

**EPSU position on the EC proposal for a Directive on the
award of concessions contracts
adopted by the Executive Committee November 2012**

1. The Executive Committee adopted a position at its meeting in April 2012 on the European Commission's (EC) Communication "A Quality Framework for Services of General Interest in Europe" COM (2011) 900¹, which accompanied recent initiatives on public procurement, concessions and state aid.²
2. In the position EPSU voiced dismay over the 'market framework' approach to public services that is being constructed by European policy. European policy-makers formally acknowledge the fundamental role of public services in assuring social cohesion, providing a safety net, and supporting the 'knowledge economy'; and the European Union (EU) has legal provisions (Charter of Fundamental Rights, Protocol 26 on Service of General Interest (SGI), Article 14) that can be used to underpin this fundamental role. However in practice EU policy is directed towards public services playing only a 'residual' role in society.³ The inclusion of social security schemes within the scope of the EC proposals on concessions and public procurement is a further illustration of the extent of this market approach. This development mirrors in some way what is happening with labour rights, where anything above 'minimum' levels of workers protection is seen as distorting competition as an obstacle to the internal market's objective to increase cross-border trade in services. As the EC Communication published in October 2012 on the Single Market Act II⁴ says: "*The mobility of citizens and businesses across border is at the heart of the Single Market; we must do everything to encourage it further.*"
3. In theory the EU is supposed to be neutral on the question of public or private ownership⁵ but direct public service provision is increasingly being challenged. Service concessions are not yet regulated by EU legislation and the EC has been careful in saying that it is up to public authorities to decide whether or not to set up a concession. However it is clear from the preparatory texts that the aim is indeed to promote the further use of concessions, including Public-Private Partnerships (PPPs). The EC's Impact Assessment refers explicitly to restraints on public spending as a reason to set up concessions and it claims that competitive tendering of 'non-externalised' public tasks can generate efficiency savings of between 10-30%. This, it says, "*gives an idea of the potential losses due to inappropriate choice of organisational arrangements for the provision of public services.*"⁶ No actual evidence is provided to substantiate this claim. There is no acknowledgment of research, published for example in EPSU's Public Services Monitor,⁷ that finds no efficiency gains from outsourcing public services, or of problems with public

¹ See http://ec.europa.eu/commission_2010-2014/president/news/speeches-statements/pdf/20111220_1_en.pdf.

² For the position of the Executive Committee April 2012 see <http://www.epsu.org/r/589>

³ See UNISON-verdi discussion document: The Future of Public Services in Europe for a description of "residual" vs. "expansive" public services <http://www.unison.org.uk/acrobat/B1846.pdf>

⁴ See <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/1054&format=HTML&aged=0&language=EN&guiLanguage=fr>

⁵ Set out Article 345 of the Treaty on the Functioning of the European Union (TFEU).

⁶ See page 10, 14 of EC Impact Assessment at

http://ec.europa.eu/internal_market/publicprocurement/docs/concessions/SEC2011_1588_en.pdf

⁷ For latest research results on the impact of outsourcing see <http://www.epsu.org/r/578>. The EPSU Public Services Monitor also collects information regarding alternatives to competition, such as public-public cooperation (PuPs), which have shown to be very successful (see for example <http://www.europarl.europa.eu/activities/committees/studies/download.do?language=en&file=31831>).

money being used to finance high profits of private companies.⁸ The EC's Impact Assessment also says that, *"by transferring the main operating risks to a private partners and alleviating public authorities of this burden, concessions make it possible to carry out much needed public works and services while keeping the corresponding commitments out of the government balance sheet."*⁹ This position on PPPs echoes BusinessEurope's claims that *"Public-private partnerships (PPPs) provide financial relief for public authorities, innovative solutions, more customer-oriented services and better value for money for the users policy-makers should focus on extending the use of concessions."*¹⁰

4. Thus, EPSU fears that the Directive will contribute to an increased use of PPPs and consequently to a growth in the number of failed PPPs. The experiences with PPPs throughout Europe and in particular in the UK where the experience with PPPs is the longest, show that these contracts are expensive for citizens and governments. EPSU recently published a factsheet on PPPs that sums up the main problems, not least regarding the transfer of (economic) risk to the economic operator.¹¹ In practice risk regarding public services cannot be outsourced. The recent failed PPP on the underground in London is an example of how public authorities and citizens end up with having to pick up the pieces, whatever is written in the contract. The Mayor of London, Boris Johnson, was quoted as saying: *"We are being asked to write a blank cheque in order to prop up failing Tube Lines. In other countries this would be called looting, here it is called PPP"*.¹² The total cost of PPPs in the UK currently is estimated at £300bn and repayments on contracts will amount to £10bn a year by 2017-18.¹³
5. The EU seems to take a somewhat different view on the role of public and private sectors in providing public services outside the European Union. In May 2012 the EC published the report, *"Confronting scarcity: managing water, energy and land for inclusive and sustainable growth"*,¹⁴ which is critical of private sector performance in water and other sectors. The report also has positive references to "public-public" partnerships (PuPs) and notes that, *"PuPs generally have lower costs [than PPPs] and a greater focus on capacity-building and equity A key conclusion is that governments should have a choice of partnership options and be able to end any that are not working."* The report includes remarks on the impact of the private sector on water resources and concludes that *"the companies and governments concerned may wish to make transparency a priority, in order to help establish whether these potentially significant interventions are in the special interest of the firms concerned, or serve the broader public interest of sustainably managed, equitably distributed water resources."*¹⁵ This statement stands in stark contrast to the comments in the EC's letter of 26 September promoting the privatisation of water services in Europe.¹⁶
6. The EC argues that a Directive is necessary because not all Member States have adequate national rules on service concessions. However, the EC has provided little comparative information on the national legal frameworks, let alone an assessment of how adequate they are, even from a narrow internal market perspective. The Impact Assessment only notes that, *"different labeling for concessions and the current lack of transparency on their award makes systematic and precise measuring of their economic*

⁸In Sweden in 2010 the returns on total equity were 15% for private enterprises providing education, healthcare and social services, compared to 8% for all private enterprises in the country. And yet public funds provide most of the funding in these sectors, e.g. 86% in social services. Statistics Sweden, OE29SM1201

⁹ page 7 of EC Impact Assessment

¹⁰ See <http://www.businesseurope.eu/content/default.asp?PageID=568&DocID=30727>

¹¹ See EPSU/PSIRU Factsheet on PPPs in EN/FR/DE/ES/SV/RU <http://www.epsu.org/a/8193> and briefing on 2010 EC Communication on PPPs <http://www.epsu.org/a/6348>

¹² http://news.bbc.co.uk/2/hi/uk_news/england/london/8559144.stm

¹³ <http://www.guardian.co.uk/politics/2012/jul/05/pfi-cost-300bn>

¹⁴ http://erd-report.eu/erd/report_2011/documents/erd_report%202011_en_lowdef.pdf

¹⁵ See EPSU report on 'Water companies and trends in Europe. Page 33

http://www.epsu.org/IMG/pdf/2012_Water_companies-EWCS.pdf

¹⁶ See [letter to civil society groups on 26 September 2012](#)

and social importance difficult. Comparable data...are generally lacking particularly in Member States where concessions are not sufficiently regulated. The information gathered shows that there is potential for further development of this type of contract."¹⁷

The European Parliament did commission a study that shows that one of the main differences among countries is in how risk is allocated between the parties, but it did not draw any conclusions on how this might effect the performance of concessions.¹⁸

7. EPSU has consistently argued that public service principles and objectives - including universality, affordability, continuity, and democratic control – are a necessary framework to provide quality services for all. It is very difficult to integrate these principles into commercial contracts. Furthermore, concessions are complex arrangements that have a significantly longer duration than public procurement contracts. This makes it even more difficult to maintain real and effective competition. Often there are changes in the structure of the private company during contract periods. In Norway for example, out of 38 public contracts concerning nursing homes, 33 were sold or restructured during the period of contract¹⁹. Citizens did not know who they are receiving services from and the authorities did not know who they were in business with. This problem is only exacerbated in longer concession contracts. A study carried out for the European Parliament, notes that “*renegotiations in concessions contracts are the rule, not the exception*”.²⁰ In France for example contracts are renegotiated about once every two and a half years.
8. All EPSU members have strong concerns about the approach taken in the EC proposal and the possible impacts on public services, collective agreements and employment²¹ as does the ETUC.²² Services concessions in all EU and EEA (European Economic Area) are subject to the general principles of the internal market and some 11 countries have more detailed rules on some types of services concessions. However, until now service concessions have been spared some of the problems caused by the public procurement Directives, especially in relation to ‘lowest price’ tendering which has put pressure on the quality of services and employment. ‘Lowest price’ tendering has been fuelled by unhelpful wording in the public procurement Directives but also by the accompanying Remedies Directive²³, which gives economic operators that lose public contracts the right to challenge the decisions. This has made public authorities even more wary of including social obligations in public contracts. This also undermines EC arguments that the EC proposal will improve legal certainty.
9. The concessions Directive is now being discussed in the European Parliament’s (EP) internal market and consumers affairs committee (IMCO) and the Council. Eleven MEPs in IMCO from five different political groups, including the EPP and S&D, have put forward amendments to reject the EC’s proposal. These amendments will generate debate in the EP over whether to reject the Directive. EPSU considers that rejection of the EC proposal would be the best outcome, but we also press for safeguards for public services and workers’ rights.²⁴ In particular we have focused on:
 - ensuring mandatory and clear rules for the respect for labour law and collective agreements
 - securing the right to ‘in-house’ provision of public services and public-public cooperation
 - improving transparency and public accountability requirements; and

¹⁷ EC Impact Assessment, pages 8, 10

¹⁸ <http://www.europarl.europa.eu/document/activities/cont/201206/20120619ATT47200/20120619ATT47200EN.pdf>

¹⁹ See http://www.velferdsstaten.no/Forsiden/?article_id=96590

²⁰ <http://www.europarl.europa.eu/document/activities/cont/201206/20120626ATT47715/20120626ATT47715EN.pdf>

²¹ See EPSU response to the EC consultation in 2011 at <http://www.epsu.org/a/6884>

²² See also the ETUC resolution adopted on 6 and 7 March 2012, <http://www.etuc.org/a/9801>.

²³ See http://ec.europa.eu/internal_market/publicprocurement/infringements/remedies/index_en.htm

²⁴ See March 2012 joint EPSU/ETF letter to the European Parliament

http://www.epsu.org/IMG/pdf/Joint_Letter_EPSU ETF_-_concessions_directive_IMCO.pdf

- excluding public services such as water, health and social services from the scope of the Directive

These points were discussed in the EPSU/ver.di workshop in July 2012²⁵ and form the basis of EPSU's proposals on the EC proposal (see Annex). The call for mandatory and clear rules on collective agreements is an important step towards correcting the ECJ decision on Rüffert etc. and should be seen alongside demands to improve the Posted Workers' Directive and to implement a Social Progress Protocol in the EU Treaties. The call for transparency is also supported by a recent EP study which says, "*the transparency mechanisms of the drafted law should be further strengthened. Independent observers should be allowed to make informed assessments of how these concessions offer 'value for money' for citizens.*"²⁶ This point about 'value for money' in the broad sense has been picked up also in new OECD Principles for public governance for PPPs. The Principles state that, "*By value for money is meant the optimal combination of quality, features and price, calculated over the whole of the project's life.*" (Principle 2).²⁷ As mentioned in the OECD PR accompanying the guidelines "*....experiences from our Member countries show that it can be difficult to get value for money out of PPPs if government agencies are not equipped to manage them effectively. Moreover, PPPs can obscure real spending and make government actions un-transparent, using off-budget financing. This means PPPs are potentially risky for fiscal sustainability, possibly leading to credit rating downgrades as has happened in some OECD countries.*"

²⁵ See report and background documents at <http://www.epsu.org/a/8724>

²⁶ <http://www.europarl.europa.eu/document/activities/cont/201206/20120626ATT47717/20120626ATT47717EN.pdf>

²⁷ See http://www.oecd.org/document/19/0,3746,en_2649_37405_50254099_1_1_1_37405,00.html .

Annex

EPSU proposals (September 2012) to the draft EP IMCO report from Philippe Juvin on the award of concession contracts¹ (EPSU text in **bold**)

Principle of free administration by public authorities (Article 1)

(see amendment 381)

This Directive recognises the principle of free administration by contracting authorities and contracting entities in conformity with national legislation. The latter will be free to decide how best to **provide, organise and** manage the execution of the work and the provision of the services for which they are responsible, in accordance with the legislative arrangements and the methods which they judge to be the most effective manner **to ensure a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights in public services.**

Justification

The rapporteur's text acknowledges free administration but only refers to 'managing' services, not their direct provision by public authorities. The Lisbon Treaty reinforces local self-government (Article 4(2) and the "*essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users*". (Protocol 26). Protocol 26 also supports "*a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights*" in the provision of public services. This means that principles such as quality, continuity, accessibility, availability and comprehensiveness of the services, as well as democratic control and accountability are particularly important and need to be taken into account when awarding concession contracts. The rapporteur refers to the Protocol in the recitals but we would like to see it reflected in the main body of the Directive.

Principle of transparency (Article 1)

See amendment 383

The details of concession contracts, including regarding the transfer of operating risk and eventual payments from the grantor to the economic operator, shall be made public and open to scrutiny. Any subsequent modifications to the contract shall also be made public.

Member States and the grantor shall ensure that Services of General Interest (SGI) concessions are subject to the transparency requirements and public control mechanisms that apply for publically-delivered services.

Member States and the grantor shall carry out periodic evaluation of the performance of Services of General (SGI) Interest concessions and publish the results.

Justification

The EP should press for transparency requirements that are in citizens' interests: Citizens have the right to know how public money is spent and how public services / infrastructures are provided. Contracting authorities also need to have legal certainty that they can inform

¹ <http://www.europarl.europa.eu/committees/en/imco/draft-reports.html#menuzone>

their citizens of their contractual obligations and the use of public money. Economic operators that bid for public service concessions need to recognise that this involves greater public control and accountability. Member States need to evaluate how concessions operate in practice and inform citizens. OECD principles on PPPs point out that Member States should aim to get 'value for money' from PPPs but that *experiences show that this can be difficult "if government agencies are not equipped to manage them effectively."* The principles state that *"By value for money is meant the optimal combination of quality, features and price, calculated over the whole of the project's life."* (principle 2).²

Definitions (Article 2)

See amendment 408

a 'services concession' means a contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrusts the operation of a service for which they are responsible to one or more economic operators, where the consideration for this delegation consists either solely in the right to exploit the service which is the subject of the contract or in that right together with payment.

The right to exploit the works or services shall imply the transfer to the concessionaire of the substantial economic risk in exploiting these works or services, defined as the risk of exposure to the vagaries of the market **and encompassing both demand and availability risk**. The concessionaire shall be deemed to assume the substantial operating risk where, under normal conditions of exploitation **and according to the provisions of the contract**, it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services which are the subject-matter of the concession.

Justification

The rapporteur clarifies the concept of risk but in our view needs to go further to ensure that both the demand and availability risk are transferred, according to the type of concession. In many instances it is the demand risk that is the most relevant. We also think that it would be useful to clarify that both market varies and contractual provisions will influence how risk is defined and transferred.

Employment conditions (Article 26)

See amendment 735

Obligations relating to terms and employment conditions, as set out by national law and collective agreements in the place where the work, service or supply is performed, and, where applicable, international labour law provisions shall be clearly set out by contracting authorities as part of the absolute requirements for the tendering of the contract.

Employment conditions (Article 36a new)

See amendments 847

- 1. Contracting authorities and contracting entities shall lay down special conditions relating to the performance of a service or works concession and concerning in particular social and environmental considerations, provided that these are indicated in the concession notice.**

² See http://www.oecd.org/document/19/0,3746,en_2649_37405_50254099_1_1_1_37405,00.html -

- 2. As regards wages (including allowances), hours of work and other conditions of labour for the workers concerned the contracting authorities shall include conditions which ensure to the workers concerned a level of protection which is not less favourable than that established for work of the same character in the trade or industry concerned in the district where the work is carried out by**
- a) collective agreement or other recognised machinery of negotiation between organisations of employers and workers representative respectively of substantial proportions of the employers and workers in the trade or industry concerned; or**
 - b) by arbitration award (if this is provided by the relevant national law); or**
 - c) by national laws or regulations.**

Where the conditions of labour referred to in the preceding subparagraph are not regulated in a manner referred to therein in the district where the work or service is carried out, the conditions for the performance of the contract shall be determined according to such instruments in the nearest appropriate district or to the general level observed in the trade or industry in which the concessionaire is engaged by employers whose general circumstances are similar.

Justification

These amendments integrate the requirements of ILO 94³ into European law thus giving legal certainty for the public authorities. Non-discrimination requires a level playing field between national and foreign economic operators.

³ See ILO Guide to the Convention and accompanying recommendation - http://www.ilo.org/wcmsp5/groups/public/---ed_norm/normes/documents/publication/wcms_099699.pdf