

Client Alert

Parliament and Council question the extent of the proposed revision to the EU public procurement regime

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Since the end of February, debates have been ongoing in both the European Parliament and in the Council on the proposed revision to the EU public procurement regime. As part of an overall review of the EU public procurement rules, the Commission issued three legislative proposals on 20 December 2011: one to amend the current rules on public contracts, one to amend the current rules on utilities contracts (water, energy, transport and postal services) and one to introduce a new Directive on concessions contracts.

The three proposed Directives have now passed to the European Parliament and to the national governments in the Council, where they have become part of a lively debate on what form and shape the reform shall take.

On 20 and 21 February, Member States in the Competitiveness Council held their first public debate on the Commission's proposed changes. On 29 February, the European Parliament held its first exchange of views within its Internal Market and Consumer Affairs Committee ("IMCO"). The tone of the debate in these meetings as well as among the various stakeholders thereafter indicates that amendments to the Commission proposals are likely.

The proposed revisions to the Public Contracts and Utilities Directives are mainly directed at modernising and simplifying the rules. These proposals have met with broad support, although certain concerns have been raised on specific issues. However, the proposed Concessions Directive, which would bring the award of contracts for service concessions within the EU public procurement regime for the very first time, has been met with strong opposition from MEPs in the European Parliament.

The proposed Directives are still some way from becoming reality. First, they have to be approved by the European Parliament and national governments in the Council, who will continue to debate their contents and may well introduce amendments. The Commission anticipates that the proposal will be adopted towards the end of 2012 or the start of 2013. Second, Member States will have two years in which to implement the provisions of the Directive into their national law.

Public contracts and Utilities revision

The purpose of the revision is to "modernise and simplify" the EU rules on public procurement rather than to radically change the system. However, certain important details have been amended. For example, the proposals would introduce a greater degree of flexibility in the procurement procedures which must be followed, notably allowing for an increased level of negotiations between contracting authorities and bidders. The majority of the Member States in the Council and MEPs in the Parliament are in favour of the proposed increased use of negotiation.

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In addition, the proposals would abolish the distinction between “part A” services (currently subject to the full application of the Directive) and “part B” services (currently subject to a lighter regime). In place of this division, the Commission has proposed the application of uniform rules applicable to all services, except social, cultural, education and health services, which are subject to a simplified procurement regime. During the debate in the Council, Member States were divided on this point. Germany, Austria, Belgium, France and Italy opposed the abolition of the A/B distinction, whilst Hungary, the Netherlands, Lithuania and Estonia believe it is important to subject certain services on the “B” list to the full application of the Directives, such as legal services and hotel services.

The proposals would also allow more scope for public authorities to introduce environmental and social considerations into public tenders, if they choose to do so. The proposed Directives also envisage a common methodology for calculating the “life cycle costing” of goods and services, which may be relied upon by contracting authorities to verify the most economically advantageous tender. It is understood that methodologies would be developed separately, on a sector- or product-specific basis. Whether or not these proposed revisions will change the system in practice will largely depend on whether public authorities make use of such options available to them when procuring contracts.

The proposed Concessions Directive

The proposal for a new Directive on EU concessions is particularly controversial, since it would bring within the regime the award of contracts for service concessions, which were previously always outside the scope of the EU’s public procurement Directives. Many European Parliamentarians have expressed opposition to its introduction, questioning why a Directive is required for concessions contracts at all.

The Commission considers that the Directive is necessary to introduce clarity to the rules on concessions contracts. Whilst services concessions currently fall outside the scope of the EU Directives, they are nevertheless subject to the general procurement rules developed in the case law, such as transparency and non-discrimination. To a large extent the proposed Directive only codifies the case law of the EU Courts.

In this respect, the Directive brings welcome clarity for businesses and public authorities on their legal obligations for procuring and modifying concessions contracts. The proposed Directive would introduce a clear definition of “concessions”, a formula for calculating the maximum duration of a concessions contract, and explicit rules on the modification of concessions contracts after they have been awarded. The most significant change for economic operators is that the Remedies Directive would now apply to concessions contracts, giving aggrieved bidders the opportunity to challenge illegal award decisions.

The relevant provisions of the Concessions Directive are as follows:

1. What is a concession? A new definition

A concession is a partnership between the public sector and mostly private companies, where the private company exclusively operates, maintains or develops infrastructure (such as ports, water distribution, parking garages, toll roads) or provides services of general economic interest (such as energy, water and waste disposal). The most common form of concession is a Public Private Partnership (“PPP”).

For the first time, there would be a clear legal definition of a concession, which focuses on the transfer of “substantial operating risk” from the public authority to the concessionaire. This is set out in Article 2.2:

“The right to exploit the works or services...shall imply the transfer to the concessionaire of the substantial operating risk. The concessionaire shall be deemed to assume the substantial operating risk where it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services which are the subject-matter of the concession.”

The proposed Directive would cover all works and service concessions valued

above EUR 5 million, with certain exemptions for concessions which are already regulated by sectoral regulations, such as public passenger transport and airline transport. Concessions awarded to an undertaking on the basis of exclusive rights would also be excluded, and a lighter regime would apply to contracts for social services and those valued above EUR 2.5 million.

2. A maximum permitted duration for concessions contracts

Article 16 of the proposed Directive would limit the permitted duration of a concession contract as follows:

“The duration of the concession shall be limited to the time estimated to be necessary for the concessionaire to recoup the investments made in operating the works or services together with a reasonable return on invested capital.”

While this has proven to be one of the more controversial elements of the proposal, it is in fact a codification of the current case-law. The centre of the debate will be how to calculate the time necessary to recoup the investment, which depends on many factors which may vary from sector to sector. While it would be inappropriate to impose a fixed maximum duration in years given the marked differences between industries, the Commission considered that it was not an option to allow concessions to run for an unlimited period. Therefore, the duration has been defined by reference to possibility of recouping the investment, which will be assessed on a case-by-case basis.

3. Modifications to concessions contracts

The proposed Directive provides welcome guidance on important issues often faced by authorities and bidders. Notably, it clarifies, in line with current EU case-law, that a “substantial” modification of a contract during its term will be considered to be a new contract, requiring a new tender procedure. It also clarifies when a modification is considered to be “substantial”. It provides a “safe harbour” for minor (non-substantial) changes to the contract, namely those not exceeding the EUR 5 million threshold and inferior to 5% of the price of the initial contract, which will always be acceptable. Finally, it gives guidance on acceptable variation clauses and the conditions under which a contract may be substantially modified in light of unforeseen circumstances.

4. Remedies Directive now applies to concessions contracts

The most important change for contracting authorities and businesses is that the Remedies Directive would now apply to the award of concessions contracts. The Remedies Directive was amended with effect from 2009 to make it easier for aggrieved bidders to challenge procurement decisions. It imposes a mandatory standstill period which comes after the contracting authority announces its intention to award the contract to the successful bidder. The standstill period aims to provide unsuccessful bidders with more time before the contract award to assess whether to bring a claim. If a challenge is successful, contracting authorities may be required to award damages to aggrieved bidders, and in some cases the contract will be cancelled and would need to be re-procured. If the proposed Directive enters into force, concessions contracts would now also be subject to this regime.

5. Next steps

While the Directives are in the process of being negotiated in the European Parliament and the Council, any interested stakeholder that disagrees with the approach taken in the proposed Directive can lobby European Parliamentarians and Member States to support specific amendments.

Once they enter into force, the Directives would have no retroactive effect. This means that any concession contracts in place when the Directive is implemented by Member States will not be affected for their entire duration. However, an extension of their duration may qualify as a new concession contract, and – if this happens after the new Directive enters into effect - would have to comply with the rules of the new Directive.

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