

## CEEP opinion

### Answer to the public consultation of the European Commission on the possible legislative initiative on service concessions

#### Executive summary

1. CEEP welcomes the efforts of the European Commission to work on an impact assessment of a possible EU legislation on service concessions. CEEP follows the work as well as the public consultations with high interest and therefore considers it important to contribute to this ongoing discussion.
2. CEEP remains doubtful about legislative action on service concessions at the European level as it is not convinced that such an initiative would bring added-value to the current situation, mainly because:
  - A flexible legal framework already exists at European level
  - Changing the existing legal framework would inevitably bring rigidity to authorities and providers of services of general interest,

This would be detrimental to the provision of public services via the concession tool and restrict public authorities' room for manoeuvre when organising these services of general interest.
3. Providers of public services would only see improvement to the current situation if the current overall framework of procurement introduces:
  - the possibility of 'in-house' arrangements
  - free choice of the appropriate awarding procedure
  - legal certainty to existing sectoral legislation by guaranteeing their prejudice

Annex

## I. Introduction

CEEP welcomes the effort of the European Commission to work on an impact assessment of a possible EU legislation on service concessions. CEEP has followed very closely any possible development on this issue during the last decade, and contributing actively to the ongoing discussions ([CEEP opinion 2007/18](#)). Therefore CEEP is pleased to once again outline its position.

CEEP remains doubtful about a legislative action on service concessions at the European level. CEEP is not convinced that such an initiative would bring added-value to the current situation, mainly because:

- A flexible legal framework on service concessions – the EU ‘*acquis*’ - already exists at the European level, which guarantees that the EU Treaty is respected
- Changing the existing situation would inevitably introduce a high level of rigidity into the legal framework

This would be detrimental to the provision of public services, or services of general interest, and restrict the public authorities’ and service providers’ room for manoeuvre when organising the provision of a service of general interest via the service concession tool

## II. Overview of the current state of play

### ❖ *The existing ‘acquis’ of the EU on service concessions*

Service concessions are already subject to a flexible legal framework at the European level, consisting of:

- EU Treaty principles that are to be respected in the service concession award procedures (equal treatment, non-discrimination on the grounds of nationality and transparency),
- the definition of ‘service concession’ in the secondary law of EU - public procurement directives 2004/18/EC and 2004/17/EC. This allows to distinguish them from public service contracts, which are subject to the public procurement directives,
- notions which are being used to define service concessions agreements were developed by the European Court of Justice , thus further clarifying the definition of service concession and the applicability of the EU Treaty principles<sup>1</sup>.

CEEP members are committed to ensuring best practices in accordance with Community and national legislative frameworks, through effective competitive processes, which are transparent and provide equality of treatment. CEEP members recognise the importance and benefits of competitively tendering public contracts in light of its best value obligations. However, further regulation in relation to service concessions could prove unduly restrictive,

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<sup>1</sup> Latest ECJ judgement in the Case C-206/08 (WAZV Gotha) has clarified the notion of ‘risks’, building also on its previous jurisprudence on the matter of service concessions.

increase costs to the public purse and adversely affect CEEP members' ability to provide cost effective public service solutions for citizens.

❖ *Why do public service providers need flexibility?*

*Fundamental difference from public contracts*

Service concessions are markedly different from public service contracts. They are not targeted to buy a service to be used by the awarding authority. Their aim is usually 'to delegate' to an economic agent the provision of a service of general interest.

The particularities of the provision of services of general economic interest which are assigned through service concessions lie in the fact that they concern very complex situations, which go beyond the simple procurement of goods or services. At the announcement of the intention to award a concession, the proposals of the bidders often vary considerably as to content. It is not so easy for the competent authority to define in advance in a complete and conclusive manner all the criteria which concern either the quality or the manner of provision of the respective service.

It is therefore important, for the awarding of service concessions in accordance with the principles of transparency, lack of discrimination, proportionality and mutual recognition, to afford the public authorities the greatest possible flexibility in selecting the most appropriate criteria for the choice of the contractor and in dealing with the different bidders of services, without being constrained by formal procedures. Otherwise this would mean that dumping offers of any kind have to be considered and the public authorities would be obliged in many places to accept a partner for the long-term provision of services of general interest, in whom they have no confidence.

*Difference from works concessions*

It must be noted that works concessions are in fact designed to finance and construct big infrastructures that return to public ownership when the concession is over. It is a way to help to avoid the budgetary constraints authorities face when financing big infrastructure plans.

In the case of service concessions, the schemes are very complex ones as the main concern involves not so much the initial award but the monitoring of the quality standards, the periodic change of tariffs to be charged to users through an act of authority, the maintenance of the financial equilibrium of service providing, the need for the authorities to update or change the conditions and obligations to be met in the concession, duly compensating the concessionaire on an objective basis. Above all, it is essential to envisage the concession as something that requires full flexibility over its whole period, as any rigidity could prove highly detrimental for the essential service the authority is responsible for. Procurement rules fail to provide such flexibility, as their aim is to focus on the award of

contracts, paying little attention to the fulfilment of long-standing missions and obligations as the ones that occur in any service concession.

The most important difference lies in the fact that the authority in most of the cases has the legal power to restrict the provision of a service for general interest purposes, and to decide to ensure its provision through a third party that acts on its behalf, being responsible for its delivery according to the conditions laid down by the authority, and subject to its close monitoring. We are therefore in the realm of Services of General Interest where art. 14 of the Treaty imposes the obligation on the Community and Member States 'to take care that such services operate on the basis and conditions which enable them to fulfil their missions'.

In any case, the area of service concessions is so broad that only some service concessions might be regulated similar to works concessions. The health sector needs more room for manoeuvre. For example, health insurance is at the borderline between public and private. Public authorities do not have democratic legitimacy to entrust a private partner with the management of health insurance. Public authorities need to consult broadly and involve many more stakeholders than in other sectors before deciding to entrust a private partner with this kind of activity.

Moreover, the European Commission's intention currently seems to be to promote competition in an area that is in many cases characterised by natural monopolies. Even though this may be a legitimate objective it contradicts the public authorities' right to organise services of general interest the way they consider it is best done, taking into account all the particularities of the local environment.

In conclusion, any failure to achieve the right balance between the much needed flexibility that is needed for a successful service concession arrangement throughout its term and the legal security that European Commission is aiming to introduce for all the parties concerned could have the adverse effects. In CEEP's opinion a too rigid legal framework for service concessions might altogether discourage the public authorities from using concessions as a form of a public-private partnership.

### **III. Key issues for Public Service providers**

CEEP deems it inevitable to stress on the following issues which are of vital importance for Public Service providers:

#### **❖ *'In-house' sphere***

In order to ensure legal certainty for any party involved it is crucial that a potential legislative initiative on service concessions clarifies the "in-house sphere" where in the absence of a third party a certain service can be "awarded" directly without any call for tender to an entity belonging to the sphere of an authority. The 'internal operator' as defined in the Regulation (EC) 1370/2007<sup>2</sup> on public transport serves as a clear example of what CEEP

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<sup>2</sup> 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 Regulations (EEC) Nos 1191/69 and 1107/70.

would call for to be adopted as a blueprint for all comparable public services in any future legislation. Article 5 (2)(a) of the afore-mentioned Regulation sets out a range of factors to be considered for the purpose of determining whether an authority exercises control. It is as well worthwhile to stress that if a company is controlled by an authority, 100 % public ownership is not and should not be by itself a mandatory condition for an in-house situation.

Furthermore, the public-public cooperation needs to be established as a type of internal provision of services of general economic interest, which does not need to be subjected to public procurement procedures. The European Court of Justice has developed this type of 'in-house' relations recently<sup>3</sup>.

❖ *Possibility to choose freely the appropriate awarding procedure*

It is also indispensable for public authorities to be able to choose the most appropriate awarding procedures.

The current public procurement framework could benefit from a *sui generis* procedure, which would account for the specific features of the particular contract in question. The awarding procedure similar to that of the negotiated procedure in public procurement directives would be necessary since it provides for more flexibility. The identical application of other procedures foreseen in the public procurement directives, i.e. the open procedure, should not be considered.

As mentioned above, flexibility is essential when entering into a service concession agreement and during its whole period, for instance, when it comes to the need of changing certain conditions during the term of the contract. During the award of a service concession whole range of criteria have to be taken into account. This cannot be done by taking into account only the simple market-based considerations of the cheapest or most economically advantageous offer, automatically being taken as the best one.

❖ *Sector-specific European legislation should neither be restricted, nor modified by future EU transversal legislation*

## **Transport**

The most significant piece of legislation in recent years concerning urban mobility has been the Regulation on Public Passenger Transport Services by Rail and by Road<sup>4</sup>. CEEP believes that this regulation strikes the right balance in ensuring fair competition without imposing unnecessary burdens on public authorities and service providers. CEEP does not see any added-value to changes in the legal framework of public transport services, either directly or indirectly through legislation on service concessions, as the application of this regulation is dependent on the scope of the Public Procurement directives (2004/18/EC and 2004/17/EC) and the definition of the service concessions.

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<sup>3</sup> ECJ judgment in the case Coditel Brabant, C-324/07.

<sup>4</sup> The same as Footnote 1.

## **Water and wastewater**

In CEEP's view such an initiative is directly related to the attempt to liberalise the provision of water supply services and perhaps also sanitation services in Europe. If the European Commission decides to legislate on service concessions, the relationship between municipalities and water or wastewater suppliers could be designed as a service concession and would therefore be subjected to detailed tendering. This would result in a covert liberalisation of these sectors, which has been repeatedly rejected by the European Parliament in the years 2004 and 2005. EU internal market rules should not be used to circumvent policy decisions, which have been adopted in a democratic process.

## **Energy and waste management sector**

The energy, district heating and waste management sectors are also covered by the on-line consultation. CEEP would like to point out that these sectors are either subject to a detailed sectoral legislation precluding any heterodyne of unspecific public procurement rules or there is no necessity to further develop such legislation. Even if right-of-access contracts under which local authorities assign network operators the right to use public roads for laying and operating energy supply lines could be partially designated as concession contracts, such arrangements are not service concessions within the meaning of Art. 1 (3) lit. b) of Directive 2004/17/EC or Art. 1(4) of Directive 2004/18/EC. Although licence agreements in the district heating sector and agreements in the waste management sector are often wrongly referred to as concession agreements, they are not in fact service concessions either.

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## ANNEX

CEEP considers the present legal framework on service concessions to be fully sufficient. However, CEEP deems it important to answer some of the issues raised by the DG Market & Services in the process of an impact assessment:

### ❖ *Awarding procedures*

Flexibility is essential when entering into a service concession agreement and during its whole period, for instance, when it comes to the need of changing certain conditions during the term of the contract. During the award of a service concession whole range of criteria have to be taken into account. This cannot be done by taking into account only the simple market-based considerations of the cheapest, or most economically advantageous offer, automatically being taken as the best one.

### ❖ *Appropriate thresholds are necessary to meet the principle of proportionality*

Thresholds are necessary to meet the principle of proportionality. However, the internal market relevance cannot be expressed only in terms of threshold values. For smaller local and regional administrative entities seeking to award concession contracts in fields of large infrastructure services, EU-wide transparency obligations would impose disproportionate demands. For those fields, thresholds that are currently in place for public contracts would be regularly exceeded due to the lengthy terms of the contracts, the high values of installations and the large investment sums involved.

### ❖ *Long duration of the of service concession arrangements*

Due to the economic setup, a long duration of the contract is in principle immanent to the concession; accordingly, the economic life correlates with the size of the investment level. Any attempt to reduce these periods may cause undue disruptions and lower the level of quality of essential services. They usually involve rather substantial investments, and the concessionaire would be unwilling to keep up a high standard unless given the prospect to recover the investments made.

### ❖ *Extension of the judicial guaranties enclosed in the Remedies directive 2007/66/EC*

Although ensuring judicial guarantees for the bidders seem like a perfectly legitimate consideration in case legal initiative on service concessions should be put forward, CEEP must warn the European Commission of the danger of the possible abuses of such guarantees to the provision of the public services. Legal possibilities to obstruct and delay the commissioning of services after the procedure was closed should be restricted. Although this falls mainly into the competence of the Member States, ways need to be explored to

increase legal certainty for the authority and the chosen service provider after the decision has been made. Today, in some countries procurement seems to some observers to be an invitation to blackmail, therefore all the measures needed to prevent the unnecessary and costly judicial proceedings should be envisaged. Lessons might be learnt on a best practice basis.

❖ *Transitional periods*

There might be arrangements between municipalities and their enterprises from 50 years ago where no end of the contractual relationship has been agreed. For those cases there must either be some kind of unlimited guaranteed continuance or they have to be given an appropriate transitional period from the date of entry into force of any legislation changes in order to safeguard the investments they made.

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