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CEMR

Response to the consultation on an EU Initiative on Concessions

Brussels, September 2010

“An EU Initiative on Concessions”

General remarks

1. CEMR notes with surprise that the European Commission is considering a proposal for a legal instrument, whose aim is to regulate the award of service concessions.
2. In the negotiations of the current public procurement directives, service concessions were explicitly excluded from the scope of the directives in recognition that procurement rules were not appropriate for such arrangements.
3. In its resolution on new developments in public procurement, the European Parliament recently (May 2010) also took a sceptical stance towards a legal instrument on service concessions.
4. Local and regional authorities throughout Europe are aware that the general principles of the Treaties (non-discrimination and transparency) apply to the award procedure of service concessions.
5. Recent decisions of the Court of Justice on these principles have provided local and regional authorities with sufficient understanding and guidance about the application of these principles. A new legal instrument on service concessions would put into question the legal certainty obtained through these judgements.
6. CEMR would like to stress that the Lisbon Treaty safeguards local and regional self-government. It recognises the fact that it is the local and regional level, which is closest to the European citizens and that sufficient room for the democratic process at grass-root level needs to be insured. The Treaty therefore shows a fundamental shift of perspective in favour of greater freedom for action by national, regional and local governments.
7. The organisation of public services is a core principle of local and regional self-government. Protocol 26 of the Lisbon Treaty on services of general interest emphasizes the wide discretion of local and regional governments to decide, democratically and on their own initiative, on the best means of providing, commissioning and organising public services.
8. The former Member of the European Commission, Mr Mario Monti in his recently published report on the Single Market advocates for flexibility for the local and regional level when it comes to organising public services in general and the selection of the service provider in particular. Every attempt to introduce new regulation would be against the recommendations of Professor Monti.
9. The CEMR notes that recent data being gathered by the European Commission shows very small volumes of cross-border procurement activities despite the Directives having been in place for many years. A legislative approach at EU level is therefore not at all a proportionate response to service concession activities, as it would be unlikely to lead to any meaningful increase in cross-border trade in the Internal Market.

10. Therefore, CEMR seriously questions the added value of a legal instrument on service concessions.
11. Furthermore, the CEMR would regard such an initiative as an example of the excessive use of public procurement as a policy instrument pursued by the European Commission; and therefore would like to repeat our concern expressed at an earlier occasion¹ that procurement policy is being used as a “quick-fix” policy tool in too many spheres of activity. Individual initiatives, some mandatory, some voluntary and some creating de-facto rules, add to an already complex legal framework; and therefore are likely to counteract and add to administrative burden.
12. However, and without prejudice to our general conviction that such a legal instrument is not necessary, and in case the European Commission continues to work on such an initiative, we would like to invite the European Commission, the European Parliament and the Council to take note of the enclosed points which are of utmost importance for local and regional authorities.

Including service concessions in the public procurement directives

13. CEMR takes note that the European Commission is considering a reference on the application of the Treaty principles in relation to service concessions in the public procurement directives 2004/17 and 2004/18.
14. We would like to stress that recent judgements of the Court of Justice in case Eurawasser (C-206/ 08) and Wall AG (C-91/08) have provided sufficient legal certainty on the definition of service concessions and urge the European Commission not to question this level of clarity by redefining the borderline between public service contracts and public service concessions.
15. The CEMR notes, mainly in its position paper on over-reliance², the wide range of procurement initiatives that local and regional authorities have had to spend time and money adapting to. Additional burdens are therefore seen as unwelcome.

Application of the remedies directives

16. CEMR opposes any attempt to introduce the application of the remedies directives to a potential initiative on service concessions. The provision of extensive remedies would confront local authorities with high administrative burden and an additional element of uncertainty.
17. Local authorities, which are legally obliged to provide a service, could be inclined not to take the risk of possible remedial procedures and to provide the service “in-house” instead. Applying the remedies directives, therefore, wrongfully limits the freedom of local and regional authorities in contradiction to the provisions of the Lisbon Treaty and takes away the attractiveness of service concessions as an instrument for local and regional authorities to organise public services.

¹ CEMR position paper : “[Over reliance on Public Procurement as a Policy Instrument](#)”

² CEMR [Key messages](#) on Over-reliance on Public Procurement

Choice of awarding procedure

18. CEMR welcomes the fact that the European Commission intends to provide contracting authorities with flexibility in the choice of the four awarding procedures foreseen by the existing directives. In this context it is crucial, that the distinctive feature of service concessions will be taken into account. Especially, the freedom to negotiate with the bidders has to be safeguarded, while the application of the rules governing the award of public service contracts to service concessions would not only lead to absurd results but would also cause unnecessary administrative burden.
19. If the European Commission wants to integrate provisions on the awarding procedure of a service concession in a potential initiative, the free choice of the local authority to choose the awarding procedure could be a suitable solution.

Thresholds

20. CEMR would strongly advocate for thresholds which take into account the specific features of service concessions.
21. Thresholds are meant to distinguish between contracts with relevance for the internal market and contracts without this relevance.
22. Therefore, an EU-wide call for tender should only be required if the task for which a service concession is to be awarded will have an impact beyond national boundaries.
23. However, in the case of a large number of infrastructure services, e.g. in the water management sector, the existing thresholds are already regularly exceeded due to the lengthy terms of the contracts, the high value of installations and the large investment sums involved.
24. The application of the existing thresholds, i.e. the one for works concessions, would therefore lead to a situation in which even service concessions with a clearly regional significance will fall under the scope of the possible directive.

Exemptions

25. During the last years the European Court of Justice identified a number of exemptions from public procurement law, which have to be respected also with regards to a possible initiative on service concessions. These exemptions include in-house arrangements and other cases of public-public or inter-municipal cooperation.
26. As far as in-house is concerned, the CEMR considers a possible initiative on service concessions as one way to introduce a broad in-house clause in positive law, as suggested by former Commissioner Mario Monti.
27. Finally, a general exclusion of services of general interest from the application of a potential initiative should be considered.

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