



The proposed legislative initiative on service concessions – Is it needed and what will it achieve?

In the Single Market Act the European Commission promised that in 2011 it would adopt a legislative initiative on service concessions. The aim is that “clear and proportionate rules will improve market access for EU undertakings by ensuring transparency, equal treatment and a level playing field for economic operators”. This is consistent with the Commission’s Work Plan for 2011 which sets out the aim as being “to provide legal clarity and certainty as to the rules governing award of concessions contracts”.

The legislative is long anticipated – the possible need for such an initiative was referred to in the Commission’s PPP Communication of November 2005 and it is important to PPP, because 60% of PPP are estimated by the Commission to be in the form of service concessions.

Since November 2005 there has been a lengthy process of impact assessment and consultation, including two periods of public consultation in 2010, but it now looks likely that there will be a proposal for a legislative initiative is likely in spring 2011. It is still not clear if the initiative will be a stand alone Directive or proposed by way of amendments to Directives 2004/18 and 2004/17.

What is not in doubt is - as the Commission has pointed out in its indicative road map – that “do nothing is not an option” because it would “preserve the situation of legal uncertainty” and fail to address the key problems identified by the Commission of:

- **Disparity of definitions and regimes in Member States**, which could act as an entry barrier to different national markets
- **Deficient application of the principles of transparency, equal treatment and non-discrimination**, especially as current practices in Member States are very often not in line with these principles
- **Insufficient legal certainty**, since the case-law of the European Court of Justice is not very precise or even complete on the concrete obligations resulting from the application of the principles, leaving Contracting Authorities unsure if the advertisement and award methods they apply are compliant with the EU law and bidders unsure if a contract which they have bid for in good faith may be open to challenge
- **Imperfect legal protection of tenderers**, since the exclusion of service concessions from Directives 2004/18 and 2004/17 also means that interested parties cannot seek remedies using the Public Procurement Remedies Directives.

The Competitive Dialogue procedure, giving the freedom to Contracting Authorities discuss all aspects of the contract with selected candidates, creates the conditions for those genuinely uncertain about the extent to which risk can be transferred to the contracting partner and thus whether or not a transaction should be classified as public contract or as a concession.

If Competitive Dialogue is used, and its procedural rules followed, this will fulfill the procedural requirements for both forms of transaction and will thus minimise the risk of infringement of EU law. But the use of Competitive Dialogue for this purpose presumes, of course, the intent to maximise transparency and competition on the part of the

Contracting Authority.

So what options might the Commission pursue?

In an article in the European PPP Law Review in 2008 I argued that there were three main options for legislators ie:

- A new Concessions Directive setting out rules for the award of concessions
- Repeal of Article 17, Directive 2004/18 (which excludes service concessions from the scope of that Directive) and to extend the scope of the Articles which refer to works concessions also to include service concessions
- A new definition of a public service transaction embracing both what are currently public contracts and concessions, introduced by amendment to Directive 2004/18.

I concluded then that the most straightforward way to address the problems highlighted by the Commission was to make all public works and service contracts and all works and service concessions above the thresholds and not exempted by reason of the objective of the contract subject to identical award procedures. In effect, this would render redundant the current distinction in Community law between public contracts and concessions.

This is a solution which the Commission appears to have ruled out (eg in the PPP Communication of November 2005), though there is in reality little justification for the different award procedures public contracts and those which are classified in the Directive as concessions, especially for PPP. Treaty principles themselves do not provide sufficient justification and nor does the potential existence of additional risk to the supplier in a concession, the fact that the principal beneficiaries are third parties rather than the Contracting Authority or the nature of the service provided.

I also drew attention to the fact that the existing distinction between public contracts and concession contracts encouraged "régime shopping" ie the process by which a Contracting Authority can use the existence of different rules to structure a transaction so as to be able to use an award procedure with the intention to avoid transparent and competitive procurement. Transparent and competitive procurement is key to securing value for money for the public sector, and is especially important at a time of crisis in European public finances.

Since then, the ECJ judgment in the *Eurawasser* case has made the need for action more urgent. It appears to have re-defined the nature and extent of the risk which needs to be accepted by the concessionaire and thus potentially widened the number of transactions which may be classified as a concession.

Yet in doing so the ECJ has not definitively resolved the uncertainty about how much and what type of risk has to be present for a transaction to be classed as a concession as opposed to a public contract.

What are the new rules likely to cover?

The indications are that they are likely to cover:

- The definition of a concession, including the nature and extent of risk necessary for a transaction to be classed as a concession as opposed to a public contract
- The thresholds for the application of the rules and the method of calculation of them
- The procedures for awarding concessions
- The selection and award criteria for concessions
- The duration of concessions
- Amendments to a concession during its lifetime
- Remedies regarding infringements relating to concessions.

It is not clear whether or not the legislative initiative will cover both works and service concessions or only service concessions and how to deal with concessions which could be

classified as both works and service concessions.

What is likely to happen?

There have been different views in the Council over many years on this issue, differences which still remain, and the European Parliament's view, as expressed in the Rühle report in May 2010, was that "any proposal for a legal act dealing with service concessions would be justified only with a view to remedying distortions in the functioning of the internal market" and "points out that such distortions have not hitherto been identified, and that a legal act on service concessions is therefore unnecessary as long as it is not geared to an identifiable improvement in the functioning of the internal market".

So it is not clear what progress this Directive will make, and thus whether the uncertainty for Contracting Authorities will remain to be resolved through ECJ

In any event, Contracting Authorities need more guidance, be it from Member States or the European Commission, to address in some detail the factors discussed above and thus to clarify the concept of concessions, perhaps by way of examples of what types and extent of risk accepted by the contracting partner would or would not constitute sufficient risk to classify the transaction as a concession. The ECJ could also, when another judgment is required from them (for example in the *Passau* case where the Advocate-General gave his opinion in September 2010), use the opportunity to clarify the whether or not their judgement in the *Eurawasser* case will become part of its settled judgment of how a concession is to be defined.

And, of course, more debate and comment via this website - and in our seminar in December - would be welcome.