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**IMPACT ASSESSMENT OF AN INITIATIVE ON CONCESSIONS**

*Accompanying the document*

**PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF  
THE COUNCIL**

**on the award of concession contracts**

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## IMPACT ASSESSMENT OF AN INITIATIVE ON CONCESSIONS

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#### 1. INTRODUCTION

##### 1.1. SCENE SETTER

The legislative initiative on concessions is to be seen as one of the measures that can help ensure a more efficient allocation of public money by creating the conditions for a competitive award of this type of contract.

Today, in the particular context of severe budgetary constraints and economic difficulties in many EU Member States, the efficient allocation of public funds is a point of special concern, leading to increased pressure for new ways to obtain the best possible procurement results for the available resources.

When public authorities need to mobilise private capital and know-how to supplement scarce public resources, concessions are a particularly attractive way of carrying out projects of public interest. Concession holders may, for instance, build and manage motorways, provide airport services and operate water distribution networks. In undertaking these tasks, they usually need to make substantial up-front investments which are then recouped by collecting fees from the users of the infrastructure or service.

The use of concessions may allow for new investments in public infrastructures and services without increasing public debt figures in specific circumstances according to Eurostat guidelines. Hence, in the current situation the initiative on concessions is of immediate relevance as a support to economic recovery.

Concession contracts are different from public contracts, which are traditionally used by public authorities to procure supplies, works or services. In the case of public contracts, an economic operator is awarded a fixed payment for completing the required work or service. Concessions, on the other hand, are contractual arrangements between a public authority and an economic operator (the concession holder) where the latter receives substantial remuneration through being permitted to exploit the work or service.

Hence, concessions involving private partners are a particular form of Public Private Partnership (PPP).<sup>1</sup> Although PPPs have never been defined in EU Public Procurement legislation, they are usually understood to be cooperation between a public authority and a private partner, where the latter ‘(...) bears risks that are traditionally borne by the public sector and often contributes to

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<sup>1</sup> For the purpose of statistical treatment, concessions are defined as projects where most of the revenue is generated by third party users, whereas in PPPs it is generated by public authorities. However, this distinction does not coincide with the legal criterion to define concessions and therefore it is not used in the present text.

financing the project<sup>2</sup>. Some PPPs are structured as public contracts, but the majority of PPPs take the form of concessions.

The award of public contracts and concessions is subject to EU rules. The same rules do not apply to different categories of concessions and public contracts.

Unlike public contracts, which are exhaustively regulated in secondary legislation, and works concessions, which are partially covered by secondary rules, the award of service concessions is only subject to the general principles of the Treaty.

This legal loophole results in irregularities and economic inefficiencies, which are discussed further in the text, and has a negative impact on the achievement of the best value for public money.

Thus, the initiative's objective is to create a stable legal framework for public authorities and economic operators, ensuring non-discrimination and fair access to service markets in Member States.

## 1.2. LEGAL BACKGROUND

The Treaty on the Functioning of the European Union (TFEU), like its predecessors, does not contain any specific provisions governing the award of public contracts.<sup>3</sup> It does, however, establish four fundamental freedoms and the ensuing principles of equal treatment, non-discrimination, transparency and proportionality which contracting authorities and contracting entities (hereinafter CAEs) must observe when awarding public contracts and concessions. These principles have been interpreted and developed by the Court of Justice of the European Union ('the Court').

In order to apply the Treaty principles more efficiently, secondary legislation was developed containing specific rules on award procedures. Today, two main directives regulate public procurement in the EU: Directive 2004/18/EC ('Classic Directive') and Directive 2004/17/EC ('Utilities Directive').<sup>4</sup>

The European legislature decided to differentiate between *public contracts*, conceived as the procurement of works, goods or services against payment, and *concession contracts*, where works or services are provided to CAEs or to users in consideration for the right to exploit a facility.<sup>5</sup>

With regard to the latter, it should be pointed out that the award of *works concessions* under the Classic Directive<sup>6</sup> is currently subject to a limited number of provisions only. In particular, it is

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<sup>2</sup> See Commission interpretative communication on the application of Community law on Public Procurement and Concessions to institutionalised PPP (IPPP) (OJ 91, 12.4.2008, p. 1).

<sup>3</sup> The only reference to public procurement is to be found in Article 199 (4) of the TFUE in relation to investments financed by the EU in the overseas countries and territories.

<sup>4</sup> Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ L 134, 30.4.2004).

<sup>5</sup> Definitions of works and services concessions in Article 1(3) and (4) of Directive 2004/18/EC and Article 1(3)(a) and (b) of Directive 2004/17/EC. The first provisions on works concessions date back to the adoption of Directive 89/440/EEC of 18 July 1989 amending Directive 71/305/EEC (see OJ L 210, 21.7.1989).

<sup>6</sup> Articles 56 to 65 of Directive 2004/18/EC.

compulsory to publish a concession notice in the EU Official Journal (EUOJ) and to respect a minimal period for the submission of applications. Moreover, there are rules on the obligations of concession holders. Bidders also enjoy judicial guarantees provided by Directive 2007/66 ('Remedies Directive').<sup>7</sup> Their award is supplemented by the general Treaty principles. On the other hand, the award of works concessions under the Utilities Directive is only subject to the general principles of the TFEU.

Similarly, *service concessions* are currently subject only to the general principles of the TFEU.

In practice, the distinction between works concessions and service concessions may prove to be difficult to determine. The problems identified below do not concern all categories of works and service concessions to the same extent. As already explained, the existing provisions already regulate some aspects of the award of a major part of works concessions. As a result, the solutions discussed in the report would affect different categories of concessions to a different degree. Necessary clarifications in this regard will be provided in the relevant sections of the Report.

Table 1 – Rules of the Public Procurement Directives applicable to public contracts and concessions

	Publication in the OJEU	Min. deadline for submission	Rules on additional services	Rules on sub-contracting	Remedies	Rules on selection criteria	Provisions on tech. spec.	Rules on award criteria	Pub. of contract award notices	Rules on choice of procedures
Public contracts in 'classical' sectors	X	X	X		X	X	X	X	X	X
Public contracts in 'utilities' sector	X	X	X		X	X	X	X	X	X
Works concessions	X	X	X	X	X					
Works concessions in the utilities sector										
Service concessions in both classical and utilities sectors										

### 1.3. CONTEXT OF THE INITIATIVE

The potential of a legislative initiative on concession contracts for creating a supportive EU framework for PPPs was singled out in the Commission's Communication on «Mobilising private

<sup>7</sup> Directive 2007/66/EC, (OJ L 335, 20.12.2007)

and public investment for recovery and long term structural change: developing Public Private Partnerships».<sup>8</sup>

The Europe 2020 strategy<sup>9</sup> highlights the importance of PPPs for accelerating growth and boosting innovation. The Single Market Act<sup>10</sup> announced the adoption of a legislative initiative on concessions in 2011 in order to promote PPPs and help deliver better value for money for users of services and for contracting authorities, while improving market access for EU undertakings by ensuring transparency, equal treatment and a level playing field across the Single Market.<sup>11</sup>

The following sections will demonstrate how the lack of a complete EU legal framework applicable to concessions as a major part of PPPs hinders their development and undermines their benefits.

The current initiative is not the first attempt to submit concessions to a more precise legal framework. In 1989 a number of provisions were adopted on the award of works concessions.<sup>12</sup> Following the failure to agree on procedures on the award of service concessions in the proposal for the public service contracts directive,<sup>13</sup> in 1992, the Commission issued three subsequent Communications addressing the subject of concessions.<sup>14</sup>

The initiative is pursued in parallel to the revision of Public Procurement Directives<sup>15</sup>. It will result in the adoption of a separate legal instrument, regulating the award of concessions. The three proposals: the two resulting from the revision of the public procurement framework and the one on a directive on concessions, will be submitted for adoption by the Commission in December 2011.

The main reasons for adoption of a set of rules on concessions separate from the revised framework of Public Procurement are related to differences of the objectives pursued as well as to the very nature of the envisaged rules on concessions.

In the first place it has to be underlined that while the general revision of public procurement rules aims at modernising and simplifying the current framework, the basis of which has been put in place roughly 40 years ago, the purpose of a new directive on concessions is to propose, for the first time, a comprehensive, clear and unambiguous set of provisions in the area which so far has been characterized by a continuous uncertainty and erroneous interpretation, often leaving room for unlawful practices.

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<sup>8</sup> COM(2009) 615 final of 19.11.2009.

<sup>9</sup> COM(2010) 2020 final of 3.3.2010, point 3.2.

<sup>10</sup> COM(2010) 608 final, of 27.10.2010, point 1.4, proposal n° 18.

<sup>11</sup> See footnote 10 above.

<sup>12</sup> See Directive 89/440/EEC, (OJ L 210, 21.7.1989).

<sup>13</sup> The Commission expressly proposed to include «public service concessions» within the scope of Directive 92/50 (OJ 1991 C 250) covering public service contracts in general. However, the Council eliminated all references to public service concessions, in particular because of the differences between Member States as regards the delegation of the management of public services and modes of the delegation, which could create imbalances in the opening-up of the public concession contracts (see point 6 of document No 4444/92 ADD 1 of 25 February 1992, ‘Statement of reasons of the Council and annexed to the common position of the same date’).

<sup>14</sup> These are: Commission interpretative communication on concessions under Community law (OJ C 121, 29.4.2000). Communication on Public-Private Partnerships and Community Law on Public Procurement and Concessions of November 2005 COM(2005) 569, Commission’s Communication on «Mobilising private and public investment for recovery and long-term structural change: developing Public Private Partnerships» COM(2009) 615 final of 19.11.2009.

<sup>15</sup> COM(2010) 608 final, point 1.4, proposal n° 17.

Secondly, concession contracts display a number of distinct characteristics as compared to public contracts. These are: the exposure of the contractor to the economic risk of providing the services, long average duration, greater complexity and important contract value as well as a patchwork of national rules determining the status of concessions in various Member States.

Furthermore, the limited character of the proposed rules allows for a joint framework covering concessions in both the classic and the utilities sector, preserving the specificities of the utilities when absolutely necessary. More developed rules on public contracts and contracts in the utilities sector would involve, by contrast, more differences between legislation in both sectors, which would not allow for such a simplification.

Last but not least, the Commission considers a legislative proposal in the field of concessions as one of the key measures that will facilitate the setting up of PPPs, and as such considers it as a means of stimulating economic recovery in the context of the current economic downturn. PPPs are also important for accomplishing structural reforms<sup>16</sup> and could play an increasing role in accompanying EU policies in the context of the next multiannual financial framework, as suggested by the EU Budget review.<sup>17</sup>

## 2. PROCEDURE

This Impact Assessment Report (IAR) has been prepared in accordance with the Commission's principles on Better Regulation. The initiative is the result of an extensive dialogue and consultation with all major stakeholders, including CAEs, economic operators and social partners, as well as with the Member States. The assessment is also based on the findings of three studies which have been carried out for the Commission.

The Report was consulted by the Impact Assessment Board (IAB) on 26 January and the Board issued its opinion on 28 January. Subsequently, the Board issued its second opinion, on the revised text of the Report on 21<sup>st</sup> March 2011. Following the recommendations of the Board, the text of the Report has been further supplemented in the following sections: stressing the importance of the initiative for efficient spending of public resources (Introduction, Section 4); scope of the initiative and relation to the revision of Public Procurement directives (Sections 1.3 and 9.1); additional evidence on the magnitude of the problem, consequences of identified distortions (Section 3, 4 – 4.1.3, 4.2.2, Annex IV); better justification of the choice of the 'mixed rules' option (Section 9.4); choice of the legal instrument (Section 6, 8.5); justification of the exclusion of non-priority services and the choice of threshold (Section 9.1.2, 9.1.6); scope of various options (Sections 9.2, 9.3, 9.4); social and economic impact (Section 9.2.1, 9.2.2); implementation aspects (Sections 9.2, 9.3, 9.4 in fine); and different treatment of public contracts and concessions (sections 4.2.2, 9.1.6 and 9.4). Across the whole text references to specific cases in support of the existence and scale of the problem have been added.

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<sup>16</sup> In view of the present reduced capacity of national administrations to finance the necessary investments in infrastructures, in particular to meet strict EU environmental standards.

<sup>17</sup> COM(2010) 700 final of 19.10.2010.

## 2.1. STUDIES

**Price Waterhouse Coopers** — The 2007 PwC report on PPPs aimed *inter alia* at assessing the extent, range and type of approach adopted to partnerships and concessions on the market, and described the impacts which might be expected from the introduction of a new EU legislative initiative.<sup>18</sup>

**Centre for Strategy & Evaluation Services** — The 2009 CSES report sought to determine the sector spread of service concessions in eight Members States and to identify any sectoral issues to be taken into consideration in an assessment of the potential impact of the EU secondary rules.<sup>19</sup>

**College of Europe** — The 2010 College of Europe study aimed at identifying how public authorities in seven Member States inform economic operators of their intention to award service concessions.<sup>20</sup>

## 2.2. CONSULTATION WITH MEMBER STATES AND DISCUSSIONS WITH STAKEHOLDERS

As well as consulting Member States in 2007 and 2010 within the framework of the Advisory Committee on Public Procurement on different aspects of an initiative on concessions, the Commission departments held bilateral meetings with Member States.<sup>21</sup> They also conducted about 60 bilateral meetings with relevant stakeholders active on the concessions market.<sup>22</sup>

## 2.3. PUBLIC CONSULTATIONS

On 30 April 2004 the Commission issued a Green Paper on PPPs and Community Law on Public Contracts and Concessions.<sup>23</sup> On 3 May 2005 the Commission departments published a working report on the public consultation on the Green Paper on PPPs and Community law on public contracts and concessions,<sup>24</sup> which was followed by the Commission's Communication on PPPs of November 2005.

Between 12 May and 9 July 2010 a public online consultation was held through an Interactive Policy Making site ('online consultation'). It was addressed to the general public and aimed at collecting views and experiences regarding concessions and learning about how the current rules work.

Between 5 August and 30 September 2010 the Commission departments ran a targeted public consultation ('targeted consultation'). This consultation, which was of a more technical nature, was addressed to the business community, social partners and CAEs. Its aims were to learn from these groups' experience on concessions, hear their views on the working of the current rules and collect suggestions for future improvements.<sup>25</sup>

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<sup>18</sup> See [http://ec.europa.eu/internal\\_market/publicprocurement/index\\_en.htm](http://ec.europa.eu/internal_market/publicprocurement/index_en.htm).

<sup>19</sup> See footnote 18 above.

<sup>20</sup> See footnote 18 above.

<sup>21</sup> With the exceptions of BE, LV, MT, and SK where, for different reasons, the Commission's departments' invitations did not have a follow-up.

<sup>22</sup> List of meetings in Annex III.

<sup>23</sup> COM(2004) 327 final of 30.4.2004.

<sup>24</sup> SEC(2005) 629 of 3.5.2005.

<sup>25</sup> See Annex I A on the outcome of the consultations.

The results of the abovementioned consultations highlighted the fact that stakeholders hold contrasting views when it comes to awarding concessions. They have also confirmed that (i) the uncertainty of the present rules and access to the market cause problems and (ii) a targeted EU intervention is desirable.

## 2.4. STEERING GROUP

The Steering Group was set up by representatives of the following European Commission departments: SG, LS, DG ECFIN, DG EMPL, DG REGIO, DG ENTR, DG COMP, DG MOVE, EUROSTAT.<sup>26</sup> The group met three times: on 25 May 2010, 30 November 2010 and 3 December 2010. DG MARKT also conducted bilateral meetings with the SG, the LS, DG MOVE, DG REGIO, DG EMPL and DG COMP. Consultations with DG EMPL were particularly far-ranging and included very close cooperation, in particular on preparing the consultation which was addressed to the social partners. The contributions of the members of the Steering Group have been taken into account in the content and shape of this IAR.

## 3. THE ECONOMIC AND SOCIAL IMPORTANCE OF CONCESSIONS WITH RESPECT TO THE INTERNAL MARKET

Concession contracts underpin an important share of economic activity in the EU. They are particularly significant in economic sectors that are of great importance to both citizens and economic operators, such as network industries and services of general economic interest.<sup>27</sup> They are important vehicles in the long-term structural development of infrastructures and strategic services, as they help to harness private sector expertise, achieve efficiency and deliver innovation. Moreover, their role is also likely to become more prominent in years to come in the face of increasing constraints on public finances. Indeed, by transferring the main operating risks to a private partner and alleviating the public authorities of this burden, concessions make it possible, in certain cases, to carry out much needed public works and services while keeping the corresponding commitments out of the government balance sheet.<sup>28 29</sup> There is further potential for increased take-up of concessions in many projects supported by the European funds, where the use of PPPs in co-funded projects is currently low.<sup>30</sup>

A decision to resort to a concession should be assessed on a case-by-case basis and its costs and benefits should always carefully and comprehensively be compared with those of alternative solutions.

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<sup>26</sup> DG SANCO did not attend the meeting of the Steering Group since it considered that it was not concerned by the initiative.

<sup>27</sup> In the Commission's 2006 report on the evaluation of the performance of Network industries providing services of general economic interest, network industries were estimated to account for 7% of the EU 15 total value added. In the new Member States this share was calculated to be much higher, ranging from 9.8% in Hungary to 14.3% in the Slovak Republic. In 2005, slightly more than 10.5 million people were employed in EU25 network industries corresponding to 5.4% of the total workforce. A recent study on public services in the EU estimates the number of persons employed by Services of General Interest to be over 64 million. The number of enterprises providing SGI is estimated to be more than 500.000. SGI providers of electricity, gas, water, transport, post and telecommunications and research contribute to 6.4% of the total investment in the EU which, for the year 2006 was over EUR 150. (see «Public services in the European Union and in the 27 Member States» a study commissioned in the framework of the 'Mapping of the Public services' project managed by CEEP).

<sup>28</sup> See rules on statistical accounting of Public Private Partnerships, Eurostat News Release 18/2004: Treatment of public-private partnerships and ESA95 Manual on government deficit and debt 2010 Edition: Chapters on public infrastructure financed and exploited by corporations and on public-private partnerships.

<sup>29</sup> PWC study, p. 56.

<sup>30</sup> This is partly due to the perception that combining sets of EU and different national rules and practices and timetables in one project may be complex. See Commission's Communication, footnote 8, para. 3.3.

The fact that Member States use different labelling for concessions and the current lack of transparency on their award makes systematic and precise measuring of their economic and social importance difficult. Comparable data across the Internal Market are generally lacking, or inconsistent, particularly in Member States where concessions are not sufficiently regulated. However, there is some relevant data with regard to PPPs and concessions in several Member States where concessions are subject to specific rules. According to the PwC study, the value of all PPPs between 2000 and 2006 in the sectors and Member States analysed<sup>31</sup> was estimated<sup>32</sup> to be worth €230 billion. Based on a thorough review of contract samples, PwC concluded that over 60% of all PPP contracts qualified as concessions.<sup>33</sup> This would bring the total value of concessions in those Member States for the relevant period to €138 billion. Such percentage can be extrapolated to subsequent references to PPPs in the present text. The table below provides examples of the importance of concessions in different sectors, on the basis of statistics on either concessions or data concerning PPPs.

Table 2 — Value of concessions in selected Member States (as GDP percentage)

Member State	Information about concessions*
<b>FR</b>	There is an estimated stock of 10.000 concession-type contracts worth around €80 billion <sup>34</sup> (equivalent to 2.1 % of GDP). The most relevant sectors are water and sanitation, waste management, gas and electricity infrastructure management, motorways, sport facilities (60-70% of concession-type contracts) and heating networks.
<b>IT</b>	There were 530 invitations to tender for concessions in 2009 with a total value of €8.4 billion (out of which €536 million corresponded to service concessions). The overall value of concessions published since 2006 and up to 2009 amounts to €30.4 billion (equivalent to 2.1 % of GDP). Data for 2009 show that use of concessions was already picking up after a marked slowdown in 2007-2008. <sup>35</sup>
<b>UK</b>	More than 700 PPP deals were signed up to March 2006 with a total capital value of over €60 billion (equivalent to 3 % of GDP). Based on the PwC study, most of the UK contracts would qualify as concessions <sup>36</sup> , even if this has not been confirmed by the CSES study <sup>37</sup> . In the UK, concessions are to be found in public transport, roads and bridges, waste management, waste water management, marine services and care homes.
<b>DE</b>	PPP projects were estimated in 2007 at €3 billion of investment (equivalent to 0.1 % of GDP). Investment at the Federal/Land level averaged €70 million per project, while at the municipal level the average investment was around €16 million. <sup>38</sup> The sectors most concerned are water and energy supply, schools, sport and leisure facilities.
<b>ES</b>	Since 2006, 6169 concessions have been advertised in the national Official Journal. <sup>39</sup> Concessions are most prevalent in the road sector, where the total capital value was estimated at € 8 billion in 2005 (equivalent to 0.9 % of GDP). Concessions in water distribution and waste-water management as well as in waste have been developing quite rapidly. <sup>40</sup>
<b>PL</b>	Limited concession-based activity, mostly focused on the motorway sector. <sup>41</sup>
<b>CZ</b>	PPP projects with a total capital value of €1.1 billion <sup>42</sup> in 2005 (equivalent to 1.1 % of GDP). This value refers to projects in health, transport, and public buildings sectors. There are several concession contracts in the waste/drinking water and waste sectors.

<sup>31</sup> Sectors: transport, (roads, bridges and tunnels/mass rapid transit), water, waste, health, education and public sector accommodation; Member States: CZ, DE, ES, FR, IT, PL, SE, UK, see PwC study, figure 3.1, p. 54.

<sup>32</sup> The Dealogic Projectware database used in the estimation is a database of project finance transactions. The concessions and PFI/PPP projects included are normally those involving an element of debt finance and therefore it is unlikely to capture all concession contracts, see footnote 29.

<sup>33</sup> See PwC study Tables 3.15 & 3.16, p. 104.

<sup>34</sup> Data provided by the French authorities.

<sup>35</sup> Data sent to the Commission services by the Italian authorities.

<sup>36</sup> See PwC study, pp. 54 and 103.

<sup>37</sup> See CSES study, p. 52.

<sup>38</sup> See PwC study, p. 65.

<sup>39</sup> See CSES study, p. 27.

<sup>40</sup> See CSES study, p. ??

<sup>41</sup> See PwC study, p. 74.

<sup>42</sup> See PwC study, p. 57.

Member State	Information about concessions*
<b>EL</b>	In 2009 a total of 52 PPP projects worth €5.7 billion were at different stages of the approval process (equivalent to 2.5% of GDP). <sup>43</sup> They concerned the construction and maintenance of hospitals, government buildings, schools, prisons and universities.
<b>PT</b>	In 2010 there were 115 concession contracts representing an investment value of € 32.5 billion (equivalent to 19.87% of GDP). <sup>44</sup> Sectors covered: water distribution and waste water, waste, energy and heating services, transport, port and airport services, health services, road and motorway operation among others.

\* All GDP data in this table (with the exception of Portugal) originate from Eurostat.

With reference to the sectoral coverage of concessions, studies done as well as the consultations carried out show that concessions are mostly used in water distribution and treatment, road and rail transport, ports and airports services, motorway maintenance and management, waste management, energy or heating services, leisure facilities and car parks.<sup>45</sup> Concessions in these sectors imply significant amounts of capital investment.

However, on the basis of the studies and consultations, it is also possible to identify, sectors, where concessions seem to be less present. This is the case in health, social and education services, which are qualified in the Public Procurement Directives as 'non-priority' services.

Table 3 — Value of concessions in selected sectors of activity

Sector	Economic & social importance	Situation regarding concessions
Water provision, waste water & sewage	<p>Eurostat data on 'Collection, purification and distribution of water' (NACE = E41):</p> <ul style="list-style-type: none"> <li>EU turnover (2007): €50 billion</li> <li>No of enterprises in the EU (2007): 9 million</li> <li>No of persons employed in the EU (2007): 3.7 million</li> </ul>	<p><b>EU:</b> 33% of Europeans served by economic operators (according to International Federation)</p> <p><b>FR:</b> 72% of the population served through service concessions; 2.536 concessions underway in 2007 with 700 concessions re-opened every year.</p> <p><b>ES:</b> 36% of the population served under a concession contract, 16% served through IPPPs, some under concession contracts.</p> <p><b>DE:</b> 6% of the population served by private companies, 39% by IPPPs.</p>
Waste management	<p>Eurostat data on 'Recycling' (NACE = DN37):</p> <ul style="list-style-type: none"> <li>EU turnover (2007): €50.7 billion</li> <li>No of enterprises in the EU (2007): 17.4 million</li> <li>No of persons employed in the EU (2007): 1.6 million.</li> </ul> <p>Only the members of the industrial association FEAD, covering 19 Member States, accounting for a 60% share in the household waste market and handling more than 75% of industrial and commercial waste in Europe, can boast an annual turnover of €54 billion.<sup>46</sup></p>	<p><b>IT:</b> growing 20% of the population served by private or mixed entities of Private Water Operators (Aquafed)</p> <p><b>EU:</b> 50% of waste treatment is operated on the basis of a concession<sup>47</sup></p> <p><b>FR:</b> 80-90% of contracts underway are concessions.</p>
Motorways & roads	360 000 people employed, with a turnover of €66 billion. <sup>48</sup>	<b>EU</b> (notably <b>FR, IT, PT</b> ): extensive presence of concessions

<sup>43</sup> CSES study, p. 41.

<sup>44</sup> Source: Direcção Geral do Tesouro e Finanças, Boletim Trimestral nº 2/2010 (30.06.2010) referred to by the Portuguese authorities in their response to the CAEs'consultation.

<sup>45</sup> For the full list of sectors concerned, see CSES report, pp. 31-34.

<sup>46</sup> See footnote 41 above, p. 77.

<sup>47</sup> See footnote 41 above, p. 80.

<sup>48</sup> See footnote 41 above p. 83.

<b>Sector</b>	<b>Economic &amp; social importance</b>	<b>Situation regarding concessions</b>
Ports & airports	There are currently over 1000 seaports <sup>49</sup> in Europe handling 3.5 billion tonnes of cargo a year and 350 million passengers and employing 350.000 people in the ports themselves and in directly related services. <sup>50</sup> In airports concessions some of the main companies active in this market, (Swissport, Menzies and Aviapartner) employ a total of 50.000 employees. <sup>51</sup>	EU: In the airport sector, concessions in the handling of passengers, baggage and freight, in car parking and catering
Energy & heating	<p>Eurostat data on 'Electricity, gas, steam and hot water supply' (NACE = E40):</p> <ul style="list-style-type: none"> <li>EU turnover (2007): €940 billion</li> <li>No of enterprises in the EU (2007): 26.8 million</li> <li>No of persons employed in the EU (2007): 12 million</li> </ul>	FR: 54% of contracts are concessions <sup>52</sup>

According to the European Investment Bank, in all more than 1300 PPP contracts were signed in the EU from 1990 to 2009, representing a capital value of more than EUR 250 billion.<sup>53</sup>

The EIB itself, which is Europe's foremost funder of PPP projects, has a portfolio of 120 projects representing an investment of around EUR 25 billion. Funding of new projects was in excess of EUR 3.5 billion in 2008 and in 2009 was worth EUR 2 billion despite difficult economic conditions.<sup>54</sup> Bearing in mind the share of concessions in PPP set-ups, the above numbers confirm their current and potential economic importance.

Additional information on the use of concessions by Member States is provided in Annex IV with reference to the modes of delivery of public services.<sup>55</sup>

In the light of the data quoted above, it can be concluded that concessions are important not only in terms of their value, but also because they are used in vital sectors of the economy. Many of these sectors include services that directly affect businesses and the quality of life of users across the EU. However, the take up of concessions is very uneven across Member States. The information gathered shows that there is potential for further development of this type of contract.

#### 4. PROBLEM DEFINITION

One of the impacts of having adequate rules for public purchases (thus also rules for the award of concessions) is a more efficient allocation of public resources.

According to OECD data (referred to in Section 4.2.1), the estimated cost savings generated by the use of competitive tendering for the delivery of public services can range from 10% to 30% (resulting from the externalisation of certain public tasks and the improvement of previously applied procurement practices).

<sup>49</sup> See Communication from the Commission on a European Ports Policy, COM(2007) 616 final of 18.10.2007, sections, 4.1, 4.3.

<sup>50</sup> See CSES study, p. 67.

<sup>51</sup> See footnote 46 above, p. 76.

<sup>52</sup> See footnote 46 above, p. 45.

<sup>53</sup> The EIB notes several difficulties in compiling a comprehensive database on PPPs in Europe, particularly the fact that data available on actual PPP investment is poor and incomplete. See EIB, «Economic and Financial Report 2010/04 — Public Private Partnerships in Europe — Before and During recent financial crisis».

<sup>54</sup> See presentation made by the EIB to the EPEC — Private sector Forum II, Europe 2020 — A view of the future, Brussels, 2 June 2010.

<sup>55</sup> Information provided in the report «Public services in the European Union and in the 27 Member States» study commissioned in the framework of the 'Mapping of the Public services' project managed by CEEP.

In one Member State the introduction of the obligation to follow a competitive procedure and to publish a notice at the national level resulted in annual savings estimated to be up to 9%, as well as in significant technological improvements (see Section 9.2.1 for further analysis).

These figures are an indication of the significant impact of a clear and appropriate legal environment on the efficiency of public spending. They also underline the importance of a framework which stimulates competition and guarantees optimal organisational arrangements for the carrying out of public tasks. Finally, they point to the potential for further improvement in public spending — or rather, inversely, the scale of today's inefficiencies — in those sectors and Member States where the competitive and transparent award of service concessions is not the rule.

At the moment, the absence of clear rules at EU level and in many cases at national level governing the award of concession contracts gives rise to obstacles to the free provision of services and causes distortions in the functioning of the Internal Market.<sup>56</sup> As a result, EU citizens do not benefit from quality services at best prices, economic operators (in particular SMEs) are being deprived of their rights within the Internal Market and miss out on important business opportunities, and CAEs may fail to manage public resources on a sound financial basis.

These shortcomings are caused not only by **legal uncertainty** and **entry barriers** but also by a **lack of appropriate judicial guarantees** for bidders.

The following considerations apply primarily to the award of service concessions and works concessions in the utilities field.

#### **4.1. LACK OF LEGAL CERTAINTY GENERATES ECONOMIC INEFFICIENCIES**

Legal certainty is essential to any economic activity and is particularly important in the context of long-term, high-value contracts such as most concessions. However, the grant of concessions is currently impaired, on the one hand by the lack of a clear and adequate definition of these contracts in EU law and, on the other hand by the imprecise character of the obligations arising from the Treaty principles. These problems are often not resolved (and sometimes even exacerbated) by national regimes for awarding concessions.

##### **4.1.1. Lack of clear definition of concessions**

Uncertainty with regard to the definition of concession appears already at the stage of qualification of a given arrangement as falling within the scope of the rules on public purchases. The distinction between public contracts and concessions on the one hand and other types of agreements or unilateral acts (such as licenses and authorisation schemes) on the other hand, is unclear and stakeholders (e.g. in the ports sector) reported that it is often difficult to know which legal regime applies to a given scheme. Furthermore, the lack of clarity stretches to certain activities carried out in the form of public-public cooperation.

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<sup>56</sup> In its report on «New developments in public procurement» the European Parliament considered that «any proposal for a legal act dealing with service concessions would only be justified with a view to remedying distortions in the functioning of the internal market.» see recommendation 14, in European Parliament A7-0000/2010.

The current definition makes it difficult to distinguish between concessions and public contracts. Out of the twenty five Court rulings on concessions since the *Telaustria* landmark judgment<sup>57</sup> in 2000,<sup>58</sup> as many as thirteen concerned the clarification of the notion of concession. The majority of these very numerous cases stemmed from requests by national courts for a preliminary review, reflecting their recurrent uncertainties or, sometimes, their lack of understanding of the concept of concessions.

The Commission provided some clarity in this respect in its interpretative Communication,<sup>59</sup> explaining that the risk inherent in the exploitation of the work or service which the concessionaire has to bear is the essential feature of a concession. Although the case law of the Court shed some more light on this definition, fundamental elements, such as the level and types of risk, still remain unclear.<sup>60</sup>

There is also some uncertainty regarding the distinction between works concessions and service concessions.<sup>61</sup> Indeed, since most works concessions also involve, to a certain extent, the provision of services, and as it is not always easy to ascertain what the main purpose of the contract is, certain works concessions might be awarded as service concessions, thus unduly avoiding the application of the secondary rules.

Moreover, Member States' definitions of concession do not remove the aforementioned uncertainty at EU level. Some of them are as unclear as the current definition in the Directive. Moreover, it is unclear whether those national definitions which provide additional clarification do in fact comply with EU law.<sup>62</sup>

#### **4.1.2. No clear obligations with respect to the award of concessions**

The legal uncertainty regarding the definition of concessions is compounded by doubts regarding the content and application of the obligations of transparency and non-discrimination arising from the Treaty which guide the award of concessions. This problem affects all types of concession when it comes to the rules regulating the award.

Although the Court confirmed in *Telaustria* that CAEs which award concessions are bound to comply with the fundamental rules of the Treaty, it did not sufficiently explain the content of those

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<sup>57</sup> Case C-324/98, *Telaustria* [2000] ECR I-10745, where the Court stated that the contracting authorities need to comply with the Treaty principles of equal treatment and transparency when awarding concession contracts.

<sup>58</sup> Case C-324/98, *Telaustria* [2000] ECR I-10745, where the Court stated that the contracting authorities need to comply with the Treaty principles of equal treatment and transparency when awarding concession contracts.

<sup>59</sup> Commission interpretative communication on concessions under Community law (OJ C 121, 29.4.2000), pp. 2-13; point 2.1.1.

<sup>60</sup> This case law is still not sufficiently clear, in particular regarding the level of operating risk to be transferred to the economic operator so that a contract can qualify as a concession (it seems that case C-437/07, *COM vs. Italy* [2008] I-00153 and case C-300/07, *Oymanns* [2009], are difficult to interpret along with case C-206/08 Eurawasser on this particular issue). The uncertainty is increased by lingering doubts on the categories of risk that can be transferred to the concessionaire. While demand risk for services seems to be widely accepted as relevant for the definition of a concession, there is uncertainty as to what other categories of risk (availability, construction, legal and political, etc.) should also qualify. See judgment of the Court in case C-206/08 *Eurawasser* [2009] ECR I-08377, point 79, where it ruled that «general risk resulting from amendments to the rules made in the course of performance of the contract cannot be taken into account».

<sup>61</sup> See Case C-331/92, *Gestion Hotelera Internacional* [1994] ECR I-01329 and Case C-220/05, *Jean Auroux* [2007] ECR I-00385, paras. 36-37.

<sup>62</sup> Some Member States reproduce in their national laws the definition of concession set out in the Directive (BE, CY, DK, EE, EL, IE, IT, LU, MT, NL, AT, FI, and SE), while some others do not have any definition at all (DE and RO) or no definition of services concessions (BE).

rules. Thus it is not easy to judge the adequacy of measures aimed at ensuring compliance with the principles of equal treatment, non-discrimination and transparency.<sup>63</sup>

A problem of uncertainty as to the applicable rules has also been identified in case of a contract modification. Many stakeholders have identified this issue as an important one. Although the case-law of the Court applicable to modifications of public contracts also applies to concessions, the level of certainty provided by these judgments does not seem to be adequate.

As concession award regimes in Member States are often unclear or – in case of services concession - non-existent,<sup>64</sup> the burden of ensuring, in each specific case, the compliance of the procedures to be followed with the Treaty principles falls on CAEs.<sup>65</sup> In other words, CAEs are faced with a situation where they apply national rules or ad-hoc award procedures which do not necessarily meet EU Treaty standards.<sup>66</sup> Similarly, economic operators remain uncertain about the legality of the procedures followed.

#### **4.1.3. Consequences of lack of legal certainty on concessions**

The current situation of uncertainty at several levels is causing significant **economic inefficiencies** and is prejudicial to CAEs, economic operators and users of the services provided.

This was confirmed by many respondents in the targeted consultations, who indicated that neither the Court case law nor the existing guidance by the Commission provided sufficient legal certainty and that, in particular, the current definition of concession should be improved by clarifying the notion of risk.<sup>67</sup> Furthermore, as many as 27% of the respondents to the public online consultation considered they were unable to distinguish between public contracts and concessions, whereas a further 45.9 % of respondents indicated that they were aware of cases in which public contracts had been wrongly qualified as concessions.<sup>68</sup>

For CAEs, the lack of legal certainty increases the risks and costs of cancellation or early termination of illegally awarded contracts<sup>69</sup><sup>70</sup> and ultimately prevents them from using concessions where this type of contract might be a good solution. This may have the effect of reducing the uptake of PPPs, resulting in missed opportunities for engaging private investments and know-how. This is particularly the case in new Member States, where uncertainty is compounded by a lack of

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<sup>63</sup> As the Commission recalled in its interpretative communication on concessions under Community law (OJ C 121, 29.4.2000), 'this principle (of equal treatment) requires that all offers conform to the tender specifications to guarantee an objective comparison between offers and, on the other hand, this principle is violated, and transparency of the procedure impaired, when an awarding entity takes account of changes to the initial offers of one tenderer who thereby obtains an advantage over his competitors'.

<sup>64</sup> This is the case in AT, BE, CY, DE, EL, LU, MT, NL, SL and UK.

<sup>65</sup> As an example, German public procurement law does not contain provisions relating to the award of services concessions. This means that a number of service concessions, in particular at municipal level, are subject to unclear rules and legal uncertainty for both the public and the private sector partners. See PwC study, page 66.

<sup>66</sup> For example in Portugal, it is possible to award directly concessions of public service "for relevant reasons of public interest".

<sup>67</sup> See Annex I B, p.2, 5.

<sup>68</sup> In its contribution to the targeted consultation the Institut d'Experts Juridiques Internationaux argues that the overlapping of [EU] definitions [of public contracts and concessions] leads to risks of re-qualification of the contract awarded and that the present blurring [between these two notions] makes it tempting to circumvent the award procedures.

<sup>69</sup> The Court ruled in Case C-503/04, *Bockhorn/Braunschweig*, that a contract awarded in breach of EU law must be terminated (point 33).

<sup>70</sup> See «European PPP Report» (2009), page 19.

experience. Indeed, CAEs may often prefer to remain within the framework of the direct provision of services, rather than confer these activities to a private operator on the basis of a concession.

As regards economic inefficiencies caused by the non-externalisation of certain tasks, as demonstrated by the OECD study, the estimated cost savings generated by the application of competitive tendering range from 10% to 30%. This gives an idea of the potential losses due to the inappropriate choice of organisational arrangements for the provision of public services.<sup>71</sup>

Moreover, economic operators may be less inclined to engage in projects which could turn out to have been tendered in violation of EU law. They may not be certain about the standards of transparency and equal treatment which apply during the award procedure.<sup>72</sup> In the long term, legal uncertainty and the resulting arbitrariness of CAEs may permanently discourage some economic operators from participating in expensive tendering procedures, which could provoke further efficiency losses.<sup>73</sup> Legal risks also translate into additional costs (i.a. cost of credit<sup>74 75</sup>) and ultimately lead to less favourable conditions for CAEs and users. Operators may hesitate to participate when the procedure might be cancelled or re-qualified as a public contract at anytime.

The negative consequences of unclear rules have been confirmed by economic operators responding to the targeted consultations, who declared that they were 'looking for their own advice and information' with regard to applicable rules, given the deficiencies in the current legal framework.<sup>76</sup>

Several SME respondents to the targeted consultation considered that unclear rules at EU level increase the cost of legal advice, as well as the cost of searching for information on contract opportunities.<sup>77</sup>

Legal uncertainty is also a factor in the sub-optimal use of EU funds in relation to concessions, contributing to a low uptake of concessions in the new Member States.<sup>78</sup> This has been confirmed

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<sup>71</sup> This means that wider use of concessions in the future has the potential to generate a higher rate of savings than the €2 billion per year referred to in footnote 123. See also «Competition and Efficiency in Publicly Funded Services», by Jens Lunsdgaard, box 1, page 7, OECD Economics Department Working Paper, 2002.

<sup>72</sup> Indeed, stakeholders criticised excessive procedural discretion granted to CAEs when applying EU Treaty principles Annex I A, Annex I B [http://ec.europa.eu/internal\\_market/consultations/2010/concessions\\_en.htm](http://ec.europa.eu/internal_market/consultations/2010/concessions_en.htm).

<sup>73</sup> *'Opening the public sector to SMEs in the Alpine Space. Coping with the difficulties encountered by SMEs when tendering abroad'. Abstract of the SWOT analysis conducted by the ALPPS (Alpine Public Procurement Services) — April 2005, available at <http://www.alpps-online.com/ALPPS-Ang.pdf>.*

<sup>74</sup> This is the case, in particular, where the right to exploit the assets is the sole or main guarantee for the credits granted to the concession holder. In a recent complaint received by the Commission departments, an excessively long award procedure due to existing legal uncertainties led to the conversion of the funding Bank's guarantee on the assets into full ownership of the said assets. This question (cost of credit) is particularly important in the context of the current economic crisis and the ensuing acute liquidity shortage where many lending institutions have withdrawn from the PPP market, thus reducing competition among the remaining funders and increasing the cost of financing.

<sup>75</sup> When funding results from an EIB loan, non-compliance with EU law always leads to the rejection of the application or the full withdrawal of the Bank from the financial operation. These cases are not publicly reported, which means information is not publicly available.

<sup>76</sup> See Annex I B, [http://ec.europa.eu/internal\\_market/consultations/2010/concessions\\_en.htm](http://ec.europa.eu/internal_market/consultations/2010/concessions_en.htm).

<sup>77</sup> See Annex I B, p.2.

<sup>78</sup> In its «Guidelines for successful Public-Private Partnerships (2003), the Commission (DG REGIO) defines as a key requirement on Commission financing the condition that «PPPs should not impact negatively on the operation of open markets nor on the clear transparent rules of these markets.» see page 8. This means that legal uncertainty as to the applicable procurement rules on the award of concessions clearly affects the combination of EU funds with this type of arrangement. See also Commission's Communication on «Mobilising private and public investment for recovery and long term structural change: developing Public Private Partnerships»

during several bilateral meetings with national authorities. As an example, both the CSES study and the interviews with Member States confirmed that the lack of legal certainty is a major factor determining the lack of development of concessions in the Czech Republic. This was also raised as a problem in Estonia.

As an illustration of the above, the European Association of tolled motorways, bridges and tunnels concessionaires (ASECAP) considered that many Member States do not yet have clear public sector rules; recent examples prove that the EC could act to prevent the uncertainty that undermines future initiatives. By favouring legal clarity, the EU can bring leverage/sponsorship to foster the political readiness of Member States to adopt a «PPP agenda» and explore more efficient ways of developing infrastructure.<sup>79</sup>

## 4.2. ENTRY BARRIERS

In many Member States concession markets remain predominantly national, with a limited presence of companies originating in other EU Member States.<sup>80</sup> Entry barriers stem from divergent national legal regimes for the award of concessions, as well as from inappropriate or even unlawful practices of the national awarding authorities.

### 4.2.1. Barriers stemming from the divergence of national legal regimes

Divergent national legal frameworks on concessions deter non-domestic EU operators from entering national markets.

Identified divergence of regimes concerns:

- the **definition of concession**, whereby economic operators have to contend with a complex pattern of setups considered to be concessions in different Member States (e.g. administrative authorisations or licences)<sup>81</sup> and contracts qualifying as concessions under EU law but not considered as such by national legislators;
- **publication standards**<sup>82</sup> where, as a result of different national frameworks, concessions of the same type and importance are being published at different levels in different Member States and even within the same Member State (e.g. in a local or trade newspaper, on the contracting entity's website, in the official journal or even in the OJEU);<sup>83 84 85</sup>

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<sup>79</sup> COM(2009) 615 final of 19.11.2009, para. 3.3, opinion of DG REGIO within the context of the steering group and Report on Green Paper on PPPs, page 12.

<sup>80</sup> See ASECAP's presentation to EPEC's Private sector forum (2010), entitled «Leveraging EU grants: the case for PPPs».

<sup>81</sup> See, e.g., data reported in 'A Practical Guide to PPP in Europe', City and Financial Publishing, 2006, or in 'PPP in Europe 2006', Linklaters, 2006.

<sup>82</sup> This is the case of a German notion of 'Konzession'. Licences or authorisations are acts whereby a public authority authorises the exercise of an economic activity. While certain conditions for carrying out the activity usually need to be met by the licensee, or he might have been assigned certain public service obligations linked to the licensed activity, the authorisation does not principally aim at assigning a given public task to the licensee.

<sup>83</sup> The obligation to publish a contract notice in the OJEU applies only to works concessions covered by Directive 2004/18/EC.

<sup>84</sup> As already mentioned, a group of MS do not have any provisions on this subject (see footnote 64).

<sup>85</sup> Some Member States have provisions on this matter meeting high levels of transparency, where the notification is supposed to take place at national and, in some cases, EU level. This is the case of BG, CZ, DK, EE, ES, FR, LV, LT, PL, PT, RO, SK, FI and SE.

- **award procedures**<sup>86</sup> which are either regulated in detail<sup>87</sup> or covered by very limited provisions.<sup>88</sup> Substantial differences also exist between requirements and practices related to selection criteria, technical specifications and award criteria.<sup>89</sup>

Where operators are faced with fragmented national frameworks, they have either to invest heavily in a learning process about national rules and procedures (with costs multiplying in line with the number of Member States involved and often being prohibitive, in particular for SMEs) or to simply forego existing business opportunities. Any investment opportunities available are therefore most likely to be exploited by a limited number of large EU companies which are currently the only ones with the financial resources to meet the extensive costs involved.<sup>90</sup> Indeed, the existence of entry barriers was confirmed by a number of stakeholders during the targeted consultation: overall, as many as 41% of the undertakings that provided a response to the relevant question confirmed the existence of entry barriers.<sup>91</sup>

#### 4.2.2. Barriers stemming from unlawful practices

Barriers stemming from a divergence of national regimes are made worse by the often unlawful practices of CAEs due to the lack of clarity of EU rules.

One of the fundamental problems in this regard is the direct award of a concession contract with a cross-border interest. Direct awards originate from inadequate application of the principle of transparency, either by national lawmakers or by CAEs. This concerns, in particular, Member States that do not regulate the award of concessions but it also often concerns Member States where the award is governed by national rules.<sup>92</sup> Direct awards have particularly negative consequences for the proper functioning of the Internal Market (as described in the next section). This applies to concession contracts which are often extended or renewed without any competition or transparency.

As many as 37% of the respondents to the online consultation declared they were aware of concessions being awarded without any publication or transparency, in particular in the water distribution and waste water, waste treatment and energy sectors. Similarly, an important number of undertakings questioned in the context of the targeted consultation of the business community (44% of those who answered the relevant question) confirmed that they were aware of such awards, often quoting specific cases. With reference to the port sector, where concessions are widespread, the results from a survey conducted by the Institute of Transport and Maritime

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<sup>85</sup> In some other Member States, national law provides for less ambitious publication requirements, e.g. in national newspapers instead of the national official journal (HU – for certain sectors), reasonable degree of publicity (AT).

<sup>86</sup> Again, in some Member States, no provisions of the sort exist (see footnote 64).

<sup>87</sup> This is the case in BG, CZ, ES, FR, LV, LT, HU, PL, PT, RO.

<sup>88</sup> IE and AT in particular.

<sup>89</sup> See Annex II.

<sup>90</sup> See PwC study, pp. 148-149.

<sup>91</sup> See Annex I B, p.2.

<sup>92</sup> According to the College of Europe study, in Italy «CAEs awarding public service concessions often do not publish contract notices at all, but invite those economic operators to the informal tender which are included in their «official list» of trustful service providers for the specific sector concerned or have been identified by the means of call for interest.» (final report for Italy, page 2). In its reply to the targeted consultation the Institut d'Experts Judiciaires Internationaux considers that the practice of direct awards of concessions is provided for in most national legal systems. This stakeholder claims that such practice is rather exceptional in France but nevertheless refers to a case of a direct award (based on an unsolicited offer) relating to the highway A86 in the Parisian region.

Management and the University of Antwerp for the European Seaport Organisation (ESPO) show that 14 % of the respondents declared they had directly awarded contracts for port services.<sup>93</sup>

Another unlawful practice concerns the award of public contracts<sup>94</sup> in accordance with lenient rules applicable to concessions (undermining the effectiveness of Public Procurement rules).<sup>95</sup> On other occasions concessions are granted as licences or authorisations (usually encompassing exclusive rights) in breach of the Treaty principles.<sup>96</sup>

Finally, the consultations indicate that the lack of clear rules also leads to the unlawful use of non-objective selection and award criteria.<sup>97</sup> This is the case when objectives unrelated to the subject matter of the contract are included in the evaluation of the best offer. For instance, CAEs may want to take into account tenderers' social commitments not related to the subject matter of the contract or relations of trust with one of the bidders. Non-objective and discriminatory criteria undermine the fairness of the award. The same can be said about discretion in setting selection criteria, which may lead to some certain companies being disadvantaged. This problem concerns SMEs in particular, which appear to be reduced largely to the role of sub-contractors.<sup>98</sup>

The problems outlined above primarily concern service concessions and works concessions in the Utilities sector, as the existing provisions on works concessions in the Classic Directive cover the issues of publication. By contrast, the problems related to the misapplication of the Treaty principles at later stages of the award procedure may also concern works concessions, although to a lesser extent.

#### **4.2.3. Consequences of entry barriers**

Entry barriers hinder the access of EU operators to concession markets. Economic operators are faced with different levels of transparency, resulting in an unlevel playing field and often translating into lost opportunities to seek contracts. They generate costs related to legal advice and

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<sup>93</sup> Among the sectors concerned, port services and waste treatment, but also water distribution, waste water & sewage, transport, energy, car parking and airport services seemed to be particularly affected by this practice; for data quoted in this paragraph see Annex I A and B, p.2.

<sup>94</sup> Case, C-300/07 *Oymanns*, OJEU, C-180/4, 01.08.2009.

<sup>95</sup> During the online Public consultation 45.9 % of the respondents indicated that they were aware of public contracts being awarded as concessions, but a further 27 % admitted it was difficult for them to distinguish between a public contract and a concession (the latter percentage was even higher among economic operators, public administrations and professional associations, 28 % of which found it difficult to distinguish between the 2 concepts). There are indications that this may be a common occurrence at municipal level, see CSES study, page 47.

<sup>96</sup> This means that a concession contract is wrongly qualified as a unilateral act and may be granted without a competitive procedure. Although the Court made it clear that the granting of a licence encompassing an exclusive right had to comply with the principles of equal treatment and transparency (see Case C-203/08, *Betfair*) it also acknowledged the existence of quite a wide derogation from these principles, excluding from this transparency obligation licences granted to (1) public operator subject to direct State supervision or (2) private operators subject to strict control by the public authorities.» see case above, point 59.

<sup>97</sup> Under the Directive, qualification criteria need to relate to technical, economic and financial capacity, whereas award criteria relate to price or the economically most advantageous tender. These requirements do not concern either work or service concessions. Meanwhile in France, until recently the award was to a large extent dependent on the «intuitu personae» or the relation of personal trust between the contracting authority and the concessionaire. In Lithuania, the «effect of the tender on the social and economic development of the country or an appropriate region» may be used as an award criterion which may give rise, in view of its wide scope, to possible discrimination.

<sup>98</sup> *Report on the Public Consultation on the Green Paper on PPP and Community law on public contracts and concessions*, SEC(2005) 629 of 3.5.2005, p. 11.

the need to acquire in-depth knowledge of specific local conditions. Divergent national rules on concession contracts, which create barriers to the entry into the markets of Member States (in particular for SME's) or delay their entry, put incumbent national players at a significant advantage. The market stays fragmented and the rate of cross-border provision of services remains limited.<sup>99</sup>

The PwC Study confirms that a significant proportion of the major public procurement projects seem to be *de facto* excluded from the full benefit of the Internal Market, as most of the participants and awardees are either national companies or locally represented large foreign enterprises.<sup>100</sup> In the online consultation 32.4% of the respondents also considered that diverging national legal provisions and practices governing the award of works concessions and service concessions constitute an obstacle to the cross-border award of this type of contract. These findings have been confirmed by several respondents to the targeted consultation.

Unlike for some large companies with experience in concessions and present in several Member States, access to information on concession opportunities is particularly costly for SMEs, which lack the financial means to obtain the necessary information. As pointed out by one of the SMEs during the targeted consultation, 'as awarding authorities are not obliged to publish the contract notice on the OJEU, companies based in other Member States do encounter difficulties in obtaining information on the service to be awarded'.<sup>101</sup> Besides the prejudice to competitors located in other Member States, CAEs and consumers also stand to lose since they do not get value for money.<sup>102</sup>

As a result of direct awards many European economic operators potentially interested in bidding for concession contracts are denied the opportunity to do so and thus cannot enter the market. Direct awards lead to foreclosure of the market (based on discrimination of competitors) and generate considerable inefficiencies corresponding to the difference between the price of the award and the market price.

In addition, the award of public contracts as concessions reduces or even eliminates the competition for contracts and effectively undermines the chances of achieving the best outcome on procured services for both CAEs and consumers. All the problems described above related to the consequences of insufficient transparency and fairness in the award of concessions are therefore extended to these contracts.<sup>103</sup>

There is also evidence (with regard to the port sector, for instance) that the granting of concessions as licences or authorisations under conditions of nonexistent or insufficient competition leads to higher prices and reduced quality of the services provided to contracting authorities and consumers while excluding economic operators from the relevant markets.

#### **4.3. INSUFFICIENT LEGAL PROTECTION OF TENDERERS**

Pursuant to Article 47 of the Charter of Fundamental Rights of the EU, anyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy.

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<sup>99</sup> See PwC study, p. 58.

<sup>100</sup> See PwC study, pp. 148-149.

<sup>101</sup> See website [http://ec.europa.eu/internal\\_market/consultations/2010/concessions\\_en.htm](http://ec.europa.eu/internal_market/consultations/2010/concessions_en.htm).

<sup>102</sup> See «The Role of Transparency in Preventing Corruption in Public Procurement: Issues for Consideration» by János Bertók, published in «Fighting Corruption and promoting integrity in public procurement» / OECD, 2005, p. 86.

<sup>103</sup> See footnote 89 above.

However, this right is not fully ensured to tenderers participating in procedures for the award of concessions.

Concessions falling outside of the scope of the Classic Directive are not covered by the Remedies Directive. Hence, tenderers do not benefit from an adequate system guaranteeing effective enforcement of EU Treaty principles. Although some Member States (such as France, Portugal and Romania) extended the application of the Remedies Directive to service concessions, a number of other (Germany, UK, Sweden and Netherlands, for instance) have not done so.<sup>104</sup> In all, 24.9% of the respondents to the online consultation considered that national rules did not offer effective remedies to all parties wishing to challenge decisions awarding service concessions.

It follows that some important guarantees provided for by the Remedies Directive (such as the obligation to abstain from concluding a contract before the expiry of the standstill period or the conditions for ineffectiveness of concessions awarded directly) are not available in many Member States. As a result, potential violation of the EU Treaty principles cannot be adequately tackled by the aggrieved economic operators. Moreover, any arbitrariness of CAEs enjoying wide discretion throughout the tendering process escapes effective scrutiny. Taking into account the number of concessions reported to be either awarded directly or tendered according to inadequate standards,<sup>105</sup> this may effectively lead to a continuous failure to redress national situations of deficiency or non-compliance with the application of the Treaty principles.

## 5. BASE LINE SCENARIO

If no action is taken to address the status quo, the economic inefficiencies brought about by the legal uncertainty and the existing entry barriers to EU concession markets will persist and might even get worse. The use of concessions will continue to be hindered by legal and economic risks, undermining innovation and competitive pressures, in particular those which arise as new players emerge.<sup>106</sup> This problem will be the most prevalent in those Member States where no rules, or unclear rules, apply to awarding concessions but also, to some extent, in Member States where concessions are already regulated.<sup>107</sup>

As a consequence of legal uncertainty, those Member States which have limited or no experience of concessions and which refrain from resorting to these arrangements in view of perceived and existing risks and related costs will most likely continue in the same vein. By not engaging in PPPs they miss out on opportunities to use concessions where they would be the most efficient mode of delivering public tasks.<sup>108</sup> CAEs may continue to provide services directly, even in cases where

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<sup>104</sup> In relation to Germany, PwC reported that German procurement chambers have rejected applications for review regarding services concessions while referring to the decisions of the Court of Justice of the EU and confirmed that CAEs have to adhere to the basic principles of the Treaty; See PwC study, page 68.

<sup>105</sup> With reference to the port sector, where concessions are prevalent, the results from a survey conducted by the Institute of Transport and Maritime Management and the University of Antwerp for the European Seaport Organisation (ESPO) show that 14% of the respondents declared that they had directly awarded contracts for port services and 12% awarded the contracts through a process of private and bilateral negotiations from a qualified pool of market players, see «The awarding of seaport terminals in Europe» final draft 28 May 2008, page 11.

<sup>106</sup> See CSES study, pp. 109 and 142.

<sup>107</sup> Failure to develop an EU-wide concession market means that concessions awarded in those Member States will face less competition than they would otherwise.

<sup>108</sup> A recent report on PPPs conducted by the consultant Arcturus Group states that «Le cadre juridique des PPP reste inexistant et leur statut est flou: la situation actuelle repose sur la jurisprudence (notamment l'arrêt «Stadt

externalisation would appear to be a preferable solution. This would contribute to underinvestment in many public services which already today are obsolete and costly for the public purse. In a context of increasing budgetary constraints such problems might be aggravated.

In those Member States where CAEs will nonetheless decide to resort to concessions for modernising services and infrastructures, economic operators might still approach concession award procedures with mistrust. Furthermore, as the existing legal barriers will not be addressed, a substantial number of EU economic operators will not be aware of many of the economic opportunities related to concessions and may decide not to bid for contracts, discouraged by real or perceived lack of equal treatment.

Within the current framework, the use of EU structural and cohesion funds in association with concession contracts and PPPs is likely to remain sub-optimal, without the multiplying effect of private investment. This may have an impact on Member States' capacities to negotiate and achieve balanced contractual relations with private operators, which could affect the long-term sustainability of EU co-financed infrastructures.<sup>109</sup>

Finally, for ordinary public contracts, significant use may still be made of less detailed and less restrictive concession-type procurement rules. This will also help to restrict economic opportunities to EU operators with regard to public contracts and in addition will undermine the effectiveness of Public Procurement Directives.

On the other hand, the continuation of the current situation is likely to benefit certain stakeholders. Incumbent operators in particular might benefit from better opportunities to secure the extension of current contracts, given the lack of precise rules and weak competition.

## 6. SUBSIDIARITY

Although the aforementioned problems have an effect at national level, they also fundamentally affect the efficient functioning of the EU Internal Market, in view of the absence of a level playing field.

Until now most of the Member States have not uniformly interpreted, sufficiently clarified or implemented the relevant Treaty principles for the correct attribution of concessions contracts. The ensuing lack of legal certainty and foreclosure of markets is unlikely to be eliminated without intervention at the appropriate level. Even if Member States were to take legislative action to establish a legal framework based on the Treaty principles of transparency and equal treatment at national level, at least two problems would remain unresolved: the risk of legal uncertainty related to interpretations of those principles by national rules and the risk of wide disparities among legislations in different Member States, resulting from the lack of precision of applicable EU standards.

Hence, in order to eliminate discrepancies among national regimes and ensure homogenous understanding of the Treaty principles across Member States, it appears that these principles must

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Halle). Un cadre réglementaire adapté est de plus en plus demandé par les nouveaux États membres qui souhaitent utiliser cet outil avec une certaine sécurité juridique, notamment, au regard de l'attribution des fonds structurels dans ce cadre.», see report on «L'avenir des partenariats public privés (ppp) au sein de l'Union Européenne», Arcturus Group, note de synthèse, page 17. This information has also been confirmed in bilateral meetings with Member States' representatives in particular from Estonia and the Czech Republic.

<sup>109</sup> See footnote 71 above.

be given concrete expression and translated into EU secondary legislation. This will help to achieve a working Internal Market on concessions which ensures equal opportunities for all EU economic operators and fosters competition for those contracts. EU intervention is therefore the most appropriate way to overcome existing barriers to the EU-wide concession market and to ensure convergence and a level playing field in the EU, ultimately guaranteeing the free movement of goods and services in 27 Member States.

This is already the case today for works concessions (with the exception of the utilities sector), which are subject to some provisions of EU secondary legislation, as well as public contracts, which are fully covered by secondary legislation.

Secondary rules in the field of public procurement improve efficiency and specify the obligations derived from the application of the fundamental freedoms, of which the most important are the free movement of goods and services and the right of establishment. Pursuant to Article 114 TFEU, the European Union « adopts the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the Internal Market ». Moreover, whenever the EU legislates in the field of the right of establishment and free movement of services, it must ground its action in the provisions of Article 53(1) and 62 TFEU. The aforementioned provisions restrict the choice of the European lawmaker to directives as the only possible legal instrument to coordinate national legislations facilitating the establishment of economic operators and their access to the services market. As the objective of the present initiative is to ensure non-discriminatory access to the market of concessions, the combined legal basis of Articles 114, 53.1 and 62 of the Treaty is therefore adequate.

## **7. OBJECTIVES**

### **7.1. GENERAL OBJECTIVES**

The overall objectives of the present initiative are to contribute to economic growth and innovation through the creation of a supportive framework for a wider use of concessions.

### **7.2. SPECIFIC OBJECTIVES**

- Better value for money for both CAEs and users, to create more business opportunities for EU companies and to foster innovation through increased competition for the award of concessions.
- To facilitate investments, in particular on infrastructure projects and on the provision of quality strategic services to the public.

### **7.3. OPERATIONAL OBJECTIVES**

- To improve legal certainty with regard to the definition of concessions and their award procedure.
- To reduce entry barriers caused by divergent national rules and inappropriate procedures for the award of concession contracts.
- To improve the legal protection of tenderers.

## 8. POLICY OPTIONS

The Commission departments have analysed different policy options aimed at meeting the objectives set out in the previous section.

<b>1. No policy change</b>
<b>2. Focused infringement policy</b>
<b>3. Soft law</b>
<b>4. Legislation — Basic rules</b>
<b>5. Legislation — Detailed rules</b>
<b>6. Legislation — Mixed rules (Basic rules + )</b>

Only the legislative options will be subject to a detailed analysis since, as will be explained below, neither the focused infringement policy nor the soft law option seems adequate to accomplish the above mentioned objectives fully.

### 8.1. NO POLICY CHANGE (OPTION 1)

The points made with regard to the Baseline Scenario apply with respect to this option.

### 8.2. FOCUSED INFRINGEMENT POLICY (OPTION 2)

This option would consist in increased and more systematic use of the infringement procedure under Article 258 of the TFEU to address cases of violation of the Treaty principles during the award of concessions, in particular service concessions.

This might encourage CAEs to abandon some practices which are clearly not in line with the Treaty principles. It might also, to a certain extent, improve information on concession contracts in the EU and increase the fairness of the award procedures. It might also provide the Court with the necessary opportunities gradually to clarify the definition of concession as well as the rules on the publication of concession notices and on the organisation of award procedures.

However, the hypothetical positive effects of such a policy can only be expected in the long term. Moreover, the legal uncertainty could even temporarily increase, as CAEs would be aware of the risk of Commission intervention without having the necessary tools to ensure compliance with EU law. This option would also be of little help in reducing costs for companies operating cross-border (in particular SMEs), as it would not result in any coordination of rules on award procedures throughout the EU or on the availability of adequate remedies.

Hence the effects expected from this option do not correspond to the objectives of the initiative. Indeed, this option would neither guarantee legal protection nor ensure legal certainty.

**This option is hereby discarded without further analysis of its impact.**

### 8.3. SOFT LAW (OPTION 3)

The soft law option would consist in either an interpretative communication of the Commission or a recommendation.

A communication would state the Commission's understanding of the applicable EU law and the Court's case law on concessions, but would not establish new rules. This clarification of the Treaty principles would commit the Commission only and would not bind third parties. Already in 2000 and 2008, the Commission adopted communications on concession contracts. Neither of these Communications has done much to improve the persisting situation of legal uncertainty or tackled existing entry barriers in Member States to the award of concessions. There are therefore few grounds for believing that a more in-depth explanation would substantially alter the behaviour of CAEs.

A new communication could probably raise awareness of the case law of the Court among stakeholders. However, according to the results of the consultations, most stakeholders were already aware of the relevant jurisprudence, although they often showed a lack of understanding of specific decisions in their responses.<sup>110</sup> Furthermore, as the case law of the Court has not developed significantly since the adoption of the abovementioned Communications and still does not cover all relevant aspects of the award of concessions, a new communication would not introduce new clarifications of substance.

In addition, a communication would be unlikely to improve information on concession contracts in the EU. More CAEs would probably become aware of the obligation to publish a concession notice but, as a communication cannot spell out all the relevant conditions of such publication, 'adequate advertisement' would not be ensured and publication in the OJEU would not be guaranteed.

With regard to improving the legal protection of tenderers, a communication could only emphasise that remedies with respect to concession contracts must not be less efficient than those applying to similar claims based on domestic law and must not make it impossible or excessively difficult in practice to obtain judicial protection. This could have a positive impact but would fall short of ensuring the rights of unsuccessful tenderers provided explicitly under the Remedies Directive or recognised by the Court. Therefore, the overall level of legal protection would not increase.

Most importantly, a communication would not be binding on public entities. As a result, CAEs adhering to its terms could still not be sure that a national court would not find a procedure illegal and cancel it or order damages to be awarded. Similarly, tenderers would still be uncertain about the CAEs' compliance with the interpretation provided in the communication. For these reasons, a communication would also fail to address the problem of legal barriers and costs.

A recommendation would have similar content to a communication and would essentially produce a similar effect because of its non-binding nature. Thus, the observations made with reference to the communication also apply, with the necessary adjustments, to this soft law instrument.

On these grounds, it would appear that a communication or a recommendation would not fully achieve the operational objectives of the initiative.

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<sup>110</sup> For example, some respondents referred to a definition of concessions which was clearly erroneous. National traditions seemed to play a crucial role in their interpretation of the notion of concession: *e.g.* some French stakeholders believed that the criteria for distinguishing public contracts from concessions included the global nature of the devolution of tasks or the length of a contract, whereas ECJ case law leaves no doubt on this particular point, clearly referring to the transfer of risk as the ultimate criterion.

**This option is therefore discarded without further analysis of its impact.**

#### 8.4. LEGISLATION — CONTENT OF THE OPTIONS

There are two extreme legislative options: **Basic rules** corresponding to existing provisions for works concessions of Directive 2004/18/EC or **Detailed rules** based on the current legal framework for public contracts. The third option, **Mixed rules**, amounts to a compromise between the two in which the Basic rules are complemented with certain solutions inspired by the Detailed rules. The exact scope of each option is discussed further in Section 9.

Table 4 — options content

PROVISIONS	BASIC RULES	DETAILED RULES	MIXED RULES
Definition of concessions	X	X	X
Publication in the OJEU	X	X	X
Deadline for applications	X		
Remedies	X	X	X
Selection criteria		X	
Technical specifications		X	X
Publication of contract award notices		X	X
Rules on public-public:		X	X
Rules on modifications		X	X
Rules on governance		X	
General requirements on the suitability of tenderers, on equal treatment during award procedures and on award criteria as deduced from the Court's case law.			X
Award criteria		X	
Mandatory award procedures		X	
Duration	This issue is not directly concerned by rules on award procedures; rather it relates to the content of the contract and the adequacy of the time needed for the recovery of the investments. Hence, it shall not be included in the present assessment.		

#### 8.5. LEGAL INSTRUMENT

As explained in Section 6, this initiative, should be based not only on Article 114 TFEU but also on Articles 53(1) and 62 TFUE, providing a specific legal basis for the coordination of legislation conditioning access to establishment and services markets. These provisions specifically require the use of a directive as the only possible legal instrument.

Due to the nature of the envisaged rules, a single directive will permit to regulate both classic and utilities sector.

## **9. IMPACT ANALYSIS OF THE LEGISLATIVE OPTIONS**

### **9.1. SCOPE OF LEGISLATION**

#### **9.1.1. Utilities sector**

The Utilities Directive covers important sectors such as water, ports, airports, energy and heating. These sectors are characterised by a significant number of concessions,<sup>111</sup> but even works concessions are at present excluded from the scope of application of this Directive. This situation appears unjustified. Both the contracting authorities and other CAEs in the Utilities sectors are bound to apply Treaty principles with regard to concessions. Consequently, when dealing with concessions in these sectors, they encounter the abovementioned problems relating to the imperfect application of the Treaty, lack of legal certainty and barriers to entry. If works and service concessions were to be covered by the classic Directive but utilities remained outside its scope, this would add yet another level of legal uncertainty regarding which set of rules apply. For example, concessions are often awarded by local authorities, and these authorities may be subject to both sets of rules. Economic operators might thus find it hard to understand that a service concession for running a municipal car park would be subject to procurement rules, whereas a concession awarded by the same local authority for running the entire water supply system would not. That is why one directive on concessions will cover both utilities and classic sectors.

#### **9.1.2. Priority and non-priority services**

Non-priority services (e.g. port services, catering, health, education and social services) are at present only partially covered by the Public Procurement Directives. The intention of the legislator was that certain specific service contracts, which were considered not to have much potential for cross-border trade, should be excluded from the full application of the rules of the Directives, for a transitional period. However, in the light of the recent findings by the Commission published in the "Evaluation Report: Impact and Effectiveness of EU Public Procurement Legislation", many categories of services formerly classified as non-priority services showed a relatively high *ratio* of cross-border provision. Consequently, any new proposal in the field of public purchases must take account of these data. Therefore, such conclusions justify the extension of the envisaged rules to those services.

Nevertheless, services such as social, health and education continue to have a limited cross-border dimension, due to the strong impact of different national cultural traditions.

Furthermore, the data presented in Section 3 shows that concessions are less prevalent in the above sectors. It must also be said that the full coverage of these services by the complete framework is politically very sensitive. It is therefore appropriate to establish a specific regime for the award of these services. This regime should include the obligation to publish by CAE, at the beginning of the budgetary year, a prior information notice. Such a notice would ensure adequate transparency, without prejudice to national systems of purchase of this kind of services. Such a legal framework should also encompass a requirement to publish a concession award notice.

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<sup>111</sup> See CSES study, p. 55.

### **9.1.3. Public passenger transport services by rail and road as covered by Regulation 1370/2007<sup>112</sup>**

At the time when the Transport Regulation was adopted, service concessions in this field were governed by the Treaty principles. Nevertheless, this sector was considered sufficiently distinctive to be subject to a more precise and specific set of rules (including the possibility of awarding contracts to 'internal operators'). For this reason, and in order not to interfere with the objectives of EU transport policy and to maintain the stability of the legal framework, service concessions currently subject to the Transport Regulation should be excluded from the scope of the future EU legislation on concessions. Moreover, as the current rules applicable in this sector already provide for transparency and a fair degree of legal certainty, changing the legal framework applicable to these concessions is not considered a priority.

### **9.1.4. Air transport services as covered by Regulation 1008/2008<sup>113</sup>**

Pursuant to this Regulation, a Member State may impose a public service obligation (PSO) in respect of scheduled air services between two airports in the Union, in particular when one of them serves an outlying or developing region. To this end, the Regulation lays out a very detailed procedure for setting up these PSOs and for compulsory tendering. For this reason, and in order to avoid any possible conflict with rules that might be drawn up under this initiative, it seems preferable to exclude from its scope concessions in air transport services.

### **9.1.5 Concessions awarded to entities enjoying of exclusive rights granted in compliance with EU law**

In the utilities sector the grant of exclusive rights for the operation of a network is part of specific legislative measures aimed at liberalising such sectors. An exclusive right granted in compliance with EU law makes it unnecessary and redundant to follow a competitive procedure for the award of a concession of network management services to the holder of an exclusive right since no other competitor would be in a position to apply for such contract. Moreover, the transparency resulting from a mandatory publication of the act granting the exclusive right should permit all interested parties to fully evaluate the compliance of such right with Treaty or Union sectoral legislation. Therefore it seems appropriate to provide for concessions awarded under such conditions to be excluded from the scope of a legislative initiative..

### **9.1.6. Concessions of less important value**

Currently, secondary legislation on Public Procurement applies only to public contracts and works concessions of a value equal or superior to a certain threshold, above which they are subject to an irrebuttable presumption of cross-border interest. Similarly, national provisions on concessions usually apply only to contracts above a certain value. All options discussed below involve the existence of such thresholds, below which service concessions and works concessions would remain governed only by the Treaty principles.

Thresholds currently applicable to public contracts and works concessions indicate not only their economic importance but also reflect a political consensus on their cross-border interest. The

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<sup>112</sup> OJ L 315, 03.12.2007.

<sup>113</sup> OJ L 293, 31.10.2008.

appropriate threshold for service concessions should therefore reflect the extent to which economic operators located in other Member States are interested in such concessions. Note, however, that such interest depends not only on the value of the concession but also on its geographic location, the sector concerned, differences in economic wealth, the rate at which concessions are used, costs (including labour costs), etc. To assess the cross-border interest would mean gathering data on the actual participation of non-domestic companies in bidding procedures for concessions of different values. However, as already explained, accessing such information is extremely difficult if not impossible, given the existing lack of transparency. (This is particularly true of information on concessions advertised and awarded).

Furthermore, reference to existing national thresholds is largely irrelevant, not only because they differ widely in those Member States which have regulated concessions but also because national thresholds reflect interests of national policy rather than the cross-border interest of the contracts.

Nor does it appear appropriate to take the existing thresholds for service contracts and automatically extend them to service concessions, since concession contracts have a higher value and are more complex and long-lasting.

The same applies to the method used for calculating the value of public service contracts<sup>114</sup>. Indeed, given that in concession contracts the investments and revenues are often spread over many years, it seems inadequate to calculate the contract value on the basis of a fixed and limited initial timespan (as is the case with public contracts). Consequently, the threshold value applicable to a service concession should be calculated on the basis of the total value of services provided during the whole duration of the concession.

Against this background, it does not seem appropriate to establish a threshold for service concessions that is equal to or slightly greater than the one applicable to public service contracts (currently € 193 000) but calculated on the basis of the total value of services stipulated. The risk is that this threshold would cover concessions that have no clear cross-border interest and would impose unreasonable costs and administrative burdens on CAEs and companies. Furthermore, covering small-value concessions might prove ineffective.

Stakeholders have also been consulted on the appropriate level of thresholds for service concession contracts. The PwC study showed considerable support from economic operators and public authorities for a threshold for service concessions equal to the one already applicable to works concessions (currently € 4 845 000). It was considered that this would keep the additional administrative burden and costs proportionate to the value of the contract, and reflect the contracts' clear cross-border interest. This would also be an advantage in terms of legal certainty and simplification.<sup>115</sup>

#### **9.1.7. Scope of application in time**

The proposed legislative initiative will only affect concession contracts which are advertised after the date on which the future legislation comes into force. Hence, new legislation will not have any impact on the performance of ongoing concession contracts.

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<sup>114</sup> According to Art. 9.8(b)(II) of Directive 2004/18/EC, in the case of contracts without a fixed term or with a term greater than 48 months, the value of a public service contract is the monthly value multiplied by 48.

<sup>115</sup> By contrast, a threshold of a value of €2.5 million was, in the same study, considered too low. For details, see PwC study, p. 119.

## 9.2. OPTION 4: LEGISLATION — BASIC RULES

Basic rules correspond to the existing rules for works concessions.

The 'basic rules' option would clarify the rules on publishing concession notices, on some basic aspects of the conduct of award procedures (principally by setting minimal deadlines for the submission of a tender) and on available remedies.

Economic operators and CAEs responding to the targeted consultation mostly agreed that the Classic Directive rules currently applicable to public works concessions bring legal certainty.<sup>116</sup> It can therefore be reasonably assumed that similar rules for concessions not currently covered would improve legal certainty and benefit CAEs and undertakings in at least two ways. First, in Member States where concessions are already in use, both parties would run less risk of the concession being considered as illegally awarded and thus cancelled.<sup>117</sup> Second, in all Member States, and in particular in those where CAEs presently shy away from awarding concessions, legal certainty could help the development of PPPs through this type of contract, increasing the overall efficiency of the public action and creating new business opportunities for undertakings.<sup>118</sup> This expectation is clearly shared by many economic operators who responded to the public consultation.<sup>119</sup>

If CAEs become more interested in awarding public tasks as concessions, this is also likely to push Member States to develop or complete national legal frameworks covering non-procurement aspects (e.g. taxation, property issues etc.) to make concessions even easier to use and more beneficial. Public entities would thus have at their disposal a much better legal instrument, enabling them to alleviate budgetary pressures by transferring the provision of services to third parties, whenever appropriate. This would substantially reduce legal uncertainty and thus stimulate the uptake of concessions and therefore also of PPPs. Projects which are today too costly or too complicated to be carried out by the CAEs themselves might, in this event, be more easily realised thanks to third parties' resources and know-how. Ultimately, the increased uptake of concessions and hence PPPs is expected to benefit consumers, who would gain from new investment in infrastructure and service provision.

The 'basic rules' approach would include clarifying the **definition** of a concession. To the current definition would be added a reference to transferring the operating risk to the concession holder. In addition, the types of relevant risk would be clarified. This would eliminate confusion between concessions and public contracts and is likely to reduce the number of public contracts wrongly

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<sup>116</sup> See Annex I B, p.3 and 6.

<sup>117</sup> The risk is also taken into account by financial institutions and is reflected in the cost of credit and in equity's eagerness to support the project financially.

<sup>118</sup> This conclusion may be drawn from the Report on the Green Paper consultation, which indicates that the lack of legal certainty is one of the major factors deterring the players from using concessions and from taking part in the concession award procedures. See the Green Paper on Public Private Partnerships and Community Law on Public Contracts and Concessions, COM(2004) 327 final of 30.4.2004.

<sup>119</sup> Of the economic operators who answered the question on possible changes to the way public services are delivered following the legislation on service concessions, some 48% consider it likely that authorities which currently provide the services directly will externalise them by means of a concession. On the other hand, only around 18% feared a shift in the opposite direction.

qualified as concessions, thus also improving the application and effectiveness of Public Procurement Directives.<sup>120</sup>

**An obligation to publish** a concession notice in the OJEU for all concession contracts above a certain threshold would be proposed to eliminate legal uncertainty as to whether the requirement of 'adequate advertisement' has been met. It would give all EU operators better information on concessions and reduce the number of direct awards. It would also reduce the cost of bidding for concessions, in particular the cost borne by SMEs.<sup>121</sup> Non-publication would be considered a serious infringement of EU law, opening the possibility of claiming ineffectiveness of the contract as a result of the associated extension of Remedies Directives.

Mandatory publication of a concession notice would also apply to awards resulting from contracts being substantially changed while they are being implemented. (It would therefore also apply to renewals).<sup>122</sup>

A legal requirement to publish a concession notice would probably lead to service concession contracts being systematically published at rates comparable to works concessions and public contracts.<sup>123</sup> Even if publication did not immediately result in a higher number of expected bidders, positive effects could still result. For example, bidders would have a greater opportunity to challenge the award of a concession.<sup>124</sup> Indeed, when calculating the value of their bid, bidders usually do not know how many competitors will submit an offer. As a result, firms tend to base the value of their bid on their perception of competition in their market. EU-wide publication of concession notices would thus enable bidders to submit more competitive offers, to the benefit of both CAEs and consumers.<sup>125</sup> <sup>126</sup> <sup>127</sup> Moreover, some stakeholders believed that making it compulsory to advertise concessions would probably open the market for new entrants and could be a way to promote PPP projects by raising awareness of such projects and introducing more

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<sup>120</sup> According to the CSES study, 'ironically, the greatest early impact may be on public contracts that have been designated service concessions in order to avoid procurement procedures'. see CSES study, p.110.

<sup>121</sup> Difficulties in obtaining information on business opportunities is a recurrent problem raised by SMEs as they are unable to allocate sufficient resources to collecting information. See *European Code of best practices facilitating access by SMEs to public procurement contracts*, SEC(2008) 2193 of 25.6.2008. EDITOR'S NOTE: I was unable to locate this document on the internet: please check the reference number.

<sup>122</sup> According to the case law of the Court, an extension or a renewal of a concession may qualify as material change of the terms of the award and therefore correspond to the award of a new contract, see Case C-454/06, *Presstext Nachrichtenagentur* [2008] ECR I-04401, point 34.

<sup>123</sup> In 2004, the estimated compliance rate was 46%. See *Evaluation of Public Procurement Directives*, Markt/2004/10/D.EDITOR'S NOTE: I have not been able to check this reference.

<sup>124</sup> A contestable market is a market served by a small number of firms but which is nevertheless characterised by competitive pricing because of the existence of potential short-term entrants. Its fundamental features are low barriers to entry and exit. In theory, a perfectly contestable market would have no barriers to entry or exit.

<sup>125</sup> The Commission services estimate that, in 2006, the savings made by publishing notices for public contracts amounted to 8% of the value of those contracts (representing €30 billion – which is equivalent to the entire budget for regional and convergence policy). A similar rate of savings could be achieved by publishing concession notices in the OJEU and thus increasing competition and contestability. Given that the value of the concessions market was around €138 billion in 2000-2009 (see Chapter 3), some €2 billion could be saved each year, at a conservative estimate. This calculation is based on data for only eight Member States and does not take into account the expected future growth of the concessions market.

<sup>126</sup> 'Contracting out by relying more on open tenders, governments are likely to obtain public service at lower cost. In order to avoid fragmented markets detrimental to efficiency, tendering rules should be harmonised across jurisdictions and government levels...' see *Market Mechanisms in Public Service Provisions*, OECD working paper n° 6, page 4.

<sup>127</sup> See CSES study, p. 171.

competition. These assumptions have been largely confirmed by the CSES study,<sup>128</sup> which judges the potential effects of this action as significant.

As many as 61.6% of the respondents to the online consultation agreed that compulsory publication of a service concession notice in the OJEU would help increase the transparency of the award process. Such publication was also supported by most of the undertakings or associations taking part in the targeted consultation. The overwhelming majority of firms and their associations considered that the current Classic Directive rules applicable to works concessions ensure a fair degree of transparency<sup>129</sup>.

Firms were also asked how the publication of service concessions would affect different categories of stakeholders. Some 44% of undertakings answering this question expected the impact on consumers to be positive whereas 24% believed it would be negative. Economic operators were even more optimistic about the impact on companies: some 51% of respondents felt that publishing service concessions would have a positive impact, while around 22% feared negative consequences (due to increased costs). The rest believed that the impact would be insignificant or zero.

Regulating the ***minimum deadlines for the submission of bids*** could also be crucial to avoid discrimination. It would prevent a contracting entity from fixing a very short deadline in order to eliminate unwanted tenderers. This would greatly diminish the risk of corruption and ensure fair outcomes. It would also encourage the participation of trans-border bidders, who normally need more time to prepare their bid (e.g. to seek advice on local legal provisions, translate documents or find a locally based partner).

The provisions applicable today for works concessions require contracts awarded by both public and private concession holders to be published and awarded following a competitive procedure. Moreover, contracting authorities have the opportunity to impose on concession-holders the obligation to sub-contract a minimal part of the concession to third parties.

Although the overall assessment of the legal framework applicable to works concessions by the stakeholders is positive, the aforementioned rules were considered by many stakeholders as burdensome and inefficient. Therefore, the solutions assessed in the Report include neither of these provisions.

As evidenced by the CSES study, the effects of the 'basic rules' option in terms of increased competition, greater innovation and the increased use of concessions are likely to be particularly strong in sectors where services are currently provided directly by public authorities. By contrast, increased use of concessions is not likely to take place in sectors and Member States where concessions are already in use. The greatest benefits to these sectors would be improved transparency and equal treatment leading to intensified competition. The CSES study concluded that other possible differences of impact in different sectors would be relatively minor.

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<sup>128</sup> According to the report, the "result of requiring a publication notice under the 'light approach' would be to promote considerably more transparency". According to the same study, the increase in transparency is likely to attract more operators having sufficient capacities and, hence, would bring more innovation. In addition, there is relatively "little opposition expressed to the idea of a legislative provision obliging CAEs to publish a service concession notice in the Official Journal of the European Union, since this was generally recognised as a direct way of promoting transparency in concession markets". CSES study, pp. 100, 110 and 117.

<sup>129</sup> See Annex I B, p.3.

The CSES study also indicated a possible drawback: greater transparency in awarding concessions not covered at present by secondary legislation could increase the dominance of large companies in some sectors such as water supply and waste water treatment. Were this situation to materialise, it could make it more difficult for smaller undertakings to access the market. However, this is by no means certain. Large companies are already established in and have access to many national markets that interest them. This situation is not likely to change much with increased transparency. Furthermore, it is not certain that SMEs really are less competitive, especially when it comes to smaller concessions.<sup>130</sup> As a matter of fact, smaller undertakings would still benefit from greater flexibility and better knowledge of local conditions. According to a survey conducted for the European Commission, ‘procurers have a rather favourable view of SMEs as suppliers in public procurement. Being more flexible and quicker in reacting to their needs than large companies seem to be relevant strengths in the eyes of most procurers’<sup>131</sup>. Advertising concessions should also help SMEs to access the market.

According to the CSES study, stakeholders felt that relatively few costs were likely to be generated by basic legislation. Administrative costs may increase for CAEs following the introduction of compulsory publication, since the number of bidders may increase and there would be the additional burden of preparing a minimum amount of information to be published. However, this cost would be small compared to the value of the contract and may be offset by the better value for money achieved thanks to intensified competition. Furthermore, the increase in administrative costs should not be measured against a situation where there is no publication at all, or publication of only very basic information. Such practices should be considered unlawful under the Treaty principles and might actually generate much higher costs due to the risk of litigation or intervention by the European Commission. Besides, in certain Member States, the existing practices or legislative requirements involving multiple publication in national bulletins or the sector-specific press may actually involve costs higher than publication in the OJEU.

The increase in compliance costs for undertakings is also often quoted as a likely consequence of legislation on concessions, although this claim is rarely substantiated. Indeed, it is difficult to see why the obligation on a contracting entity to publish a call for a concession would increase costs for the undertakings. This might perhaps be true if bidders found they needed to prepare better tenders in order to face livelier competition. On the other hand, it is certainly true that incumbent companies receiving contracts directly or quasi directly would have to take part in a bidding process (which might lead to them losing their concession) and to spend money on preparing their tenders. However, such costs already flow from observance of the Treaty principles. Finally, it should be noted that most of the respondents to the targeted consultation (addressed to the business community) consider that the current Classic Directive rules applicable to works concessions generate only marginal costs, if any.<sup>132</sup>

Legislation is the only way to bring service concessions award procedures within the scope of the **Remedies** Directives. This would make it possible to substantially improve the legal protection of bidders, guaranteeing not only their right to contest the result of an award procedure on the grounds of EU law but also giving a number of practical judicial guarantees to all aggrieved bidders,

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<sup>130</sup> In France, home base of Veolia and Suez (the largest European players in the water sector), small and medium-sized companies still manage to compete for and obtain concessions for water and waste water management.

<sup>131</sup> ‘Evaluation of SME’s access to Public Procurement markets in the EU’, DG Enterprise and Industry, Final Report, September 2010, p. 66.

<sup>132</sup> See Annex I B, [http://ec.europa.eu/internal\\_market/consultations/2010/concessions\\_en.htm](http://ec.europa.eu/internal_market/consultations/2010/concessions_en.htm).

whether foreign or domestic. This would give economic operators greater confidence in the impartiality of CAEs' decisions and lead them to take part in a higher number of tendering procedures (in other Member States as well as in their own). As demonstrated by several studies<sup>133</sup>, the assumption that bids by foreign companies are automatically rejected may be an important factor discouraging cross-border participation in procurement procedures. Remedies would also enable authorities to monitor, regularly and efficiently, whether the Treaty principles are being respected in those areas, where there would be no EU secondary legislation.

It is less certain whether the objective of increasing *equal treatment* throughout the procedures would be effectively achieved by having basic rules on concessions. Nevertheless, 'adequate advertisement' through compulsory publication, together with the effective remedies available to the bidder, may improve the fairness of the procedure by disciplining the CAEs. Moreover, if the present rules on exceptional changes to contracts for public works concessions were extended to cover all concessions, this would foster compliance with the principle of equal treatment. It would ensure that competition for the contract is not undermined by substantial and unjustified changes to the contract after it is signed. This would improve the current legal situation where it is difficult to ensure compliance with the equal treatment principle because it is difficult to draw a line between justified and abusive changes to a contract, relating to the provision of additional services.

On the other hand, the 'basic rules' approach *would neither regulate the award procedure nor restrict choice*. It would thus allow for negotiations between tenderers and the contracting entity. Under this 'basic' scenario, the rules governing the award procedures would not be harmonised.

Nor would the 'basic rules' option specify the concrete requirements of CAEs in terms of the choice of *selection criteria, award criteria or technical specifications*. In that respect, both the CAEs and the economic operators would still be left with uncertainty as to the interpretation of the case law of the Court on these issues. The disparity of national rules would still generate extra costs and market entry obstacles. Similarly, entry barriers arising from divergent national rules and inappropriate award procedures might persist.

The responses to the online consultation confirm that stakeholders expect rules enabling EU-wide competition to have a positive and direct impact on the price and quality of the services used. As many as 32.4% of the respondents believed that the price would decrease (which is twice as many as those believing it would increase) and 36.2% thought that quality would improve (against 26.5% who believed it would deteriorate). Similarly, many of the consulted economic operators considered that the current rules on public works concessions contribute to lower prices and higher quality.

According to the results of the online consultation, the stakeholders who are expected to benefit most from the planned legislation are the users of services (according to 31.9% of respondents), followed by public authorities, companies and taxpayers. Employees were most often quoted as the group which would benefit the least (27%).

However, despite these expected benefits, the 'basic rules' option does not fully eliminate the problems of legal uncertainty described earlier.

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<sup>133</sup> See e.g. 'Opening the public sector to SMEs in the Alpine Space. Coping with the difficulties encountered by SMEs when tendering abroad. Abstract of the SWOT analysis conducted by the ALPPS (Alpine Public Procurement Services) — April 2005.

When it comes to transposing future 'basic rules' legislation into national law, it should be noted that all of the proposed provisions already apply to works concessions and have thus already been transposed. Member States will only need to extend them to service concessions. Moreover, certain Member States have already adopted legislation on service concessions, embracing most of the proposed requirements. The new provisions will be enforced through the disciplining effect of the Remedies Directive.

### **9.2.1. Option 4: Legislation — Basic rules — Economic Impact**

As the CSES report concludes, 'a greater profile for service concessions would promote innovation and productivity and ultimately economic growth and employment. Use of concessions in the new areas outlined could provide a boost to the creative economy, with all its benefits in terms of locally generated and sustainable growth'<sup>134</sup>. In addition, the introduction of the 'basic rules' approach is likely to result in lower prices and more investment. More efficient and higher-quality strategic services such as energy or water services may help boost the competitiveness of the European economy as whole.

Greater competition for the award of service concessions could also improve and speed up the delivery of public investment. This was the view of 48.7% of respondents to the online consultation, while 44.3% disagreed. In addition, 37.3% of the respondents believe that greater competition would have an impact on access to services of general economic interest, and as many as 84.1% think it may make these services more accessible.

The accuracy of these forecasts seems to be confirmed by the downward trend of prices in France, where the 1993 *Loi Sapin* made it obligatory to publish a concession notice at national level and to follow a competitive procedure. According to studies by a French institute (Labo GEA), prices paid by consumers for water supply and waste water treatment are constantly decreasing: they have fallen on average by 5.5% per year since 2004 and fell by as much as 9.2% in 2006. Moreover, according to a study by another French institute (FP2E), the R&D work done by private water sector concessionaires — investing €140 million in 2008 alone — has permitted a 'technological leap' in the field of water and waste water management and environmental protection.<sup>135</sup>

### **9.2.2. Option 4: Legislation — Basic rules — Social Impact**

When it comes to the possible social impact of 'basic rules' legislation, 48.1% of respondents to the public online consultation felt that greater competition for the award of service concessions would benefit employment in the sectors concerned. According to the CSES study, greater transparency would create the 'possibility of more innovative approaches and greater choice and efficiency in the public services'.

On the other hand, the study also draws attention to possible drawbacks in the field of employment. If public authorities take an increased interest in concessions, this could result in a shift from the direct provision of public services towards externalisation via concessions, and thus the incumbent operators would lose their contracts.

To regard this as a drawback is to assume that public sector employers offer better working conditions and that the execution of a public task by a private company is more efficient, as the

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<sup>134</sup> See CSES study, p. 110.

<sup>135</sup> See ENREF, <http://engref.fr/labogea> and «Les services publics d'eau et d'assainissement en France», BIPE/FP2E, 4ème édition, mars, 2010.

work is organised differently. However, consultation of the social partners shows that at least the first of these assumptions is questionable. Although it was not possible to compare working conditions in public and private undertakings throughout the EU specifically in the sectors concerned by concessions, statistics quoted for the waste management sector in France indicate that the salaries paid by private employers were actually higher than those paid to public employees. Interestingly, the online consultation indicated that the number of local jobs was expected to decrease: this was the view of 57.3 % of those participants who believed that greater competition would have an impact on employment. On the other hand, 50.6 % of the abovementioned group believed that working conditions would improve. According to 47.5 % of the respondents, EU legislation on service concessions would lead public authorities to make greater use of concessions to deliver public services: 51.6 % of respondents considered that this would lead to the disappearance of local jobs, but 55.8 % felt it would improve working conditions.

There are fears that the externalisation of tasks could have negative consequences. For example, these tasks might be taken over by undertakings which organise their work differently and need fewer employees. However, the current EU legislation on safeguarding employees' rights in the event of transfers of undertakings<sup>136</sup> may be applicable here. In such cases, this legislation restricts the scope for lay-offs, as the transfer does not in itself constitute valid grounds for dismissing workers. This legislation applies every time there is a change of employer, provided that the transferred entity maintains its identity. (The 'transferred entity' is defined as an organised grouping of resources having the objective of pursuing an identifiable economic activity).

Not all concession awards will be covered by these rules<sup>137</sup>. The case law of the CJEU concerning the scope of this Directive recognises that it applies in cases involving a transfer of public service activities from an administration (direct provision) to a private law company, from a legal person governed by private law to a municipality and from one undertaking to another, following the award of a public contract. Several consulted stakeholders have also indicated that the abovementioned EU provisions would often apply to a change of concession-holder. In several of their responses to the targeted consultation, social partners also clearly expected that the shift would have no significant impact on employment, as EU law prevents the employer from laying off employees on the grounds of a transfer.

Some other social partners were hesitant as to the actual impact of compulsory advertisement and observed that it is 'difficult to claim a priori what impact on job creation or losses the compulsory advertisement of services concessions might have. It might be the case that the enhancement of efficiency in the provision of public services could be achieved through creation of new jobs, in other cases — through the abolishment of some workplaces.'<sup>138</sup>

### **9.2.3. Option 4: Legislation — Basic rules — Environmental Impact**

The introduction of basic rules on the award of services concessions would have no impact on the ability of CAEs or regulatory bodies to set environmental standards that must be respected. Consequently, anticipated externalisation and the increasing popularity of concessions are unlikely to impede or influence environmental policies. That being said, the CSES report observed that 'in

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<sup>136</sup> See Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (OJ L 82, 22.3.2001).

<sup>137</sup> For instance, the rules may not apply to a change of private partner in a mixed capital entity executing a concession, given that a change in the shareholding of a company does not constitute a transfer of the undertaking, as the employer's legal personality remains the same.

<sup>138</sup> See Annex I B, p.8 .

important areas for the environment, where service concessions are common, such as the water sector and waste treatment especially, encouraging innovative processes would also lead to advantages for the environment'. Overall, both the increased use of concessions and increased competition resulting from greater transparency are likely to have a positive influence on investment in and the management of services which affect the environment.

### 9.3. **OPTION 5: LEGISLATION — DETAILED RULES**

The detailed rules, as explained above, correspond to the rules applicable to public contracts.

As was mentioned in the 'Options' section, the 'Detailed rules' option embraces all the legal solutions included in the 'Basic rules' option, except for rules on subcontracting. The two options are therefore expected to have very similar impacts on legal certainty. Detailed rules would clarify the provisions on advertising concessions and would draw a clear distinction between concessions and public contracts.

This option is also likely to enhance legal certainty. Indeed, unlike the Basic rules, it offers a comprehensive and detailed formulation of the Treaty principles and makes them applicable to many aspects of the award procedure. Most importantly, this is the case with rules on selection and award criteria, and on technical specifications. Its specific provisions are likely to ensure even better access to the market.

The detailed provisions going beyond the 'basic' option considered in the previous section can be divided into two different categories. The first category covers clarifying provisions, enhancing legal certainty without adding additional or more concrete obligations. This category includes rules on public-public cooperation and on modifications. The second category encompasses rules imposing additional – or concretised – obligations on CAEs or Member States, such as many procedural requirements foreseen today in the Public Procurement Directives, as well as envisaged provisions on governance.

Rules on ***public-public cooperation*** would more clearly define the boundaries of the initiative and would make it easier for CAEs to know when to apply rules for the award of concessions. This should in turn reduce the perceived risks and incidence of litigation. Reducing the costs of legal assistance associated with avoiding (perceived) legal uncertainty, managing risk and dealing with legal challenges should generate budgetary savings. Clarification (through targeted legislative intervention) of the applicability of EU rules could bring valuable support to the development of public-public cooperation in procurement. These types of collaborative purchasing between groups of public purchasers (often for purposes of achieving scale or administrative efficiency) seem set to increase as local authorities look for ways to optimise the use of scarce public resources.

Rules on ***modifications*** would clarify the notion of modification of substantial terms of the award of the contract. They would also provide for a «safe harbour» covering modifications with a value that does not exceed the thresholds of the initiative and is below 5% of the price of the initial concession and provided that the modification does not alter the subject-matter of the concession.

Rules on ***selection criteria*** would ensure that candidates are assessed purely in terms of their capacity to carry out a concession contract. These rules would therefore prevent CAEs from laying down other criteria which, although strictly speaking non-discriminatory, would nevertheless allow them to eliminate potential contractors on more or less arbitrary basis. More importantly, these provisions would help improve the situation of SMEs, not only by giving them the chance to sub-

contract but, in particular, by providing certain guarantees to consortia. The rules require CAEs to apply the criteria jointly to all members of a consortium and prohibit the exclusion of candidates for the sole reason that they rely on a third party.

Detailed rules would also ensure that the choice of ***award criteria*** is restricted to the price and the most economically advantageous tender (MEAT). Again, this restriction ensures transparency and fairness of choice, as CAEs are bound to evaluate tenders on their merits, without including discriminatory considerations such as a relationship of personal trust with a bidder. An important advantage of detailed rules is that they would require CAEs to publish the relative weighting of their award criteria. This allows effective verification of whether the criteria have been applied correctly and impartially. By ensuring impartiality on the part of CAEs, this increased transparency may boost the participation of non-domestic EU companies.

Provisions on ***technical specifications*** play an important role in preventing any distortion of the free movement of goods and services, reaching beyond the issue of awarding concessions. Public Procurement Directives require observance of the rules on technical specifications even when awarding non-priority services — which are exempt from almost all other provisions of the Directive, including the publication of a tender notice. The complexity of the services provided through concessions would not be an impediment to applying the existing rules on technical specifications, as the specifications can also be formulated in terms of performance or functional requirements.

The obligation to publish an award notice would make the procedures more transparent and reinforce the self-discipline of CAEs. It would also provide the Commission with a useful tool for monitoring and obtaining statistical data on the number of concessions awarded.

All of the abovementioned provisions would help improve the general fairness of concession-awarding procedures and provide better access to the market. They would thus strengthen competition between bidders, delivering better value for money and promoting innovation.

However, according to the CSES report, many stakeholders perceive the complexity of the 'detailed rules' option as a major threat. It appears from the consultations carried out that this position is actually shared by both public administrations and economic operators. The most problematic issues are, in their view, the choice of procedure and the award criteria.

Given the market's strong perception of the difference between public contracts and concessions, certain types of provisions applicable to public contracts such as the ***obligation to follow a specific procedure*** might actually reduce the uptake of concessions and diminish legal certainty (although they would probably make the procedures fairer). It might, indeed, be counterproductive to insist that only the ***standard procedures*** (i.a. open or restricted procedure or 'competitive dialogue') be used for awarding concessions, and also counterproductive to prohibit different models of negotiation (commonly used in certain MS to award concessions) except in very specific circumstances. Such restrictions could prove inadequate to the needs of more complex concessions and might increase the risk of litigation and of subsequent cancellation of the contract. 'Competitive dialogue' has been invented as a more transparent solution to be used in cases of legal, financial or technical complexity. However, a large number of stakeholders claim that it is inadequate for dealing with the type of problems encountered when awarding concessions.

With reference to the award criteria, apart from those who do not understand the concept of MEAT and reduce it only to price, many argue that, in view of the long duration of concessions, and given

their complex character and the important responsibilities conferred on the concession-holder, the contracting entity should be permitted to re-use some bidder-related criteria at the award stage.

According to the CSES study, if the 'detailed rules' option were applied, 'many companies would simply withdraw from the concessions market. The effects of this are the opposite of those outlined as the benefits of the lighter approach (Basic rules)'<sup>139</sup>. This is because of the perceived risks and additional costs of this option. Moreover, the way CAEs and economic operators perceive the 'detailed rules' might determine their effect more than their actual strengths and weaknesses.

This perception may not actually be well grounded. Indeed, some idea of the additional burden these rules would impose (in terms of the length of the procedure and the human resources deployed) can be obtained from the relevant figures for public contracts<sup>140</sup>. According to the study, public contract procedures conducted under EU Procurement Directives in 1992-2003<sup>141</sup> generated enforcement and compliance costs for the CAEs estimated at less than 0.7 per cent of the contract value. These costs were largely offset by a reduction in prices (resulting from increased competition) of more than 2.5 per cent of the contract value.<sup>142</sup>

Overall, however, it is quite possible that the major benefit of the 'basic rules' option (which is an increased interest in concessions among both economic operators and administrations, and the resulting increase in the efficiency of public action) would be lost if detailed rules were introduced. Many economic operators fear that overregulation of concessions would provoke a shift towards the direct provision of services or direct awards to public 'in-house' entities. Against this background, the CSES report concludes that 'the 'fully fledged' (Detailed rules) approach is thought to provide only marginal advantages over the 'light approach' (Basic rules) in terms of open, transparent and fair procedures'<sup>143</sup>, in comparison with clear disadvantages.

The 'Detailed rules' approach appears, therefore, to provide better access to the market, but at the same time its advantages would be neutralised by substantially reducing the market for concessions. CAEs would therefore fail to realise the expected benefits and consumers would fail to gain access to cheaper and better quality services. The most affected group of stakeholders seems to be economic operators who would, in many cases, actually lose market opportunities as a result of a shift towards direct provision of services by public administrations.

In addition, transposing detailed rules may be more problematic than transposing the basic rules. Detailed rules are, indeed, much more complex and require much greater adaptation of the existing national rules or practices. Nevertheless, the proposed rules are well known to the Member States as they currently apply to public contracts. The Remedies Directive will, again, help ensure that the rules are enforced, but the complexity of the system is likely to provoke greater perturbations as compared to Basic rules.

### **9.3.1. Option 5: Legislation — Detailed rules — Economic Impact**

Introducing detailed rules is likely to have a negative economic impact because it might reduce the extent to which concessions are used. The objectives announced in the Commission's

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<sup>139</sup> See CSES study, p. 111.

<sup>140</sup> Evaluation of Public Procurement Directives, Markt/2004/10/D.

<sup>141</sup> Directive 93/37/EEC (OJ L 199, 9.8.1993), Directive 93/36/EEC (OJ L 199, 9.8.1993), Directive 92/50/EEC (OJ L 209, 24.7.1992) and Directive 93/38/EEC (OJ L 199, 9.8.1993).

<sup>142</sup> See Evaluation of Public Procurement Directives, Markt/2004/10/D, executive summary, point 9, page iv.

<sup>143</sup> See CSES study, p. 6.

Communication on PPPs<sup>144</sup> (in particular investment in infrastructure projects and innovation in public services provision) would not be achieved, as CAEs might stop using the most popular and adequate legal forms of PPP. According to CSES, 'there would be a dampening effect on innovation, with the eventual consequences of lower growth and employment'.<sup>145</sup> The overall economic impact would be suboptimal.

### 9.3.2. Option 5: Legislation — Detailed rules — Social Impact

The impact on employment and the quality of jobs is likely to be limited. The anticipated shift towards direct provision of services should not provoke direct lay-offs if all the requirements are met for applying the abovementioned EU legislation on transfers of undertakings (see the evaluation of social impacts for Basic rules). However, if the reduced use of concessions were to result in less innovation and poorer-quality services, the social impact might be negative.

### 9.3.3. Option 5: Legislation — Detailed rules — Environmental Impact

As with the social impact, the result could be slightly negative due to slower innovation.

## 9.4. OPTION 6: LEGISLATION — MIXED RULES

Our analysis of the two preceding 'extreme' options shows that neither of them is capable of fully achieving the objectives of the initiative. Although the 'Basic rules' approach appears to be a better solution, offering clear economic benefits and possible social and environmental advantages, it nevertheless falls short of fully meeting certain objectives. In particular, the objectives of improved market access and increased transparency would be better achieved if legislation included a few additional provisions on technical specifications, selection criteria, award criteria and publication of the award notice.<sup>146</sup> Such provisions could therefore be usefully added to the basic rules. On the other hand, it has been shown that detailed rules would be rejected by the market players and might result in less use of concessions<sup>147</sup>. However, there has been no substantial opposition to including ***limited rules on technical specifications, selection criteria or award notices*** in the legislative proposal. Such additional rules might apply not only to service concessions, but also to works concessions, in order to keep both types of concession under a similar legal regime.

An optimal set of rules should not only ensure better access to the market and greater legal certainty but also avoid the dissuasive effect of the detailed rules (diminished use of concessions). The choice of each concrete requirement regarding the award of concessions must be informed by a comparison of its expected benefits and possible negative consequences. The rules already

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<sup>144</sup> COM(2009) 615 final of 19.11.2009.

<sup>145</sup> See footnote 141 above, p. 172.

<sup>146</sup> This balanced approach would also reduce the risks of favouritism or corruption which are particularly high in view of the large sums normally at stake in this type of contract. As noted by the OECD, 'corruption arises in procurement when the agent of the procurer in charge of procurement is influenced to design the procurement process or alter the outcome of the process in order to favour a particular firm in exchange for bribes or other rewards. Examples might include drawing up the specifications in a way that excludes other firms from competing for the contract or cutting short the period of responses to limit the number of bidders'. see background note by Darryl Biggar, in *Procurement Markets*, OECD Journal of Competition Law and Policy, 1998.

<sup>147</sup> According to EPEC's *European PPP Report* (2009), 'the difficulties of navigating the procurement process [i.e. the public procurement standard award procedures] can discourage investors, particularly without local partners and knowledge'. See page 20.

referred to above (Basic or Detailed) will be taken into account as a basis, as these rules essentially cover the requirements which can be derived from the Treaty principles.

In addition to the provisions of the basic rules, 'mixed' rules would require provisions on ***public-public cooperation*** and on ***modifications***, which would enhance legal certainty as to, respectively, the scope of the new legislation and the provisions governing re-tendering of a modified concession. These rules would allow national authorities to implement legislation more effectively while helping companies to identify confidently valid business opportunities and organise themselves accordingly.

It would also require selection criteria to be proportionate to the subject matter of the contract and allow for the use of third parties' capacities. Such rules would ensure that the candidates' qualifications are assessed objectively. Additionally, the proposed rules would also encourage small and medium-sized firms (SMEs) to take part in the tendering process, as part of wider consortia or as subcontractors, since their capacities would be evaluated jointly by the contracting entity. At the same time, the contracting entity could also expect to be given a non-exhaustive catalogue of evidence of these capacities. This would improve the fairness and transparency of procedures, preserve flexibility and allow CAEs to require evidence considered appropriate for carrying out the contract. This flexibility is justified by the long duration and complexity of the contractual relations established within the framework of a concession. As to possible provisions on procedures and on ***award criteria***, account should be taken of the objections raised in the context of the 'Detailed rules' option, while at the same time providing for some additional guarantees of fairness in the award procedure. On the basis of the Court's case-law, it seems reasonable to require the use of objective, non-discriminatory award criteria linked to the subject matter of the contract, and these criteria would have to be published prior to the submission of offers (in decreasing order of importance or together with the respective weightings). Social and environmental criteria could be included here. By contrast, the more restrictive provisions currently applicable to public contracts, such as the compulsory use of price or MEAT criteria, would not be included. In particular, the CAEs would have the option of referring to features of the operator that are relevant to the concession's subject matter. This goes beyond the scope of MEAT.

As to the ***shape of award procedures***, guarantees related to the compulsory *ex ante* publication of criteria or minimum deadlines would substantially improve fairness. Specific requirements for safeguards during the negotiation stage could also usefully be added. For instance, the contracting entity could be obliged to disseminate the same information to all bidders and to keep a material record of the negotiations conducted. Such provisions can be expected to increase transparency, fairness and legal certainty, thereby helping achieve a number of the present initiative's objectives. Fairer competition and more consistent legislation might improve the outcome of tendering procedures without hindering the expected increase in the use of concessions. At the same time, the proposed rules would not provide for a fixed catalogue of fully-structured award procedures, as this would arguably be quite burdensome and incompatible with the need for flexibility. Indeed, referring to the standard procedures would effectively mean applying all the other rules laid down in the Public Procurement Directives — in other words, the 'Detailed rules' option.

Furthermore, the calculation of the value of a concession might sometimes be problematic, in light of the need to take into account the future – uncertain – revenue of the concessionaire. Hence the publication of the award notice could contribute to streamlining the calculation methods and to discipline those authorities who would tend to undervalue the concessions in order to avoid publication. For this reason, publication of an award notice including details of calculation of the concession value could be made compulsory for all concessions the value of which is higher than € 2 500 000.

The positive effects of mixed rules have been confirmed by the respondents to our public online consultation. Participants were asked how the provision of works and services might be affected by clear and appropriate EU rules on the procedure for awarding works and service concessions. In response, 25.9% said that the price would decrease and 31.9% that the quality would improve. (This is against 16.8% of respondents who believed that the price would increase and 18.4% who thought that the quality would deteriorate). According to 46.5% of the respondents, EU legislation on services concessions ensuring Europe-wide transparency and equal opportunities for all EU operators would help deliver the best value for money. In our targeted consultation of the business community, fair selection criteria and technical specifications were often cited as crucial features of a fair and transparent procedure, and problems concerning selection criteria were also most often cited as shortcomings of award procedures in which the respondents had participated.<sup>148</sup> Similarly, in the study realised by PwC, a scenario very similar to the 'mixed rules'<sup>149</sup> was analysed and received a positive overall appreciation both from the private<sup>150</sup> and the public sector.<sup>151</sup>

The requirements mentioned above would not be as detailed and prescriptive as the corresponding provisions of the Public Procurement Directive, but would nevertheless contain concrete obligations. They would leave substantial flexibility in the hands of the contracting entity (freedom to choose the most appropriate award procedure, substantial room for manoeuvre in choosing the award criteria or the required evidence of compliance with the selection criteria), duly taking into account the complex nature of concessions and the existing practices and legal traditions. The abovementioned provisions impose only a small burden on the stakeholders and should not substantially raise the compliance cost. Obligations such as *ex ante* publication of criteria, non-discrimination of consortia or the simultaneous dissemination of information for negotiations are sufficiently clear and self-explanatory and should therefore not cause problems. This would be a great improvement over the current situation, where the vague and general nature of the Treaty principles makes them hard to understand. In other words, the above rules will effectively reduce the margin of interpretation left to Member States on these issues.

The transposition process for the 'mixed' rules is likely to be similar to the process for transposing 'basic' rules, and no major problems should be expected. Although many of the proposed provisions are generic in nature, they always refer to concepts well known in the national legal systems and currently applicable to public contracts. At the same time, the proposed solutions are less detailed and prescriptive than the detailed rules and their implementation should not involve

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<sup>148</sup> Annex I B, p.3.

<sup>149</sup> Base line scenario: introduction of detailed rules for awarding concessions consistent with the current Commission interpretative communication on concessions under Community law (OJ C 121, 29.4.2000). The threshold amount for service concessions is €5 million, while the threshold amount for a works concession remains as at present. These rules include a clear definition of concessions, rules on advertising concessions, technical specifications, the obligation to follow a certain procurement procedure (see Options 2 and 3) and some judicial protection.

<sup>150</sup> It should be noted that the rate of approval was lower among SMEs. However, the scenario tested did not refer to certain SME-friendly provisions which are set to be a part of the Mixed Rules, such as provisions favouring the participation of consortia and rules on sub-contracting.

<sup>151</sup> In its opinion on the Commission's Communication on *Mobilising private and public investment for recovery and long term structural change: developing Public Private Partnerships*, COM(2009) 615 final of 19.11.2009, the Committee of the Regions considered that 'it is too soon for the Commission to regulate on service concessions. If the Commission decides nonetheless that service concessions are to be covered by the Community's procurement directives, it is extremely important that these rules be as simple and flexible as possible. In that case they should be guided by the provisions of the directives on public works concessions and on no account by the provisions governing procurement of services'. See recommendation n° 3, ECOS-V-005.

any major problems in Member States which already have rules or follow practices compliant with the Treaty principles. The Remedies Directive will additionally serve the purpose of efficient enforcement.

#### **9.4.1. Option 6: Legislation — Mixed rules — Economic, Social and Environmental impact**

If the market players correctly perceive the scope of proposed extra provisions, all impacts (economic, social and environmental) should be slightly improved in comparison with the effects of the Basic rules.

## 10. COMPARING THE OPTIONS

On the basis of the above analysis, it is clear that the 'Basic rules' option would achieve most of the objectives and significantly improve both legal certainty and market access. The long-term economic effects of such rules are likely to be clearly positive, while the social and environmental impacts would also be positive or at least neutral. However, they would fall short of making the award process sufficiently clear and transparent.

The 'Detailed rules' option would make for better results in terms of fair procedures and better value for money, but would also have major drawbacks. There is a risk that overregulation would discourage the use of concessions and that public authorities might increasingly turn to 'in-house' solutions instead of externalising the services. In that case, the overall impact would be negative.

By contrast, the 'Mixed rules' option capitalises on all the benefits of the 'Basic rules' approach and provides some additional advantages in terms of fairness and better value for money, as provided for by the 'Detailed rules'. Consequently, 'Mixed rules' would best achieve the objectives of the initiative, and - given their flexibility - also seem to provide the most appropriate framework for stimulating the use of concessions and therefore engagement in PPPs.

**In the light of the above analysis it is recommended that the Commission adopt Option 6 — Mixed rules — which represents an ambitious and comprehensive solution.**

In terms of scope, the legislation should cover concessions in the field of utilities (as defined currently in Directive 2004/17/EC), but the core of its provisions should not apply to some of the non-priority services (as currently defined in Directive 2004/18/EC and Directive 2004/17/EC), namely to educational, health and social services.. Nor should the envisaged legislation apply to public passenger transport services by rail and road as covered by Regulation 1370/2007 or to air transport services as covered by Regulation 1008/2008.

## 11. MONITORING AND EVALUATION

The indicators for evaluating the legislation will be as follows:

- Number of concession notices and concession award notices published in the OJ and yearly changes of this number,
- Estimated value of concessions advertised at EU level (measured as a percentage of GDP)
- Average number of bidders replying to concession tenders advertised at EU level (to measure competition)
- Number of concession contracts awarded to firms operating in a country other than the country where the concession was put out to tender (to measure cross-border activity).
- Percentage of Court rulings on concessions which deal with clarifying either the notion of concession (and the confusion between the notions of public contracts and concessions) or the procedures for the award of concession contracts (to measure to what extent legal certainty has been improved)
- Value of the concessions awarded

These indicators will be retrieved from concession notices and (in the Mixed rules scenario) from the award notices. The obligation to publish an award notice, if included in the future legal

instrument, will provide systematic insight into the number of concessions published, the estimated value of the contract and its relation with the value calculated on the basis of the winning tender, the origin of the winner and the collection of other information that is useful from the point of view of the abovementioned parameters.

#### Summary of the impacts identified

	Effects on:				
	Legal certainty	Procedural compliance with EU law	Legal protection of tenderers	Effective competition	Facilitation of Investments
<b>Basic rules</b>	+	≈	++	+	++
<b>Detailed rules</b>	+	++	++	++	--
<b>Mixed rules</b>	++	+	++	+	++

  

	Stakeholders			
	Consumers/Taxpayers	CAEs	Economic Operators	Employees
<b>Basic rules</b>	+	++	++	+ / ≈
<b>Detailed rules</b>	+ / ≈	--	--	- / ≈
<b>Mixed rules</b>	++	+	+	+ / ≈

Magnitude of impact as compared with the baseline scenario:

++ strongly positive; + positive; -- strongly negative; — negative; ≈ marginal; ? uncertain

## Annex I — Outcome of the consultations

### Annex I A

<b><i>Response statistics for PUBLIC CONSULTATION ON AN INITIATIVE ON CONCESSIONS – ONLINE QUESTIONNAIRE</i></b>			
Status : Active			
Date open :			
End date : 2010-07-09			
There are 185 responses matching your criteria of a total of 185 records in the current set of data.			
<b>Search criteria</b>			
All data requested			
<b>Meta Informations</b>			
<b>I – PROFILE</b>			
1. Are you replying: (Please choose only one answer)			
	Number of requested records (185) - All respondents	% Total n° of respondents (185)	
As a citizen/consumer	67	(36.2%)	
On behalf of an organisation/company/public authority (→ go to Question 1.c)	118	(63.8%)	
<b>A. Citizen/ Consumer</b>			
<b>1.a Gender</b>			
	Number of requested records (67) - all citizens/ consumers	% Total n° of citizens/ consumers (67)	% Total n° of respondents (185)
Male	44	(65.7%)	(23.8%)
Female	23	(34.3%)	(12.4%)
<b>1.b Your age group</b>			

	Number of requested records (67) - all citizens/ consumers	% Total n° of citizens/ consumers (67)	% Total n° of respondents (185)			
Under 18	1	(1.5%)	(0.5%)			
18-24	1	(1.5%)	(0.5%)			
25-44	48	(71.6%)	(25.9%)			
45-64	17	(25.4%)	(9.2%)			
65+	0	(0%)	(0%)			
<b>B. Organisations</b>						
<b>1.c Type of organisation</b>						
	Number of requested records (118) - all organisations/ companies/ public authorities	% Total n° of organisations (118)	% Total n° of respondents (185)			
Private company	54	(45.8%)	(29.2%)			
NRA (national regulatory authority) (→ go to question 1.f)	2	(1.7%)	(1.1%)			
Public administration (→ go to question 1.f)	32	(27.1%)	(17.3%)			
NGO (non-governmental organisation) (→ go to question 1.e)	11	(9.3%)	(5.9%)			
Trade union (→ go to question 1.e)	1	(0.8%)	(0.5%)			
Professional association (→ go to question 1.e)	18	(15.3%)	(9.7%)			
<b>- Companies</b>						
<b>1.d Number of employees in your organisation</b>						
	Number of requested records (54 companies)	% Total n° of companies (54)	% Total n° of organisations (118)			
Self-employed	1	(1.9%)	(0.8%)			
1-9	2	(3.7%)	(1.7%)			
10-49	10	(18.5%)	(8.5%)			
50-249	9	(16.7%)	(7.6%)			
250-499	5	(9.3%)	(4.2%)			
500+	27	(50%)	(22.9%)	54		
<b>1.e Which sector(s) do you operate in/do you represent?</b>						

	Number of records (119) - 54 companies invited to select <b>one or more</b> sectors	% Total sectors recorded (119)			
Water distribution	22	18,5%			
Waste water and sewage processing	11	9,2%			
Waste treatment	6	5,0%			
Energy or heating services	18	15,1%			
Transport (railway, tramway, bus, automated systems, cable)	15	12,6%			
Port services	2	1,7%			
Airport services	2	1,7%			
Postal services	0	0,0%			
Education (administration of schools, specialised education, training or catering)	3	2,5%			
Health services	3	2,5%			
Social services (nurseries, employment coaching, care of the elderly)	4	3,4%			
Motorway operation	6	5,0%			
Sports and leisure facilities (administration of sports halls, library services)	4	3,4%			
Catering services	2	1,7%			
Car parks	5	4,2%			
Judiciary systems (administration of courts or prisons)	1	0,8%			
Research and laboratory services	3	2,5%			
Other (please specify)	12	10,1%			119

#### 1.f Scope of activity

	Number of requested records (54 companies)	% Total n° of companies (54)	% Total n° of organisations (118)	
Local/Regional	15	(27.8%)	(12.7%)	
National	18	(33.3%)	(15.3%)	
European	9	(16.7%)	(7.6%)	
World	12	(22.2%)	(10.2%)	
<b>- National Regulatory Authorities (NRA)</b>				

#### 1.f Scope of activity

	Number of requested records (2 NRA)	% Total n° of NRA (2)	% Total n° of organisations (118)	
Local/Regional	1	(50%)	(0.8%)	
National	1	(50%)	(0.8%)	

European	0	(0%)	(0%)		
World	0	(0%)	(0%)	2	
<b>- Public administrations</b>					
<b>1.f Scope of activity</b>					
	Number of requested records (32 public administrations)	% Total n° of public administration s (32)	% Total n° of organisations (118)		
Local/Regional	17	(53.1%)	(14.4%)		
National	12	(37.5%)	(10.2%)		
European	1	(3.1%)	(0.8%)		
World	2	(6.2%)	(1.7%)	32	
<b>- NGO</b>					
<b>1.e Which sector(s) do you operate in/do you represent?</b>					
	Number of records (11) - 11 NGOs invited to select <b>one or more</b> sectors	% Total sectors recorded (11)			
Water distribution	0	0,0%			
Waste water and sewage processing	0	0,0%			
Waste treatment	0	0,0%			
Energy or heating services	0	0,0%			
Transport (railway, tramway, bus, automated systems, cable)	1	9,1%			
Port services	3	27,3%			
Airport services	0	0,0%			
Postal services	0	0,0%			
Education (administration of schools, specialised education, training or catering)	3	27,3%			
Health services	1	9,1%			
Social services (nurseries, employment coaching, care of the elderly)	1	9,1%			
Motorway operation	0	0,0%			
Sports and leisure facilities (administration of sports halls, library services)	0	0,0%			
Catering services	0	0,0%			
Car parks	0	0,0%			
Judiciary systems (administration of courts or prisons)	0	0,0%			
Research and laboratory services	0	0,0%			
<b>Other (please specify)</b>	2	18,2%		11	

<b>1.f Scope of activity</b>				
	Number of requested records (11 NGOs)	% Total n° of NGOs (11)	% Total n° of organisations (118)	
Local/Regional	2	(18.2%)	(1.7%)	
National	6	(54.5%)	(5.1%)	
European	0	(0%)	(0%)	
World	3	(27.3%)	(2.5%)	
<b>- Trade Unions</b>				
<b>1.e Which sector(s) do you operate in/do you represent?</b>				
	Number of records (1) - 1 trade union invited to select <b>one or more</b> sectors	% Total sectors recorded (1)		
Water distribution	0	0%		
Waste water and sewage processing	0	0%		
Waste treatment	0	0%		
Energy or heating services	0	0%		
Transport (railway, tramway, bus, automated systems, cable)	0	0%		
Port services	0	0%		
Airport services	0	0%		
Postal services	0	0%		
Education (administration of schools, specialised education, training or catering)	0	0%		
Health services	0	0%		
Social services (nurseries, employment coaching, care of the elderly)	0	0%		
Motorway operation	0	0%		
Sports and leisure facilities (administration of sports halls, library services)	0	0%		
Catering services	0	0%		
Car parks	0	0%		
Judiciary systems (administration of courts or prisons)	0	0%		
Research and laboratory services	0	0%		
Other (please specify)	1	(100%)		
<b>1.f Scope of activity</b>				
	Number of requested records (1 trade union)	% Total n° of trade union (1)	% Total n° of organisations (118)	

Local/Regional	0	(0%)	(0%)		
National	1	(100%)	(0.8%)		
European	0	(0%)	(0%)		
World	0	(0%)	(0%)		
 - Professional associations					
 1.e Which sector(s) do you operate in/do you represent?					
	Number of records (52) - 18 professional associations invited to select <b>one or more</b> sectors	% Total sectors recorded (52)			
Water distribution	7	13,5%			
Waste water and sewage processing	7	13,5%			
Waste treatment	6	11,5%			
Energy or heating services	5	9,6%			
Transport (railway, tramway, bus, automated systems, cable)	5	9,6%			
Port services	3	5,8%			
Airport services	2	3,8%			
Postal services	0	0,0%			
Education (administration of schools, specialised education, training or catering)	1	1,9%			
Health services	1	1,9%			
Social services (nurseries, employment coaching, care of the elderly)	1	1,9%			
Motorway operation	2	3,8%			
Sports and leisure facilities (administration of sports halls, library services)	1	1,9%			
Catering services	1	1,9%			
Car parks	3	5,8%			
Judiciary systems (administration of courts or prisons)	0	0,0%			
Research and laboratory services	0	0,0%			
Other (please specify)	7	13,5%			52
 1.f Scope of activity					
	Number of requested records (18 professional associations)	% Total n° of professional associations (18)	% Total n° of organisations (118)		
Local/Regional	3	(16.7%)	(2.5%)		
National	10	(55.6%)	(8.5%)		

European World	3 2	(16.7%) (11.1%)	(2.5%) (1.7%)			

## 2. Country of residence or where your organisation/company is based

	Number of requested records (185) - All respondents	% Total n° of respondents (185)				
Austria	4	(2.2%)				
Belgium	5	(2.7%)				
Bulgaria	13	(7%)				
Cyprus	0	(0%)				
Czech Republic	4	(2.2%)				
Germany	53	(28.6%)				
Denmark	1	(0.5%)				
Estonia	0	(0%)				
Greece	1	(0.5%)				
Spain	7	(3.8%)				
Finland	0	(0%)				
France	16	(8.6%)				
Hungary	1	(0.5%)				
Ireland	2	(1.1%)				
Italy	14	(7.6%)				
Lithuania	2	(1.1%)				
Luxemburg	1	(0.5%)				
Latvia	0	(0%)				
Malta	0	(0%)				
Netherlands	2	(1.1%)				
Poland	13	(7%)				
Portugal	17	(9.2%)				
Romania	11	(5.9%)				
Sweden	2	(1.1%)				
Slovenia	0	(0%)				
Slovakia	1	(0.5%)				
United Kingdom	13	(7%)				
Iceland	1	(0.5%)				
Lichtenstein	0	(0%)				
Norway	1	(0.5%)				
Switzerland	0	(0%)				
Other	0	(0%)				185

## II – KNOWLEDGE OF AND EXPERIENCE WITH CONCESSIONS

3. Which of the following statements about public contracts and concessions is correct?					
	Number of requested records (185) - All respondents	% Total n° of respondents (185)			

In concessions, responsibility for exploitation of works/services is transferred from the public authority to the private operator	160	(86.5%)			
In concessions, the concession-holder always breaks even on the investment made	4	(2.2%)			
In concessions, the public authority never pays for the works/services provided	8	(4.3%)			
In public contracts, only the public authority pays for the works/services provided	7	(3.8%)			
Don't know	6	(3.2%)		185	

4. Which of the sentences below correctly describes the present EU legal situation?

	Number of requested records (185) - All respondents	% Total n° of respondents (185)		
Works and services concessions are regulated only by the principles of transparency and equal treatment in the Treaty on the Functioning of the European Union	41	(22.2%)		
Works and services concessions are regulated by some of the rules in the Directive on coordination of procedures for the award of public contracts	20	(10.8%)		
Works concessions are regulated by some of the rules in the Directive on coordination of procedures for the award of public contracts and services concessions by the general principles in the Treaty on the Functioning of the European Union	106	(57.3%)		
Services concessions are not subject to EU law	8	(4.3%)		
Don't know	10	(5.4%)		185

5. Please indicate the sectors in which you have heard of concession agreements in your Member State.

	Number of records (1144) - 185 respondents invited to select <b>one or more</b> sectors	% Total sectors recorded (1144)		
Water distribution	124	10,8%		
Waste water and sewage processing	97	8,5%		
Waste treatment	87	7,6%		

Energy or heating services	85	7,4%			
Transport (railway, tramway, bus, automated systems, cable)	122	10,7%			
Port services	72	6,3%			
Airport services	81	7,1%			
Postal services	28	2,4%			
Education (administration of schools, specialised education, training or catering)	36	3,1%			
Health services	43	3,8%			
Social services (nurseries, employment coaching, care of the elderly)	35	3,1%			
Motorway operation	97	8,5%			
Sports and leisure facilities (administration of sports halls, library services)	50	4,4%			
Catering services	39	3,4%			
Car parks	88	7,7%			
Judiciary systems (administration of courts or prisons)	18	1,6%			
Research and laboratory services	13	1,1%			
Other (please specify)	26	2,3%			
Don't know	3	0,3%			1144

6. Are any works or services concession-holders from other States active in your area/region?

	Number of requested records (185) - All respondents	% Total n° of respondents (185)	
Yes	98	(53%)	
No	23	(12.4%)	
Don't know	64	(34.6%)	185

6bis. Please indicate the State(s) of origin of the concession-holder referred to above

	Number of records (229) - Those who answered 'Yes' to Q6 (98) were invited to select <b>one or more</b> country/ies	% Total n° of service concession-holders recorded (229)	
Austria	6	2,6%	
Belgium	5	2,2%	
Bulgaria	1	0,4%	
Cyprus	0	0,0%	
Czech Republic	3	1,3%	
Germany	26	11,4%	
Denmark	5	2,2%	

Estonia	1	0,4%		
Greece	2	0,9%		
Spain	25	10,9%		
Finland	1	0,4%		
France	60	26,2%		
Hungary	2	0,9%		
Ireland	2	0,9%		
Italy	11	4,8%		
Lithuania	1	0,4%		
Luxemburg	3	1,3%		
Latvia	1	0,4%		
Malta	1	0,4%		
Netherlands	11	4,8%		
Poland	6	2,6%		
Portugal	7	3,1%		
Romania	2	0,9%		
Sweden	6	2,6%		
Slovenia	1	0,4%		
Slovakia	2	0,9%		
United Kingdom	23	10,0%		
Iceland	1	0,4%		
Lichtenstein	1	0,4%		
Norway	1	0,4%		
Switzerland	3	1,3%		
Other (non-EEA State(s), please specify)	9	3,9%		229

6ter. Please indicate the sector of activity of the concession-holder referred to above

	Number of records (313) - Those who answered 'Yes' to Q6 (98) were invited to select <b>one or more</b> sector(s)	% Total sectors recorded (313)
Water distribution	62	19,8%
Waste water and sewage processing	50	16,0%
Waste treatment	29	9,3%
Energy or heating services	33	10,5%
Transport (railway, tramway, bus, automated systems, cable)	37	11,8%
Port services	12	3,8%
Airport services	13	4,2%
Postal services	3	1,0%
Education (administration of schools, specialised education, training or catering)	5	1,6%
Health services	7	2,2%
Social services (nurseries, employment coaching, care of the	4	1,3%

elderly)				
Motorway operation	23	7,3%		
Sports and leisure facilities (administration of sports halls, library services)	5	1,6%		
Catering services	5	1,6%		
Car parks	14	4,5%		
Judiciary systems (administration of courts or prisons)	4	1,3%		
Research and laboratory services	3	1,0%		
Other (please specify)	4	1,3%		313

7. What is your experience with concessions?

	Number of requested records (185) - All respondents	% Total n° of respondents (185)	
I am a user of concession services (*)	32	(17.3%)	
I work for a company which has been granted a concession	36	(19.5%)	
My business holds or has applied for a concession	15	(8.1%)	
I represent an entity awarding concessions (*)	15	(8.1%)	
I deal with concessions regulations (*)	33	(17.8%)	
I represent labour interests in connection with concessions (*)	2	(1.1%)	
I have no experience with concessions (**)	39	(21.1%)	
Other (please specify) (*)	13	(7%)	185

8. Please indicate the sector in which you have most experience in dealing with services concession in your Member State.

	Number of requested records (95) - those who answered by (*) to Q 7	% Total sectors recorded (95)	
Water distribution	21	22,11%	
Waste water and sewage processing	7	7,37%	
Waste treatment	7	7,37%	
Energy or heating services	5	5,26%	
Transport (railway, tramway, bus, automated systems, cable)	15	15,79%	
Port services	2	2,11%	
Airport services	2	2,11%	
Postal services	0	0,00%	

Education (administration of schools, specialised education, training or catering)	3	3,16%			
Health services	1	1,05%			
Social services (nurseries, employment coaching, care of the elderly)	3	3,16%			
Motorway operation	10	10,53%			
Sports and leisure facilities (administration of sports halls, library services)	3	3,16%			
Catering services	2	2,11%			
Car parks	5	5,26%			
Judiciary systems (administration of courts or prisons)	0	0,00%			
Research and laboratory services	0	0,00%			
Other (please specify)	8	8,42%			94

8bis. Please give your assessment of the services provided by concession-holders in the sector you have chosen in the preceding question.

	Number of requested records (95) - those who answered by (*) to Q 7	% Total requested records(95)		
Both the price and the quality of the service are acceptable	55,00	57,89%		
The quality of the service is insufficient but the price is acceptable	6,00	6,32%		
The quality of the service is good but the price is too high	10,00	10,53%		
I am dissatisfied with both the price and the quality of the service	7,00	7,37%		
Don't know	17,00	17,89%		95

8ter. In your opinion what could be the main reasons for the low quality or high price of the services provided by concession-holders in the chosen sector? Please rank them in decreasing order of importance.

Requested records (23) - those who are dissatisfied with either the quality, the price or both (see answers to Q 8bis)	Very important % Total records (23)	Important % Total records (23)	Little important % Total records (23)	Not important % Total records (23)	Don't know % Total records (23)	
Insufficient supervision of the concession-holder's activities by the public authorities	43,48%	17,39%	17,39%	17,39%	4,35%	
Lack of investment in infrastructure by the concession-holders	30,43%	17,39%	39,13%	13,04%	0,00%	
Absence of competition	34,78%	21,74%	8,70%	34,78%	0,00%	

Other (Please specify)	21,74%	0,00%	0,00%	8,70%	13,04%	

9. Please indicate a second sector in which you also have experience in dealing with services concession in your Member State.

	Number of requested records	% Requested records(95) - those who answered by (*) to Q 7	% of total number records(185)	
Water distribution	7	9,33%	3,78%	
Waste water and sewage processing	12	16,00%	6,49%	
Waste treatment	5	6,67%	2,70%	
Energy or heating services	3	4,00%	1,62%	
Transport (railway, tramway, bus, automated systems, cable)	11	14,67%	5,95%	
Port services	2	2,67%	1,08%	
Airport services	4	5,33%	2,16%	
Postal services	1	1,33%	0,54%	
Education (administration of schools, specialised education, training or catering)	1	1,33%	0,54%	
Health services	1	1,33%	0,54%	
Social services (nurseries, employment coaching, care of the elderly)	1	1,33%	0,54%	
Motorway operation	11	14,67%	5,95%	
Sports and leisure facilities (administration of sports halls, library services)	2	2,67%	1,08%	
Catering services	2	2,67%	1,08%	
Car parks	7	9,33%	3,78%	
Judiciary systems (administration of courts or prisons)	0	0,00%	0,00%	
Research and laboratory services	0	0,00%	0,00%	
Other (please specify)	5	6,67%	2,70%	75

9bis. Please give your assessment of the services provided by concession-holders in the sector you have chosen in the preceding question.

	Number of requested records	% Requested records(81)	% of total number records(185)	
Both the price and the quality of the service are acceptable	45	55,56%	24,32%	
The quality of the service is insufficient but the price is acceptable	4	4,94%	2,16%	
The quality of the service is good but the price is too high	5	6,17%	2,70%	
I am dissatisfied with both the price and the quality of the service	13	16,05%	7,03%	
Don't know	14	17,28%	7,57%	81

9ter. In your opinion what could be the main reasons for the low quality or high price of the services provided by concession-holders in the chosen sector? Please rank them in decreasing order of importance.					
Requested records (22) - those who are dissatisfied with either the quality, the price or both (see answers to Q 9bis)	Very important % requested (22)	Important % requested (22)	Little important % requested (22)	Not important % requested (22)	Don't know % requested (22)
Insufficient supervision of the concession-holder's activities by the public authorities	54,55%	22,73%	9,09%	13,64%	0,00%
Lack of investment in infrastructure by the concession-holders	50,00%	13,64%	22,73%	9,09%	4,55%
Absence of competition	45,45%	18,18%	22,73%	13,64%	0,00%
Other (Please specify)	18,18%	0,00%	0,00%	4,55%	13,64%
10. Do you think that opting for a concession rather than direct provision by public authorities could help to secure/speed up new investment in public infrastructure/services?					
	Number of records (105) - in principle, those who answered by (*) to Q 7	% total records(105)			
Yes	57	54,3%			
No	34	32,4%			
Don't know	14	13,3%			105
10bis. Please choose one or more of the following reasons:					
	Number of requested records (57) - Those who answered 'Yes' to Q 10	% Requested records(113)	% of total number records(185)		
Concessions provide an additional source of capital and relieve immediate pressure on public finances by spreading the cost of financing infrastructure over the lifetime of the asset	42	37,17%	(22.7%)		
Better risk-sharing between the public and private sectors permits more efficient risk management and reduces the overall cost of projects	29	25,66%	(15.7%)		
The private sector has a better track record of on-time and on-budget delivery of investments than the public sector	25	22,12%	(13.5%)		

The private sector is in a better position to make investments to boost sustainability and innovation to meet the socio-economic challenges facing society.	17	15,04%	(9.2%)		113		
11. Imagine your local government is awarding a services concession for waste management in your district. In your view, to what extent are the following aspects of the service important (please rank them from 1 (very important) to 6 (not important))?							
% Requested records (134) - those who answered by (*) or (**) to Q 7	1 (Very important)	2	3	4	5	6 (Not important)	Don't know/ No answer
Price	38,81%	34,33%	17,91%	2,99%	0,75%	2,24%	2,99%
Quality	70,15%	21,64%	4,48%	0,75%	0,75%	0,75%	1,49%
Continuity in provision of services	49,25%	24,63%	10,45%	5,22%	2,99%	2,99%	4,48%
Origin of the provider	10,45%	8,21%	10,45%	9,70%	8,96%	45,52%	6,72%
Creating local employment	23,88%	29,10%	19,40%	9,70%	5,97%	5,97%	5,97%
Meeting Environmental standards	53,73%	20,90%	11,19%	6,72%	2,99%	0,75%	3,73%

### III – ASSESSMENT OF PROCEDURES FOR AWARDING CONCESSIONS

12. Have you heard of service concessions being awarded in your country or in other EU Member States without any publication/transparency?

	Number of requested records	% Requested records(185)	% of total number records(185)	
No	116	(62.7%)	(62.7%)	
Yes	69	(37.3%)	(37.3%)	185

12bis. Please indicate the sector(s) concerned:

	Number of requested records	% Requested records(69)	% of total number records(185)	
Water distribution	27	(39.1%)	(14.6%)	
Waste water and sewage processing	15	(21.7%)	(8.1%)	
Waste treatment	28	(40.6%)	(15.1%)	
Energy or heating services	14	(20.3%)	(7.6%)	
Transport (railway, tramway, bus, automated systems, cable)	31	(44.9%)	(16.8%)	
Port services	8	(11.6%)	(4.3%)	
Airport services	10	(14.5%)	(5.4%)	
Postal services	4	(5.8%)	(2.2%)	

Education (administration of schools, specialised education, training or catering)	6	(8.7%)	(3.2%)			
Health services	8	(11.6%)	(4.3%)			
Social services (nurseries, employment coaching, care of the elderly)	6	(8.7%)	(3.2%)			
Motorway operation	13	(18.8%)	(7%)			
Sports and leisure facilities (administration of sports halls, library services)	8	(11.6%)	(4.3%)			
Catering services	5	(7.2%)	(2.7%)			
Car parks	15	(21.7%)	(8.1%)			
Judiciary systems (administration of courts or prisons)	1	(1.4%)	(0.5%)			
Research and laboratory services	1	(1.4%)	(0.5%)			
Other (please specify)	1	(1.4%)	(0.5%)	201		

12ter. If possible, could you also indicate the value or (if many) the average value of the contract(s) concerned?

	Number of requested records	% Requested records(69)	% of total number records(185)	
< € 200 000	2	(2.9%)	(1.1%)	
€ 200 000 – € 799 999	2	(2.9%)	(1.1%)	
€ 800 000 – € 2 499 999	1	(1.4%)	(0.5%)	
€ 2 500 000 – € 4 999 999	0	(0%)	(0%)	
≥ € 5 000 000	22	(31.9%)	(11.9%)	
Don't know	42	(60.9%)	(22.7%)	69

13. At what level are the services concessions normally published in your country?

	Number of requested records	% Requested records(185)	% of total number records(185)	
Local	22	(11.9%)	(11.9%)	
National	78	(42.2%)	(42.2%)	
International	64	(34.6%)	(34.6%)	
They are never published	5	(2.7%)	(2.7%)	
Don't know	16	(8.6%)	(8.6%)	185

14. Have you heard of any public contracts which have been awarded as services concessions or works concessions in your country or in other EU Member States?

	Number of requested records	% Requested records(185)	% of total number records(185)	
No	50	(27%)	(27%)	
Yes	85	(45.9%)	(45.9%)	
Don't know: it is difficult to distinguish between public contracts and concessions	50	(27%)	(27%)	185

14bis. Please indicate the sector(s) concerned:				
	Number of requested records	% Requested records(85)	% of total number records(185)	
Water distribution	46	(54.1%)	(24.9%)	
Waste water and sewage processing	39	(45.9%)	(21.1%)	
Waste treatment	38	(44.7%)	(20.5%)	
Energy or heating services	36	(42.4%)	(19.5%)	
Transport (railway, tramway, bus, automated systems, cable)	47	(55.3%)	(25.4%)	
Port services	20	(23.5%)	(10.8%)	
Airport services	27	(31.8%)	(14.6%)	
Postal services	12	(14.1%)	(6.5%)	
Education (administration of schools, specialised education, training or catering)	11	(12.9%)	(5.9%)	
Health services	21	(24.7%)	(11.4%)	
Social services (nurseries, employment coaching, care of the elderly)	8	(9.4%)	(4.3%)	
Motorway operation	40	(47.1%)	(21.6%)	
Sports and leisure facilities (administration of sports halls, library services)	13	(15.3%)	(7%)	
Catering services	17	(20%)	(9.2%)	
Car parks	30	(35.3%)	(16.2%)	
Judiciary systems (administration of courts or prisons)	8	(9.4%)	(4.3%)	
Research and laboratory services	4	(4.7%)	(2.2%)	
Other (please specify)	3	(3.5%)	(1.6%)	420

14ter. If possible, could you also indicate the value or (if many) the average value of the contract(s) concerned?

	Number of requested records	% Requested records(85)	% of total number records(185)	
< € 200 000	3	(3.5%)	(1.6%)	
€ 200 000 – € 799 999	2	(2.4%)	(1.1%)	
€ 800 000 – € 2 499 999	5	(5.9%)	(2.7%)	
€ 2 500 000 – € 4 999 999	3	(3.5%)	(1.6%)	
≥ € 5 000 000	40	(47.1%)	(21.6%)	
Don't know	32	(37.6%)	(17.3%)	85

15. In your view, do the national rules/practices on publication of service concessions in your country ensure that sufficient information is provided to allow all interested EU economic operators to participate in the award procedure?

	Number of requested records	% Requested records(185)	% of total number records(185)	

Yes	130	(70.3%)	(70.3%)			
No	31	(16.8%)	(16.8%)			
Don't know	24	(13%)	(13%)		185	
16. In your view, are the existing national rules/practices in your country adequate to ensure equal treatment of EU economic operators in procedures to award works concessions and services concessions?						
(a) Services concessions						
	Number of requested records	% Requested records(185)	% of total number records(185)			
Yes	135	(73%)	(73%)			
No	34	(18.4%)	(18.4%)			
Don't know	16	(8.6%)	(8.6%)		185	
(b) Works concessions						
	Number of requested records	% Requested records(185)	% of total number records(185)			
Yes	144	(77.8%)	(77.8%)			
No	20	(10.8%)	(10.8%)			
Don't know	21	(11.4%)	(11.4%)		185	
17. Do you believe that diverging national legal provisions and practices governing award of works concessions and services concessions are an obstacle to cross-border economic activity?						
	Number of requested records	% Requested records(185)	% of total number records(185)			
No	89	(48.1%)	(48.1%)			
Yes	60	(32.4%)	(32.4%)			
Don't know	36	(19.5%)	(19.5%)		185	
18. In your view, do national rules in your country offer effective remedies to all parties wishing to challenge decisions awarding service concessions?						
	Number of requested records	% Requested records(185)	% of total number records(185)			
No	46	(24.9%)	(24.9%)			
Yes	104	(56.2%)	(56.2%)			
Don't know	35	(18.9%)	(18.9%)		185	
<b>IV – IMPACT OF POSSIBLE EU LEGISLATION ON CONCESSIONS</b>						
19. Do you agree that publication of notices on the intention to award services concessions in the Official Journal of the European Union would help to increase transparency?						

	Number of requested records	% Requested records(185)	% of total number records(185)			
No	60	(32.4%)	(32.4%)			
Yes	114	(61.6%)	(61.6%)			
Don't know	11	(5.9%)	(5.9%)		185	

20. What effect could EU-wide competition for services concessions have on the quality and price of services you use?

A) On price:

	Number of requested records	% Requested records(185)	% of total number records(185)		
None	72	(38.9%)	(38.9%)		
Decrease	60	(32.4%)	(32.4%)		
Increase	29	(15.7%)	(15.7%)		
Don't know	22	(11.9%)	(11.9%)		
Other	2	(1.1%)	(1.1%)		185

B) On quality:

	Number of requested records	% Requested records(185)	% of total number records(185)		
None	41	(22.2%)	(22.2%)		
Deteriorate	49	(26.5%)	(26.5%)		
Improve	67	(36.2%)	(36.2%)		
Don't know	26	(14.1%)	(14.1%)		
Other	2	(1.1%)	(1.1%)		185

21. What effect could clear and appropriate EU rules of procedure on the award of works and services concessions have on provision of the works/services?

A) On Price:

	Number of requested records	% Requested records(185)	% of total number records(185)		
None	64	(34.6%)	(34.6%)		
Decrease	48	(25.9%)	(25.9%)		
Increase	31	(16.8%)	(16.8%)		
Don't know	41	(22.2%)	(22.2%)		
Other	1	(0.5%)	(0.5%)		185

B) On quality:

	Number of requested records	% Requested records(185)	% of total number records(185)		
None	57	(30.8%)	(30.8%)		

Deteriorate	34	(18.4%)	(18.4%)			
Improve	59	(31.9%)	(31.9%)			
Don't know	32	(17.3%)	(17.3%)			
Other	3	(1.6%)	(1.6%)			185

22. Overall, who will benefit most from a greater competition for the award of services concessions ?  
Please rank in decreasing order of importance from 1 to 6):

% Requested records (185)	1 (Very important)	2	3	4	5	6 (Not important)	Don't know/ No answer
Users	31,89%	17,84%	8,65%	9,19%	4,86%	22,16%	5,41%
Companies	19,46%	22,70%	20,00%	11,89%	9,73%	8,11%	8,11%
Employees	3,78%	9,73%	20,54%	20,00%	14,05%	27,03%	4,86%
Taxpayers	16,22%	18,92%	12,97%	8,65%	21,08%	16,22%	5,95%
Public Authorities	21,08%	20,00%	17,84%	10,27%	13,51%	11,35%	5,95%
Other	4,86%	0,54%	1,62%	0,00%	0,54%	3,78%	13,51%

23. Greater competition for award of services concessions will allow greater and speedier delivery of public investment.

	Number of requested records (185)	% Requested records(185)	% of total number records(185)	
Strongly agree	17	(9.2%)	(9.2%)	
Agree	73	(39.5%)	(39.5%)	
Disagree	47	(25.4%)	(25.4%)	
Strongly disagree	35	(18.9%)	(18.9%)	
Don't know	13	(7%)	(7%)	185

24. EU legislation on services concessions ensuring Europe-wide transparency and equal opportunities for all EU operators would improve delivery of the best value-for-money.

	Number of requested records (185)	% Requested records(185)	% of total number records(185)	
Strongly agree	23	(12.4%)	(12.4%)	
Agree	63	(34.1%)	(34.1%)	
Disagree	27	(14.6%)	(14.6%)	
Strongly disagree	38	(20.5%)	(20.5%)	
Don't know	34	(18.4%)	(18.4%)	185

25. EU legislation on services concessions ensuring Europe-wide transparency and equal opportunities for all EU operators would encourage public authorities to make greater use of concessions to provide public services.

	Number of requested records (185)	% Requested records(185)	% of total number records(185)	
Strongly agree	16	(8.6%)	(8.6%)	
Agree	72	(38.9%)	(38.9%)	
Disagree	37	(20%)	(20%)	

Strongly disagree	36	(19.5%)	(19.5%)			
Don't know	24	(13%)	(13%)		185	

26. In your opinion, would opting for concessions to provide public services rather than direct provision of the services by public authorities have any impact on employment in the sectors concerned?

	Number of requested records (185)	% Requested records(185)	% of total number records(185)			
Yes	95	(51.4%)	(51.4%)			
No	44	(23.8%)	(23.8%)			
Don't know	46	(24.9%)	(24.9%)		185	

26bis. What impact on employment would you expect?

	Number of requested records (95) - those who answered 'yes' to Q 26	% Requested records(95)	% of total number records(185)			
The number of local jobs is likely to increase	39	(41.1%)	(21.1%)			
The number of local jobs is likely to decrease	49	(51.6%)	(26.5%)			
Don't know	7	(7.4%)	(3.8%)		95	

26ter. What impact on working conditions would you expect?

	Number of requested records (95) - those who answered 'yes' to Q 26	% Requested records(95)	% of total number records(185)			
The conditions of local employment are likely to improve	53	(55.8%)	(28.6%)			
The conditions of local employment are likely to deteriorate	30	(31.6%)	(16.2%)			
Don't know	12	(12.6%)	(6.5%)		95	

27. In your view, would greater competition for award of services concessions have any impact on employment in the sectors concerned?

	Number of requested records	% Requested records(185)	% of total number records(185)			
Yes	89	(48.1%)	(48.1%)			
No	37	(20%)	(20%)			
Don't know	59	(31.9%)	(31.9%)		185	

27bis. What impact on employment would you expect?

	Number of requested records (89) - those who answered 'yes' to Q 27	% Requested records(89)	% of total number records(185)			
The number of local jobs is likely to increase	34	(38.2%)	(18.4%)			
The number of local jobs is likely to decrease	51	(57.3%)	(27.6%)			
Don't know	4	(4.5%)	(2.2%)		89	
<b>27ter. What impact on working conditions would you expect?</b>						
	Number of requested records (89) - those who answered 'yes' to Q 27	% Requested records(89)	% of total number records(185)			
The conditions of local employment are likely to improve	45	(50.6%)	(24.3%)			
The conditions of local employment are likely to deteriorate	34	(38.2%)	(18.4%)			
Don't know	10	(11.2%)	(5.4%)		89	
<b>28. Many services of general interest (this means 'market and non-market services which the public authorities class as being of general interest and subject to specific public-service obligations', see the Green Paper on services of general interest (COM(2003) 270 final, paragraph 16) are presently provided by means of a concession. Do you expect greater competition for award of concessions to have any impact on access to these services?</b>						
	Number of requested records	% Requested records(185)	% of total number records(185)			
Yes	69	(37.3%)	(37.3%)			
No	70	(37.8%)	(37.8%)			
Don't know	46	(24.9%)	(24.9%)		185	
<b>28bis. What impact would you expect?</b>						
	Number of requested records	% Requested records(69)	% of total number records(185)			
Accessibility will improve	58	(84.1%)	(31.4%)			
Accessibility will deteriorate	8	(11.6%)	(4.3%)			
Don't know	3	(4.3%)	(1.6%)		69	
<b>29. What effect could clear and detailed EU rules on award of concessions have on provision of social services (such as education or health services)?</b>						
On price:						

	Number of requested records	% Requested records(185)	% of total number records(185)			
None	42	(22.7%)	(22.7%)			
Decrease	48	(25.9%)	(25.9%)			
Increase	33	(17.8%)	(17.8%)			
Don't know	62	(33.5%)	(33.5%)		185	
<b>On quality:</b>						
	Number of requested records	% Requested records(185)	% of total number records(185)			
None	37	(20%)	(20%)			
Deterioration	36	(19.5%)	(19.5%)			
Improvement	59	(31.9%)	(31.9%)			
Don't know	53	(28.6%)	(28.6%)		185	
<b>On accessibility:</b>						
	Number of requested records	% Requested records(185)	% of total number records(185)			
None	39	(21.1%)	(21.1%)			
Deterioration	26	(14.1%)	(14.1%)			
Improvement	62	(33.5%)	(33.5%)			
Don't know	58	(31.4%)	(31.4%)		185	

## Annex I B

### **Report on the targeted public consultation on concessions held between 5 August and 30 September 2010**

Between 5 August and 30 September 2010 the Commission services run a consultation addressed to specific groups of stakeholders – the business community, the contracting entities and the social partners. In essence, it aimed to learn about the experience of these groups on concessions, to hear their views on the operation of the present rules and finally to gather suggestions for their future improvement. The replies provided will be published on the Commission's website at [http://ec.europa.eu/internal\\_market/consultations/2010/concessions\\_en.htm](http://ec.europa.eu/internal_market/consultations/2010/concessions_en.htm). The objective of this report is to provide the outcome for each of these consultations.

#### A) The consultation of the business community

It is noted that 62 stakeholders provided their input to this consultation. In particular, 14 came from a private company, 3 from a mixed capital company, 11 from a public company and 34 provided their reply on behalf of the industry or a professional association. Only 7 replies came from SME's.

The sectors most represented were transport, water distribution and waste water and sewage processing, waste treatment and energy or heating services.

Replies originated from participants located in 20 different Member States. Germany, France and Belgium were, by far, the Member States submitting the highest number of replies (45,1%, 33,8% and 19,3% of replies respectively).

Out of those 62 respondents who make up this stakeholders group, 36 replied to the question on whether their company currently holds a concession, with 30 (83%) of those confirming, while the other 6 (17%) indicating the contrary. In addition, 33 respondents answered to the question on whether they have participated in a tendering procedure in a Member State other than the one they are established. Out of those, 15 (46%) answered positively and 18 negatively (54%). These figures show that a substantial part of the respondents have first hand knowledge of concessions and of tendering procedures.

Concessions by number and value were considered to have a substantial economic importance in sectors such as energy, transport and port services in BE, DE, DK, EL, ES, FR, HU, IT, LV, NL, PL and the UK. In addition concessions also have a significant economic weight in water distribution and waste water treatment sectors, waste treatment and motorways in ES, FR and DE.

The majority of respondents considered that the case law of the CJEU on definition and award of concessions provided sufficient clarification while 19% considered otherwise. On the guidance provided by the Commission on the definition and application of the Treaty principles 48% of the respondents considered it to be insufficient.

Furthermore, 15 respondents indicated that they are aware of entry barriers to the concession markets in the Member States, while 22 indicated that they are not. Hence out of the 37 who replied to this question, a substantial proportion amounting to 40,5% indicated that entry barriers do exist.

With regard to the advertisement practices for the award of concessions, and in particular the level at which publication usually takes place, the results of the group reveal that about half of the publications merely take place at a local or regional level, while only one quarter takes place at international level.

Concerning the question on the possible taking place of direct awards, 43 respondents answered to that. 26 (60%) of those indicated that they were not aware of any such practices while 17 (40%) indicated that they were actually well aware of their existence.

In relation to the question whether the advertisement practice of service concessions is usually fair and transparent, out of the 36 respondents who answered to this, 8 (22%) indicated that it is not, while 28 respondents (78%) consider that it is. Nevertheless, these 28 constitute merely 45% of all the respondents in the group, which suggests that less than half of the group considers the advertisement practices to be fair. In addition, with regard to the question of whether the information is easily available to vigilant non-national operators, the results revealed that only in 5 Member States this was the case (BE, DE, FR, PT, SE) which corresponds to 19% of all the Member States. By contrast, for the large majority of Member States (18 – 67% thereof) the answer was negative suggesting that overall, at EU wide level, the information on concessions is not easily available to non-national operators.

Furthermore, 9 out of the 40 respondents who answered to the relevant question (23%) consider the diversity of national rules and practices to be an obstacle to the cross border provision of services. Then, 4 out of 15 (21%) consider that this generates additional costs, while 3 out of 13 (19%) consider that this generates administrative burden.

Moreover, 18 respondents (29% of the group), indicated that in the tendering procedures that they have participated in, there were also participants coming from other Member States. This constitutes evidence that there is already in place some cross border activity.

On the procedures used for the award of concessions it seems that the negotiated procedure with publication (but not necessarily the one set out in the Public Procurement Directives) is the most commonly used (28 respondents from 8 Member States). It is followed by the open procedure (6 respondents from 4 Member States) and the restricted procedure (/ respondents from 3 member States) and a *sui generis* procedure (5 respondents from 3 member States). In only one Member State, Germany, is the negotiated procedure without publication of a contract notice used (8 respondents).

With reference to the most important features of fair and transparent tender procedures, publication was considered the most important (14 replies), followed by negotiation (11 replies) and selection and award criteria (10 replies each).

In relation to the question of whether the awarding procedures in the Member States are usually fair and transparent, the replies revealed that in 9 Member States that was the case (including DE and FR), which corresponds to 33% of all the Member States. 35 respondents

in the group (62% thereof) did not answer this question. For 17 Member States, no information was received on this point.

On the key features of fair and transparent procedures missing respondents had participated the most common referred one was selection criteria (8 replies originating from DE, ES, FR, IT, PT, SE and UK). In one case, UK, the missing key feature concerned award criteria.

Concerning the average duration of services concessions the longest duration has been reported in Germany (12 respondents pointing to concessions lasting 20 years or more and 8 indicating concessions of 11 up to 10 years). In France the duration of concessions is evenly spread between concessions lasting up to 10 years and concessions of 20 years or more. Most respondents noted the positive impact of a long duration (enough to recover the initial investment) on competition for the contract and on costs. In one case (DE) the long duration was considered to have a negative impact making it difficult to enter the market.

With regard to the question concerning the effectiveness of the remedies system in the Member States, the consultation revealed a positive picture in relation to 6 Member States (including DE and FR), which corresponds to 22% of all the Member States. Only in one Member State, Germany, some respondents considered the remedies system to be ineffective.

The consultation also revealed that 38 out of the 46 respondents (82,6%) who answered to the question consider that they find it not difficult to distinguish between public contracts and concessions while 8 (17,3%) considered the opposite. In addition, 25 out of the 62 people (40%) in this stakeholders group indicated that there are indeed shortcomings with the current definition of concessions provided in EU law, while another 11 people in the group (18%) indicated that they are fine with the definition but want it to be improved.

The issue of public contracts being misattributed as concessions in order to elude detailed EU provisions has been identified by the Commission services as one of the most burning problems which have to be addressed. The consultation revealed that 3 out of 33 respondents (9%) are actually aware of the existence of this phenomenon.

On the existence of practices or market structures reducing competition between tenderers most respondents (21) were not aware of such practices/structures while 3 declared to be aware of those cases: two of collusion between established organisations in Germany and France and one of existing oligopolies in Germany.

Concerning the operation of the current rules on works concessions, the consultation revealed very positive results. In particular, with regard to the provision on mandatory publication, 20 out of 21 respondents (95%) indicated that this provides a sufficient degree of transparency and equal treatment, while 17 out of 18 (94%) consider that it provides legal clarity. Concerning the provisions on time limits and additional works, 16 respondents consider that these provide a sufficient degree of transparency and equal treatment with none considering otherwise, while 14 respondents consider that these provide legal clarity with none considering otherwise. Finally, with regard to the provision on subcontracting, 15 respondents consider that this provides a sufficient degree of transparency and equal treatment with none considering otherwise, while 13 out of 14 respondents (93%) consider that this provides legal clarity. This confirms the positive assessment made by this group of the present rules for awarding works concessions.

With regard to the question on the expected impact of new legislation providing for compulsory advertisement of service concessions at the European level, it should be pointed out that an overall negative impact is expected in only 1 Member State (DE). In another Member State (FR) no impact is expected, while with regard to another 6 Member States (ES, IT, NL, PT, SK, UK) a positive overall impact is expected.

With regard to the question on possible shifts on services directly provided by contracting authorities towards concessions-based provision of services 2 respondents considered that there would be a shift on the short term, 9 on the medium term and 3 on the long term. By contrast, only 6 respondents considered as likely the opposite shift (from concessions to direct provision of services) out of which 4 on the medium term.

Concerning the question on whether the respondents expect that such a legislative provision would result in new entrants into the market, half of those who replied to this (18 out of 36) have answered positively. Out of the 18 responding positively, 16 considered that the new entrants would be non-domestic companies, 10 domestic companies in new business areas, 13 joint ventures and 2 SME's.

Concerning the possible legislative content, the majority of those who replied to the relevant questions indicated that they are clearly in favour of compulsory publication of contract notices in the Official Journal of the EU (20 out of 37, that is 54% thereof), the possibility to directly award additional services to the original concession holder (20 out of 32, that is 63% thereof) and the obligation to announce qualification criteria (20 out of 34, that is 59% thereof).

In relation to the other possible provisions mentioned in the consultation, there appears to be no overall support in this group.

Concerning , the obligation to respect minimum deadlines, 12 out of the 32 respondents who answered this (38% thereof) indicated their support. In addition, with regard to the obligation of the concession holder to respect the principle of non-discrimination while selecting sub-contractors, 6 out of the 26 people who replied to this (23% thereof) indicated their support.

Similarly, with regard to the requirement to award a minimum of 30% of sub-contracts to third parties or to request the concession holder to specify the percentage of services to be sub-contracted, 6 out of the 31 respondents who answered this (20% thereof) indicated their support.

Concerning the application of the Remedies Directive 2007/66/EC, 11 out of the 28 respondents who answered this (40% thereof) indicated their support. Similarly, concerning the possibility to participate in a tendering procedure, in particular by relying on the standing of other entities, 11 out of the 26 people who replied to this (42% thereof) indicated their support. In relation to the possibility to restrict the award criteria to price and the economically most advantageous tender, 7 out of the 37 people who replied to this (19% thereof) indicated their support.

With regard to the provision on the non-discriminatory use of technical specifications, 12 out of the 25 respondents who answered to this (48% thereof) indicated their support. Finally, with regard to a provision limiting the choice of procedures to the ones currently available for

public contracts, 13 out of the 31 people who replied to this (42%) also indicated their support.

## B) The consultation of the contracting authorities

It is noted that 49 stakeholders from 14 different Member States provided their input to this consultation. The highest number of respondents originated from BG and DE (8 each) followed closely by the UK (7) and ES (6). 10 replies came from a state authority, 5 from a regional authority, 20 from a local authority, 4 provided their reply on behalf of an association of regional or local authorities, 1 came from a body governed by public law, 4 came from associations of bodies governed by public law and 1 from another contracting entity within the meaning of Directive 2004/17/EC. They were responsible in particular for transport (11), sports and leisure facilities (11), health services (10) waste treatment (9) energy or heating services(9) and road and motorway operation (9).

Out of the 49 respondents who make up this stakeholders group, 42 replied to the question on whether they have awarded a concession within the last 10 years, with 32 (76%) of them indicating that they actually have, while the other 10 (24%) indicating the contrary. In addition, 43 respondents who replied to the question on whether they consider awarding a concession in the future. Out of those, 32 (74%) answered positively and 11 negatively (26%). These figures show that a substantial part of the respondents have first hand knowledge of concessions and of tendering procedures and that they intend to use them in the future. The highest number of concessions awarded by this group of stakeholders referred to transport (8) road and motorway operation (7), port services (6), health services (6) and energy and heating services (6). It is interesting to note that concessions were used for the construction of an artificial lake, the operation of an Official Journal, the operation of information systems and a visa information service.

With reference to the economic importance of concessions these were considered to be unimportant in Bulgaria and somewhat important in the Czech Republic (12 contracts related to small-scale regional projects on the supply of heat and water management). By contrast, in Portugal, concessions are omnipresent in all sectors the most important being the motorway sector (investment realized of € 13288 million). In most of the States of the respondents, including Bulgaria, concessions were considered to have an increase potential.

The consultation further revealed that 12 out of the 30 respondents (40%) who replied to the question consider that they find it actually difficult to distinguish between public contracts and concessions. The main reason for this lies on lack of clarity on the types of risks to be taken into account on the definition of operating risk (10 replies) and on the amount of consideration to be paid by the contracting authority (7 replies).

In addition, 4 people in the group (8%) are completely satisfied with the definition, 13 out of the 49 people (26,5%) indicated that they are fine with the definition but want it to be improved while 2 in this stakeholders group indicated that there are shortcomings with the current definition of concessions provided in EU law.

With regard to the procedure which is usually followed for the award of service concessions and in particular with reference to the level at which publication takes place, it appears that many publications take place only at national level, while a substantial number of those does not appear to take place at the international level at all.

In relation to the question of whether in the procedures launched for the award of concessions there were any tenderers coming from other Member States, answers were provided with regard to 4 Member States. Negative answers were given for tendering procedures carried out in BG and IE, while positive for those carried out in PT and the UK. Hence for half of the Member States where input was provided, the replies confirmed the existence of cross-border tendering. In addition, concerning the question of whether the respondents have awarded a concession to a tenderer from another Member State, a negative answer was received for 3 Member States (BG, IE, UK) while there was one positive answer (PT).

Concerning the question of which are the most important reasons favouring the direct provision of a service, the most frequent reason provided (8 replies) related to the direct control of the service provision. Other grounds included, the time and effort required for local and regional authorities to familiarise themselves with the complex procurement rules (2 replies) and the lower costs usually involved (2 replies). Conversely, with regard to the question of which are the most important reasons favouring the use of concessions, the most frequent reason provided (7 replies) related to the transfer of the risk to the concession holder. Other grounds included the private funding involved (4 replies), the know-how of the private sector (4 replies) and the need to provide the service in a cost-effective manner (5 replies). Concerning the follow-up question of how in the present circumstances the above reasons will play into the future decision of the stakeholders on whether to opt for the direct provision of a service or for the award of a service concession contract, out of the 8 replies received, 3 indicated that they will opt for concessions while the remaining 5 indicated that they will opt for direct provision. This suggests that a substantial proportion of contracting authorities would in the present circumstances probably opt for the former.

In addition, with regard to the operation of the current rules on works concessions, as in the case of the business community consultation, this stakeholders' consultation also revealed very positive results. In particular, with regard to the provision on publication, 19 respondents indicated that this provides a sufficient degree of transparency and equal treatment with none considering otherwise, while 17 out of 18 (94%) consider that it provides legal clarity. Concerning the provisions on time limits, additional works and subcontracting, 17 people consider that these provide a sufficient degree of transparency and equal treatment with none considering otherwise, while 15 people out of 16 (94%) consider that these provide legal clarity. This confirms the positive assessment which has been made by this group as well, of the present rules on works concessions.

With regard to the question on the expected impact of new legislation providing for compulsory advertisement of service concessions at the European level, it should be pointed out that as in the case of the business community consultation, an overall negative impact is expected in only 1 Member State (DE). By contrast, it is noted that with regard to another 6 Member States (BG, ES, IE, PT, SK, UK) a positive overall impact is expected.

Concerning the question on whether the respondents expect that such a legislative provision would result in new entrants into the market, 69% of those who replied to this question (18 out of 26) have answered positively. This suggests that as in the case of the business community, the contracting authorities group is also quite optimistic that such a legislative provision will result in the opening of the concessions market to competition.

In particular, the majority of those who replied to the questions on the possible legislative content indicated that they are clearly in favour of the following: the compulsory publication of contract notices in the Official Journal of the EU (18 out of 32, that is 56% thereof), the obligation to respect minimal deadlines (18 out of 30, that is 60% thereof), the obligation for a concession holder to respect the principle of non-discrimination while selecting holders of subcontracts 17 out of 31, that is 55% thereof), the possibility to directly award additional services to the original concession holder (17 out of 27, that is 63%), the obligation to announce qualification criteria (19 out of 33, that is 58% thereof), the possibility to participate in a tendering procedure in particular by relying on the standing of other entities (15 out of 29, that is 52% thereof), the possibility to restrict the award criteria to price and the economically most advantageous tender (15 out of 27 people, that is 56% thereof), and the provisions on the non- discriminatory use of technical specifications (14 out of 25, that is 56% thereof).

In relation to the other possible provisions mentioned in the consultation, there appears to be no overall support in this group.

In particular, with regard to the requirement to award a minimum of 30% of sub-contracts to third parties or to request the concession holder to specify the percentage of services to be sub-contracted, 9 out of the 36 people who replied to this (35% thereof) indicated their support. Similarly, concerning the application of the Remedies Directive 2007/66/EC, 14 out of the 29 people who replied to this (48% thereof) also indicated their support. Finally, with regard to a provision limiting the choice of procedures to the ones currently available for public contracts, 11 out of the 27 people who replied to this (41%) also provided their support.

With regard to the obligation of the concession holder to respect the principle of non-discrimination while selecting sub-contractors , 17 out of 31 people in the contracting authorities' consultation provided their support. With regard to the obligation of the concession holder to respect the principle of non-discrimination while selecting sub-contractors , 9 out of 26 people in the contracting authorities' consultation provided their support. Finally, with regard to the requirement to award a minimum of 30% of sub-contracts to third parties or to request the concession holder to specify the percentage of services to be sub-contracted 15 out of 27 people in the contracting authorities' consultation provided their support.

### C) The consultation of social partners, civil society and stakeholders

There was a very small number of replies received, and even amongst those there was very limited information provided. Only 12 social partners participated in the consultation by sending their contributions. In particular, 4 replies came from associations of employers, 3 from trade unions or associations of trade unions, 2 from NGOs and one from a committee of employees (in an undertaking). In one reply the type of organisation was not specified.

Out of those 12 respondents, 5 (42 %) replied to the question on whether they were aware of service concessions awarded to foreign companies and they all indicated that they were aware of such awards, in their respective sectors.

Two respondents (17 %) reported that, in the sectors they were familiar with, companies could easily secure the renewal of concession contracts. In addition, with regard to the consequences of non renewal or failure to secure a new concession contract, 3 respondents

answered the question, and amongst those 1 indicated that the non-renewal caused job losses, whereas 2 replied that there were no job losses related to non-renewal, because contracts have "social clauses" obliging the new concessionaire to take on the employees of the former concessionaire.

Concerning the question on the type of labour contracts most prevalent in concession holding companies, 4 (33%) respondents replied, all of them indicating that both in services provided on the basis of concessions as well as in services directly provided by public authorities there is a predominance of permanent jobs or fixed-term contracts. Two respondents added that in the case of services provided on the basis of concessions there are also temporary agents and part time contracts. In relation to the question concerning the types of professional qualifications in companies holding concessions and in services directly provided by the public authority, 5 (42%) respondents replied; 4 of them indicating that in both cases there was a predominance of specialized employees, while 1 respondent pointed out that in the case of companies holding concessions there was a prevalence of highly specialised workers.

Concerning the operation of the current rules on works concessions, the consultation revealed that 3 out of 4 respondents who replied to the relevant question (75%) considered that these rules had a positive impact on the degree of transparency, equal treatment and legal clarity, as well as on quality and price. Only 1 respondent indicated that these rules had a negative impact, while 2 respondents indicated that there had been compliance costs. In addition, 2 respondents considered that these rules had a negative impact on the number of jobs, wage levels and type of contracts.

Concerning the question on the possible impact of budget cuts on companies holding concessions and on public administrations, 3 (25%) respondents replied. Two indicated that the cuts would result in a decrease in the number of jobs and in worse working conditions for both companies and public administrations, while one respondent considered that the cuts would have no impact.

In relation to the expected impact of new legislation on the choice of public authorities on whether to externalise the provision of services to third parties or not, 2 (17%) respondents answered. One considered that the legislation might favour the use of concessions, whereas the other respondent indicated there would be no impact on the services directly provided by public authorities.

With reference to the question on the possible impact of compulsory advertisement in relation to the renewal of concessions on incumbent operator, 4 (33%) respondents answered; out of those, 1 considered that there would be a positive impact on competition and prices, while the other 3 indicated that there would be a negative impact on the number of jobs and on job conditions.

Concerning the possible impact of compulsory advertisement of concessions on service of general economic interest (SGEI), 2 respondents answered. One respondent indicated that there would be a positive impact on availability, quality and costs, while the other respondent considered that there would be a negative impact on quality.

In relation to the possible legislative content, the great majority of the respondents (9 respondents that is 75% thereof) did not reply to the questions. Those very few who replied (3 respondents, that is 25% thereof) are in favour of the possibility to award directly additional

services to the original concession holder (2 out of 3) as well as of the obligation, for the concession holder, to respect the principle of non-discrimination while selecting sub-contractors (2 out of 3). In relation to the other possible provisions mentioned in the consultation, there appears to be no overall support.

In particular, with regard to the compulsory publication of a contract notice in the Official Journal of the EU, the obligation to respect minimal deadlines and the application of the Remedies Directive, 1 respondent was in favour and 2 were against these provisions.

In addition, the very few who replied are in favour of the possibility for an EU operator to prove it meets qualification criteria for participation in a tendering procedure by relying on the standing of other entities (2 replies in favour out of 3 total replies to the question) and of the provision of non discriminatory use of technical specifications (one single reply to the question).

As it is clear from the number of replies to the questions, the data collected cannot constitute a solid basis for drawing conclusions on the position of social partners.

## Annex II — Overview of the MS legislation

	Definition of service concessions	Level of publication	Thresholds and method of calculating the value of the contract	Services covered	Technical specifications and selection criteria	Award procedure	Award criteria	Remedies Directive
Austria	Same definition as the EU Directives (see §8 of BVergG 2006 of the Austrian law on public procurement).	According to §11 of BVergG 2006 a reasonable degree of publicity has to be safeguarded (insofar as it appears necessary with regard to value and subject matter of the contract and taking into account that in principle several undertakings should participate in award proceedings).  Austrian public authorities may voluntary notify to the Commission announcements relating to award of service concessions (§11 in conjunction with §49 of BVergG 2006).	The direct award of a service concession to a specific contractor is allowed for contracts below a threshold of 100 000 Euro (§11 of BVergG 2006)	Provisions of BVergG 2006 relating to service concession contracts do not differentiate between various kinds of services.	No specific provisions, only principles from §11 of BVergG 2006 (identical for utilities: §177 BVergG 2006): A service concession has to be basically awarded in proceedings with several undertakings. The basic freedoms of the EU and prohibition of discrimination shall be respected as well as principles of free and fair competition).	See previous cell	See previous cell	Not applicable to service concessions. Remedies against administrative decisions are available as far as / under the conditions foreseen by normal administrative law.
Belgium	For works concession Article 3 (12) of the Act of 15-06-2006: concession de travaux publics : le contrat présentant les mêmes caractéristiques qu'un marché public de travaux, à l'exception du fait que la contrepartie des travaux consiste soit uniquement dans le droit d'exploiter l'ouvrage, soit dans ce droit assorti d'un prix (ATTENTION: NO BELGIAN RULES FOR SERVICE CONCESSIONS and NO RULES FOR WORKS CONCESSIONS IN UTILITIES SECTOR!)	Only obligation for works concessions: above threshold Directive: in EU OJ and national OJ. Below threshold: in national OJ	See previous cell. No rules on calculation of value.	Services are not covered (only works concessions)	Normal rules on technical specifications and selection criteria are not applicable, (except one general article on selection criteria (see Article 150 that refers to Article 58 of the Royal Decree of 15 July 2011).	Not specifically provided (can be negotiated procedure article 154 Royal Decree 15-7-2011), but some deadlines are provided, also for below threshold concessions).	Not specified in detail what these could be, but they should be stipulated in the contractual documents (Art. 147 and 154 Royal Decree 15-11-2011).	Not applicable to service concessions but general system of remedies applies
Bulgaria	La Loi bulgare sur les concessions est entrée en vigueur le 01.07.2006.  L'article 2 de la LC définit la concession comme le droit d'exploiter un ouvrage et/ou de fournir un service. Ce droit est attribué par le pouvoir adjudicateur au concessionnaire. La contrepartie de ce droit est l'obligation pour le concessionnaire de bâtir, gérer et entretenir en bon état l'ouvrage concédé ou de gérer le service à son propre risque. Trois types de concessions existent en Bulgarie: travaux, services et extraction.	Article 42 de la LC Publication des concessions de services et de travaux au JO national et inscription au Registre national des concessions. Concernant les avis des concessions de travaux, parallèlement à la publication au JO, les concessions de travaux au-dessus des seuils fixés par la Directive 2004/18/CE européenne, sont aussi publiées au JOUE. Article 43 de la LC Après publication au JOUE, l'avis de concession est publié dans la presse et/ou sur internet.	Pas de seuil prévu Pas de méthode de calcul	Article 4 de la LC: Les services d'intérêt public qui peuvent inclure certains travaux.	Article 25 et 26 de la LC concernant la situation personnelle du candidat, habilitation à exercer l'activité professionnelle, capacité économique et financière, capacités techniques et/ou professionnelles comparables à celles de la Directive 2004/18/CE.	Article 24 de la LC: procédure ouverte uniquement	Article 27 de la LC : "...le critère d'évaluation des offres est l'offre économiquement la plus avantageuse."	Applicable to service concessions.

	Definition of service concessions	Level of publication	Thresholds and method of calculating the value of the contract	Services covered	Technical specifications and selection criteria	Award procedure	Award criteria	Remedies Directive
Cyprus	Law 12(1)/2006 (classical sector) defines a works/services concession, as a contract of the same type as a public works/services contract except for the fact that the consideration for the works/services to be carried out/provided consists either solely in the right to exploit the work or in this right together with payment (art.2). Service concessions are excluded from this Law (art.16)- Law 11(1)/2006 (utilities) provides for the same definition (art.2) Both types of concessions are expressly excluded from this Law (art.17)	Law 12(1)/2006 (classical sector), provides for publication in the OJEU, for works concessions falling within the scope of Dir.2004/18 (art.64). On service concessions, N/A, as these are excluded from this Law (art.16)- With regard to Law 11(1)/2006 (utilities) –N/A, as both types of concessions are expressly excluded from this Law (art.17).	Law 12(1)/2006 (classical sector) applies only for works concessions with an estimated value above the threshold set in 2004/18. (art.64). The method for calculating the value of the works concession, is the same as the one with regard to a public works contract, namely, the total amount to be paid, as estimated in advance by the contracting authority (articles 21 and 64).On service concessions, N/A, as these are excluded from this Law (art.16)- With regard to Law 11(1)/2006 (utilities) –N/A, as both types of concessions are expressly excluded from this Law (art.17)	Law 12(1)/2006 (classical sector) provides with regard to works concessions, that the same types of contracts are covered, as in the case of public works contracts (art.2). On service concessions, N/A, as these are excluded from this Law (art.16)- With regard to Law 11(1)/2006 (utilities) –N/A, as both types of concessions are expressly excluded from this Law (art.17)	Law 12(1)/2006 (classical sector) does not make any provision on the award procedures to be followed for awarding works concessions – N/A. On service concessions, N/A, as these are excluded from this Law (art.16)- With regard to Law 11(1)/2006 (utilities) –N/A, as both types of concessions are expressly excluded from this Law (art.17)	Law 12(1)/2006 (classical sector) does not make any provision on the award criteria for awarding works concessions – N/A. On service concessions, N/A, as these are excluded from this Law (art.16)- With regard to Law 11(1)/2006 (utilities) –N/A, as both types of concessions are expressly excluded from this Law (art.17)	Law 12(1)/2006 (classical sector) does not make any provision on the award criteria for awarding works concessions – N/A. On service concessions, N/A, as these are excluded from this Law (art.16)- With regard to Law 11(1)/2006 (utilities) –N/A, as both types of concessions are expressly excluded from this Law (art.17)	Not applicable: Law 104(1) which implements the Directive into national law does not cover service concessions. Only general remedies provided by Cypriot administrative law are applicable.
Czech Republic	There is no definition of the concession. The Concessions Act n. 139/2006 defines the Concession Contract in Article 16 as a contract whereby the concessionaire undertakes to provide service or perform works and the contracting authority undertakes to enable the concessionnaire to receive benefits resulting from the provision of the service or usage of the works, eventually combined with a monetary payment. A substantial part of the risk relating to the reception of benefits should be borne by the concessionnaire.	Works concessions above EU thresholds: publication in the OJEU + National Information System of Public Contracts (single point of access). All other (works+service) concessions: publication in the National Information System of Public Contracts.	1. Minimum threshold is CZK 20 mil (€ 800 000) value is estimated income of the concessionaire. 2. EU threshold for works concession is used for publication purposes (see cell C7). Another distinction is made at national level for major concessions (variable threshold according to the contracting authority) for financial approval of the concession project and final contract. 3. Value of concession: Estimated income of the concessionaire during the expected term of contract. Estimated value of cost is not relevant for threshold.	The Concessions Act apply to all works and service concessions awarded by contracting authorities, including in sector activities covered by Dir 2004/17/EC (only if awarded by contracting authorities, not if awarded by entities).	Provisions of Public Contracts Act apply.	1. Restricted procedure not applicable 2. Negotiated procedure following a selection stage 3. Concession Dialogue - equivalent to Competitive Dialogue	Provisions of Public Contracts Act apply accordingly, but only economically most advantageous tender can be used in award criteria.	Applicable to service concessions
Denmark	Definition of service concession is identical to the definition in Directives 2004/17 and 2004/18.	National	Not defined	No limitations	Not defined	Not defined	Not defined	Not applicable to service concessions
Estonia	Same as the EU Directives (see Art. 6 (2) of the public procurement act).	National	Not defined.	No limitations.	Not defined.	Not defined.	Not defined.	Not applicable.
Finland	Service concession defined in § 5(6) of the public procurement act and in § 4(6) of the utilities procurement act: "a contract, similar to a service contract except that the consideration consists either on the right to exploit the service or the right together with a payment"	National.	Not defined.	No limitations.	Not defined.	Not defined.	Not defined.	Applicable to service concessions, except for the provisions on the mandatory standstill period.

	Definition of service concessions	Level of publication	Thresholds and method of calculating the value of the contract	Services covered	Technical specifications and selection criteria	Award procedure	Award criteria	Remedies Directive
France	<p>Selon l'article 38 (1er tiret) de la loi n° 93-122 du 29 janvier (loi Sapin) une délégation de service public (c.à.d., une concession) est "un contrat par lequel une personne morale de droit public confie la gestion d'un service public dont elle a la responsabilité à un délégué public ou privé, dont la rémunération est实质lement liée aux résultats de l'exploitation du service. Le délégué peut être chargé de construire des ouvrages ou d'acquérir des biens nécessaires au service."</p> <p>La jurisprudence nationale a établi que le transfert du risque à l'exploitant/délégué/concessionnaire est le critère fondamental pour déterminer l'existence d'une DSP/concession (décision Département de la Vendée du Conseil d'Etat du 7 novembre 2008), 2) Les concessions de travaux sont définies comme étant "des contrats administratifs dont l'objet est de faire réaliser tous travaux de bâtiment ou de génie civil par un concessionnaire dont la rémunération consiste soit dans le droit d'exploiter l'ouvrage, soit dans ce droit assorti d'un prix." (article 1er de l'ordonnance n° 2009-864 du 15 juillet 2009). Bien que la question ne soit pas totalement claire, il semble que si un contrat est qualifié de concession de travaux, seule l'ordonnance n° 2009-864 s'applique (et non la loi Sapin).</p>	<p>L'article 38, 2ème tiret, de la loi Sapin dispose que "Les délégations de service public des personnes morales de droit public sont soumises par l'autorité délégitante à une procédure de publicité permettant la présentation de plusieurs offres concurrentes, dans des conditions prévues par un décret en Conseil d'Etat." Le décret n° 93-471 du 24 mars 1993 établit que "l'autorité responsable de la personne publique délégitante doit satisfaire à l'exigence de publicité prévue à l'article 38 de la loi du 29 janvier 1993 susvisée par une insertion dans une publication habilitée à recevoir des annonces légales et dans une publication spécialisée correspondant au secteur économique concerné". La jurisprudence nationale a établi qu'à ces obligations peuvent s'ajouter des obligations de publicité supplémentaires pour atteindre un degré de publicité adéquate selon la nature de la concession/DSP et tel qu'exigé par la jurisprudence communautaire "Telaustria". Une publication d'"ampleur européenne" peut ainsi être requise. En revanche, il n'y a aucune obligation de principe de publication au JOUE. 2) Pour les concessions de travaux d'une valeur inférieure à ce montant le pouvoir adjudicateur "choisit librement les modalités de publicité adaptées (...) en fonction des caractéristiques du contrat et notamment de son montant et de la nature des travaux en cause." (articles 12 et 27 du décret n° 2010-406).</p>	<p>En principe, toutes les concessions/DSP sont soumises à la loi Sapin (c.à.d., qu'il n'y pas de seuil de minimis). Toutefois, les concessions/DSP dont "le montant des sommes dues au déléguétaire pour toute la durée de la convention n'excède pas 106 000 euros" ou lorsque "la convention couvre une durée non supérieure à trois ans et porte sur un montant n'excédant pas 68 000 euros par an" peuvent être passées selon une procédure allégée (article 41, sous c) de la loi Sapin). Cette procédure allégée maintient toutefois l'obligation de publicité préalable ainsi que l'obligation de respecter l'article 40 de la loi Sapin sur la durée et la prolongation des concessions/DSP. Il n'y a aucune règle sur le calcul de la valeur du contrat.</p> <p>2) Un seul seuil de 4,845,000 euros (articles 10, 19 et 27 du décret n° 2010-406). Concernant le calcul de la valeur du contrat le décret n° 2010-406 (articles 10, 19 et 27) dispose que: "Pour la détermination du montant mentionné au I, est pris en compte l'ensemble des produits prévisibles de l'exécution de la concession, incluant le cas échéant la valeur des installations et fournitures que le pouvoir adjudicateur se propose de mettre à la disposition du concessionnaire. Le pouvoir adjudicateur ne peut se soustraire à l'application des règles de publicité et de mise en concurrence en scindant ses achats ou en utilisant des modalités de calcul de la valeur estimée des contrats autres que celles prévues à l'alinéa qui précède. Lorsque l'opération envisagée peut être réalisée par lots séparés, est prise en compte la valeur globale estimée de la totalité de ces lots."</p>	<p>La loi Sapin couvre tous les secteurs, en principe sans aucune restriction. Des questions sur son champ d'application se sont posées, d'une part, quant aux activités visées par la définition de "service public" (par exemple, la réalisation de logements en dehors de tout but social ne serait pas un "service public") et, d'autre part, quant aux exceptions qui écartent l'application de la loi dans les cas de droits exclusifs et de "in-house" (qui a écarté pendant longtemps l'application de la loi Sapin aux concessions aéroportuaires).</p> <p>2) La réglementation sur les concessions de travaux (ordonnance n° 2009-864 et décret n° 2010-406) ne s'applique pas aux concessions de travaux relevant de la directive 2004/17/CE (articles 4, 7ème point et 11, 7ème point, de l'ordonnance n° 2009-864 et article 4, 8ème point, du décret n° 2010-406).</p>	<p>La loi Sapin ne prévoit aucune disposition sur les spécifications techniques. Ces spécifications sont toutefois contrôlées par le juge national qui a estimé (décision Corsica Ferries - Conseil d'Etat du 15 décembre 2006) que "des spécifications techniques supérieures à celles exigées par la réglementation applicable au secteur d'activité peuvent être édictées par le règlement de la consultation ou le cahier des charges ; que, toutefois, si de telles spécifications ont pour effet de limiter la concurrence entre les candidats potentiels, elles doivent être justifiées par les nécessités propres au service public faisant l'objet de la délégation". La sélection des candidatures est effectuée dans les conditions prévues à l'article 38, 3ème alinéa qui dispose: "La collectivité publique dresse la liste des candidats admis à présenter une offre après examen de leurs garanties professionnelles et financières et de leur aptitude à assurer la continuité du service public et l'égalité des usagers devant le service public". La jurisprudence nationale a, à plusieurs reprises, précisé le premier de ces deux critères généraux.</p> <p>2) La réglementation sur les concessions de travaux ne prévoit aucune disposition sur les procédures de passation. La formulation de certaines dispositions indiquent que le législateur a envisagé que les concessions de travaux soient passées aussi bien par procédure négociée que par procédure ouverte ou restreinte. Les principes généraux sont toutefois d'application (articles 5 et 11 de l'ordonnance n° 2009-864, article 5 du décret n° 2010-406).</p>	<p>Le délai pour la présentation des candidatures est d'au moins un mois après la date de la dernière publication (article 1er, 2ème alinéa, du décret n° 93-471). Il n'y pas de délai pour la présentation des offres. Selon l'article 38, 5ème alinéa, de la loi Sapin, les offres "sont librement négociées par l'autorité responsable de la personne publique délégitante qui, au terme de ces négociations, choisit le déléguétaire." Par ailleurs, l'article 43, 5ème alinéa, relatif aux concessions/DSP passées par les collectivités territoriales précise que "l'autorité habilitée à signer la convention engage librement toute discussion utile avec une ou des entreprises ayant présenté une offre." Enfin, l'article 45, relatif lui aussi aux collectivités territoriales, dispose que "le recours à une procédure de négociation directe avec une entreprise déterminée n'est possible que dans le cas où, après mise en concurrence, aucune offre n'a été proposée ou n'est acceptée par la collectivité publique." Le principe est donc la négociation totalement libre entre le concédant/délégué et un ou plusieurs soumissionnaires. Ce principe va jusqu'à permettre au délégué de décider de ne pas entamer la négociation avec certains ou certains soumissionnaires ayant pourtant été sélectionnés. Toutefois, la jurisprudence nationale veille au respect du principe d'égalité entre les candidats participant à la négociation et à ce que l'objet de la concession/DSP ne soit pas modifié pendant celle-ci.</p> <p>2) La réglementation sur les concessions de travaux ne prévoit aucune disposition sur les critères d'attribution. Les principes généraux sont toutefois d'application (articles 5 et 11 de l'ordonnance n° 2009-864, article 5 du décret n° 2010-406), et l'annexe VII B de la directive 2004/18/CE impose l'indication de ces critères dans l'avis de la concession.</p>	<p>La loi Sapin ne dit rien sur les critères d'attribution, choix justifié sur le caractère "intuitu personae" de l'attribution de la concession/DSP. Il était ainsi entendu que le délégué n'était pas obligé d'indiquer les critères d'attribution qu'il comptait appliquer pour attribuer la concession/DSP. Toutefois, les derniers développements de la jurisprudence nationale indiquent un changement de cap. Ainsi le Conseil d'Etat a estimé (décision Musée de Versailles du 23 décembre 2009) que, les DSP étant soumises aux principes généraux de la commande publique, "la personne publique doit apporter aux candidats à l'attribution d'une délégation de service public, avant le dépôt de leurs offres, une information sur les critères de sélection des offres" même si "elle n'est pas tenue d'informer les candidats des modalités de mise en œuvre de ces critères".</p> <p>2) La réglementation sur les concessions de travaux ne prévoit aucune disposition sur les critères d'attribution. Les principes généraux sont toutefois d'application (articles 5 et 11 de l'ordonnance n° 2009-864, article 5 du décret n° 2010-406), et l'annexe VII B de la directive 2004/18/CE impose l'indication de ces critères dans l'avis de la concession.</p>	<p>Applicable to service concessions.</p>

	Definition of service concessions	Level of publication	Thresholds and method of calculating the value of the contract	Services covered	Technical specifications and selection criteria	Award procedure	Award criteria	Remedies Directive
Germany	<p>The German public procurement legislation does not contain any provisions relating to service concessions.</p> <p>NB: the notion of "Konzession" is used in Germany in a much larger way, often just referring to administrative authorisations ("Gaststättenkonzession" - licence for running a restaurant, or the famous Taxikonzessionen) or the simple right to use a public good/ public grounds (e.g. "Wegenutzungskonzession" - usage of public area for Energy grids, cf. the German Energiewirtschaftsgesetz: <a href="http://www.gesetze-im-internet.de/englw_2005/index.html">http://www.gesetze-im-internet.de/englw_2005/index.html</a>). However, the rules relating to these "Konzessionen" are not public procurement rules but other administrative law.</p>	Not defined.	Not defined.	Not defined.	Not defined.	Not defined.	Not defined.	Not applicable. Remedies against administrative decisions are available as far as / under the conditions foreseen by general administrative law.
Greece	<p>La loi grecque reprend la définition des concessions de services telle qu'elle apparaît dans le texte de la Directive 2004/18 article 1.</p>	<p>A la lumière des informations disponibles, il y a pas de législation nationale couvrant les concessions de services. Par conséquent, dans le cas de procédures pour l'attribution des marchés des concessions de services, il y aura au moins de la publicité au niveau national. Il est à noter que les autorités grecques publient des avis de marché pour des contrats publics importants dans le JOEU, pour avoir une concurrence plus accrue, même s'elles n'y sont pas obligées.</p>	<p>Aucun seuil et aucune méthode prévus pour les concessions de services. Absence de réglementation.</p>	<p>Sans objet (vu l'inexistence de réglementation). L'étude de Bruges a réperé des concessions de service concernant la liaison maritime avec des îles isolées. Néanmoins, il ne s'agit pas de concessions de services, vu que l'Etat accorde des subventions enlevant ainsi le risque.</p>	<p>Aucune réglementation. Pas d'information disponible sur la pratique suivie.</p>	<p>Aucune réglementation. Pas d'information disponible sur la pratique suivie.</p>	<p>Pas d'information disponible sur la pratique suivie.</p>	<p>Not applicable, but there are other existing remedies, i.e. request for suspension and request for annulment. Nevertheless, there is no possibility to request interim measures. Given the fact that the courts reject in most cases the requests for suspensions, only the request for annulment remains (but it is also very difficult to obtain and in any case decisions on this ground take a lot of time to be issued).</p>

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Hungary	Under Art. 242(4) of Act No. 129 of 2003 on Public Procurement (HPPA), "Service concession involves contracting for services where the contracting authority transfers the right to exploit commercially the provision of the relevant services (the right of exploitation) for a specific period of time and the consideration is the right of exploitation or the transfer of this right together with a monetary consideration."	For works concessions in the Public Sector, exceeding the EU threshold: publication in the OJEU (Art. 44 and 138 HPPA). For works concessions and service concessions in the Public Sector, above the national threshold: publication in the national Procurement Gazette (Art. 244 HPPA). For service concessions covered by Act No. 16 of 1991 on Concessions (CA): publication in 2 national newspapers (Art. 8(1) CA). (The CA governs the award of concession contracts in a few specific sectors (e.g. public roads (not motorways), local and regional utilities). Its relation with the HPPA is as follows: for works concessions the HPPA prevails, for service concessions the CA has precedence.)	Public Sector: EU threshold for works concessions: EUR 4.85M (Art. 31(2) HPPA), national threshold for works concessions: ~EUR 380T, national threshold for service concessions: ~EUR 95T (Art. 244 HPPA). Under Art. 35(1) of the HPPA, "The value of a public procurement shall be the highest consideration requested or offered in general for its subject-matter at the time of the beginning of the contract award procedure, which is to be calculated net of VAT and taking account of the provisions of Articles 36 to 40 (hereinafter referred to as 'estimated value'). The full consideration shall include the value of the transfer of the buy option."	All services in the Public Sector (Utilities not covered), with some specific rules for certain transport and health services (Art. 254 HPPA).	The technical specifications and selection criteria used for the Public Sector in general.	In general, the open, restricted and negotiated procedure with prior publication can be used. The use of the negotiated procedure without publication is subject to strict rules based on the Public Sector Directive. (Art. 144(6) and 252 HPPA)	For works concessions only the criterion 'the economically most advantageous offer' can be used, for service concessions either the lowest offer or the economically most advantageous offer. (Art. 141(a) and 250(3)(c) HPPA)	Applicable also to service concessions which are covered by the PP Act by reason of their value etc., with the exception of concessions in certain sectors (defined in the Concession Act, e.g. public roads - not motorways - local and regional utilities).
Italy	The same as that contained in Articles 3 and 17 of Directive 2004/18/EC (see Article 30.1 of the Italian Code for public contracts)	See reply on award procedures	The threshold for services concessions is the same as that provided by Article 7 b of Directive 2004/18/EC for services contracts	Statistically, the main sectors covered by services concessions are water management services and, on the other hand, bet and games-related services; motorway management activities are normally concocted as a part of motorway concessions, which also involve a part of works contracts and works concessions	Technical specifications are frequent; sometimes, they can be rather detailed, as it can occur in the field of bet and games-related services concessions, which often lay down very significant requirements of technical and financial capacity that have to be normally scrutinized as for their consistency with the principle of proportionality; this stems from the choice of Italy to create a market in such sector, in which the competition on it is far from being perfect.	The general procedure provided is generally the negotiated (Art. 30 (3) of Italian Code of public contracts); however, the case-law of administrative courts makes it compulsory the recourse to open procedures on the basis of the principles of transparency and non discrimination; this entails the publication on the EUOJ of call for tenders related to services above the thresholds (those for services contracts; publication in the EUOJ basically almost all the time) and on the ITOJ for services below them; open procedures are more clearly provided as compulsory for the management of local services (article 50 of Decree Law 112/2008), for which the recourse to the "in house providing" regime is made more restrictive (besides the two Teckal conditions the authority has also to show through a market survey that recourse to the free market is not economically efficient).	Award criteria are defined on the basis of the best income/conditions the concessionaire can assure to the benefit of the awarding authority (e.g. as for the award of bets and games-related services concessions).	Applicable to service concessions.

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Ireland	<p>The 2006 Public Sector Procurement Regulations transpose literally Directives 2004/18/EC and 2004/17/EC. The definition of service concession is therefore the one in those Directives.// The figure of service concession as such does not exist in IE. However the Irish concept of PPP in IE would seem to include EU service concession cases, notably in terms of the private operator bearing large part of the risk.// The State Authorities Act (public private partnership agreements) Act 2002 governs some aspects of the setting up of PPPs by State Authorities. Also, the Irish Government issued guidelines in 2006 for the setting up of PPPs which may be used by contracting authorities. <a href="http://www.ppp.gov.ie/">http://www.ppp.gov.ie/</a> According to those Guidelines: PPP projects must be procured in line with all regulatory and EU procurement requirements in regard to tendering and bid evaluation.</p>	<p>The 2006 Guidance from the central Goverment concerning PPPs establishes that: Under EU procurement law, the nature and level of communication permissible with bidders / potential bidders will be determined by the procurement procedure chosen. In this respect please see box in this excel table relating to the choice of procedures.</p>	Not defined.	Not defined.	<p>According to the 2006 National Guidelines on PPPs: In any procurement competition, all of the tenders received are first examined to determine whether they are "suitable" bids. The basis on which "suitability" will be determined should be clear and transparent and signalled in the tender documentation.</p> <p>The Public Sector Benchmark should be finalised before any tender-related communications with the private sector are commenced. Earlier communication with the market to determine their interest in delivering a project may only occur in circumstances as outlined in section 3.3 below – dealing with optional market consultation. Where the use of a negotiated procedure is permitted, the client should use the tender liaison meetings as a forum to discuss the tenderers' interpretation of the output specifications. As indicated previously, current policy is that the final PSB, or any elements thereof, should not be made public in any communication with the market.</p>	<p><a href="http://www.ppp.gov.ie/key-documents/guidance/central-guidance">http://www.ppp.gov.ie/key-documents/guidance/central-guidance</a> The 2006 National Guidelines on PPPs establish that :Under EU procurement law, the nature and level of communication permissible with bidders / potential bidders will be determined by the procurement procedure chosen. The choice of procedure should be made on advice from the Sponsoring Agency's / Centre of Expertise's legal advisors, as appropriate.</p>	<p>According to the 2006 National Guidelines on PPPs: If a tender meets the considerations for "suitability", including any relevant budgetary considerations, it should then be considered "suitable in principle". Such a bid will then be evaluated, scored and ranked according to the published Evaluation Criteria. The Sponsoring Agency or the Centre of Expertise (according to where responsibility for the procurement of the project lies in a particular instance), will have identified the most appropriate evaluation criteria for the project and these will have been made available to interested parties in line with the requirements within the Directives.</p>	<p>Not applicable. It is difficult to be sure, since the concept of concession does not really exist, but it appears that the Remedies Directive is not applicable since the national Statute transposing it provides that the remedies therein apply to contracts covered by the national Statutes transposing Directives 2004/18 and 2004/17.</p>

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Latvia	The Public-Private Partnership Law from 2009 defines the service concession contract in Article 1 § 7 as "a contract in accordance with which by an order of a public partner the private partner renders the services set forth in Annex 2 to the Public Procurement Law and as remuneration or a significant part thereof for the rendering of such services is granted the right to exploit these services (Clause 8) of this Article) and simultaneously such service exploitation risks (Clause 9) of this Article) or a significant share thereof is transferred thereto; Should a service concession contract also include the performance of the construction works set forth in Annex 1 to the Public Procurement Law, which is an insignificant part of the subject of this contract, such contract shall be considered a public service contract;"	Article 38 and article 57 of the PP Law -website of the Public Monitoring Bureau and the Official Journal of the European Union	Not defined	The Public-Private Partnership Law applies to all works and service concessions awarded by contracting authorities, including in sector activities covered by Dir 2004/17/EC.	Not defined	Article 17 Types of Concession Procedures 1) a competition without selection of candidates;2) a competition with selection of candidates;3) competitive dialogue.	According to the 2006 National Guidelines on PPPs: If a tender meets the considerations for "suitability", including any relevant budgetary considerations, it should then be considered "suitable in principle". Such a bid will then be evaluated, scored and ranked according to the published Evaluation Criteria. The Sponsoring Agency or the Centre of Expertise (according to where responsibility for the procurement of the project lies in a particular instance), will have identified the most appropriate evaluation criteria for the project and these will have been made available to interested parties in line with the requirements within the Directives.	Applicable to service concessions.

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Lithuania	Article 2 §1 of the Law amending the Law of the Republic of Lithuania on Concessions defines Concession as : "...the authorisation granted under this Law by the awarding authority to the concessionaire in compliance with the concession contract under the terms and conditions set forth therein to engage in the economic activity connected with the design, construction, development, renovation, transformation, repairs, management, use and/or maintenance of infrastructure objects, to provide public services, manage and/or use state-owned or municipal property (including the exploitation of mineral resources) where the concessionaire assumes under the concession contract all or part of the operating risk and undertakes the relevant rights and duties ."	Article 9 (3) Tendering conditions shall be published in the supplement to the official gazette. By the decision of the awarding authority notice of the tendering conditions may be additionally published in the international, Lithuania's national or regional press or other mass media. Full text of the tendering conditions approved by the awarding authority or clear and accurate reference as to the place and time when and where the relevant parts of the tendering conditions will be accessible to any interested person, the purchasing price (where set) of the documents indicated in the notice which the tendering conditions are specified, provided, however, that the text of the notice always contains a short characterisation of the subject the proposed concession.	Not defined	The Law of the Republic of Lithuania on Concessions applies to all works and service concessions awarded by contracting authorities, including in activities in sectors covered by Dir 2004/17/EC.	Article 10. 1) appropriate professional and technical qualification; 2) equipment and other means necessary for all phases of activities that will be carried out under the proposed concession contract or feasible possibility of possession thereof; 3) financial resources (own or borrowed funds) for all phases of works to be carried out under the proposed concession contract or feasible possibility of possession thereof after the conclusion of the concession contract. 4) proper management and organisational experience; 5) other terms and conditions laid down by the awarding authority.	Article 6. Procedure for Awarding Concessions Concessions shall be awarded following open public tendering procedure provided for in Section Two of Chapter III of this Law except in cases provided for in Section Three of Chapter III of this Law when concessions may be awarded not subject to tendering.	Article 14. (...) 2. The criteria for evaluation and comparison of technical aspects of the tenders submitted by the tenderers may include the following requirements: 1) technical soundness of the tender; 2) operational feasibility the tender; 3) quality of public services and measures ensuring continuity of service provision; 4) environmental protection aspects of the tender; 5) effect of the tender on the social and economic development of the country or an appropriate region. 3. The criteria for evaluation and comparison of financial and commercial aspects of the tenderers' tenders may provide for the following requirements: 1) the value of the amounts which the concessionaire proposes to set and collect as remuneration for the provided public services or to collect as local fees and charges under the concession contract, taking into account the planned time and periodicity of payment of such amounts; 2) the value of any payments to be made by the awarding authority under the concession contract, taking into account the planned time and periodicity of payment of such amounts; 3) the of any payments to be made by the concessionaire under the concession contract, taking into account the planned time and periodicity of payment of such amounts; 4) the costs related to design and construction activities, annual exploitation and maintenance costs, costs of proposed financial arrangements; 5) the extent of financial support requested from the state or the appropriate municipality by the awarding authority or any other state or municipal authority, should any be requested; 6) the feasibility and specifics of the proposed financing in accordance with the submitted documents relating thereto; 7) the acceptability to the tenderer of the proposed contractual terms and the conditioning circumstances.	Not applicable, but the Law on Concessions provides for some sort of appeal procedure.

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Luxembourg	Les définitions de concessions de travaux et de concessions de services des directives ont été transposées (article 3, § 3 et 4, et article 55, § 2, de la loi du 25 juin 2009 sur les marchés publics). Il n'y a aucune législation sur les concessions de services. Sur les concessions de travaux, la seule législation existante est celle résultant de la transposition des dispositions de la directive 2004/18/CE (articles 48 à 50 de la loi du 25 juin précitée et articles 253 à 259 du Règlement grand-ducal du 3 août 2009 portant exécution de la loi du 25 juin). A l'exception de ces dispositions, la passation des concessions de services et des concessions de travaux n'est soumise à aucune législation, mais doit respecter les principes généraux de la commande publique. Selon les informations disponibles, les concessions de services seraient très rares (voire inexistantes) au Luxembourg. Par ailleurs, l'information est inexisteante sur les pratiques suivies et sur l'existence éventuelle d'une jurisprudence nationale sur les concessions.	Au JOUE pour les concessions de travaux relevant de la directive 2004/18/CE (article 253 du Règlement grand-ducal précité). Aucune obligation réglementaire pour les concessions de services et pour les concessions de travaux ne relevant pas de la directive. Pas d'informations disponibles sur la pratique suivie.	Pour les concessions de travaux, il n'y a que le seuil prévu par la directive 2004/18/CE (article 48 de la loi du 25 juin 2009). Le calcul de la valeur des concessions de travaux est fait selon la même méthode que pour les marchés publics de travaux (article 48 précité qui renvoie à l'article 23 de la loi du 25 juin). Aucun seuil et aucune méthode prévus pour les concessions de services.	Sans objet (vu l'inexistence de réglementation).	Aucune réglementation. Pas d'information disponible sur la pratique suivie.	Aucune réglementation. En principe, procédure libre. Pas d'information disponible sur la pratique suivie.	A l'exception de l'obligation (résultant de l'annexe VII B de la directive 2004/18/CE) d'indiquer les critères d'attribution dans l'avis de marché pour les concessions de travaux relevant de la directive, aucune réglementation. Pas d'information disponible sur la pratique suivie.	Not applicable to service concessions. Probably the common rules of administrative law on remedies apply.

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Malta	<p>Legal notice 296 "Financial Administration and Audit Act CAP.174) Public Procurement Regulations, 2010" defines the service concessions as follows: " "public service concessions contract" means a public services contract except for the fact that the consideration for the services to be provided consists either solely of the right to exploit the service or in this right together with a payment." (Regulation 2).</p> <p>As far utilities are concerned, Subsidiary Legislation 174.06 "Public Procurement of Entities operating in the water, energy, transport and postal services sectors regulations" defines service concessions as follows: " "service concession" is a contract of the same type as a service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in that right together with payment." (Regulation 1).</p>	<p>The only provisions of L.N. 296/2010 applicable to service concessions are:</p> <p>Regulation 17(2) concerning remedies which reads: "Without prejudice to the application of regulation 65(2), these regulations [L.N. 296/2010] shall not apply to public service concession contracts, provided that ..."(see column " Remedies Directive") and Regulation 65(2) which reads: "When a contracting authority grants to a body other than a contracting authority, regardless of its status, special or exclusive rights to engage in a public service activity, the instrument granting this right shall stipulate that the body in question must observe the principle of non-discrimination by nationality when awarding public supply contract to third parties."</p> <p>Regulation 18 of S.L. 174.06 provides that: "These regulations shall not apply to works and service concessions which are awarded by contracting entities carrying out one or more of the activities referred to in regulations 3 to 7 , where those concessions are awarded for carrying out those activities."</p>	None provided for service concessions.	None	No rules	No rules	No rules	Applicable only in certain conditions and to a certain extent to service concessions. It results from Regulation 17 (2) of L.N. 296 of 2010 that competent authorities have the choice to decide whether their decisions will be subject to the reviews procedures laid down in L. N. 296/2010. Therefore, private parties/entities have themselves no right to the remedies procedure provided for under Directive 2007/66/EC.
Netherlands	Same definition as the Directive for both service and works concessions in both Utilities and Classical sector. However, no legislative rules for utilities sector and very limited in classical sector.	EU OJ (works concessions)	Same as the Directive for works concessions, calculation rules of classical Directive apply	None	No rules	No rules	No rules	Not applicable., but general system of remedies applies.
Poland	According to the Act on public works concessions and services concessions, a service concession is a contract, where a concession holder commits to perform the service against remuneration consisting either exclusively in the right to exploit the service or in this right together with payment, where the concession holder bears the major part of the economic risk of the concession and where payment cannot result in full recovery of the investment made by the concession holder.	National Public Procurement Bulletin for both works and services concessions, Official journal of the EU for works concessions	Publication of both works and services concessions does not depend on the value (no threshold). However, for other purposes, the value of a services concession is the estimated value, without VAT, of the services constituting its subject matter.	All services including non-priority services and utilities, with the exception of telecommunication services	On technical specifications: provisions similar to those in the Public Procurement Act, but simplified, i.a. requirement of recognition of equivalent norms, prohibition of references to a specific trademark. Selection criteria must be relevant to the subject matter of a concession.	Negotiated procedure	Award criteria must be disclosed in the concession notice, if possible together with their importance. No restrictions as to the content, award criteria may also refer to the characteristics of the bidder	Remedies similar to those applicable to public contracts.

	Definition of service concessions	Level of publication	Thresholds and method of calculating the value of the contract	Services covered	Technical specifications and selection criteria	Award procedure	Award criteria	Remedies Directive
Portugal	Decree-law 18/2008 of 29 January (the Public Procurement code) covers works and services concessions. Art. 407 defines «services concessions» as the contract under which the concessionnaire undertakes to manage for a certain period, on his own name and under his own responsibility, an activity of public service provision, where consideration consists on the financial results of that management or on a direct payment by the contracting authority. Art. 413 further adds that the contract shall imply a significant and effective transfer of risk to the concessionnaire.	Works concessions falling within the scope of Dir. 2004/18/EC: publication in the OJEU irrespectively of the estimated value of the contract. Works concessions in the utilities sector and services concessions: publication in the national Official Journal (Diário da República) irrespectively of the estimated value to the contract.	On applicable thresholds see previous cell. The value of the contract is the maximum value of the economic benefit which, according to the procedure adopted, can be obtained by the contractor with the full performance of the contract (see Article 17).	All services including non-priority services and services in the «utilities» sector.	In addition to technical specifications used for public contracts in general, tender documents for the award of concessions shall include a code on the exploitation of the service or work, which shall cover the rights and obligations of both parties to the contract. This code shall also include, whenever necessary, rules on the protection of the interests of users (of the services or works to be exploited, see Art. 44). Tender documents of award procedures related to the award of PPPs must submit to competition aspects of its implementation related to charges for the contracting authority as well as direct and indirect risks borne by it arising from the specific model of contract.	All award procedures are accepted including the negotiated procedure with prior publication of a contract notice (see Arts. 31 and 33). The competitive dialogue is excluded for the award of concessions in the «utilities» sector (see Art. 33 (2)). Direct awards are possible for relevant reasons of public interest (see Art. 31 (3)).	The same as for public contracts in general.	The Remedies Directive apply
Romania	No specific definition in the OUG 34/2006.	All concessions (services + works) should be published in the national electronic system of public tenders (SEAP), which has a public website. In addition, works concessions above 4.845.000 Euros must also be published at EU level in the EU Official Journal. It is possible that this obligation of publication at EU level also applies to some service concessions, but rules are not very clear.  Tender notices published in SEAP should contain a minimum level of information, listed in annex 3B of the OUG 34/2006.	Calculation of the value of the contract is governed by the same rules as those applicable for public contracts (see art. 219 of OUG 34/2006).	The provisions of OUG 34/2006 are equally applicable to works concessions and to services concessions. However, these provisions are not applicable to concessions awarded by contracting authorities acting in the "utilities" sectors, if such concessions are granted in relation to the performance of one of such "utilities" activities.	The same rules as those applicable to public contracts (please see art. 218 of OUG 34/2006)	All award procedures (referred to in the Directives in relation to public contracts), with the exception of the negotiated procedure without publication of a tender notice, are accepted in Romania for the award of concessions contracts (please see art. 2181 of OUG 34/2006).	TBC	Applicable to service concessions (art. 1 of OUG 34/2006).

	Definition of service concessions	Level of publication	Thresholds and method of calculating the value of the contract	Services covered	Technical specifications and selection criteria	Award procedure	Award criteria	Remedies Directive
Slovakia	Public Procurement Act 25/2006, Article 15(2) "Service concession" is a contract of the same type as a service contract, except for the fact that the consideration for the services to be provided consists either solely of the right to exploit the services provided for an agreed time or of that right together with payment. In a concession contract, the contracting authority and the concessionaire agree the scope of exploitation of the service provided, which may include the receiving of its benefits as well as the amount and terms of payment, if any.	Article 67(2) Contracting authorities shall call for a concession by publishing a concession notice. The concession notice(a) concerning building works shall be sent to the Publications Office and the Office,b) concerning services shall be sent to the Office.(3) Contracting authorities shall send the Office a contract award notice within 48 days from the conclusion of a concession contract.(4) When drafting and sending notices pursuant to paragraphs 2 and 3, contracting authorities shall follow Article 23 (1).	No thresholds for service concessionsArticle 5Rules for Calculating the Estimated Contract Value(1) For the purpose of this Act, the estimated contract value is determined as the price excluding the value added tax. The estimated contract value must be based on the price at which a similar or comparable object of contract is usually sold at the time when the contract notice or notice used as a means of calling for competition is dispatched for publication. If publication of such notice is not required, the estimated contract value must be based on the price at which the same or comparable object of contract is usually sold at the time when the contract award procedure is commenced.+ general rules of the Public Procurement Act apply according to the PP Directives principles for repetition of concessions, division in lots or separate contracts, etc.	Not defined.	The law refers to the general procedure for above-threshold service contracts (IIA services)	1. Open procedure2. Restricted procedure3. Negotiated procedure with publication of a contract notice4. Competitive dialogue	The law refers to the general procedure for above-threshold service contracts (IIA services)	The law does not state expressly that service concessions claims may be submitted under the normal review procedure, but Review Body experts interpret the law in the way enabling these claims to be brought into the normal review system (complaint with the Remedies Directive) on the basis of 'miscellaneous claims'.

	Definition of service concessions	Level of publication	Thresholds and method of calculating the value of the contract	Services covered	Technical specifications and selection criteria	Award procedure	Award criteria	Remedies Directive
Slovenia	<p>Article 26 of Public-Private Partnership Act  - a concession; i.e. a bilateral legal relationship between the state or self-governing local community or other person of public law as the awarding authority and a legal or natural person as a concessionaire, in which the awarding authority awards to the concessionaire the special or exclusive right to perform a commercial public service or other activity in the public interest, which may include the construction of structures and facilities that are in part or entirely in the public interest (hereinafter: concession partnership), Article 92 (concept of service concessions) Where the subject of a concession partnership is the performance of commercial public services or activities provided in a manner and under conditions applicable for commercial public services, or other activities whose performance is in the public interest, or the construction of structures and facilities or individual parts thereof, whose concessionaire has during the period of the relationship the right to their use, operation and exploitation or where the right to use, operate and exploit structures and facilities is combined with payment for executing the works and this does not involve a works concession (hereinafter: services concession), the selection of concessionaire and operation of the concession relationship shall be governed by the act regulating concession partnerships Article 27 (distinction between public procurement and concession partnership) (1) If the public partner bears the majority or entirety of the commercial risk involved in operating a public-private partnership project, the public-private partnership, irrespective of its title or arrangement in a special law, for the purposes of this Act shall not be deemed to be a concession, but a public procurement partnership.</p>	<p>Article 42 of Public-Private Partnership Act  Irrespective of the form of selection instrument, a public-private partnership contractor shall be selected, unless otherwise provided by law, on the basis of a public tender, notice of which must also be published on the Internet.</p>	<p>4. METHODS OF PROMOTING PUBLIC-PRIVATE PARTNERSHIP  Article 8  (assessing the possibilities for public-private partnership)  (1) In order to promote public-private partnership, in selecting the method of implementing the project (procedure) that might be the subject of public-private partnership in the sense of Article 2 of this Act, the public partner must assess whether it can be carried out as a public-private partnership (assessing the grounds of project feasibility and comparison of options or other projects). Assessments shall not be obligatory in the case of projects provided by a regulation referred to in the fourth paragraph of this Act.  (2) In the case of a value greater than 5,278,000 euros the public partner may carry out the procurement of works or services as public procurement only if in respect of the economic and other circumstances of the project it has determined that the procedure cannot be carried out in one of the forms of public-private partnership or that this is not economically justified.</p>	<p>Article 93  (performing commercial public services)  Where the subject of a services concession is the performance of commercial public services or activities provided in a manner and under conditions applicable for commercial public services, the selection of concessionaire and operation of the concession relationship shall also be governed by the rules of the act regulating commercial public services.  Article 94  (performing other activities in the public interest)  Where the subject of a services concession is the performance of other provided in the public interest, the selection of concessionaire and operation of the concession relationship shall also be governed mutatis mutandis by the rules of the act regulating commercial public services.</p>	Not defined	Not defined	Not defined	Not applicable to concessions

	Definition of service concessions	Level of publication	Thresholds and method of calculating the value of the contract	Services covered	Technical specifications and selection criteria	Award procedure	Award criteria	Remedies Directive
Spain	Article 8, Public Contracts Law, 2007 defines service concessions as the contract in which a public authority entails a juridical or physical person the management of a public service, whose provision falls within the scope of the competences of the public authority. Articles 251 and 253.a) settle down that through a concession a public administration could manage indirectly services of its own competence, whenever they could be exploited by private operators. In concessions, the concessionaire will assume the risk of the contract.	Publication must be at national level in the "Boletín Oficial del Estado" or at regional level in the "Diario Oficial de la Comunidad Autónoma" (depending on the contracting authority). Works concessions must be published at EU level in the OJEU (article 126).	Works contracts and works concessions above 5.278.000 euros euros and supply and services contracts above 18.000 euros shall be awarded by open, restricted (see Art. 122). Negotiated procedures can be used in special circumstances (see Arts. 154 and 156) or, for services concessions only, when the value of the contract is below 500.000 euros. Competitive dialogue can be used only in case of specially complex contracts. On the calculation of the value of the contract, Art 76 (3) provides on works concessions that it shall be taken into consideration the value of the works and the estimated value of the expenses needed for the execution of these works. Regarding services concessions, article 156.b) specifies that the negotiated procedure can be used if the value of all the expenses the concessionaire has incurred to start the provision of the service is below 500.000 euros.	Utilities and non-priority services are covered by Public Contracts Law and the applicable procedures.	Use of those related to public contracts in general. In addition, the law requires prior specifications of the legal regime related to the service exploited, this is to say, " there must be express declaration that the activity in question is undertaken by the Administration in question, attribution of the necessary administrative competences, fixing the duration of the prestation in favour of the administered citizenship and regulation of the legal, economic and administrative aspects relating to the prestation of the service". In the relevant cases, the legal regime of tolls will also be determined (whenever applicable, see Arts. articles 116 and 117).	As a general rule, use of an open and restricted procedure. Competitive dialogue as exception for complex contracts provided by law. Negotiated procedure only for special cases established by law namely: 1) The same as in articles 30 (1) (a), 30 (1) (b), 31 (1) (a), 31 (1) (b), 31 (1) (c) of Directive 2004/18/EC, 2) when the contract has been declared secret or reserved; when its execution must be accompanied by special security measures fixed the legislation in force; or when it is necessary for the protection of the essential interests of the State. 3) In the case of contracts included under article 296 of the EC Treaty.	The same as for public contracts in general.	Applicable whenever "the budget for the expenses of the first establishment, excluding VAT, is above 500.000 euros and its duration exceeds 5 years".
Sweden	Definition of service concession in § 17 of the public procurement act and in § 18 of the utilities act: "same type of contract as a service contract, except that the consideration consists partly or completely of the right to exploit the service.	National	Not defined	No limitations	Not defined.	Not defined.	Not defined.	Not applicable.

	Definition of service concessions	Level of publication	Thresholds and method of calculating the value of the contract	Services covered	Technical specifications and selection criteria	Award procedure	Award criteria	Remedies Directive
UK	<p>The Public Contracts Regulations SI 2006 No.5 (classical sector) define a works/services concession, as a public works/services contract under which the consideration given by the contracting authority consists of or includes the grant of a right to exploit the works/services to be carried out under the contract. (art.2) Service concessions are excluded from this Law (art.6)- The Utilities Contracts SI 2006 No.6 (utilities sector) provides the same definition, except that the term "contracting authority" is replaced by "utility". (art.2) Both types of concessions are expressly excluded from this Law (art.6)</p>	<p>The Public Contracts Regulations SI 2006 No.5, provides for publication in the OJEU, for works concessions falling within the scope of Dir.2004/18 (art.36) On service concessions, N/A, as these are excluded from this Law (art.6)- With regard to The Utilities Contracts SI 2006 No.6 –N/A, as both types of concessions are expressly excluded from this Law (art.6)</p> <p><b>N.B For those cases which fall completely outside the Directives (i.e concerning service concessions for the classical sector, and both services and works concessions for the utilities sector), as well as for works concessions which only fall partly within the classical Directive, guidance has been published by the Office of Government Commerce in March 2008, which explains the need that tendering procedures have to comply with the fundamental Treaty principles.</b></p>	<p>The Public Contracts Regulations SI 2006 No.5, applies only for works concessions with an estimated value above the threshold set in 2004/18. (art.36). The estimated value for a works concession, is the value of the consideration which the contracting authority would expect to give for the carrying out of the works, if it did not propose to grant a concession (art.36). On service concessions, N/A, as these are excluded from this Law (art.6)- With regard to The Utilities Contracts SI 2006 No.6 –N/A, as both types of concessions are expressly excluded from this Law (art.6)</p>	<p>The Public Contracts Regulations SI 2006 No.5 provides with regard to works concessions, that the same types of contracts are covered, as in the case of public works contracts (art.2). On service concessions, N/A, as these are excluded from this Law (art.6)- With regard to The Utilities Contracts SI 2006 No.6 –N/A, as both types of concessions are expressly excluded from this Law (art.6)</p>	<p>The Public Contracts Regulations SI 2006 No.5 provides that the same technical specifications that apply to public works contracts, also apply with regard to work concessions. (articles 5 &amp; 9). On selection criteria, however, N/A, as no similar provision exists. On service concessions, N/A, as these are excluded from this Law (art.6)- With regard to The Utilities Contracts SI 2006 No.6 –N/A, as both types of concessions are expressly excluded from this Law (art.6)</p>	<p>The Public Contracts Regulations SI 2006 No.5 does not make any provision on the award procedures to be followed for awarding works concessions – N/A. On service concessions, N/A, as these are excluded from this Law (art.6)- With regard to The Utilities Contracts SI 2006 No.6 –N/A, as both types of concessions are expressly excluded from this Law (art.6)</p>	<p>The Public Contracts Regulations SI 2006 No.5 does not make any provision on the award criteria for awarding works concessions – N/A. On service concessions, N/A, as these are excluded from this Law (art.6)- With regard to The Utilities Contracts SI 2006 No.6 –N/A, as both types of concessions are expressly excluded from this Law (art.6)</p>	<p>Not applicable to service concessions.</p>

### Annex III — List of consultations with stakeholders

2009	January	•Meeting with Veolia on PPP's and concessions
	March	•Meeting with E3PO
	September	•Meeting with BOUYGUES •Meeting with ASECAP
	October	•Meeting with FIEC •Meeting with IGD •Meeting with EDF •Meeting with CARITAS on concessions and German Social Services system
	December	•Meeting with SUEZ on concessions and PPPs
2010	March	•Meeting with BDEW German Association of Energy- and Water Industries •Meeting with BDI
	April	•Meeting with UTP
	June	•Meeting with Veolia •Meeting with Europabüro des DStGB •Meeting with Committee of the Regions •Meeting with FIEC - PPPS, concessions •Meeting with BUSINESSEUROPE •Meeting with ports association ESPO •Meeting with L'Union sociale pour l'habitat-Représentation auprès de l'UE Housing Europe Center, concession and social housing
	July	•Meeting with BDI •Meeting with CEMR •Meeting with Maison Européenne des pouvoirs locaux français •Meeting with French Local public Entreprises'
	September	•Meeting with Council of European Municipalities and Regions •Meeting with the CoR rapporteur •Meeting with Representation of the State of Baden Württemberg •Meeting with Representation NRW - Ministerium für Wirtschaft, Mittelstand und Energie des Landes Nordrhein-Westfalen •Meeting with Land Mecklenburg-Vorpommern
	October	•Meeting with DIHK
	December	•Videoconference with EIB •Meeting with E3PO
2011	January	•Meeting with SUEZ Environnement •Meeting with VATTENFALL AB   European Affairs •Meeting with Hutchison Port Holdings •Meeting with GDF SUEZ
	February	•Meeting with VEOLIA ENVIRONNEMENT •Meeting with SUEZ Environnement •Meeting with ESPO •Meeting with CEEP •Meeting with BUSINESSEUROPE
	March	•Meeting with UITP

	<ul style="list-style-type: none"> <li>•Meeting with European Affairs Advisor Union Française de l'Electricité</li> <li>•Meeting with ESPO</li> </ul>
April	<ul style="list-style-type: none"> <li>•Meeting with CEEP</li> </ul>
May	<ul style="list-style-type: none"> <li>•Meeting with VEOLIA</li> <li>•Meeting with ASECAP</li> </ul>
July	<ul style="list-style-type: none"> <li>•Meeting with Europolitique</li> </ul>
September	<ul style="list-style-type: none"> <li>•Meeting with CEEP</li> <li>•Meeting with SUEZ Environnement</li> <li>•Meeting with ETUC</li> </ul>
October	<ul style="list-style-type: none"> <li>•Meeting with ETUC</li> </ul>
November	<ul style="list-style-type: none"> <li>•Meeting with CEEP</li> <li>•Meeting with SUEZ Environnement</li> <li>•Meeting with E 3PO</li> <li>•Meeting with CEEP</li> </ul>
December	<ul style="list-style-type: none"> <li>•Meeting with Groupe Keolis</li> <li>•Meeting with GDF Suez</li> </ul>

Annex IV — Summary of the report «Public services in the European Union and in the 27 Member States» (potential for concession contracts)

### **Information on PPPs and public services in Member States indicating the potential use of concessions**

Additional information on the use of concessions in the EU may be found in the study conducted by the European Centre of Employers and Enterprises providing Public services (CEEP) on the provision of services of general interest (SGIs) in Europe. The study entitled "Public Services in the European Union and in the 27 Member States" was published in May 2010.

The report provides an indication on Member States' dynamics concerning the externalisation of the provision of some important services and therefore also on the potential future use of concessions.<sup>1</sup>

In this regard, certain general trends can be identified, confirming the growing need for a clear legal framework governing externalisation or delegation of public tasks, notably PPPs and thus, concessions (which are estimated to constitute approximately 60% of all PPPs).

Indeed, most of the EU Member States referred to in the report have undertaken measures aiming at a greater involvement of private entities in the provision of public services. This trend is particularly strong in Member States such as France or Spain, with well established legal environment for concessions and where concessions have traditionally played an important role, but also in such countries as the UK, Italy, Germany, Portugal, Greece and some new Member States, with notable examples of Bulgaria, Czech Republic and Hungary.

This involvement frequently takes a form of PPPs, therefore concessions or public contracts awarded in certain cases to mixed entities (Institutionalised PPPs). PPPs are of particular interest to those Member States which are faced with budgetary constraints, as well as to those with the imminent need to upgrade, modernise or develop public services infrastructures. This is the case of many new Member States, such as Bulgaria, Czech Republic, Hungary, Poland or Lithuania, but also in certain old Member States, such as Germany.

The benefits of PPPs have been recognised in many Member States and such forms of providing public services and infrastructures are often promoted by specialised PPP agencies. However, in spite of national legislation and institutions backing development of PPPs, many of these Member States are still at an early stage of the process. In many sectors, direct public

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<sup>1</sup> However, in using this information one has to bear in mind that:

- a) the study covers both the provision of market (services of general economic interest) and nonmarket services (which are not covered by the initiative on concessions);
- b) SGEI are not defined in the Treaty or in secondary legislation and refer only to a part of the services that can be awarded as concessions;

provision of services or provision by fully public bodies is still predominant (i.a. water in Bulgaria and Portugal, local and non-network public services in Italy) although devolution of powers to regional and local entities seems to be, in some cases, stimulating the use of PPPs (Czech Republic, Spain, Slovakia). Finally, there are also Member States where the provision of public services by private entities remains rare or nonexistent (Denmark, Luxembourg).

Under "New Public Management" (NPM) the study examines a broad movement of EU countries which have initiated a reform processes to increase efficiency of public action. In this context, public authorities are considered to be playing a greater role as a purchaser, organizer and controller rather than as producer. The general trend is to gradually reduce the direct intervention of public authorities and to involve the private sector. This evolution indicates further potential for the increased use of concessions.

#### Situation per Member State:

### **AUSTRIA**

Provision of services of general interest is partly handled by outsourced companies. According to assessments<sup>2</sup>, the management of local public services in Austria is provided by around 1200 local companies.

### **BELGIUM**

Belgium is marked by the logics of the NPM and begins to see the development of autonomous regulatory agencies to support the liberalisation of certain sectors (post and telecommunications, audiovisual etc.). Flanders has adopted a specific legislation to encourage and facilitate the PPPs<sup>3</sup>. However, in 2005, less than 2% of Belgian public investment took the form of PPP (urban centres, schools, sport, and local transportation).

### **BULGARIA**

From 1998, after the beginning of the privatisation process of public property, the procedure most often used for re-development of public enterprises and infrastructure used to provide public services, is the procedure of concession<sup>4</sup>.

In a period, between 1998 and 2000, concessions were concluded in the area of water, heating, electricity, and also functions relating to waste treatment and transport. Currently, most of economic and non economic services of general interest are run by private or mixed companies. In the field of services of general economic interest, the involvement of the private sector often results from the privatisation of commercial companies established by the state or the municipalities for the purpose of the delivery of public services. Also, the provision of public services by the private sector is governed not only by the concession regime but also by a set of sectoral laws and regulations.

In 2006, an initiative of the Ministry of Finance formally announced the support of PPPs in order to improve the quality of public services and investments in national infrastructure.

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<sup>2</sup> Dominique Hoorens, Les collectivités territoriales dans l'Union européenne. Organisation, compétences et finances, Dexia, 2008, p. 187.

<sup>3</sup> [http://www2.vlaanderen.be/pps/documenten/flemish\\_ppp\\_decree\\_english\\_version.pdf](http://www2.vlaanderen.be/pps/documenten/flemish_ppp_decree_english_version.pdf)

<sup>4</sup> Concession Act of 2005.

However, the concept of PPP is not enshrined in the legislation, PPP practices being developed on the basis of concession regime and commercial law. In the water sector, the concession granted for the provision of water supply services in Sofia is the only delegated management in this sector<sup>5</sup>.

## CZECH REPUBLIC

The implementation of the regional reform and the delegation of some State powers to local authorities are considered opportunities to develop new methods of public service delivery by different levels of administration through horizontal and vertical cooperation, and partnership with the third sector<sup>6</sup>.

External forms of delivery dominate particularly in the areas of waste and sewerage, municipal transport, cleaning, street lighting and municipal housing. 70% of the population receives water services from private companies, the highest percentage of the new EU Member States.

Czech municipal firms were dominantly established by privatisation of former communal services organizations.

The Czech Government adopted in 2004 a policy introducing PPPs as a standard tool for the provision of public services and public infrastructure. In practice, however, there is still much room for development of PPPs<sup>7</sup>.

Scale of external forms (contracting-out) of delivery of selected local public services in Czech municipalities (% among all used service delivery methods)

Service	2000	2004
Waste	71	80
Cemeteries	42	26
Public green areas	45	24
Communications	31	38
Public lighting	23	60

## GERMANY

For the management of public services, the infranational authorities or their associations (mostly unions of municipalities - Zweckverbände, but also associations of municipalities and regional associations) tend to have recourse to local public companies subject to company law. In practice, the vast majority of local public companies are still owned by the local communities (mainly in the sectors of water supply and energy, waste treatment, transport, housing, cultural services and hospitals).

<sup>5</sup> Maria Schueler, «Bulgaria», in Markus Krajewski, Ulla Neergaard, J. van de Gronden (eds.), *The Changing Legal Framework for Services of General Interest in Europe*, TMC Asser Press, The Hague, 2009, p. 481.

<sup>6</sup> OECD, *Examens territoriaux de l'OCDE. République tchèque*, p. 121-122

<sup>7</sup> For information about some important PPP projects see [http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/en\\_ppp\\_czech\\_republic\\_47747.html](http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/en_ppp_czech_republic_47747.html)

The debate on the virtues of PPPs, inspired by *inter alia* economic pressures from the rising costs of social benefits and the costs of modernising local infrastructure. Recent assessments indicate about 5% of PPP projects in the total local investment (school, transport, culture, urban development)<sup>8</sup>.

## **DENMARK**

Denmark has been more reluctant to implement the marketisation aspect of NPM; it tries out new management ideas but not primarily those concerned with markets and contracting<sup>9</sup>. That explains the less developed PPP policy and relatively few PPP projects. The official Danish PPP policy paper (Action Plan for Public Private Partnerships) was first issued in January 2004<sup>10</sup>.

## **ESTONIA**

Local authorities may arrange the provision of certain public services through the private sector. Contracting out is widely used in practice, especially in the case of technical tasks.

## **SPAIN**

Spain has a long tradition of delegating management of local public services to the private sector. With the opening of many areas of competition, the model of delegated management is now more widely used, private structures replacing the local government (in the area of heating and water for example).

The delegation of a public service to a public entity may take four different forms - contracts of indirect provision of public services: a concession (concesión) to a private undertaking that will provide the public service and assume the economic risk resulting from its exploitation; the “interested” provision (gestión interesada), a technique rarely used, whereby the private party provides the service, but both this party and the public body share the results of the activity according to proportions previously agreed in the contract; the “agreement” (concierto) between the public administration and a private party that was already supplying the service and that receives fixed compensation; and an institutionalised public private partnership in the form of a mixed capital entity, the capital of which is held jointly by the contracting entity and the private partner.

Concessions and mixed capital companies are the two most frequently used delegation forms in the area of economic public services, especially at local level. The water and waste services are most often managed by concession (e.g. for water and wastewater, public monopoly in Madrid, private monopoly in Barcelona, PPP). The legal regime and the effects of concession depend on whether the activity has been reserved, or remains open to the free market.

The concierto is habitually employed in the field of social public services, such as education, hospitals and social care services (e.g., elderly homes)<sup>11</sup>.

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<sup>8</sup> Dominique Hoorens, *Les collectivités territoriales dans l’Union européenne. Organisation, compétences et finances*, Dexia, 2008, p. 163.

<sup>9</sup> The same approach as in the two other Scandinavian states.

<sup>10</sup> Carsten Greve, Graeme Hodge, “Public-Private Partnership: a comparative perspective on Victoria and Denmark”, in Tom Christensen, Per Laegreid, *Transcending new public management: the transformation of public sector reforms*, Ashgate, 2007, 179

<sup>11</sup> Luis Arroyo Jimenez, in Markus Krajevski, Ulla Neergaard, Johan van de Gronden (eds.), *The challenging legal framework for services of general interest in Europe*, T.C.M. Asser Press, 2009, pp. 320, 312.

Since 2003, PPP has developed in Spain, mostly in the sectors of transportation, infrastructure and hospital care<sup>12</sup>.

## FINLAND

Municipalities may purchase public services from various service providers (other municipalities, federation of municipalities, public sector organisations, and private providers). The recent developments show a tendency to make stronger the private provision of public services which play an important role in the sectors of energy (highly competitive), day-care, elderly care and even hospital and health services.

Development of PPP in public services provision is mainly focused on investment projects aiming at development of infrastructure (public buildings like schools and motorways and railways).

## FRANCE

The model of delegated management<sup>13</sup> is widely present in the areas of industrial and commercial services, private structures substituting for the public authorities. The delegate operator may be a private or a public local company (mixed company - société d'économie mixte/SEM).

In the sector of transport (except for rail), the local authorities generally use delegated management<sup>14</sup>. In urban public transport in provincial France, the share of direct management tends to stabilise around 10% (from 1997 to 2005). It is governed by régies with financial autonomy, in the small networks (for a total of about twenty networks in direct management) and EPIC for large networks. Compared to all public transport networks, direct management concerns rather the small networks (15 of 19 régies in 2005 covering fewer than 100 000 inhabitants). For bigger networks, organizing authorities tend to use a specialised private provider. The Communities (urban agglomerations, municipalities) delegate extensively; the municipalities and mixed unions (syndicats mixtes) delegate less.

The water sector is dominated by delegated management: in 2004, over 80% of the population is served by private companies (some remunicipalisations in Grenoble, 1994; Castres, 2003; Cherbourg, 2005; Paris, 2010). In waste water delegated management covers about 55% of the population.

More recently, at the level of State public services, NPM led the state to divest some of its functions of service operator, in favour of the role of regulator of activities entrusted to private operators.

This change of the conception of the role of the State, has particularly led to a multiplication of privatisations, the development of public-private partnerships<sup>15</sup> and the emergence of numerous regulatory agencies, under the label of independent administrative authorities.

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<sup>12</sup> Dominique Hoorens (dir.), *Les collectivités territoriales dans l'Union européenne. Organisation, compétences et finances*, Dexia, 2008, p.335.

<sup>13</sup> See <http://www.eurosig.eu/article78.html>

<sup>14</sup> Excepting Paris –Régie autonome des transports parisiens RATP, and several others (régies with only financial autonomy for small networks, and EPIC for larger networks)

<sup>15</sup> Since the ordinance of June 2004 and establishment of May 2005 of Mission d'appui aux partenariats public-privé (MAPPP).

## **GREECE**

Over recent years Greece has seen significant participation by the private sector, by means of PPPs, in the construction and management of projects involving in particular major infrastructures or specific construction projects (airport, bridge, and motorway). PPPs are regulated by the Act 3389/2005 'Partnerships between the Public and Private Sector' which covers only partnerships with a budget of up to 200 million euros<sup>16</sup>.

## **HUNGARY**

In Hungary, both simple contract (for example between municipalities and privately owned schools providing a public service, or between family physicians, who are private entrepreneurs, and the national health insurance), and concessions are common.

PPP is a relatively new phenomenon and is used in the development of the infrastructure necessary for the provision of services in a limited range of sectors: (i) in the field of sport services (the building of gymnasiums, swimming pools, sports halls), (ii) road transportation (the building of motorways), (iii) cultural services (the "Palace of Arts" in Budapest), and (iv) secondary and higher education (the building and renovation of student halls and dormitories). Some prisons are also being built and reconstructed in the framework of PPP programmes. The yearly budgetary spending on PPP programmes is around 80-100 billion HUF.

## **IRELAND**

Since the National Development Finance Agency Act 2002, local authorities may establish joint ventures in the form of PPP. At local level, most PPPs are concluded in the areas of water and sewerage. At national level the PPP projects involve the construction of roads/carriageway/services areas on the national roads network, building projects for services of justice, health, education, culture, etc<sup>17</sup>.

## **ITALY**

In the past two decades, the management methods of public service were enlarged by the Italian legislator both for national and local public services. Direct provision is widespread in most local public services and in all non-network activities. Delegated management by concession was introduced in the Italian legal order by the Law n°103 of 29 March 1903 under the public law regime. Today it is used, at national level, in the public broadcasting sector and at regional-local level mostly in the areas of regional and local transport sectors and other local services such as childcare, and school transport and meals.

The third (ie, voluntary) sector, composed of a complex of institutions placed between State and market, plays an important role today. These are privately organised entities which aim to produce and supply social services of general interest. The legislation permits contracting out for the supply of social services and attributes to Regions the function to take measures in order to regulate the relationship between local authorities and the third sector, with particular regard to the "contracting out system" of services to individuals. It belongs to public authorities to establish forms of collaboration with voluntary organisations. Municipalities may purchase services and interventions organized by the third sector or may contract out

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<sup>16</sup> P.C. Spyropoulos, Theodore P. Fortsakis, Constitutional Law in Greece, Kluwer Law International, p. 176.

<sup>17</sup> <http://www.ppp.gov.ie/>; <http://www.environ.ie/en/DevelopmentandHousing/PlanningDevelopment/PPP/>

their management while respecting the national and EU rules which regulate the contracting out of services by the government. Municipalities contract out based on the most economically advantageous tender having regard to specific qualitative elements.

Since the 1990s, the use of PPP has been widespread in Italy, primarily in the sectors of transport infrastructure, utilities, hospital health services, housing, management of waste, etc. A special public structure was created in 2000 to support investment projects in the public sector (Unita Tecnica Finanza di Progetto - UFP). In 2006, the work concession under private initiative was the most widespread procedure in the Italian PPP market; the service concession accounted for 23,6% in value of total PPP market<sup>18</sup>.

## LITHUANIA

Municipal institutions and administration may not provide public services, except for the cases provided by law. They shall be provided by budgetary and public establishments, municipal undertakings, companies with share capital and other entities. Public services shall be provided by service providers established by municipalities or other legal and natural persons under contracts concluded with municipalities, who are chosen by public tender. In the absence of a provider of public services, a ward or neighbourhood may, by the decision of the municipal council, provide public services itself (article 5 and 8, 9 of the law on local self-government).

In general, the concession procedure may be used for the provision of public services in areas determined by law: energy, including heat and electricity energy, oil and natural gas extraction, transmission, distribution, supply, railway lines and systems, water economy, including water collection, pumping, treatment, purification and distribution; waste water, including waste water collection, transportation and treatment, and sludge treatment; utilisation, recycling and management of waste; infrastructure of road transport; health care system; telecommunications infrastructure; educational system; port and barrage infrastructure; airport infrastructure; public transport infrastructure; tourism objects, facilities and other infrastructure; culture, sports, leisure facilities, equipment and other infrastructure<sup>19</sup>.

The need to improve public infrastructure and public services situation and the limitations on the main country fiscal indicators set by international treaties (Stability and Growth Pact and Maastricht Treaty) and therefore Government inability to devote appropriate financial resources to meet those needs are determining the PPP development in Lithuania. PPP country process development was started by MOF in the middle of 2005. Today the process is mainly spontaneous as there is no long term PPP strategy or action plan, no centralised PPP process development and management and supervision or a sufficient clearly developed legal system enabling effective application of different PPP forms. Public and private sectors cooperation possibility is foreseen by the Concession law of 1997 revised in 2003, the public procurement law, the Civil code, the Law on Management, Usage and Disposal of State and Municipal Property. Currently existing legal basis provides for 2 PPP forms application: concession (the most developed PPP type, on the grounds of Concession Law provisions), joint activity (joint ventures) - establishing mixed capital enterprises (on the grounds of Law on Management, Usage and Disposal of State and Municipal Property provisions, contract limited to 3 years). PPP projects are initiated and carried out mainly by municipalities. The

<sup>18</sup> Laura Martiniello, Italian PPP at a glance,

[http://www.utfp.it/docs/Italian%20PPP%20at%20a%20glance\\_Martiniello\\_2008.pdf](http://www.utfp.it/docs/Italian%20PPP%20at%20a%20glance_Martiniello_2008.pdf)

<sup>19</sup> Law n° I-1510 on concession of 10 September 1996, last amended by Law n° X-749 of 11 July 2006

State is not active in PPP field and there is a lack of strong political support for the PPP process (the first concession type project was in 2002 - long term lease of Vilnius city heating networks). According to the National Audit Office of Lithuania by September 2007, 45 concession type projects were initiated by 26 municipalities (above 43% out of total amount) and in many cases there was only one participant during tender<sup>20</sup>. The Lithuanian government decided to start implementing a new PPP programme from 2010.

## **LUXEMBOURG**

The contracting of public services provision is not developed in Luxembourg<sup>21</sup>; the majority of local public services are supplied by public structures.

## **LATVIA**

The contractual delegation of public services to a private company or a local public company had been governed by the Law on concessions in force since 2000.

In 2004, a new law on public procurement was enacted in Latvia with a provision on PPP and the adoption of specific legislation is in progress. PPP projects could also be realised under the concession regime (law of 2000). The first PPP projects at local level concern mainly the areas of housing, education, heating, street lighting, etc.). At national level, practical projects were planned for the transport sector, and energy infrastructure. A public policy framework on PPP (“Promotion Guidelines of Latvian Public Private Partnership”) and an action plan (“Action Plan for Implementation of Promotion Guidelines of Latvian PPP for 2006–2009”) were adopted in 2005. The first Latvian law on PPP<sup>22</sup> came into effect on 1st October 2009 and repeals the previous law on concessions<sup>23</sup>. In 2008 there were 18 PPP concluded agreements (the first was concluded in 2001), 16 in the transport sector (public transport service concession), 7 for communal services (waste water treatment service concession), 1 in education (art school renovation and operation), health care, natural resources, IT and tourism<sup>24</sup>.

## **THE NETHERLANDS**

Many PPP projects were initiated at national level and a centre of expertise on PPP (Kenniscentrum publiekprivate samenwerking) was founded in 1999. However, locally, PPPs are rare.

## **POLAND**

For the provision of some public services, the public authorities can entrust the activity to private providers by means of public procurement. There is also a large group of providers

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<sup>20</sup> Diana Vaitiekūniene, Ministry of Finance of Lithuania, PPP process development in Lithuania, 29 January 2009, [http://www.ppp.gov.lv/fetch\\_1856.html](http://www.ppp.gov.lv/fetch_1856.html). See also some examples on [http://www.ppp.gov.lv/fetch\\_1857.html](http://www.ppp.gov.lv/fetch_1857.html)

<sup>21</sup> For example, canteens

<sup>22</sup> See the text on [http://www.ppp.gov.lv/fetch\\_5917.html](http://www.ppp.gov.lv/fetch_5917.html)

<sup>23</sup> Latvijas Republikas Saeimas un Ministru Kabineta Ziņotājs, 2000, No. 4; 2003, No. 2

<sup>24</sup> [http://www.ppp.gov.lv/fetch\\_1849.html](http://www.ppp.gov.lv/fetch_1849.html)

outside the public sector, acting in the name of the community – non-public providers of services – including both private undertakings as well as non-profit organisations.

PPPs, namely the provision of services of general interest by private operators is sanctioned by Polish law in the form of the cooperation of private enterprise supported by private capital with the public sector at all levels. In Poland it has only just begun to play a role.

The legal basis for PPPs in Poland is constituted, notably, by the Act on public-private partnership of 19 December 2008. Public and private partners cooperate in various forms, especially in water and sanitation, waste disposal, and most recently in municipal building for the communities.

Agreement on public-private partnership is preceded by economic financial and legal analyses, to ensure the optimal financing of subsequent investment, and the realisation of savings, which every PPP project must be demonstrated to secure during its life cycle.

## **PORUGAL**

As their competences are growing, local governments in Portugal no longer assume the provision of all public services through in-house services. By the end of the 1990s, some local governments began contracting with external actors to provide public services, including water and solid waste, electricity and local transport.

PPP projects and concession agreements were developed in the mid-1990s. Today, the concession agreements are regulated by the Public Contracts Code<sup>25</sup> and the public-private partnerships are regulated by Decree-law n°86 of 2 April 2003<sup>26</sup> and are well developed in the transport sectors (highways, metro, tram, rail transport infrastructure, and telecommunications), and advances in health care (hospital building<sup>27</sup>), management of water and waste.

Portuguese public administration was also subject to NPM reforms meant to revitalise service delivery and to introduce innovative organisation to deliver public services.

The major dimensions of NPM initiatives were:

- autonomisation and “corporatisation” of public services although remaining in the public sector (water, health care and cultural services);
- introduction of market mechanisms in the public services sector through tariffs and free choice of the service provider (health, education, etc.);
- “Contractualisation” of public service obligations with the public providers (TV and radio public service, postal services, etc.)

## **ROMANIA**

The delegated management of public services developed after 1990 through the concession of economic public services to private operators (private or mixed commercial enterprises, some arising from the transformation of autonomous public regii<sup>28</sup> or the specialised municipal

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<sup>25</sup> See Decree Law n° 18 of 29 January 2008

<sup>26</sup> See for the health sector Decree Law n° 185 of 20 August 2002

<sup>27</sup> <http://www.parpública.pt/pppsanalise.html>

<sup>28</sup> The Law on local public administration n° 69/1991 gives local authorities the power and autonomy to perform the services of local interest. In 1991, on the basis of the Law n° 15 of 7 August 1990, the units of local

services), most often in areas of heating, waste management, urban public transport, street cleaning and rarely water<sup>29</sup>.

Not-for-profit operators are most often involved in the provision of social services.

Romanian legislation introduced the contracts of public-private partnership in 2002. The Law n° 34/2006 created a general framework for the concession contracts (including PPP – transport infrastructure, tourism, research, etc.).

## SWEDEN

The main relevant legal regime derives from the Public Procurement Act<sup>30</sup> which establishes the rules for public authorities as contracting entities and from the Company Law<sup>31</sup>. According to the Local Government Act, before a regional municipality hands over management to a private entrepreneur it has to make sure that it will have the capacity to control and to be able to follow up on the activities.

## SLOVENIA

The manner of and conditions for performing local public services shall be defined by the municipality, unless otherwise provided by law<sup>32</sup>.

Public services in Slovenia are performed by the special legal persons (public institution, public commercial institutions, public enterprise etc.) established by the state or municipality. These organisations have their own legal personality and autonomy in determining their strategic plan, annual working programmes, financial plans and annual report. They are not directly financed from the national or local budget.

The law on institutions enabled the participation of the private sector in non-commercial public services (e.g. education, culture, health, etc.) by concession. The law on economic public services allows for the delegated management by concession. Both laws gave only the basic legal framework. How certain public services should be “produced” is should by a regulated by each specific law for each type of service.

The Public-Private Partnership Act<sup>33</sup> was adopted at the end of 2006 to enable and encourage mutual help and cooperation between entities from the public and the private sectors to ensure economical and efficient provision of public services and other goods or services in the public interest<sup>34</sup>. PPP are carried out in the areas of financing, design and engineering, construction,

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administration were involved in a reorganisation process and became autonomous entities (regii autonome) and companies, and later in a process of privatisation. By Government Decision n° 597/1992, the autonomous entities (regii autonome) and the companies established with the capital from the State for the provision of public services have been transferred to the competence of local councils. The evolution of the public services reorganisation process has revealed the deficiencies of the management by autonomous public entitites (regii autonome) and their inefficiency. In 1997, the Government Decision n° 30 started a long process of reorganisation (in some cases, of liquidation) of autonomous entities (regii autonome) into limited companies.

<sup>29</sup> For example, Apa Nova SA Bucharest, the concessionaire of the water and waste water public service in Bucharest capital city – subsidiary of Veolia Environment – Veolia Water. Since March 2000, 83,69% of its capital is owned by Veolia Group, 16,31% by the municipality, 0,0009% others.

<sup>30</sup> [http://www.konkurrensverket.se/t/Page\\_490.aspx](http://www.konkurrensverket.se/t/Page_490.aspx)

<sup>31</sup> <http://www.sweden.gov.se/sb/d/9171>

<sup>32</sup> Article 62, Chapter VII Municipal public services - 2005 Act on Local Self-Government

<sup>33</sup> [www.mf.gov.si/slov/javnar/53646-ZJP\\_EN.pdf](http://www.mf.gov.si/slov/javnar/53646-ZJP_EN.pdf)

supervision, organisation and management, maintenance, and provision of public services and other activities.

There are a lot of concession agreements for delivering different public services or services of general interest are concluded □ at state level 1520 and at the local level: for health care and 1575 for other services<sup>35</sup>.

## SLOVAKIA

At regional and municipal level, including smaller municipalities, all types of service delivery methods are used.

The following categories of local public services delivery arrangements can be distinguished for purposes of our research:

1. Direct production by the municipality and its employees,
2. Municipal net budgetary organisations,
3. Municipal firm (firms with more than 50% municipal share included),
4. External supplier,
5. Combination of four aforementioned arrangements
6. Other forms.

Scale of external forms (contracting-out) of delivery of selected local public services in Slovak municipalities (% among all used service delivery methods)

Service	2000	2005	2005
Waste	49	64	69
Cemeteries	27	12	16
Public green areas	16	18	33
Communications	21	41	45
Public lighting	30	35	40

Slovakia started to use the economic instrument of “Public Private Partnership“ at the national level in 2009, in the sector of road building, so-called “speedily roads“ one level lower, as than highway/motorway. However, there have been PPP arrangements at local and regional level for a long time.

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<sup>34</sup> Article 2 defines PPP as a relationship involving private investment in public projects and/or public co-financing of private projects that are in the public interest, and such a relationship is formed between public and private partners in connection with the construction, maintenance and operation of public infrastructure or other projects that are in the public interest, and in connection with the associated provision of commercial and other public services or activities provided in a way and under the conditions applicable to commercial public services, or of other activities where their provision is in the public interest, and of other investment of private or private and public funds in the construction of structures and facilities that are in part or entirely in the public interest, or in activities where their provision is in the public interest.

<sup>35</sup> Report on Public-Private partnership in Republic of Slovenia for year 2008  
[http://www.mf.gov.si/slov/jav\\_zas\\_partnerstvo/Porocilo\\_jav\\_zas\\_part.pdf](http://www.mf.gov.si/slov/jav_zas_partnerstvo/Porocilo_jav_zas_part.pdf), page 29, 34.

## UNITED KINGDOM

In the current UK system, the direct provision of services by the public sector is smaller than in the years 1940-1970. The public sector intervenes usually as an authority to define and regulate the service. SGIs are more provided under a concession or PPP by the private sector, though most hospitals and schools (more than 90%) are in public sector management.

A more profound transformation of the public services sector happened after 1987. A series of reforms made the scale of use of market-type-mechanisms much bolder and larger, intensified organisational and spatial decentralisation of the management and production of services. A law of 1988 required communities to proceed to tender for a list of SGIs (Compulsory Competitive Tendering CCT)<sup>36</sup> on an increasing scale every year. The 1999 Local Government Act abolished compulsory competitive tendering (CCT) for the provision of services in favour of a new regime of ‘best value authorities’ (which include, among others, local authorities, National Park authorities, police authorities, fire authorities, metropolitan county fire and civil defence authorities, waste disposal authorities and metropolitan county passenger transport authorities).

The Deregulation and Contracting Out Act (1994) defined the framework for the future evolution of the public sector and public services, the “marketing” of some functions of ministerial departments and to complete this process for local communities<sup>37</sup>. The Act removes obstacles to contracting out functions but does not require them to be contracted out. It is for individual ministers and statutory office holders to determine the extent to which services are contracted out<sup>38</sup>. Excluded from the process of contracting out are such sensitive constitutional functions as the exercise of the judicial power of the State, the regulatory authority and the activities undermining fundamental freedoms.

Tendering continues to form one part of the government’s quest for value and efficiency in the provision of local authority services. In 2005 the level of outsourcing of government services (purchase of goods and services vs in-house provision) in United Kingdom was nearly 80%. But, 90% plus of (for instance) doctors, nurses, teachers and so on are public sector employees who work in public sector organisations under public sector management and subject to political control of finance.

In 2003-2004 about one-tenth of UK total capital investments in public services were through PPPs<sup>39</sup>. PPPs are governed by Partnership UK, under the supervision of the Treasury. The Private Finance Initiative PFI, are the most common form, launched in 1992. Since their creation more than 700 projects have been developed at local level (health<sup>40</sup>, education, transport) and more than 200 are expected between 2006- 2010.

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<sup>36</sup> For a review of the Conservatives’ 1998 Local Government Act, see David Parker, “The 1998 Local Government Act and Compulsory Competitive Tendering”, in *Urban Studies*, vol. 27, n° 5/October 1990, pp. 653-667. Its impact was limited to certain blue-collar functions like refuse collection and the results were very mixed as the system was subject to local political bias.

<sup>37</sup> Local Government Planning and Land Act (1980) and the Local Government Acts (1988, 1992) already forced local authorities to bring to market several services to the public and also the services they receive from officials, for example, the collection of garbage and trash, services with professional character, etc.

<sup>38</sup> A contractor may be authorized to carry out functions for a maximum of ten years (Section 69(5) a); the authorisation may be revoke any time(Section 69(5) b).

<sup>39</sup> OECD, Modernising government : the way forward, 2005, p. 141

<sup>40</sup> “The system [of PFI] nevertheless flourishes because it has the key attraction of reducing the government borrowing requirement. A publicly financed alternative which would be very likely to be cheaper is in practice not available because not constructed by the government. The PFI becomes the dominant way of financing hospitals by default, in the absence of any public sector option.” David Hall (PSIRU), Services of

In a first phase, the NPM “revolution” involved in the UK, in particular, extensive privatisation, marketisation, and contractualisation of public services. At the same time, new coexists with old; the “new public management” till adheres to many of the values and aspirations of “old public administration”<sup>41</sup>.

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general interest in Europe – an evidence-based approach, Written submission to European Parliament Committee on Economic and Monetary Affairs, 21 February 2001, [www.psiru.org](http://www.psiru.org)

<sup>41</sup> Gavin Drewry, « The United Kingdom System », in K.K. Tummala (ed.), Comparative Bureaucratic Systems, Lexington Books, 2005, p. 55.