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Service Concession Contracts: Do we need the Commission's Proposed Directive?

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Background

- COM (2011) 897 final, published on 20.12.11
 - Proposed Directive on the award of concession contracts
- Policy History
 - COM (2004) 327 final (30.4.04): Green Paper on PPPs and Community Law on Public Contracts and Concessions
 - COM (2004) 374 final (12.5.04): White Paper on Services of General Interest
 - COM (2009) 615 final (19.11.09): Developing PPPs
 - COM (2011) 15 final (27.1.11): Green Paper on Modernisation of Public Procurement Policy

Reasons for the Directive

- *Need for Legal Certainty*
 - Cf Commission Interpretative Communication on EU Law governing awards not subject to the PP Directives, [2006] OJ C 179/2; *Germany v Commission*, T-258/06
 - Proposed Directive, recitals 1, 2, 7 and 17
- *Encouraging Investment*
 - Need for “effective” access to the market; unlevel playing field; “bad” direct awards; problems of “budgetary constraints”; need to support more PPPs

The Current Legal Position 1

- Awards governed by EU Treaties: Free Movement Rules
- PP Directives (2004/EC/17 & 2004/EC/18)
 - Works concessions; definition of service concession
- General Principles of Law: Non-Discrimination, Transparency, Fairness, Proportionality
- Problems:
 - Defining concessions: see *JBW Group Ltd v. Ministry of Justice* [2012] EWCA Civ 8.
 - “absence of clear EU rules”; disparities among national legislative provisions; no common rules on remedies.

Current Legal Position 2

- ECJ Case Law applying TFEU and General Principles:
 - *Telaustria*, Case C-324/98 (advertisements)
 - *CoNaMe*, Case C-231/03 (access to appropriate information)
 - *Parking Brixen*, Case C-458/03 (“appropriate” for national authorities)
 - *Commission v. Ireland*, Case C-507/03 (“Part B” services caught)
 - *Commission v. Italy*, Case C-412/04 (< thresholds caught)
 - *SECAP & Santorso*, Case C-147/06, C-148/06 (cross border interest = contract value with “significant amount”)

The Need for Reform 1

- Wide Application of EU Law to service concessions
 - Procurement Directives thresholds don't apply; EU rules apply to "Part B" services
- PPPs and service concessions often overlap
- Uncertain requirements of the general principles of law: eg how much advertising, where, in what languages?
- ECJ's approach one of proportionality
 - Cf how much "transparency" depends on the potential market: *Commission v. Finland*, Case C-195/04
- Rules in *Pressetext*, *Teckal* apply generally.
 - *Lianakis* too? Cf. *Commission v. Ireland*, Case C-226/09, at para 43. See article 39(5) of proposed Directive

The Need for Reform 2

- ECJ itself accepts that EU rules applying to concessions are unclear
 - See *Presstext*, Opinion of AG Kokott; and *Commission v. Finland*, Case C-195/04, Opinion of AG Sharpston
- The Court's case law requires codification
- The prevailing pragmatic application of procurement rules for PPPs inadequate. *Cf Acoset SpA*, Case C-196/08
- Value of the market excluded from EU rules: e.g. > 60% of PPP contracts in EU qualify as concessions.

The Proposed Directive's Provisions 1

- Definitions:
 - Article 2
 - concessionaire must have “the substantial operating risk”, e.g. where “not guaranteed” to (at least) break-even
- Scope:
 - applies to acquisition of “works and services”
 - concession contracts in utilities sector covered: art 1(2)(b)
 - Exclusions – articles 8 – 15. Article 15: public – public cooperation excluded.
- Advertising:
 - Title II, Chapter I
 - > threshold concessions: publication in the OJ
 - Deadline for applications: article 38 (52 or 47 days)

The Proposed Directive's Provisions 2

- The Award Procedure
 - Title II, Chapter II
 - More flexible procedure than under the existing PP rules
 - Minimum standards to ensure equal treatment, transparency and fairness: art. 35
 - Reasons for decisions, including to unsuccessful tenderers: arts. 35(6) & (7)
- Award Criteria
 - article 39. *Lianakis* applies
- Modification
 - article 42

The Proposed Directive's Provisions 3

- Duration of Award: article 16
- Early Termination
 - article 43, e.g. where a modification requires a new award
- Remedies
 - Remedies Directive applies
 - See recital 34 – “An exceptional and temporary extension of the term of the concession strictly aimed at ensuring the continuity of provision of the service pending the award of a new concession should not normally qualify as a material change to the initial concession”

The Future

- Concessions will continue to be subject to the Treaty and general principles
 - See, e.g. *Photo-Me Int'l PLC v. Network Rail* [2011] EWHC 3168 (QB)
- Consideration by the Council and the E P
- If Directive passed, no retroactive effect