



EUROPEAN PARLIAMENT

2009 - 2014

Plenary sitting

A7-0030/2013

1.2.2013

*****I**
REPORT

on the proposal for a directive of the European Parliament and of the Council
on the award of concession contracts
(COM(2011)0897 – C7-0004/2012 – 2011/0437(COD))

Committee on the Internal Market and Consumer Protection

Rapporteur: Philippe Juvin

Symbols for procedures

- * Consultation procedure
- *** Consent procedure
- ***I Ordinary legislative procedure (first reading)
- ***II Ordinary legislative procedure (second reading)
- ***III Ordinary legislative procedure (third reading)

(The type of procedure depends on the legal basis proposed by the draft act.)

Amendments to a draft act

In amendments by Parliament, amendments to draft acts are highlighted in ***bold italics***. Highlighting in *normal italics* is an indication for the relevant departments showing parts of the draft act which may require correction when the final text is prepared – for instance, obvious errors or omissions in a language version. Suggested corrections of this kind are subject to the agreement of the departments concerned.

The heading for any amendment to an existing act that the draft act seeks to amend includes a third line identifying the existing act and a fourth line identifying the provision in that act that Parliament wishes to amend. Passages in an existing act that Parliament wishes to amend, but that the draft act has left unchanged, are highlighted in **bold**. Any deletions that Parliament wishes to make in such passages are indicated thus: [...].

CONTENTS

	Page
DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION.....	4
EXPLANATORY STATEMENT.....	188
OPINION OF THE COMMITTEE ON INTERNATIONAL TRADE	193
OPINION OF THE COMMITTEE ON EMPLOYMENT AND SOCIAL AFFAIRS.....	202
OPINION OF THE COMMITTEE ON INDUSTRY, RESEARCH AND ENERGY	223
OPINION OF THE COMMITTEE ON TRANSPORT AND TOURISM.....	255
OPINION OF THE COMMITTEE ON REGIONAL DEVELOPMENT	269
OPINION OF THE COMMITTEE ON LEGAL AFFAIRS	284
PROCEDURE.....	323

DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

on the proposal for a directive of the European Parliament and of the Council on the award of concession contracts

(COM(2011)0897 – C7-0004/2012 – 2011/0437(COD))

(Ordinary legislative procedure: first reading)

The European Parliament,

- having regard to the Commission proposal to Parliament and the Council (COM(2011)0897),
 - having regard to Article 294(2) and Articles 53(1), 62 and 114 of the Treaty on the Functioning of the European Union, pursuant to which the Commission submitted the proposal to Parliament (C7-0004/2012),
 - having regard to Article 294(3) of the Treaty on the Functioning of the European Union,
 - having regard to the reasoned opinions submitted, within the framework of Protocol No 2 on the application of the principles of subsidiarity and proportionality, by the German Bundesrat, the Spanish Congress of Deputies and the Austrian Federal Council, asserting that the draft legislative act does not comply with the principle of subsidiarity,
 - having regard to the opinion of the European Economic and Social Committee of 26 April 2012¹,
 - having regard to the opinion of the Committee of the Regions of 19 July 2012²,
 - having regard to Rule 55 of its Rules of Procedure,
 - having regard to the report of the Committee on the Internal Market and Consumer Protection and the opinions of the Committee on International Trade, the Committee on Employment and Social Affairs, the Committee on Industry, Research and Energy, the Committee on Transport and Tourism, the Committee on Regional Development and Committee on Legal Affairs (A7-0030/2013),
1. Adopts its position at first reading hereinafter set out;
 2. Calls on the Commission to refer the matter to Parliament again if it intends to amend its proposal substantially or replace it with another text;
 3. Instructs its President to forward its position to the Council, the Commission and the national parliaments.

¹ OJ C 191, 29.6.12, p. 84.

² OJ C 277, 13.9.2012, p. 74.

Amendment 1

Proposal for a directive Citation 1

Text proposed by the Commission

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 53 (1), Article 62 and Article 114 thereof,

Amendment

Having regard to the Treaty on the Functioning of the European Union, and in particular **Article 14**, Article 53(1), Article 62 and Article 114, **as well as Protocol No 26** thereof,

Justification

Takes into account the provisions relating to services of general interest and their specific features in the directive.

Amendment 2

Proposal for a directive Recital 1

Text proposed by the Commission

(1) 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, while public authorities may not find the best use of public money so that EU citizens benefit from quality services at best prices. 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

Amendment

(1) 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-sized enterprises* (SMEs), are being deprived of their rights within the Internal Market and miss out on important business opportunities, while public authorities may not find the best use of public money so that EU citizens benefit from quality services at best prices. An adequate, **balanced and flexible** 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.

citizen. *Such a legal framework would also afford greater legal certainty to economic operators and could be a basis for and means of further opening up international public procurement markets and boosting world trade. A general principle should be established at Union level whereby the award of concessions would be open to SMEs so as to improve their access opportunities on the concession market.*

Amendment 3
Proposal for a directive
Recital 1 a (new)

Text proposed by the Commission

Amendment

(1a) The rules of the legislative framework applicable to the award of concessions should be clear and simple and should not create an excessive amount of bureaucracy.

Amendment 4
Proposal for a directive
Recital 1 b (new)

Text proposed by the Commission

Amendment

(1b) The nature of concessions is such that concession award provisions should not be simply equated with the rules for the awarding of public contracts.

Amendment 5
Proposal for a directive
Recital 2

Text proposed by the Commission

Amendment

(2) Public procurement plays a key role in the Europe 2020 strategy as one of the market-based instruments to be used to

(2) Public procurement plays a key role in the Europe 2020 strategy as one of the market-based instruments to be used to

achieve a smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. *The award of works concessions is presently subject to basic rules of 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 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. 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.*

Amendment 6

Proposal for a directive Recital 2 a (new)

Text proposed by the Commission

achieve a smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. *In this context, concession contracts represent important instruments in the long-term structural development of infrastructure and strategic services. Accordingly, they smooth the progress of competition within the internal market, enhancing private sector expertise, achieving efficiency and delivering innovation.*

Amendment

(2a) The award of works concessions is currently subject to basic rules of 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 contracts¹ while the award of services concessions with a cross-border interest has to comply with the principles of the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), and in particular the principles 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 TFEU by national legislators and of wide disparities between the legislation of different Member States. Such risk has been confirmed by the extensive case-law of the Court of Justice of the European Union which has, nevertheless, only partially addressed certain aspects of the award of concession contracts.

¹ OJ L 134, 30.4.2004, p. 114.

Amendment 7

Proposal for a directive Recital 2 b (new)

Text proposed by the Commission

Amendment

(2b) Hence, this Directive aims at achieving a uniform application of the principles of the Treaties across all Member States in order to ensure legal certainty, eliminate persisting distortions of the internal market, increase the efficiency of public spending, facilitate equal access and fair participation of SMEs in the award of concession

contracts, both at local and Union level, and support the achievement of sustainable public policy objectives.

Amendment 8

Proposal for a directive Recital 2 c (new)

Text proposed by the Commission

Amendment

(2c) Subject to the provisions on the exclusion of activities which are directly exposed to competition as laid down in Article 14 of this Directive, the provisions of Directive 2004/18/EC and of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sector¹ should not apply to concessions as defined in this Directive. However, rules set by this Directive should not be used to circumvent the award procedure laid down in those Directives.

¹ OJ L 134, 30.4.2004, p. 1.

Amendment 9

Proposal for a directive Recital 3

Text proposed by the Commission

Amendment

(3) This Directive should not in any way affect the freedom of Member States *or* public authorities to ***decide on the direct provision of*** works or services to the public or ***on the outsourcing of*** such provision to third parties. Member States or public authorities ***should remain free*** to define the characteristics of the ***service*** to be provided, including any conditions regarding the quality or price of the

(3) This Directive ***recognises and reaffirms the right of Member States and public authorities to decide the means of administration they judge to be most appropriate for performing works and providing services.*** This Directive should not in any way affect the freedom of Member States ***and*** public authorities to ***perform*** works or ***provide*** services ***directly*** to the public or ***to outsource*** such

services, in order to pursue their public policy objectives

provision *by delegating it* to third parties. Member States or public authorities *should retain the right* to define *and specify* the characteristics of the *services* to be provided, including any conditions regarding the quality or price of the services, in order to pursue their public policy objectives

Justification

Reaffirms the principle of free administration by public authorities freely choosing the means of administration for the missions for which they are responsible (implementation of missions or delegation to a third party). The Directive does not pre-empt the choice of any one means of administration in particular but sets out rules if delegation to a third party (concession) is selected.

Amendment 10

Proposal for a directive

Recital 4

Text proposed by the Commission

(4) For concessions above a certain value, it is appropriate to provide for a minimum coordination of national procedures for the award of such contracts based on principles of the Treaty so as to guarantee the opening-up of concessions to competition and adequate legal certainty. Those coordinating provisions should not go beyond what is necessary in order to achieve the aforementioned objectives. **However**, Member States should be allowed to complete and develop further those provisions if they find it appropriate notably to better ensure compliance with the principles above.

Amendment

(4) For concessions *equal to or* above a certain value, it is appropriate to provide for a minimum coordination of national procedures for the award of such contracts based on principles of the Treaty so as to guarantee the opening-up of concessions to competition and adequate legal certainty. Those coordinating provisions should not go beyond what is necessary in order to achieve the aforementioned objectives *and to ensure a certain degree of flexibility*. **Accordingly**, Member States should be allowed to complete and develop further those provisions if they find it appropriate notably to better ensure compliance with the principles above.

Amendment 11

Proposal for a directive Recital 6

Text proposed by the Commission

(6) Concessions are contracts for pecuniary interest ***concluded between*** one or more ***economic operators and one or more*** contracting authorities or entities ***and having as their object the acquisition*** of works or services where the consideration consists, ***normally***, in the right to ***exploit*** the works or services ***that*** are the subject of the contract. The execution of these works or services ***are*** subject to specific binding obligations defined by the ***contracting authority or entity*** which are legally enforceable. By contrast, certain State acts such as authorisations or licences whereby the State or a public authority establishes the conditions for the exercise of an economic activity, should not qualify as concessions. The same applies to certain agreements ***having as their object*** the right ***of an economic operator*** to exploit certain public domains or resources, such as land lease contracts whereby the State or contracting authority or entity establishes only general conditions for their use without ***acquiring*** specific works or services.

Amendment

(6) Concessions are contracts for pecuniary interest ***through which*** one or more contracting authorities or entities (***'grantors'***) ***awards the performance*** of works or ***the management of*** services ***to one or more economic operators, and*** where the consideration ***for that award*** consists ***either*** in the right to ***execute and manage*** the works or ***provide the*** services ***which*** are the subject of the contract, ***or in that right together with payment***. The execution of these works or services ***should be*** subject to specific binding obligations defined by the ***grantor*** which are legally enforceable. By contrast, certain State acts such as authorisations, ***permits*** or licences ***including those issued for limited periods***, whereby the State or a public authority establishes the conditions for the exercise of an economic activity, should not ***be regarded*** as concessions. The same applies to certain agreements ***through which*** the ***State or the contracting authority or entity awards an economic operator the*** right to exploit certain public domains or resources, such as ***public domain and private rental or*** land lease contracts, ***particularly in the maritime or inland ports sector, or grants rights of way*** whereby the State or contracting authority or entity establishes only general conditions for their use without ***becoming a recipient of*** specific works or services ***provided by the economic operator. The general conditions contained in both, public domain and private rental or land lease contracts include especially rules concerning the transfer of the rented property to the tenant, the use thereof (for instance a description of the rented property, provisions on permissible uses of the rented property, provisions on the***

optimum use of the rented property such as performance indicators and environmental standards), the respective obligations of the landlord and the tenant with regard to the maintenance of the rented property, the duration of the lease and repossession by the landlord of the rented property and the rent and other costs borne by the tenant, including penalties.

Justification

Clarification of the definition of concession (see Article 2) and of the types of contract not corresponding to concessions within the meaning of this Directive (authorisations, licences, contracts laying down general conditions without a delegation to perform the works or manage the services). The term 'grantor' is used to simplify the text where it refers to the contracting authority and contracting entity in the same way.

Amendment 12

Proposal for a directive

Recital 7

Text proposed by the Commission

(7) Difficulties related to the interpretation of the *concepts* of concession **and public contract** have *been source of* continued legal uncertainty among stakeholders and have given rise to numerous judgments of the Court of Justice of the European Union on this subject. Therefore, the definition of concession should be clarified, in particular by referring to the concept of *substantial* operating risk. The main feature of a concession, the right to exploit the works or services, always implies the transfer to the concessionaire of an economic risk involving the possibility that it will not recoup the investments made and the costs incurred in operating the works or services awarded. The application of specific rules governing the award of concessions would not be justified if the *contracting authority or entity* relieved the *contractor* of any potential loss, by guaranteeing a minimal revenue, equal or higher to the costs that

Amendment

(7) Difficulties related to the interpretation of the *concept* of concession have *generated* continued legal uncertainty among stakeholders and have given rise to numerous judgments of the Court of Justice of the European Union on this subject. Therefore, the definition of concession should be clarified, in particular by referring to the concept of operating risk. The main feature of a concession, the right to exploit the works or services, always implies the transfer to the concessionaire of *a substantial part of the* economic risk involving the possibility that it will not recoup the investments made and the costs incurred in operating the works or services awarded *under normal operating conditions*. *The fact that the risk is very limited from the outset, in particular because of the detailed rules of public law governing the works or services which are the object of the concession, should not*

the contractor has to incur in relation with the performance of the contract. At the same time it should be made clear that certain arrangements which are fully paid by a contracting authority or a contracting entity should qualify as concessions where the *recoupelement* of the *investements* and costs incurred by the operator for execution the work or *provididng* the service depends on the actual demand for or the availability of the service or asset.

preclude the qualification of the contract as a concession. The application of specific rules governing the award of concessions would not be justified if the ***grantor*** relieved the ***concessionaire*** of any potential loss, by guaranteeing a minimal revenue, equal or higher to the costs that the contractor has to incur in relation with the performance of the contract. At the same time it should be made clear that certain arrangements which are fully paid by a contracting authority or a contracting entity should qualify as concessions where the *recouping* of the *investments* and costs incurred by the operator for execution the work or *providing* the service depends on the actual demand for or the availability of the service or asset.

Amendment 13

Proposal for a directive Recital 8 a (new)

Text proposed by the Commission

Amendment

(8a) An operating risk should stem from the factors which are outside the control of the parties and thus can not result from inappropriate performance of the contract by any of the parties to the contract. It is defined as the risk of exposure to the vagaries of the market, which may consist of either a demand risk or a supply risk, or both a demand and supply risk. The operating risk may include for instance the risk that supply of the services will not match demand, the risk that those liable will be unable to pay for the services provided, or the risk that the costs of operating the services will not fully be met by revenue.

Justification

The definition and meaning of "availability risk" in Article 2 Paragraph 2 are not very clear. This suggested new recital is an attempt to link it to the decisions of the concessionaire as to its investments in delivering the concession

Amendment 14

Proposal for a directive

Recital 9

Text proposed by the Commission

(9) The notion of special or exclusive rights is central to the definition of the scope of this Directive, since entities which are neither contracting entities pursuant to Article 4 (1) (1) nor public undertakings are subject to its provisions only to the extent that they exercise one of the activities covered on the basis of such rights. ***It is therefore appropriate to clarify that rights which have been granted by means of a procedure based on objective criteria, notably pursuant to Union legislation, and for which adequate publicity has been ensured do not constitute special or exclusive rights for the purposes of this Directive. This legislation should include Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas, Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity, Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, Directive 94/22/EC of the European Parliament and of the Council of 20 May 1994 on the conditions for granting and using authorisations for the prospection, exploration and production of hydrocarbons and Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council***

Amendment

(9) The notion of special or exclusive rights is central to the definition of the scope of this Directive, since entities which are neither contracting entities pursuant to Article 4 (1) (1) nor public undertakings are subject to its provisions only to the extent that they exercise one of the activities covered on the basis of such rights.

Regulations (EEC) Nos 1191/69 and 1107/70. The increasingly diverse forms of public action made it necessary to define more clearly the notion of procurement itself. The Union rules on concessions refer to the acquisition of works or services for a consideration consisting in exploitation of those works or services. The notion of acquisition should be understood broadly in the sense of obtaining the benefits of the works or services in question not requiring in all cases a transfer of ownership to contracting authorities or contracting entities. Furthermore, the mere financing of an activity, which is frequently linked to the obligation to reimburse the amounts received where they are not used for the purposes intended, does not usually fall under this Directive.

Justification

To ensure consistency with the amended version of Article 4(3).

Amendment 15

**Proposal for a directive
Recital 10**

Text proposed by the Commission

(10) It has also proven necessary to clarify what should be understood as a single procurement, with the effect that the aggregate value of all concessions concluded for the purpose of this procurement has to be taken into account with regard to the thresholds of this Directive, and that the procurement should be advertised as a whole, possibly split into lots. The concept of single procurement encompasses all supplies, works and services needed to carry out a particular project. Indications for the existence of one single project can for instance consist in overall prior planning

Amendment

(10) This Directive should only apply to concession contracts whose value is equal to or greater than a certain threshold, which should reflect the clear cross-border interest of concessions to economic operators located in other Member States. Consequently, the method of calculating the estimated value of a concession needs to be defined, and should be identical for works and services concessions, as most contracts are mixed. It should include taking into account the cumulative turnover of the concession concerned, excluding tax, over the duration of the contract estimated by the grantor. The

and conception by the *contracting authority*, the fact that the different elements *purchased* fulfil a single economic and technical function *or* that they are otherwise logically interlinked.

value of a concession should take into account the value of all the works and/or services covered by the contract and forming part of the same concession project. Indications for the existence of one single project can for instance consist in overall prior planning and conception by the *grantor*, the fact that the different elements *of the concession* fulfil a single economic and technical function, that they are otherwise logically interlinked, *or that they require the same types of investment by the concessionaire.*

Justification

To ensure consistency with the amended versions of Articles 5 and 6.

Amendment 16

Proposal for a directive

Recital 11

Text proposed by the Commission

(11) To ensure *a real opening up of* the market and a fair balance in the application of concession award rules in the water, energy, transport and postal services sectors it is necessary for the entities covered to be identified on a basis other than their legal status. *It should be ensured, therefore, that* the equal treatment of contracting entities operating in the public sector and those operating in the private sector *is not prejudiced*. It is also necessary to ensure, in *keeping with Article 345 of the Treaty*, that the rules governing the system of property ownership in Member States are not prejudiced.

Amendment

(11) To ensure real *access to* the market and a fair balance in the application of concession award rules in the water, energy, transport and postal services sectors it is necessary for the entities covered to be *clearly* identified on a basis other than their legal status. The equal treatment of contracting entities operating in the public sector and those operating in the private sector *should be ensured*. It is also necessary to ensure, in *accordance with Article 345 TFEU*, that the rules governing the system of property ownership in Member States are not prejudiced.

Amendment 17

Proposal for a directive

Recital 12

Text proposed by the Commission

(12) Concessions may be awarded by **contracting entities** for the purpose of meeting the requirements of several activities, possibly subject to different legal regimes. It should be clarified that the legal regime applicable to a single concession intended to cover several activities should be subject to the rules applicable to the activity for which it is principally intended. Determination of the activity for which the concession is principally intended may be based on an analysis of the requirements which the specific concession must meet, carried out by the **contracting entity** for the purposes of estimating the concession value and drawing up the concession **award** documents. In certain cases, it might be objectively impossible to determine for which activity the concession is principally intended. The rules applicable to such cases should be indicated.

Amendment

(12) Concessions may be awarded by **a grantor** for the purpose of meeting the requirements of several activities, possibly subject to different legal regimes. It should be clarified that the legal regime applicable to a single concession intended to cover several activities should be subject to the rules applicable to the activity for which it is principally intended. Determination of the activity for which the concession is principally intended may be based on an analysis of the requirements which the specific concession must meet, carried out by the **grantor** for the purposes of estimating the concession value and drawing up the concession documents. In certain cases, it might be objectively impossible to determine for which activity the concession is principally intended. The rules applicable to such cases should be indicated.

Amendment 18

Proposal for a directive

Recital 13

Text proposed by the Commission

(13) It is appropriate to exclude from the scope of this Directive certain services concessions awarded to an economic operator which **is itself a contracting authority or a contracting entity on the basis of** an exclusive right **which that operator enjoys** under published national law or administrative act and which has been granted in accordance with the Treaty and Union sectoral legislation **concerning the management of networks infrastructure related to the activities set**

Amendment

(13) It is appropriate to exclude from the scope of this Directive certain services concessions **related to an activity set out in Annex III, including those services concessions concerning the management of network infrastructure related to such an activity, when those concessions are** awarded to an economic operator which **enjoys** an exclusive right under published national law, **regulation** or administrative act and which has been granted in accordance with the Treaty and Union

out in annex III, since such exclusive right makes it impossible to follow a competitive procedure for the award. By way of derogation and without prejudice to the legal consequences of the general exclusion from the scope of this Directive, concessions *as defined in article 8(1)* should be subject to the obligation to publish a concession award notice in view of ensuring basic transparency unless the conditions of such transparency are provided for in sectoral legislation.

sectoral legislation , since such exclusive right makes it impossible to follow a competitive procedure for the award. By way of derogation and without prejudice to the legal consequences of the general exclusion from the scope of this Directive, *such* concessions should be subject to the obligation to publish a concession award notice in view of ensuring basic transparency unless the conditions of such transparency are provided for in sectoral legislation. ***In order to reinforce transparency, where a Member State grants an exclusive right to an economic operator for the exercise of one of the activities set out in Annex III, it should inform the Commission thereof.***

Amendment 19

Proposal for a directive Recital 13 a (new)

Text proposed by the Commission

Amendment

(13a) It is appropriate to exclude from the scope of this Directive concessions relating to gambling activities involving a financial risk through investing a sum of money in games of chance (that is to say lotteries or betting), awarded to one or more bodies by one or more Member States on the basis of exclusive rights granted pursuant to applicable national laws, regulations or administrative provisions in accordance with the Treaties. That exclusion is justified by the granting of exclusive rights to one or more bodies at national level, making a competitive procedure inapplicable, as well as by the need to retain the possibility for Member States to regulate the gambling sector at national level in view of their obligations in terms of protecting public and social order.

Justification

New recital clarifying the exclusion of a part of the gambling sector. The granting of exclusive rights makes any competitive procedure inapplicable. Member States must also retain some flexibility in this sensitive sector (protection of public and social order). A state's capacity for action in this regard must not be diminished by rules that are inappropriate to the sector (e.g. cessation of operation of a game of chance).

Amendment 20

Proposal for a directive Recital 13 b (new)

Text proposed by the Commission

Amendment

(13b) Service contracts in the fields of civil defence, civil protection, and hazard prevention should be excluded from the scope of this Directive. Those fields include, in particular, emergency ambulance services, which should be defined as separate from patient transport ambulance services. In order to ensure successful civil protection and emergency response in the interests of the general public, it should be sufficient to apply the principles of primary law.

Amendment 21

Proposal for a directive Recital 13 c (new)

Text proposed by the Commission

Amendment

(13c) This Directive should be without prejudice to the Member States' power to award, define and organise the provision of a public service task in accordance with Protocol No 29 on the system of public broadcasting in the Member States annexed to the Treaties.

Justification

A new recital should be added making an explicit reference to the Amsterdam Protocol as an

instrument of primary EU law. This amendment would be along the same lines as the reference to the Amsterdam Protocol in the Commission's interpretative communication on concessions under Community law.

Amendment 22

Proposal for a directive

Recital 14

Text proposed by the Commission

(14) It is appropriate to exclude certain service and works concessions awarded to **an** undertakings affiliated to contracting entities, having as **its** principal activity the provision of such services or works to the group of which **it is** part, rather than offering them on the market. It is also appropriate to exclude certain service and works concessions awarded by a contracting entity to a joint venture which is formed by a number of contracting entities for the purpose of carrying out activities covered by this Directive and of which that entity is part. However, it is appropriate to ensure that this exclusion does not give rise to distortions of competition to the benefit of the undertakings or joint ventures that are affiliated with the contracting entities; it is appropriate to provide a suitable set of rules, in particular as regards the maximum limits within which the undertakings may obtain a part of their turnover from the market and above which they would lose the possibility of being awarded concessions without calls for competition, the composition of joint ventures and the stability of links between those joint ventures and the contracting entities of which they are composed.

Amendment

(14) It is appropriate to exclude certain service and works concessions awarded to undertakings affiliated to contracting entities, ***with or without private participation, and*** having as ***their*** principal activity the provision of such services or works to the group of which ***they are*** part, rather than offering them on the market. It is also appropriate to exclude certain service and works concessions awarded by a contracting entity to a joint venture which is formed by a number of contracting entities for the purpose of carrying out activities covered by this Directive and of which that entity is part. However, it is appropriate to ensure that this exclusion does not give rise to distortions of competition to the benefit of the undertakings or joint ventures that are affiliated with the contracting entities; it is appropriate to provide a suitable set of rules, in particular as regards the maximum limits within which the undertakings may obtain a part of their turnover from the market and above which they would lose the possibility of being awarded concessions without calls for competition, the composition of joint ventures and the stability of links between those joint ventures and the contracting entities of which they are composed.

Justification

Clarification of Article 11 on affiliated undertakings. In the context of this article, private participation in affiliated undertakings is authorised, as opposed to Article 15 on public-public cooperation, where no participation in the legal person controlled by the contracting

authority or entity is possible.

Amendment 23

Proposal for a directive Recital 14 a (new)

Text proposed by the Commission

Amendment

(14a) There might be in the water sector so-called multi-activities affiliated undertakings which operate in other sectors of activity with different market structures (for instance both liberalised and non-liberalised) and which may encounter structural problems in applying the requirements for exemption provided for in this Directive. Therefore, in order to enable those affiliated undertakings operating concessions for the purpose of pursuing activities in the water sector to effectively make use of this exemption, a transitional period may apply until 2020. During that period, existing concessions may be extended without this Directive being applied if certain conditions are fulfilled. Indeed, under Article 11, for an affiliated undertaking to be exempted, 80 % of its average total turnover has to derive from its activities with members of the economic group they belong to, directly to them or to citizens on behalf of them. However, for multi-activities affiliated undertakings operating in the water sector, this turnover requirement may be difficult to meet because the turnover of those undertakings encompasses activities both in the liberalised and non-liberalised sectors. The transitional period is intended to give the affiliated undertakings concerned a reasonable period of time to adapt their internal organisation, possibly by separating their accounting on their activities in the water sector from their other activities. In order to limit any potential distortion of competition, the contracts concerned should however end

by July 2020. After the end of the transitional period, this adaptation of their internal organisation should enable them to meet the conditions for exemptions for affiliated undertakings provided for in this Directive.

Amendment 24

Proposal for a directive Recital 15

Text proposed by the Commission

(15) ***This Directive should not apply to*** concessions awarded by contracting entities and intended to permit the performance of an activity referred to in Annex III ***if, in the*** Member State in which ***this*** activity is ***carried out, it is*** directly exposed to competition on markets to which access is not limited, ***as established following a procedure provided for to this purpose*** in accordance with Art. 27 and 28 of Directive [current 2004/17/EC]. This procedure should provide legal certainty for the entities concerned, as well as an appropriate decision-making process, ensuring, within short time limits, uniform application of Union law in this area.

Amendment

(15) Concessions awarded by contracting entities and intended to permit the performance of an activity referred to in Annex III ***in a*** Member State in which ***the*** activity is directly exposed to competition on markets to which access is not limited, ***should not be considered concessions within the meaning of this Directive, and should not therefore be subject to it. Direct exposure to competition should be analysed*** in accordance with Articles 27 and 28 of Directive 2004/17/EC. This procedure should provide legal certainty for the entities concerned, as well as an appropriate decision-making process, ensuring, within short time limits, uniform application of Union law in this area.

Justification

To ensure consistency with the amended version of Article 14.

Amendment 25

Proposal for a directive Recital 16

Text proposed by the Commission

(16) This Directive does not apply to the concession award carried out by international organisations on their own behalf and for their own account. There is,

Amendment

(16) This Directive does not apply to the concession award carried out by international organisations on their own behalf and for their own account. There is,

however, a need to *clarify* to which extent it is appropriate to apply this Directive to concession *award* governed by specific international rules.

however, a need to *investigate* to which extent it is appropriate to apply this Directive to concession *awards* governed by specific international rules *to allow greater legal certainty for economic operators. Given that the internal market and international markets are increasingly closely interlinked, public procurement policy should be used as a means of promoting Union principles such as transparency, an uncompromising stance on corruption, the reciprocity rule and progress on social and human rights.*

Amendment 26

Proposal for a directive

Recital 17

Text proposed by the Commission

(17) There is considerable legal uncertainty as to how far cooperation between public authorities should be covered by concession award 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 or certain contracting entities*. It is therefore necessary to clarify in what cases concessions concluded between *such* authorities *are* not subject to the *application of public concession award* rules. Such clarification should be guided by the principles set out in the relevant case-law of the Court of Justice. The sole fact that both parties to an agreement are themselves contracting authorities or contracting entities under Art. 4 (1) (1) does not as such rule out the application of concession award rules. *However*, the application of concession award rules *should* not interfere with the *freedom* of public authorities to decide how to organise the way they carry out their public service tasks. Concessions *awarded* to controlled entities *or cooperation for the*

Amendment

(17) There is considerable legal uncertainty as to how far cooperation between public authorities should be covered by concession award rules. The relevant case-law of the Court of Justice of the European Union is interpreted differently between Member States. It is therefore necessary to clarify, *in line with that case-law, under what conditions the award of* concessions concluded between *public* authorities *is* not subject to the rules *laid down in this Directive*. Such clarification should be guided by the principles set out in the relevant case-law of the Court of Justice. The sole fact that both parties to an agreement are themselves contracting authorities or contracting entities under Art. 4 (1) (a) does not as such rule out the application of concession award rules. The application of concession award rules *must* not interfere with the *right* of public authorities to decide *freely* how to organise the way they carry out their public service tasks. *The award of* concessions to controlled entities should therefore be exempted from the application of *this Directive* if the conditions are fulfilled. The

joint execution of the public service tasks of the participating contracting authorities or entities should therefore be exempted from the application of the rules if the conditions set out in this Directive are fulfilled. *This Directive should aim to ensure that any exempted public-public cooperation does not cause a distortion of competition in relation to private economic operators. Neither should* the participation of a contracting authority as a tenderer in a procedure for the award of a *public contract* cause any distortion of competition.

participation of a contracting authority as a tenderer in a procedure for the award of a *concession should not* cause any distortion of competition. *To achieve this, the conditions for the exclusion of contracts from the scope of this Directive should be subject to strict interpretation. If any of the cumulative conditions for exclusion from the scope is no longer fulfilled during the term of a contract or cooperation that has been excluded from the scope of this Directive, that ongoing contract or cooperation must be opened to competition through regular concession award procedures.*

Justification

Clarification of the recital. The question of cooperation between public authorities with a view to jointly carrying out a public service mission is covered in a new and separate recital.

Amendment 27

Proposal for a directive Recital 17 a (new)

Text proposed by the Commission

Amendment

(17a) One condition for determining whether a concession awarded by a contracting authority or a contracting entity as referred to in point 1 of Article 4(1) to another legal person should fall outside the scope of this Directive, is that such an authority or entity exercises over the legal person concerned control which is similar to that which it exercises over its own departments. This means that it exercises a decisive influence over both strategic objectives and significant decisions of the controlled legal person. With a view to determining whether such control is being exercised, account may also be taken of factors such as the level of representation on administrative, management or supervisory bodies, the relevant provisions of the articles of association or the ownership

arrangements; it should not be required under this Directive that the controlled legal person be wholly owned by the contracting authority or entity. The above conditions should apply mutatis mutandis if a contracting authority awards a public contract to a legal person it controls jointly with other contracting authorities.

Amendment 28

Proposal for a directive Recital 17 b (new)

Text proposed by the Commission

Amendment

(17b) Cooperation between local public authorities, or between local public authorities and groups composed exclusively of local public authorities, with a view to jointly ensuring the organisation of the same public service mission for a public interest purpose as part of the internal institutional and administrative organisation of Member States, should be exempted from the scope of application of this Directive. Union law does not require public authorities to use a particular legal form in order to jointly undertake a public service task. Similarly, transfers of powers relating to public service missions involving a global transfer of responsibility between local public authorities, or between local public authorities and groups composed exclusively of local public authorities, as part of the internal institutional and administrative organisation of Member States and pursuant to applicable national law or regulation, should be exempted from the scope of application of this Directive.

Amendment 29

Proposal for a directive Recital 17 c (new)

Text proposed by the Commission

Amendment

(17c) The duration of the concession should be limited in order to avoid market foreclosure and the prevention of competition.

Amendment 30

Proposal for a directive

Recital 18

Text proposed by the Commission

Amendment

(18) In order to ensure adequate advertisement of works and services concessions above a certain ***value awarded by contracting entities and by the contracting authorities***, the award of such contracts should be preceded by the compulsory publication of a concession notice in the Official Journal of the European Union. ***The thresholds should reflect the clear cross-border interest of concessions to economic operators located in other Member States. To calculate the value of a services concession, account must be taken of the estimated value of all services to be provided by the concessionaire from the point of view of a potential tenderer.***

(18) In order to ensure adequate advertisement of works and services concessions ***equal to or*** above a certain ***threshold***, the award of such contracts should be preceded by the compulsory publication of a concession notice in the Official Journal of the European Union.

Justification

The notion of a threshold and the calculation method are dealt with and clarified in recital 10, in accordance with the amended versions of Articles 5 and 6.

Amendment 31

Proposal for a directive

Recital 19

Text proposed by the Commission

Amendment

(19) In view of the detrimental effects on competition, awarding concessions without

(19) In view of the detrimental effects on competition, awarding concessions without

prior publication should only be permitted in very exceptional circumstances. ***This exception should*** be limited to cases where it is clear from the outset that a publication would not trigger more competition, notably because there is objectively only one economic operator who can perform the concession. ***Only situations of objective exclusivity can justify the award of a concession without publication to an economic operator***, where the *situation of exclusivity has not been created by the contracting authority or contracting entity itself in view of the future award procedure, and where there are no adequate substitutes, the availability of which should be assessed thoroughly.*

prior publication should only be permitted in very exceptional circumstances ***and*** be limited to cases where it is clear from the outset that a publication would not trigger more competition, notably because there is objectively only one economic operator who can perform the concession, ***or*** where the ***subject of the concession concerns social services or other specific services with a minimal cross-border impact.***

Justification

Clarification of cases where a concession notice is not necessary. This recital is updated particularly with regard to the deletion of the prior information notice for social services and other specific services initially provided for in Article 26(3).

Amendment 32

Proposal for a directive

Recital 20

Text proposed by the Commission

(20) A review of so-called *prioritary* and *non-prioritary* services ('A' and 'B' services) by the Commission has shown that it is not justified to restrict the full application of procurement law to a limited group of services. As a result, this Directive should apply to a number of services (***such as catering and water distribution services***), which ***both*** showed a potential for cross-border trade.

Amendment

(20) ***In the context of the reform of public contract rules***, a review of so-called *priority* and *non-priority* services ('A' and 'B' services) by the Commission has shown that it is not justified to restrict the full application of procurement law to a limited group of services. As a result, this Directive should apply to a number of services, which showed a potential for cross-border trade.

Amendment 33

Proposal for a directive Recital 21

Text proposed by the Commission

(21) In the light of the results of the evaluation conducted by the Commission on the reform of public procurement rules it is appropriate to exclude from the full application of this Directive only those services which have a limited cross-border dimension, namely the so-called services to the person such as certain social, health and educational services. These services are provided within a particular context that varies widely amongst Member States, due to different cultural traditions. A *specific* regime should therefore be established for concession for these services which takes into account the fact that they are newly regulated. An obligation to publish a *prior information notice and a concession award notice of any concession with a value equal to or greater than thresholds* established in this Directive is an adequate way to *provide information on business opportunities to potential tenderers as well as on the number and type of contracts awarded to all interested parties. Furthermore, Member States should put in place appropriate measures with reference to the award of concession contracts for these services aimed at ensuring compliance with the principles of transparency and equal treatment of economic operators* while allowing *contracting authorities and contracting entities* to take into account the specificities of the services in question. Member States should ensure that *contracting authorities and contracting entities* may take into account the need to ensure quality, *continuity, accessibility, availability and comprehensiveness of the services, the specific needs of different categories of users, the involvement and*

Amendment

(21) In the light of the results of the evaluation conducted by the Commission on the reform of public procurement rules it is appropriate to exclude from the full application of this Directive only those services which have a limited cross-border dimension, namely the so-called services to the person such as certain social, health and educational services. These services are provided within a particular context that varies widely amongst Member States, due to different cultural traditions. A *lighter* regime should therefore be established for concession for these services which takes into account the fact that they are newly regulated. An obligation to publish a concession award notice *for any concession with a value equal to or greater than the threshold* established in this Directive is an adequate way to *ensure* compliance with the *principle* of transparency while allowing *the grantor* to take into account the specificities of the services in question. Member States should ensure that *the grantor* may take into account the need to ensure *innovation and, in accordance with Article 14 TFEU and Protocol No 26 annexed to the Treaties, a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of users' rights.*

empowerment of users and innovation.

Justification

The proposal for a directive does not prevent the public authorities from laying down an appropriate level of quality, or public service public obligations, in the context of a concession contract. The Directive regulates the award of the contracts, but not the objectives pursued by the public authorities in awarding them.

Amendment 34

Proposal for a directive
Recital 21 a (new)

Text proposed by the Commission

Amendment

(21a) This Directive should be without prejudice to the freedom of national, regional and local authorities to define, in conformity with Union law, services of general economic interest, their scope and the characteristics of the service to be provided, including any conditions regarding the quality of the service, in order to pursue its public policy objectives. It should also be without prejudice to the power of national, regional and local authorities to provide, commission and finance services of general economic interest in accordance with Article 14 TFEU and Protocol No 26 annexed to the Treaties. In addition, this Directive does not deal with the funding of services of general economic interest or with systems of aids granted by Member States, in particular in the social field, in accordance with Union rules on competition.

Justification

Reminder of the freedom of national, regional and local authorities to define services of general economic interest and to provide, commission and finance services of general economic interest in accordance with the Treaties.

Amendment 35

Proposal for a directive

Recital 22

Text proposed by the Commission

(22) Given the importance of the cultural context and the sensitivity of these services, Member States should ***be given*** wide discretion to organise the choice of the service providers in the way they consider most appropriate. The rules of this Directive do not prevent Member States to apply specific quality criteria for the choice of service providers, such as the criteria set out in the voluntary European Quality Framework for Social Services of the European Union's Social Protection Committee . Member States and/or public authorities remain free to provide these services themselves or to organise ***social services*** in a way that does not entail the conclusion of concessions, for example through the mere financing of such services or by granting licences or authorisations to all economic operators meeting the conditions established beforehand by the contracting authority or contracting entity, without any limits or quotas, provided such system ensures sufficient advertising and complies with the principles of transparency and non-discrimination.

Amendment

(22) Given the importance of the cultural context and the sensitivity of these services, Member States should ***have*** wide discretion to organise the choice of the service providers in the way they consider most appropriate. The rules of this Directive do not prevent Member States to apply specific quality criteria for the choice of service providers, such as the criteria set out in the voluntary European Quality Framework for Social Services of the European Union's Social Protection Committee. Member States and/or public authorities remain free to provide these services themselves or to organise ***them*** in a way that does not entail the conclusion of concessions, for example through the mere financing of such services or by granting licences or authorisations to all economic operators meeting the conditions established beforehand by the contracting authority or contracting entity, without any limits or quotas, provided such system ensures sufficient advertising and complies with the principles of transparency and non-discrimination.

Amendment 36

Proposal for a directive

Recital 22 a (new)

Text proposed by the Commission

Amendment

(22a) In order to ensure confidentiality during the procedure, grantors should not disclose information that the economic operators have forwarded to them and designated as confidential. Non-compliance with that obligation should

render the grantor liable if harm can be clearly demonstrated by the economic operator. Similarly, economic operators should not disclose information that has been designated as confidential. Non-compliance with that obligation should make the economic operators liable.

Amendment 37

Proposal for a directive Recital 22 b (new)

Text proposed by the Commission

Amendment

(22b) The procedure for awarding concession contracts should comprise several stages, including the publication of a concession notice allowing the grantor wishing to award a concession to make known its intention; the presentation by interested economic operators of their application in response to that notice; verification of the conditions of participation for candidates; the submission of a tender by the candidates; the grantor's right to negotiate with the tenderer on the basis of objective award criteria; the decision on the award by the grantor of the concession contract to the concessionaire and the publication of an award notice. Intermediate stages should be possible, including the selection of certain candidates authorised to submit a tender and the sending of an invitation to tender to the candidates thus selected. The grantor should also be able to approach economic operators who have not responded to the concession notice. In addition, and subject to compliance with the principles of transparency and non-discrimination, it should be possible to reverse the order of certain stages, including, for example, analysing submitted tenders before verifying compliance with the selection criteria. Subject to compliance with this Directive,

the grantor should be allowed considerable flexibility to define the procedure leading to the choice of concessionaire, the only two mandatory stages being the publication of a concession notice at the beginning of the procedure, except where this is not required under this Directive, and the publication of an award notice at the end of the procedure. This freedom should be balanced against a requirement of transparency and equal treatment of candidates and tenderers.

Justification

Clarification of the award procedure to improve understanding of the articles on the conduct of the procedure, transparency and the procedural guarantees. Insistence on the grantor's right to opt to add intermediate stages or to reverse the order of stages, in compliance with the provisions of this Directive and subject to mandatory publication of a concession notice at the start of the procedure and an award notice at the end of the procedure.

Amendment 38

Proposal for a directive Recital 22 c (new)

Text proposed by the Commission

Amendment

(22c) In order to combat fraud, favouritism and corruption and prevent conflicts of interest, Member States should adopt rules to ensure the transparency of the award procedure and the equal treatment of all candidates and tenderers. The measures adopted should establish and apply a comprehensive, actionable indicator and monitoring systems to prevent, detect and eliminate reported instances of concessions fraud, corruption, conflict of interest and other serious irregularities.

Amendment 39

Proposal for a directive

Recital 23

Text proposed by the Commission

(23) In order to make it possible for all interested operators to submit applications **and** tenders, **contracting authorities and contracting entities** should be obliged to respect a minimum time limit for the receipt of such applications.

Amendment

(23) In order to make it possible for all interested operators to submit applications **or** tenders, **the grantor** should be obliged to respect a minimum time limit for the receipt of such applications **or tenders**.

Amendment 40

Proposal for a directive

Recital 24

Text proposed by the Commission

(24) The choice and application of proportional, non-discriminatory and fair selection criteria to economic operators is crucial for their effective access to the economic opportunities related to concessions. In particular, the possibility for a candidate to rely on the capacities of other entities can be decisive to enable the participation of small and medium sized enterprises. Therefore, it is appropriate to provide that the selection criteria should relate **exclusively** to the technical, financial **and economic capacity of operators**, should be announced in the concession notice and cannot preclude **an economic operator** from relying on the capacities of other entities, regardless of the legal nature of its links with those entities, if the latter proves to the **contracting authority or entity** that it will have at its disposal the necessary resources.

Amendment

(24) The choice and application of proportional, non-discriminatory and fair selection criteria to economic operators is crucial for their effective access to the economic opportunities related to concessions. In particular, the possibility for a candidate to rely on the capacities of other entities can be decisive to enable the participation of small and medium sized enterprises. Therefore, it is appropriate to provide that the selection criteria should **be clearly defined, should** relate to the **professional, technical and financial capacities of candidates and be linked to the subject-matter of the contract**, should be announced in the concession notice and cannot preclude **a candidate** from relying on the capacities of other entities, regardless of the legal nature of its links with those entities, if the latter proves to the **grantor** that it will have at its disposal the necessary resources.

Justification

To ensure consistency with the amended version of Article 36.

Amendment 41

Proposal for a directive Recital 25

Text proposed by the Commission

(25) In order to ensure transparency and equal treatment, criteria for the award of concessions should always comply with some general standards. These should be disclosed in advance to all **potential** tenderers, be **related** to the subject matter of the contract **and should not offer to the contracting authority or contracting entity an unrestricted freedom of choice**. They should ensure the possibility of effective competition and be accompanied by requirements that allow the information provided by the tenderers to be effectively verified. **In order to comply with these standards while improving legal certainty, Member States may provide for the use of the criterion of the most economically advantageous tender.**

Amendment

(25) In order to ensure transparency and equal treatment, criteria for the award of concessions should always comply with some general standards. These should be disclosed in advance to all **candidates or** tenderers **and be linked** to the subject matter of the contract. They should ensure the possibility of effective competition and be accompanied by **minimum** requirements that allow the information provided by the **candidates or** tenderers to be effectively verified **by the grantor**.

Justification

To ensure consistency with new article on award criteria.

Amendment 42

Proposal for a directive Recital 25 a (new)

Text proposed by the Commission

Amendment

(25a) In order to better integrate social considerations in the award of concessions, the grantor should also be able to include characteristics relating to working conditions among the award criteria. Those characteristics should aim to protect the health of the staff involved in the production process or to promote the social integration of disadvantaged persons or members of vulnerable groups among the persons responsible for

performing the contract, including accessibility for persons with disabilities. The grantor should also be allowed to use as award criteria the organisation, qualifications and experience of the staff assigned to the performance of the concession contract, as they may affect the quality of provision and, as a result, the economic value of the tender. In order to ensure that women and men have equal access to the labour market, the grantor should also be able to include characteristics relating to promoting gender equality among the award criteria.

Justification

Reorganisation of recitals (logical link between recital 29 and recital 25 on the award criteria). Strengthening of social considerations. Removal of references to the most economically advantageous tender criterion, technical specifications and product life cycle, which are not relevant to concessions ('public contract' vocabulary). Nevertheless, the grantor may, should it so wish and in compliance with EU law, apply award criteria relating to social considerations (see new Articles 38a and 38b).

Amendment 43

Proposal for a directive Recital 25 b (new)

Text proposed by the Commission

Amendment

(25b) Technical and functional requirements should define the characteristics required of works and/or services covered by the concession, including requirements concerning accessibility for people with disabilities or environmental performance levels. Those technical and functional requirements should be included in the concession documents and should comply with the principles of equal treatment and transparency. They should not be designed to artificially limit competition.

Justification

Clarification of technical and/or functional requirements which define the characteristics required of the works and/or services forming the subject matter of the concession. This notion seems more appropriate for concessions than the technical specifications originally proposed in the proposal for a directive (lower level of detail, compliance with the ‘spirit’ of the concession based on the transfer of the economic risk to the concessionaire, who must be able to retain a certain margin of flexibility, if the grantor so wishes).

Amendment 44

Proposal for a directive

Recital 26

Text proposed by the Commission

Amendment

(26) Where contracting authorities and contracting entities choose to award a concession to the most economically advantageous tender, they should determine the economic and quality criteria on the basis of which they assess the tenders in order to identify which one offers the best value for money. The determination of these criteria depends on the object of the concession since they should allow the level of performance offered by each tender to be assessed in the light of the subject-matter of the concession, as defined in the technical specifications and the value for money of each tender to be measured.

deleted

Justification

Removal of reference to the most economically advantageous tender criterion as it is not relevant to concession contracts (‘public contract’ vocabulary).

Amendment 45

Proposal for a directive

Recital 27

Text proposed by the Commission

Amendment

(27) Concessions are usually **long term**, complex arrangements where the **contractor** assumes responsibilities and

(27) Concessions are usually **long-term**, complex arrangements where the **concessionaire** assumes **the**

risks traditionally *born* by the *contracting authorities* and normally falling within *their* remit *and contracting entities*. For this reason, *contracting authorities or entities* should maintain a margin of flexibility in organising the awarding process, *involving also a possibility to negotiate* the content of the contract with the candidates. *However, in order to ensure* equal treatment and transparency throughout the *awarding* procedure, *it is appropriate to provide for certain requirements as to the structure of the awarding process, including negotiations, the dissemination of information and the availability of written records. It is also necessary to provide that the initial terms of the concession notice should not be deviated from, in order to prevent unfair treatment of any potential candidates.*

responsibilities and risks traditionally *borne* by the *grantor* and normally falling within *its* remit. For this reason, *the grantor* should maintain a *real* margin of flexibility in organising the awarding process *and negotiating* the content of the contract with the candidates *and tenderers, while ensuring respect for the principles of* equal treatment and transparency throughout the procedure.

Justification

To ensure consistency with the new Articles on award criteria and procedural aspects. The negotiation must be the central element of the procedure for awarding concession contracts. The grantor (contracting authority or entity) must have sufficient flexibility to make the most appropriate choice.

Amendment 46

Proposal for a directive

Recital 28

Text proposed by the Commission

Amendment

(28) The technical specifications drawn up by contracting authorities and contracting entities need to allow concession award to be opened up to competition. To that end, it must be possible to submit tenders that reflect the diversity of technical solutions so as to obtain a sufficient level of competition. Consequently, technical specifications should be drafted in such a way to avoid artificially narrowing down competition through requirements that favour a specific economic operator by mirroring

deleted

key characteristics of the supplies, services or works habitually offered by that economic operator. Drawing up the technical specifications in terms of functional and performance requirements generally allows this objective to be achieved in the best way possible and favours innovation. Where reference is made to a European standard or, in the absence thereof, to a national standard, tenders based on equivalent arrangements should be considered by contracting authorities or contracting entities. To demonstrate equivalence, tenderers can be required to provide third-party verified evidence; however, other appropriate means of proof such as a technical dossier of the manufacturer should also be allowed where the economic operator concerned has no access to such certificates or test reports, or no possibility of obtaining them within the relevant time limits.

Justification

Removal of the reference to technical specifications because it is not relevant to concession contracts ('public contract' vocabulary). However, functional requirements may be laid down.

Amendment 47

**Proposal for a directive
Recital 29**

Text proposed by the Commission

Amendment

(29) In technical specifications and in award criteria, contracting authorities and contracting entities should be allowed to refer to a specific production process, a specific mode of provision of services, or a specific process for any other stage of the life cycle of a product or service, provided that they are linked to the subject-matter of the concession. In order to better integrate social considerations in the award of concessions, procurers may also

deleted

be allowed to include, in the award criteria, characteristics related to the working conditions. However, where the contracting authorities or contracting entities use the most economically advantageous tender, such criteria may only relate to the working conditions of the persons directly participating in the process of production or provision in question. Those characteristics may only concern the protection of health of the staff involved in the production process or the favouring of social integration of disadvantaged persons or members of vulnerable groups amongst the persons assigned to performing the contract, including accessibility for persons with disabilities. In this case, any award criteria which include those characteristics should in any event remain limited to characteristics that have immediate consequences on staff members in their working environment. They should be applied in accordance with Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services and in a way that does not discriminate directly or indirectly against economic operators from other Member States or from third countries parties to the Agreement or to Free Trade Agreements to which the Union is party. Contracting authorities and contracting entities should, also where they use the criterion of the most economically advantageous tender, be allowed to use as an award criterion the organisation, qualification and experience of the staff assigned to performing the concession in question, as this may affect the quality of concession performance and, as a result, the economic value of the tender.

Justification

Removal of references to the most economically advantageous tender criterion, technical specifications and product life cycle, which are not relevant to concessions ('public contract')

vocabulary). It is nevertheless important to indicate that the grantor may, should it so wish and in compliance with EU law, apply award criteria relating to social considerations.

Amendment 48

Proposal for a directive

Recital 30

Text proposed by the Commission

(30) Electronic means of information and communication can greatly simplify the publication of contracts and increase the efficiency and transparency of concession award processes. They should become the standard means of communication and information exchange in concession award procedures. ***The use of electronic means also leads to time savings. As a result, provision should be made for reducing the minimum periods where electronic means are used, subject, however, to the condition that they are compatible with the specific mode of transmission envisaged at Union level. Moreover, electronic means of information and communication including adequate functionalities can enable contracting authorities and contracting entities to prevent, detect and correct errors that occur during procurement procedures.***

Amendment

(30) Electronic means of information and communication can greatly simplify the publication of contracts and increase the efficiency, ***speed*** and transparency of concession award processes. They should become the standard means of communication and information exchange in concession award procedures. ***It should also be made obligatory to send a concession notice and an award notice and to make the concession documents available electronically.***

Justification

To ensure consistency with the amended version of Article 25. As concessions are contracts which are inherently complex and based on negotiation, few procedures can be effectively carried out electronically, except for the sending of the concession and award notices (amended Article 28) and the provision of concession documents (amended Article 30).

Amendment 49

Proposal for a directive

Recital 31

Text proposed by the Commission

(31) Contracting authorities and

Amendment

deleted

contracting entities from different Member States may be interested in cooperating and in awarding jointly public concessions in order to take the best benefit of internal market potential in terms of economies of scale and risk-benefit sharing, notably for innovative projects involving a greater amount of risk than reasonably supportable by a single contracting authority or contracting entity. Therefore new rules on cross-border joint concession award designating the applicable law should be established in order to facilitate setting up cross-border joint public concession award. In addition, contracting authorities and contracting entities from different Member States may set up joint legal bodies established under national or Union law. Specific rules should be established for such form of joint concession award.

Justification

To ensure consistency with the deletion of article 31.

Amendment 50

Proposal for a directive
Recital 33

Text proposed by the Commission

(33) Concessions should not be awarded to economic operators that have participated in a criminal organisation or have been found guilty of corruption, fraud to the detriment of the Union's financial interests or money laundering. Non-payment of taxes or social security contributions should also be sanctioned by mandatory exclusion at *the level of the Union*. Furthermore, ***contracting authorities and contracting entities*** should be given the possibility to exclude candidates or tenderers for serious violations of Union or national law aimed at the protection of

Amendment

(33) Concessions should not be awarded to economic operators that have participated in a criminal organisation or have been found guilty of corruption, fraud to the detriment of the Union's financial interests or money laundering. Non-payment of taxes or social security contributions should also be sanctioned by mandatory exclusion at *Union level*. Furthermore, ***grantors*** should be given the possibility to exclude candidates or tenderers for serious violations of Union or national law aimed at the protection of public interests compatible with the *Treaties provided that*

public interests compatible with the Treaty **or** where the economic operator has shown significant or persistent deficiencies in the performance of a prior concession or concessions of a similar nature with the same ***contracting authority or contracting entity***.

it has been established by a competent body that the violation has taken place, where the economic operator has shown significant or persistent deficiencies in the performance of a prior concession or concessions of a similar nature with the same ***grantor, for serious or repeated violations of social, environmental or labour law***.

Justification

To ensure consistency with the amended version of Article 36.

Amendment 51

Proposal for a directive Recital 34

Text proposed by the Commission

(34) It is necessary to clarify the conditions under which modifications of a concession during its execution require a new award procedure, taking into account the relevant case-law of the Court of Justice of the European Union. A new award procedure is required in case of material changes to the initial concession, demonstrating the intention of the parties to renegotiate essential terms or conditions of that concession. This is notably the case if the amended conditions would have had an influence on the outcome of the procedure, had they been part of the initial procedure. An exceptional and temporary extension of the term of the concession strictly aimed at ensuring the continuity of the provision of the service pending the award of a new concession should not normally qualify as a material change to the initial concession.

Amendment

(34) It is necessary to clarify the conditions under which modifications of a concession during its execution require a new award procedure, taking into account the relevant case-law of the Court of Justice of the European Union. ***Any concession in force may be modified by means of a supplementary agreement, subject to this Directive.*** A new award procedure is required, ***however, in the*** case of material changes to the initial concession, demonstrating the intention of the parties to renegotiate essential terms or conditions of that concession. This is notably the case if the amended conditions would have had an influence on the outcome of the procedure, had they been part of the initial procedure. An exceptional and temporary extension of the term of the concession strictly aimed at ensuring the continuity of the provision of the service pending the award of a new concession should not normally qualify as a material change to the initial concession. ***Nevertheless, where a contract has reached its term the grantor and the concessionaire should refrain from such extensions for purposes***

of investments not essential to the performance of the concession and which would be implemented solely with a view to extending the duration thereof.

Justification

To ensure consistency with the amended version of Article 42.

Amendment 52

**Proposal for a directive
Recital 34 a (new)**

Text proposed by the Commission

Amendment

(34a) As concessions are often long-term contracts, in order to determine their value the relevant quantitative data need to be updated whenever the value of a concession is assessed. In this way the legal approach can be made consistent with the economic and financial reality of the concession contract.

Justification

Consistency with amendments to articles.

Amendment 53

**Proposal for a directive
Recital 35**

Text proposed by the Commission

Amendment

*(35) Contracting authorities and contracting entities can be faced with external circumstances that they could not foresee when they awarded the concession. In this case, a certain degree of flexibility is needed to adapt the concession to these circumstances without a new award procedure. The notion of circumstances that a diligent **contracting authority or contracting entity** could not foresee refers to those circumstances which could not be predicted despite reasonably diligent*

*(35) **Grantors** can be faced with external circumstances that they could not foresee when they awarded the concession. In this case, a certain degree of flexibility is needed to adapt the concession to these circumstances without a new award procedure. The notion of circumstances that a diligent **grantor** could not foresee refers to those circumstances which could not be predicted despite reasonably diligent preparation of the initial award by the **grantor**, taking into account its available*

preparation of the initial award by the **contracting authority or contracting entity**, taking into account its available means, the nature and characteristics of the specific project, good practice in the field in question and the need to ensure an appropriate relationship between the resources spent in preparing the award and its foreseeable value. However, this cannot apply in cases where a modification results in an alteration of the nature of the overall **procurement**, for instance by replacing the works, **supplies** or services **to be procured** by something different or by **fundamentally changing the type of procurement since, in such a situation, a hypothetical** influence on the outcome may be assumed.

means, the nature and characteristics of the specific project, good practice in the field in question and the need to ensure an appropriate relationship between the resources spent in preparing the award and its foreseeable value. However, this cannot apply in cases where a modification results in an alteration of the nature of the overall **concession**, for instance by replacing the works or services **for which the contract is to be awarded** by something different or by **introducing conditions such that an** influence on the outcome may be assumed.

Amendment 54

Proposal for a directive Recital 36

Text proposed by the Commission

(36) In line with the principles of equal treatment and transparency, the successful tenderer should not be replaced by another economic operator without reopening the concession to competition. However, the successful tenderer performing the concession may undergo certain structural changes during the performance of the concession, such as purely internal reorganisations, mergers and acquisitions or insolvency or be substituted on the basis of a contractual clause known to all tenderers and in line with the principles of equal treatment and transparency. Such structural changes should not automatically require new award procedures for all concessions performed by that undertaking.

Amendment

(36) In line with the principles of equal treatment and transparency, the successful tenderer should not be replaced by another economic operator without reopening the concession to competition. However, the successful tenderer performing the concession may undergo certain structural changes during the performance of the concession, such as purely internal reorganisations, mergers and acquisitions, **transfer of property or assets between companies** or insolvency or be substituted on the basis of a contractual clause known to all tenderers and in line with the principles of equal treatment and transparency. Such structural changes should not automatically require new award procedures for all concessions performed by that undertaking.

Justification

To ensure consistency with the amended version of Article 42.

Amendment 55

Proposal for a directive

Recital 37

Text proposed by the Commission

(37) ***Contracting authorities or contracting entities*** should have the possibility to provide for modifications to a concession in the concession contract itself, by way of review clauses which should not give them unlimited discretion. This Directive should therefore set out to what extent modifications may be provided for in the initial concession.

Amendment

(37) ***Grantors*** should have the possibility to provide for modifications to a concession in the concession contract itself, by way of review clauses which should not give them unlimited discretion. This Directive should therefore set out to what extent modifications may be provided for in the initial concession.

Amendment 56

Proposal for a directive

Recital 38

Text proposed by the Commission

(38) In order to adapt to rapid technical and economic developments, the power to adopt acts in accordance with Article 290 ***of the Treaty*** should be delegated to the Commission ***in respect of a number of non-essential elements of this Directive. In fact, the technical details and characteristics of the devices for electronic receipt should be kept up to date with technological developments and administrative needs; it is also necessary to empower the Commission to make mandatory technical standards for electronic communication to ensure the interoperability of technical formats, processes and messaging in concession award procedures conducted using electronic means of communication taking into account technological***

Amendment

(38) In order to adapt to rapid technical and economic developments, the power to adopt acts in accordance with Article 290 ***TFEU*** should be delegated to the Commission ***in order to update CPV reference numbers, including those in Annexes I and X, if this is necessitated by the changes in the CPV nomenclature. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level. The Commission should, when preparing and drawing up delegated acts, ensure the simultaneous, timely and appropriate transmission of all relevant documents to the European Parliament and to the Council.***

developments and administrative needs. Furthermore, the list of legislative acts of the Union establishing common methodologies for the calculation of life-cycle costs should be quickly adapted to incorporate the measures adopted on a sectoral basis. In order to satisfy these needs, the Commission should be empowered to keep the list of legislative acts including LCC methodologies up-to date.

Justification

To ensure consistency with the amendments to Articles 25 and 40.

Amendment 57

**Proposal for a directive
Recital 41**

Text proposed by the Commission

Amendment

(41) The law of the Union on public procurement requires Member States to consistently and systematically monitor the implementation and functioning of those rules in order to ensure the efficient and uniform application of Union law. Hence, where Member States designate a single national authority in charge of monitoring, implementation and control of public procurement, that authority may have the same responsibilities regarding concessions. A single body with overarching tasks should ensure an overview of main difficulties in implementation and suggest appropriate remedies to more structural problems. That body may also provide immediate feedback on the functioning of policy and potential weaknesses in national legislation and practice, thus contributing to the quick identification of solutions and the improvement of concession award procedures.

deleted

Justification

To ensure consistency with the deletion of the reference to the single control authority resulting from the revision of the public procurement directives.

Amendment 58

Proposal for a directive

Recital 42

Text proposed by the Commission

Amendment

(42) It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level. The Commission, when preparing and drawing-up delegated acts, should ensure a simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and Council.

deleted

Justification

Integration of these elements concerning the delegated acts into recital 38.

Amendment 59

Proposal for a directive

Recital 43

Text proposed by the Commission

Amendment

(43) In order to ensure uniform conditions for the implementation of this Directive; the procedure for drawing up and transmission of notices and for sending and publishing data referred to in Annexes IV to VI, the amendment of the thresholds implementing powers should be conferred on the Commission. Those powers should be exercised in accordance with Regulation (EU) 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by the Member States of the Commission's exercise of implementing

(43) In order to ensure uniform conditions for the implementation of this Directive; the procedure for drawing up and transmission of notices and for sending and publishing data referred to in Annexes IV to VI, the amendment of the thresholds implementing powers should be conferred on the Commission. Those powers should be exercised in accordance with Regulation (EU) 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by the Member States of the Commission's exercise of implementing

powers. The advisory procedure should be used for the adoption of implementing acts, which do not have any impact either from the financial point of views or on the nature and scope of obligations stemming from this Directive. On the contrary, these acts characterised by a mere administrative purpose and serve to facilitate the application of the rules set by this Directive.

powers. The advisory procedure should be used for the adoption of **those** implementing acts, which do not have any impact either from the financial point of **view** or on the nature and scope of obligations stemming from this Directive. On the contrary, these acts are characterised by a mere administrative purpose and serve to facilitate the application of the rules set by this Directive.

Justification

The amendment aims to align the recital to the standard formulation on implementing acts. Deletion of the reference to modification of the thresholds, which is not subject to an implementing act.

Amendment 60

Proposal for a directive Section I – title

Text proposed by the Commission

Definitions **and** scope

Amendment

Definitions, scope, **thresholds and ways of calculating the value of a concession**

Amendment 61

Proposal for a directive Article 1 – paragraph 1

Text proposed by the Commission

1. This Directive establishes rules **on the procedures for procurement by contracting authorities and by contracting entities with respect to concessions** whose value is estimated to be not less than the thresholds laid down in Article 5.

2. This Directive applies to the acquisition of works or services, including supplies which are incidental to the subject matter of a concession, from economic operators

Amendment

1. This Directive establishes rules **which are applicable to the procedures for the award of works or services concession contracts** whose value is estimated to be not less than the thresholds laid down in Article 6 **and which are awarded to economic operators by one of the following actors:**

chosen by either of the following:

a) Contracting authorities *whether or not the works or services including the related supplies, are intended for a public purpose;*

b) Contracting entities provided that the works or services *including the related supplies*, are intended for the pursuit of one of the activities referred to in Annex III.

a) Contracting authorities;

b) Contracting entities provided that the works or services are intended for the pursuit of one of the activities referred to in Annex III.

Justification

Clarification of the scope of the Directive and deletion of terms borrowed from public procurement (award procedures, acquisition of works/services, supplies).

Amendment 62

Proposal for a directive Article 1 a (new)

Text proposed by the Commission

Amendment

Article 1a

Principle of free administration by public authorities

This Directive recognises the principle of free administration by public authorities in conformity with the applicable national law. The latter will be free to decide how best to manage the execution of works or the provision of services, in accordance with the legislative arrangements and the methods which they judge to be the most effective to ensure in particular a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights in public services..

Contracting authorities and contracting entities can therefore choose to perform their public interest tasks with their own resources or in cooperation with other contracting authorities or to delegate them to economic operators.

Justification

Reaffirms the principle of free administration by public authorities freely choosing the means of administration for the missions for which they are responsible (implementation of missions or delegation to a third party). The Directive does not pre-empt the choice of any one means of administration in particular but sets out rules if delegation to a third party (concession) is selected.

Amendment 63

Proposal for a directive Article 1 b (new)

Text proposed by the Commission

Amendment

Article 1b

Principles of transparency by public authorities

The details of concession contracts, including regarding the transfer of the substantial part of the economic risk as defined in the third subparagraph of point 2 of Article 2(1), and payments, if any, from the grantor to the economic operator, shall be made public and open to scrutiny, subject to the provisions on confidentiality laid down in Article 24.

Any subsequent modifications to the contract shall also be made public.

Amendment 64

Proposal for a directive Article 1 c (new)

Text proposed by the Commission

Amendment

Article 1c

Freedom to define services of general economic interest

This Directive does not affect the freedom of Member States to define, in conformity with Union law, what they consider to be services of general economic interest, how those services should be organised and financed, in compliance with the State aid rules, and what specific obligations they should be subject to.

Amendment 65

Proposal for a directive Article 2 – paragraph 1 – point 1

Text proposed by the Commission

(1) 'concessions' means **public** works **concessions, works concessions** or services concessions.

Amendment

(1) 'concessions' means works or services concessions, *as defined in points (a) and (b):*

(a) a 'works concession' means a contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrust the execution of works to one or more economic operators the consideration for which consists either solely in the right to exploit the works that are the subject of the contract or in that right together with payment;

(b) a 'services concession' means a contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or entities entrust the management of a service to one or more economic operators, the consideration for which consists either solely of the right to exploit the service that is the subject of the contract or in that right together with payment.

The award of a works concession or services concession shall involve the transfer to the concessionaire of the

substantial part of the economic risk in exploiting these works or services, defined as the risk of exposure to the vagaries of the market and encompassing both demand and supply risk. The concessionaire shall be deemed to assume the substantial part of the operating risk where, under normal conditions of exploitation and according to the provisions of the contract, it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services which are the subject of the concession.

Justification

Removal of the distinction between works concession and public works concession depending on the nature of the grantor (contracting authority or contracting entity), as this adds no value to the text.

Amendment 66

Proposal for a directive

Article 2 – paragraph 1 – point 2

Text proposed by the Commission

Amendment

(2) a 'public works concession' means a contract for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, where the consideration for the works to be carried out consists either solely in the right to exploit the works that are the subject of the contract or in that right together with payment.

deleted

Justification

Clarification of the notion of 'concession' and its special nature as compared with a public contract: transfer of a mission for which the grantor is responsible to a third economic operator; transfer of risk from the grantor to the concessionaire; transfer to the

concessionaire of a right to exploit the works or services concerned by the concession; payment of concessionaire on the basis of exploitation of the works or services. Clarification of the concept of operating risk as an economic risk linked to exposure to the vagaries of the market.

Amendment 67

Proposal for a directive

Article 2 – paragraph 1 – point 2 a (new)

Text proposed by the Commission

Amendment

(2a) ‘economic operator’ means any natural or legal person, or public entity, or a group of such persons or entities, including consortia of undertakings, which offers the execution of works and/or a work, supplies or services on the market.

Justification

Definition moved for a more logical sequence. Originally Article 2 point 10 of the Commission proposal.

Amendment 68

Proposal for a directive

Article 2 – paragraph 1 – point 2 b (new)

Text proposed by the Commission

Amendment

(2b) ‘grantor’ means a contracting authority or a contracting entity which awards a concession to an economic operator.

Justification

Introduction of the idea of ‘grantor’, combining contracting authorities and contracting entities when the two are referred to together. The grantor awards the concession to the concessionaire.

Amendment 69

Proposal for a directive

Article 2 – paragraph 1 – point 2 c

Text proposed by the Commission

Amendment

(2c) ‘candidate’ means an economic operator that has sought an invitation or has been invited to take part in a concession award procedure.

Justification

Definition moved for a more logical sequence. Originally Article 2 point 8 of the Commission proposal.

Amendment 70

Proposal for a directive

Article 2 – paragraph 1 – point 2 d

Text proposed by the Commission

Amendment

(2d) ‘tenderer’ means an economic operator which has submitted a tender.

Justification

Definition moved for a more logical sequence. Originally Article 2 point 11 of the Commission proposal.

Amendment 71

Proposal for a directive

Article 2 – paragraph 1 – point 2 e (new)

Text proposed by the Commission

Amendment

(2e) ‘concessionaire’ means an economic operator which has been awarded a concession.

Justification

Definition moved for a more logical sequence. Originally Article 2 point 9 of the Commission proposal.

Amendment 72

Proposal for a directive

Article 2 – paragraph 1 – point 2 f (new)

Text proposed by the Commission

Amendment

(2f) ‘concession documents’ means all documents provided by the grantor to which the grantor refers when describing or defining features of the concession contract and the concession contract award procedure.

Justification

Removal of the term ‘public contract’; definition simplified and moved for a more logical sequence. Originally Article 2 point 13 of the Commission proposal.

Amendment 73

Proposal for a directive

Article 2 – paragraph 1 – point 4

Text proposed by the Commission

Amendment

(4) ‘works concession’ means a contract for pecuniary interest concluded in writing between one or more economic operators and one or more contracting entities and having as their object the execution of works, where the consideration for the works to be carried out consists either solely in the right to exploit the works that are the subject of the contract or in that right together with payment; *deleted*

Justification

Definition moved and amended, cf new Article 2 point 2.

Amendment 74

Proposal for a directive

Article 2 – paragraph 1 – point 5

Text proposed by the Commission

Amendment

(5) 'execution of works' means the execution, or both the design and execution, of works related to one of the activities referred to in Annex I or of a work, or the realisation, by whatever means, of a work corresponding to the requirements specified by the **contracting authority** exercising a decisive influence on the type or design of the work.

(5) 'execution of works' means the execution, or both the design and execution, of works related to one of the activities referred to in Annex I or of a work, or the realisation, by whatever means, of a work corresponding to the requirements specified by the **grantor** exercising a decisive influence on the type or design of the work.

Amendment 75

Proposal for a directive
Article 2 – paragraph 1 – point 7

Text proposed by the Commission

Amendment

(7) 'services concession' means a contract for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities or contracting entities and having as their object the provision of services other than those referred to in points 2 and 4 where the consideration for the services to be provided consists either solely in the right to exploit the services that are subject of the contract or in that right together with payment.

deleted

Justification

Definition moved and amended, cf new Article 2 point 2.

Amendment 76

Proposal for a directive
Article 2 – paragraph 1 – point 8

Text proposed by the Commission

Amendment

(8) 'candidate' means an economic operator that has sought an invitation or has been invited to take part in a

deleted

concession award procedure;

Justification

Definition moved, cf new Article 2 point 2c.

Amendment 77

Proposal for a directive

Article 2 – paragraph 1 – point 9

Text proposed by the Commission

Amendment

(9) 'concessionaire' means an economic operator which has been awarded a concession. *deleted*

Justification

Definition moved, cf new Article 2 point 2e.

Amendment 78

Proposal for a directive

Article 2 – paragraph 1 – point 10

Text proposed by the Commission

Amendment

(10) "economic operator" means any natural or legal person, or public entity, or a group of such persons and/or entities which offers the execution of works and/or a work, supplies or services on the market. *deleted*

Justification

Definition moved, cf new Article 2 point 2a.

Amendment 79

Proposal for a directive

Article 2 – paragraph 1 – point 11

Text proposed by the Commission

Amendment

(11) 'tenderer' means an economic operator that has submitted a tender

deleted

Justification

Definition moved, cf new Article 2 point 2d.

Amendment 80

Proposal for a directive

Article 2 – paragraph 1 – point 12

Text proposed by the Commission

Amendment

(12) 'electronic means' means **using** electronic equipment for the processing (including digital compression) and storage of data which is transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means.

(12) 'electronic means' means electronic equipment for the processing (including digital compression) and storage of data which is transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means; ***in the case of a works concession, 'electronic means' shall also refer to the use of interoperable three-dimensional representations covering the design, execution and operation of the building or infrastructure;***

Justification

This is an essential tool enabling contracting authorities to improve the decision-making process value for money and efficiency. This measure will save taxpayers money by ensuring that alternative designs are evaluated with comparative ease, and in particular, that energy and other lifecycle savings are properly costed and compared.

Amendment 81

Proposal for a directive

Article 2 – paragraph 1 – point 12 a (new)

Text proposed by the Commission

Amendment

(12a) ‘special or exclusive rights’ means rights granted by a competent authority of a Member State by way of any legislative, regulatory or administrative provision the effect of which is to limit the exercise of an activity to one or more economic operators, and which substantially affects the ability of other economic operators to carry out such activity.

Amendment 82

Proposal for a directive

Article 2 – paragraph 1 – point 13

Text proposed by the Commission

Amendment

(13) ‘concession documents’ means all documents produced or referred to by the contracting authority or contracting entity to describe or determine elements of the procurement or the procedure, including the contract notice, the technical specifications, proposed conditions of contract, formats for the presentation of documents by candidates and tenderers, information on generally applicable obligations and any additional documents.

deleted

Justification

Definition moved and amended, cf new Article 2 point 2f.

Amendment 83

Proposal for a directive

Article 2 – paragraph 1 – point 14

Text proposed by the Commission

Amendment

(14) ‘life cycle’ means all consecutive and/or interlinked stages, including production, transport, use and maintenance, throughout the existence of a product or a works or the provision of a service, from raw material acquisition or generation of resources to disposal, clearance and finalisation.

deleted

Justification

Deletion of the reference to the calculation of life-cycle costs, in keeping with the deletion of the most economically advantageous tender criterion. The grantor is free to use any award criteria that he considers to be appropriate, on condition that they comply with the rules laid down in this directive.

Amendment 84

Proposal for a directive

Article 2 – paragraph 2

Text proposed by the Commission

Amendment

2. The right to exploit the works or services as referred to in points 2, 4 and 7 of the first paragraph shall imply the transfer to the concessionaire of the substantial operating risk. The concessionaire shall be deemed to assume the substantial operating risk where it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services which are the subject-matter of the concession.

deleted

That economic risk may consist in either of the following:

a) the risk related to the use of the works or the demand for the provision of the service; or

b) the risk related to the availability of the infrastructure provided by the

concessionaire or used for the provision of services to users.

Justification

Integration of the idea of risk into the definition of concession in order to clarify definition and make it more intelligible. Clarification of the concept of operating risk as an economic risk linked to exposure to the vagaries of the market.

Amendment 85

**Proposal for a directive
Article 3 – paragraph 1**

Text proposed by the Commission

Amendment

1. For the purposes of this Directive ‘Contracting authorities’ are State, regional or local authorities, bodies governed by public law, associations formed by one or more such authorities or one or more such bodies governed by public law, other than those awarding a concession for the purpose of pursuing an activity as referred to in Annex III..

(Does not affect English version.)

Justification

(Does not affect English version.)

Amendment 86

**Proposal for a directive
Article 3 – paragraph 2**

Text proposed by the Commission

Amendment

2. 'Regional authorities' include all authorities of the administrative units falling under NUTS 1 and 2, as referred to by Regulation No. (EC) 1059/2003 of the European Parliament and of the Council.

(Does not affect English version.)

Justification

(Does not affect English version.)

Amendment 87

Proposal for a directive Article 3 – paragraph 3

Text proposed by the Commission

Amendment

3. 'Local authorities' include all authorities of the administrative units falling under NUTS 3 and smaller administrative units, as referred to by Regulation No. 1059/2003.

(Does not affect English version.)

Justification

(Does not affect English version.)

Amendment 88

Proposal for a directive Article 3 – paragraph 4 –introductory part

Text proposed by the Commission

Amendment

4. 'Bodies governed by public law' means bodies that have all of the following characteristics:

(Does not affect English version.)

Justification

(Does not affect English version.)

Amendment 89

Proposal for a directive Article 4 – paragraph 1

Text proposed by the Commission

Amendment

1. For the purposes of this Directive , "Contracting entities" are one of the following:

1. For the purposes of this Directive, 'contracting entities' ***are entities which award a concession for the pursuit of one of the activities referred to in Annex III and which*** are one of the following:

(I) state, regional or local authorities, bodies governed by public law, associations formed by one or more such

(a) state, regional or local authorities, bodies governed by public law, associations formed by one or more such

authorities or one or more such bodies governed by public law as defined in paragraphs 2-4 of Article 3.

(2) public undertakings as defined in paragraph 2 of this Article;

(3) entities which are not contracting authorities or public undertakings, **operating** on the basis of special or exclusive rights granted by a competent authority of a Member State

authorities or one or more such bodies governed by public law as defined in Article 3(2), (3) and (4).

(b) public undertakings as defined in paragraph 2 of this Article;

(c) entities which are not contracting authorities or public undertakings **but which operate** on the basis of special or exclusive rights granted by a competent authority of a Member State **for the exercise of one of the activities defined in Annex III.**

when they award a concession for the purpose of pursuing one of the activities as referred to in Annex III.

Justification

Clarification of the paragraph to make it more intelligible.

Amendment 90

Proposal for a directive Article 4 – paragraph 3

Text proposed by the Commission

Amendment

3. ‘Special or exclusive rights’ mean rights granted by a competent authority of a Member State by way of any legislative, regulatory or administrative provision the effect of which is to limit the exercise of activities defined in Annex III to one or more entities, and which substantially affects the ability of other entities to carry out such activity.

deleted

Rights which have been granted by means of a procedure in which adequate publicity has been ensured and where the granting of those rights was based on objective criteria shall not constitute "special or exclusive rights" within the meaning of this Directive. Such procedure includes:

a) procurement procedures with a prior call for competition in conformity with

Directive [2004/18/EC or 2004/17/EC] or this Directive

b) procedures pursuant to other legislative acts of the Union, listed in Annex XI, ensuring adequate prior transparency for granting authorisations on the basis of objective criteria.

The Commission shall be empowered to adopt delegated acts in accordance with Article 46 to modify the list of the Union legislative acts set out in Annex XI where, due to the adoption of new Union legislation or repeal of Union legislation, such modification proves necessary.

Justification

Definition of special or exclusive rights moved under Article 2.

Amendment 91

Proposal for a directive Article 5

Text proposed by the Commission

Amendment

Article 5

deleted

Thresholds

1. This Directive shall apply to the following concessions the value of which is equal to or greater than EUR 5 000 000:

a) concessions concluded by contracting entities for the pursuit of one of the activities referred to in Annex III;

b) concessions concluded by contracting authorities.

2. Services concessions the value of which is equal to or greater than EUR 2 500 000 but lower than EUR 5 000 000 other than social services and other specific services shall be subject to the obligation to publish a concession award notice in accordance with Articles 27 and 28.

Justification

Simplification of the text; the concessions referred to have already been defined in Article 1 and the integration of Article 5 has been defined in Article 6. Removal of the intermediate threshold of EUR 2.5-5 million specifying the obligation to publish a concession award notice in order to simplify the Directive and exclude any additional bureaucratic charges.

Amendment 92

Proposal for a directive Article 6

Text proposed by the Commission

Article 6

Methods for calculating the estimated value of concessions

1. The calculation of the estimated value of a concession shall be based on ***the total amount payable***, net of VAT, as estimated by the contracting authority or the contracting entity, including any form of option and any extension of the duration of the concession.

2. The estimated value of a concession shall be calculated as the value of an entirety of works ***or*** services, ***even if purchased through different contracts, where the contracts*** are part of one single project. ***Indications for the existence of one single project consist in overall prior***

Amendment

Article 6

Thresholds and methods for calculating the estimated value of concessions

-1. This Directive shall apply to concessions the value of which is equal to or greater than EUR 8 000 000.

1. The calculation of the estimated value of a concession shall be based on ***its turnover***, net of taxes, accumulated over the duration of the contract, as estimated by the grantor, to which shall be added any public investment subsidies received by the concessionaire and provided for the purpose of the concession.

That estimate shall be valid at the moment at which the concession notice is sent or, in cases where such notice is not provided for, at the moment at which the grantor commences the concession award procedure.

If the value is changed as a result of negotiations during the award procedure, the valid estimate shall be the estimate indicated at the time of signature of the contract.

2. The estimated value of a concession shall be calculated as the value of an entirety of works ***and/or*** services ***which*** are part of one single ***concession*** project, including studies carried out by the economic operator for the purposes of the concession. The unique nature of the

planning and conception by the **contracting authority or contracting entity**, the fact that the different elements **purchased** fulfil a single economic and technical function or that they are otherwise logically interlinked.

Where the contracting authority or the contracting entity provides for prizes or payments to candidates or tenderers it shall take them into account when calculating the estimated value of the concession.

3. The **choice of the method used to calculate the estimated** value of a concession shall not be made with the intention of excluding it from the scope of this Directive. **A works project or an entirety of services shall not be subdivided with the effect of preventing it from falling within the scope of this Directive, unless justified by objective reasons.**

4. This estimate shall be valid at the moment at which the concession notice is sent, or, in cases where such notice is not foreseen, at the moment at which the contracting authority or the contracting entity commences the concession award procedure, in particular by defining the essential characteristics of the intended concession.

5. With regard to public works concessions and works concessions, calculation of the estimated value shall take account of both the cost of the works and the total estimated value of the supplies and services that are made available to the contractor by the contracting authorities or entities provided that they are necessary for executing the works.

6. Where a proposed work or purchase of services may result in concessions being

project **can for instance be demonstrated by the existence of** planning and conception by the **grantor**, the fact that the different elements **of the concession project** fulfil a single economic and technical function or that they are otherwise logically interlinked.

3. The **estimate of the** value of a concession shall not be made with the intention of excluding it from the scope of this Directive.

3a. The estimated value of the concession shall be calculated using an objective method.

awarded at the same time in the form of separate lots, account shall be taken of the total estimated value of all such lots.

7. Where the aggregate value of the lots is equal to or exceeds the threshold laid down in Article 5, this Directive shall apply to the awarding of each lot.

8. Contracting authorities or contracting entities may award concessions for individual lots without applying the provisions on the award provided for under this Directive, provided that the estimated value net of VAT of the lot concerned is less than EUR 1 million. However, the aggregate value of the lots thus awarded without applying this Directive shall not exceed 20% of the aggregate value of all the lots into which the proposed work or the proposed purchase of services has been divided.

9. The value of services concessions shall be the estimated total value of services to be provided by the concessionaire during the whole duration of the concession, calculated in accordance with an objective methodology which shall be specified in the concession notice or in the concession documents.

The basis for calculating the estimated concession value shall, where appropriate, be the following:

a) for insurance services: the premium payable and other forms of remuneration;

b) for banking and other financial services: fees, commissions, interest and other forms of remuneration;

c) for design services: fees, commission payable and other forms of remuneration;

10. The value of concessions shall include both the estimated revenue to be received from third parties and the amounts to be paid by the contracting authority or the contracting entity.

Justification

Rewording of Article 6 and integration of Article 5 in order to clarify the Directive. The proposed rules are too complex, lack clarity and introduce an unjustified distinction between works and services concessions. Proposal: 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.

Amendment 93

Proposal for a directive Article 7

Text proposed by the Commission

Amendment

Article 7

deleted

General principles

Contracting authorities and contracting entities shall treat economic operators equally and shall act in a transparent and proportionate way. The design of the concession award procedure shall not be made with the objective of excluding it from the scope of this Directive or of artificially narrowing competition.

Justification

Keeps and integrates this article into the section concerning the rules governing the award procedure (new article – 26a).

Amendment 94

Proposal for a directive Article 8 - paragraph 1

Text proposed by the Commission

Amendment

1. This Directive shall not apply to services concessions awarded by a **contracting authority or by a contracting entity** to an economic operator **which is a contracting entity or an association of thereof**, on the basis of an exclusive right that **economic operator** enjoys pursuant to applicable *and*

1. This Directive shall not apply to services concessions **for an activity listed in Annex III, including those services concessions concerning the management of network infrastructure related to such an activity, where such concessions are** awarded to an economic operator on the basis of an

*published national law, regulation or administrative **provision**, and which has been granted in accordance with the Treaty and Union sectoral legislation **concerning the management of networks infrastructure related to the activities set out in annex III.***

exclusive right that ***the latter*** enjoys pursuant to applicable national law, regulation or administrative ***provisions***, and which has been granted in accordance with the Treaty and Union sectoral legislation.

By way of derogation from the first subparagraph, where sectoral legislation referred to in the first subparagraph does not provide for sector-specific transparency obligations, Article 27(1) and (3) shall apply.

Where a Member State grants an exclusive right to an economic operator for the exercise of one of the activities listed in Annex III, it shall inform the Commission thereof within one month after the award of that exclusive right.

Justification

Extension of the scope of the exclusion concerning services concessions awarded on the basis of an exclusive right (beyond just networks infrastructure management for the activities set out in Annex III). To avoid abuses, these exclusive rights should be notified to the Commission.

Amendment 95

Proposal for a directive Article 8 - paragraph 2

Text proposed by the Commission

Amendment

2. By way of derogation from paragraph 1 of this Article, where sectoral legislation referred to in paragraph 1 of this Article does not provide for sector specific transparency obligations, the requirements of Article 27 (1) and (3) shall apply ***deleted***

Justification

This paragraph is being incorporated into Article 8(1).

Amendment 96

Proposal for a directive Article 8 - paragraph 2 a (new)

Text proposed by the Commission

Amendment

2a. This Directive shall not apply to concessions for air transport services based on the granting of an operating licence within the meaning of Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (Recast)¹ or for public passenger transport services within the meaning of Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road

¹ OJ L 293, 31.10.2008, p. 3.

² OJ L 315, 3.12.2007, p. 1.

Justification

Based on Article 8(5)(f) and (g) of the Commission proposal.

Amendment 97

Proposal for a directive Article 8 - paragraph 3 – subparagraph 1 – introductory part

Text proposed by the Commission

Amendment

3. This Directive shall not apply to concessions which the **contracting authority or a contracting entity** is obliged to award or organise in accordance with **procurement** procedures set out in:

3. This Directive shall not apply to concessions which the **grantor** is obliged to award or organise in accordance with procedures **for the award of services concession contracts** set out in:

Justification

Simplification and streamlining of inessential provisions of the Directive.

Amendment 98

Proposal for a directive

Article 8 - paragraph 3 – subparagraph 1 – point a

Text proposed by the Commission

Amendment

a) an international agreement concluded in conformity with the Treaty between a Member State and one or more third countries and covering works, **supplies** or services intended for the joint implementation or exploitation of a project by the signatory States;

a) an international agreement concluded in conformity with the Treaty between a Member State and one or more third countries and covering works or services intended for the joint implementation or exploitation of a project by the signatory States;

Justification

Simplification and streamlining of inessential provisions of the Directive.

Amendment 99

Proposal for a directive

Article 8 - paragraph 3 – subparagraphs 2 and 3

Text proposed by the Commission

Amendment

All agreements referred to in point (a) of the first subparagraph shall be communicated to the Commission, which may consult the Advisory Committee for Public Contracts referred to in Article 48.

deleted

For the purposes of point (d) of the first subparagraph, where a concession is co-financed for a considerable part by an international organisation or international financing institution the parties decide on applicable concession award procedures which shall be in conformity with the provisions of the Treaty on the Functioning of the European Union.

Justification

Simplification and streamlining of inessential provisions of the Directive.

Amendment 100

Proposal for a directive
Article 8 – paragraph 4

Text proposed by the Commission

4. Subject to Article 346 of the Treaty, this Directive shall **not** apply to the awarding of concessions in the fields of defence and security **to the extent that the protection of the essential security interests of a Member State cannot be guaranteed by the rules provided for in this Directive.**

Amendment

4. Subject to Article 346 of the Treaty **on the Functioning of the European Union**, this Directive shall apply to the awarding of concessions in the fields of defence and security, **with the exception of the following:**

(a) concessions for which the application of this Directive would oblige a Member State to supply information the disclosure of which it considers contrary to the essential interests of its security, or the procurement and performance of the concession must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in a Member State where the Member State has determined that the essential interests concerned cannot be guaranteed by less intrusive measures, for instance such as referred to in paragraph 4a;

(b) concessions awarded in the framework of a cooperative programme referred to in point (c) of Article 13 of Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security¹;

(c) contracts awarded by a government to another government relating to works and services directly linked to military equipment or sensitive equipment, or works and services specifically for military purposes, or sensitive works and sensitive services;

(d) concessions awarded in a third country, carried out when forces are deployed outside the territory of the Union

where operational needs require them to be concluded with economic operators located in the area of operations.

¹ OJ L 216, 20.8.2009, p. 76.

Justification

This Amendment is part of a package aiming to ensure there is no overlap between this Directive and the Directive on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security (2009/81/EC), as well as the related relevant Treaty articles.

Amendment 101

Proposal for a directive Article 8 – paragraph 4 a (new)

Text proposed by the Commission

Amendment

4a. This Directive shall not apply to concessions not otherwise exempted under paragraph 4 to the extent that the protection of the essential security interests of a Member State cannot be guaranteed by less intrusive measures, for instance by imposing requirements aimed at protecting the confidential nature of information which the grantor makes available in a concession award procedure as provided for in this Directive.

Justification

This Amendment is part of a package aiming to ensure there is no overlap between this Directive and the Directive on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security (2009/81/EC), as well as the related relevant Treaty articles.

Amendment 102

Proposal for a directive

Article 8 – paragraph 5 – subparagraph 1 – point a

Text proposed by the Commission

a) the acquisition *or* rental, by whatever financial means, of land, existing buildings or other immovable property or concerning rights thereon; ***however financial service concessions awarded at the same time as, before or after the contract of acquisition or rental, in whatever form, shall be subject to this Directive;***

Amendment

a) the acquisition, rental ***or lease, by a contracting authority or contracting entity,*** by whatever financial means, of land, existing buildings or other immovable property or concerning rights thereon;

Justification

There is no provision for a concession for financial services. Leasing is an option that was not initially included in the Directive, but that warrants consideration (link with recital 6).

Amendment 103

Proposal for a directive

Article 8 – paragraph 5 – subparagraph 1 – point b

Text proposed by the Commission

b) the acquisition, development, production or co-production of programme material ***intended*** for broadcasting, ***defined as*** transmission and distribution using any form of electronic network, ***that are awarded by broadcasters, nor to concessions for broadcasting time, that are awarded to broadcasters;***

Amendment

b) the acquisition, development, production or co-production of programme material ***and related preparatory services for media services that are provided by broadcasters, nor to concessions for broadcasting time that are awarded to broadcasters; for the purposes of this Directive, media services means all forms of*** transmission and distribution using any form of electronic network;

Justification

This paragraph has been rewritten to take account of technological progress in the media.

Amendment 104

Proposal for a directive
Article 8 – paragraph 5 – subparagraph 1 – point d

Text proposed by the Commission

Amendment

(d) financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments within the meaning of Directive 2004/39/EC of the European Parliament and of the Council, central bank services and **operations** conducted with the European Financial Stability Facility (EFSF);

(d) financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments within the meaning of Directive 2004/39/EC of the European Parliament and of the Council *of 21 April 2004 on markets in financial instruments*¹, central bank services and **transactions** conducted with the European Financial Stability Facility (EFSF), **as well as operations to raise money or capital for the contracting authority**;

¹ *OJ L 145, 30.4.2004, p.1.*

Amendment 105

Proposal for a directive
Article 8 - paragraph 5 – subparagraph 1 – point e

Text proposed by the Commission

Amendment

e) employment contracts;

deleted

Justification

Simplification of the Directive by removing a passage that is a mere copy-paste from the directives on public procurement. There are no concessions for such services, to the rapporteur's knowledge.

Amendment 106

Proposal for a directive
Article 8 - paragraph 5 – subparagraph 1 – point f

Text proposed by the Commission

Amendment

f) Air transport services based on the grant of an operating licence within the meaning of Regulation (EC) 1008/2008 of the European Parliament and of the

deleted

Council ;

Justification

Reorganisation of Article 8 of the Directive to refer to sector-specific exclusions under EU legislation (paragraph 2(a) (new)).

Amendment 107

Proposal for a directive

Article 8 - paragraph 5 – subparagraph 1 – point g

Text proposed by the Commission

Amendment

**g) Public passenger transport services
within the meaning of Regulation (EC)
1370/2007 of the European Parliament
and of the Council.** **deleted**

Justification

Reorganisation of Article 8 of the Directive to refer to sector-specific exclusions under EU legislation (paragraph 2(a) (new)). The definition of a services concession enshrined in Regulation (EC) No 1370/2007 applies under Article 50 of this Directive.

Amendment 108

Proposal for a directive

Article 8 – paragraph 5 – subparagraph 1 – point g a (new)

Text proposed by the Commission

Amendment

**(ga) civil defence, civil protection, and
hazard prevention;**

Amendment 109

Proposal for a directive

Article 8 – paragraph 5 – subparagraph 2

Text proposed by the Commission

Amendment

**The broadcasting referred to in point (b)
of the first paragraph shall include any
transmission and distribution using any
form of electronic network.** **deleted**

Justification

This paragraph has been incorporated into Article 8(5)(b).

Amendment 110

Proposal for a directive

Article 8 - paragraphs 5 a and 5 b (new)

Text proposed by the Commission

Amendment

5a. This Directive shall not apply to service concessions for gambling activities involving a financial risk through investing a sum of money in games of chance (that is to say lotteries or betting), awarded to one or more bodies by one or more Member States on the basis of exclusive rights granted pursuant to applicable national laws, regulations or administrative provisions in accordance with the Treaties.

5b. This Directive shall not apply to concessions awarded by contracting entities for purposes other than the pursuit of their activities as described in Annex III or for the pursuit of such activities in a third country, in conditions not involving the physical use of a network or geographical area within the Union.

Justification

Reorganisation and simplification of the Directive (incorporation of Article 10(1) into Article 8(5(a) (new)).

Amendment 111

Proposal for a directive

Article 9 - paragraph 1

Text proposed by the Commission

Amendment

I. This Directive shall not apply to concessions for the principal purpose of permitting the contracting authorities to

This Directive shall not apply to concessions for the principal purpose of permitting the contracting authorities to

provide or exploit public communications networks or to provide to the public one or more electronic communications services.

provide or exploit public communications networks *as defined in point (d) of Article 2 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services*¹, or to provide to the public one or more electronic communications services *as defined in point (c) of Article 2 of that Directive*.

¹ OJ L 108, 24.4.2002, p. 33.

Justification

Simplification of the Directive by replacing the definitions with references to the relevant legislation (Directive 2002/21/EC).

Amendment 112

Proposal for a directive Article 9 - paragraph 2

Text proposed by the Commission

Amendment

2. For the purposes of this Article:

deleted

(a) 'public communications network' means an electronic communications network used wholly or mainly for the provision of electronic communications services available to the public which support the transfer of information between network termination points;

(b) 'electronic communications network' means transmission systems and, where applicable, switching or routing equipment and other resources, including network elements which are not active, which permit the conveyance of signals by wire, radio, optical or other electromagnetic means, including satellite networks, fixed (circuit and packet-switched, including Internet) and mobile terrestrial networks, electricity cable systems, to the extent that they are used for the purpose of transmitting signals,

networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed ;

(c) a ‘network termination point’ (NTP) means the physical point at which a subscriber is provided with access to a public communications network; in the case of networks involving switching or routing, the NTP is identified by means of a specific network address, which may be linked to a subscriber number or name;

(d) ‘electronic communications services’ means a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting, but exclude services providing, or exercising editorial control over, content transmitted using electronic communications networks and services; it does not include information society services, as defined in Article 1 of Directive 98/34/EC, which do not consist wholly or mainly in the conveyance of signals on electronic communications networks.

Justification

Simplification of the Directive replacing the definitions with references to the relevant legislation (Directive 2002/21/EC).

Amendment 113

Proposal for a directive Article 10

Text proposed by the Commission

Amendment

Article 10

deleted

**Exclusions applicable to concessions
awarded by contracting entities**

1. This Directive shall not apply to

concessions awarded by contracting entities for purposes other than the pursuit of their activities as described in Annex III or for the pursuit of such activities in a third country, in conditions not involving the physical use of a network or geographical area within the Union.

2. Contracting entities shall notify the Commission or the national oversight body at their request of any activities which they regard as excluded. The Commission may periodically publish in the Official Journal of the European Union for information purposes, lists of the categories of activities which it considers to be covered by this exclusion. In so doing, the Commission shall respect any sensitive commercial aspects that the contracting entities may point out when forwarding this information.

Justification

Reincorporation of the provisions of Article 10(1) into Article 8, concerning exclusions applicable to concessions awarded by contracting authorities and/or entities, to simplify and clarify the text. Reincorporation of the provisions of Article 10(2) into Article 13, concerning the information provided by contracting entities, to simplify and clarify the text.

Amendment 114

Proposal for a directive Article 11 - paragraphs 1, 2 and 3

Text proposed by the Commission

1. For the purposes of this Article, "affiliated undertaking" means any undertaking the annual *account* of which are consolidated with those of the contracting entity in accordance with the requirements of the Seventh Council Directive 83/349/EEC.

Amendment

1. For the purposes of this Article, "affiliated undertaking" means:

a) any undertaking the annual accounts of which are consolidated with those of the contracting entity in accordance with the requirements of the Seventh Council

2. In the case of entities not subject to that Directive, "affiliated undertaking" shall mean any undertaking that :

a) may be, directly or indirectly, subject to a dominant influence by the contracting entity *within the meaning of the second paragraph of Article 4 of this Directive*;

b) may exercise a dominant influence over the contracting entity;

c) in common with the contracting entity, is subject to the dominant influence of another undertaking by virtue of ownership, financial participation, or the rules which govern it.

3. Article 15 notwithstanding and provided that the conditions in *paragraph 4* are met, this Directive shall not apply to the following concessions:

(a) concessions awarded by a contracting entity to an affiliated undertaking;

(b) concessions awarded by a joint venture, formed exclusively by *a number of* contracting entities for the purpose of carrying out activities described in Annex III, to an undertaking which is affiliated with one of those contracting entities.

Directive 83/349/EEC; **or**

b) any undertaking finding itself to be in any of the following situations:

i) it may be, directly or indirectly, subject to a dominant influence by the contracting entity

ii) it may exercise a dominant influence over the contracting entity;

iii) in common with the contracting entity, **it** is subject to the dominant influence of another undertaking by virtue of ownership, financial participation, or the rules which govern it.

The notion of dominant influence is defined in the second subparagraph of Article 4(2).

2. Article 15 notwithstanding and provided that the conditions *set out* in *paragraphs 1 and 3* are met, this Directive shall not apply to the following concessions:

(a) concessions awarded by a contracting entity to an affiliated undertaking; **and**

(b) concessions awarded by a joint venture, formed exclusively by *two or more* contracting entities for the purpose of carrying out activities described in Annex III, to an undertaking which is affiliated with one of those contracting entities.

Justification

Reorganisation and clarification of the entire Article with a view to stating unambiguously: (1) the subject of the Article (the exclusion of certain concessions); (2) the definition of an affiliated undertaking (which was previously spread over two paragraphs (11(1) and 11(2) whose relationship was unclear); (3) the conditions governing these exclusions. the phrase 'within the meaning of the second paragraph of Article 4 of this Directive' has been deleted and moved so as to make it clear what it refers to ('dominant influence' rather than 'the contracting entity')

Amendment 115

Proposal for a directive

Article 11 - paragraph 4 – points a and b

Text proposed by the Commission

a) to service concessions provided that at least 80 % of the average total turnover of the affiliated undertaking ***with respect to services in general for*** the preceding three years derives from the provision of services to ***undertakings with which it is affiliated***;

b) works concessions provided that at least 80 % of the average total turnover of the affiliated undertaking ***with respect to works in general*** for the preceding three years derives from the provision of works to ***undertakings with which it is affiliated***.

Amendment

a) to service concessions provided that at least 80 % of the average total turnover of the affiliated undertaking, ***taking into account all services provided by that undertaking over*** the preceding three years, derives from the provision of services to ***the contracting entity to which the undertaking is affiliated, or to the contracting entity which is itself subject to the dominant influence of another undertaking to which the undertaking granted the concession is affiliated***;

b) to works concessions provided that at least 80 % of the average total turnover of the affiliated undertaking, ***taking into account all works carried out by that undertaking over*** the preceding three years, derives from the provision of works to ***the contracting entity to which the undertaking is affiliated, or to the contracting entity which is itself subject to the dominant influence of another undertaking to which the undertaking granted the concession is affiliated***.

Justification

Necessary clarification regarding exclusions for affiliated undertakings. All services provided by the affiliated undertaking must be taken into account when calculating this amount of 80% of turnover (services provided to the contracting entity + other services). A link must also be made between this 80% of the affiliated undertaking's turnover and the contracting entity that awarded the concession to the affiliated undertaking, regardless of whether it is directly affiliated or subject to the dominant influence of another undertaking affiliated to the undertaking granted the concession.

Amendment 116

Proposal for a directive Article 11 - paragraph 5

Text proposed by the Commission

5. Where, because of the date on which an affiliated undertaking was created or commenced activities, the turnover is not available for the preceding three years, it shall be sufficient for that undertaking to show that the turnover referred to in points (a) or (b) of paragraph 4 is credible, particularly by means of business projections.

Amendment

5. Where, because of the date on which an affiliated undertaking was created or commenced activities, the turnover is not available for the preceding three years, it shall be sufficient for that undertaking to show that the ***proportion of the average total*** turnover referred to in points (a) or (b) of paragraph 4 is credible, particularly by means of business projections.

Justification

Paragraph deleted because its provisions could be open to abuse.

Amendment 117

Proposal for a directive Article 11 - paragraph 6

Text proposed by the Commission

6. Where more than one undertaking affiliated with the contracting entity provides the same or similar services, supplies or works, the above percentages referred to in paragraph 4 shall be calculated taking into account the total turnover deriving respectively from the provision of services, supplies or works by those affiliated undertakings.

Amendment

deleted

Justification

Paragraph deleted to clarify and simplify the Article.

Amendment 118

Proposal for a directive Article 11 a (new)

Article 11a

Transitional provisions linked to Article 11

1. Service concessions for the purpose of pursuing the activity referred to in paragraph 3 of Annex III which, when this Directive enters into force, are operated by affiliated undertakings, as defined in Article 11, may be extended without the provisions of this Directive being applicable, provided that 100 % of the total turnover of the affiliated undertaking with respect to services that are the subject of the contract and concerning the activity referred to in paragraph 3 of Annex III for the preceding three years derives from the provision of services to contracting entities with which it is affiliated. Where such concessions cover limited areas of neighbouring municipalities the total turnover of the affiliated undertaking shall be 90 %.

2. For the purpose of this Article the notion of affiliated undertaking shall also refer to any undertaking that may be, directly or indirectly, subject to a dominant influence by contracting entities within the meaning of Article 4(2) of this Directive.

3. The extensions of service concessions as referred to in paragraph 1 may take place within three years from the date referred to in Article 49(1). The resulting contracts shall be valid as long as the conditions set out in paragraph 1 are met, and shall come to an end by 1 July 2020.

Justification

This new provision introduces a transitional period for those affiliated undertakings operating in the water sector and other fields, whose activities cannot be separated in the calculation of the total turn-over regarding the conditions imposed by article 11. This will allow those entities to adapt themselves to the current rules without jeopardizing their global

structure.

Amendment 119

Proposal for a directive Article 13 – paragraph -1 (new)

Text proposed by the Commission

Amendment

-1. The contracting entities shall notify the Commission or the competent national authorities, at their request, of any activities which they regard as excluded pursuant to Article 8(5b). The Commission may periodically publish in the Official Journal of the European Union for information purposes, lists of the categories of activities which it deems to be covered by that exclusion. In so doing, the Commission shall respect any sensitive commercial aspects that the contracting entities may point out when forwarding that information.

Justification

Reorganisation and simplification of the Directive by incorporating all provisions on information concerning exclusions under the Directive that the contracting entities have to provide (the existing Article 13 is left untouched and Article 10(2) is added).

Amendment 120

Proposal for a directive Article 13 – paragraph 1 – introductory part

Text proposed by the Commission

Amendment

Contracting entities shall notify to the Commission or the national ***oversight body***, at their request, the following information regarding the application of ***paragraphs 2 and 3 of Article 11 and of Article 12.***

2. Contracting entities shall notify to the Commission or the ***competent national authorities***, at their request, the following information regarding the application of Article 11(2) ***and (3)*** and Article 12.

Justification

Reorganisation and simplification of the Directive by incorporating all provisions on

information concerning exclusions under the Directive that the contracting entities have to provide (the existing Article 13 is left untouched and Article 10(2) is added).

Amendment 121

Proposal for a directive

Article 13 – paragraph 1 – point c

Text proposed by the Commission

c) proof deemed necessary by the Commission or the national ***oversight body*** that the relationship between the undertaking or joint venture to which the concessions are awarded and the contracting entity complies with the requirements of Articles 11 or 12.

Amendment

c) proof deemed necessary by the Commission or the ***competent national authorities*** that the relationship between the undertaking or joint venture to which the concessions are awarded and the contracting entity complies with the requirements of Articles 11 or 12.

Justification

Change linked to governance provisions.

Amendment 122

Proposal for a directive

Article 14

Text proposed by the Commission

This Directive shall not apply to concessions awarded by contracting entities ***where, in the Member State in which such concessions are performed*** the activity is directly exposed to competition in accordance with Article 27 and 28 of Directive [replacing Directive 2004/17/EC].

Amendment

Concessions awarded by contracting entities ***and performed in a Member State in which*** the activity is directly exposed to competition in accordance with Article 27 and 28 of Directive .../.../EU* ***shall not be considered to be concessions within the meaning of this Directive.***

** OJ: please insert the number, the date and the publication reference of the directive replacing Directive 2004/17/EC*

Justification

Clarification of the Article. The original wording would appear to suggest that, if there is free competition in the utilities sector, the Directive does not apply to the concession contracts concerned. In fact, in such cases, these contracts are not concessions but contracts under which a public authority or a private undertaking granted special or exclusive rights acts like

any other economic operator in the market.

Amendment 123

Proposal for a directive Article 15 – title

Text proposed by the Commission

Amendment

Relations between public authorities

Cooperation between public authorities

Amendment 124

Proposal for a directive Article 15 - paragraph 1 – subparagraph 1 – point a

Text proposed by the Commission

Amendment

a) *such an* authority or entity exercises over the legal person concerned a control which is similar to that which it exercises over its own departments

a) *the contracting* authority or entity exercises over the legal person concerned a control which is similar to that which it exercises over its own departments; ***that is to say it exerts a decisive influence over both strategic objectives and significant decisions of the controlled legal person;***

Justification

Clarification of the criteria which are used to define ‘in-house’ contracts and which justify the exclusion of such contracts from the scope of the Directive. The term ‘equivalent control’ is drawn from the case law of the CJEU and strengthens the criterion relating to the control exercised by the contracting authority over the controlled entity. The concept of equivalent control is also clarified by taking over elements of Regulation (EC) No 1370/2007 (public passenger transport) designed to facilitate the identification of cases where such control is being exercised.

Amendment 125

Proposal for a directive Article 15 - paragraph 1 – subparagraph 1 – point b

Text proposed by the Commission

Amendment

b) at least **90%** of ***the activities*** of that legal person ***are*** carried out for the controlling contracting authority or entity or for other

b) at least **80 %** of the ***average total turnover*** of that legal person ***is*** carried out for the controlling contracting authority or

legal persons controlled by that contracting authority or entity

entity or for other legal persons controlled by that contracting authority or entity

Justification

Clarification of the criteria which are used to define ‘in-house’: the phrase ‘90 % of the activities’ clarifies one of the terms used in the case law (‘most of the activities’) but not the other, hence the proposal to include the phrase ‘90 % of the turnover’.

Amendment 126

Proposal for a directive

Article 15 - paragraph 1 – subparagraph 1 – point c

Text proposed by the Commission

Amendment

c) there is no private participation in the controlled legal person

c) there is no private participation in the controlled legal person *with the exception of forms of private participation enforced by law, in conformity with the Treaties, which do not exert any influence on the decisions of the controlling contracting authority or entity.*

Amendment 127

Proposal for a directive

Article 15 - paragraph 1 – subparagraph 2

Text proposed by the Commission

Amendment

A contracting authority or a contracting entity as referred to in paragraph 1 subparagraph 1 of Article 4 shall be deemed to exercise over a legal person a control similar to that which it exercises over its own departments within the meaning of point (a) of the first subparagraph where it exercises a decisive influence over both strategic objectives and significant decisions of the controlled legal person.

deleted

Justification

Clarification of the criteria which are used to define ‘in-house’ contracts and which justify the exclusion of such contracts from the scope of the Directive. ‘Similar control’ replaced by

'equivalent control' and incorporated into Article 15(1)(a).

Amendment 128

Proposal for a directive Article 15 - paragraph 2

Text proposed by the Commission

2. Paragraph 1 also applies where a controlled entity which is a contracting authority or contracting entity as referred to in *paragraph 1 subparagraph 1 of Article 4* awards a concession to its controlling entity, or to another legal person controlled by the same contracting authority, provided that there is no private participation in the legal person being awarded the public concession.

Amendment

2. Paragraph 1 also applies where a controlled entity, ***or entities***, which is/***are*** (a) contracting authority/***authorities*** or contracting entity/***entities*** as referred to in *point 1 of Article 4(1)* award(s) a concession to its controlling entity ***or entities***, or to another legal person controlled by the same contracting authority ***or contracting entity***, provided that there is no private participation in the legal person being awarded the public concession, ***with the exception of forms of private participation enforced by law, in conformity with the Treaties, which do not exert any influence on the decisions of the controlling contracting authority or entity.***

Justification

Addition of a reference to the contracting entity which had been left out at this point in the text (reverse in-house).

Amendment 129

Proposal for a directive Article 15 - paragraph 3 – subparagraph 1 – introductory part

Text proposed by the Commission

3. A contracting authority or a contracting entity *as referred to in paragraph 1 subparagraph 1 of Article 4*, which does not exercise over a legal person control within the meaning of paragraph 1, may nevertheless award a concession ***without applying the provisions of the current Directive*** to a legal person which it controls jointly with other such contracting

Amendment

3. A contracting authority or a contracting entity as referred to in *point 1 of Article 4(1)*, which does not exercise over a legal person control within the meaning of ***point (a) of subparagraph 1 of paragraph 1 of this Article***, may nevertheless award a concession ***outside the scope of this Directive*** to a legal person which it controls jointly with other such contracting

authorities or entities, where the following conditions are fulfilled:

authorities or entities *as referred to in point 1 of Article 4(1)*, where the following conditions are fulfilled:

Justification

Clarification of the criteria which are used to define joint ‘in-house’ contracts and which justify the exclusion of such contracts from the scope of the Directive.

Amendment 130

Proposal for a directive

Article 15 - paragraph 3 – subparagraph 1 – point b

Text proposed by the Commission

Amendment

b) at least **90%** of the **activities** of that legal person **are** carried out for the controlling contracting **authorities** or **entities** as referred to in *paragraph 1 subparagraph 1* of Article 4 or other legal persons controlled by *the same* contracting authority or entity;

b) at least **80 %** of the **average total turnover** of that legal person **is** carried out for the controlling contracting **authority** or **entity** as referred to *point 1* of Article 4(1) or other legal persons controlled by *that* contracting authority or entity;

Justification

Clarification of the criteria which are used to define joint ‘in-house’ contracts and which justify the exclusion of such contracts from the scope of the Directive. The phrase ‘90 % of the activities’ clarifies one of the terms used in the case law (‘most of the activities’) but not the other, hence the proposal to include the phrase ‘90 % of the turnover’.

Amendment 131

Proposal for a directive

Article 15 – paragraph 3 – subparagraph 1 – point c

Text proposed by the Commission

Amendment

c) there is no private participation in the controlled legal person.

c) there is no private participation in the controlled legal person **with the exception of forms of private participation enforced by law, in conformity with the Treaties, which do not exert any influence on the decisions of the controlling contracting authority or entity.**

Amendment 132

Proposal for a directive

Article 15 – paragraph 3 – subparagraph 2

Text proposed by the Commission

For the purposes of point (a), contracting authorities or entities as referred to in **paragraph 1 subparagraph 1** of **Article 4** shall be deemed to jointly control a legal person where the following cumulative conditions are fulfilled:

- (a) the decision-making bodies of the controlled legal person are composed of representatives of **all** participating contracting authorities or contracting entities as referred to in **paragraph 1 subparagraph 1** of Article 4;
- (b) those contracting authorities or contracting entities as referred to in **paragraph 1 subparagraph 1** of Article 4 are able to jointly exert decisive influence over the strategic objectives and significant decisions of the controlled legal person;
- (c) the controlled legal person does not pursue any interests which are **distinct from** that of the public authorities affiliated to it;
- (d) the controlled legal person does not draw any gains other than the reimbursement of actual costs from the public contracts with the contracting authorities.**

Amendment 133

Proposal for a directive

Article 15 - paragraph 4 – introductory part

Text proposed by the Commission

4. An agreement concluded between two or

Amendment

For the purposes of point (a), contracting authorities or entities as referred to in **point 1** of **Article 4(1)** shall be deemed to jointly control a legal person where the following cumulative conditions are fulfilled:

- (a) the decision-making bodies of the controlled legal person are composed of representatives of **the** participating contracting authorities or contracting entities as referred to in **point 1** of Article 4(1); **while one representative may represent one or many participating contracting authorities;**
- (b) those contracting authorities or contracting entities as referred to in **point 1** of Article 4(1) are able to jointly exert decisive influence over the strategic objectives and significant decisions of the controlled legal person;
- (c) the controlled legal person does not pursue any interests which are **in conflict with** that of the public authorities affiliated to it;

4. An agreement concluded between two or

more contracting authorities or contracting entities as referred to in *paragraph 1 subparagraph 1* of Article 4 shall not be deemed to be a concession ***within the meaning of point 1 of paragraph 1 of Article 2*** of this Directive, where the following cumulative conditions are fulfilled:

more contracting authorities or contracting entities as referred to in *point 1* of Article 4(1) shall ***fall outside the scope*** of this Directive, where the following cumulative conditions are fulfilled:

Amendment 134

Proposal for a directive Article 15 - paragraph 4 – point a

Text proposed by the Commission

(a) the agreement establishes a genuine co-operation between the participating contracting authorities or entities aimed at carrying out jointly their public service tasks and involving mutual rights and obligations of the parties;

Amendment

Does not apply to English text.

Amendment 135

Proposal for a directive Article 15 - paragraph 4 – point a

Text proposed by the Commission

(a) the agreement establishes a genuine co-operation between the participating contracting authorities or entities aimed at carrying out jointly their public service tasks and involving mutual rights and obligations of the parties;

Amendment

(a) the agreement establishes a genuine co-operation between the participating contracting authorities or entities aimed at carrying out jointly their public service tasks and involving mutual rights and obligations of the parties ***for the purpose of the performance of a shared public service task***;

Amendment 136

Proposal for a directive

Article 15 - paragraph 4 – point c

Text proposed by the Commission

(c) the participating contracting authorities or entities shall do not perform on the open market more than **10%** in terms of turnover of the activities which are relevant in the context of the agreement;

Amendment

(c) the participating contracting authorities or entities shall do not perform on the open market more than **20 %** in terms of turnover of the activities which are relevant in the context of the agreement;

Amendment 137

Proposal for a directive

Article 15 - paragraph 4 – point d

Text proposed by the Commission

(d) the agreement does not involve financial transfers between the participating contracting authorities or entities, other than those corresponding to the reimbursement of actual costs of the works, services or supplies;

Amendment

deleted

Amendment 138

Proposal for a directive

Article 15 - paragraph 4 – point e

Text proposed by the Commission

(e) there is no private participation in any of the contracting authorities or entities involved.

Amendment

(e) there is no private participation in any of the contracting authorities or entities involved, ***with the exception of forms of private participation enforced by law, in conformity with the Treaties, which do not exert any influence on the decisions of the controlling contracting authority or entity.***

Amendment 139

Proposal for a directive Article 15 - paragraph 4 a (new)

Text proposed by the Commission

Amendment

4a. This Directive shall not apply to agreements, decisions or other legal instruments, concluded between several contracting authorities or contracting entities referred to in point (1) of Article 4(1), or groupings of contracting authorities or contracting entities referred to in point (1) of Article 4(1) which make provision, in the context of the internal institutional and administrative organisation of a Member State and pursuant to applicable national law or regulation, for the transfer of powers between the parties with a view to the performance of a public service task.

Justification

The explicit exclusion of horizontal cooperation (Article 15(4)) raises doubts as to the status under the directive of arrangements for the transfer of powers between public authorities ('intercommunality' under French law), which are not explicitly excluded. Accordingly, a new paragraph is being proposed which would exclude such arrangements.

Amendment 140

Proposal for a directive Article 15 - paragraph 5

Text proposed by the Commission

Amendment

5. The absence of private participation referred to in paragraphs 1 to **4** shall be verified at the time of the award of the concession or of the conclusion of the agreement.

The exceptions provided for in this Article shall cease to apply from the moment any private participation takes place, with the effect that ongoing concessions need to be

5. The absence of private participation referred to in paragraphs 1 to **4a** shall be verified at the time of the award of the concession or of the conclusion of the agreement.

opened to competition through regular concession award procedures.

Amendment 141

Proposal for a directive

Article 16

Text proposed by the Commission

The duration of *the concession* shall be limited *to the time estimated to be necessary for the concessionaire to recoup the investments made in operating the works or services together with a reasonable* return on invested capital.

Amendment

1. The duration of concessions shall be limited. **The grantor shall estimate the duration on the basis of the works or services requested.**

When the cost of investments must be met by the concessionaire, the duration of a concession shall reflect the nature and amount of the investments involved, both initial and further investments during the life of a concession, and shall not, under those circumstances, exceed the normal amortisation period.

The duration of the concession, whether or not the concessionaire is required to make investments, shall also reflect the amount of time deemed necessary to meet the objectives set in the contract, in particular as regards the provision of the service in question.

2. The normal amortisation period shall correspond to the time that concessionaires could reasonably be expected to take to recoup their investment costs and secure a reasonable return on invested capital.

Justification

This amendment stresses that the concession is for a limited time period. The original wording also failed to take account of the fact that the ‘the investments made in operating the works or services’ referred neither to initial investments nor to concessions without material investments likely to be amortised (which is why other criteria such as performance of the contract have been added).

Amendment 142

Proposal for a directive Article 17

Text proposed by the Commission

Concessions for social and other specific services listed in Annex X ***falling within the scope*** of this Directive shall be subject to ***the obligation of paragraph 3 of Art. 26 and of paragraph 1 of Article 27.***

Amendment

Concessions for social and other specific services listed in Annex X of this Directive shall be subject ***only to Article 27(1) and (3).***

Justification

This amendment stresses that concessions for social and other specific services are subject only to provisions requiring the publication of a contract award notice (transparency). The original wording was ambiguous as to whether other provisions applied to such services. The prior information notice has also been deleted in order to cut red tape in the procedure that adds no value for this type of service.

Amendment 143

Proposal for a directive Article 18 - title

Text proposed by the Commission

Mixed ***concessions***

Amendment

Mixed ***contracts***

Amendment 144

Proposal for a directive Article 18 – paragraph 1

Text proposed by the Commission

1. Contracts which have as their object both services and supplies shall be awarded in accordance with this Directive where the main object of the contract in question are services and where they are concessions within the meaning of point (1) of the first paragraph of Article 2

Amendment

1. Where contracts have as their object concessions covered by this Directive as well as procurement or other elements not covered by it, the part of the contract which constitutes a concession covered by this Directive shall be awarded in accordance with the provisions thereof.

Where the different parts of the contract in question are not separable, the application of this Directive shall be

determined by the main subject of that contract, established on the basis of the respective values of the concession, the items to be procured or other elements not covered by the Directive.

Justification

Clarification and simplification of the Article, which refers to a set of specific cases of mixed contracts that can be summed up in a new paragraph 1 (contracts for concessions covered by this Directive as well as procurement or other elements not covered by it, such as public procurement), with a course of action to follow if the various parts of the contract cannot be separated (application of the rule of primacy of the main subject of the contract).

Amendment 145

**Proposal for a directive
Article 18 - paragraph 2**

Text proposed by the Commission

2. Concessions which have as *their* object both services within the meaning of Article 17 and other services *shall be awarded in accordance with* the provisions *applicable to* the type of service that characterises the main object of the contract in question.

Amendment

2. Where a services concession contract falling within the scope of this Directive has as *its* object both services within the meaning of Article 17 and other services, the provisions *of this Directive shall apply on the basis of* the type of service that characterises the main object of the contract in question, *determined by reference to the respective costs of the services concerned.*

Justification

Clarification of the paragraph on mixed contracts for social specific and other types of services, and arrangements to determine which provision should apply.

Amendment 146

**Proposal for a directive
Article 18 - paragraph 3**

Text proposed by the Commission

3. In the case of mixed contracts referred to in paragraphs 1 and 2, the main object shall be determined by a comparison of

Amendment

deleted

the values of the respective services or supplies.

Justification

Provisions incorporated into paragraphs 1 and 2 of Article 18.

Amendment 147

**Proposal for a directive
Article 18 - paragraph 4**

Text proposed by the Commission

Amendment

4. Where contracts have as their object concessions covered by this Directive as well as procurement or other elements not covered by it nor by Directives [replacing 2004/17/EC and Directive 2004/18] or 2009/81/EC, the part of the contract which constitutes a concession covered by this Directive shall be awarded in accordance with this Directive. However, when the different parts of the contract are objectively not separable, the application of this Directive shall be determined on the basis of the main subject of that contract. *deleted*

Justification

Clarification and simplification of the Article, which refers to a set of specific cases of mixed contracts that can be summed up in a new paragraph 1 (contracts for concessions covered by this Directive as well as procurement or other elements not covered by it, such as public procurement), with a course of action to follow if the various parts of the contract cannot be separated (application of the rule of primacy of the main subject of the contract).

Amendment 148

**Proposal for a directive
Article 18 - paragraph 5**

Text proposed by the Commission

Amendment

5. In the case of concessions subject to this Directive and contracts subject to *deleted*

[Directive 2004/18/EC or 2004/17/EC] or 2009/81/EC, the part of the contract which constitutes a concession covered by this Directive shall be awarded in accordance with the provisions thereof.

Where the different parts of such contracts are not objectively separable, the application of this Directive shall be determined on the basis of the main subject of that contract.

Justification

Clarification and simplification of the Article, which refers to a set of specific cases of mixed contracts that can be summed up in a new paragraph 1 (contracts for concessions covered by this Directive as well as procurement or other elements not covered by it, such as public procurement), with a course of action to follow if the various parts of the contract cannot be separated (application of the rule of primacy of the main subject of the contract).

Amendment 149

Proposal for a directive Article 19 - paragraph 1 –subparagraph 2

Text proposed by the Commission

However, the choice between awarding a single concession and awarding a number of separate concessions *may* not be made with the objective of excluding *it* from the scope of this Directive.

Amendment

The choice between awarding a single concession and awarding a number of separate concessions *shall* not be made with the objective of excluding *the concession* from the scope of this Directive.

Amendment 150

Proposal for a directive Article 19 – paragraph 2

Text proposed by the Commission

2. Where one of the activities for which the concession *subject to the provisions of* this Directive is intended is listed in Annex III and the other is not listed therein and where it is objectively impossible to determine for which activity the concession is principally intended, the concession shall

Amendment

2. Where one of the activities for which the concession *falling within the scope of this* this Directive is intended is listed in Annex III and the other is not listed therein and where it is objectively impossible to determine for which activity the concession is principally intended, the concession shall

be awarded in accordance with the provisions applicable to concessions awarded by contracting authorities.

be awarded in accordance with the provisions applicable to concessions awarded by contracting authorities, ***without prejudice to Union law***.

Justification

The amendment takes account of sectoral legislation.

Amendment 151

**Proposal for a directive
Article 19 – paragraph 3**

Text proposed by the Commission

3. If one of the activities for which ***the contract or*** the concession is intended is subject to this Directive and the other is not subject to ***either*** this Directive ***or [Directive 2004/18/EC or 2004/17/EC] or 2009/81/EC*** and if it is objectively impossible to determine for which activity ***the contract or*** the concession is principally intended, ***the contract or*** the concession shall be awarded in accordance with this Directive.

Amendment

3. If one of the activities for which the concession is intended is subject to this Directive and the other is not subject to this Directive and if it is objectively impossible to determine for which activity the concession is principally intended, the concession shall be awarded in accordance with this Directive.

Amendment 152

**Proposal for a directive
Article 22 – paragraph -1 (new)**

Text proposed by the Commission

Amendment

-1. The legal personality of the economic operators shall not constitute a valid ground for rejection in the framework of a concession contract award procedure.

Justification

Simplification of the paragraph stating simply that the legal personality of the economic operators (natural persons, legal persons) cannot be a ground for rejection in the context of a concession award procedure.

Amendment 153

Proposal for a directive Article 22 - paragraph 1

Text proposed by the Commission

Amendment

1. Economic operators that, under the law of the Member State in which they are established, are entitled to provide the relevant service, shall not be rejected solely on the ground that, under the law of the Member State in which the concession is awarded, they would be required to be either natural or legal persons. **deleted**

Justification

Incorporation of this paragraph into the previous paragraph (Article 22(-1)) due to the logical link between the two provisions.

Amendment 154

Proposal for a directive Article 22 - paragraph 2

Text proposed by the Commission

Amendment

2. However, legal persons may be required to indicate in the *tender or the application*, the names and relevant professional qualifications of the staff to be responsible for the performance of the concession in question.

However, legal persons may be required to indicate in the ***application or the tender***, the names and relevant professional qualifications of the staff to be responsible for the performance of the concession in question.

Amendment 155

Proposal for a directive Article 22 - paragraph 3

Text proposed by the Commission

Amendment

3. Groups of economic operators may *submit tenders or* put themselves forward as candidates.

3. Groups of economic operators, ***including consortia of undertakings***, may put themselves forward as candidates ***or submit tenders. Their participation in a***

concession award procedure may not be subject to additional conditions that are not imposed on individual candidates.

Amendment 156

**Proposal for a directive
Article 22 - paragraph 3 a (new)**

Text proposed by the Commission

Amendment

3a. Grantors may establish specific conditions for the performance of the concession by a group of economic operators, provided that those conditions are justified by objective reasons and are proportionate.

Amendment 157

**Proposal for a directive
Article 22 - paragraph 4**

Text proposed by the Commission

Amendment

4. Contracting authorities and contracting entities shall not establish specific conditions for participation of such groups in concession award procedures which are not imposed on individual candidates. In order to submit an application or a tender, these groups shall not be required by the contracting authorities or contracting entities to assume a specific legal form.

deleted

Contracting authorities and contracting entities may establish specific conditions for the performance of the concession by a group, provided that those conditions are justified by objective reasons and proportionate. Those conditions may require a group to assume a specific legal form once it has been awarded the contract, to the extent that this change is necessary for the satisfactory performance of the concession.

Justification

Incorporation of the first part of the paragraph into the previous paragraph (Article 22(2) new) due to the logical link between the two provisions (authorisation for groups to present applications or submit tenders and impossibility of imposing specific conditions on these groups which are not imposed on individual candidates or tenderers).

Amendment 158

Proposal for a directive Article 24 - paragraph 1

Text proposed by the Commission

1. Unless otherwise provided in this Directive or in the national law concerning access to information, and without prejudice to the obligations relating to the advertising of awarded contracts and to the information to candidates and tenderers set out in Articles 27 and 35 of this Directive, the **contracting authority** shall not disclose information forwarded to it by economic operators **which they have designated as confidential, including, but not limited to, technical or trade secrets and the confidential aspects of tenders.**

Amendment

1. Unless otherwise provided in this Directive or in the national law concerning access to information, and without prejudice to the obligations relating to the advertising of awarded **concession** contracts and to the information to candidates and tenderers set out in Articles 27 and 35 of this Directive, the **grantor** shall not disclose information forwarded to it by economic operators, **in particular** technical or trade secrets.

This Article shall not prevent public disclosure of non-confidential parts of concluded contracts, including any subsequent changes.

Justification

Reinforcement of the provisions on the confidentiality of the information supplied by candidates or tenderers to the grantor during the award procedure. These obligations apply to both contracting authorities and contracting entities. The grantor is rendered liable if sensitive information, such as technical or trade secrets, is disclosed.

Amendment 159

Proposal for a directive Article 24 - paragraph 2

Text proposed by the Commission

2. **Contracting authorities or contracting**

Amendment

2. **The grantor** may impose on economic

entities may impose on economic operators requirements aimed at protecting the confidential nature of information which **the contracting authorities or contracting entities make** available throughout the concession award procedure.

operators requirements aimed at protecting the confidential nature of information which **it makes** available throughout the concession award procedure.

Amendment 160

Proposal for a directive

Article 25 - paragraph 1 – subparagraph 1 – introductory part

Text proposed by the Commission

1. Except where use of electronic means is mandatory pursuant to Articles 28 (2) and 30 of this Directive **contracting authorities and contracting entities** may choose between the following means of communication for all communication and information exchange:

Amendment

1. Except where use of electronic means is mandatory pursuant to Articles 28 (2) and 30 of this Directive **the grantor** may choose between the following means of communication for all communication and information exchange:

Amendment 161

Proposal for a directive

Article 25 - paragraph 1 – subparagraph 1 – point a

Text proposed by the Commission

a) electronic means **in accordance with paragraphs 3, 4 and 5**;

Amendment

a) electronic means;

Justification

Simplification of the provisions relating to electronic communications and adaptation to 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. On the other hand, the electronic transmission of concession notices and award notices, and the electronic availability of concession documents, are mandatory in order to facilitate the process.

Amendment 162

Proposal for a directive

Article 25 - paragraph 1 – subparagraph 1 – point c

Text proposed by the Commission

Amendment

c) telephone *in the cases and circumstances referred to in paragraph 6, or*

c) telephone, ***subject to transmission of written confirmation;***

Justification

Simplification of the provisions relating to electronic communications and adaptation to 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. On the other hand, the electronic transmission of concession notices and award notices, and the electronic availability of concession documents, are mandatory in order to facilitate the process.

Amendment 163

Proposal for a directive

Article 25 - paragraph 1 – subparagraph 1 – point c a (new)

Text proposed by the Commission

Amendment

(ca) hand delivery certified by an acknowledgement of receipt;

Justification

This amendment takes into account another possible means of communication (hand delivery with acknowledgement of receipt)

Amendment 164

Proposal for a directive

Article 25 - paragraph 2

Text proposed by the Commission

Amendment

2. The means of communication chosen must be generally available and not restrict economic operators' access to the concession award procedure.

2. The means of communication chosen must be generally available ***and non-discriminatory***, and not restrict economic operators' access to the concession award procedure. ***In the case of electronic means, they must also be interoperable***

with the information and communication technology products in general use.

In all communication, exchange and storage of information, ***contracting authorities and contracting entities*** shall ensure that the integrity of data and the confidentiality of ***tenders and*** applications are preserved. They shall examine the content of ***tenders and*** applications only after the time limit set for submitting them has expired.

In all communication, exchange and storage of information, ***the grantor*** shall ensure that the integrity of data and the confidentiality of applications ***and tenders*** are preserved. They shall examine the content of applications ***and tenders*** only after the time limit set for submitting them has expired.

Justification

Simplification of the provisions relating to electronic communications and adaptation to 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. On the other hand, the electronic transmission of concession notices and award notices, and the electronic availability of concession documents, are mandatory in order to facilitate the process.

Amendment 165

Proposal for a directive Article 25 - paragraph 3

Text proposed by the Commission

Amendment

3. The tools to be used for communicating by electronic means, as well as their technical characteristics, shall be non-discriminatory, generally available and interoperable with the information and communication technology products in general use and shall not restrict economic operators' access to the concession award procedure. The technical details and characteristics of the devices for the electronic receipts to be deemed in compliance with the first subparagraph of this paragraph are set out in Annex XII

deleted

The Commission shall be empowered to adopt delegated acts in accordance with Article 46 to amend the technical details and characteristics set out in Annex XII due to technical developments or

administrative reasons.

To ensure the interoperability of technical formats as well as of process and messaging standards, especially in a cross-border context, the Commission shall be empowered to adopt delegated acts in accordance with Article 46 to establish the mandatory use of specific technical standards, at least with regard to the use of e-submission, electronic catalogues and means for electronic authentication.

Justification

Simplification of the provisions relating to electronic communications and adaptation to 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. On the other hand, the electronic transmission of concession notices and award notices, and the electronic availability of concession documents, are mandatory in order to facilitate the process.

Amendment 166

Proposal for a directive Article 25 - paragraph 4

Text proposed by the Commission

Amendment

4. Contracting authorities and contracting entities may, where necessary, require the use of tools which are not generally available, provided that they offer alternative means of access. ***deleted***

Contracting authorities and contracting entities shall be deemed to offer suitable alternative means of access in any of the following situations:

(a) They offer unrestricted and full direct access by electronic means to these tools from the date of publication of the notice in accordance with Annex IX or from the date when the invitation to confirm interest is sent; the text of the notice or the invitation to confirm interest shall specify the internet address at which these

tools are accessible;

(b) ensure that tenderers established in other Member States than the contracting authority's may access the concession award procedure through the use of provisional tokens made available online at no extra cost;

(c) support an alternative channel for electronic submission of tenders.

Justification

Simplification of the provisions relating to electronic communications and adaptation to 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. On the other hand, the electronic transmission of concession notices and award notices, and the electronic availability of concession documents, are mandatory in order to facilitate the process.

Amendment 167

Proposal for a directive Article 25 - paragraph 5

Text proposed by the Commission

Amendment

5. The following rules shall apply to devices for the electronic transmission and receipt of tenders and for the electronic transmission and receipt of applications:

deleted

(a) information on specifications for the electronic submission of tenders and requests to participate, including encryption and time-stamping, shall be available to interested parties;

(b) devices, methods for authentication and electronic signatures shall comply with the requirements of Annex XII;

(c) contracting authorities and contracting entities shall specify the level of security required for the electronic means of communication in the various stages of the concession award procedure followed. The level shall be proportionate

to the risks attached.

(d) where advanced Electronic Signatures as defined by Directive 1999/93/EC of the European Parliament and of the Council are required, contracting authorities and contracting entities shall accept signatures supported by a qualified electronic certificate referred to in the Trusted List provided for in the European Commission Decision 2009/767/EC, created with or without a secure signature creation device, subject to compliance with the following conditions:

(i) they must establish the required advanced signature format on the basis of formats established in Commission Decision 2011/130/EU and put in place necessary measures to be able to process these formats technically;

(ii) where a tender is signed with the support of a qualified certificate that is included in the Trusted list, they must not apply additional requirements that may hinder the use of those signatures by tenderers.

Justification

Simplification of the provisions relating to electronic communications and adaptation to 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. On the other hand, the electronic transmission of concession notices and award notices, and the electronic availability of concession documents, are mandatory in order to facilitate the process.

Amendment 168

Proposal for a directive Article 25 - paragraph 6

Text proposed by the Commission

Amendment

6. The following rules shall apply to the transmission of applications to participate:

deleted

(a) applications to participate in a

procedure for the award of a concession may be made in writing or by telephone; in the latter case, a written confirmation must be sent before expiry of the time limit set for their receipt;

(b) contracting authorities or contracting entities may require that applications for participation made by fax must be confirmed by post or by electronic means, where this is necessary for the purposes of legal proof.

For the purposes of point (b), the contracting authority or entity shall indicate in the concession notice or in the invitation to confirm interest that it requires applications to participate made by fax to be confirmed by post or by electronic means and the time limit for sending such confirmation

Justification

Simplification of the provisions relating to electronic communications and adaptation to 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. On the other hand, the electronic transmission of concession notices and award notices, and the electronic availability of concession documents, are mandatory in order to facilitate the process.

Amendment 169

Proposal for a directive Article 25 - paragraph 7

Text proposed by the Commission

Amendment

7. Member States shall ensure that, at the latest 5 years after the date provided for in Article 49 (1), all procedures for the award of concessions under this Directive are performed using electronic means of communication, in particular e-submission, in accordance with the requirements of this Article.

deleted

This obligation shall not apply where the use of electronic means would require specialised tools or file formats that are

not generally available in all the Member States within the meaning of paragraph 3. It is the responsibility of the contracting authorities or contracting entities using other means of communication for submission of tenders to demonstrate in the concession documents that the use of electronic means, due to the particular nature of the information to be exchanged with the economic operators, would require specialised tools or file formats that are not generally available in all the Member States.

Contracting authorities and contracting entities shall be deemed to have legitimate reasons not to request electronic means of communication in the submission process in the following cases:

(a) the description of the technical specifications, due to the specialised nature of the concession award, cannot be rendered using file formats that are generally supported by commonly used applications;

(b) the applications supporting file formats that are suitable for the description of the technical specifications are under a proprietary licensing schema and cannot be made available for downloading or remote use by the contracting authority;

(c) the applications supporting file formats that are suitable for the description of the technical specifications use file formats that cannot be handled by any other open or downloadable applications.

Justification

Simplification of the provisions relating to electronic communications and adaptation to 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. On the other hand, the electronic transmission of concession notices and award notices, and the electronic availability of concession documents, are mandatory in order to facilitate the process.

Amendment 170

Proposal for a directive Article 25 - paragraph 8

Text proposed by the Commission

Amendment

8. Contracting authorities may use the data processed electronically for public procurement procedures in order to prevent, detect and correct errors occurring at each stage by developing appropriate tools.

deleted

Justification

Simplification of the provisions relating to electronic communications and adaptation to 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. On the other hand, the electronic transmission of concession notices and award notices, and the electronic availability of concession documents, are mandatory in order to facilitate the process.

Amendment 171

Proposal for a directive Titre II – title

Text proposed by the Commission

Amendment

**RULES ON THE AWARD OF
CONCESSIONS**

**RULES ON THE AWARD OF
CONCESSIONS: *GENERAL
PRINCIPLES, TRANSPARENCY AND
PROCEDURAL GUARANTEES***

Justification

Reorganisation of Title II on rules on the award of concessions in order to simplify and clarify the text. Addition of a new chapter on general principles, followed by the chapter on transparency and a chapter on procedural guarantees.

Amendment 172

Proposal for a directive Titre II – Chapter -I (new)

Text proposed by the Commission

Amendment

Chapter -I

General principles

Article -26

Freedom of the grantor to organise the procedure

The grantor shall have the freedom to organise the procedure leading to the choice of concessionaire subject to compliance with this Directive, the only two mandatory stages being the publication of a concession notice at the beginning of the procedure, except in the cases provided for in Article 17 and Article 26(5), and the publication of an award notice at the end of the procedure.

Intermediate stages may be provided for during the award procedure by the grantor, such as the sending of an invitation to submit an offer to the candidates who have responded where appropriate to the concession notice.

Article -26 a

General principles

1. Concessions shall be awarded on the basis of the criteria set out by the grantor, in accordance with Article 38b, provided that the following cumulative conditions are fulfilled:

(a) the tender complies with the requirements, conditions and criteria set out in the concession notice or in the invitation to submit a tender and in the concession documents;

(b) the tender comes from a tenderer who
(i) is not excluded from participating in the award procedure in accordance with Article 36(5) and (7), and subject to

Article 36(8), and

(ii) meets the selection criteria set out by the grantor in accordance with Article 36(2) and (3).

2. During the concession award procedure, the grantor shall treat economic operators equally and shall act in a transparent and proportionate way. In particular, it shall not provide information in a discriminatory manner which may give some candidates or tenderers an advantage over others. The design of the concession award procedure shall not be made with the objective of excluding it from the scope of this Directive or of artificially narrowing competition.

3. Member States shall ensure that economic operators comply with the environmental, social and labour law provisions which apply at the place where the works are executed or services provided, as set out in international conventions listed in Annex Xa, Union and national law as well as collective agreements concluded in accordance with national law and practices which respect Union law.

4. The grantor shall not award a concession contract to the tenderer submitting the best tender where it has been established, based on clear and sufficient evidence, that the tenderer does not comply with the environmental, social and labour law provisions referred to in paragraph 3 of this Article.

5. The Commission shall be empowered to adopt delegated acts in accordance with Article 46 to amend the list in Annex Xa, where necessary due to the conclusion of new international agreements or modification of existing international agreements.

Justification

Clarification of the award procedure in order to make the articles in the subsequent chapters more comprehensible. Insistence on the grantor's right to opt to add intermediate stages or to reverse the order of stages, in compliance with the directive and subject to mandatory publication of the concession notice, and of the award notice at the end of the procedure. New Article -26a has wording taken over from the initial Article 34, together with an added paragraph taken over from the original Article 7.

Amendment 173

Proposal for a directive Article 26 – paragraph 1

Text proposed by the Commission

1. Contracting authorities and contracting entities wishing to award a concession shall make known **their** intention by means of a concession notice.

Amendment

1. A grantor wishing to award a concession shall make known **its** intention by means of a concession notice **in accordance with the procedures laid down in Article 28. The concession notice shall contain the information referred to in Annex IV and, where appropriate, any other information deemed useful by the grantor.**

Justification

Merger of paragraphs 1, 2 and 4 to simplify and clarify the Directive. As regards the manner of publication, reference is made to Article 28 in order to simplify the text and avoid unnecessary repetition.

Amendment 174

Proposal for a directive Article 26 – paragraph 2

Text proposed by the Commission

2. Concession notices shall contain the information referred to in part of Annex IV and, where appropriate, any other information deemed useful by the contracting authority or entity, in accordance with the format of standard forms.

Amendment

deleted

Justification

Merger of paragraphs 1, 2 and 4 to simplify and clarify the Directive. As regards the manner of publication, reference is made to Article 28 in order to simplify the text and avoid unnecessary repetition.

Amendment 175

**Proposal for a directive
Article 26 – paragraph 3**

Text proposed by the Commission

Amendment

3. Contracting authorities and contracting entities wishing to award a concession for social and other specific services shall make known their intention of planned concession award through the publication of a prior information notice as soon as possible after the beginning of the budgetary year. Those notices shall contain the information set out in Annex XIII. *deleted*

Justification

The prior information notice has been deleted in order to cut red tape in the procedure that adds no value for this type of service.

Amendment 176

**Proposal for a directive
Article 26 – paragraph 4**

Text proposed by the Commission

Amendment

4. The Commission shall establish those standard forms. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 48. *deleted*

Justification

Merger of paragraphs 1, 2 and 4 to simplify and clarify the Directive. As regards the manner of publication, reference is made to Article 28 in order to simplify the text and avoid unnecessary repetition.

Amendment 177

Proposal for a directive Article 26 – paragraph 5

Text proposed by the Commission

5. By way of derogation from paragraph 1, the ***contracting authorities and entities*** shall not be required to publish a concession notice ***in any of the following cases:***

a) where no tenders or no suitable tenders or no applications have been submitted in response to a concession procedure, provided that the initial conditions of the concession contract are not substantially altered and on condition that a report is sent to the Commission or to the national oversight body designated pursuant to Article 84 of Directive [replacing Directive 2004/18/EC] where they so request;

b) where the works or services can be supplied only by a particular economic operator due to the absence of competition for technical reasons, the protection of patents, copyrights or other intellectual property rights **or he protection of other exclusive rights** and where no reasonable alternative or substitute exists and the absence of competition is not the result of an artificial narrowing down of the parameters of the concession award;

c) for new works or services consisting in the repetition of similar works or services entrusted to the economic operator to

Amendment

5. By way of derogation from paragraph 1, the ***grantor*** shall not be required to publish a concession notice where the works or services can be supplied only by a particular economic operator, due to ***the existence of a special or exclusive right***, the absence of competition for technical reasons, ***or*** the protection of patents, copyrights or other intellectual property rights and where no reasonable alternative or substitute exists and the absence of competition is not the result of an artificial narrowing down of the parameters of the concession award.

which the same contracting authorities or contracting entities awarded an original concession subject to the obligation referred to in paragraph 1, provided that such works or services are in conformity with a basic project for which the original concession was awarded. The basic project shall mention the extent of possible additional works or services and the conditions under which they will be awarded.

As soon as the first project is put up for tender the total estimated cost of subsequent works or services shall be taken into consideration by the contracting authorities or contracting entities when they apply the provisions of Article 5

Justification

Distinction between two different types of case described, though not explicitly, in this paragraph resulting in non-publication of a concession notice: cases where no concession notice has yet been published (initial Article 26(5)(b) and cases where a concession notice has already been published but no new notice is required (initial Article 26(5)(a) and (c)).

Amendment 178

Proposal for a directive Article 26 – paragraph 5 a (new)

Text proposed by the Commission

Amendment

5a. By way of derogation from paragraph 1, the grantor shall not be required to publish a new concession notice in either of the following cases:

(a) where no applications or no tenders or no suitable tenders have been submitted in response to an initial concession procedure, provided that the initial conditions of the concession contract are not substantially altered and that a report is sent to the Commission or the competent national authorities where they so request;

(b) for new works or services consisting of the repetition of similar works or services entrusted to the original concessionaire to which the same grantor awarded an original concession subject to the obligation referred to in paragraph 1, provided that such works or services are in conformity with a basic project for which the original concession was awarded. The basic project shall mention the extent of possible additional works or services and the conditions under which they will be awarded.

As soon as the first project is put out to tender the total estimated cost of subsequent works or services shall be taken into consideration by the grantor when it applies Article 6.

Justification

Distinction between two different types of case described, though not explicitly, in this paragraph resulting in non-publication of a concession notice: cases where no concession notice has yet been published (initial Article 26(5)(b) and cases where a concession notice has already been published but no new notice is required (initial Article 26(5)(a) and (c)). Points (a) and (b) of the new paragraph 5a are based on paragraph 5(a) and 5(c) of the Commission proposal.

Amendment 179

Proposal for a directive Article 26 – paragraph 6

Text proposed by the Commission

6. For the purposes of **point (a)** of the first subparagraph, a tender shall be considered not to be suitable where:

- it is irregular or unacceptable, and*
- it is completely irrelevant to the concession, being incapable of meeting the contracting authority or contracting*

Amendment

6. For the purposes of **point (a) of paragraph 5a**, a tender shall be considered not to be suitable where **it is completely irrelevant to the concession, being incapable of meeting the grantor's needs as specified in the concession documents.**

;

entity's needs as specified in the concession documents.

Tenders shall be considered to be irregular, where they do not comply with the concession documents or where the prices offered are sheltered from normal competitive forces.

Tenders shall be considered to be unacceptable in any of the following cases:

(a) where they have been received late;

b) they have been submitted by tenderers who do not have the requisite qualifications;

c) their price exceeds the contracting authority or contracting entity's budget as determined prior to the launching of the concession award procedure and documented in writing;

d) they have been found to be abnormally low

Justification

Distinction between 3 possible cases where a tender is unsuitable: tender irrelevant to the concession, irregular tender or unacceptable tender. A tender that is unsuitable may not always be irrelevant to the subject of the concession (e.g. it may be relevant to the subject of the concession, but is received after the deadline; in this case it is unacceptable). The initial second subparagraph is deleted because it is already covered by points (c) and (d) which explain when a tender is unacceptable (over-budget or abnormally low).

Amendment 180

Proposal for a directive Article 27 – paragraph 1

Text proposed by the Commission

1. Not later than 48 days after the award of a concession, **contracting authorities and contracting entities** shall send a concession award notice on the results of the concession award procedure.

Amendment

1. Not later than 48 days after the award of a concession, the **grantor** shall **in accordance with the procedures laid down in Article 28** send a concession award notice on the results of the concession award procedure.

Amendment 181

Proposal for a directive Article 27 – paragraph 2

Text proposed by the Commission

Amendment

2. The obligation referred to in paragraph 1 shall also apply to those services concessions the estimated value of which, as calculated according to the method referred to in Article 6 (5), is equal to or higher than 2 500 000 EUR with the sole exception of social services and other specific services as referred to in Article 17. **deleted**

Justification

The intermediate thresholds and the provisions relating to them are deleted in order to simplify and clarify the directive.

Amendment 182

Proposal for a directive Article 27 – paragraph 3

Text proposed by the Commission

Amendment

3. **Such** notices shall contain the information set out in Annex V or in relation to concessions for social services and other specific services the information set out in VI and be published in accordance with **the provisions of** Article 28

3. **Concession award** notices shall contain the information set out in Annex V or in relation to concessions for social services and other specific services the information set out in VI and be published in accordance with Article 28.

Amendment 183

Proposal for a directive Article 28 - paragraph 1 – subparagraph 1

Text proposed by the Commission

Amendment

1. **The** notices **referred to in Articles 26 and 27** and the second subparagraph of **Article 43(6)** shall include the information

1. **Concession** notices, **concession award notices and the notice** referred to in the second subparagraph of **Article 42(6)** shall

set out Annexes IV to VI and in the format of standard forms, including standard forms for corrigenda.

include the information set out Annexes IV to VI and in the format of standard forms, including standard forms for corrigenda.

Amendment 184

Proposal for a directive Article 28 - paragraph 2

Text proposed by the Commission

2. The notices shall be drawn up, transmitted by electronic means to the Commission and published in accordance with Annex IX. Notices shall be published not later than five days after they are sent. The costs of publication of the notices by the Commission shall be borne by the Union.

Amendment

2. The notices *referred to in paragraph 1* shall be drawn up, transmitted by electronic means to the Commission and published in accordance with Annex IX. ***The Commission shall give the grantor confirmation of the receipt of the notice and of the publication of the information sent, indicating the date of publication which shall constitute proof of publication.*** Notices shall be published not later than five days after they are sent. The costs of publication of the notices by the Commission shall be borne by the Union.

Justification

Merger and simplification of Articles 28 and 29. Article 28(4) is being incorporated into this paragraph.

Amendment 185

Proposal for a directive Article 28 - paragraph 3

Text proposed by the Commission

3. ***The*** notices *referred to in Article 26* shall be published in full in an official language of the Union as chosen by the ***contracting authority or contracting entity***. That language version shall constitute the sole authentic text. A summary of the important elements of each notice shall be published in the other official languages.

Amendment

3. ***Concession*** notices shall be published in full in an official language of the Union as chosen by the ***grantor***. That language version shall constitute the sole authentic text. A summary of the important elements of each notice shall be published in the other official languages.

Amendment 186

Proposal for a directive Article 28 - paragraph 3 a (new)

Text proposed by the Commission

Amendment

3a. Concession notices and concession award notices shall not be sent for publication at national level before the date on which they are dispatched to the Commission. Concession notices and concession award notices published at national level shall not contain information other than that contained in the notices dispatched to the Commission but shall indicate the date of dispatch of the notice to the Commission.

Justification

This new paragraph 3a is based on Article 29 of the Commission's proposal. It merges Articles 28 and 29 in order to simplify the directive.

Amendment 187

Proposal for a directive Article 28 - paragraph 4

Text proposed by the Commission

Amendment

4. Contracting authorities and contracting entities shall be able to supply proof of the dates on which notices are dispatched. ***deleted***

The Commission shall give the contracting authority or contracting entity confirmation of the receipt of the notice and of the publication of the information sent, indicating the date of that publication. Such confirmation shall constitute proof of publication.

Justification

Paragraph 4 is being incorporated into Article 28(2) in order to simplify the directive.

Amendment 188

Proposal for a directive Article 28 - paragraph 5

Text proposed by the Commission

Amendment

5. Contracting authorities and contracting entities may publish notices for concessions that are not subject to the publication requirements laid down in this Directive provided those notices are sent to the Commission by electronic means in accordance with the format and procedures for transmission indicated in Annex IX. *deleted*

Justification

This paragraph has been deleted to simplify and clarify the directive.

Amendment 189

Proposal for a directive Article 29

Text proposed by the Commission

Amendment

Article 29

deleted

Publication at national level

1. Notices referred to in Articles 26 and 27 and the information contained therein shall not be published at national level before the publication pursuant to Article 28.

2. Notices published at national level shall not contain information other than that contained in the notices dispatched to the Commission but shall indicate the date of dispatch of the notice to the Commission.

Justification

Article 29 has been incorporated into Article 28 (cf. new paragraph 3a). Merger and simplification of Articles 28 and 29. Concession notices and award notices are not to be published at national level before the date of their dispatch to the Commission (rather than before the date of their publication by the Commission) since publication at national level is

often faster than at European level.

Amendment 190

Proposal for a directive Article 30 - paragraph 1

Text proposed by the Commission

1. **Contracting authorities and contracting entities** shall offer unrestricted and full direct access free of charge by electronic means to the concession documents from the date of publication of the notice **in accordance with Article 28** or the date on which the invitation to submit tenders is sent. The text of the notice or of these invitations shall specify the internet address at which this documentation is accessible.

Amendment

1. **The grantor** shall offer unrestricted and full direct access free of charge by electronic means to the concession documents from the date of publication of the **concession** notice or the date on which the invitation to submit tenders is sent. The text of the **concession** notice or of these invitations shall specify the internet address at which this documentation is accessible.

Justification

The concession documents must be made available by electronic means as soon as the concession notice is published (erroneous reference to Article 28 in the initial text) or the invitation to submit a tender is sent.

Amendment 191

Proposal for a directive Article 30 - paragraph 2

Text proposed by the Commission

2. Provided that it has been requested in good time, the **contracting authorities and contracting entities or competent departments** shall supply additional information relating to the concession documents not later than six days before the deadline fixed for the receipt of tenders.

Amendment

2. Provided that it has been requested in good time, the **grantor** shall supply additional information relating to the concession documents not later than six days before the deadline fixed for the receipt of tenders.

Justification

The reference to 'competent departments' is too vague. It is the grantor's job to forward

information to candidates and tenderers.

Amendment 192

Proposal for a directive Article 30 a (new)

Text proposed by the Commission

Amendment

Article 30a

Combating corruption and preventing conflicts of interest

Member States shall adopt rules combating fraud, favouritism and corruption and preventing conflicts of interest, aimed at ensuring the transparency of the award procedure and the equal treatment of all candidates and tenderers.

With regard to conflicts of interest, the measures adopted shall not go beyond what is strictly necessary to prevent a potential conflict of interest or eliminate a conflict of interest that has been identified. In particular, those measures shall allow for the exclusion of a tenderer or candidate from the procedure only where the conflict of interests cannot be effectively remedied by other means.

Justification

This wording has been taken from Article 36(4) and made into a new article, in order to give it greater prominence.

Amendment 193

Proposal for a directive Chapter II – title –section I –title

Text proposed by the Commission

Amendment

CHAPTER II

CHAPTER II

Conduct of the procedure

Procedural guarantees

Section I

Joint concessions, time limits and technical specifications

Justification

Taken over from Section II (Choice of participants and award of concessions) of Chapter II of the proposal, with modifications. Section I of Chapter II is deleted.

Amendment 194

**Proposal for a directive
Article 31**

Text proposed by the Commission

Amendment

Article 31

deleted

Joint concessions between contracting authorities or contracting entities from different Member States

1. Without prejudice to Article 15, contracting authorities or contracting entities from different Member States may jointly award public concessions by using one of the means described in this Article.

2. Several contracting authorities or contracting entities from different Member States may jointly award a concession. In that case, the participating contracting authorities or contracting entities shall conclude an agreement that determines

(a) which national provisions shall apply to the concession award procedure.

(b) the internal organisation of the concession award procedure, including the management of the procedure, the sharing of responsibilities, the distribution of the works, supplies or services to be procured and the conclusion of concessions.

When determining the applicable national law in accordance with point (a), contracting authorities or contracting entities may choose the national provisions of any Member State in which

at least one of the participating authorities is located.

3. Where several contracting authorities or contracting entities from different Member States have set up a joint legal entity, including European Groupings of territorial cooperation under Regulation (EC) N° 1082/2006 of the European Parliament and of the Council, the participating contracting authorities or participating contracting entities shall, by a decision of the competent body of the joint legal entity, agree on the applicable national concession award rules of one of the following Member States:

(a) the national provisions of the Member State where the legal body has its registered office;

(b) the national provisions of the Member State where the legal body is carrying out its activities.

This agreement may either apply for an undetermined period, when fixed in the constitutive act of the joint legal body, or may be limited to a certain period of time, certain types of concessions or to one or more individual concession awards.

4. In the absence of an agreement determining the applicable concession rules, the national legislation governing the concession award shall be determined following the rules set out below:

(a) where the procedure is conducted or managed by one participating contracting authority or participating contracting entity on behalf of the others, the national provisions of the Member State of that contracting authority or entity shall apply;

(b) where the procedure is not conducted or managed by one participating contracting authority or participating contracting entity on behalf of the others, and

(i) concerns a public works or works

concession, contracting authorities or entities shall apply the national provisions of the Member State where most of the works are located;

(ii) concerns a service concession, contracting authorities or entities shall apply the national provisions of the Member State where the major part of the services is provided.;

(c) where it is not possible to determine the applicable national law pursuant to points (a) or (b), contracting authorities or entities shall apply the national provisions of the Member State of the contracting authority which bears the biggest share of the costs.

5. In the absence of an agreement determining the applicable concession award law under paragraph 3, the national legislation governing concession award procedures conducted by joint legal bodies set up by several contracting authorities or contracting entities from different Member States shall be determined following the following rules:

(a) where the procedure is conducted or managed by the competent organ of the joint legal body, the national provisions of the Member State where the legal body has its registered office shall apply.

(b) where the procedure is conducted or managed by a member of the legal body on behalf of that legal body, the rules set out in points (a) and (b) of paragraph 4 shall apply.

(c) where it is not possible to determine the applicable national law pursuant to points (a) or (b) of paragraph 4, the contracting authorities or contracting entities shall apply the national provisions of the Member State where the legal body has its registered office.

6. One or more contracting authorities or one or more contracting entities may award individual concessions under a framework agreement concluded by or

jointly with a contracting authority located in another Member State, provided that the framework agreement contains specific provisions enabling the respective contracting authority or contracting authorities or to award contracting entity or contracting entities the individual concessions.

7. Decisions on the award of concessions in cross-border concession award shall be subject to the ordinary review mechanisms available under the national law applicable.

8. In order to enable the effective operation of review mechanisms, Member States shall allow the decisions of review bodies within the meaning of Council Directive 89/665/EEC and of Council Directive 92/13/EEC located in other Member States to be fully executed in their domestic legal order, where such decisions involve contracting authorities or contracting entities established on their territory participating in the relevant cross-border concession award procedure.

Justification

This article has been deleted in order to simplify and clarify the directive.

Amendment 195

Proposal for a directive Article 32

Text proposed by the Commission

Amendment

Article 32

deleted

Technical specifications

1. The technical specifications as defined in point 1 of Annex VIII shall be set out in the concession documents. They shall define the characteristics required of a works, service or supply..

These characteristics may also refer to the specific process of production or provision

of the requested works, supplies or services or of any other stage of its life cycle as referred to in point (14) of Article 2.

The technical specifications shall also specify whether the transfer of intellectual property rights will be required.

For all concession awards the subject of which is intended for use by persons, whether general public or staff of the contracting authority or contracting entity, those technical specifications shall, except in duly justified cases, be drawn up so as to take into account accessibility criteria for people with disabilities or design for all users.

Where mandatory accessibility standards are adopted by a legislative act of the Union, technical specifications shall, as far as accessibility criteria are concerned, be defined by reference thereto.

2. Technical specifications shall guarantee equal access of economic operators to the concession award procedure and not have the effect of creating unjustified obstacles to the opening up of concession award to competition.

3. Without prejudice to mandatory national technical rules, to the extent that they are compatible with Union law, the technical specifications shall be formulated in one of the following ways:

(a) in terms of performance or functional requirements, including environmental characteristics, provided that the parameters are sufficiently precise to allow tenderers to determine the subject-matter of the contract and to allow contracting authorities or contracting entities to award the contract;

(b) by reference to technical specifications defined in Annex VIII and, in order of preference, to national standards transposing European standards, European technical approvals, common

technical specifications, international standards, other technical reference systems established by the European standardisation bodies or — when those do not exist — national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the supplies; each reference shall be accompanied by the words 'or equivalent';

(c) in terms of performance or functional requirements as referred to in point (a), with reference to the technical specifications referred to in point (b) as a means of presuming conformity with such performance or functional requirements;

(d) by reference to the technical specifications referred to in point (b) for certain characteristics, and by reference to the performance or functional requirements referred to in point (a) for other characteristics.

4. Unless justified by the subject-matter of the contract, technical specifications shall not refer to a specific make or source, or a particular process, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products. Such reference shall be permitted on an exceptional basis, where a sufficiently precise and intelligible description of the subject-matter of the contract pursuant to paragraph 3 is not possible; such reference shall be accompanied by the words "or equivalent".

5. Where a contracting authority or contracting entity uses the option of referring to the specifications referred to in point (b) of paragraph 3, it shall not reject a tender on the grounds that the works, supplies and services tendered for do not comply with the specifications to which it has referred, once the tenderer proves in its tender by whatever

appropriate means including the means of proof referred to in Article 33 that the solutions it proposes satisfy in an equivalent manner the requirements defined by the technical specifications.

6. Where a contracting authority or contracting entity uses the option laid down in point (a) of paragraph 3 to formulate technical specifications in terms of performance or functional requirements, it shall not reject a tender for works, supplies or services which comply with a national standard transposing a European standard, a European technical approval, a common technical specification, an international standard or a technical reference system established by a European standardisation body, where these specifications address the performance or functional requirements which it has laid down.

In its tender, the tenderer must prove by any appropriate means including the means of proof referred to in Article 33 that the work, supply or service in compliance with the standard meets the performance or functional requirements of the contracting authority or contracting entity.

Justification

This article has been deleted because it takes a 'public procurement' approach to concessions. Given that the economic risk is transferred from the grantor to the concessionaire, the latter must be given a certain amount of leeway in meeting the objectives and criteria laid down by the grantor. However, technical and/or functional requirements may be laid down by any grantors wishing to keep a tighter control over the technical aspects of the concession (see justification for Article 38b).

Amendment 196

Proposal for a directive Article 33

Text proposed by the Commission

Amendment

Article 33

deleted

Test reports, certification and other means of proof

1. Contracting authorities or contracting entities may require that economic operators provide a test report from a recognised body or a certificate issued by such a body as means of proof of conformity with the technical specifications.

Where contracting authorities require the production of certificates drawn up by recognised bodies attesting conformity with a particular technical specification, certificates from equivalent other recognised bodies shall also be accepted by the contracting authorities.

2. Contracting authorities or contracting entities shall also accept other appropriate means of proof such as a technical dossier of the manufacturer where the economic operator concerned has no access to the certificates or test reports referred to in paragraph 1, or no possibility of obtaining them within the relevant time limits.

3. Recognised bodies, within the meaning of this Article, are test and calibration laboratories and any certification and inspection bodies accredited in accordance with Regulation (EC) No 765/2008 of the European Parliament and of the Council.

4. Member States shall make available to other Member States, upon request, any information related to the evidence and documents produced to prove compliance with the technical requirements referred to in Article 32 and this Article. The competent authorities of the Member State of establishment shall provide this

information in accordance with provisions on governance as referred to in Article 88 of (Directive replacing Directive 2004/18/EC).

Justification

This article has been deleted because it takes a 'public procurement' approach to concessions. Given that the economic risk is transferred from the grantor to the concessionaire, the latter must be given a certain amount of leeway in meeting the objectives and criteria laid down by the grantor. However, functional requirements may be laid down by any grantors wishing to keep a tighter control over the technical aspects of the concession (see Article 38a - Award criteria).

Amendment 197

**Proposal for a directive
Section II - title**

Text proposed by the Commission

Amendment

Section II

deleted

Choice of participants and award of concessions

Justification

Structural simplification.

Amendment 198

**Proposal for a directive
Article 34**

Text proposed by the Commission

Amendment

Article 34

deleted

General principles

Concessions shall be awarded on the basis of the criteria set out by the contracting authority or contracting entity in accordance with Article 39 provided that the following cumulative conditions are fulfilled:

a) the tender complies with the requirements, conditions and criteria set

out in the concession notice or in the invitation to confirm interest and in the concession award documents;

b) the tender comes from a tenderer who

i) is not excluded from participating in the award procedure in accordance with paragraphs 4 to 8 of Article 36 and

ii) meets the selection criteria set out by the contracting authority or contracting entity in accordance with paragraphs 1 to 3 of Article 36.

Justification

Taken over into new Article -26a.

Amendment 199

Proposal for a directive

Article 35

Text proposed by the Commission

Amendment

Article 35

deleted

Procedural guarantees

1. Contracting authorities and contracting entities shall indicate in the contract notice, in the invitation to submit tenders or in the concession documents a description of the concession, the award criteria and the minimum requirements to be met. This information must allow to identify the nature and scope of the concession, enabling economic operators to decide whether they request to participate in the concession award procedure. The description, award criteria and minimum requirements shall not be changed in the course of the negotiations.

2. During the concession award, contracting authorities and contracting entities shall ensure the equal treatment of all tenderers. In particular, they shall not provide information in a discriminatory manner which may give

some tenderers an advantage over others.

3. Whenever the contracting authority or contracting entity limits the number of applicants to an appropriate level, this shall be done in a transparent manner and on the basis of objective criteria which are available to all interested economic operators.

4. The rules on the organisation of the concession award procedure, including rules on communication, on the stages of the procedure and on timing, shall be established in advance and communicated to all participants

5. Where the concession award involves negotiation, contracting authorities or contracting entities shall comply with the following rules:

(a) where the negotiation takes place after the submission of tenders they shall negotiate with tenderers the tenders submitted by them in order to adapt them to the criteria and requirements indicated in accordance with paragraph 1.

(b) they shall not reveal to the other participants solutions proposed or other confidential information communicated by a candidate participating in the negotiations without its agreement. This agreement shall not take the form of a general waiver but must be given with reference to the intended communication of specific solutions or other confidential information;

(c) they may conduct the negotiation in successive stages in order to reduce the number of tenders to be negotiated by applying the award criteria in the contract notice, in the invitation to submit tenders or in the concession documents. In the contract notice, the invitation to submit tenders or the concession documents, the contracting authority shall indicate whether it has had recourse to this option.

(d) they shall assess the tenders as negotiated on the basis of the initially

indicated award criteria;

(e) they shall establish a written record of formal deliberations and any other steps and events relevant for the concession award procedure. In particular, it shall ensure, by all appropriate means, the traceability of the negotiations.

6. Contracting authorities and contracting entities shall as soon as possible inform each candidate and tenderer of decisions reached concerning the award of a concession including the grounds for any decision not to award a contract for which there has been publication of a concession notice or to recommence the procedure.

7. On request from the party concerned, the contracting authority shall as quickly as possible, and in any case within 15 days from receipt of a written request, inform:

(a) any unsuccessful candidates of the reasons for the rejection of their application,

(b) any unsuccessful tenderers of the reasons for the rejection of their tender, including, for the cases referred to in Article 32 (5) and (6), the reasons for its decision of non-equivalence or its decision that the works, supplies or services do not meet the performance or functional requirements,

(c) any tenderers that have made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer or the parties to the framework agreement,

(d) any tenderers that have made an admissible tender of the conduct and progress of negotiations and dialogue with tenderers.

8. However, contracting authorities may decide to withhold certain information referred to in paragraph 6, regarding the

contract where the release of such information would impede law enforcement, would otherwise be contrary to the public interest, would prejudice the legitimate commercial interests of economic operators, whether public or private, or might prejudice fair competition between them.

Justification

Deleted for the purposes of simplification. Taken over in part into Articles 36, 38b and 38c.

Amendment 200

**Proposal for a directive
Article 36 – title**

Text proposed by the Commission

Amendment

Selection *of* and qualitative assessment of candidates

Selection and qualitative assessment of candidates *and tenderers and grounds for exclusion*

Justification

Clarification of Amendment 169 of the Rapporteur.

Amendment 201

**Proposal for a directive
Article 36 – paragraph -1 (new)**

Text proposed by the Commission

Amendment

-1. The grantor shall provide:

(a) in the concession notice, a description of the concession and of the conditions of participation;

(b) in the concession notice, in the invitation to submit a tender or in the concession documents, a description of the award criteria.

Justification

Clarification of Amendment 169 of the Rapporteur. The description of the concession and of the conditions of participation must appear in the concession notice, which is mandatory in order to ensure compliance with the principles of transparency, non-discrimination and equal treatment of candidates and tenderers.

Amendment 202

Proposal for a directive Article 36 – paragraph 1

Text proposed by the Commission

1. **Contracting authorities** shall **specify, in the concession notice** the conditions for participation relating to:

(a) suitability to pursue the professional activity;

(b) economic and financial standing;

(c) technical and professional ability.

Contracting authorities shall limit any conditions for participation to those that are appropriate to ensure that a candidate or tenderer has the legal and financial capacities and the commercial and technical abilities to perform the concession to be awarded. All requirements shall be related and strictly proportionate to the subject-matter of the contract, taking into account the need to ensure genuine competition.

Contracting authorities and contracting entities shall also indicate in the concession notice the reference or references to be submitted as proof of the

Amendment

1. **The grantor** shall **verify** the conditions for participation relating to **the professional and technical ability of the candidates or tenderers, the financial standing of the candidates or tenderers and the reference or references to be submitted as proof in accordance with the requirements specified in the concession notice. Those conditions shall be linked to the subject-matter of the contract and non-discriminatory and may be accompanied by minimum requirements, wherever necessary.**

economic operator's capacities. The requirements in respect of those references shall be non-discriminatory and proportionate to the subject-matter of the concession.

Justification

Combines various provisions of Articles 35 and 36 in a new wording of the provisions relating to the conditions for participation by candidates or tenderers (professional and technical ability and financial standing).

Amendment 203

**Proposal for a directive
Article 36 – paragraph 2**

Text proposed by the Commission

2. With ***regard to the criteria referred to*** in paragraph 1, an economic operator may, where appropriate and for a particular concession, rely on the capacities of other entities, regardless of the legal nature of its links with them. It shall, in that case, prove to the ***contracting authority or the contracting entity*** that it will have at its disposal, throughout the period of the concession, the necessary resources, for example, by producing an undertaking by those entities to that effect. With regard to ***economic and*** financial standing, ***contracting authorities and contracting entities*** may require that the economic operator and those entities are jointly liable for the execution of the contract.

Amendment

2. With ***a view to meeting the conditions for participation laid down*** in paragraph 1, an economic operator may, where appropriate and for a particular concession, rely on the capacities of other entities, regardless of the legal nature of its links with them. It shall, in that case, prove to the ***grantor*** that it will have at its disposal, throughout the period of the concession, the necessary resources, for example, by producing an undertaking by those entities to that effect. With regard to financial standing, ***the grantor*** may require that the economic operator and those entities are jointly liable for the execution of the contract.

Amendment 204

**Proposal for a directive
Article 36 – paragraph 3**

Text proposed by the Commission

3. Under the same conditions, a group of economic operators as referred to in Article 22 may rely on the capacities of

Amendment

deleted

participants in the group or of other entities.

Justification

Deleted for purposes of simplification.

Amendment 205

Proposal for a directive Article 36 – paragraph 3 a (new)

Text proposed by the Commission

Amendment

3a. The grantor may limit the number of candidates or tenderers to an appropriate level, on condition that this is done in a transparent manner and on the basis of objective criteria. The number of candidates or tenderers invited shall be sufficient to ensure genuine competition.

Justification

Takes over part of Article 35 for a new wording on the possibility of placing a limit on the number of candidates (in such cases, an invitation to submit a tender will be forwarded to the candidates selected).

Amendment 206

Proposal for a directive Article 36 – paragraph 4

Text proposed by the Commission

Amendment

4. Member States shall adopt rules combating favouritism, corruption and preventing conflicts of interest, aimed at ensuring the transparency of the award procedure and the equal treatment of all tenderers. *deleted*

With regard to conflicts of interest the measures adopted shall not go beyond what is strictly necessary to prevent or eliminate the conflict identified. In particular, they shall allow for the exclusion of a tenderer or candidate from

the procedure only where the conflict of interests cannot be effectively remedied by other means.

Justification

The provisions on conflicts of interest have been fleshed out and incorporated into new Article 30a.

Amendment 207

Proposal for a directive

Article 36 – paragraph 5 – subparagraph 1 – point e a (new)

Text proposed by the Commission

Amendment

(ea) participation in exploitation of human trafficking and child labour covered by Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims¹.

¹ *OJ L 101, 15.4.2011, p. 1.*

Amendment 208

Proposal for a directive

Article 36 – paragraph 5 – subparagraph 2

Text proposed by the Commission

Amendment

The obligation to exclude a candidate or a tenderer from participation in a concession shall also apply where the conviction by final judgment has condemned company directors or any other any person having powers of representation, decision or control in respect of the candidate or tenderer.

deleted

Amendment 209

Proposal for a directive

Article 36 – paragraph 7 – subparagraph 1 – point a

Text proposed by the Commission

Amendment

(a) where it is aware of any other serious violation of *provisions of European Union* or of national law aimed at the protection of public interests compatible with the *Treaty*;

(a) where it is aware of any other serious violation of Union or of national law aimed at the protection of public interests compatible with the *Treaties*, ***provided that it has been established by a competent body that the violation has taken place***;

Justification

Clarification of the circumstances in which such an exclusion can be made in order to ensure proportionality and free access to concession contracts.

Amendment 210

Proposal for a directive

Article 36 – paragraph 7 – subparagraph 1 – point c

Text proposed by the Commission

Amendment

(c) where the economic operator has shown significant or persistent deficiencies in the performance of any substantive requirement under a prior concession or concessions of a similar nature ***with the same contracting authority or contracting entity***.

(c) where the economic operator has shown significant or persistent deficiencies in the performance of any substantive requirement under a prior concession or concessions of a similar nature.

Justification

It should be possible to exclude an operator also where the contracting authority or contracting entity is aware of such persistent deficiencies with another contracting authority or contracting entity.

Amendment 211

Proposal for a directive

Article 36 – paragraph 7 – subparagraph 1 – point c a (new)

Text proposed by the Commission

Amendment

(ca) where it is aware of any serious or repeated violation of social, environmental, or labour law provisions, as referred to in Article -26a(3).

Amendment 212

Proposal for a directive

Article 36 – paragraph 7 – subparagraph 2

Text proposed by the Commission

Amendment

In order to apply the ground for exclusion referred to in point (c) of the first subparagraph, contracting authorities and contracting entities shall provide a method for the assessment of contractual performance that is based on objective and measurable criteria and applied in a systematic, consistent and transparent way. Any performance assessment has to be communicated to the economic operator in question, which must be given the opportunity to object to the findings and to obtain judicial protection. ***deleted***

Justification

Deleted for purposes of simplification.

Amendment 213

Proposal for a directive

Article 36 – paragraph 9

Text proposed by the Commission

Amendment

9. Member States shall specify the implementing conditions for this article. They shall make available to other Member States, upon request, any information related to the exclusion grounds listed in this Article. The competent authorities of the Member State of establishment shall provide this information in accordance with the provisions of Article 88 of Directive [replacing Directive 2004/18/EC]. ***deleted***

Justification

Deleted for purposes of simplification.

Amendment 214

**Proposal for a directive
Article 37 – paragraph 1**

Text proposed by the Commission

1. When fixing the time limits for the submission of applications *for the concession and submission* of tenders, *contracting authorities or contracting entities* shall take account in particular of the complexity of the concession and the time required for drawing up tenders, *without prejudice to the minimum time limits set out in Article 37.*

Amendment

1. When fixing the time limits for the submission of applications *or* of tenders, *the grantor* shall take account in particular of the complexity of the concession and the time required for drawing up tenders *or applications.*

Justification

The provisions on setting time limits previously spread over Articles 37 and 38 are now brought together in Article 37 for simplification purposes.

Amendment 215

**Proposal for a directive
Article 37 – paragraph 2**

Text proposed by the Commission

2. *Where applications or tenders can be made only after a visit to the site or after on-the-spot inspection of the documents supporting the concession award documents, the time limits for the submission of applications for the concession shall be extended so that all economic operators concerned may be aware of all the information needed to produce applications or tenders.*

Amendment

deleted

Justification

The provisions on setting time limits previously spread over Articles 37 and 38 are now

brought together in Article 37 for simplification purposes.

Amendment 216

Proposal for a directive

Article 37 –paragraphs 2 a and 2 b (new)

Text proposed by the Commission

Amendment

2a. The time limit for the submission of applications or for the submission of tenders shall be not less than 30 working days from the date on which the concession notice was sent or the date on which candidates received notification of the invitation to submit a tender, respectively.

2b. The time limit for receipt of tenders may be reduced by five working days where the contracting entity accepts that tenders may be submitted by electronic means.

Justification

The provisions on setting time limits previously spread over Articles 37 and 38 are now brought together in Article 37 for simplification purposes.

Amendment 217

Proposal for a directive

Article 38

Text proposed by the Commission

Amendment

Article 38

deleted

Time limits for submission of applications for the concession

1. Where contracting authorities and contracting entities resort to a concession, the time limit for the submission of applications for the concession shall be not less than 52 days from the date on which the concession notice was sent.

2. The time limit for receipt of tenders may be reduced by five days where the

contracting entity accepts that tenders may be submitted by electronic means in conformity with Article 25.

Justification

Merged with Article 37 in order to simplify and clarify the directive's provisions.

Amendment 218

**Proposal for a directive
Article 38 a (new)**

Text proposed by the Commission

Amendment

Article 38a

Technical and functional requirements

1. Technical and functional requirements shall define the characteristics required of the works or services that are the subject matter of the concession. They shall be set out in the concession documents.

2. Those requirements shall comply with the principle of equal access of economic operators to the concession award procedure and shall not have the effect of creating unjustified obstacles to the opening up of concessions to competition.

In particular, unless justified by the subject-matter of the contract, technical and functional requirements shall not refer to a specific make or source, or a particular process, or to trade marks, patents, types or a specific production with the effect of favouring or eliminating certain undertakings or certain products. Such a reference shall be permitted, on an exceptional basis, where a sufficiently precise and intelligible description of the subject matter of the contract is not possible. The reference shall be accompanied by the words "or equivalent".

Justification

Article 38a = Article 32(1) and (3)(b) of the Commission proposal. Inclusion of provisions enabling grantors to lay down technical and/or functional requirements for the works or services that are the subject of concessions. This will enable grantors to clarify the subject matter of concessions or lay down more specific requirements (e.g. for disabled access or environmental performance). The technical specifications provided for in Article 32 were too detailed and were at odds with the principle of risk transfer, which calls for a degree of leeway for concessionaires.

Amendment 219

Proposal for a directive Article 38 b (new)

Text proposed by the Commission

Amendment

Article 38b

Award criteria

- 1. The grantor may hold negotiations with candidates and tenderers. It shall provide for appropriate recording of the main stages of the procedure using the means it judges appropriate, subject to compliance with Article 24(1) of this Directive. Concessions shall be awarded by the grantor on the basis of objective award criteria which comply with the principles set out in Article -26a(2).***
- 2. The subject matter of the concession, the award criteria and the minimum requirements shall not be changed in an arbitrary or discriminatory manner during the course of the negotiations. Any changes shall be immediately brought to the attention of the candidates and tenderers concerned.***
- 3. The award criteria shall be linked to the subject matter of the concession. They may include, inter alia, environmental, social or innovation-related criteria. The grantor shall verify whether tenders properly meet the award criteria.***
- 4. The grantor shall indicate in the concession notice or the invitation to submit a tender his ranking order, if any,***

for the criteria referred to in paragraph 1.

Justification

Formerly Article 39. New article on award criteria, arranged as follows: (1) reference to the importance of negotiations in the procedure for awarding concessions; (2) stipulation that no arbitrary changes may be made to award criteria during the course of the procedure; (3) specification of scope of award criteria; (4) option for the grantor to rank the criteria. The weighting approach has been discarded, as it does not provide the necessary flexibility. Ranking should be optional, so as to enable any innovative solutions not previously provided for to be included.

Amendment 220

**Proposal for a directive
Article 38 c (new)**

Text proposed by the Commission

Amendment

Article 38c

***Provision of information to candidates
and tenderers***

- 1. The grantor shall as soon as possible inform each candidate and tenderer of decisions reached concerning the award of a concession, including the grounds for any decision to reject his application or tender and the grounds for any decision not to award a contract for which there has been publication of a concession notice or to recommence the procedure.***
- 2. The grantor may decide to withhold certain information referred to in paragraph 1, regarding the contract, where the release of such information would impede law enforcement, would otherwise be contrary to the public interest, would prejudice the legitimate commercial interests of economic operators, whether public or private, or might prejudice fair competition between such operators.***

Justification

Based on Article 35(6) and (8) of the Commission proposal.

Amendment 221

Proposal for a directive Article 39

Text proposed by the Commission

Amendment

Article 39

deleted

Concession award criteria

1. Concessions shall be awarded on the basis of objective criteria which ensure compliance with the principles of transparency, non-discrimination and equal treatment and which ensure that tenders are assessed in conditions of effective competition permitting to identify an overall economic advantage for the contracting authority or the contracting entity.

2. The award criteria shall be linked to the subject matter of the concession, and shall not confer an unrestricted freedom of choice on the contracting authority or the contracting entity.

Those criteria shall ensure effective competition and shall be accompanied by requirements which allow the information provided by the tenderers to be effectively verified. Contracting authorities and contracting entities shall verify effectively on the basis of the information and proof provided by the tenderers, whether the tenders meet the award criteria.

3. The contracting authority or the contracting entity shall indicate in the concession notice or documents the relative weighting which it gives to each of the criteria set out in paragraph 1 or list those criteria in descending order of importance.

4. Member States may provide that contracting authorities and contracting entities shall base the award of concessions on the criterion of the most economically advantageous tender, in compliance with paragraph 2. Those

criteria may include, in addition to price or costs, any of the following criteria

(a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, environmental characteristics and innovative character.

(b) for service concessions and concessions involving the design of works, the organisation, qualification and experience of the staff assigned to performing the concession in question may be taken into consideration, with the consequence that, following the award of the concession, such staff may only be replaced with the consent of the contracting authority or the contracting entity, which must verify that replacements ensure equivalent organisation and quality;

(c) after-sales service and technical assistance, delivery date and delivery period or period of completion;

(d) the specific process of production or provision of the requested works, supplies or services or of any other stage of its life cycle as referred to in point 14 of paragraph 1 of Article 2, to the extent that those criteria concern factors directly involved in these processes and characterise the specific process of production or provision of the requested works, supplies or services.

5. In the case referred to in paragraph 4, the contracting authority or entity shall specify in the contract notice, in the invitation to submit a tender, or in the concession documents, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender.

Those weightings may be expressed by providing for a range with an appropriate maximum spread.

Where weighting is not possible for objective reasons, the contracting

authority or entity shall indicate the criteria in decreasing order of importance.

Justification

See new Article 38b.

Amendment 222

Proposal for a directive Article 40

Text proposed by the Commission

Amendment

Article 40

deleted

Life-cycle costing

1. Life-cycle costing shall to the extent relevant cover all of the following costs over the life cycle of a product, service or works as defined in point 14 of paragraph 1 of Article 2:

(a) internal costs, including costs relating to acquisition (such as production costs), use (such as energy consumption, maintenance costs) and end of life (such as collection and recycling costs)

(b) external environmental costs directly linked to the life cycle, provided their monetary value can be determined and verified, which may include the cost of emissions of greenhouse gases and of other pollutant emissions and other climate change mitigation costs.

2. Where contracting authorities assess the costs using a life-cycle costing approach, they shall indicate in the concession award documents the methodology used for the calculation of the life-cycle costs. The methodology used must fulfil all of the following conditions:

(a) It has been drawn up on the basis of scientific information or is based on other objectively verifiable and non-discriminatory criteria;

(b) It has been established for repeated or continuous application;

(c) It is accessible to all interested parties.

Contracting authorities and contracting entities shall allow economic operators to apply a different methodology for establishing the life-cycle costs of their offer, provided that they prove that this methodology complies with the requirements set out in points a, b and c and is equivalent to the methodology indicated by the contracting authority or contracting entity.

3. Whenever a common methodology for the calculation of life-cycle costs is adopted as part of a legislative act of the Union, including by delegated acts pursuant to sector specific legislation, it shall be applied where life-cycle costing is included in the award criteria referred to in Article 39 paragraph (4).

A list of such legislative and delegated acts is set out in Annex II. The Commission shall be empowered to adopt delegated acts in accordance with Article 46 concerning the update of this list, when on the basis of the adoption of new legislation, repeal or modification of such legislation, such amendments prove necessary.

Justification

This article has been deleted in line with the deletion of the most economically advantageous tender criterion. The grantor should be free to use any award criteria that he considers appropriate, on condition that they comply with the rules laid down in this directive.

Amendment 223

Proposal for a directive Article 41

Text proposed by the Commission

1. In the concession documents, the *contracting authority or contracting entity*

Amendment

1. In the concession documents, the *grantor shall* ask the tenderer to indicate in

may ask or may be required by a Member State to ask the tenderer to indicate in its tender any share of the contract it may intend to subcontract to third parties and any proposed subcontractors.

2. Paragraph 1 shall be without prejudice to the question of the principal economic operator's liability.

its tender any share of the contract it may intend to subcontract to third parties.

1a. After the tenderer has been selected, it shall indicate to the contracting authorities the name, contact details and legal representatives of the subcontractors and any changes related to that information during the course of the contract. The information shall be provided to the tenderer by each subcontractor in the subcontracting chain through the subcontractor's direct contractor. Each subcontractor shall keep the information up-to-date during the course of the contract.

2. Paragraph 1 shall be without prejudice to the question of the principal economic operator's liability.

2a. Member States shall ensure that subcontractors also respect all mandatory legal, regulatory and administrative provisions in force in the Member State of contract performance, including the obligations referred to in Article - 26a(3). To this end, Member States may provide for a system of liability throughout the subcontracting chain so that the direct contractor of a subcontractor is liable in the event that the subcontractor fails to comply with one of those provisions or is insolvent. When a direct contractor is insolvent, such system should provide that the next solvent direct contractor up the subcontracting chain, including the main contractor, is liable.

2b. Member States may provide for more stringent liability rules under national law.

Amendment 224

Proposal for a directive Article 42 - paragraph 1

Text proposed by the Commission

1. ***A substantial modification of the provisions of a concession during its term shall be considered as a new award for the purposes of this Directive and shall require a new concession award procedure in accordance with this Directive.***

Amendment

1. A concession ***may be modified*** during its term ***by means of a supplementary agreement unless the modifications are substantial.***

Justification

Introduction of a new paragraph to make the article clear, by specifying that a concession may be modified during its term (general principle), unless the modifications are substantial (exclusions).

Amendment 225

Proposal for a directive Article 42 - paragraph 2

Text proposed by the Commission

2. ***A modification of a concession during its term shall be considered substantial within the meaning of paragraph 1, where it renders the concession substantially different from the one initially concluded. In any case, without prejudice to paragraph 3 and 4, a modification shall be considered substantial where one of the following conditions is met:***

(a) the modification introduces conditions which, had they been part of the initial concession award procedure, would have allowed for the selection of other applicants than those initially selected, or would have allowed for awarding the

Amendment

2. ***Substantial*** modification of a concession during its term shall ***require a new award procedure in accordance with this Directive. A modification shall*** be considered substantial where one of the following conditions is met:

(-a) the modification changes the nature of the concession;

(-aa) the modification entails replacement of the concessionaire;

(a) the modification introduces conditions which, had they been part of the initial concession award procedure, would have allowed for the selection of other applicants than those initially selected, or would have allowed for awarding the

concession to another applicant or tenderer;
(b) the modification changes the economic balance of the concession *in favour of the concessionaire* or
(c) the modification extends the scope of the concession considerably *to encompass* supplies, services or works not initially covered.

concession to another applicant or tenderer;
(b) the modification *substantially* changes the economic balance of the concession; or
(c) the modification extends the scope of the concession considerably *in that it encompasses* supplies, services or works not initially covered.

Justification

The term 'substantial modification' which entails the launching of a new award procedure is clarified and Article 42(3), which also covers a case of substantial modification (replacement of the concessionaire), is included here. This makes the text clearer and simplifies it.

Amendment 226

Proposal for a directive Article 42 - paragraph 3

Text proposed by the Commission

3. The replacement of the concessionaire shall be considered a substantial modification within the meaning of paragraph 1.

*However, the first subparagraph shall not apply in the event of universal or partial succession into the position of the initial contractor, following corporate restructuring operations, insolvency or **on the basis of** a contractual clause of another economic operator that fulfils the criteria for qualitative selection initially established provided that this does not entail other substantial modifications to the concession and is not aimed at circumventing the application of this Directive.*

Amendment

Point (-aa) of the first subparagraph of this paragraph shall not apply in the event of universal or partial succession into the position of the initial contractor following:

- (a) corporate restructuring operations;***
- (b) the transfer of capital or assets between undertakings,***
- (c) the takeover of the concessionaire following insolvency or pursuant to a contractual clause of another economic***

operator that fulfils the criteria for qualitative selection initially established provided that this does not entail other substantial modifications to the concession and is not aimed at circumventing the application of this Directive.

Justification

This paragraph is moved into Article 42(2) so as to clarify and simplify the directive.

Amendment 227

**Proposal for a directive
Article 42 - paragraph 2 a (new)**

Text proposed by the Commission

Amendment

2a. Provided the overall nature of the concession remains the same, modification of the concession shall not be considered substantial where:

(a) the modification has been provided for in the original concession contract in clear, precise and unequivocal review clauses or options made in accordance with Union and national law which state the scope and nature of possible modifications as well as the conditions under which they may be used; or

b) the value thereof is below 10 % of the updated value of the original contract.

Where several successive modifications are made, the value of the successive modifications shall be assessed on the basis of the updated cumulative value of the successive modifications.

Justification

Rearrangement of existing Articles 42(4) and 42(5) which concern two cases where the modification is not considered to be substantial if it does not change the nature of the concession (review clauses or options; threshold of 5 % of the initial value). The 'public procurement' terminology ('price') has been changed. The new updated value of the original contract, which is a more accurate value, is taken into account. The second subparagraph is taken from Article 42(4).

Amendment 228

Proposal for a directive Article 42 – paragraph 4

Text proposed by the Commission

Amendment

4. Where the value of a modification can be expressed in monetary terms, the modification shall not be considered to be substantial within the meaning of paragraph 1, where its value does not exceed the thresholds set out in Article 5 and where it is below 5 % of the price of the initial contract, provided that the modification does not alter the overall nature of the contract. Where several successive modifications are made, the value shall be assessed on the basis of the cumulative value of the successive modifications. *deleted*

Justification

Text covered by paragraph 2a.

Amendment 229

Proposal for a directive Article 42 - paragraph 5

Text proposed by the Commission

Amendment

5. Concession modifications shall not be considered substantial within the meaning of paragraph 1, where they have been provided for in the concession documents in clear, precise and unequivocal review clauses or options. Such clauses shall state the scope and nature of possible modifications or options as well as the conditions under which they may be used. They shall not provide for modifications or options that would alter the overall nature of the concession. *deleted*

Amendment 230

Proposal for a directive

Article 42 – paragraph 6 – subparagraph 1 – point a

Text proposed by the Commission

(a) the need for modification has been brought about by circumstances which a diligent **contracting authority or entity** could not **foresee**

Amendment

(a) the need for modification has been brought about by circumstances which a diligent **grantor** could not **anticipate**;

Justification

Modification of the existing Article 42(6) which sets out the situation in which, even though the modification is substantial, a new award procedure is not required.

Amendment 231

Proposal for a directive

Article 42 - paragraph 6 – subparagraph 1 – point c

Text proposed by the Commission

(c) in case of concessions awarded by contracting authorities where **any increase in price** is **not** higher than 50% of the value of the **original** concession.

Amendment

(c) in case of concessions awarded by contracting authorities where **the value of the intended modification does not exceed** 50% of the **updated initial** value of the concession;

Justification

Modification of the existing Article 42(6), which sets out the situation in which, even though the modification is substantial, a new award procedure is not required. The new updated value of the original contract, which is a more accurate value, has been taken into account. In addition, the ‘public procurement’ terminology (‘price’) has been changed.

Amendment 232

Proposal for a directive

Article 42 - paragraph 6 - subparagraph 2

Text proposed by the Commission

Contracting authorities or contracting entities shall publish in the Official Journal of the European Union a notice on such modifications. Such notices shall contain

Amendment

The grantor shall publish in the Official Journal of the European Union a notice on such modifications. Such notices shall contain the information set out in Annex

the information set out in Annex VII and be published in accordance with the provisions of Article 28.

VII and be published in accordance with the provisions of Article 28.

Amendment 233

Proposal for a directive

Article 42 - paragraph 7 – introductory part

Text proposed by the Commission

Amendment

7. Contracting authorities and contracting entities shall not have recourse to modifications of the concession in the following cases:

7. The grantor shall not invoke this Article in the following cases:

Amendment 234

Proposal for a directive

Article 42 - paragraph 7 – point b

Text proposed by the Commission

Amendment

(b) where the modification would aim at **compensating risks of price increases that are the result of price fluctuations that could substantially impact the performance of a contract and that have been hedged** by the concessionaire.

(b) where the modification would aim at **lessening the operating risks assumed** by the concessionaire.

Justification

Clarification of existing Article 42(7), which refers to two modification cases where the grantor may not rely upon the clauses of this article, in order to avoid possible abuses (claims that changes which should in reality require a new contract award procedure are only modifications and thus may benefit from potentially less stringent provisions such as the new Articles 42(3) and (4)).

Amendment 235

Proposal for a directive

Article 43 – introductory part

Text proposed by the Commission

Amendment

Member States shall ensure that

Member States shall ensure that **the**

contracting authorities and contracting entities have the possibility, under the conditions determined by the applicable national ***contract*** law, to terminate a concession during its term, where one of the following conditions is fulfilled:

grantor has the possibility, under the conditions determined by the applicable national law, to terminate a concession during its term, where one of the following conditions is fulfilled:

Amendment 236

Proposal for a directive Article 43 – point a

Text proposed by the Commission

(a) the exceptions provided for in Article 15 cease to apply following a private participation in the legal person awarded the contract pursuant to Article 15 (4);

Amendment

(a) the exceptions provided for in Article 15 cease to apply following a private participation in the legal person awarded the contract pursuant to Article 15;

Justification

Restricting the provisions of this paragraph solely to Article 15(4) (horizontal cooperation) is not logical. They should apply to all the cases cited in Article 15(4) where no private participation is a criterion.

Amendment 237

Proposal for a directive Article 43 – point c

Text proposed by the Commission

(c) the Court of Justice of the European Union finds, in a procedure pursuant to Article 258 of the Treaty, that a Member State has failed to fulfil its obligations under the Treaties by the fact that a ***contracting authority or entity*** belonging to that Member State has awarded the concession in question without complying with its obligations under the Treaties and this Directive.

Amendment

(c) the Court of Justice of the European Union finds, in a procedure pursuant to Article 258 of the Treaty, that a Member State has failed to fulfil its obligations under the Treaties by the fact that a ***grantor*** belonging to that Member State has awarded the concession in question without complying with its obligations under the Treaties and this Directive.

Amendment 238

Proposal for a directive Article 43 a (new)

Text proposed by the Commission

Amendment

Article 43a

Governance

1. In order to ensure correct and efficient implementation of this Directive, Member States shall ensure that at least the tasks set out in this Article are performed by one or more authorities or structures. They shall indicate to the Commission all authorities or structures competent for performing those tasks.

2. Member States shall ensure that the application of rules for the award of concessions contracts is monitored, including the implementation of projects co-financed by the Union with a view to detecting threats to the financial interests of the Union. Such monitoring shall be used to prevent, detect and adequately report possible instances of procurement fraud, corruption, conflict of interest and other serious irregularities.

Where monitoring authorities or structures identify specific violations or systemic problems, they shall be empowered to refer those violations or problems to national auditing authorities, courts or tribunals or other appropriate authorities or structures, such as the ombudsman, national Parliaments or committees thereof.

3. At their request, the competent national authorities shall be notified by contracting authorities and entities of any activities which they regard as excluded from this Directive pursuant to Article 8(5b).

4. The results of the monitoring activities carried out pursuant to paragraph 2 shall be made available to the public through appropriate means of information. In

particular, Member States shall publish, at least once every two years, an overview of the most frequent causes of incorrect application of the rules for the award of concessions contracts or of legal uncertainty, including possible structural or recurring problems in the application of the rules, including possible cases of fraud and other illegal behaviour.

5. Member States shall ensure that guidance on the interpretation and application of Union law for the award of concessions contracts is available free of charge to assist contracting authorities and entities and economic operators in correctly applying the Union rules.

Amendment 239

Proposal for a directive Article 46 – paragraph 2

Text proposed by the Commission

2. The *delegation of* power referred to in *Articles 4 (3), 21 (3), 23 (2), 25 (3), 40 (3) and 52 (2)* shall be conferred on the Commission for an indeterminate period of time from *the [date of entry into force of the present Directive]*.

Amendment

2. The power *to adopt delegated acts* referred to in *Article 21(3) and Article 23(2)* shall be conferred on the Commission for an indeterminate period of time from*.

**OJ: please insert the date of entry into force of this Directive.*

Justification

This deletes an incorrect reference that does not exist (Article 52(2)) and brings the provisions on delegated acts up to date.

Amendment 240

Proposal for a directive Article 46 – paragraph 3

Text proposed by the Commission

3. The delegation of power referred to in **Articles 4 (3), 21 (3), 23 (2), 25 (3), 40 (3) and 52 (2)**, may be revoked at any time by the European Parliament or **by** the Council. **A revocation** decision shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the Official Journal of the European Union or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.

Amendment

3. The delegation of power referred to in **Article 21(3) and Article 23(2)** may be revoked at any time by the European Parliament or the Council. **The decision to revoke** shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the Official Journal of the European Union or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.

Justification

This deletes an incorrect reference that does not exist (Article 52(2)) and brings the provisions on delegated acts up to date.

Amendment 241

Proposal for a directive Article 49 – paragraph 2 a (new)

Text proposed by the Commission

Amendment

2a. Member States shall ensure that this Directive does not apply to concessions awarded before ...*. This Directive shall however apply to modifications and terminations of contracts taking place after ...*.

*** OJ: please insert the date of entry into force of this Directive.**

Amendment 242

Proposal for a directive

Article 51 – paragraph 1 a and 1 b(new)

Text proposed by the Commission

Amendment

The Commission shall review the functioning of this Directive and shall report to the European Parliament and to the Council by ..., and every five years thereafter, based on information that Member States shall provide.*

The Commission shall make the results of the reviews carried out in accordance with the second paragraph publicly available.

** OJ Please insert the date: "[five] years after the date of transposition of this Directive set out in Article 49(1), first subparagraph".*

Amendment 243

Proposal for a directive

Annex II

Text proposed by the Commission

Amendment

ANNEX II

deleted

**LIST OF EU LEGISLATION
REFERRED TO IN ARTICLE 40 (3)**

1. Directive 2009/33/EC.

Justification

Linked to deletion of Article 40.

Amendment 244

Proposal for a directive Annex III – point 1

Text proposed by the Commission

1. As far as gas **and heat** are concerned:

(a) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of gas ;

(b) the supply of gas **or heat** to such networks.

The supply of gas **or heat** to networks which provide a service to the public by a contracting entity referred to in paragraph 1 subparagraph 2 and subparagraph 3 of Article 4 shall not be considered a relevant activity within the meaning of paragraph 1 where all of the following conditions are met:

(c) the production of gas **or heat** by the entity concerned is the unavoidable consequence of carrying out an activity other than those referred to in this paragraph or in paragraphs 2 to 4 of this Annex;

(d) the supply to the public network is aimed only at the economic exploitation of such production and amounts to not more than 20 % of the entity's turnover on the basis of the average for the preceding three years, including the current year.

Amendment

1. As far as gas, **heating and cooling** are concerned:

(a) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of gas, **heating and cooling**;

(b) the supply of gas, **heating and cooling** to such networks.

The supply of gas, **heating and cooling** to networks which provide a service to the public by a contracting entity referred to in paragraph 1 subparagraph 2 and subparagraph 3 of Article 4 shall not be considered a relevant activity within the meaning of paragraph 1 where all of the following conditions are met:

(c) the production of gas, **heating and cooling** by the entity concerned is the unavoidable consequence of carrying out an activity other than those referred to in this paragraph or in paragraphs 2 to 4 of this Annex;

(d) the supply to the public network is aimed only at the economic exploitation of such production and amounts to not more than 20 % of the entity's turnover on the basis of the average for the preceding three years, including the current year.

Justification

Addition of activities linked to cold as this involves the same system as for heat.

Amendment 245

Proposal for a directive Annex III – point 2 – subparagraph 2

Text proposed by the Commission

For the purposes of this Directive, supply of electricity includes generation (production) and **wholesale of electricity**.

Amendment

For the purposes of this Directive, supply of electricity includes generation (production) and **supply**.

Justification

Supply of electricity also covers the retail sale (to individuals) thereof and not just its wholesaling.

Amendment 246

Proposal for a directive Annex III – point 5

Text proposed by the Commission

5. Activities relating to the exploitation of a geographical area for the purpose of the provision of airports and maritime or inland ports or other **terminal facilities** to carriers by air, sea or inland waterway.

Amendment

5. Activities relating to the exploitation of a geographical area for the purpose of the provision of airports and maritime or inland ports or other **general infrastructure** to carriers by air, sea or inland waterway.

Justification

Terminal facilities are not a type of general infrastructure, which is covered by the activities of contracting authorities, but a type of superstructure, and therefore covered by the activities of private undertakings.

Amendment 247

Proposal for a directive Annex IV – title

Text proposed by the Commission

INFORMATION TO BE INCLUDED IN
CONCESSION NOTICES

Amendment

(Does not affect English version)

Amendment 248

Proposal for a directive Annex IV – point 4

Text proposed by the Commission

Amendment

4. Description of the **procurement**: nature and extent of works, **nature and quantity or value of supplies**, nature and extent of services. **Where the concession is divided into lots, this information shall be provided for each lot. Where appropriate, description of any options.**

4. Description of the **contract**: nature and extent of works, nature and extent of services.

Justification

This simplifies the information required in concession notices and removes information linked to public procurement (such as lots, supply of goods, etc.).

Amendment 249

Proposal for a directive Annex IV – point 5

Text proposed by the Commission

Amendment

5. CPV Nomenclature reference No(s). **Where the concession is divided into lots, this information shall be provided for each lot.**

5. CPV Nomenclature reference No(s).

Justification

This simplifies the information required in concession notices and removes information linked to public procurement (such as lots, supply of goods, etc.).

Amendment 250

Proposal for a directive Annex IV – point 6

Text proposed by the Commission

Amendment

6. NUTS code for the main location of works in case of works concessions or NUTS code for the main place of performance service concessions; **where**

6. NUTS code for the main location of works in case of works concessions or NUTS code for the main place of

the concession is divided into lots, this information shall be provided for each lot.

performance service concessions.

Justification

This simplifies the information required in concession notices and removes information linked to public procurement (such as lots, supply of goods, etc.).

Amendment 251

**Proposal for a directive
Annex IV – point 7**

Text proposed by the Commission

Amendment

7. Estimated total value of concession(s); where the concession is divided into lots, this information shall be provided for each lot, together with detailed method of calculation of the estimated total value of the concession, in accordance with Art. 6

7. Estimated total value of concession(s).

Justification

This simplifies the information required in concession notices and removes information linked to public procurement (such as lots, supply of goods, etc.).

Amendment 252

**Proposal for a directive
Annex IV – point 8**

Text proposed by the Commission

Amendment

8. Where the concession is to be subdivided into lots, indication of the possibility of tendering for one, for several or for all of the lots; indication of any possible limitation of the number of lots that may be awarded to any one tenderer.

deleted

Justification

This simplifies the information required in concession notices and removes information linked to public procurement (such as lots, supply of goods, etc.).

Amendment 253

Proposal for a directive

Annex IV – point 9

Text proposed by the Commission

Amendment

9. Time-frame for ***delivery or provision of supplies, works or services and, as far as possible***, duration of the concession.

9. Time frame for ***implementation of the concession***; duration of the concession.

Justification

This simplifies the information linked to public procurement (such as lots, supply of goods, etc.).

Amendment 254

Proposal for a directive

Annex IV – point 10 – point b

Text proposed by the Commission

Amendment

b) where appropriate, indication whether the provision of the service is reserved by law, regulation or administrative provision to a particular profession; reference to the relevant law, regulation or administrative provision,

deleted

Justification

This amendment seeks to simplify the rules on the award of concession contracts.

Amendment 255

Proposal for a directive

Annex IV – point 11 – introductory part

Text proposed by the Commission

Amendment

11. Description of award procedure used, ***if the procedure is to be conducted in stages, number of candidates to be admitted to a given stage or to be invited to submit tenders and objective criteria to be used to choose the candidates in question.***

11. Description of award procedure used:

Justification

This simplifies the information required in concession notices and removes information linked to public procurement (such as lots, supply of goods, etc.).

Amendment 256

Proposal for a directive Annex IV – point 11 – point a

Text proposed by the Commission

a) Time limit for the submission of applications

Amendment

a) Time limit for the submission of applications ***or receipt of tenders;***

Amendment 257

Proposal for a directive Annex IV – point 14

Text proposed by the Commission

14. Name and address of the body responsible for appeal and, where appropriate, mediation procedures. Precise information concerning the deadline for lodging appeals or, if need be, the name, address, telephone number, fax number and email address of the service from which this information may be obtained.

Amendment

14. Name and address of the ***competent national authorities and of the*** body responsible for appeal and, where appropriate, mediation procedures. Precise information concerning the deadline for lodging appeals or, if need be, the name, address, telephone number, fax number and email address of the service from which this information may be obtained.

Amendment 258

Proposal for a directive Annex IV – point 17

Text proposed by the Commission

17. In case of one-stage procedures:
a) Time limit for receipt of tenders, if different from the time limit the submission of applications
b) time frame during which the tenderer must maintain its tender,

Amendment

deleted

c) date, time and place for the opening of tenders,

d) persons authorised to be present at such opening.

Justification

This simplifies the information required in concession notices and removes information linked to public procurement (such as lots, supply of goods, etc.).

Amendment 259

Proposal for a directive Annex V – part I – point 5

Text proposed by the Commission

5. Description of the **procurement**: nature and extent of works, ***nature and quantity or value of supplies***, nature and extent of services. ***Where the concession is divided into lots, this information shall be provided for each lot. Where appropriate, description of any options.***

Amendment

5. Description of the **contract**: nature and extent of works, nature and extent of services.

Amendment 260

Proposal for a directive Annex V – part I – point 7

Text proposed by the Commission

7. Criteria referred to in Article **39** which were used for award of the concession or concessions.

Amendment

7. Criteria referred to in Article **38b** which were used for award of the concession or concessions.

Amendment 261

Proposal for a directive Annex V – part I – point 9

Text proposed by the Commission

9. Number of tenders received with respect of each award, including:

Amendment

deleted

a) number of tenders received from economic operators which are small and medium enterprises,

b) number of tenders received from abroad,

c) number of tenders received electronically.

Justification

This simplifies the information required in concession award notices and removes information linked to public procurement (such as lots, supply of goods, etc.). Where no prior notice has been published, some information is not relevant.

Amendment 262

**Proposal for a directive
Annex V – part I – point 10**

Text proposed by the Commission

10. For each award, name, address including NUTS code, telephone, fax number, email address and internet address of the successful tenderer(s) **including**

a) information whether the successful tenderer is small and medium enterprise,

b) information whether the concession was awarded to a consortium.

Amendment

10. For each award, name, address including NUTS code, telephone, fax number, email address and internet address of the successful tenderer(s).

Justification

This simplifies the information required in concession award notices and removes information linked to public procurement (such as lots, supply of goods, etc.). Where no prior notice has been published, some information is not relevant.

Amendment 263

**Proposal for a directive
Annex V – part I – point 11**

Text proposed by the Commission

11. Value and main financial terms of the awarded concession, **including fees and**

Amendment

11. Value and main financial terms of the awarded concession.

prices.

Justification

This simplifies the information required in concession award notices and removes information linked to public procurement (such as lots, supply of goods, etc.). Where no prior notice has been published, some information is not relevant.

Amendment 264

**Proposal for a directive
Annex V – part I – point 12**

Text proposed by the Commission

Amendment

12. Where appropriate, for each award, value and proportion of concession likely to be subcontracted to third parties. *deleted*

Justification

This simplifies the information required in concession award notices and removes information linked to public procurement (such as lots, supply of goods, etc.). Where no prior notice has been published, some information is not relevant.

Amendment 265

**Proposal for a directive
Annex V – part I – point 14**

Text proposed by the Commission

Amendment

14. Name and address of the **oversight body and the** body responsible for review and, where appropriate, mediation procedures. Precise information concerning the deadline for review procedures, or if need be, the name, address, telephone number, fax number and email address of the service from which this information may be obtained.

14. Name and address of the **competent national authorities and of the** body responsible for review and, where appropriate, mediation procedures. Precise information concerning the deadline for review procedures, or if need be, the name, address, telephone number, fax number and email address of the service from which this information may be obtained.

Justification

Alignment with the rest of the draft report, deletion of references to the oversight body.

Amendment 266

Proposal for a directive Annex V – part I – point 17

Text proposed by the Commission

Amendment

17. Detailed method of calculation of the estimated total value of the concession, in accordance with Article 6. *deleted*

Justification

This amendment seeks to simplify the rules on the award of concession contracts. What is more, this provision could expose small contracting authorities to the risk of legal disputes.

Amendment 267

Proposal for a directive Annex V – part II

Text proposed by the Commission

Amendment

II. INFORMATION TO BE INCLUDED IN CONCESSION AWARD NOTICES PUBLISHED IN ACCORDANCE WITH ARTICLE 27(2) *deleted*

1. Name, identification number (where provided for in national legislation), address including NUTS code, telephone, fax number, email and internet address of the contracting authority or entity and, where different, of the service from which additional information may be obtained.

2. Description of the procurement: nature and extent of works, nature and quantity or value of supplies, nature and extent of services. Where the concession is divided into lots, this information shall be provided for each lot. Where appropriate, description of any options.

3. CPV Nomenclature reference No(s).

4. Type of contracting authority or entity and main activity exercised.

5. Date of concession award decision or decisions;

6. For each award, name, address including NUTS code, telephone, fax number, email address and internet address of the economic operators to which the concession has been awarded.

7. Value and main financial terms of the award, including fees and prices.

8. Detailed method of calculation of the estimated total value of the concession, in accordance with Article 6.

Justification

Deletion of this part referring to concession notices for intermediate thresholds (as a result of deleting Article 27(2)).

Amendment 268

**Proposal for a directive
Annex VI – point 3**

Text proposed by the Commission

Amendment

3. CPV Nomenclature reference No(s);
where the contract is divided into lots, this information shall be provided for each lot.

3. CPV Nomenclature reference No(s).

Justification

This simplifies the information required in award notices for the concession of social and other specific services, notably the reference to lots and deletion of information linked to public procurement.

Amendment 269

**Proposal for a directive
Annex VI – point 4**

Text proposed by the Commission

Amendment

4. ***At least a summary indication of the nature and quantity of the services and if applicable, works and supplies provided.***

4. Summary indication of the ***subject of the concession.***

Justification

This simplifies the information required in award notices for the concession of social and other specific services, and deletes information linked to public procurement.

Amendment 270

Proposal for a directive Annex VI – point 6

Text proposed by the Commission

Amendment

6. Value and main financial terms of the award, ***including fees and prices***.

6. Value and main financial terms of the award.

Justification

This simplifies the information required in award notices for the concession of social and other specific services, and deletes information linked to public procurement.

Amendment 271

Proposal for a directive Annex VII – paragraph 3

Text proposed by the Commission

Amendment

3. NUTS code for the main location of works in case of ***public works concessions or works concessions*** or NUTS code for the main place of ***delivery or performance*** in service concessions;

3. NUTS code for the main location of works in case of works concessions or NUTS code for the main place of performance in service concessions;

Justification

This simplifies the information required in concession modification notices, and deletes information linked to public procurement.

Amendment 272

Proposal for a directive Annex VII – point4

Text proposed by the Commission

Amendment

4. Description of the concession before and after the modification: nature and extent of

4. Description of the concession before and after the modification: nature and extent of

the works, ***nature and quantity or value of supplies***, nature and extent of services.

the works, nature and extent of services.

Justification

This simplifies the information required in concession modification notices, and deletes information linked to public procurement.

Amendment 273

**Proposal for a directive
Annex VII – point 5**

Text proposed by the Commission

Amendment

5. Where applicable, modification of financial terms of the concession, ***including increase in prices or fees caused by the modification.***

5. Where applicable, modification of financial terms of the concession.

Justification

This simplifies the information required in concession modification notices, and deletes information linked to public procurement.

Amendment 274

**Proposal for a directive
Annex VII – point 10**

Text proposed by the Commission

Amendment

10. Name and address of the ***oversight body*** and the body responsible for review and, where appropriate, mediation procedures. Precise information concerning the deadline for review procedures, or if need be, the name, address, telephone number, fax number and email address of the service from which this information may be obtained.

10. Name and address of the ***competent national authorities*** and ***of*** the body responsible for review and, where appropriate, mediation procedures. Precise information concerning the deadline for review procedures, or if need be, the name, address, telephone number, fax number and email address of the service from which this information may be obtained.

Justification

Alignment with the rest of the draft report, deletion of references to the oversight body.

Amendment 275

Proposal for a directive Annex VIII

Text proposed by the Commission

Amendment

ANNEX VIII

deleted

DEFINITION OF CERTAIN TECHNICAL SPECIFICATIONS

For the purposes of this Directive:

1. technical specification", " means one of the following:

a) in the case of public works concessions or works concessions, the totality of the technical prescriptions contained in particular in the concession award documents, defining the characteristics required of a material, product or supply, so that it fulfils the use for which it is intended by the contracting authority or entity. Those characteristics include levels of environmental and climate performance, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, safety or dimensions, including the procedures concerning quality assurance, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions and production processes and methods at any stage of the life cycle of the works; those characteristics also include rules relating to design and costing, the test, inspection and acceptance conditions for works and methods or techniques of construction and all other technical conditions which the contracting authority or entity is in a position to prescribe, under general or specific regulations, in relation to the finished works and to the materials or parts which they involve;

b) in the case of service concessions, a specification in a document defining the required characteristics of a product or a

service, such as quality levels, environmental and climate performance levels, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, use of the product, safety or dimensions, including requirements relevant to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions, production processes and methods at any stage of the life cycle of the supply or service and conformity assessment procedures;

2. "standard" means a technical specification approved by a recognised standardising body for repeated or continuous application, compliance with which is not compulsory and which falls into one of the following categories:

a) international standard: a standard adapted by an international standards organisation and made available to the general public,

b) European standard: a standard adopted by a European standards organisation and made available to the general public,

c) national standard: a standard adopted by a national standards organisation and made available to the general public;

3. "European technical approval" means a favourable technical assessment of the fitness for use of a product for a particular purpose, based on the fulfilment of the essential requirements for building works, by means of the inherent characteristics of the product and the defined conditions of application and use. European technical approvals are issued by an approval body designated for this purpose by the Member State;

4. "Common technical specification" means a technical specification laid down in accordance with a procedure recognised by the Member States which

has been published in the Official Journal of the European Union;

5. "Technical reference" means any deliverable produced by European standardisation bodies, other than European standards, according to procedures adapted to the development of market needs.

Justification

This deletes this annex concerning technical specifications (following on from the deletion of Article 32).

Amendment 276

Proposal for a directive Annex IX – paragraph 1 – subparagraph 3

Text proposed by the Commission

The Publications Office of the European Union will give the contracting authority or entity the confirmation referred to in Article 28 (5).

Amendment

– The Publications Office of the European Union will give the contracting authority or entity the confirmation referred to in Article 28(2).

Amendment 277

Proposal for a directive Annex X – column 1 – rows 1 and 2

Text proposed by the Commission

CPV Code
7511000-4 and
from 85000000-9 to 85323000-9
(except 85321000-5 and 85322000-2)
75121000-0, 75122000-7, 75124000-1

Amendment

CPV Code
79611000-0 and
from 85000000-9 to 85323000-9
(except 85321000-5 and 85322000-2)
75121000-0, 75122000-7, 75124000-1;
from 79995000-5 to 79995200-7; from 80100000-5 to 80660000-8 (except 80533000-9, 80533100-0, 80533200-1); from 92000000-1 to 92700000-8 (except 92230000-2, 92231000-9 92232000-6)

Justification

This updates the list of social and other specific services benefiting from less stringent requirements based on the list provided in the revised proposals for public procurement directives.

Amendment 278

Proposal for a directive Annex X a (new)

Text proposed by the Commission

Amendment

ANNEX Xa

LIST OF INTERNATIONAL SOCIAL AND ENVIRONMENTAL CONVENTIONS REFERRED TO IN ARTICLE -26a(3)

- ILO Convention 87 on Freedom of Association and the Protection of the Right to Organise;***
- ILO Convention 98 on the Right to Organise and Collective Bargaining;***
- ILO Convention 29 on Forced Labour;***
- ILO Convention 105 on the Abolition of Forced Labour;***
- ILO Convention 138 on Minimum Age;***
- ILO Convention 111 on Discrimination (Employment and Occupation);***
- ILO Convention 100 on Equal Remuneration;***
- ILO Convention 182 on Worst Forms of Child Labour;***
- Vienna Convention for the protection of the Ozone Layer and its Montreal Protocol on substances that deplete the Ozone Layer;***
- Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention);***
- Stockholm Convention on Persistent Organic Pollutants (Stockholm POPs)***

Convention);

- Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (The PIC Convention) and its three regional Protocols.

Amendment 279

Proposal for a directive Annex XI

Text proposed by the Commission

Amendment

ANNEX XI

deleted

LIST OF EUROPEAN UNION LEGISLATION REFERRED TO IN ARTICLE 4 (3) (b)

Rights which have been granted by means of a procedure in which adequate publicity has been ensured and where the granting of those rights was based on objective criteria shall not constitute "special or exclusive rights" within the meaning of this Directive. The following lists procedures, ensuring adequate prior transparency, for granting authorisations on the basis of other legislative acts of the European Union which do not constitute "special or exclusive rights" within the meaning of this Directive:

(a) Granting authorisation to operate natural gas installations in accordance with the procedures laid down in Article 4 of Directive 98/30/EC.

(b) Authorisation or an invitation to tender for the construction of new electricity production installations in accordance with the provisions of Directive 96/92/EC.

(c) The granting in accordance with the procedures laid down in Article 9 of Directive 97/67/EC of authorisations in relation to a postal service which is not or

shall not be reserved.

(d) A procedure for granting an authorisation to carry on an activity involving the exploitation of hydrocarbons in accordance with Directive 94/22/EC.

(e) Public service contracts within the meaning of Regulation (EC) No 1370/2007 which have been awarded on the basis of a competitive tendering procedure in accordance with its Article 5(3).

Justification

Linked to deletion of Article 4(3).

Amendment 280

Proposal for a directive Annex XII

Text proposed by the Commission

Amendment

ANNEX XII

deleted

REQUIREMENTS RELATING TO DEVICES FOR THE ELECTRONIC RECEIPT OF TENDERS, AND APPLICATIONS

1. Devices for the electronic receipt of tenders and applications must at least guarantee, through technical means and appropriate procedures, that:

(a) the exact time and date of the receipt of tenders and applications can be determined precisely;

(b) it may be reasonably ensured that, before the time limits laid down, no-one can have access to data transmitted under these requirements;

(c) where that access prohibition is infringed, it may be reasonably ensured that the infringement is clearly detectable;

(d) only authorised persons may set or change the dates for opening data

received;

(e) during the different stages of the concession award procedure access to all data submitted, or to part thereof, must be possible only through simultaneous action by authorised persons;

(f) simultaneous action by authorised persons must give access to data transmitted only after the prescribed date;

(g) data received and opened in accordance with these requirements must remain accessible only to persons authorised to acquaint themselves therewith, and

(h) authentication of tenders must conform to the requirements set out in this Annex.

Justification

This deletes this annex which refers to clauses deleted from Article 25.

Amendment 281

**Proposal for a directive
Annex XIII**

Text proposed by the Commission

Amendment

ANNEX XIII

deleted

**INFORMATION TO BE INCLUDED IN
PRIOR INFORMATION NOTICES
CONCERNING CONCESSIONS FOR
SOCIAL AND OTHER SPECIFIC
SERVICES**

(as referred to in Article 26(3))

1. Name, identification number (where provided for in national legislation), address including NUTS code, telephone, fax number, email and internet address of the contracting authority or contracting entity and, where different, of the service from which additional information may be obtained.

2. Where appropriate, email or internet

address at which the specifications and any supporting documents will be available.

3. Type of contracting authority or contracting entity and main activity exercised.

4. CPV Nomenclature reference No(s); where the contract is divided into lots, this information shall be provided for each lot.

5. NUTS code for the main place of delivery or performance of service concessions

6. Description of the services and where applicable, incidental works and supplies to be procured

7. Estimated total value of concession(s); where the concession is divided into lots, this information shall be provided for each lot.

8. Conditions for participation.

9. Where applicable, time limit(s) for contacting the contracting authority or contracting entity in view of participation.

10. Where applicable, brief description of the main features of the award procedure to be applied.

11. Any other relevant information.

Justification

Linked to deletion of Article 26(3).

EXPLANATORY STATEMENT

Public procurement makes up a very large portion of economic activity within the EU. Most often, it takes the form of public contracts or concessions. There are clear rules governing public contracts. By contrast, works concessions are subject only to the basic provisions of the current Public Procurement Directives (directives 2004/17/EC and 2004/18/EC), and service concessions are governed solely by the general principles laid down in the Treaty and by a substantial body of case law. A legislative initiative on concessions would have the advantage of clarifying the existing legislative framework, bearing in mind that the Court of Justice is producing more and more case law, and would make for greater legal stability and certainty, as opposed to the present state of play in the EU, in which the failure to apply Treaty principles in the same way has created a patchwork of laws. Clear rules governing the award of service and works concessions would also provide public authorities, if they were so minded, with additional means of developing and modernising public services. They would stimulate competition within the EU. Greater procedural transparency would, finally, offer a more effective weapon against favouritism in public procurement awards.

In view of the complexity of the subject, the rapporteur made a firm declaration of intent at the start of the procedure, namely to carry out an in-depth analysis and ensure that all stakeholders could be consulted on as broad a basis as possible. This approach has found expression in a working document¹, in a public hearing held on 31 March 2012, in a workshop held on 10 May 2012, and in several meetings with the shadow rapporteurs, as well as in the requests for briefing papers on specific points (the legal framework, definition of the term ‘concession’, transparency, etc.).

The exhaustive prior discussion with a wide range of players gave rise to **two key guiding principles** which have formed the basis of this draft report:

- an initiative is needed at European level if only to produce a common definition of concessions and the manner of awarding them, as well as for the reasons mentioned above;

- the approach needs to be ‘light’ and based on a legislative framework that should be sufficiently robust to avert interpretations but should neither regulate the award of concession contracts down to the minutest detail nor entail extra administrative costs.

2. Proceeding from those premises, the rapporteur is pursuing the four aims summarised below:

- the directive must be clarified, reworked, and simplified so as to provide an effective, intelligible, coherent, and pragmatic legislative framework;

- instead of equating concessions with public contracts, the provisions must be tailored to their characteristics; concessions are akin to what lawyers call ‘incomplete contracts’;

¹ PE483.644v01-00.

- public authorities must 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;

- a fair balance has to be maintained between, on the one hand, the flexibility and discretion which public authorities must exercise when taking decisions and, secondly, the transparency needed to place economic operators on an equal footing.

1. Definition of a concession and performance rules: specific features of an ‘incomplete contract’

The **definition of a concession** (the subject of 13 out of the 25 rulings on concessions to have been handed down by the Court of Justice since 2000) is essential in order to do away with the present vagueness of the law and the legal patchwork spanning the 27 Member States.

A concession is a form of management that is clearly distinct from administrative authorisation, a licence, or a public contract to the extent that:

(a) a contracting authority or entity assigns a task (carrying out works or running a service), and in so doing transfers the responsibility for performing it, to an outside economic operator; and

(b) there is an economic risk entailed in the operation of the works or services, and that has to be assumed by the concessionaire.

Some of the amendments tabled aim to dispel the misconception that a concession is just another kind of public contract: the definition of the term ‘concession’ has been rewritten; the vocabulary has been changed, and concepts borrowed from public contracts (splitting into lots, framework contracts, technical specifications, etc.) have been removed.

Calculation of the **value** of concessions is crucial, since it determines which contracts the text has to cover (threshold). The rules proposed in the directive are excessively complex and not very clear, and they distinguish unnecessarily between works and service concessions. It would be preferable to have one simple method of calculation, whatever the purpose of the concession, given that the same rules apply to works and service concessions and many concessions are mixtures of works and services, making the applicable threshold difficult to determine. The new method proposed is based essentially on the aggregate concession turnover, exclusive of tax, over the entire life of the contract. It has the merit of being clear and applying equally to works and service concessions.

In the interests of simplification, the rapporteur is doing away with the **intermediate thresholds** and the related provisions, which he considers to be needlessly cumbersome and of no real added value.

The provisions on the **duration of concessions** 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 must, in that event, be determined according to criteria other than the time taken to recoup the investment outlay (e.g. the fact of achieving the aims laid down in the contract).

Concessions bear some resemblance to the economic concept of an ‘incomplete contract’ to the extent that they involve complex contracts of fairly long duration, a need for renegotiation, substantial investment, economic vicissitudes (operating risk), and uncertainty (contingencies that might arise while a concession was being operated). A degree of flexibility is therefore required both in the award procedure and as regards the contract **performance rules**. That notwithstanding, the rapporteur is opposed to ‘perpetual’ renewals brought about by ‘last-minute’ investment just before a contract expires.

2. Maintaining the quality of public services

The removal of the distinction made in directives 2004/17/EC and 2004/18/EC between priority and non-priority services stems from a Commission analysis (see the impact assessment for the revision of the Public Procurement Directives). Annex X of the directive on concessions has been updated in the light of the proposals put forward in the revision of the Public Procurement Directives.

The rapporteur has noted the anxieties expressed about the quality of public services put out to concession, as opposed to being managed in-house. He categorically rejects headlong **privatisation** of public services. Concessions are merely one of several forms of management that public authorities are free to choose. The rapporteur, like the Commission, believes that works and services managed in-house and, to some extent, the activities of ‘affiliated undertakings’ should be excluded from the scope of the directive.

The directive allows authorities, assuming that they are anxious to offer a high standard of service to their fellow citizens, to lay down **quality criteria or public service obligations** which any concessionaires would have to fulfil. The rapporteur is, in this connection, reaffirming the right that public authorities have to provide for a given level of quality or public service obligations in accordance with Protocol (No 26) annexed to the Treaty on the Functioning of the EU.

3. Procedural safeguards: a fair balance between flexibility and transparency

In procedural terms, the concept of an ‘incomplete contract’ implies that contracting authorities and entities have to be allowed a degree of **flexibility and latitude** to enable them to make the best possible choices. The proposal for a directive, however, based as it is on the rules applicable to public contracts, over-regulates the award of concession contracts.

The rapporteur is therefore proposing a slimmed-down version of the procedural provisions, stressing the central importance of negotiation, eliminating excessive regulation (e.g. publication of stages or weighting of criteria) – bearing in mind that negotiation has to retain the freedom in which its strength and interest lie – and confining regulation of the award criteria to the requirement to observe general principles such as transparency, non-discrimination, and equal treatment.

Freedom of negotiation, however, does not detract from the need to ensure that information supplied by candidates and tenderers is treated **confidentially**.

The rapporteur nevertheless maintains that flexibility has to go hand in hand with a guarantee of procedural **transparency**, taking into account the principle of equal treatment and the often considerable investment required (in terms of financial, human, and other resources) in order

to submit a tender. Economic operators have to be fully and equally informed about the award criteria, any changes in the course of negotiations, and so on.

On the other hand, the necessary transparency should be achieved without creating needless **red tape**: that is the reason for the proposals to do away with prior information notices for social services and other services of a specific nature, change the advertising arrangements, so that a concession notice would be sent out after being sent to the Commission (instead of being published in the Official Journal), and simplify the standard forms.

Finally, the rapporteur fully agrees that the provisions of the ‘**Review**’ Directive should also apply to concession contracts.

4. Taking public policy aims into account

If the public policy objectives laid down by contracting authorities or entities are to be taken into account, the need for flexibility must also imply that a concession provider should be allowed to award a concession on the basis of **environmental, social, or innovation-related criteria**.

The concession provider should likewise be free to determine the technical and practical requirements on which the characteristics of the concession will be based. These could include, for example, the requirement to allow for the needs of people with disabilities, the decision to use devices compatible with a sustainable development approach, or the recognition of social considerations.

5. Exclusions

The rapporteur agrees that public-public cooperation should, by definition, be excluded from the scope of the directive. The codification of the Court of Justice’s *Teckal*¹ and *Coditel*² case law on **in-house** and **joint in-house** arrangements is to be welcomed, since it serves to clarify criteria that have been left too vague (Article 15(1) and (3)). The rapporteur is nevertheless proposing to spell out the concept of ‘similar control’ more explicitly, following the model of Regulation (EC) No 1307/2007 on public passenger transport, thus making it easier to establish whether such control exists. In addition, the partial clarification brought by the language of the case law (‘90% of the activities’ instead of ‘the essential part’ thereof) has to be completed by a more explicit description of the term ‘activities’ (i.e. turnover) in order to take this reasoning to its logical conclusion.

The explicit exclusion of horizontal cooperation (intermunicipal cooperation, Article 15(4)) raises doubts about the status to be accorded to transfers of responsibilities between public authorities that are not explicitly excluded. A new paragraph is therefore being proposed in order to exclude agreements on transfers of responsibilities between public authorities.

The rapporteur supports the exclusion of concessions awarded by contracting entities to **affiliated undertakings**, since these arise from the particularly close relations between entities belonging to the same group (consolidated accounts or exercise of a dominant influence). The article has been reworded more explicitly and reorganised. In addition, the

¹ Case C-107/98, 1999.

² Case C-324/07, 2008.

80% criterion has been clarified to prevent this exclusion being misused; the figure is to be calculated in relation to all of the services provided by an affiliated undertaking in the three preceding years, that is to say, those performed for the contracting entity to which the undertaking is affiliated and those performed outside that relationship (and not just all services performed for the contracting entity, which might make up only a fraction of the whole). The 80% must, moreover, be accounted for by services or works that are the subject of the concession and provided to the contracting entity as such, which means either the entity to which the concessionaire undertaking is affiliated (Article 11(2)(a) and (b)) or an entity subject to the dominant influence of another undertaking to which the concessionary undertaking is linked (Article 11(2)(c)).

As regards **sector-specific exclusions**, the rapporteur is reworking and simplifying the directive (merger of Articles 8 and 10, deletion of the references to services not covered by concessions, for example employment contracts, and so on). He is also proposing 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 directive; this provision should not be confined solely to network infrastructure management for the purposes of the activities listed in Annex III (Article 8(1)). The fact that there is a tariff regulated by the State implies that there is no choice of economic operator and hence no reason to carry out a competitive procedure of the type concerned here.

Gaming has, in addition, been excluded on account of the highly specific nature of the activities concerned and the need to ensure that Member States can continue to exercise oversight in order to pursue aims in the general interest (combating illegal gambling, fraud, and money laundering; preventing addiction). If gaming were subject to the rules of the directive, Member States would be deprived of flexibility and consequently impeded in their ability to act. National lotteries and similar games will therefore be excluded.

Conclusion

The rapporteur is convinced of the need for a European legislative initiative on concessions. Given the lack of legal certainty, the fact that contracts are continuing to be concluded privately, in defiance of the major principles on which the EU internal market has been built, and the patchwork of Member States' laws in this field, a legislative framework has to be established at European level. That framework, however, has to be consistent with a 'light' approach making for clear, coherent, intelligible, and effective rules. The rapporteur hopes that he has achieved that aim.

7.11.2012

OPINION OF THE COMMITTEE ON INTERNATIONAL TRADE

for the Committee on the Internal Market and Consumer Protection

on the proposal for a directive of the European Parliament and of the Council on the award of concession contracts
(COM(2011)0897 – C7-0004/2012 – 2011/0437(COD))

Rapporteur: Gianluca Susta

SHORT JUSTIFICATION

The Commission recently submitted proposals for updating the directives on public procurement (Directive 2004/18/EC) and the procurement procedures of entities operating in the water, energy, transport and postal services sectors (Directive 2004/17/EC). It also submitted a proposal for a directive governing concessions. However, it was not until after it had submitted that proposal that it put forward a proposal for a regulation on the access of third country goods and services to the European Union's internal market in public procurement and procedures supporting negotiations on access of European Union goods and services to the public procurement markets of third countries.

Public procurement accounts for a substantial proportion of international trade and for an average of 15% to 20% of GDP in developed countries. Despite its importance, public procurement remains one of the least open (the Commission estimates that more than half of the world public procurement market is closed to foreign competition) and least regulated sectors of world trade.

The multilateral instrument governing the sector is the Government Procurement Agreement (GPA), which was recently the subject of a revision process (which was concluded in March 2012). The aim of the revision process was to make world public procurement markets more transparent and more open and to streamline procedures. The rapporteur welcomes this revision process and hopes that the EU will lose no time in approving its outcome. He would point out, however, that to date a total of no more than 42 of the WTO member states (a figure which includes the 27 EU Member States) have acceded to this international agreement, and that it is very much to be desired that other countries should join them, in particular the more developed countries and emerging economies, so as to extend the agreement's geographical coverage and thereby establish a system of shared and universally valid rules in this important international trade sector.

Another WTO agreement, the General Agreement on Trade in Services (GATS) also contains

specific provisions on public procurement.

The EU is also subject to other binding obligations under bilateral agreements that it has already concluded (with Albania, the Former Yugoslav Republic of Macedonia, Cariforum, Chile, Croatia, Mexico, Montenegro, South Korea and Switzerland). Public procurement is an important – and in many cases delicate – chapter in negotiations under way with a view to the conclusion of new trade agreements with other international partners.

In view of this, the rapporteur considers it important to draw attention to the international dimension of public procurement and to the need for international public procurement markets to be gradually opened up on the basis of a shared system of rules based on reciprocity, fairness and compliance with international environmental, social and labour standards. The European Union currently provides international operators with a significant degree of access to its own public procurement market, which is not reciprocated by a large number of major international trade partners.

The rapporteur therefore believes that the EU should take more decisive legislative action and adopt a more cogent approach to negotiations in order to re-establish a balance and create a genuine level playing field at international level.

In view of this, he deplores the Commission's decision not to put forward a single set of rules addressing the 'external dimension' of the public procurement sector. The decision not to carry over the provisions on tenders covering goods and services originating in third countries that are included in Directive 2004/17/EC and the subsequent submission of a legislative proposal that, while complementary, is entirely separate and will be dealt with under a separate legislative procedure (although it must be said in passing that its substance is to be welcomed) could give rise to a dangerous legal vacuum by failing to ensure that EU legislation contains the necessary provisions to regulate access by non-EU goods, services and businesses to the European public procurement market.

The rapporteur therefore considers it vital to establish a cogent and comprehensive set of rules specifically designed to make it possible to reject any tenders that are predominantly made up of goods and services not covered by international agreements. To that end, the rapporteur intends to make appropriate adjustments to the provisions put forward by the Commission in its recent proposal for a regulation.

Furthermore, the provisions on 'abnormally low tenders' that have been put forward by the Commission need to be tightened up by providing for a mechanism for the automatic exclusion of tenders that are significantly lower than the others and extending the minimum conditions for requesting additional information from economic operators.

Lastly, a number of amendments have been tabled in order to draw greater attention to the international environment in which EU legislation in this area operates.

AMENDMENTS

The Committee on International Trade calls on the Committee on the Internal Market and

Consumer Protection, as the committee responsible, to incorporate the following amendments in its report:

Amendment 1

Proposal for a directive

Recital 1

Text proposed by the Commission

(1) 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, while public authorities may not find the best use of public money so that EU citizens benefit from quality services at best prices. 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.

Amendment

(1) 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, while public authorities may not find the best use of public money so that EU citizens benefit from quality services at best prices. 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. ***Such a legal framework would also afford greater legal certainty to economic operators and could be a base and means of further opening up international public procurement markets and boosting world trade.***

Amendment 2

Proposal for a directive

Recital 16

Text proposed by the Commission

(16) This Directive does not apply to the concession award carried out by international organisations on their own behalf and for their own account. There is, however, a need to **clarify** to which extent it is appropriate to apply this Directive to concession **award** governed by specific international rules.

Amendment

(16) This Directive does not apply to the concession award carried out by international organisations on their own behalf and for their own account. There is, however, a need to **investigate** to which extent it is appropriate to apply this Directive to concession **awards** governed by specific international rules **to allow greater legal certainty for economic operators. Given that the internal market and international markets are increasingly closely interlinked, public procurement policy should be used as a means of promoting EU principles such as transparency, an uncompromising stance on corruption, the reciprocity rule and progress on social and human rights.**

Amendment 3

Proposal for a directive Recital 33

Text proposed by the Commission

(33) Concessions should not be awarded to economic operators that have participated in a criminal organisation or have been found guilty of corruption, fraud to the detriment of the Union's financial interests or money laundering. Non-payment of taxes or social security contributions should also be sanctioned by mandatory exclusion at the level of the Union. Furthermore, contracting authorities and contracting entities should be given the possibility to exclude candidates or tenderers **for serious violations of Union or national law aimed at the protection of public interests compatible with the Treaty** or where the economic operator has shown significant or persistent deficiencies in the performance of a prior concession or concessions of a similar nature with the same contracting authority or contracting

Amendment

(33) Concessions should not be awarded to economic operators that have participated in a criminal organisation or have been found guilty of corruption, fraud to the detriment of the Union's financial interests or money laundering. Non-payment of taxes or social security contributions **and other serious violations of Union or national law aimed at the protection of public interests compatible with the Treaty** should also be sanctioned by mandatory exclusion at the level of the Union. Furthermore, contracting authorities and contracting entities should be given the possibility to exclude candidates or tenderers where the economic operator has shown significant or persistent deficiencies in the performance of a prior concession or concessions of a similar nature with the same contracting authority or contracting

entity.

entity.

Amendment 4

Proposal for a directive Article 5 – paragraph 1

Text proposed by the Commission

Amendment

1. This Directive shall apply to the following concessions ***the value of which is equal to or greater than EUR 5 000 000:***

- (a) concessions concluded by contracting entities for the pursuit of one of the activities referred to in Annex III;
- (b) concessions concluded by contracting authorities.

1. This Directive shall apply to the following concessions:

- (a) concessions concluded by contracting entities for the pursuit of one of the activities referred to in Annex III;
- (b) concessions concluded by contracting authorities.

This Directive shall apply to concessions the value of which is equal to or greater than:

- (a) EUR 2 500 000 for service concessions (excluding concessions covering social services);***
- (b) EUR 5 000 000 for works concessions.***

Amendment 5

Proposal for a directive Article 8 – paragraph 3 – subparagraph 1 – point d

Text proposed by the Commission

Amendment

(d) where the concessions are fully financed by an international organisation or international financing institution.

deleted

Amendment 6

Proposal for a directive Article 8 – paragraph 3 – subparagraph 3

Text proposed by the Commission

Amendment

For the purposes of point (d) of the first subparagraph, where a concession is co-financed for a considerable part by an international organisation or international financing institution the parties decide on applicable concession award procedures which shall be in conformity with the provisions of the Treaty on the Functioning of the European Union.

deleted

Amendment 7

Proposal for a directive

Article 15 – paragraph 1 – subparagraph 1 – point b

Text proposed by the Commission

Amendment

(b) ***at least 90%*** of the activities of that legal person are carried out for the controlling contracting authority or entity or for other legal persons controlled by that contracting authority or entity

(b) ***the essential part*** of the activities of that legal person are carried out for the controlling contracting authority or entity or for other legal persons controlled by that contracting authority or entity;

Justification

The amendment reflects the principle established in Court of Justice case law, based on the term 'the essential part', which does not necessarily mean the largest part.

Amendment 8

Proposal for a directive

Article 15 – paragraph 3 – subparagraph 1 – point b

Text proposed by the Commission

Amendment

(b) ***at least 90%*** of the activities of that legal person are carried out for the controlling contracting authorities or entities as referred to in paragraph 1 subparagraph 1 of Article 4 or other legal persons controlled by the same contracting authority or entity;

(b) ***the essential part*** of the activities of that legal person are carried out for the controlling contracting authorities or entities as referred to in paragraph 1 subparagraph 1 of Article 4 or other legal persons controlled by the same contracting authority or entity;

Amendment 9

Proposal for a directive Article 15 – paragraph 4 – point c

Text proposed by the Commission

Amendment

(c) the participating contracting authorities or entities shall do not perform on the open market more than 10% in terms of turnover of the activities which are relevant in the context of the agreement;

deleted

Amendment 10

Proposal for a directive Article 36 – paragraph 1 – subparagraph 1 – point c a (new)

Text proposed by the Commission

Amendment

(ca) compliance with social and environmental legislation.

Amendment 11

Proposal for a directive Article 36 – paragraph 5 – subparagraph 1 – point e a (new)

Text proposed by the Commission

Amendment

(ea) other serious violations of Union or national law aimed at the protection of public interests compatible with the Treaty;

Amendment 12

Proposal for a directive Article 38 – paragraph 1

Text proposed by the Commission

Amendment

1. Where contracting authorities and

1. Where contracting authorities and

contracting entities resort to a concession, the time limit for the submission of applications for the concession shall be not less than **52** days from the date on which the concession notice was sent.

contracting entities resort to a concession, the time limit for the submission of applications for the concession shall be not less than **70** days from the date on which the concession notice was sent.

Amendment 13

Proposal for a directive Article 38 – paragraph 2

Text proposed by the Commission

2. The time limit for receipt of tenders may be reduced by five days where the contracting entity accepts that tenders may be submitted by electronic means in conformity with Article 25.

Amendment

2. The time limit for receipt of ***applications for the concession*** may be reduced by five days where the contracting entity accepts that ***such applications*** may be submitted by electronic means in conformity with Article 25.

Amendment 14

Proposal for a directive Article 39 – paragraph 4 – point d a (new)

Text proposed by the Commission

Amendment

(da) compliance with EU or international labour, and environmental law.

PROCEDURE

Title	Award of concession contracts		
References	COM(2011)0897 – C7-0004/2012 – 2011/0437(COD)		
Committee responsible Date announced in plenary	IMCO 17.1.2012		
Opinion by Date announced in plenary	INTA 17.1.2012		
Rapporteur Date appointed	Gianluca Susta 25.1.2012		
Discussed in committee	25.4.2012	11.7.2012	18.9.2012
Date adopted	6.11.2012		
Result of final vote	+: -: 0:	26 0 0	
Members present for the final vote	William (The Earl of) Dartmouth, Maria Badia i Cutchet, Marielle de Sarnez, Yannick Jadot, Metin Kazak, Franziska Keller, Bernd Lange, David Martin, Paul Murphy, Franck Proust, Godelieve Quisthoudt-Rowohl, Helmut Scholz, Peter Šťastný, Robert Sturdy, Gianluca Susta, Henri Weber, Jan Zahradil		
Substitute(s) present for the final vote	Josefa Andrés Barea, Catherine Bearder, George Sabin Cutaş, Béla Glattfelder, Syed Kamall, Pablo Zalba Bidegain		
Substitute(s) under Rule 187(2) present for the final vote	Edite Estrela, Jean-Paul Gauzès, Arlene McCarthy, Oldřich Vlasák		

16.10.2012

OPINION OF THE COMMITTEE ON EMPLOYMENT AND SOCIAL AFFAIRS

for the Committee on the Internal Market and Consumer Protection

on the proposal for a directive of the European Parliament and of the Council on the award of Concession Contracts
(COM(2011)0897 – C7-0004-2012 – 2011/0437(COD))

Rapporteur: Thomas Händel

SHORT JUSTIFICATION

In the Rühle report in 2011, the European Parliament expressed its criticism of the requirements in relation to a possible legal act on concessions. The Commission's draft would have the contrary effect of creating a large number of new problems.

Duties of the State

The State, with all of its various departments, provides goods and services for citizens. The nature of the goods and services varies, for example, between universal service obligations, social services of general interest, services of general economic interest and services of general interest¹.

It is difficult to distinguish between these types of service, and the distinction is often made later by the courts. The draft does not make this distinction.

In order to fulfil its duties, the State awards contracts within the framework of public procurement, in some cases as concessions. The draft does not set down a limit for this, nor does it identify any mutual exclusion criteria.

In accordance with Article 14 TFEU and Protocol 26 to the TFEU, local, regional and national levels decide independently whether to provide goods and services of general interest themselves or whether to award contracts to someone else. In so doing, the supply of goods and services to citizens takes centre stage; not the criteria of the internal market. Therefore, the scope needs to be precisely defined.

All levels of government assume tasks and pursue objectives that secure the public interest,

¹ Commission Communication COM(2011) 900 final

community and cohesion.

In practice, when choosing the criteria for awarding contracts, decision-makers find themselves in a kind of straitjacket that limits their options.

The draft identifies the criterion of the most economically advantageous tender.

Accordingly, it would be possible to apply certain 'technical' criteria in addition to price and cost. This acts as a constricting factor in relation to the decision 'whether' to award a contract: public authorities experiencing financial difficulties could see themselves forced to award contracts, as workers in the public service are often better paid than those employed in the private sector.

It is not the task of a directive on concessions to essentially force decisions in favour of privatising state functions.

The question of 'how' contracts are awarded is also restricted by the limited awarding criteria.

Because the draft does not distinguish between the types of service, the right to self-determination could conflict with the freedom to provide services. The only way to avoid this would be to exclude certain services.

It is not the function of legislation on concessions to restructure government budgets. This must be achieved by making improvements on the revenue side rather than by putting pressure on the expenditure side through low prices and costs.

General requirements

The draft Directive does not provide any legal certainty. The definition of concessions differs from that of the Court of Justice of the European Union. This would result in new decisions. There are no delimiters set in relation to other contractual relationships, such as licenses, permits, etc.

The criterion for the transfer of risk is inadequate. If a water supply concessionaire were to become insolvent, the State would still have to guarantee the supply of water. The risk would never be fully transferred to the concessionaire.

The transparency and simplicity of the procedure are not guaranteed.

It is not clear for how long such arrangements have existed. It is impossible to foresee future requirements or the need for renegotiation.

Quality assurance and the low-price criterion are mutually contradictory.

Employment and social affairs

Experience has shown that the low-price criterion leads to pressure on the number of workers employed by operators and subcontractors and on employment conditions. This is irreconcilable with the horizontal social clause contained in Article 9 TFEU.

The criterion of the most economically advantageous tender involves the fostering of social criteria. It does not incorporate a 'collective agreement clause' or other criteria. Thus, competition based on price underbidding comes at the expense of the workers.

In relation to compliance with criteria, attention is drawn to compliance with national and European labour law standards. However, national standards must be compatible with European law. In practice, this means that the principle of 'equal pay for equal work at a comparable workplace' is excluded.

There is no express statement to the effect that no Member State will be prevented from complying with ILO Convention C 94 and that all Member States are encouraged to ratify and comply with this Convention.

Social services are closely linked to people's lives and health at a local level. They should be excluded from such considerations, as should services provided by workers' cooperatives.

It is often difficult to enforce compliance with mandatory employment conditions among subcontractors. There is a lack of joint liability on the main operator's part.

For the reasons exposed before, the rapporteur proposed to the Committee on Employment and Social Affairs the rejection of the Commission proposal. The Committee, however, did not follow this proposal and adopted amendments.

AMENDMENTS

The Committee on Employment and Social Affairs calls on the Committee on the Internal Market and Consumer Protection, as the committee responsible, to incorporate the following amendments in its report:

Amendment 1

Proposal for a directive Recital 2 a (new)

Text proposed by the Commission

Amendment

(2a) Under Article 9 of the Treaty on the Functioning of the European Union, the Union must take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health in defining and implementing its policies and activities. This Directive contributes to attaining

these objectives by encouraging sustainable concession contracts, the integration of social criteria in all stages of concession procedure and the respect of obligations relating to social and employment conditions, health and safety at workplace, social security and working conditions as set out by EU, national laws and international labour law provisions, arbitration awards, collective agreements and contracts.

This Directive should not prevent the Member States from adhering to International Labour Organization (ILO) Convention No. 94 on labour clauses in public contracts, and requiring the inclusion of labour clauses in services concessions.

Amendment 2

Proposal for a directive Recital 3 a (new)

Text proposed by the Commission

Amendment

(3a) In accordance with Article 14 TFEU in association with Protocol 26 thereto, national, regional and local authorities shall have wide discretion in deciding whether and how and to what extent they want to perform public functions themselves.

Public authorities may perform public interest tasks using their own resources, without being obliged to call on outside economic operators. They may do so in cooperation with other public authorities.

Amendment 3

Proposal for a directive Recital 3 b (new)

Text proposed by the Commission

Amendment

(3b) The essential role and wide discretion of national, regional and local authorities in providing, commissioning and organizing services of general interest as closely as possible to the needs of the users is also in line with Articles 2, 3, 4 and 14 of the Treaty on the Functioning of the European Union, Protocol 26 on Services of General Interest, and Article 36 of the Charter of Fundamental Rights of the European Union.

Amendment 4

Proposal for a directive Recital 20

Text proposed by the Commission

Amendment

(20) A review of so-called priority and non-priority services ('A' and 'B' services) by the Commission has shown that it is not justified to restrict the full application of procurement law to a limited group of services.

deleted

Amendment 5

Proposal for a directive Recital 21

Text proposed by the Commission

Amendment

(21) In the light of the results of the evaluation conducted by the Commission on the reform of public procurement rules it is appropriate to exclude from the full application of this Directive only those services which have a limited cross-border dimension, namely the so-called services to the person such as certain ***social, health and*** educational services. These services are provided within a particular context that varies widely amongst Member States,

(21) In the light of the results of the evaluation conducted by the Commission on the reform of public procurement rules it is appropriate to exclude from the full application of this Directive only those services which have a limited cross-border dimension, namely the so-called services to the person such as certain educational services. These services are provided within a particular context that varies widely amongst Member States, due to

due to different cultural traditions. A specific regime should therefore be established for concession for these services which takes into account the fact that they are newly regulated. An obligation to publish a prior information notice and a concession award notice of any concession with a value equal to or greater than thresholds established in this Directive is an adequate way to provide information on business opportunities to potential tenderers as well as on the number and type of contracts awarded to all interested parties. Furthermore, Member States should put in place appropriate measures with reference to the award of concession contracts for these services aimed at ensuring compliance with the principles of transparency and equal treatment of economic operators while allowing contracting authorities and contracting entities to take into account the specificities of the services in question. Member States should ensure that contracting authorities and contracting entities may take into account the need to ensure quality, continuity, accessibility, availability and comprehensiveness of the services, the specific needs of different categories of users, the involvement and empowerment of users and innovation.

different cultural traditions. A specific regime should therefore be established for concession for these services which takes into account the fact that they are newly regulated. An obligation to publish a prior information notice and a concession award notice of any concession with a value equal to or greater than thresholds established in this Directive is an adequate way to provide information on business opportunities to potential tenderers as well as on the number and type of contracts awarded to all interested parties. Furthermore, Member States should put in place appropriate measures with reference to the award of concession contracts for these services aimed at ensuring compliance with the principles of transparency and equal treatment of economic operators while allowing contracting authorities and contracting entities to take into account the specificities of the services in question. Member States should ensure that contracting authorities and contracting entities may take into account the need to ensure quality, continuity, accessibility, availability and comprehensiveness of the services, the specific needs of different categories of users, the involvement and empowerment of users and innovation.

Justification

Social and health services should not be left unregulated.

Amendment 6

Proposal for a directive Recital 25

Text proposed by the Commission

(25) In order to ensure transparency and equal treatment, criteria for the award of concessions should always comply with some general standards. These should be disclosed in advance to all potential

Amendment

(25) In order to ensure transparency and equal treatment, criteria for the award of concessions should always comply with some general standards. These should be disclosed in advance to all potential

tenderers, be related to the subject matter of the contract and should not offer to the contracting authority or contracting entity an unrestricted freedom of choice. They should ensure the possibility of effective competition and be accompanied by requirements that allow the information provided by the tenderers to be effectively verified. In order to comply with these standards while improving legal certainty, Member States may provide for the use of the criterion of the most economically advantageous tender.

tenderers, be related to the subject matter of the contract and should not offer to the contracting authority or contracting entity an unrestricted freedom of choice. They should ensure the possibility of effective competition and be accompanied by requirements that allow the information provided by the tenderers to be effectively verified. In order to comply with these standards while improving legal certainty, Member States may provide for the use of the criterion of the most economically advantageous *and sustainable* tender.

Amendment 7

Proposal for a directive

Recital 26

Text proposed by the Commission

(26) Where contracting authorities and contracting entities choose to award a concession to the most economically advantageous tender, they should determine the economic and quality criteria on the basis of which they assess the tenders in order to identify which one offers the best value for money. The determination of *these* criteria depends on the object of the concession since they should allow the level of performance offered by each tender to be assessed in the light of the subject-matter of the concession, as defined in the technical specifications and the value for money of each tender to be measured.

Amendment

(26) Where contracting authorities and contracting entities choose to award a concession to the most economically advantageous *and sustainable* tender, they should determine the economic and quality criteria on the basis of which they assess the tenders in order to identify which one offers the best value for money. The determination of *those* criteria depends on the object of the concession since they should allow the level of performance offered by each tender to be assessed in the light of the subject-matter of the concession, as defined in the technical specifications and the value for money of each tender to be measured.

Amendment 8

Proposal for a directive

Recital 28

Text proposed by the Commission

(28) The technical specifications drawn up by contracting authorities and contracting

Amendment

(28) The technical specifications drawn up by contracting authorities and contracting

entities need to allow concession award to be opened up to competition. To that end, it must be possible to submit tenders that reflect the diversity of technical solutions so as to obtain a sufficient level of competition. Consequently, technical specifications should be drafted in such a way to avoid artificially narrowing down competition through requirements that favour a specific economic operator by mirroring key characteristics of the supplies, services or works habitually offered by that economic operator. Drawing up the technical specifications in terms of functional and performance requirements generally allows this objective to be achieved in the best way possible and favours innovation. Where reference is made to a European standard or, in the absence thereof, to a national standard, tenders based on equivalent arrangements should be considered by contracting authorities or contracting entities. To demonstrate equivalence, tenderers can be required to provide third-party verified evidence; however, other appropriate means of proof such as a technical dossier of the manufacturer should also be allowed where the economic operator concerned has no access to such certificates or test reports, or no possibility of obtaining them within the relevant time limits.

entities need to allow concession award to be opened up to competition. To that end, it must be possible to submit tenders that reflect the diversity of technical solutions so as to obtain a sufficient level of competition. Consequently, technical specifications should be drafted ***and applied in conformity with the principles of transparency and non-discrimination and in*** such a way to avoid artificially narrowing down competition through requirements that favour a specific economic operator by mirroring key characteristics of the supplies, services or works habitually offered by that economic operator. Drawing up the technical specifications in terms of functional and performance requirements generally allows this objective to be achieved in the best way possible and favours innovation. Where reference is made to a European standard or, in the absence thereof, to a national standard, tenders based on equivalent arrangements should be considered by contracting authorities or contracting entities. To demonstrate equivalence, tenderers can be required to provide third-party verified evidence; however, other appropriate means of proof such as a technical dossier of the manufacturer should also be allowed where the economic operator concerned has no access to such certificates or test reports, or no possibility of obtaining them within the relevant time limits.

Amendment 9

Proposal for a directive Recital 29

Text proposed by the Commission

(29) In technical specifications and in award criteria, contracting authorities and contracting entities should be allowed to refer to a specific production process, a specific mode of provision of services, or a

Amendment

(29) In technical specifications and in award criteria, contracting authorities and contracting entities should be allowed to refer to a specific production process, a specific mode of provision of services, or a

specific process for any other stage of the life cycle of a product or service, provided that they are linked to the subject-matter of the concession. In order to better integrate social considerations *in the* award of concessions, procurers may also be allowed to include, in the award criteria, characteristics related to the working conditions. However, where the contracting authorities or contracting entities use the most economically advantageous tender, such criteria may only relate to the working conditions of the persons directly participating in the process of production or provision in question. Those characteristics may only concern the protection of health of the staff involved in the production process or the favouring of social integration of disadvantaged persons or members of vulnerable groups amongst the persons assigned to performing the contract, including accessibility for persons with disabilities. In this case, any award criteria which include those characteristics should in any event remain limited to characteristics that have immediate consequences on staff members in their working environment. They should be applied in accordance with Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services and in a way that does not discriminate directly or indirectly against economic operators from other Member States or from third countries parties to the Agreement or to Free Trade Agreements to which the Union is party. Contracting authorities and contracting entities should, also where they use the criterion of the most economically advantageous tender, be allowed to use as an award criterion the organisation, qualification and experience of the staff assigned to performing the concession in question, as this may affect the quality of concession performance and, as a result, the economic value of the tender.

specific process for any other stage of the life cycle of a product or service, provided that they are linked to the subject-matter of the concession. In order to better integrate social considerations *in the* award of concessions, procurers may also be allowed to include, in the award criteria, characteristics related to the working conditions. However, where the contracting authorities or contracting entities use the most economically advantageous *and sustainable* tender, such criteria may only relate to the working conditions of the persons directly participating in the process of production or provision in question. Those characteristics may only concern the protection of health of the staff involved in the production process or the favouring of social integration of disadvantaged persons or members of vulnerable groups amongst the persons assigned to performing the contract, including accessibility for persons with disabilities. In this case, any award criteria which include those characteristics should in any event remain limited to characteristics that have immediate consequences on staff members in their working environment. They should be applied in accordance with Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services and in a way that does not discriminate directly or indirectly against economic operators from other Member States or from third countries parties to the Agreement or to Free Trade Agreements to which the Union is party. Contracting authorities and contracting entities should, also where they use the criterion of the most economically advantageous *and sustainable* tender, be allowed to use as an award criterion the organisation, qualification and experience of the staff assigned to performing the concession in question, as this may affect the quality of concession performance and, as a result, the economic value of the

tender.

Amendment 10

Proposal for a directive Recital 29 a (new)

Text proposed by the Commission

Amendment

(29 a) In order to better integrate social considerations into the award of concessions, procurers should be allowed to include social criteria and employment policy criteria, such as: social and employment protection, working conditions, health and safety regulation, promotion of employment for the long-term unemployed, for older workers, for younger people and for trainees, for persons of disadvantaged groups, for people with disabilities, for people of migration background, decent work standards, social inclusion, gender equality, access to on-site vocational training, human rights and ethical trade.

Amendment 11

Proposal for a directive Recital 29 b (new)

Text proposed by the Commission

Amendment

(29b) This Directive ensures the application of Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of workers' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses in order to ensure the respect of the rules of equal competition and the protection of workers in the context of the transfer of an undertaking.

Amendment 12

Proposal for a directive Recital 32 a (new)

Text proposed by the Commission

Amendment

(32a) If, when a concession is awarded, workers are taken over by the new concession holder from an authority, a public contracting body or the previous concession holder, the legal consequences of Directive 2001/23/EC in terms of safeguarding employment and working conditions shall apply in respect of the workers.

Amendment 13

Proposal for a directive Article 1 – paragraph 2 a (new)

Text proposed by the Commission

Amendment

This Directive shall not affect the right of authorities at every level to decide whether, how and to what extent they shall perform public functions themselves. Authorities may perform public tasks using their own resources without being compelled to award concessions to other (external) economic operators. They may also perform such tasks jointly with other authorities.

Amendment 14

Proposal for a directive Article 2 – paragraph 1 – point 5 a (new)

Text proposed by the Commission

Amendment

(5a) 'contract for pecuniary interest' means a contract the cause of which is based on an exchange of benefits. This implies that each party may profit from the transaction and that such profit does

not necessarily have to be of an economic nature;

Amendment 15

Proposal for a directive

Article 8 – paragraph 5 – subparagraph 1 – point e

Text proposed by the Commission

(e) employment contracts;

Amendment

(e) employment contracts *or collective agreements which contribute to the improvement of conditions of work;*

Amendment 16

Proposal for a directive

Article 16 – paragraph 1

Text proposed by the Commission

The duration of the concession shall be limited *to* the time estimated to be necessary for the concessionaire to recoup the investments made in operating the works or services *together with a reasonable return on invested capital.*

Amendment

The duration of the concession shall be limited. *Among the factors that may be considered here is* the time estimated to be necessary for the concessionaire to recoup the investments made in operating the works or services. *Account may also be taken of other objective criteria such as the public interest in ongoing high-quality provision or environmentally and socially sustainable performance of the service, and the expenditure incurred in selecting a concessionaire and also to the time estimated to reach the performance objectives set by the contracting authority.*

Amendment 17

Proposal for a directive

Article 17

Text proposed by the Commission

Article 17

Social and other specific services

Amendment

deleted

Concessions for social and other specific services listed in Annex X falling within the scope of this Directive shall be subject to the obligation of paragraph 3 of Art. 26 and of paragraph 1 of Article 27.

Amendment 18

Proposal for a directive Article 20 – paragraph 1

Text proposed by the Commission

Member States may reserve the right to participate in concession award procedures *to sheltered workshops and economic operators whose main aim is the social and professional integration of disabled and disadvantaged workers or provide for such concessions to be performed in the context of sheltered employment programmes provided that more than 30% of the employees of those workshops, economic operators or programmes are disabled or disadvantaged workers.*

Amendment

Member States may reserve the right to participate in concession award procedures for:

Amendment 19

Proposal for a directive Article 20 – paragraph 1 a (new)

Text proposed by the Commission

Amendment

(a) sheltered workshops, or provide for such contracts to be performed in the context of sheltered employment programmes, provided that the majority of the employees concerned are disabled persons who, by reason of the nature or the seriousness of their disabilities, cannot carry on occupations under normal conditions or easily find employment on the ordinary market;

Amendment 20

Proposal for a directive
Article 20 – paragraph 1 b (new)

Text proposed by the Commission

Amendment

(b) the enterprises and programmes whose main aim is social and professional integration of disadvantaged workers, provided that more than 30% of the employees of those economic operators or programmes are disabled or disadvantaged workers.

Amendment 21

Proposal for a directive
Article 22 – paragraph 4 c (new)

Text proposed by the Commission

Amendment

4c. Economic operators shall comply with obligations relating to social and employment protection and the working conditions which apply in the place where the work, service or supply is to be performed as set out by national legislation and/or collective agreements or international labour law provisions listed in Annex XIII a (new).

Amendment 22

Proposal for a directive
Article 22 – paragraph 4 d (new)

Text proposed by the Commission

Amendment

4d. The details of contract concessions shall be made public and open to scrutiny.

Amendment 23

Proposal for a directive
Article 25 – paragraph 8

Text proposed by the Commission

Amendment

8. Contracting authorities may use the data processed electronically for **public procurement** procedures in order to prevent, detect and correct errors occurring at each stage by developing appropriate tools.

8. Contracting authorities may use the data processed electronically for **award concessions** procedures in order to prevent, detect and correct errors occurring at each stage by developing appropriate tools.

Amendment 24

Proposal for a directive

Article 36 – paragraph 1 – subparagraph 1 – introductory part

Text proposed by the Commission

Amendment

Contracting authorities shall specify, in the concession notice the conditions for participation relating to:

Contracting authorities shall specify, in the concession notice **or document** the conditions for participation relating to:

Amendment 25

Proposal for a directive

Article 36 – paragraph 5 – subparagraph 1 – point e a (new)

Text proposed by the Commission

Amendment

(ea) repeated and/or serious breaches of employment, social security or environmental law, established by judgments having the force of res judicata.

Amendment 26

Proposal for a directive

Article 36 – paragraph 6

Text proposed by the Commission

Amendment

6. Any economic operator shall be excluded from participation in a concession where the contracting authority or contracting entity is aware of a decision having the force of res judicata establishing

6. Any economic operator shall be excluded from participation in a concession where the contracting authority or contracting entity is aware of a decision having the force of res judicata, **or of a**

that it has not fulfilled obligations relating to the payment of taxes or social security contributions in accordance with the legal provisions of the country in which it is established or with those of the Member State of the contracting authority or entity.

legally binding administrative decision, establishing that it has not fulfilled obligations relating to the payment of taxes or social security contributions in accordance with the legal provisions of the country in which it is established or with those of the Member State of the contracting authority or entity, ***or if such an operator has been the subject on more than one occasion of an unfavourable ruling or penalty under employment law.***

Amendment 27

Proposal for a directive

Article 36 – paragraph 7 – subparagraph 1 – introductory part

Text proposed by the Commission

Amendment

Member States ***may*** provide that contracting authorities or contracting entities exclude from participation in a concession award any economic operator if one of the following conditions is fulfilled:

Member States ***shall*** provide that contracting authorities or contracting entities exclude from participation in a concession award any economic operator if one of the following conditions is fulfilled:

Amendment 28

Proposal for a directive

Article 36 – paragraph 7 – subparagraph 1 – point c a (new)

Text proposed by the Commission

Amendment

(ca) breaches of social security, employment, tax or environmental law.

Amendment 29

Proposal for a directive

Article 39 – paragraph 4 – introductory part

Text proposed by the Commission

Amendment

4. Member States may provide that contracting authorities and contracting entities shall base the award of concessions on the criterion of the most economically

4. Member States may provide that contracting authorities and contracting entities shall base the award of concessions on the criterion of the most economically

advantageous tender, in compliance with paragraph 2. Those criteria may include, in addition to price or costs, any of the following criteria

advantageous *and sustainable* tender, in compliance with paragraph 2. Those criteria may include, in addition to price or costs, any of the following criteria

Amendment 30

Proposal for a directive Article 39 – paragraph 4 – point a

Text proposed by the Commission

(a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, environmental characteristics and innovative character.

Amendment

(a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, *social interest*, environmental characteristics and innovative character.

Amendment 31

Proposal for a directive Article 39 – paragraph 4 – point aa (new)

Text proposed by the Commission

Amendment

(aa) social criteria and employment policy criteria.

Amendment 32

Proposal for a directive Article 39 – paragraph 4 – point b

Text proposed by the Commission

(b) for service concessions and concessions involving the design of works, the organisation, qualification and experience of the staff assigned to performing the concession in question *may* be taken into consideration, with the consequence that, following the award of the concession, such staff may only be replaced with the consent of the contracting authority or the contracting entity, which must verify that replacements ensure equivalent

Amendment

(b) for service concessions and concessions involving the design of works, the organisation, qualification and experience of the staff assigned to performing the concession in question, *as well as the qualification and professional of any subcontractor, shall* be taken into consideration, with the consequence that, following the award of the concession, such staff may only be replaced with the consent of the contracting authority or the

organisation *and* quality;

contracting entity, which must verify that replacements ensure equivalent organisation, quality, *qualification or experience*;

Amendment 33

Proposal for a directive

Article 39 – paragraph 5 – subparagraph 1

Text proposed by the Commission

In the case referred to in paragraph 4, the contracting authority or entity shall specify in the contract notice, in the invitation to submit a tender, or in the concession documents, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender.

Amendment

In the case referred to in paragraph 4, the contracting authority or entity shall specify in the contract notice, in the invitation to submit a tender, or in the concession documents, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous *and sustainable* tender.

Amendment 34

Proposal for a directive

Article 41 – paragraph 1

Text proposed by the Commission

1. In the concession documents, the contracting authority or contracting entity may ask or may be required by a Member State to ask the tenderer to indicate in its tender any share of the contract it may intend to subcontract to third parties and any proposed subcontractors.

Amendment

1. In the concession documents, the contracting authority or contracting entity may ask or may be required by a Member State to ask the tenderer to indicate in its tender any share of the contract it may intend to subcontract to third parties and any proposed subcontractors, *providing information regarding the subcontractor including names, contact details and legal representatives. Any changes in the subcontracting chain shall be indicated without delay to the contracting authority, including their names, contact details and legal representatives.*

Amendment 35

**Proposal for a directive
Article 41 – paragraph 2**

Text proposed by the Commission

2. Paragraph 1 shall be without prejudice to the question of the principal economic operator's liability.

Amendment

2. Paragraph 1 shall be without prejudice to the question of the principal economic operator's liability **and subcontractor liability**.

Amendment 36

**Proposal for a directive
Annex 4 – heading 1**

Text proposed by the Commission

INFORMATION TO BE INCLUDED IN CONCESSION NOTICES

Amendment

INFORMATION TO BE INCLUDED IN CONCESSION NOTICES **OR IN THE CONCESSION DOCUMENT**

Amendment 37

**Proposal for a directive
Annex 10**

Text proposed by the Commission

SERVICES REFERRED TO IN ARTICLE 17

CPV Code

7511000-4 and

from 85000000-9 to 85323000-9

(except 85321000-5 and 85322000-2)

75121000-0, 75122000-7, 75124000-1

75300000-9

**75310000-2, 75311000-9, 75312000-6,
75313000-3, 75313100-4, 75314000-0,
75320000-5, 75330000-8, 75340000-1**

98000000-3

98120000-0

Description

Health and social services

**Administrative educational, healthcare
and cultural services**

Compulsory social security services

Benefit services

**Other community, social and personal
services**

Services furnished by trade unions

98131000-0

Religious services

Amendment

deleted

PROCEDURE

Title	Award of concession contracts	
References	COM(2011)0897 – C7-0004/2012 – 2011/0437(COD)	
Committee responsible Date announced in plenary	IMCO 17.1.2012	
Opinion by Date announced in plenary	EMPL 17.1.2012	
Rapporteur Date appointed	Thomas Händel 16.2.2012	
Discussed in committee	10.7.2012	8.10.2012
Date adopted	9.10.2012	
Result of final vote	+: 42	–: 2
	0: 1	
Members present for the final vote	Regina Bastos, Edit Bauer, Heinz K. Becker, Jean-Luc Bennahmias, Phil Bennion, Pervenche Berès, Vilija Blinkevičiūtė, Philippe Boulland, Milan Cabrnich, Alejandro Cercas, Ole Christensen, Derek Roland Clark, Minodora Cliveti, Emer Costello, Karima Delli, Sari Essayah, Richard Falbr, Thomas Händel, Marian Harkin, Nadja Hirsch, Stephen Hughes, Danuta Jazłowiecka, Adam Kósa, Jean Lambert, Patrick Le Hyaric, Veronica Lope Fontagné, Olle Ludvigsson, Thomas Mann, Elisabeth Morin-Chartier, Csaba Óry, Siiri Oviir, Konstantinos Poupakis, Sylvana Rapti, Licia Ronzulli, Elisabeth Schroedter, Joanna Katarzyna Skrzydlewska, Jutta Steinruck, Traian Ungureanu, Andrea Zanon	
Substitute(s) present for the final vote	Malika Benarab-Attou, Edite Estrela, Ria Oomen-Ruijten, Antigoni Papadopoulou, Csaba Sógor, Gabriele Zimmer	

8.11.2012

OPINION OF THE COMMITTEE ON INDUSTRY, RESEARCH AND ENERGY

for the Committee on Internal Market and Consumer Protection

on the proposal for a directive of the European Parliament and of the Council on the award of concession contracts
(COM(2011)0897 – C7-0004/2012 – 2011/0437(COD))

Rapporteur: Werner Langen

SHORT JUSTIFICATION

Concessions are a significant part of economic activity in the European Union Member States. Although the current legal situation means that it is difficult to produce exact figures, studies assume that over 60 % of all public-private partnerships in Europe involve concessions.

At present only the award of works concessions is subject to a limited number of secondary law provisions, while service concessions are covered only by the general principles of the TFEU. The proposed Directive is intended to close this loophole.

The current situation is unsatisfactory because it fails to offer sufficient legal certainty either to businesses or to awarding entities, while limiting access by European businesses, in particular small and medium-sized enterprises, to the economic opportunities offered by concession contracts.

In addition, in view of the difficult economic situation in most EU Member States, the efficient use of public funds is extremely important, so that the competition for the highest-performing, most cost-efficient solution can play a key role in the awarding of concession contracts.

Regulation at EU level in no way limits the freedom of public contracting authorities to fulfil their duties independently and with their own resources. If, however, a public contracting authority decides to assign these tasks to third parties, actual market access must be assured for all suitable companies in order to obtain the highest-performing, most cost-efficient solution, while avoiding the risk of corruption.

The benefits of the Directive on Concessions outlined in the working paper published by the Committee on the Internal Market are expressly supported, particularly in terms of the clarification of the existing legal framework, the creation of incentives for more competition and the specifics of individual proposed criteria that are to be changed.

Your rapporteur substantially supports the Commission proposal.

With regard to the thresholds, it is proposed that service concessions should be reduced to EUR 2.5 million, dispensing with the additional mandatory reporting proposed by the Commission.

The proposed changes should also help avoid excessive provisions in relation to the concept of life-cycle and life-cycle costing, as these are associated with the risk of abuse. At the same time, however, awarding entities are to be allowed to add employment condition features to the awarding criteria and to exclude candidates who are known to have committed serious breaches in the area of social, labour and environmental law. Because of the major differences between the thresholds of this Directive and those of the Directive on awarding public contracts, it is also necessary to prevent the risk of avoidance by designing a contract as a concession. A period of five years following the transposition period seems too long for the introduction of the electronic awarding of contracts, particularly in comparison with the much shorter period provided for by the Directive on awarding public contracts. Small-scale private holdings of up to 10% in public undertakings should be permissible by way of derogations.

AMENDMENTS

The Committee on Industry, Research and Energy calls on the Committee on the Internal Market and Consumer Protection, as the committee responsible, to incorporate the following amendments in its report:

Amendment 1 **Proposal for a directive** **Recital 1**

Text proposed by the Commission

(1) 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, while public authorities may not find the best use of public money so that EU citizens benefit from quality services at best prices. 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

Amendment

(1) 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, while public authorities may not find the best use of public money so that EU citizens benefit from quality services at best prices. An adequate, ***balanced and flexible*** legal framework for the award of concessions would ensure effective and non-discriminatory access to the market to all

certainty, favouring public investments in infrastructures and strategic services to the citizen.

Union economic operators and legal certainty, favouring public investments in infrastructures and strategic services to the citizen.

Amendment 2
Proposal for a directive
Recital 1 a (new)

Text proposed by the Commission

Amendment

(1a) The rules of this legislative framework must be clear and simple and must not create an excessive amount of bureaucracy.

Amendment 3
Proposal for a directive
Recital 1 b (new)

Text proposed by the Commission

Amendment

(1b) The nature of concessions is such that concession award provisions should not be simply equated with the rules for the awarding of public contracts.

Amendment 4
Proposal for a directive
Recital 29

Text proposed by the Commission

Amendment

(29) In technical specifications and in award criteria, contracting authorities and contracting entities should be allowed to refer to a specific production process, a specific mode of provision of services, ***or a specific process for any other stage of the life cycle of a product or service***, provided that they are linked to the subject-matter of the concession. In order to better integrate social considerations in the award of concessions, procurers ***may also*** be allowed to include, in the award criteria,

(29) In technical specifications and in award criteria, contracting authorities and contracting entities should be allowed to refer to a specific production process, ***or*** a specific mode of provision of services, provided that they are linked to the subject-matter of the concession. In order to better integrate social considerations in the award of concessions, procurers ***should*** be allowed to include, in the award criteria, characteristics related to the working condition. However, where the contracting

characteristics related to the working conditions. However, where the contracting authorities or contracting entities use the most economically advantageous tender, such criteria may only relate to the working conditions of the persons directly participating in the process of production or provision in question. Those characteristics may only concern the protection of health of the staff involved in the production process or the favouring of social integration of disadvantaged persons or members of vulnerable groups amongst the persons assigned to performing the contract, including accessibility for persons with disabilities. In this case, any award criteria which include those characteristics should *in any event* remain limited to characteristics that have immediate consequences on staff members in their working environment. They should be applied in accordance with Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services and in a way that does not discriminate directly or indirectly against economic operators from other Member States or from third countries parties to the Agreement or to Free Trade Agreements to which the Union is party. Contracting authorities and contracting entities should, also where they use the criterion of the most economically advantageous tender, be allowed to use as an award criterion the organisation, qualification and experience of the staff assigned to performing the concession in question, as this may affect the quality of concession performance and, as a result, the economic value of the tender.

Amendment 5
Proposal for a directive
Article 1 – paragraph 2 – point a

authorities or contracting entities use the most economically advantageous tender, such criteria may only relate to the working conditions of the persons directly participating in the process of production or provision in question. Those characteristics may only concern the protection of health of the staff involved in the production process or the favouring of social integration of disadvantaged persons or members of vulnerable groups amongst the persons assigned to performing the contract, including accessibility for persons with disabilities. In this case, any award criteria which include those characteristics should remain limited to characteristics that have immediate consequences on staff members in their working environment. They should be applied in accordance with Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services and in a way that does not discriminate directly or indirectly against economic operators from other Member States or from third countries parties to the Agreement or to Free Trade Agreements to which the Union is party. Contracting authorities and contracting entities should, also where they use the criterion of the most economically advantageous tender, be allowed to use as an award criterion the organisation, qualification and experience of the staff assigned to performing the concession in question, as this may affect the quality of concession performance and, as a result, the economic value of the tender.

Text proposed by the Commission

Amendment

a) Contracting authorities whether or not the works or services including the related supplies, are intended for a public purpose;

a) Contracting authorities, ***pursuant to Article 3 of this Directive***, whether or not the works or services including the related supplies, are intended for a public purpose;

Amendment 6
Proposal for a directive
Article 1 – paragraph 2 a (new)

Text proposed by the Commission

Amendment

2a. Concessions below the threshold value may be awarded by mutual agreement.

Justification

This directive should only apply to concessions affecting the internal market.

Amendment 7
Proposal for a directive
Article 1 – paragraph 2 – point b

Text proposed by the Commission

Amendment

b) Contracting entities provided that the works or services including the related supplies, are intended for the pursuit of one of the activities referred to in Annex III.

b) Contracting entities, ***pursuant to Article 4 of this Directive***, provided that the works or services including the related supplies, are intended for the pursuit of one of the activities referred to in Annex III.

Amendment 8
Proposal for a directive
Article 2 – paragraph 1 – point 8

Text proposed by the Commission

Amendment

(8) 'candidate' means an economic operator that has sought an invitation ***or has been invited*** to take part in a concession award procedure.

(8) 'candidate' means an economic operator that has sought an invitation to take part in a concession award procedure ***or has been invited to do so.***

Amendment 9
Proposal for a directive
Article 2 – paragraph 2 – subparagraph 1

Text proposed by the Commission

The right to exploit the works or services as referred to in points 2, 4 and 7 of the first paragraph shall imply the transfer to the concessionaire of the substantial operating risk. The concessionaire shall be deemed to assume the substantial operating risk where it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services which are the subject-matter of the concession.

Amendment

The right to exploit the works or services as referred to in points 2, 4 and 7 of the first paragraph shall imply the transfer to the concessionaire of the substantial operating risk. The concessionaire shall be deemed to assume the substantial operating risk where it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services which are the subject-matter of the concession, ***except when this lack of return is directly attributable to the contracting authority.***

Amendment 10
Proposal for a directive
Article 2 – paragraph 2 – subparagraph 2 – introductory part

Text proposed by the Commission

That economic risk may consist in either of the following:

Amendment

That economic risk may, ***in particular,*** consist in either of the following:

Amendment 11
Proposal for a directive
Article 5 – paragraph 1 – introductory part

Text proposed by the Commission

1. This Directive shall apply to the following concessions the value of which is equal to or greater than EUR 5 000 000:

Amendment

1. This Directive shall apply to the following concessions the value of which is equal to or greater than EUR 5 000 000 ***for concessions lasting up to five years:***

Justification

Concessions can have different lifespans. In long-term concessions, a threshold of EUR 5.000.000 might not be enough to affect the internal market. Therefore a time component has to be added to the conditions.

Amendment 12

Proposal for a directive Article 5 – paragraph 1 a (new)

Text proposed by the Commission

Amendment

1a. This Directive shall apply to the following concessions, the value of which is equal to or greater than EUR 10 000 000 for concessions lasting more than five years:

(a) concessions concluded by contracting entities for the pursuit of one of the activities referred to in Annex III;

(b) concessions concluded by contracting authorities.

Amendment 13

Proposal for a directive Article 5 – paragraph 2

Text proposed by the Commission

Amendment

2. Services concessions the value of which is equal to or greater than EUR 2 500 000 but lower than EUR 5 000 000 other than social services and other specific services shall be subject to the obligation to publish a concession award notice in accordance with Articles 27 and 28.

2. Services concessions ***lasting for up to five years*** the value of which is equal to or greater than EUR 2 500 000 but lower than EUR 5 000 000 other than social services and other specific services shall be subject to the obligation to publish a concession award notice in accordance with Articles 27 and 28. ***Services concessions lasting more than five years, the value of which is equal to or greater than EUR 5 000 000 but lower than EUR 10 000 000, other than social services and other specific services, shall be subject to the obligation to publish a concession award notice in accordance with Articles 27 and 28.***

Amendment 14

Proposal for a directive Article 6 – paragraph 1

Text proposed by the Commission

1. The calculation of the estimated value of a concession shall be based on the total amount payable, net of VAT, as estimated by the contracting authority or the contracting entity, ***including any form of option and any extension of the duration of the concession.***

Amendment 15
Proposal for a directive
Article 6 – paragraph 3

Text proposed by the Commission

3. The choice of the method used to calculate the estimated value of a concession shall not be made with the intention of excluding it from the scope of this Directive. A works project or an entirety of services shall not be subdivided with the effect of preventing it from falling within the scope of this Directive, unless justified by objective reasons.

Amendment 16
Proposal for a directive
Article 6 – paragraph 5

Text proposed by the Commission

5. With regard to ***public works concessions and works concessions, calculation of the estimated value shall take account of both the cost of the works and the total estimated value of the supplies and services that are made available to the contractor by the contracting authorities or entities provided that they are necessary for executing the works.***

Amendment

1. The calculation of the estimated value of a concession shall be based on the total amount payable, net of VAT, as estimated by the contracting authority or the contracting entity.

Amendment

3. The choice of the method used to calculate the estimated value of a concession shall not be made with the intention of excluding it from the scope of this Directive. A works project or an entirety of services shall not be subdivided with the effect of preventing it from falling within the scope of this Directive, unless justified by objective reasons, ***such as taking SMEs into consideration.***

Amendment

5. With regard to ***determining the threshold, the estimated value of the concession shall be equal to the estimated turnover, net of taxes, accumulated over the duration of the contract.***

Justification

Concession contracts very often involve both works and services. Works concessions may include the operation and provision of services. Services concessions may require works to be carried out during the period covered by a contract. The way in which the value of a concession is calculated must be the same for works concessions and services concessions, and should better reflect the remuneration (turnover) of the concession.

Amendment 17

Proposal for a directive

Article 6 – paragraph 7

Text proposed by the Commission

7. Where the aggregate value of the lots is equal to or exceeds the **threshold** laid down in Article 5, this Directive shall apply to the awarding of each lot.

Amendment

7. Where the aggregate value of the lots is equal to or exceeds the **thresholds** laid down in Article 5, this Directive shall apply to the awarding of each lot.

Amendment 18

Proposal for a directive

Article 6 – paragraph 8

Text proposed by the Commission

8. Contracting authorities or contracting entities may award concessions for individual lots without applying the provisions on the award provided for under this Directive, provided that the estimated value net of VAT of the lot concerned is less than EUR **1 million**. However, the aggregate value of the lots thus awarded without applying this Directive shall not exceed 20% of the aggregate value of all the lots into which the proposed work or the proposed purchase of services has been divided.

Amendment

8. Contracting authorities or contracting entities may award concessions for individual lots without applying the provisions on the award provided for under this Directive, provided that the estimated value net of VAT of the lot concerned is less than EUR **500 000**. However, the aggregate value of the lots thus awarded without applying this Directive shall not exceed 20 % of the aggregate value of all the lots into which the proposed work or the proposed purchase of services has been divided.

Amendment 19

Proposal for a directive

Article 7 – paragraph 1 a (new)

Text proposed by the Commission

Amendment

Nor shall it be made with the objective of excluding it from the scope of the Directive on the Awarding of Public Contracts.

Justification

The major differences between the thresholds of this Directive and those of the Directive on the Awarding of Public Contracts give rise to the risk that contracts will be designed as concessions so as to avoid coming under the Directive for the Awarding of Public Contracts.

Amendment 20

Proposal for a directive

Article 7 – paragraph 1 b (new)

Text proposed by the Commission

Amendment

When awarding concessions which are not covered by this Directive because of their value, public contracting entities and awarding entities are required to adhere to the principles of equal treatment, non-discrimination and transparency contained in the TFEU.

Amendment 21

Proposal for a directive

Article 8 – paragraph 1

Text proposed by the Commission

Amendment

1. This Directive shall not apply to services concessions awarded by a contracting authority or by a contracting entity to an economic operator ***which is a contracting entity or an association of thereof***, on the basis of an exclusive right that economic operator enjoys pursuant to applicable and published national law, regulation ***or administrative provision***, and which has been granted in accordance with the Treaty and Union sectoral legislation concerning the management of networks infrastructure

1. This Directive shall not apply to services concessions awarded by a contracting authority or by a contracting entity to an economic operator on the basis of an exclusive right that economic operator enjoys pursuant to applicable and published national law ***or*** regulation, and which has been granted in accordance with the Treaty and Union sectoral legislation concerning the management of networks infrastructure related to the activities set out in annex III.

related to the activities set out in annex III.

Justification

It is acknowledged in Article 8(1) and Annex V that activities that are already covered by other sector-specific directives are excluded. Despite this, however, the way in which the proposal is worded suggests that the economic operator must be a contracting entity, which is not the case for all the operators carrying out these activities. This amendment proposes a form of words that fits in with the basic aim of the proposal.

Amendment 22

Proposal for a directive

Article 8 – paragraph 3 – subparagraph 1 – point a

Text proposed by the Commission

a) an international agreement concluded in conformity with the Treaty between a Member State and one or more third countries and covering works, supplies or services intended for the joint implementation or exploitation of a project by the signatory States;

Amendment

a) an international agreement concluded in conformity with the Treaty between a Member State and one or more third countries and covering works, supplies or services intended for the joint implementation or exploitation of a project by the signatory States, ***unless European Union funding is granted for this purpose***;

Justification

The principles of this Directive should be adhered to when EU funds are being spent.

Amendment 23

Proposal for a directive

Article 8 – paragraph 3 – subparagraph 3

Text proposed by the Commission

For the purposes of point (d) of the first subparagraph, where a concession is co-financed ***for a considerable part*** by an international organisation or international financing institution the parties decide on applicable concession award procedures which shall be in conformity with the provisions of the Treaty on the Functioning of the European Union.

Amendment

For the purposes of point (d) of the first subparagraph, where ***more than one quarter of*** a concession is co-financed by an international organisation or international financing institution the parties decide on applicable concession award procedures which shall be in conformity with the provisions of the Treaty on the Functioning of the European Union.

Amendment 24
Proposal for a directive
Article 8 – paragraph 3 a (new)

Text proposed by the Commission

Amendment

3a. This Directive shall not apply to agreements through which the State or the contracting authority or entity awards an economic operator the right to exploit certain public domains or resources, when the State or contracting authority or entity establishes only general conditions for their use without becoming a beneficiary of the specific works or services provided by the economic operator.

Amendment 25
Proposal for a directive
Article 8 – paragraph 5 – subparagraph 1 – introductory part

Text proposed by the Commission

Amendment

This Directive shall not apply to service concessions ***for***:

This Directive shall not apply to service concessions ***awarded by a contracting authority to another contracting authority or to an association of contracting authorities on the basis of an exclusive right which they enjoy pursuant to a published law, regulation or administrative provision which is compatible with the Treaty.***

Nor shall it apply in respect of:

Justification

Reflects the wording of Article 18 of the current Directive 2004/18 making it clear that Member States may continue to grant such exclusive rights in accordance with the Treaty.

Amendment 26
Proposal for a directive
Article 8 – paragraph 5 – subparagraph 1 – point d

Text proposed by the Commission

Amendment

(d) financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments within the meaning of Directive 2004/39/EC of the European Parliament and of the Council, central bank services and operations conducted with the European Financial Stability Facility (EFSF);

(d) financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments within the meaning of Directive 2004/39/EC of the European Parliament and of the Council, ***transactions by the contracting authorities to raise money or capital***, central bank services and operations conducted with the European Financial Stability Facility (EFSF) ***and the European Stability Mechanism (ESM)***;

Justification

The concern not to make borrowing too easy inter alia for municipalities is a reasonable one. However, sufficient safeguards to that end are already in place and there is no need for a new rule at European level. Municipalities must continue to be afforded a degree of flexibility in borrowing, and transactions to raise money or capital should therefore remain outside the Directive's scope.

Amendment 27

Proposal for a directive

Article 8 – paragraph 5 – subparagraph 1 – point e

Text proposed by the Commission

Amendment

e) employment contracts;

deleted

Amendment 28

Proposal for a directive

Article 8 – paragraph 5 – subparagraph 2

Text proposed by the Commission

Amendment

The broadcasting referred to in point (b) of the first paragraph shall include any transmission and distribution using any form of electronic network.

deleted

Justification

The term broadcasting is already defined in paragraph 5 point b).

Amendment 29
Proposal for a directive
Article 10 – paragraph 2

Text proposed by the Commission

2. Contracting entities shall notify the Commission or the national oversight body at their request of any activities which they regard as excluded. The Commission *may periodically* publish in the Official Journal of the European Union for information purposes, lists of the categories of activities which it considers to be covered by this exclusion. In so doing, the Commission shall respect any sensitive commercial aspects that the contracting entities may point out when forwarding this information.

Amendment

2. Contracting entities shall notify the Commission or the national oversight body at their request of any activities which they regard as excluded. **Every six months, beginning on 1 July 2013,** the Commission *shall* publish in the Official Journal of the European Union for information purposes lists of the categories of activities which it considers to be covered by this exclusion. In so doing, the Commission shall respect any sensitive commercial aspects that the contracting entities may point out when forwarding this information.

Amendment 30
Proposal for a directive
Article 11 – paragraph 4 – point a

Text proposed by the Commission

a) to service concessions provided that at least **80 %** of the average total turnover of the affiliated undertaking with respect to services in general for the preceding three years derives from the provision of services to undertakings with which it is affiliated;

Amendment

a) to service concessions provided that at least **60 %** of the average total turnover of the affiliated undertaking with respect to services in general for the preceding three years derives from the provision of services to undertakings with which it is affiliated;

Amendment 31
Proposal for a directive
Article 11 – paragraph 4 – point b

Text proposed by the Commission

b) works concessions provided that at least **80 %** of the average total turnover of the affiliated undertaking with respect to works in general for the preceding three years derives from the provision of works to

Amendment

b) works concessions provided that at least **60 %** of the average total turnover of the affiliated undertaking with respect to works in general for the preceding three years derives from the provision of works to

undertakings with which it is affiliated.

undertakings with which it is affiliated.

Amendment 32

Proposal for a directive

Article 15 – paragraph 1 – subparagraph 1 – point b

Text proposed by the Commission

Amendment

b) at least **90%** of the activities of that legal person are carried out for the controlling contracting authority or entity or for other legal persons controlled by that contracting authority or entity

b) at least **80 %** of the activities of that legal person are carried out for the controlling contracting authority or entity or for other legal persons controlled by that contracting authority or entity

Amendment 33

Proposal for a directive

Article 15 – paragraph 1 – subparagraph 1 – point c

Text proposed by the Commission

Amendment

c) there *is* no private **participation** in the controlled legal person

c) there **are** no private **participations** in the controlled legal person **in excess of 10 %**.

Justification

Greater precision is required because of the Altmark judgment of the European Court of Justice.

Amendment 34

Proposal for a directive

Article 15 – paragraph 3 – subparagraph 1 – point b

Text proposed by the Commission

Amendment

b) at least **90%** of the activities of that legal person are carried out for the controlling contracting authorities or entities as referred to in paragraph 1 subparagraph 1 of Article 4 or other legal persons controlled by the same contracting authority or entity;

b) at least **80 %** of the activities of that legal person are carried out for the controlling contracting authorities or entities as referred to in paragraph 1 subparagraph 1 of Article 4 or other legal persons controlled by the same contracting authority or entity.

Amendment 35
Proposal for a directive
Article 15 – paragraph 3 – subparagraph 1 – point c

Text proposed by the Commission

Amendment

c) there *is* no private **participation** in the controlled legal person.

c) there **are** no private **participations** in the controlled legal person **in excess of 10 %**.

Justification

Greater precision is required because of the Altmark judgment of the European Court of Justice.

Amendment 36
Proposal for a directive
Article 15 – paragraph 4 – point a

Text proposed by the Commission

Amendment

(a) the agreement establishes a genuine co-operation between the participating contracting authorities or entities aimed at carrying out jointly their public service tasks and involving mutual rights and obligations of the parties;

(a) the purpose of the partnership is the provision of a public service task in the public interest conferred on public authorities, or the carrying-out of ancillary purchasing activities within the meaning of Article 2(17), which is necessary in order to perform the public service task in the public interest. A pooling of tasks shall also be considered to exist where a municipality is merely obliged to make payment, provided that cooperation enables the municipality to carry out its own obligations more economically or more effectively;

Amendment 37
Proposal for a directive
Article 15 – paragraph 4 – point b

Text proposed by the Commission

Amendment

(b) the agreement is governed only by considerations relating to the public interest;

(b) the task is carried out solely by the public authorities concerned without the involvement of active private capital;

Amendment 38
Proposal for a directive
Article 15 – paragraph 4 – point c

Text proposed by the Commission

Amendment

(c) the participating contracting authorities or entities shall do not perform on the open market more than 10% in terms of turnover of the activities which are relevant in the context of the agreement;

deleted

Amendment 39
Proposal for a directive
Article 15 – paragraph 5 – subparagraph 1

Text proposed by the Commission

Amendment

The absence of private *participation* referred to in paragraphs 1 to 4 shall be verified at the time of the award of the concession or of the conclusion of the agreement.

The absence of private *participations in excess of 10 %* referred to in paragraphs 1 to 4 shall be verified at the time of the award of the concession or of the conclusion of the agreement.

Amendment 40
Proposal for a directive
Article 16

Text proposed by the Commission

Amendment

The duration of the concession shall be limited to the time estimated to be necessary for the concessionaire to *recoup* the investments made in operating the works or services together with a reasonable return on invested capital.

The duration of the concession shall *only* be limited to the time estimated to be necessary for the concessionaire to *amortise* the *initial and subsequent* investments made in operating the works or services together with a reasonable return on invested capital.

Justification

Linguistic amendment

Amendment 41
Proposal for a directive
Article 18 – paragraph 1

Text proposed by the Commission

1. ***Contracts which have as their object both services and supplies shall be awarded in accordance with*** this Directive where the main object of the contract in question are services and where they are concessions within the meaning of point (1) of the first paragraph of Article 2

Amendment 42
Proposal for a directive
Article 19 – paragraph 1 – subparagraph 2

Text proposed by the Commission

However, the choice between awarding a single concession and awarding a number of separate concessions **may** not be made with the objective of excluding it from the scope of this Directive.

Amendment 43
Proposal for a directive
Article 20

Text proposed by the Commission

Member States may reserve the right to participate in concession award procedures to sheltered workshops and economic operators whose main aim is the social and professional integration of disabled and disadvantaged workers or provide for such concessions to be performed in the context of sheltered employment programmes provided that more than **30%** of the employees of those workshops, economic operators or programmes are disabled or disadvantaged workers.

Amendment 44
Proposal for a directive
Article 25 – paragraph 7 – subparagraph 1

Amendment

1. This Directive ***shall apply with regard to contracts for both services and supplies*** where the main object of the contract in question are services and where they are concessions within the meaning of point (1) of the first paragraph of Article 2.

Amendment

However, the choice between awarding a single concession and awarding a number of separate concessions ***shall*** not be made with the objective of excluding it from the scope of this Directive.

Amendment

Member States may reserve the right to participate in concession award procedures to sheltered workshops and economic operators whose main aim is the social and professional integration of disabled and disadvantaged workers or provide for such concessions to be performed in the context of sheltered employment programmes provided that more than **50 %** of the employees of those workshops, economic operators or programmes are disabled or disadvantaged workers.

Text proposed by the Commission

Amendment

Member States shall ensure that, at the latest **5** years after the date provided for in Article 49 (1), all procedures for the award of concessions under this Directive are performed using electronic means of communication, in particular e-submission, in accordance with the requirements of this Article.

Member States shall ensure that, at the latest **3** years after the date provided for in Article 49(1), all procedures for the award of concessions under this Directive are performed using electronic means of communication, in particular e-submission, in accordance with the requirements of this Article.

Justification

A period of five years seems too long, particularly in comparison with the much shorter period provided for by the Directive for the Awarding of Public Contracts.

Amendment 45
Proposal for a directive
Article 25 – paragraph 8

Text proposed by the Commission

Amendment

8. Contracting authorities may use the data processed electronically for public procurement procedures in order to prevent, detect and correct errors occurring at each stage by developing appropriate tools.

deleted

Amendment 46
Proposal for a directive
Article 26 – paragraph 6 – subparagraph 1 – indent 2

Text proposed by the Commission

Amendment

– it is **completely** irrelevant to the concession, **being incapable of meeting** the contracting authority or contracting entity's **needs** as specified in the concession documents.

– it is irrelevant to the concession, **failing to meet** the contracting authority or contracting entity's **requirements** as specified in the concession documents.

Amendment 47
Proposal for a directive
Article 26 – paragraph 6 – subparagraph 2

Text proposed by the Commission

Amendment

Tenders shall be considered to be irregular, where they do not comply with the concession documents or where the prices offered are sheltered from normal competitive forces.

deleted

Amendment 48

Proposal for a directive

Article 26 – paragraph 6 – subparagraph 3 – introductory part

Text proposed by the Commission

Amendment

Tenders ***shall be*** considered ***to be*** unacceptable in ***any of*** the following cases:

Tenders ***are*** considered unacceptable in the following cases:

Amendment 49

Proposal for a directive

Article 26 – paragraph 6 – subparagraph 3 – point b

Text proposed by the Commission

Amendment

b) they have been submitted by tenderers who do not have the requisite qualifications;

b) they have been submitted by tenderers who do not have the requisite ***documentary evidence of*** qualifications;

Amendment 50

Proposal for a directive

Article 26 – paragraph 6 – subparagraph 3 – point c

Text proposed by the Commission

Amendment

c) their price exceeds the contracting authority or contracting entity's budget as determined prior to the launching of the concession award procedure and documented in writing;

c) their price exceeds the contracting authority or contracting entity's budget as determined prior to the launching of the concession award procedure and documented in writing ***by more than 20 %***;

Amendment 51

Proposal for a directive

Article 26 – paragraph 6 – subparagraph 3 – point d

Text proposed by the Commission

Amendment

d) they *have been found to be abnormally low*

d) they *are more than 20 % below the average of the other tenders or the documented budget.*

Amendment 52
Proposal for a directive
Article 27 – paragraph 2

Text proposed by the Commission

Amendment

2. The obligation referred to in paragraph 1 shall also apply to those services concessions the estimated value of which, as calculated according to the method referred to in Article 6 (5), is equal to or higher than 2 500 000 EUR with the sole exception of social services and other specific services as referred to in Article 17.

deleted

Amendment 53
Proposal for a directive
Article 32 – paragraph 1 – subparagraph 2

Text proposed by the Commission

Amendment

These characteristics may also refer to the specific process of production or provision of the requested works, supplies or services *or of any other stage of its life cycle as referred to in point (14) of Article 2.*

These characteristics may also refer to the specific process of production or provision of the requested works, supplies or services.

Amendment 54
Proposal for a directive
Article 35 – paragraph 1

Text proposed by the Commission

Amendment

1. Contracting authorities and contracting entities shall indicate in the contract notice, in the invitation to submit tenders or in the concession documents a description of the

1. Contracting authorities and contracting entities shall indicate in the contract notice, in the invitation to submit tenders or in the concession documents a description of the

concession, the award criteria and the minimum requirements to be met. This information must allow to identify the nature and scope of the concession, enabling economic operators to decide whether they request to participate in the concession award procedure. ***The description, award criteria and minimum requirements shall not be changed in the course of the negotiations.***

concession, the award criteria and the minimum requirements to be met. This information must allow to identify the nature and scope of the concession, enabling economic operators to decide whether they request to participate in the concession award procedure. ***Contracting authorities may, during the procedure but before tenders are received, adjust the minimum requirements and the award criteria without publishing a general correction, if the change has no impact on the tenderers. Contracting authorities should inform the tenderers concerned and should provide for a reasonable extension of the deadline for application.***

Justification

Concessions rules have to be flexible. Therefore it has to be possible to make additions to the tender during the procedure.

Amendment 55 Proposal for a directive Article 35 – paragraph 5 – point e

Text proposed by the Commission

(e) they shall establish a **written** record of formal deliberations and any other steps and events relevant for the concession award procedure. ***In particular, it shall ensure, by all appropriate means, the traceability of the negotiations.***

Amendment

(e) they shall establish a record of formal deliberations and any other steps and events relevant for the concession award procedure, ***in order to ensure, by all appropriate means, the traceability of the negotiations.***

Amendment 56 Proposal for a directive Article 36 – paragraph 5 – subparagraph 1 – point c

Text proposed by the Commission

c) fraud within the meaning of Article 1 of the Convention on the protection of the financial interests of the European Communities ;

Amendment

c) fraud within the meaning of Article 1 of the Convention on the protection of the financial interests of the European Communities ***as well as fraud within the meaning of national legislation for the public contracting entity or tendering***

authority;

Amendment 57
Proposal for a directive
Article 36 – paragraph 6

Text proposed by the Commission

6. Any economic operator shall be excluded from participation in a concession where the contracting authority or contracting entity is aware of a decision having the force of res judicata establishing that it has not fulfilled obligations relating to the payment of taxes or social security contributions in accordance with the legal provisions of the country in which it is established or with those of the Member State of the contracting authority or entity.

Amendment

6. Any economic operator shall be excluded from participation in a concession where the contracting authority or contracting entity is aware of a decision having the force of res judicata establishing that it has not fulfilled obligations relating to the payment of taxes or social security contributions in accordance with the legal provisions of the country in which it is established or with those of the Member State of the contracting authority or entity ***or becomes aware of any labour court judgments or legally binding administrative decisions.***

Amendment 58
Proposal for a directive
Article 36 – paragraph 7 – subparagraph 1 – point a

Text proposed by the Commission

a) where it is aware of any other serious violation of provisions of European Union ***or of*** national law aimed at the protection of public interests compatible with the Treaty;

Amendment

a) where it is aware of any other serious violation of provisions of European Union ***law,*** national law aimed at the protection of public interests compatible with the Treaty ***or serious breaches in the area of social, labour and environmental law;***

Amendment 59
Proposal for a directive
Article 39 – paragraph 3

Text proposed by the Commission

3. The contracting authority or the contracting entity shall indicate in the concession notice or documents the relative

Amendment

3. The contracting authority or the contracting entity shall, ***if it deems it necessary,*** indicate in the concession

weighting which it gives to each of the criteria set out in paragraph 1 or list those criteria in descending order of importance.

notice or documents the relative weighting which it gives to each of the criteria set out in paragraph 1 or list those criteria in descending order of importance.

Justification

The weighting in itself is no guarantee whatsoever of the impartiality of the procedure, and only serves as a restriction to the contracting authority. It is uncertain what impact this change will have on the renewal procedures required. Weighting or categorising the criteria in order of importance could result in the financial criterion of the awarding authority's remuneration taking precedence over energy and environmental aspects of tenders where hydroelectric concessions are concerned.

Amendment 60 **Proposal for a directive** **Article 39 – paragraph 3 a (new)**

Text proposed by the Commission

Amendment

3a. The contracting authority or the contracting entity shall exclude an economic operator established in a non-EU country from participating in a concession if, by virtue of legislation in the country in which it is established, economic operators established in the Union are prohibited from or restricted in applying for similar concessions.

Justification

This amendment suggests applying the principle of reciprocity, under international trade rules, when it comes to applying for concessions. It excludes any economic operator established in a non-EU country in which there are rules meaning that EU economic operators are prevented from or restricted in applying for concessions.

Amendment 61 **Proposal for a directive** **Article 39 – paragraph 4 – introductory part**

Text proposed by the Commission

Amendment

4. Member States **may** provide that contracting authorities and contracting entities shall base the award of concessions on the criterion of the most economically

4. Member States **shall** provide that contracting authorities and contracting entities shall base the award of concessions on the criterion of the most economically

advantageous tender, in compliance with paragraph 2. Those criteria may include, in addition to price or costs, any of the following criteria

advantageous tender, in compliance with paragraph 2. Those criteria may include, in addition to price or costs, any of the following criteria

Amendment 62

Proposal for a directive

Article 39 – paragraph 4 – point a

Text proposed by the Commission

a) quality, including technical merit, aesthetic and functional characteristics, accessibility, ***design for all users***, environmental characteristics and innovative character.

Amendment

a) quality, including technical merit, aesthetic and functional characteristics, accessibility, ***social criteria***, environmental characteristics and innovative character;

Amendment 63

Proposal for a directive

Article 39 – paragraph 4 – point d

Text proposed by the Commission

d) the specific process of production or provision of the requested works, supplies or services ***or of any other stage of its life cycle as referred to in point 14 of paragraph 1 of Article 2, to the extent that those criteria concern factors directly involved in these processes and characterise the specific process of production or provision of the requested works, supplies or services.***

Amendment

d) the specific process of production or provision of the requested works, supplies or services.

Amendment 64

Proposal for a directive

Article 39 – paragraph 5 – subparagraph 1

Text proposed by the Commission

In the case referred to in paragraph 4, the contracting authority or entity shall specify in the contract notice, in the invitation to submit a tender, or in the concession documents, the relative weighting which it gives to each of the criteria chosen to

Amendment

In the case referred to in paragraph 4, the contracting authority or entity shall, ***where appropriate***, specify in the contract notice, in the invitation to submit a tender, or in the concession documents, the relative weighting which it gives to each of the

determine the most economically advantageous tender.

criteria chosen to determine the most economically advantageous tender.

Amendment 65
Proposal for a directive
Article 40 – paragraph 1 – point a

Text proposed by the Commission

(a) internal costs, including costs relating to acquisition (*such as production costs*), use (such as energy consumption, maintenance costs) and end of life (such as collection and recycling costs)

Amendment

(a) internal costs, including costs relating to acquisition, use (such as energy consumption, maintenance costs) and end of life (such as collection and recycling costs);

Justification

When calculating life cycle costs, only those costs incurred by a concession user and external environmental costs based on legal requirements should be taken into consideration.

Amendment 66
Proposal for a directive
Article 40 – paragraph 1 – point b

Text proposed by the Commission

(b) external environmental costs directly linked to the life cycle, provided their monetary value can be determined and verified, which may include the cost of emissions of greenhouse gases and of other pollutant emissions *and other climate change mitigation costs*.

Amendment

(b) external environmental costs directly linked to the life cycle, provided their monetary value can be determined and verified, which may include the cost of emissions of greenhouse gases and of other pollutant emissions.

Amendment 67
Proposal for a directive
Article 41 – paragraph 1

Text proposed by the Commission

1. In the concession documents, the contracting authority or contracting entity may ask *or may be required by a Member State to ask* the tenderer to indicate in its tender any share of the contract it may intend to subcontract to third parties and

Amendment

1. In the concession documents, the contracting authority or contracting entity may ask the tenderer to indicate in its tender any share of the contract it may intend to subcontract to third parties and any proposed subcontractors. *Member States shall ensure there is no*

any proposed subcontractors.

discrimination, in terms of working conditions and wages, between persons employed by subcontractors and persons employed by tenderers.

Amendment 68
Proposal for a directive
Article 41 – paragraph 2 a (new)

Text proposed by the Commission

Amendment

2a. Member States can stipulate a binding undertaking pursuant to paragraph 1, and restrict the number of subcontractors in line with the size and complexity of the contract.

Amendment 69
Proposal for a directive
Article 42 – paragraph 2 – point b

Text proposed by the Commission

Amendment

(b) the modification changes the economic balance of the concession in favour of the concessionaire or

(b) the modification changes the economic balance of the concession in favour of the concessionaire *except if this results from the recovery of the economical and financial equilibrium of the concession after having been upset by the contracting authorities' actions* or

Amendment 70
Proposal for a directive
Article 42 – paragraph 6 – subparagraph 2

Text proposed by the Commission

Amendment

Contracting authorities or contracting entities shall publish in the Official Journal of the European Union a notice on such modifications. Such notices shall contain the information set out in Annex VII and be published in accordance with the provisions of Article 28.

deleted

Justification

It does not seem to make sense to publish amendments that do not result in a new award procedure.

Amendment 71
Proposal for a directive
Article 43 – title

Text proposed by the Commission

Amendment

Termination of concessions

Termination of concessions and ***new invitation to tender***

Amendment 72
Proposal for a directive
Article 43 – point b a (new)

Text proposed by the Commission

Amendment

(ba) failure to meet the obligations arising from the concession contract;

Amendment 73
Proposal for a directive
Article 43 – point a

Text proposed by the Commission

Amendment

(a) the exceptions provided for in Article 15 cease to apply following a private participation in the legal person awarded the contract pursuant to Article 15 (4);

(a) the exceptions provided for in Article 15 cease to apply following a private participation ***of more than ten per cent*** in the legal person awarded the contract pursuant to Article 15(4);

Justification

Technical amendment, r.

Amendment 74
Proposal for a directive
Article 43 – point c

Text proposed by the Commission

(c) the Court of Justice of the European Union **finds**, in a procedure pursuant to Article 258 of the Treaty, that a Member State has failed to fulfil its obligations under the Treaties by the fact that a contracting authority or entity belonging to that Member State has awarded the concession in question without complying with its obligations under the Treaties and this Directive.

Amendment

(c) **in cases in which** the Court of Justice of the European Union **determines**, in a procedure pursuant to Article 258 of the Treaty, that a Member State has failed to fulfil its obligations under the Treaties by the fact that a contracting authority or entity belonging to that Member State has awarded the concession in question without complying with its obligations under the Treaties and this Directive, **tenders must be promptly invited for the concession within six months. Member States must establish the necessary legal prerequisites for this.**

Justification

Technical amendment, new article structure.

Amendment 75

Proposal for a directive

Article 50 – paragraph 1 a (new)

Text proposed by the Commission

Amendment 76

Proposal for a directive

Annex VIII – point 1 – point a

Text proposed by the Commission

a) in the case of public works concessions or works concessions, the totality of the technical prescriptions contained in particular in the concession award documents, defining the characteristics required of a material, product or supply, so that it fulfils the use for which it is intended by the contracting authority or

Amendment

The modifications to Directives 89/665/EEC and 92/13/EEC shall be inserted into those texts at the latest by the time this Directive enters into force.

Amendment

a) in the case of public works concessions or works concessions, the totality of the technical prescriptions contained in particular in the concession award documents, defining the characteristics required of a material, product or supply, so that it fulfils the use for which it is intended by the contracting authority or

entity. Those characteristics include levels of environmental and climate performance, ***design for all requirements (including accessibility for disabled persons)*** and conformity ***assessment***, performance, safety or dimensions, including the procedures concerning quality assurance, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions ***and production processes and methods at any stage of the life cycle of the works***; those characteristics also include rules relating to design and costing, the test, inspection and acceptance conditions for works and methods or techniques of construction and all other technical conditions which the contracting authority or entity is in a position to prescribe, under general or specific regulations, in relation to the finished works and to the materials or parts which they involve;

Amendment 77
Proposal for a directive
Annex VIII – point 1 – point b

Text proposed by the Commission

b) in the case of service concessions, a specification in a document defining the required characteristics of a product or a service, such as quality levels, environmental and climate performance levels, ***design for all requirements (including accessibility for disabled persons)*** and conformity ***assessment***, performance, use of the product, safety or dimensions, including requirements relevant to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions, ***production processes and methods at any stage of the life cycle of the supply or service and conformity assessment procedures***;

entity. Those characteristics include levels of environmental and climate performance, ***assurance of accessibility for disabled persons***, and conformity ***with European Union law***, performance, safety or dimensions, including the procedures concerning quality assurance, terminology, symbols, testing and test methods, packaging, marking and labelling, ***as well as*** user instructions; those characteristics also include rules relating to design and costing, the test, inspection and acceptance conditions for works and methods or techniques of construction and all other technical conditions which the contracting authority or entity is in a position to prescribe, under general or specific regulations, in relation to the finished works and to the materials or parts which they involve;

Amendment

b) in the case of service concessions, a ***written*** specification in a document defining the required characteristics of a product or a service, such as quality levels, environmental and climate performance levels, ***assurance of accessibility for disabled persons and conformity with European Union law***, performance, use of the product, safety or dimensions, including requirements relevant to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking and labelling, ***as well as*** user instructions;

PROCEDURE

Title	Award of concession contracts
References	COM(2011)0897 – C7-0004/2012 – 2011/0437(COD)
Committee responsible Date announced in plenary	IMCO 17.1.2012
Opinion by Date announced in plenary	ITRE 17.1.2012
Rapporteur Date appointed	Werner Langen 14.3.2012
Discussed in committee	12.7.2012
Date adopted	5.11.2012
Result of final vote	+: 37 –: 6 0: 3
Members present for the final vote	Gabriele Albertini, Josefa Andrés Barea, Jean-Pierre Audy, Ivo Belet, Jan Březina, Giles Chichester, Pilar del Castillo Vera, Christian Ehler, Vicky Ford, Adam Gierek, Fiona Hall, Jacky Hénin, Kent Johansson, Romana Jordan, Krišjānis Kariņš, Béla Kovács, Angelika Niebler, Rolandas Paksas, Aldo Patriciello, Vittorio Prodi, Miloslav Ransdorf, Herbert Reul, Michèle Rivasi, Amalia Sartori, Salvador Sedó i Alabart, Francisco Sosa Wagner, Britta Thomsen, Evžen Tošenovský, Catherine Trautmann, Claude Turmes, Marita Ulvskog, Adina-Ioana Vălean, Alejo Vidal-Quadras
Substitute(s) present for the final vote	Yves Cochet, Ioan Enciu, Roger Helmer, Jolanta Emilia Hibner, Gunnar Hökmark, Yannick Jadot, Werner Langen, Zofija Mazej Kukovič, Franck Proust, Algirdas Saudargas, Silvia-Adriana Țicău
Substitute(s) under Rule 187(2) present for the final vote	Phil Bennion, Christian Engström

21.11.2012

OPINION OF THE COMMITTEE ON TRANSPORT AND TOURISM

for the Committee on the Internal Market and Consumer Protection

on the proposal for a directive of the European Parliament and of the Council on the award of concession contracts
(COM(2011)0897 – C7-0004/2012 – 2011/0437(COD))

Rapporteur: Sabine Wils

SHORT JUSTIFICATION

The European Parliament expressed its opposition to a European legislative act on concessions to provide services in its resolution of 18 May 2010 on new developments in public procurement.

The rapporteur also believes that there is no need for a legislative act on the award of service concessions at European level. There would be a risk of negative effects on the provision of services of general interest and the guaranteed provision and further development of social security.

The rapporteur recommends rejecting the draft directive.

General remarks

The principal objective of the draft is the creation of a higher degree of legal certainty. Service concessions are currently exempted from the scope of procurement law, pursuant to Article 17 of Directive 2004/18/EC (the Directive on the coordination of procedures for the award of public contracts) and Article 18 of Directive 2004/17/EC (the Utilities Directive). The award of service concessions is regulated with sufficient legal certainty by the existing primary law of the EU, in particular the principles of equal treatment, non-discrimination and transparency stemming from the fundamental freedoms and by the case-law of the European Court of Justice. The award of building concessions is also sufficiently regulated (Directive 2004/18/EC).

The rapporteur believes that the Commission is wrong to suggest that there are any non-regulated aspects. The Directive will not provide greater legal certainty.

The rapporteur also criticises the unclear and excessively broad scope of application (Articles 1, 2 and 5) and the conditions for derogations, which are too narrow (Article 8). In her opinion, the fields of social security, culture, education, public infrastructure and other local

authority services should be exempted from the scope of application.

Safeguarding services of general interest rather than opening up the market

Whilst Article 14 TFEU and the Protocol on Services of General Interest stress the wide discretion of public commissioning authorities to provide, commission and finance services of general interest, nowhere does the draft directive refer to reinforcing such services in EU primary law. Emphasis is instead placed on opening up the public procurement sector to competition (recitals 1, 2 and 4), whilst the scope available to contracting authorities is narrowed by not allowing them unrestricted freedom of choice in defining award criteria (Article 39(2)). In addition, there is no obligation to adhere to local collective agreements (Article 39, recitals 29 and 32).

The rapporteur is unhappy that the proposal disregards the fundamental purpose of public services, which is to ensure that citizens have general, non-discriminatory, comprehensive and reasonably-priced access to services of general interest. The Commission is aiming not so much to safeguard such services as to create new market sectors. This gives rise to the fear that public-public cooperation and in-house transactions will become the exception. The draft also gives better market access for undertakings and the promotion of public-private partnerships (PPPs) as objectives (recital 17). The rapporteur is especially critical of the latter, as she believes that the private sector does not provide services which are more efficient, transparent and reasonably-priced than those provided by the public sector. In addition, the effects of external factors on, for example, employees are generally not considered.

The transport sector

The proposed directive applies to activities in connection with the provision of services to the public in the field of transport by rail, automated systems, tramway, trolley bus, bus or cable and also the postal service, with the exception of air transport services based on the granting of an operating licence within the meaning of Regulation (EC) No 1008/2008 and of public passenger transport services within the meaning of Regulation (EC) No 1370/2007. It will also apply to activities relating to the exploitation of a geographical area for the purpose of the provision of airports and maritime or inland ports or other terminal facilities to carriers by air, sea or inland waterway.

AMENDMENTS

The Committee on Transport and Tourism calls on the Committee on the Internal Market and Consumer Protection, as the committee responsible, to incorporate the following amendments in its report:

Amendment 1

Proposal for a directive

Recital 6

Text proposed by the Commission

(6) Concessions are contracts for pecuniary interest concluded between one or more economic operators and one or more contracting authorities or entities and having as their object the acquisition of works or services where the consideration consists, normally, in the right to exploit the works or services that are the subject of the contract. The execution of these works or services is subject to specific binding obligations defined by the contracting authority or entity which are legally enforceable. By contrast, certain State acts such as authorisations or licences whereby the State or a public authority establishes the conditions for the exercise of an economic activity, should not qualify as concessions. The same applies to certain agreements ***having as their object the right of*** an economic operator to exploit certain public domains or resources, such as land lease contracts ***whereby the State or contracting authority or entity establishes*** only general conditions for their use without ***acquiring*** specific works or services.

Amendment

(6) Concessions are contracts for pecuniary interest concluded between one or more economic operators and one or more contracting authorities or entities and having as their object the acquisition of works or services where the consideration consists, normally, in the right to exploit the works or services that are the subject of the contract. The execution of these works or services is subject to specific binding obligations defined by the contracting authority or entity which are legally enforceable. By contrast, certain State acts such as authorisations or licences whereby the State or a public authority establishes the conditions for the exercise of an economic activity, should not qualify as concessions. The same applies to certain agreements, such as ***tenancy or*** land lease contracts, ***where the State or the contracting authority or entity grants*** an economic operator ***for remuneration the right*** to exploit certain public domains or resources, ***including maritime areas, inland and sea ports, and in which, as a rule,*** only general conditions for their use ***are established*** without ***the State or contracting authority becoming the recipient of*** specific works or services. ***In the framework of such contracts, provisions related to the transfer, permissible use and maintenance of the public domain or resources and their repossession by the State or contracting authority, the duration of the tenancy or land lease contract, the rent and other costs borne by the tenant, are to be considered as general conditions aimed at regulating the use of the public domain or resource.***

Amendment 2

Proposal for a directive
Recital 8 a (new)

Text proposed by the Commission

Amendment

(8a) Given that concessionaires bear a substantial operating risk, they should be free to select what they consider to be the best ways of performing the contract, that is to say directly by them, or in collaboration with sister companies, or by subcontracting freely to third parties.

Justification

The amendment is intended to clarify the aim of the proposal for a directive, which is to ensure flexibility and simplification regarding downstream assignment by the concessionaire, in line with the identification of the substantial operating risk as one of the defining features of the concession. Given that the risk referred to is borne by the concessionaires, they should be free to perform the contract as they see fit: either directly, or in collaboration with sister companies, or by freely subcontracting to third parties.

Amendment 3

Proposal for a directive
Recital 11

Text proposed by the Commission

Amendment

(11) To ensure a real opening up of the market and a fair balance in the application of concession award rules in the water, energy, transport and postal services sectors it is necessary for the entities covered to be identified on a basis other than their legal status. It should be ensured, ***therefore***, that ***the*** equal treatment of contracting entities operating in the public sector and those operating in the private sector is ***not prejudiced***. It is also necessary to ensure, in keeping with Article 345 of the Treaty, that the rules governing the system of property ownership in Member States are not prejudiced.

(11) It should be ensured that equal treatment of contracting entities operating in the public sector and those operating in the private sector is ***granted***. It is also necessary to ensure, in keeping with Article 345 of the Treaty, that the rules governing the system of property ownership in Member States are not prejudiced.

Amendment 4

Proposal for a directive

Recital 11 a (new)

Text proposed by the Commission

Amendment

(11a) In accordance with Article 14 of the Treaty on the Functioning of the European Union in conjunction with Protocol 26 on services of general interest, national, regional or local competent authorities should have wide discretion in deciding whether to award contracts for services of general interest.

Amendment 5

Proposal for a directive

Recital 17

Text proposed by the Commission

Amendment

(17) ***There is considerable legal uncertainty as to how far cooperation between public authorities should be covered by concession award 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 or certain contracting entities. It is therefore necessary to clarify in what cases concessions concluded between such authorities are not subject to the application of public concession award rules. Such clarification should be guided by the principles set out in the relevant case-law of the Court of Justice. ***The sole fact that both parties to an agreement are themselves contracting authorities or contracting entities under Art. 4 (1) (1) does not as such rule out the application of concession award rules. However, the application of concession award rules should not interfere with the freedom of public authorities to decide how to organise the way they carry out their public***

(17) The relevant case-law of the Court of Justice of the European Union (ECJ) ***on cooperation among contracting authorities*** is interpreted differently between Member States and even between contracting authorities or certain contracting entities. It is therefore necessary to clarify in what cases concessions concluded between such authorities are not subject to the application of public concession award rules. Such clarification should be guided by the principles set out in the relevant case-law of the ECJ. ***The*** application of concession award rules should not interfere with the freedom of public authorities to decide how to organise the way they carry out their public service tasks. Concessions awarded to controlled entities or cooperation for the joint execution of the public service tasks of the participating contracting authorities or entities should therefore be exempted from the application of the rules if the conditions set out in this Directive are fulfilled. This Directive

service tasks. Concessions awarded to controlled entities or cooperation for the joint execution of the public service tasks of the participating contracting authorities or entities should therefore be exempted from the application of the rules if the conditions set out in this Directive are fulfilled. This Directive should aim to ensure that any exempted public-public cooperation **does not cause a** distortion of competition in relation to private economic operators. Neither should the participation of a contracting authority as a tenderer in a procedure for the award of a public contract cause any distortion of competition.

should aim to ensure that any exempted public-public cooperation, **while providing to citizens services of public interest, is not considered as a source of possible** distortion of competition in relation to private economic operators. Neither should the participation of a contracting authority as a tenderer in a procedure for the award of a public contract cause any distortion of competition.

Amendment 6

Proposal for a directive Recital 37 a (new)

Text proposed by the Commission

Amendment

(37a) In line with the case law established by the Court of Justice of the European Union, this directive should apply to concessions awarded after its entry into force.

Justification

Given the importance of the principle of the inviolability of concession contracts in force in the Member States, this should be clearly specified within the directive.

Amendment 7

Proposal for a directive Article 1 – paragraph 2 a (new)

Text proposed by the Commission

Amendment

2 a. This Directive shall not affect the right of public authorities at any level to decide whether they shall perform public functions themselves, by using their own

internal resources without being obliged to award concessions to other external economic operators. These tasks may be performed in cooperation with other public contracting authorities.

Amendment 8

Proposal for a directive

Article 2 – paragraph 1 – point 1 a (new)

Text proposed by the Commission

Amendment

*(1a) 'procurement' as defined in Article 1, paragraph 2 of Directive 2013/.../EU of the European Parliament and of the Council of ... on public procurement.**

** OJ: please insert the number and date of that Directive*

Amendment 9

Proposal for a directive

Article 2 – paragraph 1 – point 2

Text proposed by the Commission

Amendment

(2) 'public works concession' means a contract for pecuniary interest concluded in writing *between one or more economic operators and* one or more contracting authorities *and having as their object* the execution of works, *where the consideration for the works to be carried out consists* either solely in the right to exploit the works *that are the subject of the contract* or in that right together with payment.

(2) 'public works concession' means a contract for pecuniary interest concluded in writing, *under which* one or more contracting authorities *entrust* the execution of *the* works, *for which they are responsible, to one or more economic operators, and in which the rights and obligations of both parties are regulated and consist* either solely in the right to exploit the works *under concession* or in that right together with payment.

Amendment 10

Proposal for a directive

Article 2 – paragraph 1 - point 7

Text proposed by the Commission

(7) 'services concession' means a contract for pecuniary interest concluded in writing ***between one or more economic operators and*** one or more contracting authorities or contracting entities ***and having as their object*** the provision of services other than those referred to in points 2 and 4 where the consideration for the services to be provided consists either solely in the right to exploit the services that are subject of the contract or in that right together with payment.

Amendment 11

Proposal for a directive Article 2 – paragraph 2

Text proposed by the Commission

2. The right to exploit the works or services as referred to in points 2, 4 and 7 of the first paragraph shall imply the transfer to the concessionaire of the substantial operating risk. The concessionaire shall be deemed to assume ***the*** substantial operating risk where it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services which are the subject-matter of the concession.

That economic risk may consist in either of the following:

- (a) the risk related to the use of the works or the demand for the provision of the service; or
- b) the risk related to the availability of the infrastructure provided by the concessionaire or used for the provision of services to users.

Amendment

(7) 'services concession' means a contract for pecuniary interest concluded in writing ***by means of which*** one or more contracting authorities or contracting entities ***entrust*** the provision of services ***for which they are responsible***, other than those referred to in points 2 and 4, ***to one or more economic operators***, where the consideration for the services to be provided consists either solely in the right to exploit the services that are subject of the contract or in that right together with payment.

Amendment

2. The right to exploit the works or services as referred to in points 2, 4 and 7 of the first paragraph shall imply the transfer to the concessionaire of ***a substantial share of the economic and*** operating risk. The concessionaire shall be deemed to assume ***a substantial share of the*** risk where it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services which are the subject-matter of the concession.

The economic ***and operating*** risk may consist in either of the following:

- (a) the risk related to the use of the works or the demand for the provision of the service; or
- (b) the risk related to the availability of the infrastructure provided by the concessionaire or used for the provision of services to users.

Amendment 12

Proposal for a directive

Article 8 – paragraph 5 – subparagraph 1 – point a

Text proposed by the Commission

(a) the acquisition **or** rental, by whatever financial means, of land, existing buildings or other immovable property or concerning rights thereon; however financial service concessions awarded at the same time as, before or after the contract of acquisition or rental, in whatever form, shall be subject to this Directive;

Amendment

(a) the acquisition, rental, ***leasing or granting*** by whatever financial means, of ***public domains, including maritime areas, inland and sea ports***, land, existing buildings or other immovable property or concerning rights thereon, ***whereby the State or contracting authority or entity only establishes general conditions for their use without acquiring works or services***; however financial service concessions awarded at the same time as, before or after the contract of acquisition or rental, in whatever form, shall be subject to this Directive;

Amendment 13

Proposal for a directive

Article 16

Text proposed by the Commission

The duration of the concession shall be limited to the time estimated to be necessary for the concessionaire to recoup the investments made in operating the works or services together with a reasonable return on invested capital.

Amendment

The duration of the concession shall be limited to the time estimated to be necessary for the concessionaire to recoup the investments made in operating the works or services together with a reasonable return on invested capital, ***as specified precisely in the concession contract.***

Amendment 14

Proposal for a directive

Article 36 – paragraph 1 – subparagraph 3 a (new)

Text proposed by the Commission

Amendment

The contracting authority shall be obliged, in publishing the concession

notice, to honour all commitments arising from the conditions set out in this article.

Amendment 15

Proposal for a directive

Article 36 – paragraph 7 – subparagraph 1 – introductory part

Text proposed by the Commission

Member States *may* provide that contracting authorities or contracting entities exclude from participation in a concession award any economic operator if one of the following conditions is fulfilled:

Amendment

Member States *shall* provide that contracting authorities or contracting entities exclude from participation in a concession award any economic operator if one of the following conditions is fulfilled:

Amendment 16

Proposal for a directive

Article 36 – paragraph 7 – subparagraph 1 – point c a (new)

Text proposed by the Commission

Amendment

(c a) Breaches of social security, employment, tax or environmental law.

Amendment 17

Proposal for a directive

Article 39 – paragraph 1

Text proposed by the Commission

1. Concessions shall be awarded on the basis of objective criteria which ensure compliance with the principles of transparency, non-discrimination and equal treatment and which ensure that tenders are assessed in conditions of effective competition permitting to identify an overall economic advantage for the contracting authority or the contracting entity.

Amendment

1. Concessions shall be awarded on the basis of objective criteria, *precisely defined by the concession provider*, which ensure compliance with the principles of transparency, non-discrimination and equal treatment and which ensure that tenders are assessed in conditions of effective competition permitting to identify an overall economic advantage for the contracting authority or the contracting entity.

Amendment 18

Proposal for a directive

Article 39 – paragraph 4 – introductory part

Text proposed by the Commission

4. Member States *may* provide that contracting authorities and contracting entities shall base the award of concessions on the criterion of the most economically advantageous tender, in compliance with paragraph 2. Those criteria may include, in addition to price or costs, any of the following criteria

Amendment

4. Member States *shall* provide that contracting authorities and contracting entities shall base the award of concessions on the criterion of the most economically advantageous tender, in compliance with paragraph 2. Those criteria may include, in addition to price or costs, any of the following criteria

Amendment 19

Proposal for a directive

Article 41 – paragraph 1

Text proposed by the Commission

1. In the concession documents, the contracting authority or contracting entity may ask or may be required by a Member State to ask the tenderer to indicate in its tender any share of the contract it may intend to subcontract to third parties *and* any proposed subcontractors.

Amendment

1. In the concession documents, the contracting authority or contracting entity may ask or may be required by a Member State to ask the tenderer to indicate in its tender any share of the contract it may intend to subcontract to third parties *specifying the names of* any proposed subcontractors, *as well as their several and joint liability. Such information shall be updated and communicated to the contracting authority or contracting entity during the term of the concession indicating possible replacements or changes.*

Amendment 20

Proposal for a directive

Article 42 – paragraph 2 a (new)

Text proposed by the Commission

Amendment

2a. Provided the overall nature of the concession remains the same,

modification of the concession shall not be considered substantial where:

a) the modification has been provided for in the original concession contract in clear, precise and unequivocal review clauses or options which state the scope and nature of possible modifications as well as the conditions under which they may be used;

b) the value thereof does not exceed the threshold set in Article 6 and is below 5 % of the updated value of the original contract.

Where several successive modifications are made, the value shall be assessed on the basis of the updated cumulative value of the successive modifications.

Amendment 21

Proposal for a directive Article 43 – point b a (new)

Text proposed by the Commission

Amendment

(ba) obligations laid down in the concession contract are not being fulfilled;

Amendment 22

Proposal for a directive Annex III – paragraph 1 – point 5

Text proposed by the Commission

Amendment

5. Activities relating to the exploitation of a geographical area for the purpose of the provision of airports and maritime or inland ports or other *terminal facilities* to carriers by air, sea or inland waterway.

5. Activities relating to the exploitation of a geographical area for the purpose of the provision of airports and maritime or inland ports or other *general infrastructure* to carriers by air, sea or inland waterway.

PROCEDURE

Title	Award of concession contracts
References	COM(2011)0897 – C7-0004/2012 – 2011/0437(COD)
Committee responsible Date announced in plenary	IMCO 17.1.2012
Opinion by Date announced in plenary	TRAN 17.1.2012
Rapporteur Date appointed	Sabine Wils 27.2.2012
Discussed in committee	17.9.2012
Date adopted	6.11.2012
Result of final vote	+: 39 –: 1 0: 4
Members present for the final vote	Magdi Cristiano Allam, Inés Ayala Sender, Georges Bach, Izaskun Bilbao Barandica, Philip Bradbourn, Antonio Cancian, Michael Cramer, Joseph Cuschieri, Philippe De Backer, Luis de Grandes Pascual, Christine De Veyrac, Saïd El Khadraoui, Ismail Ertug, Carlo Fidanza, Knut Fleckenstein, Jacqueline Foster, Mathieu Grosch, Jim Higgins, Dieter-Lebrecht Koch, Jaromír Kohlíček, Georgios Koumoutsakos, Jörg Leichtfried, Eva Lichtenberger, Marian-Jean Marinescu, Hubert Pirker, Petri Sarvamaa, David-Maria Sassoli, Vilja Savisaar-Toomast, Olga Sehnalová, Brian Simpson, Keith Taylor, Silvia-Adriana Țicău, Giommaria Uggias, Peter van Dalen, Dominique Vlasto, Artur Zasada
Substitute(s) present for the final vote	Michael Gahler, Petra Kammerevert, Bogdan Kazimierz Marcinkiewicz, Anna Rosbach, Ramon Tremosa i Balcells, Sabine Wils, Janusz Władysław Zemke
Substitute(s) under Rule 187(2) present for the final vote	Peter Simon, Patricia van der Kammen

3.12.2012

OPINION OF THE COMMITTEE ON REGIONAL DEVELOPMENT

for the Committee on the Internal Market and Consumer Protection

on the proposal for a directive of the European Parliament and of the Council on the award of concession contracts
(COM(2011)0897 – C7-0004/2012 – 2011/0437(COD))

Rapporteur: Heide Rühle

AMENDMENTS

The Committee on Regional Development calls on the Committee on the Internal Market and Consumer Protection, as the committee responsible, to incorporate the following amendments in its report:

Amendment 1

Proposal for a directive
Recital 3 a (new)

Text proposed by the Commission

Amendment

(3a) This Directive should not introduce any prejudice towards the right of public authorities at national, regional or local levels to decide whether, how and to what extent they want to perform public functions themselves. Public authorities at all levels may perform public interest tasks using their own resources, without being obliged to call on outside economic operators. They may do so in cooperation with other public authorities.

Amendment 2

Proposal for a directive
Recital 3 b (new)

Text proposed by the Commission

Amendment

(3b) This Directive should not deal with the funding of services of general economic interest or with systems of aid granted by Member States, in particular in the social field, in accordance with Community rules on competition. National, regional and local authorities should maintain their essential role and wide discretion in providing, commissioning and organizing services of general interest as closely as possible to the needs of the users and in line with pursuing their public policy objectives.

Amendment 3

Proposal for a directive
Recital 6

Text proposed by the Commission

Amendment

(6) Concessions are contracts for pecuniary interest concluded between one or more economic operators and one or more contracting authorities or entities and having as their object the acquisition of works or services where the consideration consists, normally, in the right to exploit the works or services that are the subject of the contract. The execution of these works or services are subject to specific binding obligations defined by the contracting authority or entity which are legally enforceable. By contrast, certain State acts such as authorisations or licences whereby the State or a public authority establishes the conditions for the exercise of an economic activity, should not qualify as concessions. The same applies to certain agreements having as their object the right of an economic operator to exploit certain public domains or resources, such as land lease contracts whereby the State or

(6) Concessions are contracts for pecuniary interest concluded between one or more economic operators and one or more contracting authorities or entities and having as their object the acquisition of works or services where the consideration consists, normally, in the right to exploit the works or services that are the subject of the contract. The execution of these works or services are subject to specific binding obligations defined by the contracting authority or entity which are legally enforceable. By contrast, certain State acts such as authorisations or licences whereby the State or a public authority establishes the conditions for the exercise of an economic activity, should not qualify as concessions. The same applies to certain agreements having as their object the right of an economic operator to exploit certain public domains or resources, such as land lease contracts, ***including maritime areas,***

contracting authority or entity establishes only general conditions for their use without acquiring specific works or services.

whereby the State or contracting authority or entity establishes only general conditions for their use without acquiring specific works or services.

Amendment 4

Proposal for a directive

Recital 13

Text proposed by the Commission

(13) It is appropriate to exclude from the scope of this Directive certain services concessions awarded to an economic operator which is itself a contracting authority or a contracting entity on the basis of an exclusive right which that operator enjoys under published national law or administrative act and which has been granted in accordance with the Treaty and Union sectoral legislation concerning the management of networks infrastructure related to the activities set out in annex III, since such exclusive right makes it impossible to follow a competitive procedure for the award. By way of derogation and without prejudice to the legal consequences of the general exclusion from the scope of this Directive, concessions as defined in article 8 (1) should be subject to the obligation to publish a concession award notice in view of ensuring basic transparency unless the conditions of such transparency are provided for in sectoral legislation.

Amendment

(13) It is appropriate to exclude from the scope of this Directive certain services concessions awarded to an economic operator which is itself a contracting authority or a contracting entity on the basis of an exclusive right which that operator enjoys under published national law or administrative act, ***as is the case with concessions on State-owned maritime property for tourism and leisure use***, and which has been granted in accordance with the Treaty and Union sectoral legislation concerning the management of networks infrastructure related to the activities set out in annex III, since such exclusive right makes it impossible to follow a competitive procedure for the award. By way of derogation and without prejudice to the legal consequences of the general exclusion from the scope of this Directive, concessions as defined in article 8 (1) should be subject to the obligation to publish a concession award notice in view of ensuring basic transparency unless the conditions of such transparency are provided for in sectoral legislation.

Amendment 5

Proposal for a directive

Recital 19

Text proposed by the Commission

(19) In view of the detrimental effects on competition, awarding concessions without prior publication should only be permitted in very exceptional circumstances. This exception should be limited to cases where it is clear from the outset that a publication would not trigger more competition, notably because there is objectively only one economic operator who can perform the concession. Only situations of objective exclusivity can justify the award of a concession without publication to an economic operator, where the situation of exclusivity has not been created by the contracting authority or contracting entity itself in view of the future award procedure, and where there are no adequate substitutes, the availability of which should be assessed thoroughly.

Amendment

(19) In view of the detrimental effects on competition, awarding concessions without prior publication should only be permitted in very exceptional circumstances. This exception should be limited to cases where it is clear from the outset that a publication would not trigger more competition, notably because there is objectively only one economic operator who can perform the concession, ***as is the case with owners of seaside businesses set up on property under concession***. Only situations of objective exclusivity can justify the award of a concession without publication to an economic operator, where the situation of exclusivity has not been created by the contracting authority or contracting entity itself in view of the future award procedure, and where there are no adequate substitutes, the availability of which should be assessed thoroughly.

Amendment 6

**Proposal for a directive
Recital 20**

Text proposed by the Commission

(20) A review of so-called priority and non-priority services ('A' and 'B' services) by the Commission has shown that it is not justified to restrict the full application of procurement law to a limited group of services. As a result, this Directive should apply to a number of services (such as catering and water distribution services), which both showed a potential for cross-border trade.

Amendment

deleted

Amendment 7

**Proposal for a directive
Recital 21**

Text proposed by the Commission

(21) In the light of the results of the evaluation conducted by the Commission on the reform of public procurement rules it is appropriate to exclude from the full application of this Directive *only* those services which have a limited cross-border dimension, namely the so-called services to the person such as certain social, health and educational services. These services are provided within a particular context that varies widely amongst Member States, due to different cultural traditions. A specific regime should therefore be established for concession for these services which takes into account the fact that they are newly regulated. An obligation to publish a prior information notice and a concession award notice of any concession with a value equal to or greater than thresholds established in this Directive is an adequate way to provide information on business opportunities to potential tenderers as well as on the number and type of contracts awarded to all interested parties. Furthermore, Member States should put in place appropriate measures with reference to the award of concession contracts for these services aimed at ensuring compliance with the principles of transparency and equal treatment of economic operators while allowing contracting authorities and contracting entities to take into account the specificities of the services in question. Member States should ensure that contracting authorities and contracting entities may take into account the need to ensure quality, continuity, accessibility, availability and comprehensiveness of the services, the specific needs of different categories of users, the involvement and empowerment of users and innovation.

Amendment

(21) In the light of the results of the evaluation conducted by the Commission on the reform of public procurement rules it is appropriate to exclude from the full application of this Directive those services which have a limited cross-border dimension, namely the so-called services to the person such as certain social, health and educational services. These services are provided within a particular context that varies widely amongst Member States, due to different cultural traditions. A specific regime should therefore be established for concession for these services which takes into account the fact that they are newly regulated. An obligation to publish a prior information notice and a concession award notice of any concession with a value equal to or greater than thresholds established in this Directive is an adequate way to provide information on business opportunities to potential tenderers as well as on the number and type of contracts awarded to all interested parties. Furthermore, Member States should put in place appropriate measures with reference to the award of concession contracts for these services aimed at ensuring compliance with the principles of transparency and equal treatment of economic operators while allowing contracting authorities and contracting entities to take into account the specificities of the services in question. Member States should ensure that contracting authorities and contracting entities may take into account the need to ensure quality, continuity, accessibility, availability and comprehensiveness of the services, the specific needs of different categories of users, the involvement and empowerment of users and innovation.

Amendment 8

Proposal for a directive
Article 1 – paragraph 2 – point b a (new)

Text proposed by the Commission

Amendment

(ba) Contracting authorities and contracting entities, following the principle of free administration and in conformity with the EU Treaties, should be free to decide how best to provide, organise and manage the execution of work and the provision of services for which they are responsible, in accordance with the legislative arrangements and the methods which they judge to be the most effective manner to ensure in particular a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights in public services.

Amendment 9

Proposal for a directive
Article 1 – paragraph 2 a (new)

Text proposed by the Commission

Amendment

2a. This Directive shall not affect the freedom of Member States to define, in conformity with the Union law, what they consider to be services of general economic interest, how those services should be organised and financed, in compliance with the State aid rules, and what specific obligations they should be subject to.

Amendment 10

Proposal for a directive
Article 2 – paragraph 1 – point 7

Text proposed by the Commission

Amendment

(7) 'services concession' means a contract for pecuniary interest concluded in writing

(7) 'services concession' means a contract for pecuniary interest concluded in writing

between one or more economic operators and one or more contracting authorities or contracting entities and having as their object the provision of services other than those referred to in points 2 and 4 where the consideration for the services to be provided consists either solely in the right to exploit the services that are subject of the contract or in that right together with payment.

between one or more economic operators and one or more contracting authorities or contracting entities and having as their object the provision of services other than those referred to in points 2 and 4 where the consideration for the services to be provided consists either solely in the right to exploit the services that are subject of the contract or in that right together with payment, ***except in the case of simple approvals, in particular approvals on the use of a public good or a public domain.***

Justification

Clarification that simple approvals such as right of way are not covered by the directive.

Amendment 11

Proposal for a directive

Article 2 – paragraph 2 – subparagraph 1

Text proposed by the Commission

The right to exploit the works or services as referred to in points 2, 4 and 7 of the first paragraph shall imply the transfer to the concessionaire of the substantial operating risk. The concessionaire shall be deemed to assume the substantial operating risk where it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services which are the subject-matter of the concession.

Amendment

The right to exploit the works or services as referred to in points 2, 4 and 7 of the first paragraph shall imply the transfer to the concessionaire of the substantial operating risk. The concessionaire shall be deemed to assume the substantial operating risk where it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services which are the subject-matter of the concession; ***an operating risk which is limited from the outset shall have no effect on this principle.***

Justification

Clarification in view of the case-law of the ECJ in case WAZV Gotha (C-206/08), according to which concessions may also exist where the risk taken by the operator is limited from the outset on account of the rules of public law.

Amendment 12

Proposal for a directive
Article 6 – paragraph 5

Text proposed by the Commission

5. With regard to public works concessions and works concessions, calculation of the estimated value shall take account of both the cost of the works and the total estimated value of the supplies and services that are made available to the contractor by the contracting authorities or entities provided that they are necessary for executing the works.

Amendment

5. With regard to public works concessions and works concessions, calculation of the estimated value shall take account of both the cost of the works and the total estimated value of the supplies and services that are made available to the contractor by the contracting authorities or entities provided that they are necessary for executing the works. ***In the case of public property concessions for the provision of services to the public, the threshold shall be estimated and calculated on an annual basis.***

Amendment 13

Proposal for a directive
Article 7

Text proposed by the Commission

Contracting authorities and contracting entities shall treat economic operators equally and shall act in a transparent ***and proportionate*** way. The design of the concession award procedure shall not be made with the objective of excluding it from the scope of this Directive or of artificially narrowing competition.

Amendment

Contracting authorities and contracting entities shall treat economic operators equally and shall act in a transparent way. The design of the concession award procedure shall not be made with the objective of excluding it from the scope of this Directive or of artificially narrowing competition.

Justification

Application of the principle of proportionality to certain bodies covered by the proposal for a directive may be a risk.

Amendment 14

Proposal for a directive
Article 8 – paragraph 5 – subparagraph 1 – point a

Text proposed by the Commission

(a) the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property or concerning rights thereon; however financial service concessions awarded at the same time as, before or after the contract of acquisition or rental, in whatever form, shall be subject to this Directive;

Amendment

(a) the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property, ***including maritime areas***, or concerning rights thereon; however financial service concessions awarded at the same time as, before or after the contract of acquisition or rental, in whatever form, shall be subject to this Directive;

Amendment 15

Proposal for a directive

Article 8 – paragraph 5 – subparagraph 1 – point a a (new)

Text proposed by the Commission

Amendment

(aa) services of general economic interest;

Justification

Protocol No 26 of the Treaty of Lisbon explicitly recognises the right of regional and local authorities to administer their own public services and the wide discretion they enjoy in relation to providing, commissioning and organising services of general economic interest in a way that corresponds as closely as possible to the needs of the users. Services of this kind cannot fall within the scope of the Directive, therefore.

Amendment 16

Proposal for a directive

Article 8 – paragraph 5 – subparagraph 1 – point b a (new)

Text proposed by the Commission

Amendment

(ba) civil protection, disaster prevention and everyday hazard prevention services;

Amendment 17

Proposal for a directive

Article 8 – paragraph 5 – subparagraph 1 – point c

Text proposed by the Commission

Amendment

(c) arbitration and conciliation services;

(c) arbitration and conciliation services,
legal services and notarial services;

Amendment 18

Proposal for a directive

Article 8 – paragraph 5 – subparagraph 1 – point d

Text proposed by the Commission

Amendment

(d) financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments within the meaning of Directive 2004/39/EC of the European Parliament and of the Council, central bank services and operations conducted with the European Financial Stability Facility (EFSF);

(d) financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments within the meaning of Directive 2004/39/EC of the European Parliament and of the Council, central bank services and operations conducted with the European Financial Stability Facility (EFSF) ***as well as operations to raise money or capital for the contracting authority;***

Amendment 19

Proposal for a directive

Article 8 – paragraph 5 – subparagraph 1 – point e

Text proposed by the Commission

Amendment

(e) employment contracts;

(e) employment contracts ***and mandatory social protection arrangements;***

Amendment 20

Proposal for a directive

Article 8 – paragraph 5 – subparagraph 1 – point g

Text proposed by the Commission

Amendment

(g) ***Public passenger*** transport services ***within the meaning of Regulation (EC) 1370/2007 of the European Parliament***

(g) transport services ***to the extent that they are governed by other Community***

*and of the Council.*¹⁹

instruments;

Amendment 21

Proposal for a directive

Article 8 – paragraph 5 – subparagraph 1 – point g a (new)

Text proposed by the Commission

Amendment

(ga) social services and health services.

Amendment 22

Proposal for a directive

Article 15 – paragraph 1 – subparagraph 1 – point a

Text proposed by the Commission

Amendment

a) such an authority or entity exercises over the legal person concerned a control which is similar to that which it exercises over its own departments;

(a) such an authority or entity exercises over the legal person concerned a control which is similar to that which it exercises over its own departments; ***this shall be deemed to be the case where it exercises a decisive influence over both strategic objectives and significant decisions of the controlled legal person; with a view to determining whether such control is being exercised, account may also be taken of factors such as the level of representation on administrative, management or supervisory bodies, the relevant provisions of the articles of association or the ownership arrangements; it is not a mandatory requirement that the controlled legal person be wholly owned by the contracting authority or entity;***

Amendment 23

Proposal for a directive

Article 15 – paragraph 3 – subparagraph 1 – point a

Text proposed by the Commission

Amendment

a) the contracting authorities or entities as referred to in paragraph 1 subparagraph 1

(a) the contracting authorities or entities as referred to in paragraph 1 subparagraph 1

of Article 4 exercise jointly over the legal person a control which is similar to that which it exercises over its own departments;

of Article 4 exercise jointly over the legal person a control which is similar to that which it exercises over its own departments; ***this shall be deemed to be the case where it exercises a decisive influence over both strategic objectives and significant decisions of the controlled legal person; with a view to determining whether such control is being exercised, account may also be taken of factors such as the level of representation on administrative, management or supervisory bodies, the relevant provisions of the articles of association or the ownership arrangements; it is not a mandatory requirement that the controlled legal person be wholly owned by the contracting authority or entity;***

Amendment 24

Proposal for a directive Article 15 – paragraph 4 – point d

Text proposed by the Commission

Amendment

(d) the agreement does not involve financial transfers between the participating contracting authorities or entities, other than those corresponding to the reimbursement of actual costs of the works, services or supplies;

deleted

Amendment 25

Proposal for a directive Article 36 – paragraph 1 – subparagraph 1 – introductory part

Text proposed by the Commission

Amendment

Contracting authorities shall specify, in the concession notice the conditions for participation relating to:

Contracting authorities shall specify, in the concession notice, ***in the invitation to submit tenders or in*** the conditions for participation, ***a description of the concession and the award criteria*** relating to:

Amendment 26

Proposal for a directive

Article 36 – paragraph 4 – subparagraph 1

Text proposed by the Commission

Member States shall adopt rules combating *favouritism*, corruption and preventing conflicts of interest, aimed at ensuring the transparency of the award procedure and the equal treatment of all tenderers.

Amendment

Member States shall adopt rules combating *fraud, favouritism and* corruption and preventing conflicts of interest, aimed at ensuring the transparency of the award procedure and the equal treatment of all tenderers.

Amendment 27

Proposal for a directive

Article 36 – paragraph 5 – subparagraph 1 – point e a (new)

Text proposed by the Commission

Amendment

(ea) participation in exploitation of human trafficking and child labour covered by Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims.

Amendment 28

Proposal for a directive

Article 44

Text proposed by the Commission

Amendment

Article deleted

Justification

In its judgment in Case C-324/98 the CJEU found that the Member States should be required only to allow a review of the impartiality of procurement procedures.

Amendment 29

Proposal for a directive
Article 44 a (new)

Text proposed by the Commission

Amendment

Article 44a

Member States shall ensure that suitable procedures are available to verify the impartiality of the award decision.

Justification

In its judgment in Case C-324/98 the CJEU found that the Member States should be required only to allow a review of the impartiality of procurement procedures.

Amendment 30

Proposal for a directive
Article 45

Text proposed by the Commission

Amendment

Article deleted

PROCEDURE

Title	Award of concession contracts
References	COM(2011)0897 – C7-0004/2012 – 2011/0437(COD)
Committee responsible Date announced in plenary	IMCO 17.1.2012
Opinion by Date announced in plenary	REGI 17.1.2012
Rapporteur Date appointed	Heide Rühle 26.1.2012
Date adopted	27.11.2012
Result of final vote	+: 34 –: 1 0: 7
Members present for the final vote	François Alfonsi, Luís Paulo Alves, Victor Boştinaru, Salvatore Caronna, Nikos Chrysogelos, Francesco De Angelis, Tamás Deutsch, Rosa Estaràs Ferragut, Danuta Maria Hübner, María Irigoyen Pérez, Seán Kelly, Mojca Kleva, Constanze Angela Krehl, Petru Constantin Luhan, Ramona Nicole Mănescu, Vladimír Maňka, Iosif Matula, Erminia Mazzoni, Miroslav Mikolášik, Jens Nilsson, Lambert van Nistelrooij, Jan Olbrycht, Younous Omarjee, Markus Pieper, Tomasz Piotr Poręba, Monika Smolková, Ewald Stadler, Georgios Stavrakakis, Nuno Teixeira, Oldřich Vlasák, Kerstin Westphal, Hermann Winkler, Joachim Zeller
Substitute(s) present for the final vote	Jan Březina, Andrea Cozzolino, Ivars Godmanis, Karin Kadenbach, Lena Kolarska-Bobińska, Rodi Kratsa-Tsagaropoulou, Heide Rühle, Vilja Savisaar-Toomast, Elisabeth Schroedter

03.12.2012

OPINION OF THE COMMITTEE ON LEGAL AFFAIRS

for the Committee on the Internal Market and Consumer Protection

on the proposal for a directive of the European Parliament and of the Council on the award of concession contracts
(COM(2011)0897 – C7–0004/2012 – 2011/0437(COD))

Rapporteur: Raffaele Baldassarre

SHORT JUSTIFICATION

1. Introduction

Despite the major importance of public procurement, EU legislation does not provide for a specific legal regime for the award of concession contracts¹. The absence of any Community rules gives rise to major economic inefficiencies and is detrimental to contracting authorities and entities, economic operators and service users². Economic operators are faced with an unlevel playing field, which often results in unfair practices being employed or even in corruption³.

¹ Indeed, works concessions are awarded in accordance with basic provisions in Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. Service concessions, on the other hand, are only covered by the general principles of the Treaty on the Functioning of the European Union in the areas of economic freedoms, non-discrimination, transparency, equal treatment, proportionality and mutual recognition.

² According to the Commission's impact study, legal uncertainty concerns both the definition of concession and the legal regime applicable. 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, certain 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. The impact study can be accessed on the internet at the following address:

http://ec.europa.eu/internal_market/publicprocurement/docs/concessions/SEC2011_1588_en.pdf. As regards the adverse economic effects arising from the closure of a market, see S. Saussier (2012): "*An Economic Analysis of the Closure of Markets and other Dysfunctions in the Awarding of Concession Contracts*". The study, which was commissioned by Parliament, can be accessed via the following link:

<http://www.europarl.europa.eu/document/activities/cont/201206/20120626ATT47717/20120626ATT47717EN.pdf>.

³ Cf. Soreide, Tina (2012): "*Risks of Corruption and Collusion in the Awarding of Concessions Contracts*". The study, which was commissioned by Parliament, can be accessed via the following link: <http://www.europarl.europa.eu/document/activities/cont/201206/20120626ATT47717/20120626ATT47717EN.pdf>.

The proposal for a directive therefore aims to achieve the two basic objectives of increasing legal certainty and improving access to concessions markets for European enterprises. To that end, it clarifies the applicable legal framework and introduces rules that increase the transparency and fairness of award procedures.

2. Position of the rapporteur for opinion

Preliminary remarks and priorities

The rapporteur for opinion agrees with the objectives sought by the Commission in the proposal for a regulation and, contrary to certain opinions¹, sees a need for EU legislation in this field in order to guarantee convergence of the rules and equal access to EU concessions markets.

In that connection, the rapporteur for opinion points to the need for clear rules, especially in the following fields:

- a more precise definition of concession contracts, with special reference to the notion of operational risk²;
- concrete and relevant requirements applicable to the award process³;
- specific rules in cases of modification of concessions⁴; and
- suitable provisions for increasing the transparency and fairness of award procedures.

Having said this, the rapporteur for opinion feels that any form of over-regulation should be avoided in order to ensure effective and uniform application of the rules. To that end, the rapporteur for opinion has pursued two parallel objectives:

- simplification of the provisions introduced by the Directive in the interests of their easy and cohesive transposition; and
- striking the right balance between the need to ensure equal access and equal treatment and the need for the contracting authorities and entities to retain a certain degree of flexibility⁵ (see amendments 5 to 13).

¹ Under Article 6 of Protocol No 2 on the application of the principles of subsidiarity and proportionality, national parliaments may forward a reasoned opinion setting out why they consider that a given proposal does not conform to the principle of subsidiarity. The European Parliament has to date received three reasoned opinions concerning the Directive on the award of concession contracts from the Austrian Bundesrat, the German Bundesrat and the Spanish Cortes Generales.

² Some 13 of the 25 rulings of the Court of Justice on the award of concession contracts concern clarification of the notion of concession.

³ Although Court of Justice, in its ruling on Case No C-324/98 – *Teleaustria*, found that competent authorities must adhere to the principles of the Treaty during the award phase, the Court did not set out sufficiently clearly the details of those governing principles.

⁴ As shown in the impact study conducted by the Commission (op. cit. p. 13), the requirements applicable to the modifying of contracts are a major cause of legal uncertainty among operators.

⁵ A concessionaire takes on a different risk than a contractor, and one which is not limited to the provision of goods or services in line with set quantitative and qualitative criteria, but also extends to the actual profitability of the work and/or service. A concessionaire is therefore asked to take on a qualified entrepreneurial risk on the value of something ultimately being offered to someone other than the awarding body: the end user. In the light of the fact that end user behaviour can only partially be predicted, this generates a specific market risk arising from the trilateral concession relationship of concessionary-awarding body-end user (cf. Goisis: "*Concessioni di*

Proposed amendments

The rapporteur for opinion considers that the proposal sometimes regulates the award of concession contracts inadequately, applying to them the same criteria as would apply to public procurement contracts. Since concession contracts are of a different nature, the rapporteur for opinion proposes that the following provisions be amended:

- removal of the intermediate ***thresholds*** laid down in Article 5, which are of no added value and are liable to make it needlessly difficult to circumscribe the scope of the Directive (see amendments 17 and 30);
- simplification of the ***calculation method***, removing the distinctions between works concessions and service concessions in the light of the fact that many of the concessions are ‘mixed’ in nature and introducing a common principle for the calculation of ‘estimated value’ that relates to the pre-tax turnover for the whole of the contractual period (see amendments 8, 9, 18, 19, 20, 21, 22 and 23);
- Limitation of the ***duration*** of the concession to the time estimated to be necessary for the concessionaire to recoup the investments made and make a reasonable return on investment (see amendments 10 e 24);
- adaptation of the ***award criteria*** to the type of concession contract, thereby ensuring a certain degree of flexibility which, at the same time does not allow unconditional freedom of choice to the awarding body or public entity (see amendments 11, 12, 16, 35, 44, 46, 47 and 48);

With a view to simplifying the rules introduced by the Directive and to avoid any form of ***over-regulation***, the rapporteur for opinion proposes that any superfluous type of rule be removed and, insofar as this is possible, that multiple provisions be incorporated together under one Article (see amendments 26, 27, 28, 41 and 43). To that end, the rapporteur for opinion proposes that it be obligatory to decide on the rules and laws applicable to ***joint concessions*** between the awarding authorities or awarding bodies of different Member States in order to avoid legal uncertainty and needless appeals (see amendments 31,32 and 33);

Lastly, the rapporteur for opinion considers that this Directive can make a substantial contribution to the implementation of policies aimed at high employment rates, adequate social protection and a high level of education, training and healthcare (see amendments 1 and 3). To that end, the rapporteur for opinion proposes that the awarder have the possibility of including criteria relating to the environment, social issues and innovation and, where appropriate, to the implementation of policies to promote sustainable economic growth and greater social cohesion (see amendments 4, 14 and 15).

AMENDMENTS

The Committee on Legal Affairs calls on the Committee on the Internal Market and Consumer Protection, as the committee responsible, to incorporate the following amendments

costruzione e gestione di lavori e concessioni di servizi", IUS Publicum, June 2011, p.2-9).

in its report:

Amendment 1

Proposal for a directive

Citation 1

Text proposed by the Commission

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 53 (1), Article 62 and Article 114 thereof,

Amendment

Having regard to the Treaty on the Functioning of the European Union, and in particular Article **14**, **Article** 53(1), Article 62 and Article 114 **as well as Protocol No 26** thereof,

Amendment 2

Proposal for a directive

Recital 2

Text proposed by the Commission

(2) Public procurement plays a key role in the Europe 2020 strategy as one of the market-based instruments to be used to achieve a smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. ***The award of works concessions is presently subject to basic rules of 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 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***

Amendment

(2) Public procurement plays a key role in the Europe 2020 strategy as one of the market-based instruments to be used to achieve a smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. ***In this context, concession contracts represent important instruments in the long-term structural development of infrastructures and strategic services. Accordingly, they smooth the progress of competition within the internal market, enhancing private sector expertise, achieving efficiency and delivering innovation.***

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. 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.

Amendment 3

Proposal for a directive Recital 2 a (new)

Text proposed by the Commission

Amendment

(2a) The award of works concessions is presently subject to basic rules of 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 contracts¹ while the award of services concessions with a cross-border interest is subject to the principles of the Treaty on the Functioning of the European Union (TFEU), and in particular the principles 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 TFEU by national legislators and of wide disparities between the legislation 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.

¹ OJ L 134, 30.4.2004, p. 114.

Amendment 4

Proposal for a directive Recital 2 b (new)

Text proposed by the Commission

Amendment

(2b) Hence, this Directive aims at achieving a uniform application of the Treaty principles across all Member States in order to ensure legal certainty, eliminate persisting distortions of the internal market, increase the efficiency of public spending, facilitate equal access and fair participation of SMEs in the award of concession contracts, both at local and Union-wide level, and support the achievement of sustainable public policy objectives.

Amendment 5

Proposal for a directive Recital 2 c (new)

Text proposed by the Commission

Amendment

(2c) Furthermore, this Directive aims at supporting the implementation of policies linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health. Accordingly, this Directive contributes to attaining those objectives by ensuring that social criteria relating to working

conditions, social protection and public health are embedded at all stages of the procurement procedure.

Amendment 6

Proposal for a directive Recital 3

Text proposed by the Commission

(3) This Directive should ***not in any way affect*** the freedom of Member States or public authorities to decide on the direct provision of works or services to the public or on the outsourcing of such provision to third parties. Member States or public authorities should remain free to define the characteristics of the service to be provided, including any conditions regarding the quality or price of the services, in order to pursue their public policy objectives.

Amendment

(3) This Directive should ***guarantee*** the freedom of Member States or public authorities to decide on the direct provision of works or services to the public or on the outsourcing of such provision to third parties. Member States or public authorities should remain free to define the characteristics of the service to be provided ***and to decide whether, how and to what extent they want to perform public functions themselves***, including any conditions regarding the quality or price of the services, in order to pursue their public policy objectives. ***Accordingly, this Directive should not affect the freedom of Member States to define, in conformity with Article 14 TFEU and Protocol No. 26 annexed to the Treaty, what they consider to be services of general economic interest, how those services should be organised and financed, in compliance with the State aid rules, and what specific obligations they should be subject to.***

Amendment 7

Proposal for a directive Recital 4

Text proposed by the Commission

(4) For concessions above a certain value, it is appropriate to provide for a minimum coordination of national procedures for the award of such contracts based on principles

Amendment

(4) For concessions above a certain value, it is appropriate to provide for a minimum coordination of national procedures for the award of such contracts based on principles

of the Treaty so as to guarantee the opening-up of concessions to competition and adequate legal certainty. Those coordinating provisions should not go beyond what is necessary in order to achieve the aforementioned objectives. **However**, Member States should be allowed to complete and develop further those provisions if they find it appropriate notably to better ensure compliance with the principles above.

of the Treaty so as to guarantee the opening-up of concessions to competition and adequate legal certainty. Those coordinating provisions should not go beyond what is necessary in order to achieve the aforementioned objectives **and guarantee a certain degree of flexibility**. **Accordingly**, Member States should be allowed to complete and develop further those provisions if they find it appropriate notably to better ensure compliance with the principles above.

Amendment 8

Proposal for a directive

Recital 7

Text proposed by the Commission

(7) Difficulties related to the interpretation of the concepts of concession and public contract have been source of continued legal uncertainty among stakeholders and have given rise to numerous judgments of the Court of Justice of the European Union on this subject. **Therefore, the definition of concession should be clarified, in particular by referring to the concept of substantial operating risk. The main feature of a concession, the right to exploit the works or services, always implies the transfer to the concessionaire of an economic risk involving the possibility that it will not recoup the investments made and the costs incurred in operating the works or services awarded. The application of specific rules governing the award of concessions would not be justified if the contracting authority or entity relieved the contractor of any potential loss, by guaranteeing a minimal revenue, equal or higher to the costs that the contractor has to incur in relation with the performance of the contract. At the same time it should be made clear that certain arrangements which are fully paid by a contracting authority or a contracting entity should**

Amendment

(7) Difficulties related to the interpretation of the concepts of concession and public contract have been source of continued legal uncertainty and have given rise to numerous judgments of the Court of Justice of the European Union on this subject. **In view of the fact that** the right to exploit the works or services always implies the transfer to the concessionaire of an economic risk, involving the possibility that it will not recoup the investments made and the costs incurred in operating the works or services awarded, **the definition of concession should be clarified and related to the concept of substantial economic risk**. The application of specific rules governing the award of concessions would not be justified if the contracting authority or entity relieved the contractor of any potential loss, by guaranteeing a minimal revenue, equal or higher to the costs that the contractor has to incur in relation with the performance of the contract.

qualify as concessions where the recoupement of the investments and costs incurred by the operator for execution the work or providing the service depends on the actual demand for or the availability of the service or asset.

Amendment 9

Proposal for a directive Recital 7 a (new)

Text proposed by the Commission

Amendment

(7a) With reference to the substantial operating risk, it should be made clear that certain arrangements which are fully paid by a contracting authority or a contracting entity should qualify as concessions where the recoupement of the investments and costs incurred by the operator for execution the work or providing the service depends on the actual demand for or the availability of the service or asset.

Amendment 10

Proposal for a directive Recital 9 a (new)

Text proposed by the Commission

Amendment

(9a) The estimated value of the concession is a crucial factor in the award of a concession contract. In order to avoid uncertainty among the contracting parties, it is necessary to lay down a common principle for calculation of such value. To that end, the estimated value of the concession should be based on the additional annual turnover from the beginning of the concession contract until its end.

Amendment 11

Proposal for a directive

Recital 11

Text proposed by the Commission

(11) To ensure a real opening up of the market and a fair balance in the application of concession award rules in the water, energy, transport and postal services sectors it is necessary for the entities covered to be identified ***on a basis other than their legal status. It should be ensured, therefore, that the equal treatment of contracting entities operating in the public sector and those operating in the private sector is not prejudiced.*** It is also necessary to ensure, in keeping with Article 345 of the Treaty, that the rules governing the system of property ownership in Member States are not prejudiced.

Amendment

(11) To ensure a real opening up of the market and a fair balance in the application of concession award rules in the water, energy, transport and postal services sectors it is necessary for the entities covered to be ***clearly identified in the light of the particular tasks laid down by the public authorities.*** It is also necessary to ensure, in keeping with Article 345 of the Treaty, that the rules governing the system of property ownership in Member States are not prejudiced.

Amendment 12

Proposal for a directive

Recital 18

Text proposed by the Commission

(18) In order to ensure adequate advertisement of works and services concessions above a certain value awarded by contracting entities and by the contracting authorities, the award of such contracts should be preceded by the compulsory publication of a concession notice in the Official Journal of the European Union. The thresholds should reflect the clear cross-border interest of concessions to economic operators located in other Member States. ***To calculate the value of a services concession, account must be taken of the estimated value of all services to be provided by the concessionaire from the point of view of a potential tenderer.***

Amendment

(18) In order to ensure adequate advertisement of works and services concessions above a certain value awarded by contracting entities and by the contracting authorities, the award of such contracts should be preceded by the compulsory publication of a concession notice in the Official Journal of the European Union. The thresholds should reflect the clear cross-border interest of concessions to economic operators located in other Member States.

Amendment 13

Proposal for a directive Recital 19 a (new)

Text proposed by the Commission

Amendment

(19a) Concessions of a long duration are likely to result in the closure of the market thereby hindering the free movement of services and the freedom of establishment. However, such duration may be justified if it is necessary to enable the concessionaire to recoup the investments made in order to perform the concession, including preliminary costs, as well as to obtain a return on the invested capital, which should correspond to a return expected under normal market conditions.

Amendment 14

Proposal for a directive Recital 22

Text proposed by the Commission

Amendment

(22) Given the importance of the cultural context and the sensitivity of these services, Member States ***should*** be given wide discretion to organise the choice of the service providers in the way they consider most appropriate. The rules of this Directive do not prevent Member States to apply specific quality criteria for the choice of service providers, such as the criteria set out in the voluntary European Quality Framework for Social Services of the European Union's Social Protection Committee. Member States and/or public authorities remain free to provide these services themselves or to organise social services in a way that does not entail the conclusion of concessions, for example through the mere financing of such services or by granting licences or

(22) Given the importance of the cultural context and the sensitivity of these services, Member States ***shall*** be given wide discretion to organise the choice of the service providers in the way they consider most appropriate. The rules of this Directive do not prevent Member States to apply specific quality criteria for the choice of service providers, such as the criteria set out in the voluntary European Quality Framework for Social Services of the European Union's Social Protection Committee. Member States and/or public authorities remain free to provide these services themselves or to organise social services, ***such as all services of general economic interest***, in a way that does not entail the conclusion of concessions, for example through the mere financing of

authorisations to all economic operators meeting the conditions established beforehand by the contracting authority or contracting entity, without any limits or quotas, provided such system ensures sufficient advertising and complies with the principles of transparency and non-discrimination.

such services or by granting licences or authorisations to all economic operators meeting the conditions established beforehand by the contracting authority or contracting entity, without any limits or quotas, provided such system ensures sufficient advertising and complies with the principles of transparency and non-discrimination.

Amendment 15

Proposal for a directive Recital 24

Text proposed by the Commission

(24) The choice and application of proportional, non-discriminatory and fair selection criteria to economic operators is crucial for their effective access to the economic opportunities related to concessions. In particular, the possibility for a candidate to rely on the capacities of other entities can be decisive to enable the participation of small and medium sized enterprises. Therefore, it is appropriate to provide that the selection criteria should relate *exclusively* to the technical, financial and economic capacity of operators, should be announced in the concession notice and cannot preclude an economic operator from relying on the capacities of other entities, regardless of the legal nature of its links with those entities, if the latter proves to the contracting authority or entity that it will have at its disposal the necessary resources.

Amendment

(24) The choice and application of proportional, non-discriminatory and fair selection criteria to economic operators is crucial for their effective access to the economic opportunities related to concessions. In particular, the possibility for a candidate to rely on the capacities of other entities can be decisive to enable the participation of small and medium sized enterprises. Therefore, it is appropriate to provide that the selection criteria should relate to the technical, financial and economic capacity of operators, ***but also, as regards services of general economic interest, their compliance with environmental, social and cohesion-related provisions, as well as with the objectives of a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights***, should be announced in the concession notice and cannot preclude an economic operator from relying on the capacities of other entities, regardless of the legal nature of its links with those entities, if the latter proves to the contracting authority or entity that it will have at its disposal the necessary resources.

Amendment 16

Proposal for a directive Recital 25

Text proposed by the Commission

(25) In order to ensure transparency and equal treatment, criteria for the award of concessions should always comply with some general standards. These should be disclosed in advance to all potential tenderers, be related to the subject matter of the contract and should not offer to the contracting authority or contracting entity an unrestricted freedom of choice. They should ensure the possibility of effective competition and be accompanied by requirements that allow the information provided by the tenderers to be effectively verified. ***In order to comply with these standards while improving legal certainty, Member States may provide for the use of the criterion of the most economically advantageous tender.***

Amendment

(25) In order to ensure transparency and equal treatment, criteria for the award of concessions should always comply with some general standards. These should be disclosed in advance to all potential tenderers, be related to the subject matter of the contract and should not offer to the contracting authority or contracting entity an unrestricted freedom of choice. They should ensure the possibility of effective competition and be accompanied by requirements that allow the information provided by the tenderers to be effectively verified.

Amendment 17

Proposal for a directive Recital 26

Text proposed by the Commission

(26) Where contracting authorities and contracting entities choose to award a concession to the most economically advantageous tender, they should determine the economic and quality criteria on the basis of which they assess the tenders in order to identify which one offers the best value for money. The determination of those criteria depends on the object of the concession since they should allow the level of performance offered by each tender to be assessed in the light of the subject-matter of the concession, as defined in the technical specifications and the value for money of

Amendment

deleted

each tender to be measured.

Amendment 18

Proposal for a directive Recital 27

Text proposed by the Commission

(27) Concessions are usually long term, complex arrangements where the contractor assumes responsibilities and risks traditionally born by the contracting authorities and normally falling within their remit and contracting entities. For this reason, contracting authorities or entities should maintain a margin of flexibility in organising the awarding process, ***involving also a*** possibility to negotiate the content of the contract with the candidates. However, in order to ensure equal treatment and transparency throughout the awarding procedure, it is appropriate to provide for certain requirements as to the structure of the awarding process, including negotiations, the dissemination of information and the availability of written records. It is also necessary to provide that the initial terms of the concession notice should not be deviated from, in order to prevent unfair treatment of any potential candidates.

Amendment

(27) Concessions are usually long term, complex arrangements where the contractor assumes responsibilities and risks traditionally born by the contracting authorities and normally falling within their remit and contracting entities. For this reason, contracting authorities or entities should maintain a margin of flexibility in organising the awarding process. ***This involves including flexibility in the use of award criteria in order to allow the contracting authority to carry out a global economic and qualitative analysis of the tender together with the*** possibility to negotiate the content of the contract with the candidates. However, in order to ensure equal treatment and transparency throughout the awarding procedure, it is appropriate to provide for certain requirements as to the structure of the awarding process, including negotiations, the dissemination of information and the availability of written records. It is also necessary to provide that the initial terms of the concession notice should not be deviated from, in order to prevent unfair treatment of any potential candidates.

Amendment 19

Proposal for a directive Recital 29

Text proposed by the Commission

(29) In technical specifications and in award criteria, contracting authorities and

Amendment

(29) In technical specifications and in award criteria, contracting authorities and

contracting entities should be allowed to refer to a specific production process, a specific mode of provision of services, or a specific process for any other stage of the life cycle of a product or service, provided that they are linked to the subject-matter of the concession. In order to better integrate social considerations in the award of concessions, procurers may also be allowed to include, in the award criteria, characteristics related to the working conditions. However, where the contracting authorities or contracting entities use the most economically advantageous tender, such criteria may only relate to the working conditions of the persons directly participating in the process of production or provision in question. Those characteristics may only concern the protection of health of the staff involved in the production process or the favouring of social integration of disadvantaged persons or members of vulnerable groups amongst the persons assigned to performing the contract, including accessibility for persons with disabilities. In this case, any award criteria which include those characteristics should in any event remain limited to characteristics that have immediate consequences on staff members in their working environment. They should be applied in accordance with Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services and in a way that does not discriminate directly or indirectly against economic operators from other Member States or from third countries parties to the Agreement or to Free Trade Agreements to which the Union is party. ***Contracting authorities and contracting entities should, also where they use the criterion of the most economically advantageous tender, be allowed to use as an award criterion the organisation, qualification and experience of the staff assigned to performing the concession in question, as***

contracting entities should be allowed to refer to a specific production process, a specific mode of provision of services, or a specific process for any other stage of the life cycle of a product or service, provided that they are linked to the subject-matter of the concession. ***Those criteria may include environmental, social or innovation-related criteria as well as elements relating to public policy objectives aimed at promoting sustainable economic growth and social cohesion.*** In order to better integrate social considerations in the award of concessions, procurers may also be allowed to include, in the award criteria, characteristics related to the working conditions. Those characteristics may concern the protection of health of the staff involved in the production process, ***and safeguarding their employment and working conditions and compliance with collective agreements for them,*** or the favouring of social integration of disadvantaged persons or members of vulnerable groups amongst the persons assigned to performing the contract, including accessibility for persons with disabilities. In this case, any award criteria which include those characteristics should in any event remain limited to characteristics that have immediate consequences on staff members in their working environment. They should be applied in accordance with Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services and in a way that does not discriminate directly or indirectly against economic operators from other Member States or from third countries parties to the Agreement or to Free Trade Agreements, ***based on compliance with ILO standards,*** to which the Union is party.

this may affect the quality of concession performance and, as a result, the economic value of the tender.

Amendment 20

Proposal for a directive Recital 33

Text proposed by the Commission

(33) Concessions should not be awarded to economic operators that have participated in a criminal organisation or have been found guilty of corruption, fraud to the detriment of the Union's financial interests or money laundering. Non-payment of taxes or social security contributions should also be sanctioned by mandatory exclusion at the level of the Union. Furthermore, contracting authorities and contracting entities should be given the possibility to exclude candidates or tenderers for serious violations of Union or national law aimed at the protection of public interests compatible with the Treaty or where the economic operator has shown significant or persistent deficiencies in the performance of a prior concession or concessions of a similar nature with the same contracting authority or contracting entity.

Amendment

(33) Concessions should not be awarded to economic operators that have participated in a criminal organisation, ***including participation in exploitation of human trafficking and child labour***, or have been found guilty of corruption, fraud to the detriment of the Union's financial interests or money laundering. Non-payment of taxes or social security contributions should also be sanctioned by mandatory exclusion at the level of the Union. Furthermore, contracting authorities and contracting entities should be given the possibility to exclude candidates or tenderers for serious violations of Union or national law aimed at the protection of public interests compatible with the Treaty or where the economic operator has shown significant or persistent deficiencies in the performance of a prior concession or concessions of a similar nature with the same contracting authority or contracting entity.

Amendment 21

Proposal for a directive Article 1 – paragraph 1

Text proposed by the Commission

1. This Directive establishes rules on the procedures for ***procurement by contracting authorities and by contracting entities with respect to*** concessions whose value is estimated to be not less than the

Amendment

1. This Directive establishes rules on the procedures for ***the award of works or services*** concessions whose value is estimated to be not less than the thresholds

thresholds laid down in Article 5.

laid down in Article 5.

Amendment 22

Proposal for a directive Article 1 a (new)

Text proposed by the Commission

Amendment

Article 1a

Principle of free administration by public authorities

This Directive shall recognise the principle of free administration by public authorities in accordance with national legislation in force and Union law. Those public authorities shall be free to decide on the management method they deem to be the most appropriate in order to execute the works and/or provide the services for which they are responsible.

This Directive shall not affect the freedom of Member States to define, in conformity with Union law, what they consider to be services of general economic interest, how those services should be organised and financed, in compliance with the State aid rules, and what specific obligations they should be subject to.

Amendment 23

Proposal for a directive Article 2 – paragraph 1 – point 1

Text proposed by the Commission

Amendment

(1) ‘concessions’ means **public** works **concessions, works concessions** or services concessions.

(1) ‘concessions’ means works or services concessions.

Justification

The distinction between public works concessions and works concessions is not useful in practice. Amendment for simplification purposes.

Amendment 24

Proposal for a directive Article 2 – paragraph 1 – point 4

Text proposed by the Commission

(4) works concession' means a contract for pecuniary interest concluded in writing ***between*** one or more ***economic operators*** ***and one or more*** contracting entities ***and having as their object*** the execution of works, where the consideration ***for the works to be carried out*** consists either solely in the right to exploit the works that are the subject of the contract or in that right together with payment.

Amendment

(4) 'works concession' means a contract for pecuniary interest concluded in writing ***whereby*** one or more ***contracting authorities or*** contracting entities ***entrusts*** the execution of works ***to one or more economic operators***, where the consideration ***therefore*** consists either solely in the right to exploit the works that are the subject of the contract or in that right together with payment.

Amendment 25

Proposal for a directive Article 2 – paragraph 1 – point 7

Text proposed by the Commission

(7) 'services concession' means a contract for pecuniary interest concluded in writing ***between*** one or more ***economic operators*** ***and*** one or more contracting authorities or contracting entities ***and having as their object*** the provision of services ***other than those referred to in points 2 and 4*** where the consideration ***for the services to be provided*** consists either solely in the right to exploit the ***services that are subject*** of the contract or in that right together with payment.

Amendment

(7) 'services concession' means a contract for pecuniary interest concluded in writing ***whereby*** one or more contracting authorities or contracting entities ***entrusts*** the provision of services ***to one or more economic operators***, where the consideration ***therefore*** consists either solely in the right to exploit the ***service which is the subject-matter*** of the contract or in that right together with payment;

Amendment 26

Proposal for a directive Article 2 – paragraph 1 – point 14

Text proposed by the Commission

Amendment

(14) ‘life cycle’ means all consecutive and/or interlinked stages, including production, transport, use and maintenance, throughout the existence of a product or a works or the provision of a service, from raw material acquisition or generation of resources to disposal, clearance and finalisation.

deleted

Amendment 27

Proposal for a directive

Article 2 – paragraph 2

Text proposed by the Commission

Amendment

2. The right to exploit the works or services as referred to in points 2, 4 and 7 of the first paragraph shall imply the transfer to the concessionaire of the substantial **operating** risk. The concessionaire shall be deemed to assume the substantial operating risk where it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services which are the subject-matter of the **concession**.

That economic risk **may consist in either of the following**:

- a) the risk **related to the use of** the works or **the demand for the provision of the service**; or
- (b) the risk related to the availability of the infrastructure provided by the concessionaire or used for the provision of services to users.

2. The right to exploit the works or services referred in points 2, 4 and 7 of the first paragraph shall imply the transfer to the concessionaire of a substantial part of the **economic** risk. The concessionaire shall be deemed to assume the substantial operating risk where it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services which are the subject-matter of the **contract**.

The economic risk **shall be understood as**:

- (a) the risk **on actual demand for** the works or **services which are the object of the contract**; or
- (b) the risk related to the availability of the infrastructure provided by the concessionaire or used for the provision of services to users.

Amendment 28

Proposal for a directive Article 5 - paragraph 2

Text proposed by the Commission

2. Services concessions the value of which is equal to or greater than EUR 2 500 000 but lower than EUR 5 000 000 other than social services and other specific services shall be subject to the obligation to publish a concession award notice in accordance with Articles 27 and 28.

Amendment

deleted

Amendment 29

Proposal for a directive Article 6

Text proposed by the Commission

Article 6

Methods for calculating the estimated value of concessions

1. The calculation of the estimated value of a concession shall be based on ***the total amount payable, net of VAT, as estimated by the contracting authority or the contracting entity, including any form of option and any extension of the duration of the concession.***

2. The estimated value of a concession shall be calculated as the value of an entirety of works or services, ***even if purchased through different contracts, where the contracts are part of one single project. Indications for the existence of one single project consist in*** overall prior

Amendment

Article 6

Methods for calculating the estimated value of concessions

1. The calculation of the estimated value of a concession shall be based on ***its aggregate turnover net of tax, over the duration of the contract, as estimated by the grantor. This estimate shall be valid at the moment at which the concession notice is published or, in cases where such notice is not foreseen, at the moment at which the contracting authority or entity commences the concession award procedure. Where the value is modified following negotiations during the award procedure, the valid estimate shall be that indicated when the contract is signed.***

2. The estimated value of a concession shall be calculated as the value of an entirety of works ***and/or services which*** are part of one single ***concession*** project, ***including studies. The single nature of a project may in particular be demonstrated by the existence of*** overall prior planning

planning and conception by the contracting authority or contracting entity, the fact that the different elements purchased fulfil a single economic and technical function or that they are otherwise logically interlinked.

Where the contracting authority or the contracting entity provides for prizes or payments to candidates or tenderers it shall take them into account when calculating the estimated value of the concession.

3. The ***choice of the method used to calculate the estimated*** value of a concession shall not be made with the intention of excluding it from the scope of this Directive. A works project or an entirety of services shall not be subdivided with the effect of preventing it from falling within the scope of this Directive, unless justified by objective reasons.

4. ***This estimate shall be valid at the moment at which the concession notice is sent, or, in cases where such notice is not foreseen, at the moment at which the contracting authority or the contracting entity commences the concession award procedure, in particular by defining the essential characteristics of the intended concession.***

5. ***With regard to public works concessions and works concessions, calculation of the estimated value shall take account of both the cost of the works and the total estimated value of the supplies and services that are made available to the contractor by the contracting authorities or entities provided that they are necessary for executing the works.***

6. ***Where a proposed work or purchase of services may result in concessions being awarded at the same time in the form of separate lots, account shall be taken of the total estimated value of all such lots.***

7. ***Where the aggregate value of the lots is***

and conception by the contracting authority or entity, ***by*** the fact that the different elements of the project fulfil a single economic and technical function or ***by the fact*** that they are otherwise logically interlinked.

3. The ***estimation of the*** value of a concession shall not be made with the intention of excluding it from the scope of this Directive. A works project or an entirety of services shall not be subdivided with the effect of preventing it from falling within the scope of this Directive, unless justified by objective reasons.

4. ***The estimated value of the concession shall be calculated in accordance with an objective method specified in the concession notice.***

equal to or exceeds the threshold laid down in Article 5, this Directive shall apply to the awarding of each lot.

8. Contracting authorities or contracting entities may award concessions for individual lots without applying the provisions on the award provided for under this Directive, provided that the estimated value net of VAT of the lot concerned is less than EUR 1 million. However, the aggregate value of the lots thus awarded without applying this Directive shall not exceed 20% of the aggregate value of all the lots into which the proposed work or the proposed purchase of services has been divided.

9. The value of services concessions shall be the estimated total value of services to be provided by the concessionaire during the whole duration of the concession, calculated in accordance with an objective methodology which shall be specified in the concession notice or in the concession documents.

The basis for calculating the estimated concession value shall, where appropriate, be the following

a) for insurance services: the premium payable and other forms of remuneration;

(b) for banking and other financial services: fees, commissions, interest and other forms of remuneration;

(c) for design services: fees, commission payable and other forms of remuneration

10. The value of concessions shall include both the estimated revenue to be received from third parties and the amounts to be paid by the contracting authority or the contracting entity.

Amendment 30

Proposal for a directive

Article 15 – paragraph 1 – subparagraph 1 – point b

Text proposed by the Commission

Amendment

(b) **at least 90% of** the activities of that legal person are carried out for the controlling contracting authority or entity or for other legal persons controlled by that contracting authority or entity;

(b) **all** the activities of that legal person are carried out for the controlling contracting authority or entity or for other legal persons controlled by that contracting authority or entity;

Amendment 31

Proposal for a directive Article 15 – paragraph 2

Text proposed by the Commission

Amendment

2. Paragraph 1 also applies where a controlled entity which is a contracting authority or contracting entity as referred to in paragraph 1 subparagraph 1 of Article 4 awards a concession to its controlling entity, or to another legal person controlled by the same contracting authority, provided that there is no private participation in the legal person being awarded the public concession.

deleted

Justification

The reverse in-house exemption proposed by the Commission goes beyond the Teckal judgement and restricts competition excessively.

Amendment 32

Proposal for a directive Article 15 – paragraph 3 – subparagraph 1 – point b

Text proposed by the Commission

Amendment

(b) **at least 90% of** the activities of that legal person are carried out for the controlling contracting authorities or entities as referred to in paragraph 1 subparagraph 1 of Article 4 or other legal persons controlled by the same contracting authority or entity;

(b) **all** the activities of that legal person are carried out for the controlling contracting authorities or entities as referred to in paragraph 1 subparagraph 1 of Article 4 or other legal persons controlled by the same contracting authority or entity;

Amendment 33

Proposal for a directive Article 15 – paragraph 4 – point a

Text proposed by the Commission

(a) the agreement establishes a genuine co-operation between the participating contracting authorities or entities ***aimed at carrying out jointly their public service tasks and involving mutual rights and obligations of the parties***;

Amendment

(a) the agreement establishes a genuine co-operation between the participating contracting authorities or entities ***acting as competent authorities in order to jointly ensure the organisation of the same public service mission***;

Justification

Clarification of horizontal cooperation.

Amendment 34

Proposal for a directive Article 15 – paragraph 4 – point b

Text proposed by the Commission

(b) the agreement is governed only by considerations relating to the public interest;

Amendment

(b) the agreement is governed only by considerations relating to the public interest ***and has no market orientation***;

Justification

Clarification of horizontal cooperation.

Amendment 35

Proposal for a directive Article 15 – paragraph 4 – point c

Text proposed by the Commission

(c) the participating contracting authorities or entities shall do not perform on the open market ***more than 10% in terms of turnover of the activities which are relevant in the context of the agreement***;

Amendment

(c) the participating contracting authorities or entities shall do not perform on the open market;

Justification

In line with previous amendments.

Amendment 36

Proposal for a directive

Article 15 – paragraph 5 – subparagraph 1

Text proposed by the Commission

The absence of private participation referred to in paragraphs 1 to 4 shall be verified at the time of the award of the concession or of the conclusion of the agreement.

Amendment

The absence of private participation ***and all other conditions*** referred to in paragraphs 1 to 4 shall be verified at the time of the award of the concession or of the conclusion of the agreement.

Justification

All conditions referred to in paragraphs 1-4 should be verified at the award stage, not only the private participation.

Amendment 37

Proposal for a directive

Article 15 – paragraph 5 – subparagraph 2

Text proposed by the Commission

The exceptions provided for in this Article shall cease to apply from the moment any ***private participation takes place***, with the effect that ongoing concessions need to be opened to competition through regular concession award procedures.

Amendment

The exceptions provided for in this Article shall cease to apply from the moment any ***of the cumulative conditions listed therein is no longer fulfilled***, with the effect that ongoing concessions need to be opened to competition through regular concession award procedures.

Amendment 38

Proposal for a directive

Article 16

Text proposed by the Commission

The duration of the concession shall be limited to the time estimated to be necessary for the concessionaire to recoup

Amendment

For concessions lasting for more than five years, the maximum duration of the concession shall not exceed the time

the investments made in operating the works or services together with a *reasonable* return on invested capital.

estimated to be necessary for the concessionaire to recoup the investments made in operating the works, or services, ***including preliminary costs***, together with a *reasonable* return on invested capital ***corresponding to a return expected under normal market conditions***.

Amendment 39

Proposal for a directive Article 22 – paragraph 3

Text proposed by the Commission

3. Groups of economic operators may submit tenders or put themselves forward as candidates.

Amendment

3. Groups of economic operators may submit tenders or put themselves forward as candidates. ***Groups of economic operators, notably SMEs may take the form of a consortium of enterprises.***

Amendment 40

Proposal for a directive Article 26 – paragraph 1

Text proposed by the Commission

1. Contracting authorities and contracting entities wishing to award a concession shall make known their intention by means of a concession notice.

Amendment

1. Contracting authorities and contracting entities wishing to award a concession shall make known their intention by means of a concession notice ***pursuant to Article 28.***

Amendment 41

Proposal for a directive Article 26 – paragraph 4

Text proposed by the Commission

4. The Commission shall establish those standard forms. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article

Amendment

deleted

48.

Amendment 42

Proposal for a directive Article 26 – paragraph 5 – point b

Text proposed by the Commission

(b) where the works or services can be supplied only by a particular economic operator ***due to the absence of competition for technical reasons, the protection of patents, copyrights or other intellectual property rights or the protection of other exclusive rights and where no reasonable alternative or substitute exists and the absence of competition is not the result of an artificial narrowing down of the parameters of the concession award;***

Amendment

(b) where the works or services can be supplied only by a particular economic operator ***for any of the following reasons:***

(i) the aim of the concession is the creation or acquisition of a unique work of art or artistic performance;

(ii) the competition is absent for technical reasons;

(iii) the protection of patents, copyrights or other intellectual property rights or the protection of other exclusive rights.

The exceptions set out in points (ii) and (iii) shall only apply when no reasonable alternative or substitute exists and the absence of competition is not the result of an artificial narrowing down of the parameters of the concession award;

Amendment 43

Proposal for a directive Article 26 – paragraph 6 – subparagraph 1

Text proposed by the Commission

6. For the purposes of point (a) of ***the first subparagraph***, a tender shall be considered not to be suitable where:

Amendment

6. For the purposes of point (a) ***of paragraph 5***, a tender shall be considered not to be suitable where:

Amendment 44

Proposal for a directive Article 27 – paragraph 2

Text proposed by the Commission

Amendment

2. The obligation referred to in paragraph 1 shall also apply to those services concessions the estimated value of which, as calculated according to the method referred to in Article 6 (5), is equal to or higher than 2 500 000 EUR with the sole exception of social services and other specific services as referred to in Article 17. *deleted*

Amendment 45

Proposal for a directive Article 31 – paragraph 2 – subparagraph 2

Text proposed by the Commission

Amendment

When determining the applicable national law in accordance with point (a), contracting authorities or contracting entities **may** choose the national provisions of any Member State in which at least one of the participating authorities is located.

When determining the applicable national law in accordance with point (a), contracting authorities or contracting entities **shall** choose the national provisions of any Member State in which at least one of the participating authorities is located.

Amendment 46

Proposal for a directive Article 31 – paragraph 4

Text proposed by the Commission

Amendment

4. In the absence of an agreement determining the applicable concession rules, the national legislation governing the concession award shall be determined following the rules set out below: *deleted*

(a) where the procedure is conducted or managed by one participating contracting authority or participating contracting entity on behalf of the others, the national provisions of the Member State of that contracting authority or entity shall apply;

(b) where the procedure is not conducted or managed by one participating contracting authority or participating contracting entity on behalf of the others, and

(i) concerns a public works or works concession, contracting authorities or entities shall apply the national provisions of the Member State where most of the works are located;

(ii) concerns a service concession, contracting authorities or entities shall apply the national provisions of the Member State where the major part of the services is provided;

(c) where it is not possible to determine the applicable national law pursuant to points (a) or (b), contracting authorities or entities shall apply the national provisions of the Member State of the contracting authority which bears the biggest share of the costs.

Amendment 47

Proposal for a directive Article 31 – paragraph 5

Text proposed by the Commission

Amendment

5. In the absence of an agreement determining the applicable concession award law under paragraph 3, the national legislation governing concession award procedures conducted by joint legal bodies set up by several contracting authorities or contracting entities from different Member States shall be determined following the following rules:

deleted

(a) where the procedure is conducted or managed by the competent organ of the joint legal body, the national provisions of the Member State where the legal body has its registered office shall apply.

(b) where the procedure is conducted or managed by a member of the legal body on behalf of that legal body, the rules set out in points (a) and (b) of paragraph 4 shall apply.

(c) where it is not possible to determine the applicable national law pursuant to points (a) or (b) of paragraph 4, the contracting authorities or contracting entities shall apply the national provisions of the Member State where the legal body has its registered office.

Amendment 48

Proposal for a directive

Article 35 – paragraph 5 – point -a (new)

Text proposed by the Commission

Amendment

(-a) they shall indicate in the concession documents which elements may be subject to negotiation and which elements define the minimum requirements as referred to in paragraph 1;

Amendment 49

Proposal for a directive

Article 36 – paragraph 1

Text proposed by the Commission

Amendment

1. Contracting authorities shall specify, in the concession notice the conditions for participation relating to:

(a) suitability to pursue the professional activity;

(b) economic and financial standing;

1. Contracting authorities shall specify, in the concession notice the conditions for participation relating to:

(a) suitability to pursue the professional activity;

(b) economic and financial standing;

(c) technical and professional ability.

Contracting authorities shall limit any conditions for participation to those that are appropriate to ensure that a candidate or tenderer has the legal and financial capacities and the commercial and technical abilities to perform the concession to be awarded. All requirements shall be related and strictly proportionate to the subject-matter of the contract, ***taking into account the need to ensure*** genuine competition.

Contracting authorities and contracting entities shall also indicate in the concession notice the reference or references to be submitted as proof of the economic operator's capacities. The requirements in respect of those references shall be non-discriminatory and proportionate to the subject-matter of the concession.

(c) technical and professional ability.

All requirements shall be related and strictly proportionate to the ***need to ensure the ability of the concessionaire to perform the concession, taking into account*** the subject-matter of the contract, ***and the purpose of ensuring*** genuine competition.

Contracting authorities and contracting entities shall also indicate in the concession notice the reference or references to be submitted as proof of the economic operator's capacities. The requirements in respect of those references shall be non-discriminatory and proportionate to the subject-matter of the concession.

Amendment 50

Proposal for a directive

Article 36 – paragraph 4 – subparagraph 1

Text proposed by the Commission

4. Member States shall adopt rules ***combating*** favouritism, corruption and ***preventing*** conflicts of interest, aimed at ensuring the transparency of the award procedure and the equal treatment of all tenderers.

Amendment

4. Member States shall adopt ***appropriate*** rules ***to prevent, identify and immediately remedy*** favouritism, corruption and conflicts of interest, aimed at ensuring the transparency of the award procedure and the equal treatment of all tenderers.

Amendment 51

Proposal for a directive

Article 36 a (new)

Text proposed by the Commission

Amendment

Article 36a

Grounds for exclusion of candidates

(this new Article is to contain Article 36(5))

to (9) inclusive)

Amendment 52

Proposal for a directive Article 36 – paragraph 5 – point e

Text proposed by the Commission

(e) money laundering, as defined in Article 1 of Council Directive **91/308/EEC**.

Amendment

(e) money laundering **and terrorist financing**, as defined in Article 1 of Council Directive **2005/60/EC**.

Amendment 53

Proposal for a directive Article 36 – paragraph 5 – point e a (new)

Text proposed by the Commission

Amendment

(ea) participation in exploitation of human trafficking and child labour covered by Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims.

Amendment 54

Proposal for a directive Article 36 – paragraph 8

Text proposed by the Commission

8. Any candidate or tenderer that is in one of the situations referred to in paragraphs 5 to 7 may provide the contracting authority or contracting entity with evidence demonstrating its reliability despite the existence of the relevant ground for exclusion.

Amendment

8. Any candidate or tenderer that is in one of the situations referred to in paragraphs 1 to 3 may provide the contracting authority or contracting entity with evidence demonstrating its reliability **or, where appropriate, the reliability of its sub-contractor**, despite the existence of the relevant ground for exclusion.

Amendment 55

Proposal for a directive

Article 37 – Title

Text proposed by the Commission

Setting time limits

Amendment

Time limits **for submission of applications for the concession**

Amendment 56

Proposal for a directive

Article 37 – paragraph 1

Text proposed by the Commission

1. When fixing the time limits for the submission of applications for the concession and submission of tenders, contracting authorities or contracting entities shall take account in particular of the complexity of the concession and the time required for drawing up tenders, without prejudice to the minimum time limits set out *in Article 37*.

Amendment

1. When fixing the time limits for the submission of applications for the concession and submission of tenders, contracting authorities or contracting entities shall take account in particular of the complexity of the concession and the time required for drawing up tenders, without prejudice to the minimum time limits set out *in paragraphs 3 and 4*.

Amendment 57

Proposal for a directive

Article 38

Text proposed by the Commission

Article 38

Time limits for submission of applications for the concession

1. Where contracting authorities and contracting entities resort to a concession, the time limit for the submission of applications for the concession shall be not less than 52 days from the date on which the concession notice was sent.

2. The time limit for receipt of tenders may be reduced by five days where the contracting entity accepts that tenders may

Amendment

3. Where contracting authorities and contracting entities resort to a concession, the time limit for the submission of applications for the concession shall be not less than 52 days from the date on which the concession notice was sent.

4. The time limit for receipt of tenders may be reduced by five days where the contracting entity accepts that tenders may

be submitted by electronic means in conformity with Article 25.

be submitted by electronic means in conformity with Article 25.

(If adopted, the two paragraphs of Article 38 will become Article 37(3) and (4).)

Amendment 58

Proposal for a directive Article 39 – paragraph 1

Text proposed by the Commission

1. Concessions shall be awarded on the basis of objective criteria which ensure compliance with the principles of transparency, non-discrimination and equal treatment and which ensure that tenders are assessed *in conditions of effective competition permitting to identify* an overall economic advantage *for the contracting authority or the contracting entity*.

Amendment

1. Concessions shall be awarded on the basis of objective criteria which ensure compliance with the principles of transparency, non-discrimination and equal treatment and which ensure that tenders are assessed *with a view to identifying* an overall economic, *environmental, social and cohesion-related* advantage.

Amendment 59

Proposal for a directive Article 39 – paragraph 1 a (new)

Text proposed by the Commission

Amendment

1a. The award criteria shall not confer an unrestricted freedom of choice on the contracting authority or the contracting entity and shall not be changed in an arbitrary or discriminatory manner during the course of negotiations. Any changes shall be immediately notified to the candidates and tenderers concerned.

Amendment 60

Proposal for a directive Article 39 – paragraph 2

Text proposed by the Commission

2. The award criteria shall be linked to the subject matter of the concession, ***and shall not confer an unrestricted freedom of choice on the contracting authority or the contracting entity.***

Those criteria shall ensure effective competition and shall be accompanied by requirements which allow the information provided by the tenderers to be effectively verified. ***Contracting authorities and contracting entities shall verify effectively on the basis of the information and proof provided by the tenderers, whether the tenders meet the award criteria.***

Amendment

2. The award criteria shall be linked to the subject matter of the concession, ***and may include environmental, social or innovation-related aspects, and, where appropriate, public policy grounds for the promotion of sustainable economic growth and social cohesion.***

Those criteria shall ensure effective competition and shall be accompanied by requirements which allow the information provided by the tenderers to be effectively verified.

Amendment 61

Proposal for a directive Article 39 – paragraph 4

Text proposed by the Commission

4. Member States may provide that contracting authorities and contracting entities shall base the award of concessions on the criterion of the most economically advantageous tender, in compliance with paragraph 2. Those criteria may include, in addition to price or costs, any of the following criteria

(a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, environmental characteristics and innovative character.

(b) for service concessions and concessions involving the design of works, the organisation, qualification and

Amendment

deleted

experience of the staff assigned to performing the concession in question may be taken into consideration, with the consequence that, following the award of the concession, such staff may only be replaced with the consent of the contracting authority or the contracting entity, which must verify that replacements ensure equivalent organisation and quality;

(c) after-sales service and technical assistance, delivery date and delivery period or period of completion;

(d) the specific process of production or provision of the requested works, supplies or services or of any other stage of its life cycle as referred to in point 14 of paragraph 1 of Article 2, to the extent that those criteria concern factors directly involved in these processes and characterise the specific process of production or provision of the requested works, supplies or services.

Amendment 62

Proposal for a directive Article 39 – paragraph 5

Text proposed by the Commission

Amendment

5. In the case referred to in paragraph 4, the contracting authority or entity shall specify in the contract notice, in the invitation to submit a tender, or in the concession documents, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender.

deleted

Those weightings may be expressed by providing for a range with an appropriate maximum spread.

Where weighting is not possible for objective reasons, the contracting authority or entity shall indicate the criteria in decreasing order of

importance.

Amendment 63

Proposal for a directive Article 40

Text proposed by the Commission

Amendment

Article 40

deleted

Life-cycle costing

1. Life-cycle costing shall to the extent relevant cover all of the following costs over the life cycle of a product, service or works as defined in point 14 of paragraph 1 of Article 2:

(a) internal costs, including costs relating to acquisition (such as production costs), use (such as energy consumption, maintenance costs) and end of life (such as collection and recycling costs)

(b) external environmental costs directly linked to the life cycle, provided their monetary value can be determined and verified, which may include the cost of emissions of greenhouse gases and of other pollutant emissions and other climate change mitigation costs.

2. Where contracting authorities assess the costs using a life-cycle costing approach, they shall indicate in the concession award documents the methodology used for the calculation of the life-cycle costs. The methodology used must fulfil all of the following conditions:

(a) It has been drawn up on the basis of scientific information or is based on other objectively verifiable and non-discriminatory criteria;

(b) It has been established for repeated or continuous application;

(c) It is accessible to all interested parties.

Contracting authorities and contracting entities shall allow economic operators to

apply a different methodology for establishing the life-cycle costs of their offer, provided that they prove that this methodology complies with the requirements set out in points a, b and c and is equivalent to the methodology indicated by the contracting authority or contracting entity.

3. Whenever a common methodology for the calculation of life-cycle costs is adopted as part of a legislative act of the Union, including by delegated acts pursuant to sector specific legislation, it shall be applied where life-cycle costing is included in the award criteria referred to in Article 39 paragraph (4).

A list of such legislative and delegated acts is set out in Annex II. The Commission shall be empowered to adopt delegated acts in accordance with Article 46 concerning the update of this list, when on the basis of the adoption of new legislation, repeal or modification of such legislation, such amendments prove necessary.

PROCEDURE

Title	Award of concession contracts		
References	COM(2011)0897 – C7-0004/2012 – 2011/0437(COD)		
Committee responsible Date announced in plenary	IMCO 17.1.2012		
Opinion by Date announced in plenary	JURI 17.1.2012		
Rapporteur Date appointed	Raffaele Baldassarre 1.3.2012		
Discussed in committee	30.5.2012	17.9.2012	6.11.2012
Date adopted	27.11.2012		
Result of final vote	+: 14	–: 3	0: 2
Members present for the final vote	Raffaele Baldassarre, Sebastian Valentin Bodu, Françoise Castex, Christian Engström, Marielle Gallo, Giuseppe Gargani, Sajjad Karim, Klaus-Heiner Lehne, Antonio Masip Hidalgo, Alajos Mészáros, Evelyn Regner, Rebecca Taylor, Alexandra Thein, Cecilia Wikström		
Substitute(s) present for the final vote	Sergio Gaetano Cofferati, Eva Lichtenberger, Angelika Niebler, József Szájer, Axel Voss		

PROCEDURE

Title	Award of concession contracts			
References	COM(2011)0897 – C7-0004/2012 – 2011/0437(COD)			
Date submitted to Parliament	20.12.2011			
Committee responsible Date announced in plenary	IMCO 17.1.2012			
Committee(s) asked for opinion(s) Date announced in plenary	AFET 17.1.2012	INTA 17.1.2012	ECON 17.1.2012	EMPL 17.1.2012
	ENVI 17.1.2012	ITRE 17.1.2012	TRAN 17.1.2012	REGI 17.1.2012
	CULT 17.1.2012	JURI 17.1.2012	LIBE 17.1.2012	
Not delivering opinions Date of decision	AFET 6.3.2012	ECON 13.2.2012	ENVI 24.1.2012	CULT 23.1.2012
	LIBE 28.2.2012			
Rapporteur(s) Date appointed	Philippe Juvin 29.11.2011			
Discussed in committee	6.2.2012	29.2.2012	21.3.2012	6.9.2012
	5.11.2012	29.11.2012	10.1.2013	
Date adopted	24.1.2013			
Result of final vote	+ : 28 - : 10 0 : 2			
Members present for the final vote	Adam Bielan, Preslav Borissov, Cristian Silviu Buşoi, Birgit Collin-Langen, Lara Comi, Anna Maria Corazza Bildt, Cornelis de Jong, Christian Engström, Evelyne Gebhardt, Thomas Händel, Małgorzata Handzlik, Philippe Juvin, Sandra Kalniete, Claudio Morganti, Franz Obermayr, Phil Prendergast, Mitro Repo, Zuzana Roithová, Heide Rühle, Christel Schaldemose, Olle Schmidt, Andreas Schwab, Emilie Turunen, Barbara Weiler			
Substitute(s) present for the final vote	Raffaele Baldassarre, Françoise Castex, Frank Engel, Ashley Fox, Ildikó Gáll-Pelcz, Anna Hedh, Constance Le Grip, Morten Løkkegaard, Emma McClarkin, Pier Antonio Panzeri, Antonyia Parvanova, Olga Sehnalová, Marc Tarabella, Wim van de Camp, Patricia van der Kammen, Sabine Verheyen			
Date tabled	1.2.2013			