which are the most important features of fair and transparent, concession tendering procedure (with reference to, *e.g.*, technical specifications, selection criteria, award criteria, negotiation)?
13. Do you consider that the awarding procedure in which you participated in EU Member States were usually fair and transparent? Please respond separately for each relevant Member State.
14. Which of the key features you mentioned in your response to question n° 12 were lacking?
15. What is the average duration of service concessions in the sector you operate in the Member States where you presently operate and/or you are familiar with? How does (short or long) duration of concession contracts affect competition for those contracts? Please respond separately for each relevant Member State.
16. Have you ever challenged a decision of a contracting entity/authority with regard to the award of a services concession? If not, why?  
Do you consider that the remedies system for services concessions in place in the relevant Member States allowed for effective challenging of decisions of the awarding authority?
17. Do you consider it difficult distinguishing between public contracts and concessions<sup>4</sup>?  
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)
18. In your view, what are the possible shortcomings and operational downsides, if any, associated with the present definition of concession in the EU law<sup>5</sup>?

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<sup>4</sup> 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"

<sup>5</sup> See Article 1 (3) and (4) of Directive 2004/18/EC (referred to in footnote 1) 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

19. Are you aware of any public contracts that have been awarded as concessions in order to elude detailed EU or national law award provisions? If so, please provide, if possible, concrete examples.
20. Do you consider it difficult distinguishing, with reference to EU law, between public concessions and licences or authorisation schemes? Please explain and, if possible, give examples.
21. Are you aware, in tendering procedures you have participated 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.
22. What is your assessment of the provisions of Directive 2004/18/EC<sup>6</sup> on works concessions (especially as to what concerns 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**

23. In your opinion, what would be the results of new legislation providing for compulsory advertisement of services concessions at the European level in the Member State where you presently operate and/or you are familiar with, regarding:

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supply contracts and public service contracts, (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0018:EN:NOT>)

<sup>6</sup> 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) Consumers
- b) Companies
- 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) ?

24. 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"<sup>7</sup> 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.

25. In case of 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

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<sup>7</sup> The conditions of the "in-house" status have been specified by the ECJ in its judgment in the *Teckal* case (C-107/98)

26. With reference to service concessions would you be in favour of 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)<sup>8</sup>;
- 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 Directives<sup>9</sup>?

Please explain your answers above.

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

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

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<sup>8</sup> See Title III, Chapters II-III of Directive 2004/18/CE

<sup>9</sup> 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?
- 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, competition in the sector and what might be other specific positive/negative impact (e.g. on innovation, consumer satisfaction, sustainability of services, public subventions, jobs)

28. 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* judgments<sup>10</sup>, is sufficiently clear and allows to take into account the evolving nature of concessions? Please explain.

29. 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

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<sup>10</sup> Respectively, cases C-496/99, C-454/06, C-196/08 and C-91/08

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