



## EUROCITIES statement on the draft Directive on concessions

As the network of Europe's major cities, we believe that **there is no need for a specific directive on concessions**, such as that proposed by the European Commission on 20 December 2011<sup>1</sup>. This would increase complexity for public authorities as well as private entities. The application of the basic principles of the EU Treaty (non-discrimination, proportionality and transparency) provides enough legal certainty and flexibility for local authorities when granting concessions.

These discussions have to be placed in the context of the provisions on services of general economic interest in the Lisbon Treaty. Articles 3, 14 and 106, as well as protocols 26 and 27, of the Lisbon Treaty recognise the decisive role of cities and local authorities in the provision of these services. New regulations in this area must be checked critically against subsidiarity as they may impact on national, regional and local competences. In either case, definitions and terminology used must be consistent.

### Ensuring quality of local services

It should remain possible for local authorities to choose the form of service provision based on an objective and transparent evaluation of the needs of their citizens, for instance direct in-house provision, through their own enterprises, through inter-communal cooperation or through third parties including by granting licenses or authorisations, or concessions. Local authorities are the closest to citizens and can best evaluate their needs and ensure quality, continuity, accessibility, availability and comprehensiveness of services, innovation, and involvement and empowerment of users.

For instance, France chose the concessions model for water services 20 years ago. Paris and other large cities have recently decided to re-municipalise water services as infrastructures were not properly maintained by concessionaires.

There is no need for a specific directive on concessions. We believe the current draft directive is over-prescriptive and would therefore argue for a light regime on concessions with the sole obligation to publish notices (articles 26 to 30). This could easily be included in the directives on public procurement and would avoid further fragmentation of EU legislation.

### Publication and transparency obligations

- The EU should only impose requirements related to the publication of concession notices and concession award notices (article 26 to 30).

Specimen texts would help contracting authorities to establish the concession notice and the concession award notice.

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<sup>1</sup> COM(2011) 897 final

The use of electronic means (article 30) could alleviate the administrative and cost-related burden for contracting authorities. Technical support and training programmes for contracting authorities should be funded by the European Commission, to enable the development and use of appropriate software.

## **The most critical points of the draft directive on concessions are outlined below:**

### **Only one threshold**

- One threshold would be sufficient. However this threshold should be higher than EUR 5.000.000.

The draft directive distinguishes between concessions equal to or greater than EUR 5.000.000, which are subject to all provisions, and concessions equal to or greater than EUR 2.500.000, which are only subject to the obligation to publish a concession award notice (article 5).

### **Guidelines on technical specifications and award procedures**

- The provisions on technical specifications and means of proof, choice of participants and award of concessions (articles 32 to 43), should be set as EU guidelines rather than legislative provisions, and should be simplified. Imposing prescriptive common standards would counteract the objectives of the European Commission reducing the use of these contracts.

Unlike public procurement where there is already a common approach at EU level, services concessions legislation is very diverse in EU member states corresponding to different historic and cultural models. Concession contracts are not even used in some member states.

Concessions contracts are useful and flexible instruments for public authorities, particularly in a period of tight public budgets. If a complex EU regime is introduced, the risk is that they will be used even less than now, with costly and lengthy procedures impeding the take-up of concessions.

It is also essential that new EU legislation does not limit innovative legislative systems used by cities, such as the 'free choice system' in Sweden where users choose the service provider from a list of providers fulfilling established criteria.

- Further simplification is needed to encourage the development of joint concessions across borders. More and more local authorities are exploring joint provision of services, which could be done through joint concessions (article 31). The European Commission should provide legal expertise during the concession process to support this.

### **Exclusion of social services, water supply, waste water and waste disposal**

- 'Services to the person' (article 17) should be completely exempted from the scope of the directive.

In the current draft such services (certain social, health and educational services, services listed in Annex X), which have a limited cross-border dimension, are still subject to

certain obligations. We believe that the obligation to publish a concession notice for services with a limited cross-border dimension would create a disproportionate administrative burden.

- Water, waste water and waste disposal services should be excluded from the scope of the directive. Waste and sanitation disposal as well as water supply are very sensitive services of general economic interest. Local authorities should remain free to choose the form of provision of these services.

As EUROCITIES members, we have expressed on several occasions the need that local authorities should remain free to choose the form of provision of services of general interest. There is strong concern amongst major European cities that the directive could lead to further liberalisation of sensitive areas of public services, such as social and health services, water supply, waste water and waste disposal, which have a particular role in ensuring economic, social and territorial cohesion.

### In house and public-public cooperation

- A broader definition of what is considered 'in-house' is essential.

The draft directive provides the preconditions for "in house" procurement, that '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' (article 15 (1) (b)).

We do not agree with this definition. The current case law of the ECJ understands 'In-house' based on both qualitative and quantitative factors (case C-340-/04, Carbotermo). The new draft directive focuses only on the quantitative dimension ('at least 90%'). This 90% would be especially problematic for the model of service concessions.

### Duration of a concession

- Article 16, on the duration of a concession contract, should be deleted.

We do not believe that this definition is needed. The duration should be agreed between contracting authorities and concessionaires.

### Remedies Directives

This draft directive provides that concessions should also fall into the scope of the remedies directives (89/665/EEC and 92/13/EEC). We understand the value of appeal procedures but this could mean more legal cases and be a disincentive to using concessions contracts. If this provision is maintained, there should at least be a transition period.

### Review of the Directive

The Commission proposes to review the economic effects on the internal market resulting from the application of the thresholds set in article 5 and report to the European Parliament and the Council by 30 June 2016. To ensure a real evaluation of the impact of the rules on the ground, this process should:

- Involve local authorities
- Be broader than just an economic evaluation, and also look at social effects.