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BUSINESSEUROPE's initial views on the issue of Concessions

BUSINESSEUROPE believes that Public Private Partnerships (PPPs) and particularly concessions have many advantages as an approach to the delivery of public services and as a means of instilling efficiency in the management of Europe's public services.

We believe that clarification of the circumstances surrounding concessions and of the competitive procedures applying to them would create the legal certainty required for public authorities to use concessions more widely and effectively.

We believe that such an approach could improve the efficiency of public services, create greater transparency, allow innovative approaches to the delivery of public services across Europe and allow the channelling of necessary private funding into infrastructure.

If specific legislation on concessions is to be promoted we believe that it should focus on services concessions and the contractual relationship therein between the public and the private sectors.

It should focus on how concessions are awarded on the basis of competition.

It should make clear the award procedure applying to services and public works concessions.

It should allow the possibility for the parties to renegotiate terms on the basis of stated contractual circumstances for such renegotiation.

We believe the Commission should refrain from setting hard rules for duration of concessions. Focus instead should be on providing guidelines to public authorities.

At all times the Commission and stakeholders should remain aware that there may be differences in what is understood to be a concession across Europe.



Concessions

Following the Green Paper on Public Private Partnerships (PPPs) of 2004, the European Commission published a communication on 15/11/05 indicating that there might be support for legislation on concessions and that it was going to engage in an impact assessment to determine if such new legislation may be beneficial.

The European Parliament debate on the Green Paper came to the conclusion that if such a legislation were to be proposed, "it should allow public authorities through flexible, transparent and non-discriminatory procedures to choose the best partner according to criteria which, we understand, are defined in advance".

Should the impact assessment conclude that legislation is required, BUSINESSEUROPE would like to offer the following ideas on the form and scope of a new legislation.

As already expressed in BUSINESSEUROPE's comments of October 2006 we believe that PPPs and particularly concessions have many advantages as an approach to the delivery of public services and as very useful means of instilling efficiency in the management of Europe's public services. It therefore supports the idea of clarifying the regulatory framework for concessions, in order to help spread their practise and to ensure that concessions are being awarded on the basis of fair and open competition.

What follows is a series of suggestions aiming at clarifying the concept of concessions whilst preserving their attraction as a tool of cooperation between the public and the private sectors helping in the more efficient delivery of infrastructure investments and of public services management.

THE CONCEPT OF CONCESSION – HISTORY

Concessions have played an important role in the development of public infrastructure in a number of Member states as far back as the 19th Century e.g. the development of French public transport (rail and tramways) was greatly facilitated by the use of concessions as a flexible contractual partnership between the public and the private sectors.

Concessions, in the European sense of the word, have been used extensively in several European countries during the 20th Century. France has developed a significant body of legislation around the concept of "Delegation de Service Public" (DSP) which encompasses concessions.

Both DSP and PPP, including the Private Finance Initiatives in the UK, refer to forms of partnering between the public and private sectors that aim to involve the private sector, on a competitive basis, in the delivery of a public infrastructure (and its services) and/or the delivery of a public service. The underpinning contract between the public and private sectors may present features that allow it qualify as a concession. Otherwise, it would represent public procurement (in the normal sense) of works and/or services.

The concept of concessions appears¹ in Community law in *Directive 93/37/EC* on public works contracts which distinguishes a public work concession from a public

¹ First mention is in 1971 in relation to public works procurement



works contract by the fact that the concessionaire is granted the right to exploit an infrastructure construction in consideration of having erected it. The right to utilize may also be accompanied by payment from the awarding authority to the concessionaire. The existence of an exploitation risk related to the investment made is the determining factor as to whether it is a concession or not.

Directive 92/50/EC on public service contracts does not refer to service concessions. The definition of service concessions came with the interpretative Communication on Concessions of 29/04/2000. This communication clearly establishes that service concessions arise when public authorities entrust to a third party either by a contractual or unilateral act (with the consent of the third party) the management or part management of services that pertain to the public authorities responsibility and for which the third party takes on the operating risk.

This approach is upheld by *Directive 2004/18/EC* on the coordination of procedures for the award of public work contracts, public supply contract and public service contracts. In this Directive, service concessions are defined as contracts of the same type as a public 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 this right together with payment.

However the Directive excludes service concessions from its scope. Work concessions are defined as in *Directive 93/37/EC* and the new Directive covers certain aspects of the award procedure without however submitting public works concessions to the detailed public procurement procedures that it spells out.

On the above basis, BUSINESSEUROPE took the view that, if specific legislation on concessions were to be promoted, "it should focus on services concessions and the contractual relationship therein between the public and the private sectors". As such any legislative proposals or clarification communication must focus on how concessions are awarded on the basis of competition.

THE IMPORTANCE OF A DEFINITION

As previously explained BUSINESSEUROPE is of the opinion that clarification of the circumstances surrounding concessions and of the competitive procedures applying to them would create the legal certainty required for public authorities to use concessions more widely.

Our reasons for wishing to see an extension to the use of concessions from a present situation of limited use in Europe are various:

- concessions are the classic instrument allowing to take a whole-life economic approach to the creation and/or operation and management of public infrastructure and services. In a competitive framework, it is a unique tool to improve the efficiency of public services, a worth-while objective for Europe's citizens, in keeping with the Lisbon agenda;
- the process of awarding concessions should create transparency on the economics of a given public service, and on the quality standards that it purports to deliver;



- the systemic approach to the delivery of public services provides an opportunity to call on the innovativeness of the private sector. Such innovative approaches would be particularly relevant in the context of the EU policy to promote sustainable development;
- given the huge need in Europe for investment in infrastructure in a context of overstretched national budgets, concessions could be the means to allow the channelling private funding into infrastructure.

As such we believe that an EU approach to clarifying the framework for both works and service concessions should create legal certainty but should also preserve the versatility and potential of this form of partnership, which has justified creating a status for concessions distinct from public procurement rules applicable to works, goods and services.

Saying this, one must be aware of the fact that there may be differences in what is understood to be a concession across Europe. It is not for BUSINESSEUROPE to come up with an exact definition of concessions. However we would like to underline a number of features that are important in analyzing the relationship between a public authority and a third party in order to identify a concession (whether for public works or for services):

- the services to be rendered under the concession should be services of general economic interest or portions thereof defined by the conceding public authority in the interest of the citizens it administers;
- the remuneration of the concessionaire by means of charges to the users and/or fees from the public authority should in no way eliminate the operating risk for the concessionaire as it has been split with the public authority; the conceding public authority may want to constitute provisions towards the risks that it has endorsed;
- the concessionaire will have to deliver under a set of public service obligations defined by the public authorities, as they may be adapted from time to time; such obligations would include at least:
 - the safe provision of the service at all times;
 - the control of service quality;
 - the adaptation of the service to technological change and to evolution in customer expectations;
 - the determination of charges for the service and the control of their variations;
 - prescriptions to allow for the smooth operation of the service in the years following termination of the contract;



- in case of termination of the service, the obligation for the concessionaire to allow the public authority to make arrangements to ensure on-going delivery.
- the concessionaire will deliver the services by operating a dedicated system made up of tangible and/or intangible assets to which it is granted exclusive access by the public authority;

The concessionaire may be entrusted with the design and implementation of all or part of the system to be operated as well as with its financing, but it is not a necessary condition for there to be a concession.

PROCUREMENT PROCEDURE

Any potential directive on concessions should make clear the award procedure applying to services and public works concessions. This procedure should seek to achieve openness and transparency at every stage and at every level.

The Commission has raised the question of whether the “competitive dialogue procedure” or the “negotiated procedure” should be used for concessions. Several BUSINESSEUROPE members hold the view that both procedures have been designed in the context of public procurement directives which do not apply to concessions. They have specific arguments against trying to make concessions which require some flexibility fit in a mould designed for goods and services.

Furthermore the competitive dialogue procedure is still at a relatively early stage of its implementation across Member States. As such sufficient, first hand feedback from the field is lacking to allow one to speculate on the possible extension of this procedure to concessions.

BUSINESSEUROPE will be ready to engage with the Commission on details of an award procedure at a later stage in the process.

THE DURATION OF CONCESSIONS

BUSINESSEUROPE is of the view that the Commission should refrain from setting hard rules for duration of concessions in any potential directive. Rather it should instead provide guidelines to public authorities. Any directive should be mindful of experience in Member States that points to contracts durations being variable and consistent with the circumstances and goals of the project.

When a concession involves a large investment upfront, its duration may be quite long term.. When there is no large upfront investment required of the concessionaire, the duration of concessions still has to be long enough to allow the concessionaire to optimize operation, maintenance and renewal of systems and assets. The need to repay an initial investment by the concessionaire should not be the sole driver of contract duration.

THE NEED TO AMEND CONCESSIONS



Situations can arise during a concession which may require an amendment to the terms of a concession. Typical examples of such situations include:

- an outside event beyond the control of the parties, such as regulatory changes, requirements by the customers, force majeure;
- any change in the conditions of the service imposed to a concessionaire by the public authority;
- contractual clause convening periodic reviews of the service standards and/or of the economics of the concession.

A potential directive on concessions should allow the possibility for the parties to renegotiate terms on the basis of stated contractual circumstances for such renegotiation.

SPREADING THE PRACTICE OF CONCESSIONS

BUSINESSEUROPE believes that legislative proposals on concessions should focus on improving legal clarity on the specifics of concessions and on their award. To that extent, those proposals should aim at spreading best practice in the award of concessions.

Given the economic and social benefits for Europe that could be derived from an extended use of concessions, BUSINESSEUROPE considers that the Commission could consider making recommendations to Member States towards facilitating the implementation of concessions. Such recommendations should include:

- providing guidance and training to administrators of public authorities that would become interested in concessions;
- repealing legislation or regulation that might impede the implementation of concessions;
- providing guidance to civil servants managing the allocation of EU Structural funding in Member States so that they become comfortable with the use of such funding in the context of concessions;
- facilitating the exchange of best practice within member States and across Europe.

It is a matter for consideration by the Commission as to whether such recommendations would be included in a directive or instead in a communication accompanying a directive.