

Im Auftrag des Brüsseler Kreises

Brüsseler Kreis e.V.
Geschäftsstelle
Daniel Kiesel
c/o Stiftung Liebenau
Siggenweilerstraße 11
88074 Meckenbeuren
E-Mail: daniel.kiesel[at]bruesseler-kreis.de



Brüsseler Kreis

Alle Rechte vorbehalten
©2011, Brüsseler Kreis e.V., Berlin



THE IMPACT OF EC LEGISLATION ON CONCESSIONS FOR SOCIAL SERVICES

ANALYTICAL PAPER

AUGUST 2011

I. Background and introduction

Social services represent a booming sector, in terms of both economic growth and job creation. They are also subject to an intensive quest for quality and effectiveness. Firstly, all the EU Member States have embarked upon modernisation of their social services to tackle tensions between universality, quality and financial sustainability. Secondly, social services are in a process of change to respond to the more complex and diverse societal needs. A reduction in family support as a result of changing family structures and increased female participation in the labour market as well as more flexible labour markets requires more integrated and individualised services. More people demand sophisticated, less bureaucratic services and require greater choice and autonomy in provision.

Although social services are organised very differently within the Member States, one of the general aspects of the modernisation process is the outsourcing of public sector tasks to the private sector. In this regard, the public authorities are becoming regulators, guardians of regulated competition and effective organisation at the national, regional and local level. Providers of social services face many more complex challenges as a result of an environment that is becoming increasingly competitive. Since 2001 several European countries have introduced procurement procedures in the social services sector. On the one hand, this development is influenced by European legislative factors. On the other hand, it is based on the assumption that public procurement of social services in a private market creates more competitiveness and, as a result of that, greater cost effectiveness and flexibility of the service delivery processes.

Two main mechanisms to outsource social service contracts involve either tendering public procurement or concession. It is the transfer of the responsibility of exploitation/operating risk which distinguishes a concession from a public contract. In the case of concessions, the source of revenue for the economic operator consists either solely in the right of exploitation or in this right together with payment. A survey among the Member States has revealed that the distinction between concessions and public procurement is sometimes blurred, and that there is not necessarily a common understanding of this concept.

This paper intends to look at the European context and regulatory framework, and to clarify its impact on concessions for social services that are granted by public authorities at the national, regional or local level.

II. The European context and regulatory framework

During the last few years, the impact of EU policies and regulations on the provision of social and health services has grown, despite the fact that the EU currently has no specific competence in this field. EU legislation and a set of Community rules in relation to competition and internal market (public procurement) are being applied to the social and health sector, since social services as a rule have been classified as an economic activity following ECJ rulings. There exists however, many misunderstandings, different interpretations and even legal uncertainty regarding the application and implementation of the EU Procurement Directives on social services at the national, regional or local level.

A starting point in this respect is that rules on public procurement and concessions apply only if a public authority decides to entrust the provision of a service to a third party in return for payment. When they decide to externalise such services, public authorities must observe only a limited number of provisions of the public procurement Directives. These require, in particular, that the technical specifications must be laid down at the start of the procurement process and the results of the awarding procedure must be published. Moreover, when awarding health and social services contracts, the public authorities must also comply with basic principles such as the transparency requirement and the obligation to treat economic operators equally.

III. Definition of 'concession'

The Treaty establishing the European Community does not define concessions. It is only Directive 93/37/EEC on public work contracts that lays down the specific provisions for works concessions. Service concessions, however, which have developed in practice in several Member States, are subject to rules and principles of the EC Treaty (see also section IV).

A service concession exists when the operator bears the risks involved in establishing and exploiting the service. The remuneration consists mainly of the right to exploit the service economically, and the concessionaire assumes the operating risk resulting from the exploitation of the service in question. The operator acquires revenue from the user, particularly through the charging of fees.

A contract can be covered by the definitions of concession if:

a) the aim of the contract is to meet needs previously defined by the public authority within the framework of its competences

- b) the nature of the service and the way in which it is to be provided are specified in detail by the public authority
 - c) the contract provides the remuneration of the service (payment of a price or granting of the right to operate the service in return for a fee payable by users)
 - d) the public authority takes the initiative of finding a provider to whom to entrust the service
 - e) the contract lays down penalties for failure to meet contractual obligations, in order to guarantee that the service entrusted to the third party is provided properly in such a way as to meet the public authority's requirements (penalties, compensation for damages, etc.)
- The above criteria serve to establish whether the subject matter of the contract is indeed an obligation to provide a service in return for remuneration.

IV. Scope of application of EC Law on concessions

Concessions for social services, unlike public works concessions and public contracts, have been partially excluded from the scope of the rules defined by Directives 2004/18/EC and 2004/17/EC. The reasons for this partial exclusion lie in the specific nature of social services on the one hand, and their lack of cross-border interest on the other hand. However, service concessions are governed by the principles of the TFEU, including transparency and equal treatment and proportionality.

- *Transparency*

The principle of transparency can be ensured by any appropriate means, including advertising, which contains the information necessary to enable potential concessionaires to decide whether they are interested in participating. In accordance with this principle and the interpretation of the European Court of Justice in its judgment of Case C-324/98 *Telaustria*, the contracting authorities (or the contracting bodies) must guarantee potential bidders 'a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of the procedures to be reviewed', hence they must publish an appropriate notice having regard, among other things, to the subject matter and economic value of the concession in question. This follows the limits laid down by ECJ case law, where Member States/contracting authorities are free to define appropriate advertising rules to ensure the transparency of service concessions. Contracting authorities may, of course, publish notices of service concessions in the Official Journal, even if this is not required by European law. The advertisement may be limited to a short description of the essential

details of the contract to be awarded and of the award method together with an invitation to contact the public authority.

Another element of transparency requires the awarding authority to give reasons for refusing or rejecting an offer for a concession, so that any tenderer who considers that he/she has suffered damage can open an appeal procedure.

- *Non-discrimination or equal treatment*

It is essential that all potentially interested service providers have the possibility to express their interest in bidding for the contract. Furthermore, all those interested must also know the rules in advance, and those rules should apply in the same way to all bidders. The public authority may then select, in a non-discriminatory and impartial way, the applicants to be invited to submit an offer and, where relevant, to negotiate the terms of the contract or of the concession. During such negotiations all economic operators should be on an equal footing and receive the same information from the public authority. The European Court has stipulated that in order to permit an objective comparison between offers, these offers should all conform to the tender specifications.

- *Proportionality*

According to the principle of proportionality, any measure chosen should be both necessary and appropriate in the light of the objectives sought. With regard to concessions, a Member State may not impose technical, professional or financial conditions that are excessive when selecting candidates. Nor should the duration of a concession be set in such a way that it limits open competition beyond what is required to ensure that the investment is paid off and there is a reasonable return on invested capital, whilst maintaining a risk inherent in exploitation by the concessionaire.

V. How to ensure quality in concessions for social services?

When setting out the technical specifications for a concession, the public authority may specify all the characteristics of the service which it considers useful to ensure high-quality provision (e.g. requirements to ensure continuity of service, the satisfaction of the specific needs of different categories of user, accessibility of infrastructure for people with reduced mobility etc.). The technical specifications of the service may be defined in the form of

detailed characteristics (which may in some cases contribute to over-standardisation of the services offered), or in terms of requirements for functional performance. The second approach usually provides candidates with a greater margin of discretion, allowing them the opportunity to suggest to the public authority more innovative solutions/working methods for achieving the quality targets that have been set.

The experience and competence of the service provider's staff are also decisive factors contributing to the quality of the service provided. When setting out the selection criteria, the public authority may specify particular requirements for professional ability (e.g. professional experience, staff qualifications, technical infrastructure available) to ensure that the selected concessionaire has sufficient capacity to perform the service to the quality standards laid down by the contract.

Quality requirements may also be included in the award criteria. The public authority is not compelled to award the contract on the basis of the lowest price, but may award it to the most economically advantageous tender. This allows it to include in the award criteria all the qualitative factors it considers important. The public authority may also use the weighting of the different award criteria to reflect the importance it attaches to the various qualitative aspects of the service.

The conditions for the performance of the contract are another way of focusing on the quality of the service. The public authority may, for example, include in the performance criteria clauses requiring the contractor to ensure a proper level of training and remuneration for the staff involved in implementing the contract, provided that these are compatible with the relevant provisions of EU law. Such clauses ensure that the contractor is not tempted to cut staff costs, which might demoralise the employees in question, increase staff turnover and ultimately undermine the quality of the service delivered.

VI. How to ensure choice and flexibility within a system of concessions?

Concession agreements often limit the number of providers selected, and this can have a negative impact on the preservation of a sufficient degree of freedom of choice for service users. However, contracting authorities are entirely free to choose one or several operators to satisfy their needs. Public authorities can, for example, entrust the same service concession to several operators, if this is feasible in practice, thereby guaranteeing a larger choice for users of the service.

Secondly, public authorities are not always in a position to define their needs precisely at the start of the process, the more that social services often depend on the specific needs to the target group. The public authorities may use negotiated procedures in order to purchase health or social services through concessions. The public authorities in question will not be subject to the specific rules on negotiated procedures laid down in Directive 2004/18/EC, since this Directive does not apply to service concessions and contains only a few rules applicable to the services listed in Annex II B to the Directive (such as SSGIs). For this reason, when awarding an SSGI concession, public authorities are free to organise an *ad hoc* negotiated procedure provided national law does not lay down specific rules.

VII. Alternatives to concessions and tendering

- *License system*

Arrangements do exist for outsourcing social services, other than public procurement, that are compatible with the principles of transparency and non-discrimination, which would still offer a wide choice of providers. The competent public authority may, for example, establish in advance the conditions for provision of a social service and, after sufficient advertising and in accordance with the principles of transparency and non-discrimination, grant licences or authorisations to all providers meeting these conditions. Such a system does not specify any limits or quotas concerning the number of service providers, so all those meeting the conditions can participate. Providers which have obtained a licence/authorisation must provide the service at the request of the user, who will, as a result, have the choice of several providers, at a price set beforehand by the public authority. In some countries, having a recognised quality label is a condition for obtaining a license, which is another approach to quality control. With license systems, 'quasi-markets' are created in which the public authority allows competition but also orients demand, affects price formation and can ask for quality guarantees.

- *Voucher system*

Vouchers systems still go one step further in granting a limited purchasing power to the service-users to choose among a restricted set of services. By making benefits portable and engaging a variety of providers, voucher programmes may facilitate client's access to services that meet individual preferences or needs. Moreover, the use of vouchers may promote diversification of services and improvement in service quality as providers seek to be responsive to client's needs and distinguish themselves in order to attract voucher holders. As vouchers typically have a maximum benefit amount, they can be a tool for

limiting per-client costs. Costs also can be controlled over time if the value of the voucher does not increase.

The expected advantages of vouchers rely on the premise that clients make an informed choice among providers. Public authorities must for that reason decide whether and how to assist beneficiaries in making these selections. In order to select a rather complex social service such as vocational reintegration, clients need more detailed information about the relative advantages of different programmes or type of settings, and about the standards that define quality.

VIII. Future perspectives and scenario's regarding concessions of social services

2011 has been pinpointed as the year in which concessions shall be given particular attention, with the EU Commission promising a legislative initiative on service concessions as set out in the Commission's Work Plan for 2011, with the aim to provide 'legal clarity and certainty as to the rules governing award of concessions contracts.' EU legislative improvement and development has been long awaited with the need for improvement acknowledged as far back as 2005, which was cited in the Commission's PPP Communication. Since this recognition, extensive impact assessment has been carried out, drawing upon expertise to contribute to the research. It is anticipated that the research carried out from 2005 and from 2010 (and 2011 so far) will build upon and improve Directives 2004/18 and 2004/17.

Much is still being planned and prepared, with 2012 set to represent yet further developments and improvements. The European Commission conducted two open consultations in 2010. These consultations have been addressing the current situation of works concessions being regulated at the EU level, attempting to remedy the fact that service concessions lack the same regulation, and which goes against the full implementation of the EU internal market. The consultation process is currently on-going with definitive results yet to be announced.

The continued absence of any type of EU regulation for service concessions will consequently cause a reinforcement of case law, which would never provide an adequate degree of legal certainty, hence inhibiting the full implementation of the internal market, especially for the smaller service providers.

It is widely perceived that EU regulation for service concessions should be created as it is currently provided for works concessions, with particular attention to be given to the obligation of publicity and the obligation to sub-contract part of the concession to third parties that are not companies controlled by the contracting party. Implementing such minimum EU regulation would enable the enterprises that are in a position to compete for public concession contracts, including cooperatives, with the necessary legal certainty to bring into full play their economic contribution to the EU's development in this field.

In the second consultation published in August 2010, the European Commission describes its new initiative on concessions as a measure to contribute to EU policy goals in the field of Public-Private Partnerships, as explained in the Commission's Communication on "Mobilising private and public investment for recovery and long term structural change: developing Public-Private Partnerships". If through this new initiative on concessions, the European Commission's objective is to mobilise private and public investment for recovery and long term structural change in the EU, then "modest" legal provisions on concessions such as those mentioned above could not be an adequate solution. A minimal EU regulation in this way will not be sufficient to attract capital needed for the recovery of the EU economy and long-term structural change.

It is important to note that with the demand for service concessions increasing over the last few years across the EU, that this has created a strong development potential that will be evident over the next couple of years. In this way, when developing policies and regulations related to service concessions, the European Commission should take into consideration the employment potential that is behind service concessions as well as social effects and the added value they generate.

IX. Conclusions

- Procurement of social services benefits from sustainable relations between purchasers and providers. Consequently, purchasers should strive for preferred suppliers which have proven their quality during earlier experiences and procedures. This means that public authorities that are in charge of operating the procurement procedures should invest in relationships with providers who are able to demonstrate appropriate expertise and proven track records. Extension of the contract periods leads to reduced administrative burdens, further stability in the continuous market, and reduces the pitfalls which results from competition. Additionally, this also greatly increases opportunities to invest in innovation that in the long run provides more job opportunities for the most vulnerable population. In this sense, concessions for social services are often a good solution compared to tenders.
- Regarding concessions in general, and concessions for social services in particular, there exists a disparity of definitions and regimes in Member States. This makes it difficult to compare between countries, and to identify in which way EU legislation is applicable.
- Although it is clear that the principles of transparency, equal treatment and non-discrimination apply to the awarding of concessions, current practices in Member States are very often not in line with these principles.
- There exists insufficient legal certainty with respect to concessions in the field of social services, since the case-law of the European Court of Justice lacks precision or even completion of the concrete obligations resulting from the application of the principles, leaving Contracting Authorities unsure if the advertisement and award methods they apply are compliant with the EU law, and bidders unsure if a contract which they have bid for in good faith may be open to challenge.
- Concession is a particular mechanism for public procurement, with the predominant aim to enhance competition, and thus to ensure best use of public money. However, the use of concessions of social services does not always achieve this goal, because only a few candidates participate in a procedure to award a concession, and this for various reasons. Consequently, the European Commission expressed the need to assess whether the effective application of these provisions is sufficient, or whether other measures are needed to facilitate the emergence of a more competitive environment.