

REGULATORY OVERLOAD?

NEW PROPOSALS ON THE AWARD OF CONCESSION CONTRACTS TO PORTS AND TERMINALS

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Background

In December 2011, the European Commission (the Commission) published a proposal to introduce a directive on the award of services and works concession contracts (the Proposed Directive). It is however difficult to assess the impact of the Proposed Directive as it is yet to be finalised, and is likely to be scrutinised by both the European Parliament and the European Council.

What are services concessions?

Services concessions are a form of public-private cooperation, where a public sector body grants a private sector operator the use of certain infrastructure if the private sector undertaking agrees to operate, maintain and invest in the development of the infrastructure involved. For example, a port authority may entrust a privately owned company with a parcel of port land for providing cargo-handling services.

The private sector operator undertakes the operational and investment risk and consequently is entitled to the revenues generated by the particular infrastructure or service for the duration of the concession.

What are works concessions?

Works concessions are defined in the Proposed Directive as:

“a contract for pecuniary interest concluded in writing between one or more economic operators and one or more contracting entities and having as their object the execution of works, where the consideration for the works to be carried out consists either solely in the right to exploit the works that are the subject of the contract or in that right together with payment.”

Works concessions are currently subject to limited regulatory provisions.



Why is the Proposed Directive required?

There are currently no specific legislative guidelines on services concessions contracts. The only guidance stems from case law on the principles of transparency, proportionality and equal treatment enshrined in the Treaty of the Functioning of the European Union (TFEU).

With the publication of the Proposed Directive in December 2011, the Commission seeks to address the following particular areas of concern:

Legal uncertainty - without legislative guidelines there are potential market distortions and inefficiencies concerning the award of services concessions. In particular there are concerns about SMEs being unable to enter the market for concessions and public authorities failing to guarantee efficient public spending. The latter is critical during a period where public spending is under intense scrutiny.

A lack of homogenous guidelines across the EU - The lack of guidelines has led to an un-level playing field in the award of concessions. The lack of uniform guidelines represents a barrier to enter the market as contracting entities have to obtain expert advice on complying with local conditions, leading to a prohibitive effect on competition and a reduction in value for money for customers.

Lack of legal/judicial protection - There are currently few remedies available to those who tender and wish to challenge an award decision.

What does the Proposed Directive introduce?

In summary, the content of the Proposed Directive includes:

- Precise definitions of public works concession, a works concession and services concession.
- Coverage of an award of works and services concession both in the “classic” sector (all other sectors not covered by utilities) and in the utilities sector.
- The provision for compulsory publication of services and works concessions contracts in the Official Journal of the European Union (OJEU) when their value is equal to or greater than €5 million.
- The obligation to publish a concession award notice for services concessions of a value of between €2.5 million and €5 million.
- A new mechanism for dealing with modification of concessions contracts during their term because of unforeseen circumstances. This mechanism is based on case law developments in the area of contractual modification.
- The establishment of a minimum deadline of 52 days from the date the concession notice was sent to the OJEU for the submission of interest in any concession award procedure.
- The establishment of certain obligations on the selection

and award criteria to be applied by the contracting authorities and contracting entities when awarding concessions. The new rules ensure that the criteria are published in advance, are objective and non-discriminatory. The Proposed Directive does not outline a specific tender procedure, deferring the setting of the specific guidelines to Member States. However, any procedure adopted must be fair and transparent.

- A definition of certain guarantees aimed at ensuring transparency and equal treatment with particular reference to negotiation.
- The extension of the Remedies Directive¹ to all concessions above the threshold, to guarantee effective avenues for challenging an award decision in court and providing minimal judicial safeguards that must be followed by contracting authorities.

What is the likely impact of the Proposed Directive on ports and terminals?

What is the position on contract awards for Ports and Terminals?

The European Sea Ports Organisation (ESPO) published a Policy View² on the application of EU Law Principles on Port Terminal agreements in May 2011. The document recognises that port governance systems differ across Europe, with the vast majority of European ports being state owned.

The management of port infrastructure is often devolved to

1. Directives 89/886/EEC and 92/13/EC as amended by Directive 2007/66/EC.

2. ESPO, “Application of EU Law Principles on Port Terminal Agreements”, ESPO Policy View, 17 May 2011 (the Policy View).



a port authority, which undertakes “landlord” functions at the managed port, including permitting market access to port land to provide port services. These contracts are governed by a variety of public and private law.

ESPO accepts that competitive award procedures are widely used within the ports and terminals sector, especially in the area of container traffic. ESPO has undertaken a “Fact-Finding Report” that illustrates the use of competitive bidding or tender procedures in the contracting out of port land. ESPO’s statistics indicate that larger port authorities are likely to use competitive award procedures and that the average duration of terminal agreements is 30-35 years. ESPO recommends that in any situation where port authorities permit third-party use of port land for port services, they must advertise the plans for use and adhere to selection criteria which are “*fair, non-discriminatory and open for review*”.

Possible tensions between ESPO Policy View and the Proposed Directive?

ESPO is largely supportive of the Proposed Directive, believing that it leaves port authorities with the necessary flexibility on the setting of both selection and award criteria for service concessions³.

However, ESPO has expressed concerns relating to the prolongation of an agreement between an incumbent operator and the port authority. ESPO does not endorse *automatic* prolongation but believes that if an incumbent operator is performing well and committing to infrastructure investments, the

agreement with the port authority should be prolonged.

The Commission has indicated that an extension of duration of an existing contract *may* qualify as a new concession and may have to comply with the rules of the Proposed Directive. There is thus a slight divergence between the views of ESPO and the views of the Commission on prolongation of contracts.

This minor tension is likely to remain unresolved for the moment. However, it may be that if prolongation was mentioned in the original contract award, the provision will remain valid, particularly if the concessionaire possesses the unilateral right to extend the concession if certain conditions were satisfied. Therefore there could be no new “agreement” requiring the awarding body’s consent, and the legislation would not be triggered.

Other impacts of the Proposed Directive

The industry is still assessing the impact of the Proposed Directive, and any further comment is also likely to take into account the new package of measures for ports being considered by DG Move. This package is likely to contain measures: to reduce the administrative burden at ports; to improve the transparency of port financing and proposals for measures on port services⁴.

When will the Proposed Directive take effect?

The Proposed Directive on service concessions is yet to be adopted by the European Parliament or the

Council of Ministers. It is anticipated that the measures will be adopted by the end of 2012. The current transposition date for the Proposed Directive is 30 June 2014.

However, the Commission has confirmed that the Proposed Directive will not have retrospective effect and so will not apply to contracts already in place at its date of entry into force.

Action points

Port and terminal operators may wish to expedite negotiations on new projects to finalise agreements, arrangements or variations to existing arrangements, before the new law comes into effect. They may also wish to make representations, directly or indirectly, on the final form of the legislation.

For more information, please contact **Anthony Woolich**, Partner, on +44 (0)20 7264 8033 or anthony.woolich@hfw.com, or your usual HFW contact.

3. ESPO News 17.32, “Ports Covered” by Concessions Directive but Impact Still Unclear December 2011.

4. IP/11/1009 “Transport: European Commission to bring forward a new package of measures for ports in 2013”, 8 September 2011.

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