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COMMISSION STAFF WORKING PAPER
EXECUTIVE SUMMARY OF THE IMPACT ASSESSMENT

Accompanying the document

**PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF
THE COUNCIL**

on the award of concession contracts

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EXECUTIVE SUMMARY

**OF THE IMPACT ASSESSMENT OF PROPOSAL FOR A DIRECTIVE ON THE AWARD OF
CONCESSION CONTRACTS**

1. PROBLEM DEFINITION

Concession contracts are commonly used by public authorities to provide for the delivery of services or construction of infrastructure. Concessions involve a contractual arrangement between the public authority and an economic operator (the concession holder) whereby the latter provides services or carries out works and is substantially remunerated by being permitted to exploit the work or service. Concessions are a particularly attractive way of carrying out projects of public interest when state or local authorities need to mobilise private capital and know-how to supplement scarce public resources. They underpin a significant share of economic activity in the EU and are especially common in network industries and for the delivery of services of general economic interest. Concession holders may, for example, build and manage motorways, provide airport services or operate water distribution networks.

Concessions involving private partners are a particular form of public private partnership (PPP)¹. According to the information available, over 60 % of all PPP contracts can be classed as concessions. As a model where, in remuneration, the private partner is given the right to exploit either the work or the service, with the inherent financial risks, concessions constitute a convenient legal framework for carrying out public tasks through PPPs and hence make it possible to deliver much needed public works and services, while keeping those assets out of the government balance sheet.

Since it involves the efficient allocation of public funds, procurement of concessions (and therefore indirectly of PPPs) is of special concern in the current context of severe budgetary constraints and economic difficulties in many EU Member States. The initiative on concessions is to be seen as one of the measures that can help to ensure more efficient allocation of public money by creating conditions for the competitive award of a contract.

Currently, the award of *service concessions* is subject only to the Treaty principles (equal treatment, non-discrimination, transparency and proportionality) while *works concessions* (with the exception of the ‘utilities’ sector) are also partially covered by some secondary

¹ For the purpose of statistical treatment, concessions are defined as projects where the majority of revenue is generated by third-party users, whereas in PPPs the majority of revenue comes from public authorities.

legislation. By contrast, public procurement contracts are subject to detailed secondary legislation (covering ‘classic’ and ‘utilities’ sectors)².

The lack of clarity of the EU rules governing concessions is the main driver of problems identified with regard to the present situation: legal uncertainty (1.1), entry barriers (1.2.) and lack of appropriate judicial guarantees for the bidders (1.3.).

1.1. Lack of legal certainty generating economic inefficiencies

Legal uncertainty affects both the definition of concession and the legal regime applicable. The current definition makes it difficult to distinguish between concessions and public contracts (and also between works concessions and service concessions). Although the Court has explained that the essential feature of a concession is the risk inherent in the exploitation of a work or a service which the concession holder has to bear, fundamental components of the definition, such as the level and type of risk, are still undefined. Furthermore, the precise content of the obligations of transparency and non-discrimination arising from the Treaty remains unclear. National legal frameworks do not provide a solution to the problem either as, for the same reasons, their compliance with the EU rules cannot be easily ensured.

The present situation of uncertainty at several levels gives rise to major economic inefficiencies and is detrimental to contracting authorities and entities, economic operators and users of the services. Indeed, for contracting authorities and entities, the lack of legal certainty increases the risk of cancellation or early termination of illegally awarded contracts and ultimately discourages them from using concessions in cases where this type of contract may be a good solution. Economic operators may also be less inclined to engage in projects which may turn out to have been tendered in violation of EU law. Limited interest in concessions may equally have a negative effect on the uptake of PPPs and, consequently, jeopardise improvements in efficiency and innovation in the delivery of services vital to EU citizens.

1.2. Entry barriers

In addition to legal uncertainty, the current situation is marked by the presence of barriers to market entry.

Member States' legal systems differ significantly as to the scope of application of the rules on the award of concessions, the level of publication and transparency standards, the choice of procedures, or of selection and award criteria, and technical specifications. This situation contributes to the fragmentation of national frameworks, further aggravated by the often unlawful practices of contracting authorities and entities, such as the direct award of concession contracts or the use of criteria which are not objective.

As a result, economic operators are faced with an unlevel playing field, often leading to lost market opportunities. Many respondents to the public consultations confirmed that this situation gives rise to costs related to legal advice and to the need for in-depth knowledge of specific local conditions and creates obstacles to the entry of non-domestic EU operators into these markets. In addition to the harm to competitors located in other Member States, contracting entities and consumers also stand to lose, as they do not get the value for money they might have expected.

² 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, and Directive 2004/17/EC of the EP and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ L 134, 30.4.2004).

1.3. Insufficient legal protection of tenderers

Services concessions, and to a certain extent works concessions, are not covered by the rules providing for legal remedies in the area of public procurement. Therefore, aggrieved tenderers do not benefit from important judicial protection afforded by the Remedies Directive. Despite the fact that certain Member States have extended the application of this Directive to service concessions, others have not done so. As a result, possible violations of the EU Treaty principles cannot be adequately addressed.

2. SUBSIDIARITY

Although the aforementioned problems produce their material effects at national level, they also affect the efficient functioning of the EU internal market.

Even if Member States were to take legislative action to establish a legal framework based on the Treaty principles, at least two problems would still remain unresolved: the risk of the legal uncertainty related to interpretations of those principles by national legislators and large disparities between the legislation in different Member States.

A common understanding across Member States of the obligations flowing from the EU principles can only be achieved by action at EU level. Similarly, approximation of the rules by the EU legislator can best eliminate discrepancies between national regimes.

3. OBJECTIVES

The overall objective of the present initiative is to create a supportive framework for wider use of concessions, hence contributing to economic growth and innovation. The initiative will concentrate on solutions allowing the quality and accessibility of many socially and economically important services to be improved by facilitating investment and increasing competition for the award of concessions, thus creating more business opportunities for EU companies and fostering innovation.

4. SCOPE OF LEGISLATION

Legislation on concessions should cover the award of this type of contract with regard not only to the 'classic' sector (Directive 2004/18/EC) but to the 'utilities' sector (Directive 2004/17/EC), which accounts for a significant number of concessions.

Non-priority services (e.g. health, education and social services) are presently only partially covered by the Public Procurement Directives since they were deemed not to present a significant potential for cross-border trade. However, in the light of recent findings by the Commission following the evaluation on the impact and effectiveness of EU public procurement legislation, many categories of services formerly classified as non-priority services showed a relatively high *ratio* of cross-border provision. Any new proposal in the field of public purchases must take account of these findings. Therefore, such conclusions justify the extension of the envisaged rules to those services. Nevertheless, services such as social, health and education continue to have a limited cross-border dimension, due to the strong impact of different national cultural traditions, and are less often awarded as concessions.

Concessions contracts for certain specific types of services are already subject to specific regulation with regard to the contracts they award, such as public passenger transport services

by rail and road (covered by Regulation 1370/2007) and air transport services (covered by Regulation 1008/2008) and therefore should be excluded from the scope of the future legislation on concessions.

5. POLICY OPTIONS

The Commission has analysed different policy options aimed at meeting the objectives set out in the previous section. These include the following legislative and non legislative actions: no policy change; a focused infringement policy; soft law; legislation: basic rules, detailed rules, mixed rules.

Only the legislative options above will be analysed in detail since, as will be explained below, neither the focused infringement policy nor the soft law option seem fully adequate to accomplish the objectives set out.

5.1. Base line scenario (Option 1)

This option implies no action to address the status quo. In this case the economic inefficiencies caused by legal uncertainty and the existing entry barriers to the EU concessions market would persist: contracting authorities and entities would miss the opportunity to ensure best value for money in the award of concessions, economic operators would miss out on substantial business opportunities and consumer benefits would remain limited.

5.2. Focused infringement policy (Option 2)

This option would consist in increased and more systematic use of the infringement procedure under Article 258 of the TFEU to address cases of violation of the Treaty principles during the award of concessions. While this option offers certain positive effects it would not address the problems identified and results could only be expected in the long term. Therefore, this option would not meet the objectives of the initiative and can also be discarded.

5.3. Soft law (Option 3)

The soft law option would consist either in an interpretative communication of the Commission or a recommendation. The Communication on concessions of 2000 has not so far ensured legal certainty and compliance with the Treaty principles³. A new communication would probably raise stakeholders' awareness of the case law of the Court but could not go beyond interpretation of the existing case law. Furthermore, a communication is not binding and therefore would not be likely to ensure publicity of concession contracts in the EU or fairness of the procedures used to award them.

The above comments also apply to a recommendation by the Commission. It therefore appears that neither a communication nor a recommendation would achieve the objectives of the initiative. This option can therefore be discarded.

5.4. Legislation — content of the options

The two 'extreme' legislative options are the introduction of basic rules corresponding to the existing provisions on works concessions of Directive 2004/18/EC or detailed rules based on the current legal framework for public contracts. The third option, mixed rules, would be some compromise between the two.

³ Commission interpretative communication on concessions under Community law (OJ C 121, 29.4.2000).

6. ASSESSMENT OF IMPACTS OF THE LEGISLATIVE OPTIONS

6.1. Scope of legislation

A proposal for directive on concessions, irrespective of its actual content, would cover concessions in both ‘classic’ and utilities sectors.

By contrast, new rules would not apply to services concessions currently governed by the Transport Regulation⁴ and the Air Transport Services Regulation⁵, for the sake of the stability of their separate legal regimes, and only partially to social services. The threshold for both works and service concessions should ensure that these rules cover only concessions with a manifest cross-border interest.

6.2. Option 4: Legislation — basic rules

Basic rules would include provisions currently applicable to works concessions in the ‘classic’ sectors, as well as clarification of the notion of concession.

Clearer criteria distinguishing between public contracts and concessions could be expected to reduce the number of public contracts wrongly labelled as concessions.

The most important of these rules is the obligation to publish a concession notice in the Official Journal of the EU. This requirement is expected to reduce a number of direct awards, contribute to better information on concessions, eliminate legal uncertainty as to whether the standards of ‘adequate advertisement’ have been met and reduce the cost of bidding for concessions for SMEs.

More competition and contestability is likely to result in more competitive bids and hence, in better results for contracting authorities and entities and consumers.

Provisions on the minimum deadlines for the submission of bids could help avoid discrimination, combat corruption and encourage participation of cross-border bidders.

Legislation is the only option capable of bringing procedures for the award of service concessions within the realm of the Remedies Directives. This should substantially improve legal protection for bidders, which is likely to enhance their confidence in the impartiality of contracting authorities and entities’ decisions and encourage them to bid more often.

Basic rules might also ensure equal treatment throughout the procedure. However, their effectiveness is more uncertain in this regard. One possible drawback might be that greater transparency in the award of concessions could lead to increased dominance by large companies. However, such an outcome is by no means certain. Stakeholders perceive the administrative and compliance costs likely to be generated by basic legislation as rather unsubstantial and considered they would be counterbalanced by the efficiencies achieved thanks to greater competition.

As to the possible social drawbacks, the current EU legislation on safeguarding employees’ rights in the event of transfers of undertakings reduces the possibility of redundancies in the event that an incumbent operator loses a contract.

Basic rules would have no impact on the ability of contracting authorities and entities or regulatory bodies to establish which environmental standards need to be met.

⁴ Regulation 1370/2007, OJEU, L 315 of 3.12.2007.

⁵ Regulation 1008/2008 OJEU, L 293, 31.10.2008.

Basic rules could create a stable legal framework, stimulate the use of concessions and therefore facilitate investment and promote innovation. Greater transparency, resulting in more innovative approaches to public services and greater choice and efficiency, would bring about positive outcomes for contracting authorities and entities and for users, improve access to the market and create new business opportunities.

6.3. Option 5: Legislation — detailed rules

Detailed rules would include all the legal solutions provided for in the basic rules option. Thus, the impact of detailed rules on legal certainty would be partly identical to the impact of the basic rules. In addition, however, this option would involve the application of the same rules, in particular those on selection and award criteria and on award procedures, as for public contracts. Thus in certain respects, these rules are likely to raise the level of legal certainty, as they would comprehensively enshrine the Treaty principles applicable to many aspects of the award procedure. However, despite all the expected benefits, the introduction of detailed rules might prove counter-productive and substantially decrease the attractiveness of concessions. Indeed, the complexity of rules and specific provisions (such as compulsory use of standard tendering procedures or the most economically advantageous tender (MEAT) criteria) might have a deterrent effect and also reduce overall legal certainty, due to a higher risk of litigation, ultimately discouraging the use of concessions. Many stakeholders perceive the complexity of detailed rules as a major threat.

The economic impact of the introduction of detailed rules is therefore likely to be negative, as undertakings might shy away from bidding for concessions, contracting authorities and entities would fail to reap the benefits they might expect, while consumers would fail to gain access to cheaper and better quality services.

The impact on employment and the quality of jobs is likely to be limited, while the overall social and environmental impact might be negative, with less innovation and poorer quality services.

6.4. Option 6: Legislation — Mixed rules

Nevertheless, the basic rules could usefully be complemented by some provisions on selection and award criteria, and on the course of procedures. These provisions would not strictly reproduce the content of public procurement directives (such as rules on MEAT), but would, for example consist of obligations to publish subject-matter-related selection and award criteria in advance or to observe minimum deadlines for the submission of tenders. They might also include rules on technical specifications, obligations to disseminate the same information to all bidders during negotiations, public-public cooperation and modifications of concessions during their performance. Finally, they might impose compulsory publication of the award notice.

Such provisions could be expected to have a beneficial impact on transparency, fairness and legal certainty, thereby contributing to better achievement of a number of objectives of the present initiative, in particular better access to the market, improved investment opportunities and hence more and better quality services. By encouraging the uptake of concessions more than either of the alternative options, they would also positively impact engagement in PPPs. A substantial number of stakeholders supported the introduction of mixed rules.

Under mixed rules all impacts (economic, social and environmental) should be slightly improved in comparison with the effects of basic rules.

7. COMPARING THE OPTIONS

Both the basic rules and the mixed rules options are capable of achieving significant improvement of legal certainty and hence facilitate access to the market, resulting in improved outcomes for the contracting authorities and entities, users and businesses. Detailed rules permit to achieve better results in terms of fairness of the procedures, but are likely to generate important drawbacks in the form of reduced up-take of concessions. Mixed rules appear to deliver the best results in terms of fairness and better value for money but also, given their flexibility, in terms of encouraging the use of concessions.

In the light of the above it is recommended to opt for Option 6 — mixed rules, which represents an ambitious and comprehensive solution.

8. MONITORING AND EVALUATION

Evaluation of the legislation will be based on such indicators as the change in the number and value of concessions and published and awarded, the number of bidders and successful non-domestic bidders, and the percentage of SMEs among bidders.