



28 June 2012

BUSINESSEUROPE's position on the proposal for a directive on the award of concession contracts

KEY MESSAGES

- 1** Policy-makers should focus on extending the use of concessions. We oppose any provision which could lead to obstacles to the development of concessions.
- 2** In order to ensure a level playing field in the EU-wide concession market, there should be as few exceptions as possible in the scope of the directive.
- 3** There should be no rigid provisions on purely contractual aspects such as subcontracting and modification of concessions during their term in the directive.

WHAT DOES BUSINESSEUROPE AIM FOR?

- Simplification of procedures related to public purchasing in order to limit costs for both contracting authorities and economic operators.
- The improvement of economic operators' access to the concessions markets by fairer treatment of public and private management and by favouring more transparency.
- All elements of a tender should automatically be treated as confidential. A breach of the confidentiality obligation by the contracting authority should be sanctioned.

BUSINESSEUROPE'S POSITION ON THE EUROPEAN COMMISSION PROPOSAL ON CONCESSIONS

INTRODUCTION

On 20 December 2011 the Commission published a proposal for a directive on the award of concession contracts. The legislative proposal, which is expected to enter into force by 2013, forms part of the Commission's overall public procurement package¹.

Concessions are partnerships between the public sector and private companies, where the latter exclusively operate, maintain and carry out the development of infrastructure (ports, water distribution, parking garages, toll roads) or provide services of general economic interest (energy, water and waste disposal for example). Concessions are the most common form of public-private partnership (PPP). They are a good tool to stimulate systemic innovation and provide high quality public services to the population.

BUSINESSEUROPE supports the Commission's efforts to try and overcome existing barriers to the EU-wide concession market and to ensure convergence and a level playing field in the EU. In particular, the direct award of concessions, without any transparency and competition, with the associated risks of national favouritism, fraud and corruption, effectively means that EU citizens may not be benefiting from quality services at best prices. In addition, economic operators may be discriminated against on access to concession contracts and public authorities may fail to guarantee the efficient spending of public money. These problems fundamentally affect the efficient functioning of the European single market.

However, BUSINESSEUROPE believes that creating additional bureaucracy in the field of concessions would be counterproductive. Policy-makers should rather focus on extending the use of concessions and on favouring more transparency by subjecting concessions above certain thresholds to mandatory publication in the Official Journal of the EU.

As highlighted in BUSINESSEUROPE's response to last year's Commission green paper on the modernisation of public procurement, a legislative clarification on services concessions could be supported provided that a 'light approach' is taken.

In this context, we note that the current proposal does not follow this line and some of the proposed provisions could result in real obstacles to the development of concessions. The Commission's impact assessment does not seem to justify the development of a proposal which is wider and far more detailed than needed. This goes against the idea of better regulation and creates new legal uncertainties.

BUSINESSEUROPE sets out below its specific comments on the proposal.

¹ BUSINESSEUROPE's views on the public procurement reform proposal available [here](#)

1. EXCLUSIONS FROM THE SCOPE OF THE DIRECTIVE

BUSINESSEUROPE firmly opposes exclusions to transparency and competition in all three proposals for directives on public purchasing: the directive on public procurement, the utilities directive and the directive on the award of concessions. In order to ensure a level playing field in the EU-wide concession market, there should be as few exceptions as possible in the scopes of all three directives.

Excessive codification of public-public cooperation case law

BUSINESSEUROPE welcomes one of the main objectives of the directive which is to improve economic operators' access to the concessions markets. We are therefore disappointed to see the exclusions from the scope of the directive, as laid out in article 15. These exclusions are contradictory to the draft directive's aim.

We believe that the proposed legal clarifications in the draft directive should avoid wide interpretation of the European case-law. Instead of helping enterprises grow, the draft directive in its current form will risk reducing the attractiveness of concessions in favour of in-house or public-public solutions that are fostered by the overly broad and unregulated derogations granted in their favour.

Article 15 on the relations between public authorities, codifies EU case-law enabling certain derogations from European law on public purchasing and gives them a broad interpretation. This codification however is not based on clear and stable case-law, and its implications are problematic.

The codification enables derogations which exclude a range of public-public contracts from the directive's scope, thereby leaving economic operators with an undue disadvantage. The derogations could send out the wrong signal to local authorities which think they have the choice of opting for no transparency, and that it would be legally easier to use an "in-house" service provider rather than going through a competitive process. This could ultimately lead to the use of fewer concessions and thus to a risk of market fragmentation and a narrowing of the market – in contradiction with the objectives of putting in place more PPP structures and optimising public expenditure.

Therefore, BUSINESSEUROPE recommends deleting the entire article 15 and instead suggests updating the guidance provided by the European Commission which summarises and draws conclusions from existing case-law about when the EU public procurement directives apply.²

Alternatively, in order to guarantee fairer treatment of public and private management, BUSINESSEUROPE believes that (1) paragraphs that go beyond the stable basic jurisprudence should be deleted, (2) public entities party to agreements that have not been advertised in accordance with the directive should not be able to perform on the

² EC Staff Working Document on public-public cooperation – SEC(2011)1169 dated 4/10/2011. Available [here](#)



open market, (3) in-house management should be limited in time or at least be subject to prior notice.

Other forms of exclusions

BUSINESSEUROPE opposes the exclusions of affiliated undertakings and joint ventures, as well as the exclusions of concessions awarded on the basis of an administrative provision. Such exclusions would neither lead to a level playing field nor to better regulation, but could potentially lead to a fragmentation of the internal market.

2. THE AWARD OF CONCESSION CONTRACTS

Transfer of operating risk

BUSINESSEUROPE believes that the proposed definition of concessions needs some further clarifications. We welcome that the proposal places the notion of risk at the heart of the definition. However, the assignment of risks underlying a concession should be left to the parties involved, generally on the basis of who is best placed to manage each risk. Consequently, the directive must not define what is considered a substantial operating risk.

We also believe that the definition of risk should not be restricted to elements that characterise an economic risk. In article 2, paragraph 2, it would be more suitable to refer to operating risk than economic risk as that would include exposure to for example market volatility and liability risks.

Finally, it is important that the directive is in line with the Eurostat decision which is the key reference regarding the allocation of risks in public-private partnerships³

Methods for calculating the estimated value of concessions

BUSINESSEUROPE believes that procedures related to public purchasing should be simplified in order to limit costs both for contracting authorities and economic operators. In our view, separate methods for calculating the estimated values of works concessions and services concessions should be avoided. The distinction is far from a simplification measure and it could lead to legal uncertainty.

BUSINESSEUROPE therefore suggests deletion of article 6, sections 5 and 9, and instead introducing one single method for calculating the values of the two types of concessions. This method should be based on the estimated turnover without value-added tax accumulated over the contract term.

Furthermore, we believe that the duration of the concession should not only be limited to the time estimated to be necessary for the concessionaire to recoup the investments made, as described in article 16, but also to the time estimated to reach the performance objectives set by the contracting authority.

³ Treatment of public-private partnerships, Eurostat decision, February 2004. Available [here](#)



Complexity of the award criteria

BUSINESSEUROPE welcomes the Commission's choice of giving precedence to the framework of the negotiation procedure with its traceability and flexibility. In order to better adjust the proposals of the bidders to the expectations of public authorities and the needs of the service, it is necessary to reconcile the legal certainty of the procedure and the capacity of negotiations between the parties.

However, we strongly oppose award criteria that in practice would give contracting authorities a very wide margin of discretion to decide who should be able to win a contract. Therefore, it is important that all criteria used for awards of concessions must be subject to preliminary publication, otherwise such criteria should be deemed inapplicable.

Confidentiality

Tenders contain a real intellectual added value which needs to be protected. It is particularly important to respect the confidentiality of the tenders in order to promote innovation through public purchasing.

Article 24 states that economic operators should indicate the confidential nature of every single aspect of a tender. BUSINESSEUROPE is against this provision as it would represent an unnecessary burden both for economic operators and for contracting authorities. We would rather be in favour of a system where all elements of a tender are automatically treated as confidential. We also think that a breach of the confidentiality obligation by the contracting authority should be sanctioned.

Selection of and qualitative assessment of candidates

BUSINESSEUROPE has some concerns with regard to the criteria for selection of candidates as set out in article 36 section 7. These provisions are subjective and could potentially allow exclusions without any formal finding of fault and as such could be used as a protectionist tool to exclude companies challenging local participants.

3. MODIFICATION OF CONCESSIONS DURING THEIR TERM AND TERMINATION

The directive should guarantee the economic and financial equilibrium of the concession contracts in case of events that are beyond the concessionaire's control, such as inappropriate actions by the contracting authority or other public authorities or events not foreseen when the contract was signed. The directive should establish the necessary rebalancing mechanisms, such as deadline extensions, rate increases or compensatory allowances.

In this context, rules that restrict amendments of concessions should be avoided as this could hinder the ability of the concessionaire to adapt to change. Rigid definitions do not allow full advantage to be taken of the flexibility of concession contracts.



Furthermore, we find it to be inappropriate to include purely contractual aspects such as subcontracting and modification in the directive as that does not correspond to the purpose or the title of the proposal. More precisely, the rigid definition in article 42 of what should be regarded a substantial modification of the initial contract which justifies a new concession award procedure is inappropriate in the specific framework of concessions.

Finally, the directive proposal's article 43 gives contracting authorities the possibility under some conditions to terminate concessions during its term. An example of such a condition is when a Member State has awarded a concession without complying with its obligations under the Treaties and this directive. BUSINESSEUROPE does not think that it is appropriate to terminate a concession contract as a sanction after an incorrect action by the administration of a Member State. Doing so would lead, in terms of efficiency, to drawbacks for the public interest as it would increase the price and cause delays. Therefore, BUSINESSEUROPE recommends deletion of article 43 section c as its current drafting may create legal uncertainty.

* * *