AN EU INITIATIVE ON CONCESSIONS

QUESTIONNAIRE TO BUSINESS

The Commission is presently assessing the need for and impact of an initiative on concessions[1] with a view to improving the current legal framework. In this context, the Commission has prepared the present questionnaire the aim of which is to learn from private and public undertakings, as well as from their associations on their experience with concessions, hear their views on how the present rules work and to gather suggestions for improvements. The questionnaire is part of a wider consultation of stakeholders which includes an open consultation and two other specific questionnaires addressed to social partners and contracting authorities.

An initiative on concessions would aim to facilitate the use of concessions and ensure best value for money for both users and contracting authorities, by providing all interested parties with legal security and guaranteeing transparency and equal treatment for economic operators. It would also enhance competition and the internal market in concessions contracts, and contribute to EU policy goals in the field of Public-Private Partnerships, as explained in the Commission's Communication on «Mobilising private and public investment for recovery and long term structural change: developing Public Private Partnerships».

In line with the Lisbon Treaty provisions and, in particular, the principle of proportionality, and taking into due account of the Commission's guidelines on «Better Regulation» as well as the European Parliament's report on new developments in public procurement (2009/2175(INI)), the Commission will seek to establish the most appropriate way to meet those objectives without making the legal framework too complex or burdensome while ensuring the necessary legal certainty.

Profile:

0.a. Type of organisation

- Private company
- Mixed capital company
- Public company
- Industry or Professional Association ✓

0.b Scope of activity

- Local/ Regional

[1] According to the current definition of concessions set out in art. 1 (3) and (4) of 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, (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0018:EN:NOT), concessions are contracts similar to public contracts, with a difference that the contractor bears the economic risk of the exploitation of the work or service at stake. In light of the resulting case law of the EU Court of Justice, "the essential characteristic of the concession is that it is the concessionaire himself who bears the main, or at least the substantial, operating risk".

- National ✓
- European
- World

0.c Size of the respondent

If you respond as a company:

- How many people do you employ and
- What is your average turnover over the last 3 years?

If you respond as an industry or professional association, what is the approximate

- Number of members and geographic coverage of your association
- Total number of employees of the members of the association,
- Aggregate turnover of the members of the association?

[PLA committee to complete]

0.d What sector(s) do you operate in / do you represent?

- Water distribution
- Waste water and sewage processing
- Waste treatment
- Energy or heating services
- Transport (railway, tramway, bus, automated systems, cable)
- Port services
- Airport services
- Postal services
- Education (administration of schools, specialised education, training or catering)
- Health services
- Social services (kindergartens, employment coaching, care of the elderly)
- Road & Motorway operation
- Sports and leisure facilities (administration sports halls, library services)
- Catering
- Car parking
- Judiciary systems (administration of Courts or prisons)
- Research & laboratory services
- Other (please specify) ✓

The Procurement Lawyers Association (PLA) is an association of lawyers (comprising law graduates, solicitors, barristers and other individuals holding professionally recognised legal qualifications) and other individuals with either an academic or professional interest in procurement law. Its members are primarily based in the UK and Ireland. Members of the PLA represent an extremely wide range of contracting authorities and economic operators.

0.e Country where your organisation / company is based

AT	BE	BG	CY	CZ	DE	DK	EE	EL	ES	FI	FR	HU	IE	IT	LT
													✓		
LU	LV	MT	NL	PL	PT	RO	SE	SI	SK	UK		IS	LI	NO	CH
										✓					

0.f Experience with concessions

- Does your company currently hold a concession?
- Have you ever participated in a concession tendering procedure in a Member State other than the one you are established in? If not, please indicate the reasons.

Answer: Not applicable

<u>Assessment of the current situation</u>

1. What is – according to your estimation - the economic importance (by number and value of contracts) of the use of concessions in the market(s) where you presently operate and/or you are familiar with?

   Answer: In our experience concessions form a small part of the agreements contracting authorities award to economic operators. The railway franchises are an example of some of the most economically important concession agreement in the UK. For example, the East Cost mainline franchise was acquired for £1.4 billion in 2007. Other examples include the running of wind farms, the right to exploit a toll road or a toll bridge in return for their maintenance and upkeep. There are not many examples in the UK of this taking place.

   What is their increase potential?

   Answer: We consider that the reduction in public sector spending in the UK and Ireland will result in an increase in the award of concessions as contracting authorities look for innovative ways to share risk and costs with economic operators. Contracting authorities will still need to deliver the same services as they always have but now they must do so in different ways. It is likely that economic operators as potential beneficiaries of this situation will have to contribute to come up with new ways of delivering such services and it may be that taking the risk of delivering a service whilst making its profit from a third party source rather than being paid by the contracting authority is the solution to this situation.

2. Are you familiar with the jurisprudence of the Court of the EU on definition and award of concessions? Do you consider it to provide sufficient clarification as to your rights and guarantees under EU law on the award of concessions in the Member States where you presently operate and/or you are familiar with (please specify the Member State(s), if more than one, please respond separately for each Member State concerned)? Please explain your answer.

Answer: Reference to the jurisprudence of the Court of the EU on the definition and award of concessions has been made recently by the Commission in the infraction case concerning the Municipality of Eindhoven, citing the recent Helmut Muller case. The jurisprudence of the Court has been expanded further by the case of Wall AG in which further reference to the cases of *Pressetext, Telaustria, Parking Brixen, Coname, Commission v Italy,* and others was made. More recently the Court of the EU and the Opinion of Advocate General Mazak have issued further clarification on the requirements for remuneration and exploitation of risk in *Eurawasser*[2] *and Privater Rettugsdient*[3].

The Court has used all of the above decisions to restate the Jurisprudence concerning the definition and award of concessions upon which its decisions are based. The Court has used these opportunities to restate the fundamental principles enshrined in the TFEU.

Principles of freedom of movement, establishment, equal treatment, transparency, non discrimination, proportionality, mutual recognition and the need to promote pan European competition, together with recently improved remedies regulations are all clarified within the many judgements from the Court of the EU.

The general view is that when these examples of statutes, directives, and case law are translated and implemented for the UK market, there is sufficient clarity of members' rights and obligations in respect of works concessions. The only improvement, perhaps, may be a further communication bringing all of the above together in one document. We would suggest that the Commission should put together some practical guidance on key issues concerning concessions e.g. to cover the definition of "substantial operating risk.

There is, perhaps, more confusion in relation to service concessions brought about by the very fact that they are not currently covered by the directives as implemented by the Member States. Once again, practical guidance from the Commission would be useful, especially to cover: what is sufficient advertising, how cross-border interest is to be determined, and what the appropriate forum is for this; whether an analysis of the market can mean that in some instances EU wide advertising is unnecessary.

In short, a new interpretative communication which marries up the case law with the earlier communications on concessions, and Part B and non-directive contracts would be helpful.

Please also see our response to question 17.

---

[2] See footnote 13 below.

[3] See footnote 14 below.

3. The Commission explained the definition and the application of the Treaty principles to the award of concessions in its Communication on Concessions[4] and on the Green paper on PPPs[5].

   Do you consider that the guidance provided by the Commission is sufficient to ensure equal access to the award of concessions in the Member States where you operate and/or you are familiar with?

   Please respond separately for each relevant Member State and explain your answer.

   Answer: No. The guidance itself begs a number of questions as to what the practical impact is if an arrangement is not to be classified as a concession but instead perhaps as the authorising of an economic activity (footnote 25), particularly given the statement in the communication that any act of state laying down the terms governing an economic activity is potentially caught / affected by the Treaty. The Communication also predates the extensive development of transparency case law over the past decade and is therefore (probably) considerably out of date.

   It is submitted that there are some issues regarding the clarity and ambiguity of certain areas such as those discussed at question 17 below. These ambiguities can have the effect of causing confusion for both contracting authorities and undertakings wishing to be considered potential concessionaires.

   It is submitted that, whilst. overall the Communication and subsequent case law can generally be seen as providing sufficient guidance, a revised communication containing all the recent developments may provide greater clarity. This would provide the Commission with the opportunity to restate, in one document, the many and varied developments that have been made in the past decade.

   If such an approach were adopted it would allow the Commission to further clarify some areas that have been shown to be particularly problematic. Please also see our response to question 29 below.

4. In your view, are there any entry barriers to concession markets in EU Member States? If so, please name them and explain.

   Answer: It is possible that misconstruing a service as a concession rather than a contract would be an entry barrier.

---

[4] "Commission interpretative communication on concessions under Community law", Official Journal C 121 , 29/04/2000, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000Y0429(01):EN:NOT

[5] "Green Paper on public-private partnerships and Community law on public contracts and concessions", COM/2004/0327 final , http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52004DC0327:EN:NOT

5. Please describe the advertisement practices for the award of services concessions in the Member States where you presently operate and/or you are familiar with (please specify the Member State(s), if more than one, please respond separately for each Member State concerned).
   In particular, at what level does publication take place?

   - Local,
   - Regional,
   - National,
   - International

   What information is to be included in the call for tender?

   - Name and contacts of the contracting authority
   - Nature, extent and value of the services and subsidiary works
   - Time limit for submission of offers
   - Personal, technical and financial conditions to be met by the candidates
   - Award procedure chosen
   - Criteria which will be applied in the award of the contract
   - Name and address of the body responsible for appeal and, where appropriate, mediation procedures.

   What sectors are concerned (see point 0d)? Please respond separately for each relevant Member State.

   Answer: Given the wide range and nature of concessions this is hugely variable and therefore does not sit naturally into a regulated procedure. Using the current voluntary transparency notices would not assist in this situation as it is beset with difficulties: they do not fit for service concessions and often give rise to mistaken expectations as to which procurement procedure will apply.

6. Are you aware of any practices of direct award of concessions in the EU? If yes, please provide, if possible, concrete examples.

   Answer: Yes, but we are unable to provide details at this stage as to do so would breach our professional obligations in respect of client confidentiality.

7. Do you consider that the advertisement practice of service concessions in the EU Member States where you presently operate and/or you are familiar with is usually fair and transparent and ensures effective access to the market?
   Is the information easily available to a normally vigilant non-national EU economic operator? Please respond separately for each relevant Member State.

   Answer: This varies greatly ranging from fair and transparent processes to entirely non-transparent direct awards.

8. If you consider that there are no clear rules at EU level governing

   - publication (in case of service concessions) and
   - award procedure of concessions,

does this situation bring about any additional costs (such as, *e.g.*, the cost of legal advice or paid sources of information) for EU economic operators? If yes, please explain, with reference to each of the cases above.

Answer: We doubt it at the moment – those which are satisfactory can probably be identified by any non-domestic economic operator which is reasonably interested in operating in a sector and those which are non-transparent / unsatisfactory will not involve additional cost, as other EU economic operators are probably simply unaware that the opportunities exist.

9. Do you consider the diversity of national rules and practices related to the award of concessions to be an obstacle to the cross-border provision of services?
   Does it generate any additional costs and administrative burden? Please explain your answer.

   Answer: Our experience of concession agreements is limited to the UK and Ireland. In our experience, economic operators from other member states and non-member states have expressed an interest in taking part in competitions for concession agreements in the UK and Ireland. For example, Ned Railways, a Dutch company bid for the South Central franchise. Keolis, a French company, bid for and won as a joint venture with the First Group, the TransPennine franchise. Whilst Keolis could have bid on its own, it perceived commercial advantages in bidding with an existing UK operator.

10. Can you estimate the average number of tenderers in services concessions award procedures you have participated in?
    Were there any tenderers from other Member States?

    Answer: It is not possible for us to provide a meaningful estimate in response to this question.

11. With regard to your experience, which are the procedures normally used for the award of concessions in the Member States where you presently operate and/or you are familiar with? Please respond separately for each relevant Member State.

    Answer: Differs between each. However, often a practical number of risk-management steps are taken following the maturing of a concession arrangement to the point at which recommendations on award can be made to the decision-maker within a given contracting authority. Please also see our response to question 5 above.

12. In your view, which are the most important features of fair and transparent, concession tendering procedure (with reference to, *e.g.*, technical specifications, selection criteria, award criteria, negotiation)?

    Answer: We consider that advertising the proposed concession must be the building block from which the others follow. Generally, advertisement and clarity as to the contracts on offer, together with the basis on which the contract will be awarded, are key elements.

Presumably the Commission takes the view that if it does decide to regulate services concession agreements, articles 45, 47 and 48 of the Directive will be used to de-select those candidates who do not meet the contracting authority's minimum requirements in respect of financial standing and technical competence. However, it is difficult to see how the standard award criteria of most economically advantageous tender or cheapest price are appropriate when awarding concessions. Instead, it may be that the more appropriate award criteria could include a link to delivery, innovation and the quality of proposals. That way, the selection criteria would assess an economic operator's track record on delivering concessions of a similar nature to the concession being sought by the contracting authority and the award criteria would assess whether or not the proposals on offer would deliver the concession in the form the contracting authority is expecting. Given that the contracting authority may not be contributing any monetary consideration towards the delivery of the concession in question, looking to the cheapest price will not be appropriate.

We also have some concerns about technical specifications. Of course, if it is possible for a contracting authority to specify its requirements of a concessionaire then it is clear they should specify on a generic basis. However, in our experience many specifications for concessions are out-put based and/or are drafted by the concessionaire in question as part of its proposals. Accordingly, these specifications often focus on a particular product and/or idea which goes to the heart of the deliverability of the concession by the proposed concessionaire. Bearing this in mind, dialogue between the contracting authority and the economic operators interested in taking on a concession needs to take place. Restricting the ability of a contracting authority to discuss and essentially negotiate with a potential concessionaire prohibits the parties involved from adequately identifying the works or services to be carried out by the concessionaire. It also impacts on the ability of the parties to agree an appropriate risk share to satisfy the legal tests we have set out.

It may be that the procedures in the Utilities Directive are analogous.

13. Do you consider that the awarding procedure in which you participated in EU Member States were usually fair and transparent? Please respond separately for each relevant Member State.

    Answer: Membership of the PLA is overwhelmingly comprised of advisors who would have encountered a range of circumstances. Moreover, different clients would have different perspectives upon these circumstances.

14. Which of the key features you mentioned in your response to question nº 12 were lacking?

    Answer: Not advertising widely and lack of clarity over award criteria.

15. What is the average duration of service concessions in the sector you operate in the Member States where you presently operate and/or you are familiar with? How does

(short or long) duration of concession contracts affect competition for those contracts? Please respond separately for each relevant Member State.

Answer: We have come across situations from fixed term contracts (shortest duration of three years longest 25 years) to apparently indefinite awards.

16. Have you ever challenged a decision of a contracting entity/authority with regard to the award of a services concession? If not, why?
Do you consider that the remedies system for services concessions in place in the relevant Member States allowed for effective challenging of decisions of the awarding authority?

Answer: A member of the PLA successfully acted for a client in bringing a complaint against a contracting authority in relation to its decision not to shortlist it to tender for a service concession for the design, build, operation and management of windfarms. More recently, this member has persuaded an infrastructure owner to re-run a tender process for the award of a service concession at a number of their stations.

We consider that the reasons for these successes were in part due to:

- the number of complaints that the contracting authority had received in the case of the windfarm matter;

- the desire by the contracting authorities to be seen to be complying with their procurement obligations;

rather than the effectiveness of the remedies regime.

Complainants wishing to bring a challenge in respect of the award of a service concession have to overcome a number of additional obstacles to those faced by complainants bringing a challenge in respect of the award of other public contracts:

- ***The legal basis for action*** - Directive 2004/18/EC and the implementing legislation in the UK, the Public Contracts Regulations 2006 (the "Regulations") which confer a right of action upon aggrieved operators in the national courts for a failure to comply with the procurement regime, expressly exclude the award of services concessions from their scope. This means that aggrieved operators wishing to complain about the award of a service concession have to rely upon a breach of the general EU principles of fairness, transparency and non-discrimination as the basis of a legal action against a contracting authority. Under UK law the main rights of recourse are by way of judicial review for failure to follow a proper process and, possibly, breach of statutory duty. These legal bases, particularly judicial review, are generally perceived as being harder to establish than a claim under the Regulations.

- ***Uncertainty over whether standstill rules apply*** - The decision in *Alcatel*[6] requires Member States to ensure that there are sufficient review procedures in place prior to a contract, which is subject to the full scope of the Directive, being entered into. It is unclear from the caselaw whether this requirement is of wider application to all contracts entered into by public bodies and derives from the general EU requirement for transparency. The Public Contracts (Amendment) Regulations 2009 (the

[6] *Case C-81/98 Alcatel Austria and Others [1999] ECR I-7671.*

"Amendment Regulations") which implement the Remedies Directive 2007/66/EC in the UK do not extend the provision of standstill to contracts for Part B services, even though Part B services are subject to the partial application of the Regulations. In our experience, contracting authorities do not adhere to a voluntary standstill period. This makes it very difficult for a complainant to assess the merits of its case and bring a complaint prior to a contract being entered into.

- ***Uncertainty as to when time starts to run for the purposes of the limitation period*** – Whilst the *Uniplex*[7] case has provided some clarity on this point, in practice many contracting authorities may not issue a Contract Award notices in respect of the award of a concession contract. Consequently, it is difficult for a complainant to become aware of the failure to advertise a concession and bring proceedings within the very tight limitation period.

- ***Uncertainty over whether there are effective remedies available in the event of a successful challenge*** - It is not clear to what extent the remedies available under the Amendment Regulations are applicable for breach of the general EU principles. As a result, the uncertainty can act as a disincentive for private undertakings to bring a claim and weaken the effective enforcement of failures to comply with the EU general principles in relation to concession contracts. As mentioned above, the main rights of recourse for challenging a service concession in the UK are by way of judicial review or, possibly, breach of statutory duty. The principle remedy for breach of statutory duty is damages. Under judicial review, the courts have the power to grant a declaration that a proper process has not been followed and/or to make a restraining order prohibiting the award of a contract. However, there is no equivalent remedy to the remedy of ineffectiveness introduced by the Remedies Directive for the most serious breaches of procurement law, which takes effect after a contract has been entered into. Since there is a general principle under English law that once a contract has been signed it cannot be undone, we are of the view that the UK courts would be very reluctant to extend the remedy of ineffectiveness in circumstances which are not required by EU law. However, there is evidence of other Member States being more prepared to extend the scope of procurement law. For example, in the case of *Federal Security Services Limited v Chief Constable for the Police Services for Northern Ireland*[8] the High Court in Northern Ireland granted an interim junction to prevent the contracting authority from taking any further steps in implementing a contract which had already been entered into. This case concerned a contract for Part B services. Whilst the PLA is of the opinion that the full application of the Remedies Directive may not be appropriate for concession contracts, we would appreciate guidance on the minimum remedies that should be in place in Member States to enforce the Treaty provisions in relation to the award of concessions.

- ***Requirement to obtain interim relief*** - The Remedies Directive has given a complainant an important strategic advantage in bringing a challenge by automatically suspending a tender process if legal proceedings for breach of the procurement regime have been issued and served. However, economic operators who wish to bring a challenge and suspend the award of a service concession cannot rely upon the Remedies Directive as it only applies to contracts which fall within the scope of the Regulations. Instead, they must first obtain interim relief from the courts to suspend

---

[7] *Case C-406/08 Uniplex (UK) Limited V NHS Business Services Authority*

[8] [2009]NICh3

the award of the service concession. This can be a very time consuming and expensive process. Moreover the courts in England and Wales will usually require the complainant to give a cross undertaking to the contracting authority to pay damages in the event that the action is unsuccessful as a condition of granting the interim relief. In practice this very often acts as a disincentive to complainants in bringing a challenge.

These obstacles may be one reason why, as far as we are aware, there have been no cases in the English courts challenging the award of a service concession.

In comparison, with the exception of the standstill requirement, none of these obstacles apply in relation to a service provider wishing to challenge the award of a works concession which is partially caught by the Regulations.

Even in relation to a Part B services contract, a complainant can rely upon the application of the Regulations as a cause of action and the automatic suspension procedures under the Amendment Regulations, because the principles of fairness, transparency and non-discrimination are now expressly included within the Regulations.

The reasoning behind this difference of treatment is not transparent and, to the extent that the Commission wishes to retain the position, should be justified.

In Ireland there is a separate but parallel regime based upon a number of administrative measures which are addressed to public bodies typically including Central Government, Local Government and State Agencies. These measures are not legally binding but are documents of the first moment and failure to adhere to them could result in significant sanction for a public body.

In general, the public bodies are enjoined (save for small procurements) to use a competitive process (typically auction or tender) with certain additional requirements imposed in relation to transparency obligations. Accordingly, public bodies contemplating entering into a significant concession agreement would ordinarily advertise in one form or another.

17. Do you consider it difficult distinguishing between public contracts and concessions[9]? If yes, please explain with reference to one or more of the responses below.

a) It is difficult to define "substantial" or "significant part" of the operating risk;

b) It is not clear what categories of risks are to be taken into account to this effect;

c) It is not clear how much of the consideration can be paid by the contracting authority;

d) Other reasons (please specify)

[9] According to the ECJ judgment in *Helmut Mueller* case (C-451/08), "the essential characteristic of the concession is that it is the concessionaire himself who bears the main, or at least the substantial, operating risk"

Answer: Empirical evidence would seem to suggest that there is an element of confusion with all 3 categories above. Given that concessions contracts often are a combination of works and service elements and sometimes works, supplies and service elements, it can be difficult distinguishing between public contracts and concessions. Moreover, these respective elements are often inextricably linked such that it would not be feasible to separate them and apply the rules which apply to each type separately (as suggested in *Data Processing*[10]).

- ***Classification and allocation of risk*** - As stated in the Commission's Communication on Concessions[11], the application of the exploitation criterion means that there is a concession when the operator bears the risk involved in operating the service in question (establishing and exploiting the system), obtaining a significant part of revenue from the user, particularly by charging fees in any form.

  In many instances the contracting authority may be unable to specify its requirements in sufficiently precise terms and will look for alternative offers likely to provide various solutions to a problem expressed in general terms. Where various technical solutions are proposed to meet a problem expressed in general terms, this can, it is submitted, in and of itself, give rise to difficulties in identifying the operating risk in the various technical solutions as proposed.

(a) In relation to defining a "substantial" or a "significant part" of the risk of operating the service in question, the means by which the operator is remunerated[12] can involve consideration of proposals from a potential concessionaire involving the following:

(i) Non - cash items being offered to the contracting authority in addition to a share of the revenue generated from operation of the system;

(ii) Some inter-changeability between the services and products offered (where the contracting authority is unable to specify its requirements in precise terms);

(iii) a –pro-rata reduction in the potential concessionaire's offer where the actual number of units to be constructed differs from that as set out in the proposed offer.

It can accordingly be observed that the relationship between the different products and services being offered can make it difficult to identify a "substantial" or "significant part" of the operating risk from the potential concessionaire's offer. Moreover, the case of *Eurawasser*[13] suggests that only limited risk may be sufficient in some sections to satisfy the definition of a concession. Whereas the Advocate General in the very recent opinion on *Privater Rettungsdient Krantentransport*[14] agreed that the issue of risk is irrelevant where

---

[10] Case C-3/88, *Data Processing*, ECR, p. 4035, 5 December 1989.

[11] See footnote 2 above.

[12] As is the case with works concessions, the way in which the operator is remunerated is a factor which helps to determine who bears the exploitation risk.

[13] Case C-206/08 dated 10 September 2009

[14] C274/09 opinion of 9 September 2010

there is to direct remuneration from the contracting authority. This recent line of cases demonstrates how vital further guidance is from the Commission on the definition of a concession**.**

(b) In relation to the categories to be considered in establishing operating risk, issues in this regard can arise out of the matters set out under (i) - (iii) of (a) above, or a combination of these.

Further issues could also arise under the category of copyright, that is, who is to own the copyright in the design and structures erected. If copyright ownership in the design and structures erected is to vest in the concessionaire, this could be a valuable property right in and of itself which could have long term implications for the provision of the type of service involved - long after the expiration of the concession period. It is unclear as to whether ownership of such a right should also be included in the assessment of the operation risk. The concessionaire could accordingly derive not only economic benefit from the operation of the work as constructed but also a long term technical benefit arising out of the copyright in the design and structures erected.

It would accordingly be helpful if clarity could be brought in relation to whether categories other than those which would directly relate to the provision of the service (establishment costs and revenue generated from operating the service) should also be included in the assessment of the operating risk

(c) While the Commission's Communication is of assistance in clarifying how it is possible for some payment to be made, the degree to which the consideration can be paid by the contracting authority for the contract still to fall within the definition of a concession is not altogether clear. The Communication offers up an array of possibilities, some of which, it is submitted can be confusing and contradictory.

It is not clear from the Communication [15] to what extent payment can be made by the contracting authority in order to be classified as "social prices". If "social prices" is synonymous with "subsidy" then the Directive effectively allows the contracting authority to subsidise the cost, and therefore reduce the risk, of operating the concession. However, the risks inherent in exploitation are clearly an essential characteristic of the concession. It is further unclear whether the risk of exploitation is confined to the operation of running the concession once built and in operation or whether the risk of capital funding for the construction of the project may be taken into consideration.

The Communication does not appear to rule out the possibility of the contracting authority not only subsidising the *operation* of the concession by way of maintaining social pricing but also the possibility of the awarding authority paying a sum of money towards the cost of constructing the object of the concession that is to be exploited. The potential ramifications for a contracting authority that gets this calculation wrong are immense, especially if such payments could possibly be interpreted as "state aid" from the authority concerned.

Even where the requirement of the works being incidental to rather than the object of

[15] See the Commission Interpretive Communication on Concessions under Community Law (the official journal 2000/C 121/02) point 2.1.2 ff paragraph 3 including footnotes 8 - 11

the contract is met, the degree to which consideration may be paid by the contracting authority towards the contract is somewhat uncertain. Clearly, the consideration payment cannot constitute the full value of the contract otherwise it would no longer be considered a concession.

Some guidance in this area would be welcomed. However, it would be important for some flexibility to be incorporated into whatever guidelines might be established so that the margin of manoeuvre for potential concessionaires to prepare dynamic and innovative proposals for the problem at hand would not be inhibited by overly restrictive requirements in relation to part-payment of the consideration by the contracting authority

(d) It is submitted that a further issue that can give rise to difficulty in distinguishing between public contracts and concessions is the issue of the duration of the contract: a works concession contract of long duration makes risks more likely to occur and makes them relatively greater[16]. Moreover, potential concessionaires may sometimes include multiple options in tenders as regards the duration of the concession. In the recent *Helmut Muller* case the Court very usefully clarified certain aspects that characterise concessions. There is little difficulty understanding the reasons why a concession should be of a limited, finite duration. However, it remains difficult to envisage how contracting authorities are supposed to calculate the duration of the proposed concession. Some guidance as to how the operational risk is to be assessed in the light of differing contract durations and the often conflicting aims of the contracting authority and potential concessionaires would be helpful.

Clearly, the distinguishing feature in relation to the definition of concession in EU law is that the consideration for the execution of the subject matter of the concession consists either solely in the right to exploit the work or service or in this right together with payment. The definition allows the Member State to make a payment in return for work carried out, provided that this does not eliminate a significant element of the risk inherent in exploitation.

While the definition is proportionate insofar as it allows a margin for manoeuvre for potential concessionaires to develop dynamic and innovative solutions to the problem at hand, greater clarity as to what the right of exploitation encompasses and the degree to which payment can be made would be helpful. However, it is submitted that great care should be taken to ensure that any revision to the definition does not delimit the scope for innovation among potential concessionaires.

More generally, in relation to the actual transfer of the exploitation risk, it is noted that risks arising from the operation of the concession are transferred to the concessionaire with the right of exploitation, but that specific risks are divided between the granting authority and the concessionaire on a case by case basis, according to their respective ability to manage the risk in question[17]. More guidance as to the types of risks which are to be divided between the contracting authority and the concessionaire would be welcome.

---

[16] See *Commission's interpretative communication on concessions*, op. cit., at point 2.1.2.

[17] Ibid.

18. In your view, what are the possible shortcomings and operational downsides, if any, associated with the present definition of concession in the EU law[18]?

    Answer: The consequences of misinterpreting the definition of concession due to the problems identified in Question 17, are potentially severe in light of the Remedies Directive. Previously, an economic operator which had been awarded a contract in the belief that it was a concession, was not at risk under the old remedies regime of the contract being set aside once it had been signed. An economic operator now also bears the risk of a contract being rendered ineffective after it has been entered into, if the contracting authority has misapplied the definition under the new remedies regime.

19. Are you aware of any public contracts that have been awarded as concessions in order to elude detailed EU or national law award provisions? If so, please provide, if possible, concrete examples.

    Answer: Members of the PLA are often asked to advise clients on structuring transactions to avoid the application of the Regulations. One way of achieving this is through the concession route.

    For example, a member has advised a start-up company on the option of setting up a joint venture company with a local authority for the promotion of renewable energy projects, whereby the joint venture company would supply the local authority with electricity under a fixed price power agreement. One of the issues for consideration was to ensure that the joint venture retained the majority of risk in setting up the energy projects whilst balancing the requirements of the local authority.

    Also in the renewable energy sector, a member of the PLA has advised local authorities keen to promote the development of windfarms on their land on structuring competitions as work concessions.

20. Do you consider it difficult distinguishing, with reference to EU law, between public concessions and licences or authorisation schemes? Please explain and, if possible, give examples.

    Answer: In contrast to distinguishing between public contracts and concessions, the distinction between public concessions and licences or authorisations schemes is much easier in practice because the grant of a licence does not involve the provision of any works, supplies or services.

    For example, a member of the PLA have been asked to advise a local authority on tendering a simple licence to operate a refreshment and retail kiosk. The local authority owned the kiosk but was not wishing to impose any requirements or restrictions on the use of the kiosk or improvement works which might render it a public works concession.

[18] See Article 1 (3) and (4) of Directive 2004/18/EC (referred to in footnote 1) 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, (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0018:EN:NOT)

21. Are you aware, in tendering procedures you have participated of any practices of tenderers or of market structures restricting competition between tenderers (*i.e.* collusion or other unfair methods of competition, oligopolies, etc.)? Please explain.

    Answer: No

22. What is your assessment of the provisions of Directive 2004/18/EC[19] on works concessions (especially as to what concerns advertisement, time limits, award of complementary works and sub-contracting)? In particular:

    a) Do they ensure a sufficient degree of transparency and equal treatment of the award procedure?

    b) Do they ensure sufficient degree of legal clarity?

    c) Do they involve important costs? If yes, what categories of costs (compliance cost? enforcement cost?) and what is their importance in relation to the contract value?

    d) What are their benefits?

    e) What is their impact on prices and quality?

Answer: Please see our answer to question 27.

Expected impacts of new legislation on concessions

General issues

23. In your opinion, what would be the results of new legislation providing for compulsory advertisement of services concessions at the European level in the Member State where you presently operate and/or you are familiar with, regarding:

    a) Consumers

    b) Companies

    c) Incumbent operators

    d) Jobs and wages

    e) Investments and innovation

    f) The market structure

    g) Public subventions (associated with the provision of the service)?

Answer: TUPE issues in respect of staff transferring from the incumbent concessionaire to the new concessionaire. This adds costs and risks to the "price". In a tendering

[19] See in particular Articles 56 to 65 of Directive 2004/18/EC (referred to in footnote 1). The award of services concessions are presently not subject to any provisions of this Directive (with the exception of the definition itself, see Article 1 (4)).

process for a contract such costs are built into price. In a concession agreement this would form part of the "substantial" operating risks. Would the concessionaire be required to take this risk? Arguably, yes but the effect on the cost of running the concession should be substantial. There is also a risk that if a contracting authority pays too much awards the concession that a state aid could have been made.

24. Under EU law public authorities are free to provide services (including services of general economic interest) directly or to externalise provision of those services to third parties (*i.e.* by means of concessions). Without prejudice to this freedom, what could be the impact, if any, of a new legislation providing for compulsory advertisement of concessions at the European level in relation to services which are at present:

    a) Directly provided by public authorities or public "in-house"[20] entities (notably in terms of possible incentives for shift towards concession-based provision of services)?

    b) Provided on the basis of concessions (notably in terms of possible incentives for shift towards direct provision of services by administration or public "in-house" entities?

Please distinguish between the likely impact on short, medium and long term.

Answer:

(a) Clearly, the central issues for consideration in this regard would surround the following: -

(i) the nature and purpose of the services envisaged which could be made the subject of compulsory advertisement; and

(ii) the degree to which the exploitation risk can or should be transferred to a third party.

As concluded by the Advocate General La Pergola in *Arnhem*[21], service concessions normally concern activities the nature and purpose of which, as well as the rules to which they are subject, are likely to be the Member State's responsibility and may be subject to special or exclusive rights. Accordingly, to make it compulsory for a Member State to, in effect, "out source" the performance of services in the form of concessions which are at present directly provided by public authorities would necessarily remove the margin of discretion which the Member States have in relation to the performance of the services in question.

While it is accepted that restrictions to the freedom to provide services should be interpreted narrowly, the extent to which the exploitation risk can truly be transferred would have to be ascertained for the relevant services. Further, in respect of supervision of the official authorities, it is submitted that it should be for the public

[20] The conditions of the "in-house" status have been specified by the ECJ in its judgment in the *Teckal* case (C-107/98)

[21] Case 360/96.

authorities to ascertain whether there would be in a position to ensure the protection of the interests entrusted to them.

While there may be some benefits in the short term, the medium to long term implications could be detrimental in terms of the loss of effective supervision by the public authority over the relevant service and the degree to which the State could still be held responsible and liable for the provision of the service, even though the exploitation risk would have purportedly been transferred. Moreover, depending on the type of service involved, the grant of the concession my render it practically impossible in the long term for the State to resume operation of the service itself.

(b) In this scenario, services which are currently the subject of concessions would be advertised with a view to their being performed "in house" by public authorities. A significant difference between this situation and that of (a) above would be that the public authority would have originally consented to the type of service which is currently the subject of the concession being performed by a third party. In that context it is likely that the risk factors as flagged under (a) above would have been considered by the public authority at the time of the original concession and that it would have exercised its discretion in that regard.

Teckal companies have been set up by contracting authorities for numerous reasons which do not impact on the market – e.g. in order to be able to draw down grant to improve names, the grant is then used to award contracts via the *Teckal* company to economic operators. This kind of situation needs to be preserved and the Court of the EU's jurisprudence on this matter is very clear.

Moreover, because *Teckal* is confined to the public sector, note may also be made of the decision of the Court of the EU in Case C-480/06 *Commission v Germany June 2009* (the "Hamburg Waste Case") in which the Court sanctioned arrangements between collaborating contiguous public authorities in fulfilment of their duties on a not-for-profit basis even though there had been no contract notice published or other form of advertising to the market at large. Admittedly, this was not a case of a concession contract but the analogy may be helpful.

25. In case of a new legislation providing for compulsory advertisement of services concessions at the European level, do you expect to see new entrants to the market?

If yes, please indicate the categories of entrants below which are likely to enter the market

- Foreign (non-national) companies
- Domestic companies extending activities to new business areas (e.g. multi-utility companies)
- Joint ventures between national and foreign companies
- Small and Medium Enterprises

Answer: Possibly, but this is not in our area of expertise.

Specific questions

26. With reference to service concessions would you be in favour of EU rules providing for:

a) The obligation for the contracting authority to publish a concession notice in the Official Journal of the European Union? What should the thresholds for publication and which method should be used to calculate them?

b) The obligation to respect minimal deadlines for the presentation of applications for the concession (*e.g.* not less than 52 days);

c) The obligation for a concession holder to respect the principle of non-discrimination while selecting holders of sub-contracts (if possible, please also give your assessment of the relevant provision presently applicable to works concession holders)[22];

d) The possibility for direct award of additional services to the original concession holder only if these services, through unforeseen circumstances, have become necessary for the performance of the originally stipulated services and if such additional services are technically or economically inseparable from or strictly necessary for the completion of the original services;

e) The possibility for the contracting authority to require the concession holder to award a minimum of 30% of sub-contracts to the third parties, or to request the concession holder to specify the percentage of services to be sub-contracted to the third parties;

f) Effective remedies for aggrieved bidders with the same guarantees as those provided under the Remedies Directives[23]?

Please explain your answers above.

For each of the above options, please indicate what effects you would expect on access.

Answer:

a) In general, we have no objection to contracting authorities being obliged to publish a concession notice in the OJEU: many contracting authorities in any event already have service concession notices published as a matter of course even though they are not currently obliged to do so. However, the rules in *Tel Austria* and *An Post* set out how advertisements for contracts/concessions outside of the scope of the Directive are to be dealt with. Guidance on this would be useful to deal with the

[22] See Title III, Chapters II-III of Directive 2004/18/CE

[23] Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32007L0066:EN:NOT), Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31989L0665:EN:NOT), Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31992L0013:EN:NOT).

risk of market fragmentation and the discrepancies in the application of the case law by different Member States.

Furthermore, it may not be feasible for the contracting authority to specify requirements for a service with sufficient precision to enable candidates to respond with priced tenders and the nature of the requirement itself may not permit overall pricing. It is submitted that it would be counter productive, in those circumstances, to have a threshold set, which cannot be objectively assessed.

In relation to the method to be used to calculate the threshold, in general, the same method of analysis, as set out in *Auroux*, by analogy, should be used: the value of the type of concession contract should be assessed from the perspective of a potential concessionaire. However, where the contract requirements have not been set out in sufficiently precise terms, the value of a contract could vary considerably from the perspective of the various potential concessionaires.

A notice should allow for the uncertainties as to the nature and configuration of given concession solutions offered up by the market – they should not overstate the need for, for example, specifications and award criteria given the difficulties the endeavour of stating these too early produces.

That said we would not advocate the widening out of the scope of the Remedies Directive to cover concessions for failure to advertise, except, perhaps in relation to the requirement for a standstill period.

b) Concession contracts can be highly integrated and complex. Moreover, as set out above, the contracting authority often may be unable to specify its requirements in sufficiently precise terms and will look for alternative offers likely to provide various solutions to a problem expressed in general terms.

   It is be important that the margin of manoeuvre for potential concessionaires not be inhibited by a regime which would effectively delimit the scope for potential concessionaires to prepare dynamic and innovative proposals for the problem at hand.

   It is submitted, therefore, that a balance needs to be struck between giving adequate notice to allow prospective bidders to prepare innovative and competitive proposals while on the other hand having the procurement process take place within a reasonable timeframe.

c) While this obligation appears commendable on its face, in the context of service concessions, the obligation could prove burdensome and weaken the interest of the market in service concessions insofar as it would be a significant addition to the "exploitation risk". A concessionaire will be aware that it could award a sub-contract in good faith and in the belief that it had complied with the principle of non-discrimination and nonetheless be faced with contentious and costly litigation in relation to the award. Clearly, this could also create difficulties in relation to the overall effective performance of the service concession.

d) This provision could prove difficult to apply in practice in the area of service concessions. Issues such as the true scope and purpose of the original service concession would arise which could cause general difficulties in relation to the scope for negotiation between the contracting authority and the potential concessionaires to seek innovative solutions. On balance, it is submitted that such a provision should not be adopted.

e) We would consider the latter option of requesting the concession holder to specify the percentage of services to be sub-contracted to third parties to be preferable. The key issue would be to ensure that the concessionaire – which is to bear the exploitation risk – will be in the best position to control the execution of the works to be exploited.

The imposition of a requirement on prospective bidders that a minimum of 30% of sub-contracts be awarded to third parties could arguably discourage prospective bidders from partaking in the process, given that that portion of sub-contracts could not be awarded to its own preferred company with whom it may have worked with before. On the other hand, depending on the type of service at issue, such a requirement could help reduce fragmentation of the relevant market.

f) Given the unique nature of service concessions, as canvassed above, it is submitted that the same guarantees as those provided under the Remedies Directives should not be made applicable to service concessions.

It would arguably stifle the whole procurement process and discourage innovation were precisely the same remedies as exist under the Remedies Directives made applicable to service concession contracts. In any event, as stated in the Commission's Communication, compliance with the principles of equality of treatment, transparency, proportionality, mutual recognition and the protection of the rights of individuals is required under EU law[24].

Nevertheless, as indicated in our response to question 16, there is uncertainty at least in the UK on a complainant's remedies to enforce the Treaty provisions regarding the award of service concession contracts. In order for any legislation on concessions or interpretative communication to be effective, such guidance or interpretative communication should cover the issue of remedies. Whilst the PLA is of the opinion that the full application of the Remedies Directive may not be appropriate for concession contracts, and, for example, the remedy of ineffectiveness should only be reserved for serious breaches of the procurement Directives where the full scope of the Directive applies, we consider that the requirement for a mandatory standstill period would address some of the issues currently faced by complainants in bringing a challenge.

[24] As stated under paragraph 3.1.6 of the Commission's Communication, the Court of Justice of the EU has consistently stated that decisions to refuse or reject must state the reasons and must be open to judicial appeal by the affected parties (case C – 340/89, Vlassopoulou, point 22). Further these requirements are generally applicable since, as the Court has stated, they derive from the constitutional traditions common to Member States and enshrined in the European Convention on Human Rights (Case 222/86, Heylens, point 14). They are therefore also applicable to individuals who consider that they have been harmed by the award of a concession within the meaning of the communication.

27. With reference to service concessions and public works concessions would you be in favour of EU rules providing for:

    a) The obligation to clearly announce qualification criteria restricted to issues related to financial, economic and technical capacity of a tenderer? Please justify indicating possible effects on access to the market and competition in the sector and other specific positive/negative impact (e.g. on innovation, consumer satisfaction, sustainability of services, public subventions, jobs,).

    b) The possibility for an EU operator (such as a SME) to prove it meets qualification criteria for participation in a tendering procedure in particular by relying on the standing of other entities (other members of the consortium, sub-contractors), regardless of the legal nature of the links which it has with them, provided that it is able to show that it actually has at its disposal the resources of those entities.

    c) The obligation to restrict the admissible award criteria to price and economically most advantageous tender? Alternatively, would you be in favour of introducing basic guarantees of objectivity and non-discrimination while setting award criteria?

    d) Provisions on non-discriminatory use of technical specifications, e.g. as provided for in Art. 23 of Directive 2004/18/EC?

    e) The limitation (with the exception of the utilities sector) of the choice between an open procedure, restricted procedure or competitive dialogue, as described in Directive 2004/18/EC, and admitting negotiated procedure only in exceptional situations, e.g. those currently provided for in Art. 30 of Directive 2004/18/EC?

       Alternatively**,** would you be in favour of introducing basic requirements of standards and arrangements guaranteeing equal treatment and transparency in the conduct of award procedures (notably negotiated procedures)? Which requirements would you consider as the most relevant?

    Please explain your answers above.

    For each of the above options, please indicate what effects you would expect on access to the market, competition in the sector and what might be other specific positive/negative impact (*e.g*. on innovation, consumer satisfaction, sustainability of services, public subventions, jobs)

    Answer: In our view the transfer of the substantial operating risk remains the biggest issue in respect of works concession agreements. We do not consider that the provisions of the Directive as currently drafted sufficiently set out the degree of legal clarity required to enable contracting authorities and economic operators to be certain that the approach that they are to take when agreeing a works concession agreement. If the procurement of works concession agreements needs to be regulated then we consider that incorporating a clear pre qualification stage followed by a dialogue/tender stage which would have no pre-determined length would be preferable.

We do not consider it appropriate to make the full requirements of the Directive apply to services concession agreements. We understand that this is the view taken by the European Council. Our view is that the application of the Core Treaty Principles can be applied sufficiently to service concession agreements by complying the Court of the EU's jurisprudence. Practical guidance from the Commission would assist such compliance.

28. Do you consider that the current legal framework of modifications of concessions, as established by the European Court of Justice in its Succhi di Frutta, Pressetext, Acoset and Wall AG judgments[25], is sufficiently clear an allows to take into account the evolving nature of concessions? Please explain.

Answer: We consider that the European jurisprudence set out in *Succhi di Frutta*, *Pressetext, Acoset* and *Wall AG* is sufficiently clear in relation to how changes to a concession agreement may be material in nature requiring the contracting authority in question to consider whether or not it needs to re-procure the concession in question. *Acoset* states that a company with share capital with mixed public and private ownership must retain the same corporate purpose throughout the duration of the concession. In *Wall AG* the court commented in paragraph 1 of its ruling that "where amendments to the provisions of a service concession contract are materially different in character from those on the basis on which the original concession contract was awarded, and therefore such is to demonstrate the intention of the parties to re-negotiate the essential terms of the contract, all necessary measures must be taken, in accordance with the national legal system of the Member State concerned, to restore the transparency of the procedure, which may extend to a new award procedure. If need be, a new award procedure should be organised in the manner appropriate to the specific features of the service concession involved, and should ensure that an undertaking located in another Member State has access to sufficient information on that concession before it is awarded."

We can deduce from these rulings therefore that the Court of the EU is continuing its line of judgement on the need for transparency in procurement. It does not particularly describe how an undertaking in another Member State must be able to gain sufficient access on the purpose of the concession in order to be able to decide whether or not to apply to be considered. Accordingly we would suggest that the case law in *Tel Austria* and *An Post* sufficiently covers the requirements to advertise service concessions. *Acoset* makes it clear that the test in *Pressetext* applies to concession agreements and so if a change occurs then a new procurement will need to be carried out as the contract would no longer be in the form envisaged by the original advertisement.

29. If you encountered any problem in relation with the award of concessions other than those referred to in the questions above, or you wish to make any other remarks on a EU initiative on concessions, please describe them here (specifying whether it concerns works concessions or services concessions).

[25] Respectively, cases C-496/99, C-454/06, C-196/08 and C-91/08

Answer: In our experience many potential service concession agreements arise when an economic operator proposes an innovative idea to a contracting authority in return for a short exclusivity period in which to negotiate a deal for the concession with that contracting authority. In order not to fall foul of their procurement obligations many contracting authorities take the view that in such a situation it is prudent to run a small pilot scheme to see if there is any potential for the concession agreement to work. Such a pilot scheme would be below any threshold value and as such would only be subject to the Core Treaty Principles rather than full application of the procurement Directive. This enables a contracting authority to establish whether or not the concession is viable. If it is, then at that point the contracting authority would consider running a full scale procurement of the appropriate kind in order to allow a competition to take place for the concession in question. Allowing a contracting authority the opportunity to run a pilot scheme like this enables it to assess (a) whether or not the concession will work, (b) how much the concession is likely to cost the contracting authority if anything, and (c) how the likely risk share will work. This then enables it to go to the market with realistic and worked out proposals which gives the concession more of an opportunity to work. It also means that the contracting authority can act fairly and in a transparent fashion as it is certain what its key objectives are, which will enable it to assess responses to those key objectives in a transparent way. We would suggest that the Commission considers including guidance in a revised communication on concessions to enable contracting authorities to see whether or not running pilot schemes in a proper way (so as not to circumvent the rules on procurement) is an option for contracting authorities to see whether or not such a concession would be viable.

Currently, the procurement Directive makes a distinction between Part A services and Part B services. To this end Part B services do not need to be procured pursuant to the full procurement regime set out by the Directive. If additional obligations upon contracting authorities to procure for service concession agreements in a particular way become part of the Directive then we wonder how the distinction between Part A services and Part B services will be made. Is it anticipated that service concession agreements will distinguish between Part A and Part B services given that presumably any resulting legislation should be drafted in such a way as to allow contracting authorities to have the flexibility to let service concession agreements in a similar fashion to works concession agreements?

We also wonder whether instead of requiring a contracting authority to follow a prescribed form of procurement procedure in order to award service concession agreements, it may be more prudent only to require contracting authorities to complete some form of advertisement and then enable them to choose how best to run their procurement, heeding only the Core Treaty Principles.