

Award of concession contracts

2011/0437(COD) - 20/12/2011 - Legislative proposal

PURPOSE: to guarantee transparency, fairness and legal certainty in the award of concession contracts.

PROPOSED ACT: Directive of the European Parliament and of the Council.

BACKGROUND: public procurement plays a key role in the Europe 2020 strategy. The award of works concessions is presently subject to basic rules of Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts while the award of services concessions with a cross-border interest is subject to the principles of the Treaty, and in particular the principle of free movement of goods, freedom of establishment and freedom to provide services as well as to the principles deriving therefrom such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency.

There is a risk of legal uncertainty related to different interpretations of the principles of the Treaty by national legislators and of wide disparities among the legislations of different Member States. Such risk has been confirmed by the extensive case law of the Court of Justice of the European Union but which has only partially addressed certain aspects of the award of concession contracts.

The absence of clear rules at Union level governing the award of concession contracts gives rise to legal uncertainty and to obstacles to the free provision of services and causes distortions in the functioning of the Internal Market. As a result, economic operators, in particular Small and Medium Enterprises (SMEs), are being deprived of their rights within the Internal Market and miss out on important business opportunities. An adequate legal framework for the award of concessions would ensure effective and non-discriminatory access to the market to all Union economic operators and legal certainty, favouring public investments in infrastructures and strategic services to the citizen. Hence, a **uniform concretisation of the Treaty principles across all Member States and the elimination of discrepancies in their understanding following therefrom is necessary at the Union level** in order to eliminate persisting distortions of the Internal Market.

The Commission announced the intention to adopt a legislative initiative on concessions in its communication "[The Single Market Act Twelve levers to boost growth and strengthen confidence](#)" of 13 April 2011.

This draft is being put forward in tandem with the revision of Public Procurement Directives ([COD/2011/0438](#) and [COD/2011/0439](#)). It will result in the adoption of a separate legal instrument regulating the award of concessions which, together with the two proposals to revise Public Procurement Directives (2004/17/EC and 2004/18/EC), aims at creating a modern public procurement legislative framework.

IMPACT ASSESSMENT: the final impact assessment report confirmed the need for new legislation. It found that economic operators are faced with an unlevel playing field, which often leads to missed business opportunities. The optimal solution identified was legislation based on the current provisions on public works concessions, adequately adjusted and supplemented with certain specific provisions. A more restrictive approach, would be to extend to concessions the provisions that apply to public contracts. This approach was considered counter-productive in that it could potentially discourage contracting authorities from using concessions.

LEGAL BASIS: Article 53 (1), Article 62 and Article 114 of the TFEU.

CONTENT: the proposed Directive is expected to **guarantee transparency, fairness and legal certainty in the award of concession contracts**, and thereby contribute to improved investment opportunities and ultimately to more and better quality of works and services. It will apply to concessions awarded after its entry into force. This provision is in line with rulings by the Court of Justice of the European Union on modifying contracts.

(1) Legal certainty: the main objective of the Directive is to provide for clarity on the legal framework applicable to the award of concessions, but another is to clearly delimit the scope of application of this framework.

- **Definition:** the present proposal for a Directive on the award of concession contracts provides for a more precise definition of concession contracts with reference to the notion of operational risk. It makes clear what types of risk are to be considered operational and how to define significant risk. It also provides references as to the maximum duration of concessions.
- **Incorporation of Treaty obligations into secondary law:** the proposal extends the majority of the obligations which currently apply to the award of public works concessions to all services concessions. . It also lays down a number of concrete and more precise requirements, applicable at different stages of the award process on the basis of the Treaty principles, as interpreted in the case law of the Court of Justice of the European Union. Moreover, it extends the application of secondary law to the award of concession contracts in the utilities sector, which is currently exempt from such legislation.
- **Public-public cooperation:** there is considerable legal uncertainty as to how far cooperation between public authorities should be covered by public procurement rules. The relevant case-law of the Court of Justice of the European Union is interpreted differently between Member States and even between contracting authorities. Hence the present proposal clarifies the cases in which contracts concluded between contracting authorities are not subject to the application of concession award rules. Such clarification is guided by the principles set out in the relevant case law of the Court of Justice.
- **Modifications:** a specific provision on modifying concessions incorporates the basic solutions developed in the case law and provides a pragmatic solution for dealing with unforeseen circumstances requiring an a concession to be modified during its term.

(2) Better access to the concessions markets: the proposal provides for a fundamental improvement economic operators' access to the concessions markets. The provisions are primarily designed to increase the transparency and fairness of award procedures by restricting the arbitrariness of contracting authorities and contracting entities' decisions on such issues as prior and post-publication, procedural safeguard, selection and award criteria and the deadlines imposed on tenderers. Furthermore, they provide for a better access to justice in order to prevent or to address violations of those provisions.

- **Publication in the Official Journal:** in order to ensure transparency and equal treatment to all economic operators, the present proposal provides for compulsory publication of concession contracts with a value equal to or greater than EUR 5 000 000.
- **Deadlines:** this proposal also sets a minimum deadline for the submission of interest in any concession award procedure, amounting to 52 days, as this is currently the case for public works concessions. It has been decided to provide for concessions a longer deadline than in case of public contracts, given that concession contracts are usually more complex.
- **Selection and exclusion criteria:** the rules are less restrictive than similar provisions currently applicable to public contracts. However, they restrict the selection criteria to those related to the economic, financial and technical capacity of the bidder and limit the scope of the acceptable exclusion criteria.
- **Award criteria:** the proposal provides for an obligation to apply objective criteria linked to the subject matter of the concession, ensuring compliance with the principles of transparency, non-discrimination and equal treatment, guaranteeing that tenders are assessed in conditions of effective

competition allowing an overall economic advantage for the contracting authority or the contracting entity to be determined. These criteria should prevent arbitrary decisions by contracting authorities and contracting entities and must be published in advance and listed in descending order of importance. Member States or contracting authorities or contracting entities which so wish, may also provide for or apply the 'most economically advantageous tender' criterion for the award of concessions.

- ***Procedural guarantees***: unlike the Public Procurement Directives, the proposed rules do not contain a fixed catalogue of award procedures. This solution allows contracting authorities and contracting entities to follow more flexible procedures when awarding concessions notably reflecting national legal traditions and permitting the award process to be organised in the most efficient way. However, the proposal establishes a number of clear procedural safeguards to be applied to the award of concessions notably during negotiations. These safeguards aim at ensuring that the process is fair and transparent.
- ***Remedies***: this proposal provides for an extension of the scope of application of the Remedies Directives (Directives 89/665/EEC and 92/13/EC, as amended by Directive 2007/66/EC) to all concession contracts above the threshold in order to guarantee effective channels for challenging the award decision in court and provide minimal judicial standards which have to be observed by contracting authorities or entities.

BUDGETARY IMPLICATION: the proposal has no budgetary implications for the EU.

DELEGATED ACTS: the Commission shall be empowered to adopt delegated acts in accordance with Article 290 of the Treaty on the Functioning of the European Union (TFEU).