

**Committee of the Regions****ECOS-V-030****96th plenary session, 18-19 July 2012****OPINION****of the****Committee of the Regions****THE AWARD OF CONCESSIONS CONTRACTS****THE COMMITTEE OF THE REGIONS**

- notes that the current rules on concessions consist of case-law and national legislation. Given that some concessions may have an impact on the internal market, it would be desirable to clarify the rules and foster a single interpretation and a single approach. The Committee therefore believes it legitimate to consider a regulation in this area;
- therefore considers it important that contracting authorities and Member States remain free to choose the instrument under which they wish to carry out their tasks. Licences, including operating licences issued in limited quantities, must remain outside the scope of the directive. This also applies to the simple financing of an activity, which is often linked to an obligation to repay the amounts received if they are not used for the purposes intended;
- recommends that the arrangements for awarding concessions be further clarified. A balance needs to be struck between clarifying, for example, both the way in which the contract is published and its deadlines, on the one hand, and the leeway available to the contracting authorities regarding the criteria they wish to apply on the other. This clarity provides a point of reference for the contracting authorities and creates the desired uniformity in the way Member States apply the rules. The leeway demonstrates respect for the contracting authorities' knowledge of their concessions and acknowledges the autonomy of the Member States. Contracting authorities should have ample scope for selecting socially-minded and sustainable criteria;
- believes that this proposal must show due regard for the subsidiarity principle: local and regional authorities should remain free to choose whether they will carry out works and services themselves or outsource them to third parties. When local and regional authorities decide to sub-contract these tasks, they must be free to choose the appropriate legal instrument themselves: a licence, a public procurement contract or a concession.

Rapporteur

Henk Kool (NL/PES), Alderman: member of the executive council of the city of The Hague

Reference document

Proposal for a Directive of the European Parliament and of the Council on the award of concession contracts
COM(2011) 897 final

I. POLICY RECOMMENDATIONS

THE COMMITTEE OF THE REGIONS

1. notes that there is no uniform legal framework for concessions. Public works concessions are regulated by the European procurement directives. The law regarding concessions for services, however, is exempt from the EU procurement directives, while remaining subject to the principles of the Treaty on European Union. These principles are further developed in European Court of Justice case-law;
2. is aware that the Member States are obliged to comply with the principles of the Treaty on the Functioning of the European Union (equal treatment, non-discrimination, transparency and proportionality) when awarding concessions, but notes that implementation of these vary. The proposal for a directive seeks to bring the rules on concessions for works and the rules on concessions for services within a single regulatory framework, so that there would be a single directive for the award of concessions at EU level. Given in particular the economic challenges currently facing the European Union, the European Commission attaches great importance to further developing the internal market, provided that the EU rules on concessions give contracting authorities sufficient leeway as regards implementation;
3. observes that the legal basis for creating a legal framework for concessions can be found in Articles 53(1), 62 and 114 of the TFEU. These articles deal with the functioning of the internal market. The Committee notes in this connection that concessions for services should always also be considered in relation to the provision of services of general (economic) interest. The proposal for a directive does not take sufficient account here of the changes added in the Lisbon Treaty, and the Committee therefore calls for more extensive exclusions from the scope of the directive for these services;
4. believes that this proposal must show due regard for the subsidiarity principle: local and regional authorities should remain free to choose whether they will carry out works and services themselves or outsource them to third parties. When local and regional authorities decide to sub-contract these tasks, they must be free to choose the appropriate legal instrument themselves: a licence, a public procurement contract or a concession;
5. points out that concessions are inherently more complex and last for longer periods. The Committee has previously recommended that when rules concerning concession contracts are adopted, they should be flexible and simple (CdR 21/2010) and legal ambiguities must be prevented;

HAVING REGARD TO THE ABOVE: THE COMMITTEE OF THE REGIONS

6. believes that it should be made clear in Article 1 of the directive or at least in the recitals that transfers of tasks and competences from one public entity to another do not fall within the

scope of this directive. In addition, sectors that are already covered by sector-specific provisions of EU law or are deliberately unregulated by decision of the EU legislator should not be included;

7. recognises that, above a certain value, concessions affect the internal market and could therefore be subject to EU legislation;
8. notes that the current rules on concessions consist of case-law and national legislation. Given that some concessions may have an impact on the internal market, it would be desirable to clarify the rules and foster a single interpretation and a single approach. The Committee therefore believes it legitimate to consider a regulation in this area;
9. notes that the implementation of concessions varies considerably, however, from one Member State to another. This is partly due to the other national instruments available to a Member State to regulate or authorise such activities. The impact of a directive could therefore also differ between Member States, and the Commission should therefore explicitly clarify and specify which types of contracts are regarded as concessions and which types of contractual relations fall within the scope of the directive;
10. therefore considers it important that contracting authorities and Member States remain free to choose the instrument under which they wish to carry out their tasks. Licences, including operating licences issued in limited quantities, must remain outside the scope of the directive. This also applies to the simple financing of an activity, which is often linked to an obligation to repay the amounts received if they are not used for the purposes intended;
11. expresses concern that the introduction of a procurement requirement for the use of national instruments of this type encroaches too much on Member States' national autonomy. The Committee is therefore pleased to note from the Explanatory Memorandum that the European Commission believes that such public authority acts should not have the status of concession; however the Committee believes that an explicit exemption in an article is required for this purpose;
12. believes that the directive should apply to concessions that affect the internal market. Concessions which, due to their low value, do not affect the internal market, should therefore be awarded directly without any prior call for competition;
13. considers this distinction to be exceedingly important for SMEs. Contracting authorities would thus be able to implement an SME-friendly policy for concessions;
14. expresses its concern at the regulation's complexity. Contracting authorities find the current procurement directives unnecessarily complex. There are fears that this directive on concessions will make this a highly complex issue too. The Committee believes that concessions cannot be addressed in the same way as the rules set out in the European

procurement directives and therefore calls on the Commission to ensure that the directive and any subsequent Commission communication remain simple;

15. recommends that the arrangements for awarding concessions be further clarified. A balance needs to be struck between clarifying, for example, both the way in which the contract is published and its deadlines, on the one hand, and the leeway available to the contracting authorities regarding the criteria they wish to apply on the other. This clarity provides a point of reference for the contracting authorities and creates the desired uniformity in the way Member States apply the rules. The leeway demonstrates respect for the contracting authorities' knowledge of their concessions and acknowledges the autonomy of the Member States. Contracting authorities should have ample scope for selecting socially-minded and sustainable criteria.

II. RECOMMENDATIONS FOR AMENDMENTS

Amendment 1

Recital (5)

<i>Text proposed by the Commission</i>	<i>CoR amendment</i>
(5) Certain coordination provisions should also be introduced for the award of works and services concessions awarded in the water, energy, transport and postal services sectors given that national authorities may influence the behaviour of entities operating in those sectors and taking into account the closed nature of the markets in which they operate, due to the existence of special or exclusive rights granted by the Member States concerning the supply to, provision or operation of networks for providing the services concerned.	(5) — Certain coordination provisions should also be introduced for the award of works and services concessions awarded in the water, energy, transport and postal services sectors given that national authorities may influence the behaviour of entities operating in those sectors and taking into account the closed nature of the markets in which they operate, due to the existence of special or exclusive rights granted by the Member States concerning the supply to, provision or operation of networks for providing the services concerned.

Reason

These sectors are already covered by specific legislation.

Amendment 2

Recital (6)

<i>Text proposed by the Commission</i>	<i>CoR amendment</i>
(6) Concessions are contracts for pecuniary interest concluded between one or more economic operators and one or more contracting	(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 execution of these works or services are subject to specific binding obligations 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, should not qualify as concessions. The same applies to certain agreements having as their object the right of an economic operator to exploit certain public domains or resources, such as land lease contracts whereby the State or contracting authority or entity establishes only general conditions for their use without acquiring specific works or services.	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. <u>They provide for mutually binding obligations where</u> the execution of these works or services are subject to specific binding obligations <u>requirements defined by the contracting authority or entity, and compliance is</u> which are legally enforceable. By contrast, certain State acts such as authorisations or <u>permits or (limited-issued)</u> licences whereby the State or a public authority establishes the conditions for the exercise of an economic activity <u>and where the economic operator remains free to withdraw from the provision of works or services</u> , should not qualify as concessions. The same applies to certain agreements having as their object the right of an economic operator to exploit certain public domains or resources, such as land lease contracts whereby the State or contracting authority or entity establishes only general conditions for their use without acquiring specific works or services.
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Reason

The distinction between a licence, a limited-issue licence whereby the contracting authority issues an operating licence and a concession needs to be clarified.

A licence makes it possible to subject the performance of an activity to certain requirements. But a licence may also impose restrictions on the activities themselves. These are known as operating or limited-issue licences. These are generally used for reasons relating to public order, public health and/or safety and include operating licences for prostitution, hotels and restaurants, and casinos.

A concession contract shares certain features with this type of operating licence. The main difference is that where a concession contract is concerned, performance of the activity is essential to the contracting authority. Therefore, under a concession contract, performance of the activity is legally enforceable. If performance of the activity to which the operating right applies is legally enforceable, then performance "for pecuniary interest" may be accepted. This criterion also applies to the definition of the contract.

It is important that contracting authorities and Member States remain free to choose the instrument by means of which they wish to carry out their tasks. Licences, operating licences and limited-issue licences should not fall within the scope of the directive. It is not desirable that an obligation for transparency or where relevant, for a call for tender, apply to the award of such licences. National and sub-national regulations should form the legal basis for determining to whom a licence is to be issued. Point 6 of the Explanatory Memorandum suggests that the European Commission shares this view.

The definition of a concession refers to the form of a contract, but these criteria are explained in purely functional terms. As a result, a licence may still be regarded as a concession. The difference between an (operating) licence and a concession should, therefore, be clarified in the Explanatory Memorandum and in the definition of concessions.

Concessions need to be carefully distinguished from government duties such as the issuing of permits and licences.

Amendment 3

Recital (9)

<i>Text proposed by the Commission</i>	<i>CoR amendment</i>
(9) The notion of special or exclusive rights is central to the definition of the scope of this Directive, since entities which are neither contracting entities pursuant to Article 4 (1) (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 such 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 gas[1], Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity[2], 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	(9) The notion of special or exclusive rights is central to the definition of the scope of this Directive, since entities which are neither contracting entities pursuant to Article 4 (1) (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 such 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 gas[1], Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity[2], 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

<p>Community postal services and the improvement of quality of service[3], 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 hydrocarbons[4] 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 1107/70[5]. The increasingly diverse forms of public action made it necessary to define more clearly the notion of procurement itself. The Union rules on concessions refer to the acquisition of works or services for a consideration consisting in exploitation of those works or services. The notion of acquisition should be understood broadly in the sense of obtaining the benefits of the works or services in question not requiring in all cases a transfer of ownership to contracting authorities or contracting entities. Furthermore, the mere financing 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.</p> <p>[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.</p>	<p>Community postal services and the improvement of quality of service[3], 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 hydrocarbons^[4] 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 1107/70^[5], <u>and any national laws of a Member State that respect the principles of equal treatment, transparency, proportionality and mutual recognition enshrined in the Treaties.</u> The increasingly diverse forms of public action made it necessary to define more clearly the notion of procurement itself. The Union rules on concessions refer to the acquisition of works or services for a consideration consisting in exploitation of those works or services. The notion of acquisition should be understood broadly in the sense of obtaining the benefits of the works or services in question not requiring in all cases a transfer of ownership to contracting authorities or contracting entities. Furthermore, the mere financing 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.</p> <p>[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.</p>
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Reason

The amendment seeks to restate, without any possibility of misinterpretation, the fundamental concept already asserted in Recital 25 of Directive 2004/17/EC on procurement procedures in the utilities sector, which states as follows: *Nor may rights granted by a Member State in any form, including by*

way of acts of concession, to a limited number of undertakings on the basis of objective, proportionate and non-discriminatory criteria that allow any interested party fulfilling those criteria to enjoy those rights be considered special or exclusive rights. We do not believe that this concept should be restricted to a list of EU acts, which might appear stringent, and therefore, to exclude the laws or regulations of individual Member States which nevertheless satisfy the same objective, proportionate and non-discriminatory criteria.

Amendment 4

Recital (10)

<i>Text proposed by the Commission</i>	<i>CoR amendment</i>
(10) It has also proven necessary to clarify what should be understood as a single procurement, with the effect that the aggregate value of all concessions concluded for the purpose of this procurement has to be taken into account with regard to the thresholds of this Directive, and that the procurement should be advertised as a whole, possibly split into lots. The concept of single procurement encompasses all supplies, works and services needed to carry out a particular project. Indications for the existence of one single project can for instance consist in overall prior planning and conception by the contracting authority, the fact that the different elements purchased fulfil a single economic and technical function or that they are otherwise logically interlinked.	(10) It has also proven necessary to clarify what should be understood as a single procurement, with the effect that the aggregate value of all concessions concluded for the purpose of this procurement has to be taken into account with regard to the thresholds of this Directive, and that the procurement should be advertised as a whole, possibly split into lots. The concept of single procurement encompasses all supplies, works and services needed to carry out a particular project. Indications for the existence of one single project can for instance consist in overall prior planning and conception by the contracting authority, the fact that the different elements purchased fulfil a single economic and technical function or that they are otherwise logically interlinked.

Reason

The preparation and implementation of a concession may take years. When preparing the concession, the contracting authority is likely to seek out a variety of external advice. This advice, according to the definition, should be taken into account when evaluating the concession. This is illogical. Contracts that are different in nature or awarded to another party should not play any role in the evaluation of the concession. If these contracts are of a certain value, they should be awarded on the basis of the directive on public procurement and in accordance with that directive.

This position is in line with previous Committee opinions on the need not to group contracts together unnecessarily.

See Amendment 14.

Amendment 5

Recital (11)

<i>Text proposed by the Commission</i>	<i>Amendment</i>
(11) To ensure a real opening up of the market and a fair balance in the application of concession award rules in the water, energy, transport and postal services sectors it is necessary for the entities covered to be identified on a basis other than their legal status. It should be ensured, therefore, that the equal treatment of contracting entities operating in the public sector and those operating in the private sector is not prejudiced. It is also necessary to ensure, in keeping with Article 345 of the Treaty, that the rules governing the system of property ownership in Member States are not prejudiced.	(11) To ensure a real opening up of the market and a fair balance in the application of concession award rules in the water , energy, transport and postal services sectors it is necessary for the entities covered to be identified on a basis other than their legal status. It should be ensured, therefore, that the equal treatment of contracting entities operating in the public sector and those operating in the private sector is not prejudiced. It is also necessary to ensure, in keeping with Article 345 of the Treaty, that the rules governing the system of property ownership in Member States are not prejudiced.

Reason

The wishes of the European Parliament regarding the water sector can be ascertained from its resolutions of 14 January 2004, 10 March 2004 and 31 May 2006. These resolutions indicate that the European Parliament is not pursuing liberalisation, but rather the approach of modernising the water sector, whereby economic principles must be reconciled with quality and environmental standards and the required efficiency. Additional rules in the form of horizontal arrangements are therefore not advisable.

Amendment 6

New Recital after Recital (13)

<i>Text proposed by the Commission</i>	<i>CoR amendment</i>
	(14) <u>Local and regional authorities may carry out public service tasks using their own internal resources. They may also carry out public service tasks in cooperation with other local authorities or groups of local authorities in the public interest – contractual or institutional task-sharing – in accordance with the Member States' internal organisation. These types of cooperation do not fall within the scope of EU legislation on public procurement and concessions. EU law does not require local authorities to use a particular legal</u>

	<u>form for the joint implementation of their public service tasks. Transfers of competences relating to public service tasks entailing a complete transfer of responsibility between local authorities, or between local authorities and groups made up exclusively of local authorities, do not fall within the scope of the present Directive. EU internal market legislation does not apply in such cases.</u>
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Reason

Cooperation arrangements between local authorities (contractual or institutional task-sharing among municipalities) cannot fall within the scope of internal market legislation.

Amendment 7

Recital (20)

<i>Text proposed by the Commission</i>	<i>CoR amendment</i>
(20) A review of so-called priority and non-priority services ('A' and 'B' services) by the Commission has shown that it is not justified to restrict the full application of procurement law to a limited group of services. As a result, this Directive should apply to a number of services (such as catering and water distribution services), which both showed a potential for cross-border trade.	(1) — A review of so-called priority and non-priority services ('A' and 'B' services) by the Commission has shown that it is not justified to restrict the full application of procurement law to a limited group of services. As a result, this Directive should apply to a number of services (such as catering and water distribution services), which both showed a potential for cross-border trade.

Reason

The fundamental differentiation between priority and non-priority services, and thus the preference in procurement law for so-called "B" services, must be maintained. Social and healthcare services have little or no impact on the single market and are, as a rule, provided locally. Water is a vital good. The approach to the water sector must therefore be particularly sensitive, taking environmental and health factors into account. In accordance with Article 17 of Directive 2006/123/EC on services in the internal market, water services should be excluded from the scope of the concessions directive.

Amendment 8

Recital (22)

<i>Text proposed by the Commission</i>	<i>CoR amendment</i>
(22) Given the importance of the cultural context and the sensitivity of these services, Member States should be given wide discretion to organise the choice of the service providers in the way they consider most appropriate. The rules of this Directive do not prevent Member States to apply specific quality criteria for the choice of service providers, such as the criteria set out in the voluntary European Quality Framework for Social Services of the European Union's Social Protection Committee. Member States and/or public authorities remain free to provide these services themselves or to organise social services in a way that does not entail the conclusion of concessions, for example through the mere financing of such services or by granting licences or authorisations to all economic operators meeting the conditions established beforehand by the contracting authority or contracting entity, without any limits or quotas, provided such system ensures sufficient advertising and complies with the principles of transparency and non-discrimination.	(22) Given the importance of the cultural context and the sensitivity of these services, Member States should be given wide discretion to organise the choice of the service providers in the way they consider most appropriate. The rules of this Directive do not prevent Member States to apply specific quality criteria for the choice of service providers, such as the criteria set out in the voluntary European Quality Framework for Social Services of the European Union's Social Protection Committee. Member States and/or public authorities remain free to provide these services themselves or to organise social services in a way that does not entail the conclusion of concessions, for example through the mere financing of such services or by granting licences or authorisations to all economic operators meeting the conditions established beforehand by the contracting authority or contracting entity, without any limits or quotas , provided such system ensures sufficient advertising and complies with the principles of transparency and non-discrimination.

Reason

The Committee proposes that this text be deleted.

There are a limited number of operating licences that regulate certain activities for which a call for tenders would not be desirable. These are activities that are not carried out for reasons of general interest or for the public authority in question, but are viewed by the authority as potentially dangerous and should therefore be regulated. They include, for example, licences for prostitution. Limited-issue operating licences should not, therefore, automatically be the subject of a transparent award procedure.

See also Amendment 4.

Amendment 9

Recital (25)

<i>Text proposed by the Commission</i>	<i>CoR amendment</i>
(25) In order to ensure transparency and equal treatment, criteria for the award of concessions should always comply with some general standards. These should be disclosed in advance to all potential tenderers, be related to the subject matter of the contract and should not offer to the contracting authority or contracting entity an unrestricted freedom of choice. They should ensure the possibility of effective competition and be accompanied by requirements that allow the information provided by the tenderers to be effectively verified. In order to comply with these standards while improving legal certainty, Member States may provide for the use of the criterion of the most economically advantageous tender.	(25) In order to ensure transparency and equal treatment, criteria for the award of concessions should always comply with some general standards. These should be disclosed in advance to all potential tenderers, be related to the subject matter of the contract and should not offer to the contracting authority or contracting entity an unrestricted freedom of choice. They should ensure the possibility of effective competition and be accompanied by requirements that allow the information provided by the tenderers to be effectively verified. In order to comply with these standards while improving legal certainty, Member States may provide for the use of the criterion of the most economically advantageous tender.

Reason

See Amendments 23 and 28.

Amendment 10

Article 1, new paragraph 3

<i>Text proposed by the Commission</i>	<i>CoR amendment</i>
<i>Article 1</i> <i>Subject-matter and scope</i> ...	<i>Article 1</i> <i>Subject-matter and scope</i> ... 3. <u>Concessions with a value under the threshold should be awarded without any prior call for competition</u>

Reason

The Committee considers that this directive should only apply to concessions affecting the internal market. Concessions with a value below European thresholds are of no "cross-border interest" and the internal market is therefore not at stake. This additional text guarantees contracting authorities' room for manoeuvre.

Amendment 11
Article 2, Paragraph 1, Point 7

<i>Text proposed by the Commission</i>	<i>CoR amendment</i>
<p style="text-align: center;"><i>Article 2</i> <i>Definitions</i></p> <p>1. For the purposes of this Directive the following definitions shall apply:</p> <p>...</p> <p>(7) "services concession" means a contract for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities or contracting entities and having as their object the provision of services other than those referred to in points 2 and 4 where the consideration for the services to be provided consists either solely in the right to exploit the services that are subject of the contract or in that right together with payment.</p>	<p style="text-align: center;"><i>Article 2</i> <i>Definitions</i></p> <p>1. For the purposes of this Directive the following definitions shall apply:</p> <p>...</p> <p>(7) "services concession" means a contract for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities or contracting entities and having as their object the provision of services other than those referred to in points 2 and 4 where the consideration for the services to be provided consists either solely in the right to exploit the services that are subject of the contract or in that right together with payment.</p> <p><u>"pecuniary interest" Pecuniary interest exists if mutually binding obligations, where the execution of these works or services are subject to specific requirements defined by the contracting authority or entity, are legally enforceable.</u></p>

Reason

The distinction between a licence, a limited-issue licence whereby the contracting authority issues an operating licence and a concession needs to be clarified.

A licence makes it possible to subject the performance of an activity to certain requirements. But a licence may also impose restrictions on the activities themselves. These are known as operating or limited-issue licences. These are generally used for reasons relating to public order, public health and/or safety and include operating licences for prostitution, hotels and restaurants, and casinos.

A concession contract shares certain features with this type of operating licence. The main difference is that where a concession contract is concerned, performance of the activity is essential to the contracting authority. Therefore, under a concession contract, performance of the activity is legally enforceable. If performance of the activity to which the operating right applies is legally enforceable,

then performance "for pecuniary interest" may be accepted. This criterion also applies to the definition of the contract.

It is important that contracting authorities and Member States remain free to choose the instrument by means of which they wish to carry out their tasks. Licences, operating licences and limited-issue licences should not fall within the scope of the directive. It is not desirable that an obligation for transparency or where relevant, for a call for tender, apply to the award of such licences. National and sub-national regulations should form the legal basis for determining to whom a licence is to be issued. Point 6 of the Explanatory Memorandum suggests that the European Commission shares this view.

The definition of a concession refers to the form of a contract, but these criteria are explained in purely functional terms. As a result, a licence may still be regarded as a concession. The difference between an (operating) licence and a concession should, therefore, be clarified in the Explanatory Memorandum and in the definition of concessions.

Amendment 12

Article 2, Paragraph 2

<i>Text proposed by the Commission</i>	<i>CoR amendment</i>
<i>Article 2</i> <i>Definitions</i> 2. The right to exploit the works or services as referred to in points 2, 4 and 7 of the first paragraph shall imply <i>[sic]</i> the transfer to the concessionaire of the substantial operating risk. The concessionaire shall be deemed to assume the substantial operating risk where it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services which are the subject-matter of the concession. [...]	<i>Article 2</i> <i>Definitions</i> 2. The right to exploit the works or services as referred to in points 2, 4 and 7 of the first paragraph shall imply <i>[sic]</i> the transfer to the concessionaire of the substantial operating risk. The concessionaire shall be deemed to assume the substantial operating risk where it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services which are the subject-matter of the concession. [...]

Reason

The word "substantial" in relation to operating risk should be deleted. Distinguishing, or defining, operating risk in relation to a public contract poses considerable problems at local level in practice. The definition of "substantial operating risk" in the proposal for a directive goes far beyond Court of Justice case law, which does not set very strict requirements for financial risk. Even in a case of compulsory connection and use when supplying water (see points 72-76 of ruling C-206/08 of 10 September 2009, WAZV Gotha), the Court's view is that this constitutes a service concession unaffected by public procurement law.

Amendment 13

Article 5

<i>Text proposed by the Commission</i>	<i>CoR amendment</i>
<p><i>Article 5</i> <i>Thresholds</i></p> <p>1. This Directive shall apply to the following concessions the value of which is equal to or greater than EUR 5 000 000:</p> <ul style="list-style-type: none"> a) concessions concluded by contracting entities for the pursuit of one of the activities referred to in Annex III; b) concessions concluded by contracting authorities. <p>2. Services concessions the value of which is equal to or greater than EUR 2 500 000 but lower than EUR 5 000 000 other than social services and other specific services shall be subject to the obligation to publish a concession award notice in accordance with Articles 27 and 28.</p>	<p><i>Article 5</i> <i>Thresholds</i></p> <p>1. This Directive shall apply to the following concessions the value of which is equal to or greater than EUR 5 000 000 <u>for concessions lasting up to five years</u>:</p> <ul style="list-style-type: none"> a) concessions concluded by contracting entities for the pursuit of one of the activities referred to in Annex III; b) concessions concluded by contracting authorities. <p><u>This Directive shall apply to the following concessions, the value of which is equal to or greater than EUR 10 000 000 for concessions lasting more than five years:</u></p> <ul style="list-style-type: none"> a) <u>concessions concluded by contracting entities for the pursuit of one of the activities referred to in Annex III;</u> b) <u>concessions concluded by contracting authorities.</u> <p>2. Services concessions <u>lasting for up to five years</u>, the value of which is equal to or greater than EUR 2 500 000 but lower than EUR 5 000 000, other than social services and other specific services, shall be subject to the obligation to publish a concession award notice in accordance with Articles 27 and 28. <u>Services concessions lasting more than five years, the value of which is equal to or greater than EUR 5 000 000 but lower than EUR 10 000 000, other than social services and other specific services, shall be subject to the obligation to publish a concession award notice in accordance with Articles 27 and 28.</u></p>

Reason

Concessions can have a long lifespan because the entrepreneurs concerned must be able to recover their investments. In long-term concessions, the threshold of EUR 5 000 000 for the total value of the concession is very low. The annual amount that the concession earns for the entrepreneur is not, however, sufficient to affect the internal market. That is why this distinction needs to be made.

Amendment 14

Article 6, Paragraph 2

<i>Text proposed by the Commission</i>	<i>CoR amendment</i>
<p><i>Article 6</i></p> <p><i>Methods for calculating the estimated value of concessions</i></p>	<p><i>Article 6</i></p> <p><i>Methods for calculating the estimated value of concessions</i></p>
<p>2. The estimated value of a concession shall be calculated as the value of an entirety of works or services, even if purchased through different contracts, where the contracts are part of one single project. Indications for the existence of one single project consist in overall prior planning and conception by the contracting authority or contracting entity, the fact that the different elements purchased fulfil a single economic and technical function or that they are otherwise logically interlinked.</p> <p>Where the contracting authority or the contracting entity provides for prizes or payments to candidates or tenderers it shall take them into account when calculating the estimated value of the concession.</p>	<p>2. The estimated value of a concession shall be calculated <u>on the basis of aspects forming as the value of technical, operational and/or economic</u> an entirety of works or services, even if purchased through different contracts, where the contracts are part of one single project. Indications for the existence of one single project consist in overall prior planning and conception by the contracting authority or contracting entity, the fact that the different elements purchased fulfil a single economic and technical function or that they are otherwise logically interlinked.</p> <p>Where the contracting authority or the contracting entity provides for prizes or payments to candidates or tenderers it shall take them into account when calculating the estimated value of the concession.</p>

Reason

See Amendment 8.

Amendment 15
Article 8, Paragraph 5

<i>Text proposed by the Commission</i>	<i>CoR amendment</i>
<p style="text-align: center;"><i>Article 8</i></p> <p><i>Exclusions applicable to concessions awarded by contracting authorities and contracting entities</i></p> <p>5. This Directive shall not apply to service concessions for:</p> <ul style="list-style-type: none"> (a) the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property or concerning rights thereon; however financial service concessions awarded at the same time as, before or after the contract of acquisition or rental, in whatever form, shall be subject to this Directive; (b) the acquisition, development, production or co-production of programme material intended for broadcasting, defined as transmission and distribution using any form of electronic network, that are awarded by broadcasters, nor to concessions for broadcasting time, that are awarded to broadcasters; (c) arbitration and conciliation services; (d) financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments within the meaning of Directive 2004/39/EC of the European Parliament and of the Council, central bank services and operations conducted with the European Financial Stability Facility (EFSF); (e) employment contracts; (f) Air transport services based on the grant of an operating licence within the meaning of Regulation (EC) 1008/2008[1] of the European Parliament and of the Council[2]; 	<p style="text-align: center;"><i>Article 8</i></p> <p><i>Exclusions applicable to concessions awarded by contracting authorities and contracting entities</i></p> <p>5. This Directive shall not apply to service concessions for:</p> <ul style="list-style-type: none"> (a) the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property or concerning rights thereon; however financial service concessions awarded at the same time as, before or after the contract of acquisition or rental, in whatever form, shall be subject to this Directive; (b) the acquisition, development, production or co-production of programme material intended for broadcasting, defined as transmission and distribution using any form of electronic network, that are awarded by broadcasters, nor to concessions for broadcasting time, that are awarded to broadcasters; (c) arbitration and conciliation services; (d) financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments within the meaning of Directive 2004/39/EC of the European Parliament and of the Council, central bank services and operations <u>transactions</u> conducted with the European Financial Stability Facility (EFSF) <u>as well as operations to raise money or capital for the contracting authority</u>; (e) employment contracts; (f) Air transport services based on the grant of an operating licence within the meaning of Regulation (EC)

<p>(g) Public passenger transport services within the meaning of Regulation (EC) 1370/2007 of the European Parliament and of the Council[3].</p> <p>The broadcasting referred to in point (b) of the first paragraph shall include any transmission and distribution using any form of electronic network.</p>	<p>1008/2008[1] of the European Parliament and of the Council[2];</p> <p>(g) Public passenger transport services within the meaning of Regulation (EC) 1370/2007 of the European Parliament and of the Council[3].</p> <p><u>h) medical care, transport for medical care and emergencies, civil protection and crisis management, as well as day-to-day risk prevention;</u></p> <p><u>i) services relating to abstraction, distribution and supply of drinking water, and waste water management.</u></p> <p>The broadcasting referred to in point (b) of the first paragraph shall include any transmission and distribution using any form of electronic network.</p>
<p>[1] Regulation of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community.</p> <p>[2] OJ L 293, 31.10.2008, p. 3.</p> <p>[3] OJ L 315, 3.12.2007.</p>	<p>[1] Regulation of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community.</p> <p>[2] OJ L 293, 31.10.2008, p. 3.</p> <p>[3] OJ L 315, 3.12.2007.</p>

Reason

Consistent with amendment 5 on recital 11.

Amendment 16

Article 15, paragraph 1

<i>Text proposed by the Commission</i>	<i>CoR amendment</i>
<p><i>Article 15</i></p> <p><i>Relations between public authorities</i></p> <p>1. A concession awarded by a contracting authority or a contracting entity as referred to in paragraph 1 subparagraph 1 of Article 4 to another legal person shall fall outside the scope of this Directive where the following</p>	<p><i>Article 15</i></p> <p><i>Relations between public authorities</i></p> <p>1. A concession awarded by a contracting authority or a contracting entity as referred to in paragraph 1 subparagraph 1 of Article 4 to another legal person shall fall outside the scope of this Directive where the following</p>

<p>cumulative conditions are fulfilled:</p> <ul style="list-style-type: none"> a) such an authority or entity exercises over the legal person concerned a control which is similar to that which it exercises over its own departments b) at least 90% of the activities of that legal person are carried out for the controlling contracting authority or entity or for other legal persons controlled by that contracting authority or entity c) there is no private participation in the controlled legal person <p>A contracting authority or a contracting entity as referred to in paragraph 1 subparagraph 1 of Article 4 shall be deemed to exercise over a legal person 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 person.</p>	<p>cumulative conditions are fulfilled:</p> <ul style="list-style-type: none"> a) such an authority or entity exercises over the legal person concerned a control which is similar to that which it exercises over its own departments b) at least 90<u>80</u>% of the activities of that legal person <u>that are the subject of the concession</u> are carried out for the controlling contracting authority or entity or for other legal persons controlled by that contracting authority or entity c) there is no <u>active</u> private participation in the controlled legal person <p>A contracting authority or a contracting entity as referred to in paragraph 1 subparagraph 1 of Article 4 shall be deemed to exercise over a legal person 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 person.</p>
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Amendment 17

Article 15, paragraph 2

<i>Text proposed by the Commission</i>	<i>CoR amendment</i>
<p><i>Article 15</i></p> <p><i>Relations between public authorities</i></p> <p>2. Paragraph 1 also applies where a controlled entity which is a contracting authority or contracting entity as referred to in paragraph 1 subparagraph 1 of Article 4 awards a concession to its controlling entity, or to another legal person controlled by the same contracting authority, provided that there is no private participation in the legal person being awarded the public concession.</p>	<p><i>Article 15</i></p> <p><i>Relations between public authorities</i></p> <p>2. Paragraph 1 also applies where a controlled entity which is a contracting authority or contracting entity as referred to in paragraph 1 subparagraph 1 of Article 4 awards a concession to its controlling entity <u>unit(s)</u>, or to another legal person controlled by the same contracting authority, provided that there is no <u>active</u> private participation in the legal person being awarded the public concession.</p>

Reason

The reference should only be to "operative" or "active" private participation in the capital of the controlled legal person, where management decisions of that legal person could be influenced. This should allow purely capital investment in the legal person, such as silent partnerships, without affecting the exemption for in-house arrangements or horizontal cooperation between public entities. The European Commission itself makes this point itself in its communication of 5 February 2008 on public-private partnerships (PPPs). It is important to allow purely capital participation so that local authorities can guarantee provision of services at a reasonable price to the general public.

Amendment 18

Article 15, paragraph 3

<i>Text proposed by the Commission</i>	<i>CoR amendment</i>
<p><i>Article 15</i></p> <p><i>Relations between public authorities</i></p> <p>3. A contracting authority or a contracting entity as referred to in paragraph 1 subparagraph 1 of Article 4, which does not exercise over a legal person control within the meaning of paragraph 1, may nevertheless award a concession without applying the provisions of the current Directive to a legal person which it controls jointly with other such contracting authorities or entities, where the following conditions are fulfilled:</p> <p>a) the contracting authorities or entities as referred to in paragraph 1 subparagraph 1 of Article 4 exercise jointly over the legal person a control which is similar to that which it exercises over its own departments;</p> <p>b) at least 90% of the activities of that legal person are carried out for the controlling contracting authorities or entities as referred to in paragraph 1 subparagraph 1 of Article 4 or other legal persons controlled by the same contracting authority or entity;</p> <p>c) there is no private participation in the controlled legal person.</p> <p>...</p>	<p><i>Article 15</i></p> <p><i>Relations between public authorities</i></p> <p>3. A contracting authority or a contracting entity as referred to in paragraph 1 subparagraph 1 of Article 4, which does not exercise over a legal person control within the meaning of paragraph 1, may nevertheless award a concession without applying the provisions of the current Directive to a legal person which it controls jointly with other such contracting authorities or entities, where the following conditions are fulfilled:</p> <p>a) the contracting authorities or entities as referred to in paragraph 1 subparagraph 1 of Article 4 exercise jointly over the legal person a control which is similar to that which it exercises over its own departments;</p> <p>b) at least 90%80% of the activities of that legal person <u>that are the subject of the contract</u> are carried out for the controlling contracting authorities or entities as referred to in paragraph 1 subparagraph 1 of Article 4 or other legal persons controlled by the same contracting authority or entity;</p> <p>c) there is no <u>active</u> private participation in the controlled legal person.</p> <p>...</p>

Reason

Consistent with amendment 16 on Article 15(1).

Amendment 19

Article 15, paragraph 4

<i>Text proposed by the Commission</i>	<i>CoR amendment</i>
<p><i>Article 15</i></p> <p><i>Relations between public authorities</i></p> <p>4. An agreement concluded between two or more contracting authorities or contracting entities as referred to in paragraph 1 subparagraph 1 of Article 4 shall not be deemed to be a concession within the meaning of point 1 of paragraph 1 of Article 2 of this Directive, where the following cumulative conditions are fulfilled:</p> <p>a) the agreement establishes a genuine co-operation between the participating contracting authorities or entities aimed at carrying out jointly their public service tasks and involving mutual rights and obligations of the parties;</p> <p>b) the agreement is governed only by considerations relating to the public interest;</p> <p>c) the participating contracting authorities or entities shall do not perform on the open market more than 10% in terms of turnover of the activities which are relevant in the context of the agreement;</p> <p>d) the agreement does not involve financial transfers between the participating contracting authorities or entities, other than those corresponding to the reimbursement of actual costs of the works, services or supplies;</p> <p>e) there is no private participation in any of the contracting authorities or entities involved.</p>	<p><i>Article 15</i></p> <p><i>Relations between public authorities</i></p> <p>4. An agreement concluded between two or more contracting authorities or contracting entities as referred to in paragraph 1 subparagraph 1 of Article 4 shall not be deemed to be a concession within the meaning of point 1 of paragraph 1 of Article 2 of this Directive, where the following cumulative conditions are fulfilled:</p> <p>a) the agreement establishes a genuine co-operation between the participating contracting authorities or entities aimed at carrying out jointly their public service tasks and involving mutual rights and obligations of the parties;</p> <p>b) the agreement is governed only by considerations relating to the public interest;</p> <p>c) the <u>majority of the activities of the</u> participating contracting authorities or entities shall do not perform on <u>are not performed on</u> the open market more than 10% in terms of turnover of the activities which are relevant in the context of the agreement;</p> <p>d) the agreement does not involve financial transfers between the participating contracting authorities or entities, other than those corresponding to the reimbursement of actual costs of the works, services or supplies;</p> <p>e) there is no <u>active</u> private participation in any of the contracting authorities or entities involved.</p>

Reason

Concession contracts between contracting authorities should (to ensure the responsible use of taxpayers' money) be fully exempt from procurement rules, under the conditions mentioned in points c) to e).

Contracting authorities must also be allowed to work together in areas not related to direct public services. These might include cooperation on processes that facilitate and support their operations, such as ICT, housing, purchasing and catering.

Such cooperation between contracting authorities is not always based on an equal partnership. Larger public authorities sometimes carry out work on behalf of smaller ones and it is therefore desirable that one contracting authority should be able to implement a concession contract for another. The aim is to ensure the proper use of public funds.

The ECJ has not said that a maximum of 10% of the contracting authorities' turnover may come from the open market: the percentage of turnover must depend on the activity and on other relevant factors. It is important that not all forms of private participation should rule out the exemption: only active private participation – i.e. if the shareholder is a private company that operates on the market – should lead to public procurement being required.

Amendment 20

Article 15, paragraph 5

<i>Text proposed by the Commission</i>	<i>CoR amendment</i>
<p><i>Article 15</i></p> <p><i>Relations between public authorities</i></p> <p>The absence of private participation referred to in paragraphs 1 to 4 shall be verified at the time of the award of the concession or of the conclusion of the agreement.</p> <p>The exceptions provided for in this Article shall cease to apply from the moment any private participation takes place, with the effect that ongoing concessions need to be opened to competition through regular concession award procedures.</p>	<p><i>Article 15</i></p> <p><i>Relations between public authorities</i></p> <p>The absence of private participation referred to in paragraphs 1 to 4 shall be verified at the time of the award of the concession or of the conclusion of the agreement.</p> <p>The exceptions provided for in this Article shall cease to apply from the moment any private participation takes place, with the effect that ongoing concessions need to be opened to competition through regular concession award procedures.</p>

Reason

To meet the stated goals of simplification and streamlining of the law on concessions, complicated explanations should be avoided in the legal text, as they do not increase legal certainty and they go beyond the case law of the EU Court of Justice.

Amendment 21

Article 26, paragraph 3

<i>Text proposed by the Commission</i>	<i>CoR amendment</i>
<i>Article 26</i> <i>Concession notices</i> ... 3 Contracting authorities and contracting entities wishing to award a concession for social and other specific services shall make known their intention of planned concession award through the publication of a prior information notice as soon as possible after the beginning of the budgetary year. Those notices shall contain the information set out in Annex XIII.	<i>Article 26</i> <i>Concession notices</i> ... 3 Contracting authorities and contracting entities wishing to award a concession for social and other specific services shall make known their intention of planned concession award through the publication of a prior information notice as soon as possible after the beginning of the budgetary year. Those notices shall contain the information set out in Annex XIII.

Reason

Social services have little or no impact on the single market and are, as a rule, provided locally. In this area, the proposed requirements to provide information impose a disproportionate burden on contracting authorities. In this area particularly, given that the main aim of the reform is to simplify procurement law, there should be no tightening of the rules.

Amendment 22

Article 35

<i>Text proposed by the Commission</i>	<i>CoR amendment</i>
<i>Article 35</i> <i>Procedural guarantees</i> 1. Contracting authorities and contracting entities shall indicate in the contract notice, in the invitation to submit tenders or in the concession documents a description of the concession, the award criteria and the minimum requirements to be met. This information must	<i>Article 35</i> <i>Procedural guarantees</i> 1. Contracting authorities and contracting entities shall indicate in the contract notice, in the invitation to submit tenders or in the concession documents a description of the concession, the award criteria and the minimum requirements to be met. This information must allow to identify the

<p>allow to identify the nature and scope of the concession, enabling economic operators to decide whether they request to participate in the concession award procedure. The description, award criteria and minimum requirements shall not be changed in the course of the negotiations.</p>	<p>nature and scope of the concession, enabling economic operators to decide whether they request to participate in the concession award procedure. The description, award criteria and minimum requirements shall not be changed in the course of the negotiations.</p> <p><u>Contracting authorities may, during the procedure but before tenders are received, adjust the minimum requirements and the award criteria without publishing a general correction, if the change has no impact on the tenderers. Contracting authorities should inform the tenderers concerned and should provide for a reasonable extension of the deadline for application.</u></p> <p><u>2. On request from the party concerned, the contracting authority shall as quickly as possible, and in any case within 15 days from receipt of a written request, inform:</u></p> <p><u>a) any unsuccessful candidates of the reasons for the rejection of their application;</u></p> <p><u>b) any unsuccessful tenderers of the reasons for the rejection of their tender, including, for the cases referred to in Article 32 (5) and (6), the reasons for its decision of non-equivalence or its decision that the works, supplies or services do not meet the performance or functional requirements;</u></p> <p><u>c) any tenderers that have made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer or the parties to the framework agreement;</u></p> <p><u>d) any tenderers that have made an admissible tender of the conduct and progress of negotiations and dialogue with tenderers.</u></p> <p><u>3. However, contracting authorities may decide to withhold certain information referred to in paragraph 6, regarding the contract where the release of such information would impede law enforcement, would otherwise be contrary to the public interest, would prejudice the legitimate commercial interests of economic operators,</u></p>
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	<u>whether public or private, or might prejudice fair competition between them.</u>
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Reason

A contracting authority may, during the proceedings, need to make changes or adjustments to the concession in response to questions and comments from tenderers. Through negotiation or discussions, the contracting authority should endeavour to better match supply and demand. It must therefore be possible to partially change and add to the minimum requirements and the award sub-criteria in line with the new insights gained during negotiations or discussions. If this does not happen, this contracting procedure loses its value.

Currently, if a substantial change is made to the contract, the procedure must be suspended and a fresh call for tender made. The Committee therefore recommends establishing a simple method, enabling contracting authorities to amend their concession in the form of an official correction, together with a short extension of the deadline for submission of tenders.

Amendment 23

Article 36, Paragraph 1

<i>Text proposed by the Commission</i>	<i>CoR amendment</i>
<p><i>Article 36</i></p> <p><i>Selection of and qualitative assessment of candidates</i></p> <p>1. Contracting authorities shall specify, in the concession notice the conditions for participation relating to:</p> <p>(a) suitability to pursue the professional activity;</p> <p>(b) economic and financial standing;</p> <p>(c) technical and professional ability.</p> <p>Contracting authorities shall limit any conditions for participation to those that are appropriate to ensure that a candidate or tenderer has the legal and financial capacities and the commercial and technical abilities to perform the concession to be awarded. All requirements shall be related and strictly proportionate to the subject-matter of the contract, taking into account the need to ensure genuine competition.</p>	<p><i>Article 36</i></p> <p><i>Selection of and qualitative assessment of candidates</i></p> <p>1. Contracting authorities shall specify, in the concession notice <u>or the concession documents</u>, the conditions for participation relating to:</p> <p>(a) suitability to pursue the professional activity;</p> <p>(b) economic and financial standing;</p> <p>(c) technical and professional ability.</p> <p>Contracting authorities shall limit any conditions for participation to those that are appropriate to ensure that a candidate or tenderer has the legal and financial capacities and the commercial and technical abilities to perform the concession to be awarded. All The requirements shall <u>take be</u> related and strictly proportionate to the subject matter of the contract, taking into</p>

Contracting authorities and contracting entities shall also indicate in the concession notice the reference or references to be submitted as proof of the economic operator's capacities. The requirements in respect of those references shall be non-discriminatory and proportionate to the subject-matter of the concession.	<u>account the need to ensure genuine competition.</u> Contracting authorities and contracting entities shall also indicate in the concession notice the reference or references to be submitted as proof of the economic operator's capacities. The requirements in respect of those references shall be non-discriminatory and proportionate to the subject-matter of the concession.
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Reason

See Amendments 2 and 28.

Amendment 24

Article 36, Paragraph 7

<i>Text proposed by the Commission</i>	<i>CoR amendment</i>
<p><i>Article 36</i></p> <p><i>Selection of and qualitative assessment of candidates</i></p> <p>7. Member States may provide that contracting authorities or contracting entities exclude from participation in a concession award any economic operator if one of the following conditions is fulfilled:</p>	<p><i>Article 36</i></p> <p><i>Selection of and qualitative assessment of candidates</i></p> <p>7. Member States <u>Contracting authorities</u> may provide that contracting authorities or contracting entities exclude from participation in a concession award any economic operator if one of the following conditions is fulfilled:</p>

Reason

The Committee considers that this competence falls to the contracting authorities.

Amendment 25

Article 38, new paragraph 3

<i>Text proposed by the Commission</i>	<i>CoR amendment</i>
<p><i>Article 38</i></p> <p><i>Time limits for submission of applications for the concession</i></p> <p>...</p>	<p><i>Article 38</i></p> <p><i>Time limits for submission of applications for the concession</i></p> <p>...</p> <p><u>3. Where contracting authorities and</u></p>

	<p><u>contracting entities wish to resort to a concession, they shall publish a notice containing a description of the concession, with the aim of informing interested parties about the concession. Contracting authorities shall provide for a period of at least 14 days within which parties may make their interest in the concession known. If several parties have expressed their interest, the contracting authority shall invite the parties to submit their tenders. A deadline of—at least 52 days from the date on which the invitation was sent shall be set for this purpose. If only one party expresses interest, the contracting authority may enter into negotiations with this party.</u></p>
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Reason

There is not a great deal of interest in certain concessions. It is pointless conducting a complete procedure if only one party is interested. Furthermore, open discussions in this type of situation would lead to a more favourable outcome for the contracting authority.

Amendment 26

Article 39, paragraph 2

<i>Text proposed by the Commission</i>	<i>CoR amendment</i>
<p><i>Article 39</i></p> <p><i>Concession award criteria</i></p> <p>...</p> <p>5. The award criteria shall be linked to the subject matter of the concession, and shall not confer an unrestricted freedom of choice on the contracting authority or the contracting entity. Those criteria shall ensure effective competition and shall be accompanied by requirements which allow the information provided by the tenderers to be effectively verified. Contracting authorities and contracting entities shall verify effectively on the basis of the information and proof provided by the tenderers, whether the tenders meet the award criteria.</p>	<p><i>Article 39</i></p> <p><i>Concession award criteria</i></p> <p>...</p> <p>5. The award criteria shall be linked to the subject matter of the concession, and shall not confer an unrestricted freedom of choice on the contracting authority or the contracting entity. Those criteria shall ensure effective competition and shall be accompanied by requirements which allow the information provided by the tenderers to be effectively verified. Contracting authorities and contracting entities shall verify effectively on the basis of the information and proof provided by the tenderers, whether the tenders meet the award criteria.</p>

Reason

There is no need for this provision. It provides no added value and should, keeping in mind the intention to simplify, be deleted. Its substance is already enshrined in the general principles of primary law.

Amendment 27

Article 39, paragraph 4

<i>Text proposed by the Commission</i>	<i>CoR amendment</i>
<p><i>Article 39</i> <i>Concession award criteria</i></p> <p>4. Member States may provide that contracting authorities and contracting entities shall base the award of concessions on the criterion of the most economically advantageous tender, in compliance with paragraph 2. Those criteria may include, in addition to price or costs, any of the following criteria</p>	<p><i>Article 39</i> <i>Concession award criteria</i></p> <p>4. Member States may provide that contracting authorities and contracting entities shall base the award of concessions on the criterion of <u>the lowest price or</u> the most economically advantageous tender, in compliance with paragraph 2. Those criteria may include, in addition to price or costs, <u>in any event</u>, any of the following criteria</p>

Reason

The Committee considers it desirable to retain the criterion of the lowest price. The current wording does not make it clear whether this is an option. Quality criteria can also be relevant to the "lowest price" criterion, for instance in the form of minimum requirements. Contracting authorities must be able to make their own decisions here. Furthermore, contracting authorities are often obliged to achieve a cost-cutting target, which has to be taken into account when deciding on the award criterion.

Amendment 28

Article 39, paragraph 4, indent a)

<i>Text proposed by the Commission</i>	<i>CoR amendment</i>
<p><i>Article 39</i> <i>Concession award criteria</i></p> <p>4. ... a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, environmental characteristics and innovative character. ...</p>	<p><i>Article 39</i> <i>Concession award criteria</i></p> <p>4. ... a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, <u>social interest</u>, environmental characteristics and innovative character. ...</p>

Reason

Some contracting authorities would like to be able to make their procurement and concessions meet social criteria. These are issues that cannot currently be taken into account in the assessment because they lack a sufficiently direct link to the contract. This is why a reference to them was added in the Directive on procurement. The Committee recommends that the directive on concessions indicate explicitly that setting social criteria is possible. Thus, contracting entities that wish to do so, will be able to establish such criteria. Point 29 of the Explanatory Memorandum refers to such social conditions, but they do not feature in the corresponding article.

See also Amendments 2 and 25.

Amendment 29

Article 40, paragraph 3

<i>Text proposed by the Commission</i>	<i>CoR amendment</i>
<p><i>Article 40</i> <i>Life-cycle costing</i></p> <p>3. Whenever a common methodology for the calculation of life-cycle costs is adopted as part of a legislative act of the Union, including by delegated acts pursuant to sector specific legislation, it shall be applied where life-cycle costing is included in the award criteria referred to in Article 39 paragraph (4).</p> <p>A list of such legislative and delegated acts is set out in Annex II. The Commission shall be empowered to adopt delegated acts in accordance with Article 46 concerning the update of this list, when on the basis of the adoption of new legislation, repeal or modification of such legislation, such amendments prove necessary.</p> <p>...</p>	<p><i>Article 40</i> <i>Life-cycle costing...</i></p> <p>3. Whenever a common methodology for the calculation of life cycle costs is adopted as part of a legislative act of the Union, including by delegated acts pursuant to sector specific legislation, it shall be applied where life cycle costing is included in the award criteria referred to in Article 39 paragraph (4).</p> <p>A list of such legislative and delegated acts is set out in Annex II. The Commission shall be empowered to adopt delegated acts in accordance with Article 46 concerning the update of this list, when on the basis of the adoption of new legislation, repeal or modification of such legislation, such amendments prove necessary.</p>

Reason

The fact that the Commission is encouraging contracting authorities to consider lifecycle costs when awarding concession contracts is to be welcomed. However, the above obligation goes too far by referring to a calculation methodology that lies in the future and has not yet been established. The establishment of a legal requirement to use a non-existent method must be rejected for reasons of unpredictability.

Amendment 30
Article 42, Paragraph 4

<i>Text proposed by the Commission</i>	<i>CoR amendment</i>
<p style="text-align: center;"><i>Article 42</i></p> <p style="text-align: center;"><i>Modification of concessions during their term</i></p> <p>4. Where the value of a modification can be expressed in monetary terms, the modification shall not be considered to be substantial within the meaning of paragraph 1, where its value does not exceed the thresholds set out in Article 5 and where it is below 5% of the price of the initial contract, provided that the modification does not alter the overall nature of the contract. Where several successive modifications are made, the value shall be assessed on the basis of the cumulative value of the successive modifications.</p>	<p style="text-align: center;"><i>Article 42</i></p> <p style="text-align: center;"><i>Modification of concessions during their term</i></p> <p>4. Where the value of a modification can be expressed in monetary terms, the modification shall not be considered to be substantial within the meaning of paragraph 1, where its value does not exceed the thresholds set out in Article 5 and where it is below <u>5</u>10% of the price of the initial contract, provided that the modification does not alter the overall nature of the contract. Where several successive modifications are made, the value shall be assessed on the basis of the cumulative value of the successive modifications.</p>

Reason

The Committee suggests a higher rate for permissible changes. Account should be taken of the fact that concessions usually have a longer lifespan than public procurement contracts.

Amendment 31
Annex III, paragraph 3

<i>Text proposed by the Commission</i>	<i>CoR amendment</i>
<p style="text-align: center;">ANNEX III</p> <p style="text-align: center;">ACTIVITIES EXERCISED BY CONTRACTING ENTITIES AS REFERRED TO IN ART. 4</p> <p>The provisions of this Directive governing concessions awarded by contracting entities shall apply to the following activities:</p> <p>...</p> <p>3) As far as water is concerned:</p> <p style="padding-left: 40px;">a) the provision or operation of fixed networks intended to provide a service to</p>	<p style="text-align: center;">ANNEX III</p> <p style="text-align: center;">ACTIVITIES EXERCISED BY CONTRACTING ENTITIES AS REFERRED TO IN ART. 4</p> <p>The provisions of this Directive governing concessions awarded by contracting entities shall apply to the following activities:</p> <p>...</p> <p>3) As far as water is concerned:</p> <p style="padding-left: 40px;">a) the provision or operation of fixed networks intended to provide a service to</p>

<p>the public in connection with the production, transport or distribution of drinking water;</p> <p>b) the supply of drinking water to such networks.</p> <p>This Directive shall also apply to concessions awarded or organised by entities which pursue an activity referred to above and which are connected with one of the following:</p> <p>a) hydraulic engineering projects, irrigation or land drainage, provided that the volume of water to be used for the supply of drinking water represents more than 20 % of the total volume of water made available by such projects or irrigation or drainage installations, or</p> <p>b) the disposal or treatment of sewage.</p> <p>The supply of drinking water to networks which provide a service to the public by a contracting entity referred to in paragraph 1 subparagraph 1 and paragraph 2 of Article 4 shall not be considered a relevant activity within the meaning of subparagraph 1 where all of the following conditions are met:</p> <p>a) the production of drinking water by the entity concerned takes place because its consumption is necessary for carrying out an activity other than those referred to in paragraphs 1 to 4 of this Annex;</p> <p>b) the supply to the public network depends only on the entity's own consumption and has not exceeded 30 % of the entity's total production of drinking water, on the basis of the average for the preceding three years, including the current year.</p> <p>...</p>	<p>the public in connection with the production, transport or distribution of drinking water;</p> <p>b) the supply of drinking water to such networks.</p> <p>This Directive shall also apply to concessions awarded or organised by entities which pursue an activity referred to above and which are connected with one of the following:</p> <p>a) hydraulic engineering projects, irrigation or land drainage, provided that the volume of water to be used for the supply of drinking water represents more than 20 % of the total volume of water made available by such projects or irrigation or drainage installations, or</p> <p>b) the disposal or treatment of sewage.</p> <p>The supply of drinking water to networks which provide a service to the public by a contracting entity referred to in paragraph 1 subparagraph 1 and paragraph 2 of Article 4 shall not be considered a relevant activity within the meaning of subparagraph 1 where all of the following conditions are met:</p> <p>a) the production of drinking water by the entity concerned takes place because its consumption is necessary for carrying out an activity other than those referred to in paragraphs 1 to 4 of this Annex;</p> <p>b) the supply to the public network depends only on the entity's own consumption and has not exceeded 30 % of the entity's total production of drinking water, on the basis of the average for the preceding three years, including the current year.</p> <p>...</p>
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Reason

Consistent with amendments 1, 5 and 15.

Amendment 32

Annex IV, title

<i>Text proposed by the Commission</i>	<i>CoR amendment</i>
ANNEX IV INFORMATION TO BE INCLUDED IN CONCESSION NOTICES	ANNEX IV INFORMATION TO BE INCLUDED IN CONCESSION NOTICES <u>OR THE</u> <u>CONCESSION DOCUMENTS</u>

Reason

The Committee recommends that the procedures remain flexible and therefore suggests providing for the possibility of incorporating the information contained in the concession notice in the concession documents, instead of publishing a lengthy concession notice. Experience shows that these issues require explanations that would be more usefully included in the appended concession documents. Transparency would be guaranteed because the concession documents are forwarded in advance to all interested parties.

Brussels, 19 July 2012.

The President
of the Committee of the Regions

Mercedes Bresso

The Secretary-General
of the Committee of the Regions

Gerhard Stahl

III. PROCEDURE

Title	The award of concession contracts
Reference	Proposal for a Directive of the European Parliament and of the Council on the award of concession contracts COM(2011) 897 final
Legal base	Article 307(1) TFEU
Procedural basis	Optional referral
Date of Commission letter	6 May 2011
Date of President's decision	20 January 2012
Commission responsible	Commission for Economic and Social Policy (ECOS)
Rapporteur	Mr Henk Kool, Alderman: member of the executive council of the city of The Hague
Analysis	19 March 2012
Discussed in commission	26 April 2012
Date adopted by commission	26 April 2012
Result of the vote in commission	By a majority
Date adopted in plenary	19 July 2012
Previous Committee opinions	<ul style="list-style-type: none">– Opinion of the Committee of the Regions, 11 May 2011, on modernisation of EU Public Procurement Policy: Towards a More Efficient European Procurement Market - CdR 70/2011¹– Opinion of the Committee of the Regions, 12 October 2006, on Public-Private Partnerships and Community Law on Public Procurement and Concessions - CdR 41/2006 fin²– Opinion of the Committee of the Regions, 17 November 2004, on the Green Paper on public-private partnerships and Community law on public contracts and concessions - CdR 239/2004 fin³

¹ [OJ C 192, 1.7.2011, p. 4.](#)

² [OJ C 51, 6.3.2007, p. 27.](#)

³ [OJ C 71, 22.3.2005, p. 19.](#)