



FEAD position paper on the EC proposal for a Directive on the award of concession contracts

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The European Commission published a proposal for a Directive on the award of concession contracts on 20 December 2011. After several attempts, the EC has taken up this challenge and made a new proposal that fits into the framework of the revision of the EU legislative framework for public procurement.

FEAD has previously expressed its doubts on the need of such a proposal. Although there might be a gap in EU-legislation on concessions, the Commission has not yet proven that this gap leads to a distortion of the market in this field. FEAD particularly fears that this proposal will not sufficiently open up waste management services to the market and competition and will not ensure a level playing field and non-discrimination between private and in-house operators.

Nevertheless, measures and procedures to achieve further transparency concerning the awarding of concessions could be clarified.

1. Common definition of a concession contract

Concessions are not understood the same way in Member States. Some countries do not have a definition of concession, such as Belgium and Romania. Others have a long tradition of using concessions, like France, Italy or Portugal. In addition, service concessions have been handled with sectoral European legislation (Regulation (EC) N°1370/2007 on public passenger transport services by rail and by road). This is why FEAD believes that a common definition would be beneficial and particularly supports that the proposal differentiates a concession from a public contract.

2. No higher thresholds

According to article 5 of the Proposal, the text applies to concessions, the value of which is equal to or greater than EUR 5 000 000. This threshold is based on the average value of existing concessions contracts, according to the Commission. FEAD believes this value should not be raised. It should even be considered that the threshold might be too high for some of the new Member States.

3. Adequate duration according to the objectives of the contract

Article 16 specifies that “the duration of a 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”. But other criteria, such as economic and technical factors - depending on the object of the concession and especially in terms of quality, performance and continuity of the service - should also be taken into account for the determination of an appropriate duration. Otherwise, the duration of concessions which do not include investments, or concessions where investments have been made before the operating of the works or services start, would be automatically subject to restrictions that are detrimental to the quality or to the costs of the service. It would be a mistake to consider that concessions should be as short as possible in order to stimulate competition. The duration of a concession must be adequate in order to meet the objectives of the contract.

4. Awarding criteria not focused on the lowest price and life-cycle costing

Article 39 declares that the concession should be awarded on the basis of objective criteria in compliance with the principles of transparency, non-discrimination and equal treatment, ensuring an effective competition. Furthermore, high standards of health and safety should be observed. The contracting authority must be obliged to evaluate such elements as technical evaluation of the solution proposed by each tenderer and reliability of the proposed financing structure subject to competitive assessment, and not only take into consideration the price.

Life-cycle costing shall cover external costs directly linked to the life cycle of a product, such as external environmental costs, according to article 40 paragraph 2. A contracting authority may assess the costs using a life-cycle costing approach. Since its use remains optional, we encourage also this provision to go further in its ambition towards a more binding measure.

Articles 26 and following concerning notices and publication are also supported by FEAD for transparency matters. FEAD can support the proposal only if these dispositions are kept and the essential principles guaranteed.

5. Too wide public-public cooperation exceptions

Article 15 describes different situations that fall outside the scope of the proposal for a Directive on the award of concession contracts. These situations are the following:

5.1 In-house exception

FEAD expresses serious concerns regarding the exemptions concerning public-public cooperation. According to article 15 paragraph 1, a concession awarded by a contracting authority to another legal person falls outside the scope of the Directive if:

- such an authority exercises over the legal person control similar to that exercised over its own departments
- at least 90% of the activities of that legal person are carried out for the controlling authority (or other legal persons controlled by that authority)
- there is no private participation in the controlled legal person

These criteria do not comply with the legal systems of particular Member States. The fact that a legal person carries out even 100% of its activities for the contracting authority at the time of the award of the concession does not mean that it cannot start carrying out new activities for another entity or contracting authority thereafter, because this is not explicitly prohibited.

Moreover, in some legal systems the legal persons created by contracting authorities are legally and formally independent, and they are not controlled by the contracting authority, even if the same persons sit in the governing bodies or there is full capital dependence. Regarding this, FEAD is against excluding the contracts between the contracting authorities and other legal persons from the scope of the directive, as there is no control between the contracting authorities and the legal persons which can independently act on the open market.

Paragraph 2 of the same article extends this exemption to concessions awarded by a controlled entity to its controlling entity or to another legal person controlled by the same contracting authority. We support that there is no control which could be deemed similar to that which a

contracting authority exercises over its own departments, when it comes to relations between in-house entities of the same contracting authority. This also applies when a contracting authority awards a contract to its controlling entity, as the in-house entity cannot exercise control over its controlling entity. In the case of in-house arrangements, there should be an exemption from rules applying to concessions only when such similar control exists, which would justify this exemption. Otherwise the scope of the concessions legislation would be too limited and would as such exclude cases which in our view should be kept within its scope. Furthermore, this extension is not covered by any case law of the ECJ. FEAD therefore advocates for the deletion of this paragraph.

5.2 Joint control

Another important point for FEAD is the fact that in cases of joint control exercised by several contracting authorities over an in-house entity the Directive would also not apply, allowing thus for the award of concessions without any tendering procedure (article 15 paragraph 3). In this case the European Commission seems to be transposing case law of the Court of Justice of the European Union which in our view is incorrect and should not be further supported (C-295/05 “Asemfo Tragsa” and C-324/07 “Coditel Brabant”). A contracting authority cannot claim to exercise control similar to the one over its own departments in a situation of joint control, as it cannot control itself the decisions of another contracting authority. The control that a public entity exercises over its own departments is never a joint control. These provisions in the Commission’s proposal would trigger situations where public authorities exchange services at will, thereby avoiding participation in the market. This phenomenon can prove problematic for the proper functioning of the internal market and can hamper innovation and investments from the private sector.

5.3 Agreements between two or more contracting authorities

Article 15 paragraph 4 does not concern in-house situations but codifies a broad interpretation of a unique judgement (C-480/06 “Hambourg”) aimed at situations that do not concern the provision of services but the organisation of a service between public authorities. Agreements between two or more contracting authorities are not considered as concessions when the cumulative conditions of article 15 paragraph 4 are fulfilled. The third of these conditions (c) stipulates that the participating contracting authority is allowed to perform on the open market up to 10% in terms of turnover of the activities which are relevant in the context of the agreement. FEAD agrees with the

Commission's position as declared in the Commission Staff working document¹, according to which "the cooperation agreement should not include activities to be offered on the open market". There should therefore be no performance on the open market whatsoever, in order to ensure that the cooperation remains only governed by public interest - i.e. non-commercial – considerations.

The other criteria given by the Commission for horizontal public-public cooperation in article 15 paragraph 4 are, however, helpful and seem to transpose the jurisprudence of the ECJ on that issue in a sufficient and correct manner. They should therefore be upheld and must not be softened during the legislative procedure.

6. No sectoral exclusions

The explanatory memorandum of the proposal on the award of concession contracts explains in its additional information the main objectives of the text, among which are legal certainty and better access to the concessions markets. By excluding entirely some sectors from the proposal, FEAD believes that better access to the concessions markets cannot be achieved. For instance in sectors such as gas, electricity, water or postal services, concession contracts may often find application. Therefore, their exclusion from the scope would lead to a proposal for a directive with limited substance.

Similarly, FEAD also strongly opposes the exclusions formulated in article 8 and 11 which do not belong in a directive on concessions.

FEAD is the European Federation representing the European waste management industry. FEAD's members are national waste management associations covering 19 Member States and Norway. They have an approximate 60% share in the household waste market and handle more than 75% of industrial and commercial waste in Europe. Their combined annual turnover is approximately € 75 billion.

FEAD represents about 3000 companies with activities in all forms of waste management. These companies employ over 320000 people who operate around 2400 recycling and sorting centres, 1100 composting sites, 260 waste-to-energy plants and 900 controlled landfills. They play an important role in the determination of the best environmental option for waste management problems.

¹ Commission staff working document concerning the application of EU public procurement law to relations between contracting authorities ('public-public cooperation')