



Mr Michel Barnier
Commissioner for Internal Market and Services
European Commission
200 rue de la Loi
1049 Bruxelles

8 July 2010

Dear Commissioner,

I am writing to you in response to the public consultation on concessions.

Concessions allow for a whole-life economic approach to the creation and/or operation and management of public infrastructure and services. They are a unique tool to improve the efficiency of public services, which is essential in the face of today's drastic constraints on public finances, growth and employment and the need for a greener economy. BUSINESSEUROPE believes that local authorities have a key role to play in the process of greening the economy. They should consult the market more regularly to look for proposals allowing to combine improvements in services with a better environmental footprint. In this context, concessions are a good contractual tool to stimulate systemic innovation and provide high quality public services to the population.

BUSINESSEUROPE is of the opinion that concessions for services or for public works must remain distinct from public contracts. The flexibility they present should help develop partnerships between public authorities and the private sector and bring benefits to the citizens and the competitiveness of Europe.

Today works concessions are covered by directive 2004/18/EC¹ which provides for publicity in the Official Journal of the EU and addresses sub-contracting in certain circumstances. It does not prescribe award procedures, reflecting the legislator's view that some flexibility is required to adapt to specific circumstances.

Regarding service concessions, the public procurement directives contain a definition, but they abstain from establishing procedural rules. Nevertheless service concessions are subject to the obligations of the Treaty in terms of transparency, equal treatment and non discrimination. This legal background is set out in a stable and comprehensive set of decisions of the European Court of Justice.

Above all concession contracts need transparency and should be adequately published. This is already stipulated in the Treaty and the relevant case law of the European Court of Justice. As far as any further legal clarification is necessary, we believe that service concessions should be subject to mandatory publication in the Official Journal of the EU above certain thresholds.

¹ On the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.



Otherwise, we do not believe that any new legislative action on concessions is necessary.

In particular, BUSINESSEUROPE believes that:

- The assignment of operational risk underlying a concession should be left to the parties involved, generally on the basis of who is best placed to manage each risk;
- It is for the negotiating parties to agree on the terms of remuneration. This should not be dictated by legislation;
- The Commission should refrain from setting rules on the duration of concessions and it should be left up to the parties to agree a duration adapted to the specific needs of the service to be operated;
- Rules that restrict amendment of contracts should be avoided as this could hinder the ability of stakeholders to adapt to change;
- Public authorities need to make room for innovative solutions by describing their needs as functional outputs and avoiding specifications that are too prescriptive.

Whilst we are convinced that essentially no new legislation is necessary, we believe that the Commission could focus its efforts on extending the use of concessions in Europe. In addition, based on the jurisprudence of the European Court of Justice, it might help to clarify the concept of operating risk linked to concessions as well as the ability for the national level to apply competitive award procedures consistently with the principles of the Treaty and with national practice.

We remain at your disposal should you wish to discuss these comments further.

Yours sincerely,

(original signed by)

Philippe de Buck