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AK Position Paper

Proposal for a Directive on the award of concession contracts

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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.

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.

Herbert Tumpel
President

Werner Muhm
Director

Executive Summary

The AK is opposed to the proposed legislative act on concessions and considers the current legal situation to be sufficient to find a positive result. Due to being exempt from the scope of procurement directives and based on ECJ jurisdiction, a definition of service concessions as well as the clarification that the fundamental principles of primary law will also apply to concessions already exist. The present proposal goes far beyond current ECJ jurisdiction and is not the "light approach" originally announced by the Commission. An approximation of service concession provisions to those of building concessions is not desirable.

Service concessions are generally connected to rendering services of general economic interest (SGEI) and are therefore of a particularly sensitive nature. Their special significance for social and territorial cohesion in the Union is also emphasised by European primary law (Art 14 TFEU, Protocol No 26). Without referring to this primary law requirement, the Commission exclusively bases the necessity of a legislative act on reasons concerned with opening up markets; the actual purpose of public services - namely to grant citizens general, non-discriminatory, comprehensive and affordable access to services of general economic interest - has not been considered in the Proposal.

The AK position in detail

I. General remarks:

1. Broad rejection of the legislative act

The AK has already informed the Commission of its fundamental rejection of a legislative act on concessions by submitting its position within the scope of a **consultation** on 29.09.2010. In its Notice to Members (15/2012), dated 1st February 2012, the Committee of Legal Affairs of the European Parliament refers to a **reasoned opinion** of the Austrian Bundesrat, stating that the "Commission cannot convincingly show why any legal act is needed" as well as criticising "the proposal's one-sided emphasis on market economics and the fact that it goes into such detail". In its resolution on new developments in public procurement (Rühle Report) from 18th May 2010, the **European Parliament** states [that any proposal for a legal act dealing with service concessions would be justified only with a view to remedying distortions in the functioning of the internal market; points out that such distortions have not hitherto been identified] and "that a legal act on service concessions is therefore unnecessary".

2. Objective: opening up markets and liberalisation

The Commission's proposal is driven by a clear liberalisation agenda. It is the aim of the proposal to remedy local **"serious distortions of the internal market"** and the **"proportional targeted restrictions on access to parts of the EU's procurement markets"** by providing "non-discriminatory access to the market to all Union economic operators". However, the proposal does not say a single word about the fact that the transfer of tasks, which often includes services of general interest, is generally of a problematic nature, as particularly these are not to be subjected to general economic rules. What is also missing is the recognition that in many cases these concern services, which shall be available to all at affordable prices, however, which a competitive company would not offer due to lack of cost coverage. Furthermore, these are sectors, which are characterised by network problems in the sense that it would not make economic sense for networks to compete and which would amount to wasting resources. Privatisation or the introduction of competition-like structures in this sector would increase the regulatory burden.

According to the Directive proposal, **public-public cooperation** is still permitted; however, the proposal "clarifies the cases in which contracts concluded between contracting authorities are not subject to the application of concession award rules". However, the inherent goal is an increased use of **public private partnerships (PPP).** The AK takes an extremely critical view of this objective. For example, current EPSU research - based on a variety of studies on PPPs in various countries - has clearly concluded that PPPs **do not relieve public expenditure, but skim it.** This dossier summarises some points of criticism aimed at PPPs very well: for example that (1) the de-

mand risk is not being transferred in PPPs and that it therefore remains with the public sector; that (2) cost-benefit analyses, on which PPPs are based do not normally include external effects on employees for example; that (3) with regard to completing buildings, PPPs are significantly more expensive than traditional contracts; that (4) the provisions applying to PPPs also fail to ensure complete transparency; that (5) PPP award procedures require more time and that they are more expensive than normal award procedures; (6) that - also according to the analysis of the IMF - the private sector is not necessarily more efficient in providing services than the public sector or (7) that the public sector almost always has the option to raise capital at better conditions. Compare in detail **EPSU Briefing on public-private partnerships;** online under: http://www.epsu.org/IMG/pdf/factsheetPPPs_EN.pdf

The generally repeated argumentation that more competition goes hand in hand with lower prices must also be contradicted. We refer in this context to the **FORBA study "Privatisation of Public Services and the Impact on Quality, Employment and Productivity (PIQUE)",** which was published in 2009 in the series "On the future of public services" of AK Vienna: the impact of Europe-wide liberalisation and privatisation tendencies were examined by the example of four different sectors (postal services, local public transport, electricity and healthcare). The study concludes that "in contrast to expectations […] the impact of these developments for consumers in the long term is neither satisfactory with regard to prices nor the quality of services. However, particularly dramatic is the impact of this strategy on employees working in these sectors who have to pay for privatisation and liberalisation with the loss of many jobs, with growing pressure and increasing insecurity, with worse working conditions and lower incomes". Compare in detail: http://wien.arbeiterkammer.at/online/page.php?P=68&IP=47920&AD=0&REFP=886

Apart from that, it is extremely questionable whether this legislative act will be able to meet the aim of the Commission to achieve **higher participation of SMEs.** In the past, liberalisation measures always resulted in oligopolies, where a small number of large Groups dominate the market.

3. Liberalisation of the water sector

The AK is in particular vehemently opposed to plans of the EU Commission to liberalise the water sector, which it continues to pursue with the presented Directive proposal. Public enterprises dealing with water supply and the

treatment or disposal of sewage are not just "economic operators", as described by the Commission in Art 2 (10) of the Directive proposal, but according to national definition, providers of services of general economic interest.

In Austria, the existing general task to comprehensively supply the population with high-quality water at socially acceptable prices, and to minimise a negative impact on the environment caused by sewage, is met in a subsidiary manner by provinces, municipalities, water associations and co-operatives.

So far, the existing structure of regionally restricted, democratically organised and independently acting units has been optimally taken into account the principle of services of general interest. At the same time, it makes cross-border competitive distortions almost impossible. Due to public tendering of preliminary work such as the construction of water supply and sewage plants as well as of mains systems, free competition is ensured in any case. It is definitely justified that issues concerning the supply of drinking water and sewage disposal are always of great public interest, and deserve particular care and sensitivity. A current representative survey (n=809) of the polling firm SORA regarding the awareness of the Austrian population in 2011 on the range of services of general interest showed that 90 % of all questioned are in favour of water supply being directly controlled by the public sector (Federal Government/provinces). About 70 % rate the current water prices as being justified and 95 % of the people asked were very satisfied regarding the security of supply. The European Commission would be well advised to take the needs of consumers seriously.

4. Additional administration effort for the public sector?

From the point of view of the AK, the Directive proposal will bring significant additional cost and effort for the public sector as well as, due to the comprehensive and complicated regulation, result - in particular in case of smaller towns and municipalities - in considerable legal uncertainty. For example, additional disclosure obligations, complaints by unsuccessful bidders (implementation of the Remedies Directive) or simply additional costs for (legal) advice e.g. concession contract limits, calculating the estimated value of the concession) will bring significant additional administration costs for the public sector. Unfortunately, the Commission only refers to the alleged benefits for companies, and ignores the impact on national administrations and budgets.

5. Lack of social Impact Assessment

Once again, the proposal of the Commission has failed to meet its obligation pursuant to Art 9 TFEU, i.e. to carry out a social impact assessment. However, such an impact assessment would be of great importance, in particular in respect of awarding concessions and their impact on employment and social protection.

II. On the individual provisions:

1. Term "economic operators" (Art 2 Section 10)

Under the term of "economic operators", the legal definition also subsumes the providers of services of general interest. The AK is opposed to putting the provision of services of general economic interest on the same level as actual economic services. This differentiation should also be clearly established by the definition - with reference to the special roles of services of general interest as described in Art 14 and 106 (2) TFEU as well as in Protocol No. 26.

2. Contracting authorities - Contracting entities (Art 3, 4)

Legally, the definition of "contracting authorities" (Art 3) resp. "contracting entities" (Art 4) and their differentiation has been solved in an extremely complicated manner and is relatively intransparent for legal practitioners. Apparently, the intention was to differentiate between services concessions of Annex III (mainly network SGEI), which are awarded according to the definition of "contracting entities", and all other concessions, which are awarded in accordance with the definition of "contracting authorities". From a linguistic point of view these word creations are confusing.

3. Exclusions (Art 8)

The AK requests to include exclusions for SGEI concessions in the list of concessions, to which the Directive does not apply. However, the exclusions should at least be supplemented by particular sensitive areas such as water supply, sewage and waste disposal, health services und social services.

4. Provision of in-house services (Art 15)

From the point of view of the AK it is important that the public sector will continue to be able to provide services on its own initiative as well as within the scope of cooperation between municipalities.

With the in-house regulation proposed in Art 15, the Commission's proposal follows current ECJ jurisdiction. However, instead of the materiality criterion used in the ECJ jurisdiction ("main activity for contracting authorities"), a fixed limit of 90 % has been introduced. Even though it creates a higher level of legal security, in individual cases it may also represent a restriction of the ECJ line. It would be sensible to combine both proposals: one could retain the materiality criterion of the ECJ, and automatically affirm the existence of the materiality criterion once the 90 % limit has been fulfilled.

We welcome that the in-house privilege will also be expressly applied to cases of reversed in-house contract awards resp. contract awards to sister companies (Art 15 Section 2). However, in legal terms the provisions seems not have been solved satisfactorily, as on the one hand reference is made to Section 1 and on the other hand, "only" the third criterion of Art 1 ("no private participation") is repeated. Does that mean that when a contract is awarded to a sister company, the control and materiality criteria in the contractor-sister company relationship do not apply? Do the three criteria of Art 15 Section 1 have to be applied to the contractor-controlled enterprise relationship?

According to Art 15 Section 3, several contracting authorities may jointly fulfil the control criterion. However, those laid down in Art 15.3.2 lit d are far too casuistic and hard to fulfil. Lit d of the last paragraph ("does not draw any gains other than the reimbursement of actual costs […]") contradicts the 90 % criterion and should therefore be deleted. The criteria in lit a and b of the last paragraph should be sufficient (representatives in the decision-making bodies, decisive influence over the strategic objectives and significant decisions).

What has been stated in respect of the 90 % limit, also applies to the 10 %.

5. Social and other specific services (Art 17)

The AK is in favour of including social services in the exclusion list of Art 8; the same applies to "other services" named in Annex X, in particular the "other community, social and personal services".

Negative lists with CPV codes (Annex X), as mentioned in the Directive, are extremely confusing for legal practitioners and might result in the fact that individual services are just "forgotten". Following an initial inspection of the CPV codes, rescue and fire services, which should also come under Art 17, have so far not been included. In this case, it would be more sensible to use already existing definitions of social services (e.g. those of the voluntary EU quality framework of the Social Protection Committee).

6. Sheltered workshops and sheltered employment programmes (Art 20)

The AK welcomes that, compared to the current public procurement law, the provision on sheltered workshops has been improved: it appears to be sensible that the focus is no longer on the severity of the disability; only 30 % of the employees of those workshops have to

be "disabled or disadvantaged workers"; it is also no longer mandatory that the facility has to be a sheltered workshop or integrative enterprise. We are also in favour to extend this group of people generally to people "from disadvantaged groups". The AK assumes that this term has to be understood in a broader sense and in particular also includes young employees and apprentices, the long-term unemployed as well as people with migration background. The AK suggests to clarify this point - at least in a recital.

Preliminary remark to Title II and III:

The AK is in favour of a **paradigm shift** in respect of awarding public contracts and concessions: an innovative and sensible approach would be to exclude the award of a contract on the basis of best costs, which exclusively based on the price, and only to apply an award model based on the **"economically most favourable offer".** The procurement processes of this model could place more emphasis on social, ecological and qualitative considerations, thereby enabling a holistic perspective in respect of public activities. The public sector has to lead the way by taking the **consequential costs to society** into account; after all, we are talking about the use of public taxes.

Social considerations for example should promote gender equality, the integration of particular disadvantaged groups in the labour market (in particular young employees/ apprentices, the long-term unemployed, people with migration background, disabled people) as well as the compliance with high standards in respect of working conditions in the enterprise itself as well as in the supply chain; they should be embedded within the scope of selecting the participants in the procedure, as well as within the scope of the execution itself.

In particular when awarding a concession contract also concerns services of general interest, it will be of paramount importance to ensure **high-quality services for users** as well as - similar to the other concessions - for employees. In particular in the sector of public services, focussing primarily on the most cost-effective offer is completely unsuited.

7. Selection criteria (Art 36)

With regard to the **selection criteria** included in Art 36 Section 1, it should be emphasised that this is not a final, but an **exemplary list.** The formulation, which states that "All requirements **shall be related and strictly propor-**

tionate to the subject-matter of the contract" should be deleted. Within the scope of awarding public contracts, this restriction would make it impossible to achieve the social and economic objectives - also within the meaning of the Europa 2020 targets - to the extent it would be desirable from the point of view of the AK.

In addition, the option of **including services by other companies,** which has been provided for in Art 36 Section 2 should be supplemented by the request that these other companies have to comply with the legal requirements of Sections 5 to 7 of the same Article and that the non-existence of exclusions has to be certified. Should the contracted company not comply with the requirements of Section 6 only after the concession has been awarded, the contractor should be able to retain part of the agreed price to ensure that all social security contributions are paid.

8. Exclusion criteria (Art 36)

The following points should be added to the exclusion criteria listed in Art 36 Section 5 to 7:

- According to the formulation of lit b, Section 5 lit c should also include **fraud within the meaning of national law** of the contracting authorities and not only fraud as defined by Art. 1 of the Convention on criminal-law protection of the financial interests of the Community.

- Pursuant to Section 6, not only those candidates, who were convicted because of tax evasion or non-payment of social security contributions should by law be excluded from concession awarding procedures, but also **companies with several convictions by a labour court** should by law be excluded from being awarded a concession. The BAK considers "several convictions" to be at least five judgments by a labour court against the company in question. Furthermore, Section 6 should include the provision that not only court decisions lead to an exclusion, but **also final official administrative decisions,** as in particular requests to pay social security contributions in Austria are made by notifications from administrative authorities.

- Instead of the formulation "Member States may provide […]" Section 7 should say "Member States provide […]". Apart from that, **violations in respect of social, labour and environmental law** should be specified.

Regarding the option in Art 36 Section 8 to demonstrate the reliability of the candidate despite the existence of

the relevant ground for exclusion, this should only apply to candidates who are in a situation as described in Section 7 and only if particular extenuating circumstances exist (e.g. conviction happened a long time ago), however, not to Sections 5 and 6 of Art 36.

9. Award criteria (Art 39)

As stated initially, in future it should only be possible to award a concession to the **"economically most favourable offer" and no longer to the "lowest offer".** Apart from that, in Art 39 the close relationship to the subject-matter of the concession should be deleted. Furthermore, it should be added that the award criteria in Art 39 Section 4 do not present a final catalogue. However, the following quality criteria should be added:

- **Social and employment-related criteria,** such as gender equality, the integration of particularly disadvantaged groups in the labour market (in particular young employees/apprentices, the long-term unemployed, people with migration background, disabled people) as well as the compliance with high standards in respect of working conditions in the enterprise itself as well as in the supply chain;
- Quality criteria for the **users** of the service;
- **External costs,** such as **environmental costs**, based on long distances by car to provide the service; these can be reduced by using environmentally friendly means of transport just as rail;
- **Sustainability of production processes**

Recital 29 should be reworded urgently. Admittedly, the two aspects mentioned, the "protection of health" and the "favouring of social integration of disadvantaged persons or members of vulnerable groups" are important examples for social and employment-related criteria'; however, it is difficult to understand why the Member States should be restricted to comply only with these two aspects.

10. Subcontracting (Art 41)

In particular in the construction sector, subcontracts are a breeding ground for undeclared work, social fraud and wage dumping. This has been evident since the study by Houwerzijl/Peters (Liability in subcontracting processes in the European construction sector, 2008, study commissioned by the European Foundation for the Improvement Living and Working Conditions) as well as the Communication of the European Com-

mission of 24.10.2007 "Stepping up the fight against undeclared work" (Item 3.A. Drivers of undeclared work) at the latest.

In order to avoid social fraud and thereby costs for the taxpayer, the subcontractor chain must also be restricted with regard to the award of the concession, i.e. in accordance with size and complexity of the contract to one, two or maximal three levels (restriction of the subcontractor chain).

11. Conditions for awarding the concession

A provision should be added according to which the **compliance with labour and social law** should be a condition in connection with the **award of the concession;** it should not be left to the discretion of the contracting entities. It is important that the non-compliance with the conditions entails respective consequences. Depending on the severity of the violation, this could include a warning, high contractual penalties or as a last consequence the withdrawal of the contract. If consequences are not clearly defined or agreed, normally the only consequence to be applied is the withdrawal of the contract. However, in practice this is only carried out in very rare or severe cases, so that in practice a violation against labour and social law provisions almost always remains unpunished.

Apart from that, the Member States should have the option to agree social and employment-related measures, similar to the Federal Chancellery, which adopted measures that promoted women and equality.

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

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