

Award of concession contracts

2011/0437(COD) - 01/02/2013 - Committee report tabled for plenary, 1st reading/single reading

The Committee on the Internal Market and Consumer Protection adopted the report by Philippe JUVIN (EPP, FR) on the proposal for a directive of the European Parliament and of the Council on the award of concession contracts.

The parliamentary committee recommended that the European Parliament's position adopted at first reading under the ordinary legislative procedure should amend the Commission's proposal as follows:

Simplification of the legal framework: in Members' view, the award of concession contracts should be clear, simple and not create an excessive amount of bureaucracy. A number of amendments were introduced with this in view.

Principle of free administration by public authorities: Members reaffirmed the principle that public authorities should be completely independent when it comes to choosing the legal framework for their action, organising themselves to perform their tasks, and laying down quality criteria for service concessions. This Directive should be without prejudice to the Member States' power to award, define and organise the provision of a public service task.

Specific nature of concessions: given the specific nature of concessions, Members considered that concession award provisions should not be simply equated with the rules for the awarding of public contracts.

The report clarified the **definition** of a concession and its special nature as compared with a public contract: (i) transfer of a mission for which the grantor is responsible to a third economic operator; (ii) transfer of risk from the grantor to the concessionaire; (iii) transfer to the concessionaire of a right to exploit the works or services concerned by the concession; (iv) payment of concessionaire on the basis of exploitation of the works or services; (v) the existence of an economic risk in regard to the operation of works or services by the concessionaire.

The term '**grantor**' was introduced to simplify the text where it refers to the contracting authority and contracting entity in the same way.

Thresholds: to simplify the text, the report removed the intermediate threshold of EUR 2.5 – 5 million specifying the obligation to publish a concession award notice.

Calculation of the value of a concession: Members judged it to be preferable to have a **simple calculating method which is the same** whatever the subject of the concession, as the same rules apply to works concessions as to services concessions and the mixed nature of most contracts (works and services) would make it difficult to determine the threshold applicable. The proposed new calculation method would be based on the **pre-tax turnover of the concession** for the whole of the contractual period.

Duration of the concession: the provisions concerning the duration of the concession have been amended so as to stress the point that concessions are **limited in time** and to cover cases in which there is no investment to be financed by the concessionaire. The duration of a concession should, in that event, be determined according to criteria other than the time taken to recoup the investment outlay (e.g. achieving the aims laid down in the contract).

Exclusions: Members proposed that the **exclusion** applying to concessions awarded on the basis of an exclusive right **should be widened** to encompass the activities falling under Annex III if these are subject to a tariff regulated at national level at the time of entry into force of the proposed directive. This provision should not be confined solely to network infrastructure management for the purposes of the activities listed in Annex III.

The **gaming sector** has also been excluded because of the very specific nature of its activities, as have **civil defence, civil protection, and hazard prevention**.

The report clarified the exclusions relating to **affiliated undertakings** stipulating that the calculation of 80% of its average turnover should take into account all services provided by that undertaking.

An amendment was also proposed with a view to excluding agreements relating to **transfers of powers between public authorities**.

Water sector: Members accepted the exclusion of the water sector from the scope of the Directive. They did, however, propose a new provision introducing **a transitional period, applicable until 2020**, for affiliated undertakings operating in the water sector to allow them a reasonable period of time to adapt their internal organisation to the rules in force.

Award procedure: this has been clarified in order to improve understanding of the articles on the conduct of the procedure, transparency and the procedural guarantees. The provisions on the confidentiality of the information supplied by candidates or tenderers to the grantor during the award procedure were strengthened.

Taking public policy aims into account: for the public policy objectives laid down by contracting authorities or entities to be taken into account, Members have provided for the possibility for the concession provider to award a concession on the basis of **environmental, social, or innovation-related criteria**.

Electronic communications: the report has simplified the provisions regarding electronic communications so as to take into account the specific nature of concessions for which, unlike with public contracts, widespread use is not necessarily made of electronic procedures given the significant element of negotiation involved in this type of contract.