

To the Members of the
Internal Market and Consumer Protection Committee (IMCO)
of the European Parliament

Vienna, 16 January 2013

ÖGB and BAK Position on the award of concession contracts

Dear Member of the European Parliament,

The Internal Market and Consumer Protection Committee (IMCO) of the European Parliament will vote on the proposal for a Directive on the award of concession contracts within the next few days. **Eleven members of the IMCO Committee from five different political groups have tabled amendments to reject the Commission proposal.** The Austrian Trade Union Federation (ÖGB) and the Austrian Federal Chamber of Labour (BAK) as well as the European Federation of Public Service Unions (EPSU) and many other national trade unions in Europe are in favour of rejecting the Directive and believe that the current legal situation is adequate.

Concerning service concessions, which are generally associated with providing services of general interest, privatisation and the introduction of competitive structures result in a **deterioration of quality of the services, increased costs and a higher administrative burden** for the public sector as well as **job losses, poorer working conditions and lower incomes.** The proposed Directive **endangers** the objective to grant citizens **general, non-discriminatory, comprehensive and affordable access to services of general interest**, thereby ignoring the primary-law provisions of the Lisbon Treaty.

We therefore ask you to reject the Directive proposal.

If the rejection of the legislative proposal does not get the necessary majority it is of **utmost importance that services of general interest are exempt and that social, environmental and qualitative considerations are bindingly incorporated in procurement processes**, in order to prevent deteriorations for workers and citizens.

In particular the following points are vital, in respect of which relevant amendments were tabled, in particular

- amendment 535 (broad exemption of services of general interest),
 - amendment 828 (reasons for exclusion),
 - amendment 846 (adherence to collective agreements),
 - amendments 868, 869, 871, 872, 874 (social and environmental award criteria).
- ÖGB and BAK request to **include** in the list of concessions, to which the Directive does not apply (Article 8), **a broad exemption clause for services of general (economic) interest.** In particular the areas of water supply, wastewater services, waste disposal, health services, social services, social security, education, railway and local public transport, energy, municipal services, culture, promotion of culture and audiovisual media must be explicitly exempt.
- The Commission proposal suggests a simplified procedure for social services. However, ÖGB and BAK support the notion that **social services including rescue services, ambulance services and fire brigade services will also be completely exempt from the scope** of Article 8. However, in particular negative lists with CPV reference numbers (Annex X), an approach favoured in the Directive are also rejected. This is not only extremely unclear for legal practitioners, but does also

result in the fact that individual services might easily be “forgotten”. For example, the list in Annex X does not include the relevant CPV reference numbers for rescue and fire services (CPV 75252000-7 and 75250000-3). BAK and ÖGB therefore request not to introduce negative lists with CPV reference numbers.

➤ ÖGB and BAK **support a paradigm shift** in respect of public procurement and request a **greater emphasis on social, environmental and qualitative considerations in procurement processes**. Concerning this matter, we refer to the current ECJ judgement of 10 May 2012 (Case C-368/10, Max Havelaar), in which the ECJ explicitly confirms the option to also use social and environmental criteria as award criteria in procurement procedures. The revision of Art 36, 39 and 41 must take the notion of social and environmentally sustainable award of contracts into account. In detail:

- **Reasons for selection:** in respect of the selection criteria listed Art 36.1, it must be made clear that this is **not a final list**, but only serves as an example.
- Apart from the final conviction of economic operators because of tax evasion or non-payment of national insurance contributions, the increasing number of convictions by employment tribunals, final administrative decisions as well as infringements in respect of **social, labour and environmental law must also be named as grounds for exclusion** (Art 36.5-7) from participating in concession proceedings.
- **Award criteria:** Article 39 should **not represent a final catalogue of award criteria**; however, **social, employment and environmental criteria**, such as the promotion of gender equality, the integration of particular disadvantaged groups in the labour market as well as the compliance with high working conditions standards (in the undertaking itself as well as in the supply chain), quality criteria for users of the service or external costs such as environmental costs, **should be added**. Apart from that the excess emphasis on the close connection to the subject of the concession in Art 39 is rejected.
- The **binding compliance with national labour, social and collective agreement provisions must be stipulated unreservedly**. Stating this principle is mandatory.
- **Restriction of the sub-contractor chain:** in particular in the construction sector, sub-contracts are a breeding ground for illegal employment, social security fraud and wage dumping. In order to avoid social security fraud and ultimately costs for the taxpayer, the sub-contractor chain must be restricted with regard to the concession award, i.e. according to size and complexity of the contract to one, two or maximal three levels (restriction of the sub-contractor chain).

From our point of view the **present compromise amendments** go both in respect of the exemption clause for services of general interest and with regard to embedding social criteria **not far enough**. Even though in case of services of general interest the aim is to exempt water supply, an exemption of all public services and social services is not guaranteed. We **therefore urge you to support amendment 535**.

Yours faithfully,

Erich Foglar
President
Austrian Trade Union Federation

Herbert Tumpel
President
Austrian Federal Chamber of Labour