



EUREAU

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EUREAU POSITION ON A POSSIBLE COMMUNITY INITIATIVE ON CONCESSIONS

Eureau is the federation of national associations of drinking water suppliers and waste water services. It brings together the views of water utilities across twenty three EU countries, the three EFTA countries, and three accession and candidate countries, which collectively provide sustainable water services to around 450 million European citizens.

Eureau's members reflect the very diverse way in which the European water sector has been organised. The legal structure of the water utilities varies from departments of local governments to companies whose shares are being traded on the stock exchanges. Some utilities are owners of the water infrastructure and treatment plants, others are operating the assets owned by local or regional authorities. Some are water boards that combine the operation of waste water treatment with the granting and suspending of licenses to discharge, and some hold a fixed-term concession to operate the water assets of local governments. Some are serving an area in which only some hundred people live, others serve millions.

Eureau supports this diversity. It has arisen historically from national needs to find an institutional set-up for water utilities that addresses local conditions and principles of good governance. Eureau thinks that the freedom of member states to choose the institutional set-up they consider to be most appropriate under the principle of subsidiarity is important, and should be maintained. Very often the institutional set-up allows local and regional authorities a freedom of choice in the way that water services are provided, notably in deciding to run the service by itself or to outsource the service, fully or partially, to a third party. Eureau thinks that this freedom for local and regional authorities to organise water service provision should also be maintained.

Eureau's members appreciate the importance of the work currently being undertaken by the Commission in order to improve public procurement practices and procedures, to improve legal certainty, and to guarantee the full application of the general principles of the European Treaty and relevant European legislation. The Commission is now performing an Impact Assessment into a possible Community initiative on Concessions. Eureau offers the following considerations for this Impact Assessment.

1. First define responsibilities

The Commission is considering a legal initiative on concessions in order to codify the obligations for contracting authorities who award works or services concessions. There are two stages to be distinguished. The national governments should have clearly defined first who the competent entities are to provide water services and how far their responsibility goes. In this first stage it should also be spelled out to what extent and to whom the competent entities can delegate or transfer their responsibilities to other eligible entities. This is not an issue of public procurement but of the right institutional set-up for water services provision. Only after a clear identification of its competencies can a contracting authority at a second stage decide which works or services are needed in order to meet its obligations, and then decide whether to provide these works or the services by its own means or to contract some or all of them out, either as a works or service contract or as concessions. Without a clear allocation of the specific responsibilities by the Member States, there is little to be gained by new European legislation for the awarding of concessions. Any directive can only deal with the second stage mentioned.

2. Tendering procedures for concessions must differ from public procurement procedures

Concessions and public procurement (contract of purchase of goods, works or services) are very different. The difference lies mainly in the risks involved and the direct relations between the contractor and the end-users. In principle, risks should be borne by the party most suited to handle these risks. In a service concession the contractor assumes the main financial risks involved in providing the service, like the commercial risk of not being able to recoup the investments made due to weak demand or defaulting customers, while in a service contract these risks remain with the contracting authority. This can also apply to the legal risks involved in not meeting the required service levels. This difference in risk-taking between concessions and contracts leads to a different relationship between the contracting authority and the contractor, both at the moment where the relationship is being established and during the period of execution of the contract. The awarding procedure should take into account this difference between a contract in the strict sense of the word and a concession partnership.

3. Duration of concession contracts and possibility of amendments

Concession contracts should have a maximum duration in order to make it possible for the contracting authority to change its policy or to change the contractor. When commercial risks are transferred to the contractor, a longer duration is justified. The same argument applies when investments with long-term effects are being made, both in infrastructures and in human resources. This means that the maximum duration of a concession contract should not be set at a level that is too short. A longer duration, however, also means that

the probability will rise that the circumstances change and that the need will arise to adapt the contract to these changing conditions. It is a necessity for a concession contract to have some provisions for adapting to changing conditions, because otherwise either the contractor will require an ex-ante risk premium, to be paid by the end-users, or changes that are beneficial for the end-users will be unduly postponed until the end of the contract. This need for flexibility is an essential difference between awarding a concession and concluding a public procurement contract.

4. *The competitive dialogue procedure is not adapted to awarding Concessions*

Eureau members stress that the competitive dialogue procedure is not adapted to encompass all elements that characterise the concession. This procedure, which is rightly limited to certain public procurements in its current version, focuses on the determination of a “technical project” before the tender, while the negotiation phase in the case of a concession contract focuses on the definition of the “contract” that will bind the parties over a long period of time. This procedure is insufficient to cover those situations where some complex and long-term issues need to be optimised over time so that they continue to respond to the needs of the end-users. To illustrate this, the current competitive dialogue procedure would fit the need to procure a wastewater treatment plant because the project depends essentially on a technological choice. It is however not adapted to the procurement of a service to manage the whole of the wastewater services of a municipality during a medium/long period.

5. *Concessions and state aid*

The European Union provides funding for a large number of water projects through ISPA, Cohesion Fund and Regional Fund. The procedures and administrative practices that govern the eligibility of projects should not unduly discriminate against implementing these projects in the form of a concession.