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BUSINESSEUROPE's Views on the European Commission  
Proposal on Concessions

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**TO BE FILLED IN AT A LATER STAGE**

KEY FACTS AND FIGURES




### **BUSINESSEUROPE'S VIEWS ON THE EUROPEAN COMMISSION PROPOSAL ON CONCESSIONS**

#### **DRAFT**

#### **INTRODUCTION**

On 20 December 2011 the Commission published a proposal for a Directive on the award of concession contracts. The legislative proposal, which is expected to enter into force by xxxx, forms part of the Commission's overall public procurement package<sup>1</sup>.

Concessions are partnerships between the public sector and private companies, where the latter exclusively operate, maintain and carry out the development of infrastructure (ports, water distribution, parking garages, toll roads) or provide services of general economic interest (energy, water and waste disposal for example). Concessions are the most common form of public private partnership (PPP) (60 % of PPPs are concessions and are a unique tool to improve the efficiency of public services, which is essential in the face of today's drastic constraints on public finances. They are also a good tool to stimulate systemic innovation and provide high quality public services to the population.

BUSINESSEUROPE supports the Commission's efforts to try and overcome existing barriers to the EU-wide concession market and to ensure convergence and a level playing field in the EU. In particular, the direct award of concessions, without any transparency and competition, with the associated risks of national favouritism, fraud and corruption, effectively means that EU citizens may not be benefiting from quality services at best prices. In addition, economic operators may be discriminated against on access to concession contracts and public authorities may fail to guarantee the efficient spending of public money. These problems fundamentally affect the efficient functioning of the European single market.

However, BUSINESSEUROPE believes that creating additional bureaucracy in the field of concessions would be counterproductive. Policy-makers should rather focus on extending the use of concessions and on favouring more transparency by subjecting concessions above certain thresholds to mandatory publication in the Official Journal of the EU.

As highlighted in BUSINESSEUROPE's response to last year's Commission Green Paper on the modernisation of public procurement, a legislative clarification on services concessions could be supported provided that a 'light approach' is taken.

In this context, we note that some of the proposed provisions could result in real obstacles in the field of concessions. The Commission's impact assessment does not seem to justify the development of a proposal which is wider and far more detailed than needed. This goes against the idea of better regulation and creates new legal uncertainties.

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<sup>1</sup> Insert reference to BE's position paper on reform of public procurement

BUSINESSEUROPE sets out below its specific comments on the proposal.

## **1. EXCESSIVE CODIFICATION OF PUBLIC-PUBLIC CO-OPERATION CASE LAW**

Instead of helping enterprises grow, the draft Directive in its current form will risk reducing the attractiveness of concessions in favour of in-house solutions that are fostered by the overly broad and unregulated derogations granted in their favour.

The proposed legal clarifications should avoid wide interpretation of the European case-law.

Article 15 on the relations between public authorities, codifies EU case-law enabling certain derogations to European law on public purchasing and giving them a broad interpretation. This codification however is not based on clear and stable case-law, and its implications are problematical.

The codification enables derogations which exclude a range of public-public contracts from the scope of the directive, thereby leaving economic operators with an undue disadvantage. The derogations could send out the wrong signal to local authorities who think they have the choice of opting for no transparency, and that it would be legally easier to use an “in-house” service provider rather than going through a competitive process. This could ultimately lead to the use of fewer concessions and thus to a risk of market fragmentation and a narrowing of the market – in contradiction with the objectives of putting in place more PPP structures and optimising public expenditure.

In order to guarantee fairer treatment of public and private management, BUSINESSEUROPE believes that (1) articles that go beyond the stable basic jurisprudence should be suppressed, (2) public entities party to agreements that have not been tendered out should not be able to perform on the open market, (3) In-house management should be limited in time or at least be subject to prior notice.

## **2. EXCLUSION OF CERTAIN SERVICES**

One of the main objectives of the Directive is to improve economic operators’ access to the concessions markets. The exclusions from the scope of the directive, as laid out in article 15, are therefore contradictory to the Commission’s aim. The proposal may potentially reduce private operators’ access to the Single Market.

BUSINESSEUROPE acknowledges that some services are excluded for legitimate reasons, but opposes the exclusions of public passenger transport services, social services, joint ventures and affiliated undertakings.

BUSINESSEUROPE firmly opposes exclusions to transparency and competition in all three directives on public purchasing: the Directive on public procurement, the Directive



on public procurement for network activities and the Directive on award of concessions. There should be as few exemptions as possible in the scopes of all three directives.

### **3. COMPLEXITY OF THE AWARD CRITERIA**

Public authorities need to make room for innovative solutions by describing their needs as functional outputs and avoiding specifications that are too prescriptive. It is therefore essential that the awarding regime of concessions is not rendered more rigid.

BUSINESSEUROPE welcomes the Commission's choice of privileging the framework of the negotiation procedure and their traceability and flexibility. In order to better adjust the proposals of the bidders to the expectations of public authorities and the needs of the service, it is necessary to reconcile the legal certainty of the procedure and the capacity of negotiations between parties.

However, we strongly oppose award criteria that in practice would give contracting authorities a very wide margin of discretion to decide who should be able to win a contract. It is important that all criteria used for awards of concessions must be subject to preliminary publication, otherwise such criteria should be deemed inapplicable. The suggestion in articles 39 and 40 that the contractor should indicate the relative weighting of the criteria in descending order of importance is inappropriate for the specific framework of concessions which must remain flexible.

### **4. TRANSFER OF OPERATING RISK**

BUSINESSEUROPE believes that the assignment of operational risk underlying a concession should be left to the parties involved, generally on the basis of who is best placed to manage each risk.

The Commission has rightly placed the notion of transfer of risk at the heart of the definition of a concession. The definition could be enriched by adding performance objectives that are assigned by the contracting authority to the service provider.

### **5. MODIFICATION OF CONCESSIONS DURING THEIR TERM AND TERMINATION**

BUSINESSEUROPE believes that rules that restrict amendments of contracts should be avoided as this could hinder the ability of stakeholders to adapt to change. Rigid definitions do not take full advantage of the flexibility of concession contracts.

Furthermore, we find it to be inappropriate to include purely contractual aspects such as subcontracting and modification in the directive as that does not correspond to the purpose or the title of the proposal. More precisely, the rigid definition in Article 42 of what should be regarded a substantial modification of the initial contract which justifies a new concession award procedure is inappropriate in the specific framework of concessions.

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