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CORRIGENDUM TO THE NOTE

from: General Secretariat
to: Working Party on Public Procurement
No. Cion prop.: 18960/12 MAP 8 MI 684
Subject: Proposal for a Directive of the European Parliament and of the Council on the award of concession contracts
- Consolidated Presidency compromise proposal

On behalf of the Presidency, delegations will find in the Annex further changes to a consolidated compromise text on the above proposal.

Additional changes compared to the document 15709/12 are **underlined in bold**, new deletions are marked **[...] bold**. Only Recitals and Articles that are changed appear in the document.

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The following recitals should read as follows:

(3a) *Member States and public authorities should remain free to define and specify the characteristics of the service to be provided, including any conditions regarding the quality or price of the services, **in accordance with Union law**, in order to pursue their public policy objectives.*

(6) Concessions are contracts for pecuniary interest concluded between one or more economic operators and one or more contracting authorities or entities and having as their object the acquisition of works or services where the consideration consists, normally, in the right to exploit the works or services that are the subject of the contract. The notion of acquisition should be understood broadly in the sense of obtaining the benefits of the works or services in question, not necessarily requiring a transfer of ownership to contracting authorities or contracting entities. By contrast, the mere financing, in particular, through grants, of an activity, which is frequently linked to the obligation to reimburse the amounts received where they are not used for the purposes intended, does not usually fall under this Directive.

[...]

(6a) Arrangements where all operators fulfilling certain conditions are entitled to perform a given task, without any selectivity, such as customer choice and service voucher systems, should not qualify as concessions, also when based on legal agreements between the public authority and the economic operators. Such systems are typically based on a decision by a public authority defining the transparent and non-discriminatory conditions on the continuous access of economic operators to the provision of specific services, such as social services, allowing customers to choose between such operators .

- (6a) Concession contracts provide for mutually binding obligations where the execution of these works or services are subject to specific requirements defined by the contracting authority or entity which are legally enforceable. By contrast, certain State acts such as authorisations or licences, whereby the State or a public authority establishes the conditions for the exercise of an economic activity, **including a condition to carry out a given operation**, granted, normally, on request of the economic operator and not on the initiative of the contracting authority or entity and where the economic operator remains free to withdraw from the provision of works or services, should not qualify as concessions. In those cases the specific provisions of Directive 2006/123/EC of the European Parliament and of the Council on the internal market for services may apply.
- (6b) Certain agreements having as their object the right of an economic operator to exploit certain public domains or resources, such as land or any public property [...], notably in the maritime, inland port or airport sector, whereby the State or contracting authority or entity establishes only general conditions for their use without acquiring specific works or services, should not qualify as concessions. This is normally the case of public domain or land lease contracts which generally contain terms concerning entry into possession by the tenant, the use to which the property is to be put [...], the obligations of the landlord and tenant regarding the maintenance of the property, the duration of the lease and the giving up of possession to the landlord, the rent and the incidental charges to be paid by the tenant.
- The same applies to agreements on the utilisation of public immovable property for the provision or operation of fixed lines or networks intended to provide a service to the public insofar as these agreements do not impose an obligation of supply or involve any acquisition of services by a contracting authority or entity to itself or to end users.**
- (7) Difficulties related to the interpretation of the concepts of concession and public contract have been source of continued legal uncertainty among stakeholders and have given rise to numerous judgments of the Court of Justice of the European Union on this subject. Therefore, the definition of concession should be clarified, in particular by referring to the concept of [...] operating risk. The main feature of a concession, the right to exploit the works or services, always implies the transfer to the concessionaire of an **operating risk of economic nature** involving the possibility that it will not recoup all the investments made and the costs incurred in operating the works or services awarded.

The application of specific rules governing the award of concessions would not be justified if the contracting authority or entity relieved the contractor of any potential loss, by guaranteeing a revenue, equal or higher to the investments made and the costs that the contractor has to incur in relation with the performance of the contract. At the same time it should be made clear that certain arrangements which are fully paid by a contracting authority or a contracting entity should qualify as concessions where the recoupment of the investments and costs incurred by the operator for executing the work or providing the service depends on the actual demand for or the supply of the service or asset.

Recital (7a) is deleted

- (8) Where sector specific regulation eliminates the risk by providing for a guarantee to the concessionaire on breaking even on investments and costs incurred for operating the contract, such contract should not qualify as a concession within the meaning of this Directive. This does not exclude the award of concessions in sectors, such as those with regulated tariffs, to the extent that an [...] operating risk, however limited, can still be transferred to the concessionaire. This is also the case where operating risk is limited by means of contractual arrangements providing for [...] compensation, including compensation in the event of early termination of the concession for reasons attributable to the contracting authority or for reasons of force majeure.
- (9) [...] Operating risk must **be understood as the risk of exposure to the vagaries of the market**[...] [...] **It** may consist in either a demand or a supply risk or in both a demand and a supply risk. Demand risk is to be understood as the risk on actual demand for the works or services which are the object of the contract. Supply risk is to be understood as the risk on the provision of the works or services which are the object of the contract, in particular the risk that the provision of the services will not match demand [...].**Risks such as those linked to bad management, contractual defaults by the economic operator or to a force majeure event are not decisive for the purposes of classification as a concession, since those risks are inherent in every contract, whether it be a public procurement contract or a concession.**

(9b) Entities which are neither contracting entities pursuant to Article 4 **paragraph 1 point** (1) nor public undertakings are subject to its provisions only to the extent that they exercise one of the activities covered on the basis of special or exclusive rights. It is therefore appropriate to clarify that rights which have been granted by means of a procedure based on objective criteria, notably pursuant to Union legislation, and for which adequate publicity has been ensured do not constitute special or exclusive rights for the purposes of this Directive. This legislation should include Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas¹, Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity², Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service³, Directive 94/22/EC of the European Parliament and of the Council of 20 May 1994 on the conditions for granting and using authorisations for the prospection, exploration and production of hydrocarbons⁴ and 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 1107/70⁵.

It should also be clarified that this list of legislation is not exhaustive and that rights in any form, including by way of acts of concession, which have been granted by means of other procedures based on objective criteria and for which adequate publicity has been ensured do not constitute special or exclusive rights for the purposes of defining the scope of this Directive *ration[...]is personae*. The concept of exclusive rights is also used in Article 8 and Article 26 with a wider meaning, referring to a right to exclusively provide a given service in a given geographic area.

¹ OJ L 204, 21.7.1998, p. 1
² OJ L 27, 30.1.1997, p. 20.
³ OJ L 15, 21.1.1998, p. 14.
⁴ OJ L 164, 30.6.1994, p. 3.
⁵ OJ L 315, 3.12.2007, p. 1.

- (10) While calculating the estimated value of a concession, contracting authorities and entities shall take account of the revenue from all contracts which are part of one single concession. The concept of single concession[...] encompasses all supplies, works and services needed to carry out a particular project, for instance a works project or an entirety of works, supplies and/or services. In accordance with a well-established jurisprudence of the Court of Justice of the European Union, it should be clarified that the determination of whether or not specific works, services or supplies are part of a single project should be decided on the basis of a functional approach.
- (12) In certain cases, a given contracting authority or contracting entity which is State, regional or local authority or body governed by public law or a given association thereof may be the sole source for a given service, for the provision of which it enjoys an exclusive right pursuant to published laws, regulations or administrative provisions which are compatible with the Treaty. It should be clarified that in those situations a contracting authority or entity or association thereof may award concessions to such bodies without the Directive being applied.

It is also appropriate to exclude from the scope of this Directive certain services concessions awarded to other contracting entities where they are awarded on the basis of an exclusive right which that operator enjoys under published national law or administrative act and which has been granted in accordance with the Treaty and Union sectoral legislation concerning the management of networks infrastructure related to the activities set out in annex III, since such exclusive right makes it impossible to follow a competitive procedure for the award. By way of derogation and without prejudice to the legal consequences of the general exclusion from the scope of this Directive, concessions as defined in article 8 **paragraph 2** should be subject to the obligation to publish a concession award notice in view of ensuring basic transparency unless the conditions of such transparency are provided for in sectoral legislation.

- (27) Concessions are usually long term, complex arrangements where the contractor assumes responsibilities and risks traditionally borne by the contracting authorities and normally falling within their remit. For this reason, contracting authorities or entities should maintain a margin of flexibility in organising the awarding process, involving also the way the parties negotiate the content of the contract with the tenderers or candidates. However, in order to ensure equal treatment and transparency throughout the awarding process, it is appropriate to provide for basic guarantees as to the awarding process, including information on the nature and scope of the concession, limitation of the number of candidates, scope of negotiations, the dissemination of information to candidates and tenderers and the availability of appropriate records. It is also necessary to provide that the initial terms of the concession notice should not be deviated from, in order to prevent unfair treatment of any potential candidates. Furthermore, it should be clarified that the minimum requirements to be set by the contracting authority or entities are those conditions and characteristics (particularly physical, functional and legal) that any tender should meet or possess.
- (35) *The notion of circumstances that a diligent contracting authority or contracting entity could not foresee refers to those circumstances which could not be predicted despite reasonably diligent preparation of the initial award by the contracting authority or contracting entity, taking into account its available means, the nature and characteristics of the specific project, good practice in the field in question and the need to ensure an appropriate relationship between the resources spent in preparing the award and its foreseeable value. However, this cannot apply in cases where a modification results in an alteration of the nature of the overall concession, for instance by replacing the works, supplies or services to be procured by something different or by fundamentally changing the type of procurement since, in such a situation, a hypothetical influence on the outcome may be assumed.*

Article 2, paragraph 1, point (13) should read:

- (13) 'concession document' means any document produced or referred to by the contracting authority or contracting entity to describe or determine elements of the concession or the procedure, including the concession notice, the technical specifications, proposed conditions of concession, formats for the presentation of documents by candidates and tenderers, information on generally applicable obligations and any additional documents.

Article 8, paragraph 2 should read:

2. This Directive shall not apply to services concessions awarded to an economic operator which is a public undertaking as defined in paragraph 2 of Article 4 or an [...] entity other than those as referred to in **paragraph 1, point (1)** of Article 4, operating on the basis of special or exclusive rights within the meaning of paragraph 3 of Article 4 granted by a competent authority of a Member State or an association of thereof, if these concessions are awarded on the basis of an exclusive right that economic operator enjoys pursuant to applicable and published national law, regulation or administrative provision, and which has been granted in accordance with the Treaty and pursuant to Union sectoral legislation concerning the management of networks infrastructure related to the activities set out in annex III.

Article 15 should read:

1. *A concession awarded by a contracting authority or a contracting entity as referred to in paragraph 1, **point (1)** of Article 4 to another legal entity governed by private or public law shall fall outside the scope of this Directive where the following cumulative conditions are fulfilled:*

- a) *the authority or entity exercises over the legal entity concerned a control which is similar to that which it exercises over its own departments*
- b) *at least 85% of the activities of that legal entity are carried out for the controlling contracting authority or entity or for other legal entities controlled by that contracting authority or entity*
- c) *there is no [...] participation of private undertakings in the controlled legal entity*

*A contracting authority or a contracting entity as referred to in paragraph 1, **point (1)** of Article 4 shall be deemed to exercise over a legal entity a control similar to that which it exercises over its own departments within the meaning of point (a) of the first subparagraph where it exercises a decisive influence over both strategic objectives and significant decisions of the controlled legal entity. The control may also be exercised by another entity, which is itself controlled in the same way by the contracting authority or entity.*

For the determination of the percentage of activities referred to in point (b) of the first subparagraph the average total turnover of the controlled legal entity with respect to services, supplies and works for the three years preceding the concession award shall be taken into consideration. Where, because of the date that legal entity was created or commenced activities or because of a reorganisation of its activities, the turnover is either not available for the preceding three years or no longer relevant, it shall be sufficient to show that the turnover is credible, particularly by means of business projections.

2. *Paragraph 1 also applies where a controlled entity which is a contracting authority or contracting entity as referred to in paragraph 1, **point (1)** of Article 4 awards a concession to its controlling entity, or to another legal entity controlled by the same contracting authority, provided that there is no [...] participation of private undertakings in the legal entity being awarded the public concession.*
3. *A contracting authority or a contracting entity as referred to in paragraph 1, **point (1)** of Article 4, which does not exercise over a legal entity governed by private or public law control within the meaning of paragraph 1, may nevertheless award a concession without applying the provisions of the current Directive to that legal entity [...], where the following cumulative conditions are fulfilled:*
 - a) *the contracting authority or entity as referred to in **paragraph 1, point (1) of Article 4** exercise jointly with other contracting authorities or entities over the legal entity a control which is similar to that which it exercises over its own departments;*
 - b) *at least 85% of the activities of that legal entity are carried out for the controlling contracting authorities or entities as referred to in **paragraph 1, point (1) of Article 4** or other legal entities controlled by the same contracting authority or entity;*
 - c) *there is no participation of private undertakings in the controlled legal entity.*

*For the purposes of point (a), contracting authorities or entities as referred to in **paragraph 1, point (1) of Article 4** shall be deemed to exercise joint control over a legal entity where the following cumulative conditions are fulfilled:*

(a) *the decision-making bodies of the controlled legal entity are composed of representatives of all participating contracting authorities or contracting entities as referred to in paragraph 1 subparagraph 1 of Article 4. Individual representatives may represent several or all of the participating contracting authorities;*

(b) *those contracting authorities or contracting entities as referred to in **paragraph 1, point (1) of Article 4** are able to jointly exert decisive influence over the strategic objectives and significant decisions of the controlled legal entity;*

4. *A contract concluded between two or more contracting authorities or contracting entities as referred to in **paragraph 1, point (1) of Article 4** shall not be deemed to be a concession within the meaning of point 1 of paragraph 1 of Article 2[...] , where the following cumulative conditions are fulfilled:*

...[...the rest of article remains unchanged].

Article 17 should read:

Concessions for social and other specific services, such as hotel and restaurant services or certain legal, rescue, administrative or prison services, listed in Annex X falling within the scope of this Directive shall be subject to the obligation of paragraph 3 of Art. 26, of paragraph 1 of Article 27 **and to Articles 44 and 45.**

Article 18 paragraph 5 should read:

5. *Unless otherwise provided for in this Directive, **in case of** contracts having as their object concessions covered by this Directive as well as procurement or other elements not covered by it nor by Directives [replacing 2004/17/EC and Directive 2004/18] or 2009/81/EC [...], where a contract must be awarded pursuant to the provisions of this Directive, if awarded on its own, then this Directive shall apply also to the award of a mixed contract where contracting authorities choose to include other elements in the procurement, irrespective of their value and irrespective of the legal regime these added elements would otherwise have been subject to.*

Article 22, paragraph 4 should read:

4. Specific conditions relating to economic and financial standing or to criteria relating to technical and professional ability which contracting authority or entity establish for the participation of such groups which are not imposed on individual participants shall be justified by objective reasons and proportionate.

Conditions for the performance of a concession by such groups, which are not imposed on individual participants, shall also be justified by objective reasons and proportionate. Requiring those groups to appoint a joint representation or a lead partner for the purposes of the **concession** procedure or to require information on their constitution shall be deemed to be justified and proportionate.

Article 30, paragraph 1 should read:

1. Contracting authorities and contracting entities shall by electronic means offer unrestricted and full direct access free of charge by electronic means to the concession documents from the date of publication of the notice in accordance with Article 28 or, where the contract notice does not include the invitation to submit tenders, from the date on which the invitation to submit tenders is sent. The text of the notice or of these invitations shall specify the internet address at which this documentation is accessible.

Where, in exceptional and duly justified circumstances, unrestricted and full direct access free of charge by electronic means to certain **concession** documents cannot be offered, contracting authorities or contracting entities shall indicate in the notice or the invitation to confirm interest that the **concession** documents concerned will be transmitted by other means and the time limit for the submission of tenders shall be prolonged.

Article 35, paragraph 6 should read:

6. Where the concession award involves negotiation, contracting authorities or contracting entities shall comply with the following rules:

- (a) wherever the contracting authority or entity indicates in the concession documents the minimum requirements as referred to in paragraph 2 these requirements shall not be subject to negotiation.
- (b) where the negotiation takes place after the submission of tenders they shall negotiate with tenderers **any elements of** the tenders submitted by them **not subject to minimum requirements** in order to improve their overall content based on the criteria and requirements indicated in-paragraph 1.
- (c) [*...the rest of article remains unchanged*].

Article 39, paragraph 3 should read

- 3. The contracting authority or the contracting entity shall [...] list **the criteria set out in paragraph 1** in descending order of importance.

Point a of Article 43 should read:

Member States shall ensure that contracting authorities and contracting entities have the possibility, under the conditions determined by the applicable national contract law, to terminate a concession during its term, where one of the following conditions is fulfilled:

- (a) *the exceptions provided for in Article 15 cease to apply following a participation **of private undertakings** in the legal entity awarded the contract pursuant to Article 15 (4);*