R E A S O N E D O P I N I O N

of the European Affairs Committee of the Federal Council
1 February 2012

pursuant to Article 23g (1) of the Austrian Constitution in conjunction with Article 6 of Protocol No.2 on the application of the principles of subsidiarity and proportionality

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

A. Reasoned Opinion

The project under consideration is incompatible with the principle of subsidiarity.

B. Grounds for Reasoned Opinion

Having rescheduled the date of publication several times, the European Commission published its proposal for a Directive on the award of concession contracts (COM (2011) 897) on 20 December 2011. The proposal, which covers the award of service and construction concessions, was adopted simultaneously with proposals to modify the Award of Contract Directive 2004/18 and the Special Sectors Directive 2004/17. Basically, concession contracts differ from public works contracts in that service providers do not receive compensation from the public sector, but are refinanced directly through charges paid by the users of the service provided.

With its proposal for a directive, the European Commission is going significantly beyond earlier decisions by the European Court of Justice (ECJ) regarding the rules for the award of concession contracts. ECJ jurisprudence clearly shows that concession contracts are governed by the principles of European primary law (non-discrimination, transparency, internal market, competition). In the past, the ECJ specified the rules for the award of service concessions to a sufficient extent and defined the legal notions applicable at the European level; hence, the legal vacuum diagnosed by the Commission does not exist. In the same vein, the report by the European Parliament (EP) on new developments in public procurement, adopted by a large majority on 18 May 2011, took a position against the adoption of a European legal act on service concession contracts.

As a matter of principle, we wish to refer to Article 5 TEU, according to which the Union only acts if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. The service concession contracts covered by the proposed directive regularly relate to the provision of services of general economic interest. The Treaty of Lisbon (Art. 3 TEU, Art. 14 and 106 TFEU, Protocols 26 and 27) underlines the special importance of services of general economic interest for the promotion of social and territorial cohesion and grants the Member States a broad scope for discretionary action. Therefore, new rules in this area are to be seen in a critical light, particularly in view of the fact that the Treaty of European Union, in the first sentence of the second paragraph of Article 4, states that the Union respects the equality of Member States before the Treaties as well as their national identities,

inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. Based on the above provisions of primary law, the flexibility granted to the Member States must not be curtailed by an extremely far-reaching act of secondary law. Accordingly, the Treaty of Lisbon provides for Member States to take care, each within their respective powers, that services of general economic interest operate appropriately (Art. 14 TFEU). At the same time, the Treaty emphasises the principle of municipal and local self-government, recognising it as an element of national identity (Protocol No. 9 to the TFEU).

In general, the sector concerned by the award of concession contracts and public-private partnerships is not comparable with other economic sectors. Basically, such contracts are characteristic of oligopoly or monopoly markets, in which the influence of the state and its democratic institutions is being upheld for good reasons. In this area, privatisation or the introduction of quasi-competitive structures create situations that demand a high degree of regulation. The transfer of tasks which frequently comprise services of general interest is considered to be problematic, as such services should not be subjected to the general rules of business management. The services concerned are those that are to be made available at affordable prices and would not be offered in a competitive environment, as operators would not be able to cover their costs. At the same time, these are sectors in which competition of networks would not make economic sense and constitute a waste of resources.

Implementation of the proposal might have a significant impact on the structure of municipal service provision, above all in the municipal water sector. In Austria, services of this nature are usually provided on a cooperative basis, i.e. mostly by associations of local authorities. With the proposal now on the table, the European Commission continues to pursue its plans for at least partial liberalisation of the water sector. Given the fact that direct deregulation remains politically unacceptable to both the Member States and the European Parliament, the Commission has chosen to use the instruments of competition law and, above all, the law governing the award of contracts.

In its motivation for proposing a legal act, the Commission claims “serious distortions of the internal market” as well as a “lack of legal certainty and foreclosure of markets”, though without providing evidence thereof. Last but not least, it should be pointed out that the conclusion of service concession contracts, as a rule, does not involve the use of public funds, as compensation for the services provided is not obtained from the public sector, but from the beneficiaries of these services. Against this background, the Commission is not able to demonstrate conclusively why a legal act should be required. We fail to see the reason for the one-sided market-economy orientation of the legal act and for the degree of detail foreseen in the proposal: additional provisions regarding technical specifications, selection criteria and publication requirements would result in a disproportionate bureaucratic burden.