

## Annex

### **EPSU proposals (September 2012) to the draft EP IMCO report from Philippe Juvin on the award of concession contracts<sup>1</sup>** (EPSU text in **bold**)

#### Principle of free administration by public authorities (Article 1)

(see amendment 381)

This Directive recognises the principle of free administration by contracting authorities and contracting entities in conformity with national legislation. The latter will be free to decide how best to **provide, organise and** manage the execution of the work and the provision of the services for which they are responsible, in accordance with the legislative arrangements and the methods which they judge to be the most effective manner **to ensure a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights in public services.**

#### Justification

The rapporteur's text acknowledges free administration but only refers to 'managing' services, not their direct provision by public authorities. The Lisbon Treaty reinforces local self-government (Article 4(2) and the "*essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users*". (Protocol 26). Protocol 26 also supports "*a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights*" in the provision of public services. This means that principles such as quality, continuity, accessibility, availability and comprehensiveness of the services, as well as democratic control and accountability are particularly important and need to be taken into account when awarding concession contracts. The rapporteur refers to the Protocol in the recitals but we would like to see it reflected in the main body of the Directive.

#### Principle of transparency (Article 1)

See amendment 383

**The details of concession contracts, including regarding the transfer of operating risk and eventual payments from the grantor to the economic operator, shall be made public and open to scrutiny. Any subsequent modifications to the contract shall also be made public.**

**Member States and the grantor shall ensure that Services of General Interest (SGI) concessions are subject to the transparency requirements and public control mechanisms that apply for publically-delivered services.**

**Member States and the grantor shall carry out periodic evaluation of the performance of Services of General (SGI) Interest concessions and publish the results.**

#### Justification

The EP should press for transparency requirements that are in citizens' interests: Citizens have the right to know how public money is spent and how public services / infrastructures are provided. Contracting authorities also need to have legal certainty that they can inform

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<sup>1</sup> <http://www.europarl.europa.eu/committees/en/imco/draft-reports.html#menuzone>

their citizens of their contractual obligations and the use of public money. Economic operators that bid for public service concessions need to recognise that this involves greater public control and accountability. Member States need to evaluate how concessions operate in practice and inform citizens. OECD principles on PPPs point out that Member States should aim to get 'value for money' from PPPs but that *experiences show that this can be difficult "if government agencies are not equipped to manage them effectively."* The principles state that *"By value for money is meant the optimal combination of quality, features and price, calculated over the whole of the project's life."* (principle 2).<sup>2</sup>

#### Definitions (Article 2)

##### See amendment 408

a 'services concession' means a contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrusts the operation of a service for which they are responsible to one or more economic operators, where the consideration for this delegation consists either solely in the right to exploit the service which is the subject of the contract or in that right together with payment.

The right to exploit the works or services shall imply the transfer to the concessionaire of the substantial economic risk in exploiting these works or services, defined as the risk of exposure to the vagaries of the market **and encompassing both demand and availability risk**. The concessionaire shall be deemed to assume the substantial operating risk where, under normal conditions of exploitation **and according to the provisions of the contract**, 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.

#### Justification

The rapporteur clarifies the concept of risk but in our view needs to go further to ensure that both the demand and availability risk are transferred, according to the type of concession. In many instances it is the demand risk that is the most relevant. We also think that it would be useful to clarify that both market varies and contractual provisions will influence how risk is defined and transferred.

#### Employment conditions (Article 26)

##### See amendment 735

**Obligations relating to terms and employment conditions, as set out by national law and collective agreements in the place where the work, service or supply is performed, and, where applicable, international labour law provisions shall be clearly set out by contracting authorities as part of the absolute requirements for the tendering of the contract.**

#### Employment conditions (Article 36a new)

##### See amendments 847

- 1. Contracting authorities and contracting entities shall lay down special conditions relating to the performance of a service or works concession and concerning in particular social and environmental considerations, provided that these are indicated in the concession notice.**

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<sup>2</sup> See [http://www.oecd.org/document/19/0,3746,en\\_2649\\_37405\\_50254099\\_1\\_1\\_1\\_37405,00.html](http://www.oecd.org/document/19/0,3746,en_2649_37405_50254099_1_1_1_37405,00.html) -

- 2. As regards wages (including allowances), hours of work and other conditions of labour for the workers concerned the contracting authorities shall include conditions which ensure to the workers concerned a level of protection which is not less favourable than that established for work of the same character in the trade or industry concerned in the district where the work is carried out by**
- a) collective agreement or other recognised machinery of negotiation between organisations of employers and workers representative respectively of substantial proportions of the employers and workers in the trade or industry concerned; or**
  - b) by arbitration award (if this is provided by the relevant national law); or**
  - c) by national laws or regulations.**

**Where the conditions of labour referred to in the preceding subparagraph are not regulated in a manner referred to therein in the district where the work or service is carried out, the conditions for the performance of the contract shall be determined according to such instruments in the nearest appropriate district or to the general level observed in the trade or industry in which the concessionaire is engaged by employers whose general circumstances are similar.**

Justification

These amendments integrate the requirements of ILO 94<sup>3</sup> into European law thus giving legal certainty for the public authorities. Non-discrimination requires a level playing field between national and foreign economic operators.

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<sup>3</sup> See ILO Guide to the Convention and accompanying recommendation - [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/normes/documents/publication/wcms\\_099699.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/normes/documents/publication/wcms_099699.pdf)