



October 2010  
AK Position Paper

## EU Initiative on Concessions

## About us

**The Federal Chamber of Labour is by law representing the interests of about 3.2 million employees and consumers in Austria. It acts for the interests of its members in fields of social-, educational-, economical-, and consumer issues both on the national and on the EU-level in Brussels. Furthermore the Austrian Federal Chamber of Labour is a part of the Austrian social partnership.**

**The AK EUROPA office in Brussels was established in 1991 to bring forward the interests of all its members directly vis-à-vis the European Institutions.**

### **Organisation and Tasks of the Austrian Federal Chamber of Labour**

The Austrian Federal Chamber of Labour is the umbrella organisation of the nine regional Chambers of Labour in Austria, which have together the statutory mandate to represent the interests of their members.

The Chambers of Labour provide their members a broad range of services, including for instance advice on matters of labour law, consumer rights, social insurance and educational matters.

Herbert Tumpel  
President

More than three quarters of the 2 million member-consultations carried out each year concern labour-, social insurance- and insolvency law. Furthermore the Austrian Federal Chamber of Labour makes use of its vested right to state its opinion in the legislation process of the European Union and in Austria in order to shape the interests of the employees and consumers towards the legislator.

All Austrian employees are subject to compulsory membership. The member fee is determined by law and is amounting to 0.5% of the members' gross wages or salaries (up to the social security payroll tax cap maximum). 560.000 - amongst others unemployed, persons on maternity (paternity) leave, community- and military service - of the 3.2 million members are exempt from subscription payment, but are entitled to all services provided by the Austrian Federal Chambers of Labour.

Werner Muhm  
Director

# Executive Summary

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## Considerations on the Questionnaire of the Commission to Social Partners

AK welcomes that in recent times the European Commission has increasingly called on the initiative of Consultation and uses individual questions to directly approach social partners and civil society. However, from the point of view of AK, the instrument of Consultation should only be used at a time when there is still scope for making a decision on the submission of an Initiative by the Commission. The fact that it is very probable in the present case that an Initiative by the Commission has already been determined might not exactly be beneficial to the willingness to take part in a very detailed questionnaire.

The Commission already proclaims in the questionnaire the target of an envisaged initiative: the objectives named are aimed at ensuring competition and access to the market for foreign applicants in the sector of concession contracts; at guaranteeing legal security, transparency and equal treatment for economic operators and at developing Public Private Partnerships. This gives rise to doubts whether the issues addressed in the present questionnaire – such job creation or loss, number of jobs affected, type of labour contracts or level of wages – are indeed the driving force behind a

Commission proposal in the area of services concessions.

In 2009, the **FORBA study “Privatisation of Public Services and the Impact on Quality, Employment and Productivity”** was published as part of the series “The Future of Public Services” of AK Vienna. The impact of Europe-wide liberalisation and privatisation tendencies was examined at the example of four different sectors (postal services, local public transport, electricity and health care/hospitals). In its summary, the study notes that *“contrary to the expectations raised [...] the long-term consequences of these developments for consumers are neither satisfactory with regard to prices nor to the quality of the services. However, particularly dramatic is the impact of this strategy on workers in these sectors, who have to pay for privatisation and liberalisation with the loss of many jobs, with growing pressure and increasing uncertainty, with worse labour relations and lower income”*. For a more detailed analysis of the individual results, the study may be downloaded using the following link:

<http://wien.arbeiterkammer.at/online/page.php?P=68&IP=47920&AD=0&REFP=886>.

Furthermore, the AK Vienna and the Austrian Association of Cities and

Towns had already in 2003 commissioned a very comprehensive **Comparative Study on Municipal Wastewater Management** (A, UK, F, D, NL). It was the target of this study to compare quality and costs of water supply systems (public/private). Comparing private and public water suppliers, public suppliers score in particular in respect of price and quality of the water, but also with regard to water loss. Whilst the conduction loss in France lies at 30 percent and at 22 percent in England and Wales, the value in Austria is only 9.5 percent.

#### **General points on an initiative the area of services concessions**

Referring to the introductory remarks of the European Commission, AK wants to point out that the sector, which is affected by awards of concessions and public-private partnerships, can normally not be compared to other economic sectors. The contracts are basically characteristic for oligopolistic or monopolistic markets, which not without good reason remain under governmental and democratic influence. Privatisation or the introduction of structures, which resemble competition, entail a large regulatory burden in this area. The transfer of responsibilities, which often comprise services of general interest, is also problematic for the very reason, that it is a particular aspect that they are not supposed to be subject to general economic rules. This concerns on the one hand services, which should be available for

all affordable prices, which a competing company would not offer because it cannot cover its costs. On the other hand, it concerns those sectors which are characterized by network problems (motorways, rail transport, waste management), where any competition between networks would make no economical sense and would be equivalent to misusing resources.

Unfortunately, the European Commission does not go into detail in respect of the sectors affected by concessions and public private partnerships, but basically works on the premise that in these sectors, competition has to be equated with cost efficiency. AK can only agree to this approach to a limited extent. Thus, there are relevant questions missing in the following part, which is dealing with questions.

Finally it should be noted that the advantages of mandatory general tenders are not looked upon with a great deal of reservation by workers. Hence, during the course of the economic support programme, among others at the request of SME, the thresholds for publication were raised within the scope of the so-called threshold values regulation, which is the reason why in case of smaller projects it has been envisaged to award public contracts directly. One of the reasons given for such a measure was that due to the current global financial and economic crisis it had become necessary to swiftly realise investment and job-creating measures at both international and national level. In connection with the speedy implemen-

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tation of promising measures, special importance is attached to public procurement.

Hence, from the point of view of AK, a **legal act dealing with services concessions**, which has been envisaged by the Commission, **is not required**. AK would therefore like to take the opportunity provided by the consultation procedure to urge the Commission to refrain from presenting a legal act dealing with services concessions and not to restrict the necessary flexibility of the Member States, Länder and local authorities required for establishing public-private partnerships. It is very clear from the jurisdiction of the European Court of Justice that services concessions are subject to the principles of European primary law (non-discrimination, transparency, internal market, competition). The ECJ has already clearly defined the transfer of services concessions in the past, which does not result – as diagnosed by the Commission – in a legal vacuum. In this sense, the **report by Heide Rühle on public procurement “New developments in public procurement”**, which was adopted with a large majority by the European Parliament on 18.5., has also come out against a European legislation on services concessions.

From the point of view of AK, a legal act dealing with services concessions, which has been envisaged by the Commission, is not required.

## The AK position in detail

**Question 2: Please describe the advertisement practices for the award of services in the Member States 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?**

In general, the concessions are tendered in accordance with the extent of the operators involved. If the concession has to be awarded nationally, it will be tendered at a national, in case of regional concessions only at regional levels (concerning the tender problem, please also see the references to the threshold values regulation in the introduction).

The primary aim is to strike a balance between rapid implementation of projects and the continuation of the rights of operators to be granted by the concession and the costs that will be incurred by laying down procedural rules. In particular in respect of granting concessions to SME, the procedural costs have a disproportionate impact and should therefore be kept at the lowest possible level, for example if they concern the transfer of communal general interest services.

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**Question 3: What is the impact of advertisement practices at local, national and international level and the competition (or lack of it) they generate with reference to jobs?**

It is to be expected that a possible EU-wide publication procedure has the following effects:

- a) Transfer from quality competition to pure price competition;
- b) no social criteria, such as type of labour contracts, working environment, wage level for the concession holders;
- c) long-term procedures, which cannot be economically sustained by SME and therefore result in SME being forced out of the applicant's market, slimming down of the provider market.

**Question 4: The Commission explained the definition and the application of the Treaty principles to the award of concessions in its Communication on Concessions and in the Green paper on Public Private Partnerships. Do you consider that**



**the guidance provided by the Commission is sufficient to conduct a procedure for the award of concessions in the Member States?**

From the point of view of AK, non-binding guidelines and “best practice” examples in this area are adequate.

**Question 9: In your experience, under the national legal framework(s), what are the consequences of non renewal/failure to secure a new concession contract for companies in the sector(s)?**

Significant job losses are almost certain in respect of non renewal/failure to secure new concession contracts, which are generally concluded for a term of up to 15 years and beyond. In particular with regard to SME, this issue concerns mainly highly specialised companies, which have developed a specific infrastructure (e.g. waste management) that cannot be easily converted to be useful to other economic fields of activity.

**Question 17: Do you think that the current level and structure of employment in the companies holding concessions or in the administration /in-house public entities in relation to provision of services in the sector you are familiar with are optimal (efficient) from an economic point of view?**

Due to the fact that concessions are mainly granted in connection with providing public or general-interest services, the question of cost effectiveness must be put into perspective. If supply is to be generally available at affordable prices for all, it will not be possible to measure cost effectiveness on economic requirements. In this case, the provision of such services would be superfluous. As in general, special investment has to be made for developing infrastructures, Concession contracts are often designed long-term to make respective amortisation at all possible. Given these framework conditions, the provision, as it is currently dealt with, seems to be on the whole optimal, even if competition, due to longer time horizons is relatively limited.

A comprehensive comparative study on municipal wastewater management (A, UK, F, D, NL) shows that the privatisation of companies established by municipal enterprises in Austria and France resulted on the one hand in the fact that vacant jobs were not filled (again) and that workers were employed on changed - mainly worse from the workers’ point of view - conditions. On the other hand, the same number of workers had to provide extended services, with the result that the principle of work and energy increased for each worker.

**Question 18: What is your assessment of the provisions of Directive 2004/18/EC on works concessions?**

A comprehensive comparative study on municipal wastewater management shows that the privatisation of companies established by municipal enterprises resulted in the fact that vacant jobs were not filled.

AK is strictly against the Commission proposal that services concessions have to be bindingly published at European level.

- a) The provisions of Directive 2004/18/EG ensure an sufficient degree of transparency; however only to a limited extend concerning equal treatment as due to the complexity of procedures and rules SME are disadvantaged right from the outset.
- b) Due to complexity and excessive number of laws and regulations, municipal clients often forego a project or tenderers refrain from submitting a bid (please also see the references to the threshold values regulation in the introduction).
- e) Although carrying out tender procedures had a positive impact on price competition, it leaves no room for quality. Social standards are unfortunately still a rare criterion.

**Question 19: What is the impact, if any, of the provisions of Directive 2004/18/EC on works concessions (especially concerning the advertisement and sub-contracting), and the competition they generate, on creation/losses of jobs, levels and evolutions of wages, types of contracts and working conditions?**

Competition, which has been brought about by tenders, is almost exclusively concerned with prices; in order to offer competitive prices, it is necessary to push down wages accordingly. This

is not only achieved by paying low wages but also by precarious employment contracts.

**Question 20: 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?**

AK is strictly against the Commission proposal that services concessions have to be bindingly published at European level, i.e. also in those cases where the services so far were provided directly by public authorities or internal institutions. A Europe-wide tender, especially in those areas, where services, in particular those of general economic interest, are already provided by internal institutions, only results in unnecessary administrative expense and has in general no positive impact on the requirements of recipients of services.

A mandatory tender also restricts the freedom of choice with regard to providing the services in question. Apart from that, it can be expected that the procedures, as it is already the case with public procurement, will in general be more cost intensive and



time-consuming. AK therefore opposes a mandatory EU-wide tender of concessions.

**Question 21: What would be the results, in the Member States you are familiar with, of a new legislation providing for compulsory advertisement of services concessions at the European level, with regard to: a) job creation b) job losses (age and gender groups affected; other specific consequences such as collective redundancy, transfer, re-training, retirement), c) Levels and evolution of wages, d) Types of contracts and working conditions)?**

AK therefore opposes a mandatory EU-wide tender of concessions.

A Europe-wide tender at regional level would not create additional jobs. On the contrary, we see the danger of the quality of jobs and working conditions deteriorating, as can be seen from the example given by the liberalisation of postal services across Europe. Not only wages, but also the types of employment contracts (increase of free, fixed short-term or minor employment contracts or other precarious working conditions) and working conditions would be in case of an external provision due to a Europe-wide tender as opposed to the provision by internal public institutions adversely affected.

**Question 22: More specifically, what would be the consequences of a new legislation providing for compulsory advertisement of services concessions at the European level in relation to the renewal of concessions of incumbent operators?**

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As long as the price remains the decisive criterion when awarding public contracts or services concessions – which is mainly the case in practice as determining other criteria is usually associated with higher administrative expense and rescission risks – a Europe-wide tender, because of the different cost structures within the Member States, would in our opinion have a negative impact on renewing the Concessions of established stakeholders.

**Question 23: In your view, what could be the social impact and the impact on public finances of intensified competition and/or externalisation of services as a result of greater use of concessions, notably with reference to the social protection enjoyed by the employees?**

Due to the fact that most services can only be provided by workers, increased competition, which is usually carried out via pricing entails negative social effects for workers. Savings potential, to make a more cost-effective offer, only exists for wages and working conditions. Whether public finances benefit of increased competition remains to be seen as it is well known factor that private tenderers invest far more money in marketing activities

than public institutions, which does make the overall costs for providing services not necessarily more favourable.

**Question 24: In your opinion, what would be the social impact of entry of new operators (e.g. non national companies / SMEs / large utilities companies) on the concessions market?**

As already mentioned above, one can expect that this measure has a negative impact in particular on SME, which are faced with an even greater number of competing providers, whose financial resources they cannot match. This would also have severe consequences at regional level.

**Question 25: In your view, what would be the impact of a new legislation providing for compulsory advertisement of services concessions at the European level on the quality, availability and costs of provision of so-called services of general economic interest?**

One can assume that large corporations apply for economically interesting concessions (see waste management industry), with the result that there would be hardly any tenderers for economically less interesting assignments, which are supposed to be fulfilled with the help of concessions.

The market would be characterized by "cherry-picking". Whether the increased procedural costs and the loss of jobs at the current concessionaire can be compensated by the efficiency of the new operator is extremely questionable. This is added by the fact that many concession contracts include a default guarantee for the operator (e.g. motorway, underground). Hence, at the end of the day it is once again the taxpayer who foots the bill for any losses of promised revenue.

The quality of services, including those of general economic interest does mainly depend on the human factor providing this service. Workers, who, due to stronger competition, are subjected to greater pressure and worse working conditions, are in many cases less motivated, which intensifies job fluctuation, which in turn has a negative impact on a service.

**Question 26: With reference to service concessions would you be in favour of/against EU rules providing for...?**

It should be noted that AK is opposed to presenting a European Act on services concessions. The following remarks are only hypothetical, if the Commission, in spite of the concerns expressed, decides in favour of presenting a draft act.

**a) The obligation for the contracting authority to publish a**

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**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?**

AK is against obligatory publication in the Official Journal. A transparent announcement without specifying with means of publication have been chosen is sufficient.

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

The duration of the minimal deadlines for the presentation of applications depends mainly on the size of the projects. Thus, AK does not regard a unified minimal deadline as appropriate.

**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?**

Public contractors must have the option of determining the maximal percentage, which can be provided by third party subcontractors. It is a known fact that sub contracting across several levels is associated with a

deterioration of the respective social standards and working conditions for workers employed at sub or third party contractors as the entire contract volume has to be divided between several companies, all of which want to make a profit at each level. Sub awards also make it more difficult to control the compliance with social minimum standards, because the main contractor does not feel responsible for the workers at the end of the sub award "line" and therefore in most cases is no suitable contact for supervisory bodies.

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

Such a provision is not supported by AK. Such legal protection instruments would only make the procedure unnecessarily complacent.

**Question 27: With reference to service concessions and public works concessions would you be in favour of/against EU rules providing for?**

**1. The obligation to clearly announce qualification criteria restricted to issues related to financial, economic and technical capacity of a tenderer?**

Such a provision is not supported by AK. There is a lack of criteria concerning the social competence of the ten-

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derer, hence type of labour contracts, quality of jobs etc.

**2. 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?**

Such a provision is not supported by AK. Such a provision would make a mockery of the entire set of rules on quality.

**3. The obligation to restrict the admissible award criteria to price and most economically advantageous tender?**

We are strictly opposed to an obligation to restrict the admissible award criteria to the price and the economically advantageous tender, as any competition, which is exclusively focussed on price, will in most cases – as already stated above – be at the expense of quality. This would result in the same negative impact as there is in respect of awarding public contracts. Whereby, because of the most interlinked general-interest services in the area of concessions, the quality of the service provided plays an even more important role.

In fact, we request the stipulation of social criteria in respect of the public award of services concessions. It should also – in contrast to the current ECJ judicature in the case of Ruffert – be regulated at EU level that public authorities may demand the compliance to minimum wages when awarding concessions. It is also the responsibility of the public authorities to ensure in respect of awarding services and other public contracts that high-quality jobs will be created and public funds are not allocated to those companies, which ignore labour and social standards.

**4. The limitation (with the exception of the utilities sector) of choice to that between an open procedure, a restricted procedure or competitive dialogue, as described in Directive 2004/18/EC, and admitting negotiated procedure only in exceptional situations?**

Such a provision is not supported by AK. In any case, all procedures should be available options.

**Question 28: The award of contracts for “non priority services”, such as social services, have been partially excluded from the scope of the rules defined by Directives 2004/18/EC and 2004/17/EC in view of their specific nature and lack of cross-border interest. For these category of services the above Directives merely impose the obligation to set out**

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AK is of the opinion that the exclusion from the area of application does also apply to services concessions.

**technical specifications and an ex post requirement of publicity. It must be noted however that the principles of transparency and non discrimination derived from the Treaty also apply to those contracts? In your view, do the reasons justifying the partial exclusion of non priority services from the scope of the rules on public procurement contracts also apply to services concessions? Are there any non priority services that in your opinion would justify a different treatment when awarded as services concessions?**

Concerning the first part of the question, AK is of the opinion that the exclusion from the area of application does also apply to services concessions in particular to ensure the maintenance of sufficient quality for all. With regard to the second part of the question, we think that there are no priority services, which would justify a different treatment, if they were awarded within the scope of services concessions. When awarding contracts for non priority services, it is essential that their special character is maintained by the exclusion from the scope of the provisions.

Should you have any further questions  
please do not hesitate to contact

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