

Decision
Of the Bundesrat

Proposal for a Directive of the European Parliament and the Council on the award of concession contracts
COM (2011) 897 final; Council document 18960/11

In its 893rd session on 2nd March 2012 the Bundesrat adopted the following Resolution pursuant to Article 12, Letter b, TEU:

1. The Bundesrat takes the view that the proposed Directive is not compatible with the subsidiarity principle. Pursuant to Article 5, Sub-section 3, TEU, the EU may only take action in areas where the EU does not hold exclusive competences in as much as and to the extent that the goals pursued by the envisaged measures could not be sufficiently attained by the Member States acting at either central, regional or local level, but could instead better be attained at EU level due to the scope or impact of such measures.
2. The Bundesrat considers that its misgivings, most recently addressed by its Opinion of 11th February 2011 on the Single Market Act (BR Official Document 698/10 (Decision)), are not resolved by the proposal for a Directive that has been tabled and is therefore opposed to this proposal.
3. At present, pursuant to Article 17 of Directive 2004/18/EC (Directive on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts) and Article 18 of Directive 2004/17/EC (concerning procurement procedures of entities operating in the water, energy, transport and postal services sectors), service concessions are excluded from the scope of procurement law on the basis of an explicit decision to this effect by the EU legislator. This was done in particular to take account of the particularities of service concessions in various Member States and to enable a degree of flexibility for contracting authorities and contractors.

4. The Commission does not demonstrate sufficiently that it is necessary to adopt provisions in secondary law for service concessions at the European level. To date there is not sufficient evidence of the phenomena cited by the Commission by way of justification for this draft Directive i.e. serious distortions of competition or market foreclosure. The Commission does not provide any evidence of negative developments in the proportion of service concessions awarded to public-private partnerships over the last few years or any evidence that such developments would be causally related to the alleged shortcomings identified by the Commission.
5. The European Parliament has also noted explicitly in its Resolutions - most recently from 25th October 2011 (2011/2048(INI) – that a serious distortion of competition or market foreclosure has so far not been identified. Consequently the European Parliament took the view that legislation on service concessions is not necessary.
6. Service concessions are not currently awarded in a legal vacuum. They are governed by the precepts derived from the fundamental freedoms enshrined in primary law, which have been specified in greater detail in European Court of Justice jurisprudence and in Communications from the Commission. The fundamental principles for awarding service concessions are thus stipulated for public-sector awarding authorities. These principles emphasise that equal treatment, non-discrimination and transparency must be guaranteed. In addition, regulation at the EU level would run counter to the EU's endeavours to simplify European procurement provisions and to reduce bureaucracy and administrative burdens.
7. The principles derived from primary law provisions apply equally in all Member States. These principles are enforced by the European Court of Justice, which, pursuant to Article 19, Sub-section 1, Sentence 2, TEU, has the role of ensuring that the law is observed in the interpretation and application of the Treaties.
8. Scope for the EU to devise general rules for service concessions, which also affect local authorities, was restricted still further by the Treaty of Lisbon, which entered into force on 1st December 2009. As stipulated in Article 4, Sub-section 2, Sentence 1, TEU, the EU shall respect the national identity of the

Member States, which is expressed in their fundamental political and constitutional structures, including regional and local self-administration. In addition, Article 14 TFEU and Protocol Nr. 26 of the Treaty of Lisbon stipulate the important role and broad discretionary powers, in particular of local authorities, with reference to the question of services of general economic interest, which are to be provided, procured and organised in a manner that corresponds as well as possible to the needs of users. With reference to awarding of contracts, this particular protection afforded to local authority self-administration must take sufficient account of the need to guarantee scope for local authorities to shape policy and to negotiate; particular attention must be paid to issues pertaining to general interest service provision by local authorities.

9. Even if, like the Commission, one argues that general regulatory policy makes it imperative to establish a regulatory framework for awarding service concessions, there is no clear reason for the number and detail of regulatory provisions envisaged in the draft Directive to extend far beyond existing regulations on construction concessions. The provisions proposed by the Commission on technical specifications, selection criteria, award criteria and requirements pertaining to publication would give rise to disproportionate effort. This would be counterproductive in the light of the objective pursued by the Commission in this draft Directive, namely to promote public-private partnerships. Against the backdrop of Article 5, Sub-section 3, TEU, it would suffice to regulate these matters at the national or regional level.

10. The emergency services fall within the remit of exclusive competences of the federal states (*Länder*). As a consequence of different traditions in different federal states, the federal system means that these services are regulated in a range of very different ways across the country. In some federal states there is a logical link between the emergency services and disaster relief services, which is also significant in the conception of these services; as a consequence of the systemic configuration of these services, this link must not be severed. Maintaining this composite system is vitally necessary to guarantee internal security. This can however be ensured only if there is an exemption from requirements to conduct a general tendering procedure for the emergency services and if this exemption applies to service concessions which have not to date been subject to requirements to tender.

Maintaining internal security through the emergency services and disaster relief services is a core task within provision of services of general interest. An open tendering procedure conducted with a view to minimising costs and also including other aspects arising from tendering regulations would mean that the interface between the emergency services and disaster relief services would also be commercialised. This would give rise to a dramatic drop in quality. In addition, this would also call into question an integral component of this composite system of civil protection in Germany, namely the integration of volunteers into the system, which is of great importance.

The Bundesrat therefore requests that steps be taken to ensure that the emergency services are included in the list of exemptions enumerated in Article 8, Sub-section 5 of the proposal for a Directive.