

## Key messages

### 1. Core principles of subsidiarity / local autonomy / free choice of organization are upheld in all public procurement rules and also in specific provisions for public-public cooperation

- Under European law, local autonomy is preserved. None of our public procurement proposals interfere with the freedom of public authorities to decide how to organise the way they carry out their public service tasks.
  - Public authorities remain **entirely free to decide on the direct provision of works or services to the public or on the outsourcing** of such provision to third parties.
  - Local autonomy also concerns the conditions in which these services are provided (quality standards etc).
- However, **if a local authority decides to outsource to third parties** (for instance, entities involving private capital), the **basic principles of transparency and non-discrimination** as safeguarded in the Treaty, **must be respected.**
  - Our **public procurement rules** ('classic' directive; utilities directive; concessions directive) all serve the purpose of guaranteeing these basic fundamental principles, whether through detailed rules (as for the general procurement framework) or through a light and flexible legal framework (concessions).
- The case of **public-public cooperation is in principle exempted** from the application of this legislation, and hence from the requirement of competitive tender. This has been subject to extensive case-law, nevertheless many stakeholders and also EP (Rühle report) have requested further clarification.
  - To facilitate understanding of the current case-law on exemption for public-public cooperation, Commission published a **staff working paper in October 2011.**
  - The **revision of the public procurement rules propose specific provisions for public-public cooperation which codify this European case-law** in view of enhancing legal certainty for all stakeholders.

*In sum, public-public cooperation is exempt from competitive tendering if it does not serve a commercial purpose, there is no private capital involved and the public authorities exercise analogous control over the cooperation/entity carrying out the public service tasks.*

### 2. Proposal for a directive on the award of concessions

- The directive proposal aims at enhancing **legal certainty** for contracting authorities and

business, and at ensuring effective and equal access of the European undertakings to economic opportunities related to concessions, and hence favours the **emergence of a real Internal market** in the sector of concessions.

- The concessions directive does not specifically target the **water sector**. It establishes the **horizontal rules** applicable to the award of such contracts **regardless of the sector**.
- However, again, **the autonomy of public authorities is not questioned** in terms of the organization and the requirements for the provision of water services.
  - These rules will not affect the freedom of public authorities to use their own resources or to outsource – the proposal does not intend to liberalise any sector. The proposal **does not aim at imposing outsourcing or privatisation** of public service tasks. Public authorities will remain entirely free to decide on the direct provision of water services.
  - Member states or local authorities **remain competent to determine the conditions** in which water services are provided. Notably, they will be able **to define** quality, health or environment **standards** and **to determine the fee**. Our proposal does not include any obstacle to exercising these competences. *(e.g. in France)*
- The proposed rules will only apply **if the public authority decides to outsource to third parties**.
  - Not only is it highly desirable to ensure **transparency** and that the contract is awarded to the operator who guarantees maximum service **reliability** and **continuity** and the best **conditions** of service provision, in such a case (especially in the case of such a precious good as water);
  - The proposed rules clarify and concretise the Treaty principles and the applicable case law of the Court.
- In order to ensure further clarity around these rules, we propose a **light and flexible legal framework** for the award of concessions
  - the proposal aims at ensuring **transparency, effective access** to market for companies (especially SME's) and respects the **autonomy** and **flexibility** for local authorities.
  - in order to safeguard this flexibility and not to increase administrative burden for local authorities, the proposal does not prescribe any procedure for the award of concessions.
  - the rules will also apply only above the **threshold of 5 million euros** (compared to average value and duration of contracts)
- We made research on water supply in member States. It shows that **contractual arrangements vary significantly** even within the same member State.

- For each case, it is necessary to check if the water supply corresponds to the notion of concession as defined in the proposal.
  - Therefore, we already know that in many cases, the legal form under which **water is supplied will not meet the definition of a concession** and will not be covered by the directive. (cf meeting with Bavarian stakeholders)
- ↳ no attack on German system of Hochtief*
- In addition to the codification of rules on public-public cooperation (as per above) the proposal also provides a major clarification: when the private entity receives a **special and exclusive right** via a **transparent competitive tendering procedure** it is not submitted to the public procurement and concession rules when it awards contracts and concessions to subcontractors.
- 3. Modernisation of the public procurement directives** (concerning the water sector more specifically)
- The basic rationale on local autonomy is the same as above. The review **does not aim at privatizing** the water sector and **does not affect the existing competences** of member States in this field
  - On the contrary, the proposed rules provide member States with increased **flexibility** in the context of the review of the rules applicable to the utilities sector (water, energy, transports and postal services):
    - Indeed, the utilities proposal also uses the **exemption for public-public cooperation** established for classical sectors
    - It also allows for the **exemption** from the application of the directive:
      - **in the case of intra-group markets** without excluding a private participation (as for public-public cooperation) and by softening the required percentage of activities between the two entities (80% vs 90% for public-public cooperation);
      - **in the case of joint ventures**.
    - there is a **clarification of the notion of "special and exclusive rights"**.