

AN EU INITIATIVE ON CONCESSIONS

QUESTIONNAIRE TO SOCIAL PARTNERS, CIVIL SOCIETY AND OTHER STAKEHOLDERS

Profile: WaterInCitizens'Hands (WasserInBürgerhand)
www.wasser-in-buergerhand.de, EU register No 97720343850-89

Contact:

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0.a. Type of organisation

- **NGO and Consumer's / Citizen's association**

0.b Scope of activity

- **National (but association of local initiatives)**

0.c Size of the respondent

We have nine member initiatives where a lot of citizens are engaged in; directly involved in the associations work is a group of around 15-20 citizens representing the local groups.

0.d What sector(s) do you operate in / do you represent?

- **Water distribution**
- **Waste water and sewage processing**

0.e Country where your organisation / company is based

AT	BE	BG	CY	CZ	DE	DK	EE	EL	ES	FI	FR	HU	IE	IT	LT
					x										
LU	LV	MT	NL	PL	PT	RO	SE	SI	SK	UK		IS	LI	NO	CH

I - Assessment of the current situation

1. Are you familiar with the case law of the Court of the EU on definition and award of concessions?

Yes.

If yes, do you consider it sufficient to ensure equal opportunities, to national and foreign companies, on the award of service concessions in the Member States you are familiar with (please specify the Member State(s), if more than one, please respond separately for each Member State concerned)? Please explain your answer.

As the water framework directive (EC 2000/60/EC) states, “water is not a commercial product like any other but, rather, a heritage which must be protected, defended and treated as such”. Water has a very sensitive nature and strong social impacts. Therefore, we consider it self-evident that water and waste water management must not be subordinated to market principles. It is very important that municipalities have the right to freely decide about their water and waste water management and the respective concessions. Their freedom to operate these services with their own public companies must not be limited. We refer to the provision of the Lisbon Treaty in Article 4 which acknowledges the vital role of local self-government within the EU, and to the protocol 26 on services of general interest about “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”. We support the recent ruling of the European Court of Justice that service concessions in the water and waste water sector are not covered by the obligation to tender the concession (C-206/08) and the ruling on the freedom of intermunicipal cooperation (C-480/06).

2. Please describe the advertisement practices for the award of services in the Member States you are familiar with (please specify the Member State(s), if more than one, please respond separately for each Member State concerned) . In particular: at what level does publication take place:

What information is to be included in the call for tender?

What sectors are concerned (see point 0d)? Please respond separately for each relevant Member State.

We have no comment on that.

3. What is the impact of advertisement practices at local, national and international level and the competition (or lack of it) they generate with reference to jobs:

If possible, please distinguish between the likely impact in the short, medium and long term.

We have no comment on that.

4. The Commission explained the definition and the application of the Treaty principles to the award of concessions in its Communication on Concessions¹ and in the Green paper on Public Private Partnerships.² Do you consider that the guidance provided by the Commission is sufficient to conduct a procedure for the award of concessions in the

¹ “Commission interpretative communication on concessions under Community law”, Official Journal C 121 , 29/04/2000 , ([http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000Y0429\(01\):EN:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000Y0429(01):EN:NOT))

Member States you are familiar with? Please respond separately for each relevant Member State and explain your answers.

We have no comment on that.

5. To your knowledge, have any services concessions been awarded to foreign (non-national) companies? In what sector? If not, what could be the reasons for this?

In Berlin, Braunschweig, Görlitz and many other German cities, water management concessions have been granted to the French companies Veolia or Suez.

6. What is the social and economic importance of the use of concessions, notably in terms of the number and share of total existing jobs; in the sector you are most concerned with? Please specify the sector(s).

How do you estimate their likely evolution under current public budgetary constraints?

We have no comment on that.

7. If you have specific experience within a company that has been awarded a concession(s) contract, please explain the importance of such (a) contract(s) on the total business of the company? What is the social and economic importance of the contract(s) for the region/city where your company operates?

As the concession or PPP contracts are kept secret in Germany, we as citizens have no access to it and no knowledge if these contracts are in favour of us or not. Our municipalities have lost democratic influence by this. Furthermore, the economic results are unfavourable. For example, in Berlin the price for water and waste water services has risen by 35 percent from 2003-2010 while investment has been severely diminished. There have been many job losses. Therefore, we reject this kind of concessions and PPP models.

8. To your knowledge, can companies in the sectors you are familiar with easily secure the renewal of their concession contracts? If yes, under which conditions? Please specify the sector(s) concerned.

We have no comment on that.

9. In your experience, under the national legal framework(s), what are the consequences of non renewal/failure to secure a new concession contract for companies in the sector(s) you are familiar with, in terms of :

Please specify the sector(s) and the Member State(s) concerned, as well as the relevant national legal framework. Where relevant, please also distinguish between the likely impact in the short, medium and long term.

We have no comment on that.

² “Green Paper on public-private partnerships and Community law on public contracts and concessions”, COM/2004/0327 final, (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52004DC0327:EN:NOT>)

10. The provision of certain services to the public can be either directly performed by the administration (or a public "in-house" entity under its full control and realising with it the majority of its turnover³) or conferred to a third party, *i.a.* by means of a concession.

Against this background, what type of labour contracts are the most prevalent in concession holding companies in the sector(s) you are familiar with. Please specify the sector(s):.

We have no comment on that.

Please compare with labour contracts in public administrations providing services directly to the public or through "in-house" public entities.

We have no comment on that.

11. How would you define the level of wages paid in companies holding concessions in the sector(s) you are familiar with? Please specify the sector(s).

Please compare with the level of wages in public administrations providing services directly to the public or through "in-house" public entities.

We have no comment on that.

12. What types of professional qualifications are most prevalent in companies holding concessions in the sector(s) you are familiar with? Please specify the sector(s).

Please compare with the type of qualifications prevalent in public administration providing services directly to the public or through "in-house" public entities.

We have no comment on that.

13. Are workers generally involved in the corporate decision-making procedures of the companies holding concessions in the sector(s) you are familiar with? Please specify the sector(s).

We have no comment on that.

14. Are new jobs currently being created in companies holding concessions or in the administration / "in-house public entities in relation to provision of services in the sector you are familiar with? If yes, how many, where and by whom?

In our experience, concessions for private water companies lead to higher job losses due to forced rationalization and shrinking investment. Even if this may be justifiable in some cases, we wonder if this lay-off is a sign to an unsustainable maintenance of our water networks.

³ The conditions of the "in-house" status have been specified by the ECJ in its judgment in the *Teckal* case (C-107/98)

15. Are jobs presently being lost in such entities in relation to provision of services in the sector you are familiar with? If yes, what are, in your view, the reasons?

See above, question 14.

16. What impact, if any, may cuts in public budgets have on companies holding concessions or on the administration / "in-house public entities in relation to provision of services in the sector you are familiar with? Please answer in particular with regard to:

a) Number of jobs, age and gender groups affected, and other specific consequences (e.g. collective redundancy, transfer, re-training, retirement)

See above, question 14.

b) Levels and evolution of wages

We have no comment on that.

c) Types of contracts and working conditions

We have no comment on that.

If possible, please distinguish between the likely impact in the short, medium and long term.

We have no comment on that.

17. Do you think that the current level and structure of employment in the companies holding concessions or in the administration / "in-house public entities in relation to provision of services in the sector you are familiar with are optimal (efficient) from an economic point of view? If not, what are the reasons?

We have no comment on that.

18. What is your assessment of the provisions of Directive 2004/18/EC⁴ on works concessions (especially as to what concerns advertisement, time limits, award of complementary works and sub-contracting)?

We have no comment on that.

19. What is the impact, if any, of the provisions of Directive 2004/18/EC on works concessions (especially concerning the advertisement and sub-contracting), and the competition they generate, on:

If relevant, please distinguish between the impact in the short, medium and long term.

We have no comment on that.

II - Expected impacts of new legislation on concessions

⁴ See in particular Articles 56 to 65 of Directive 2004/18/EC (referred to in footnote 1). The award of services concessions are presently not subject to any provisions of this Directive (with the exception of the definition itself, see Article 1 (4)).

A - General issues

20. Under EU law public authorities are free to provide services (including services of general economic interest) directly or to externalise provision of those services to third parties (i.a. by means of concessions). Without prejudice to this freedom, what could be the impact, if any, of a new legislation providing for compulsory advertisement of concessions at the European level in relation to services which are at present:

a) Directly provided by public authorities or public "in-house" entities⁵, notably in terms of possible incentives for shift towards concession-based provision of services)?

b) Provided on the basis of concessions, notably in terms of possible incentives for shift towards direct provision of services by administration or public "in-house" entities)?

Please distinguish between the likely impact in the short, medium and long term.

We have no comment on that.

21. What would be the results, in the Member States you are familiar with, of a new legislation providing for compulsory advertisement of services concessions at the European level, with regard to:

Please distinguish between the likely impact in the short, medium and long term.

We have no comment on that.

22. More specifically, what would be the consequences of a new legislation providing for compulsory advertisement of services concessions at the European level in relation to the renewal of concessions of incumbent operators?

We have no comment on that.

23. In your view, what could be the social impact and the impact on public finances of intensified competition and/or externalisation of services as a result of greater use of concessions, notably with reference to the social protection enjoyed by the employees? Please distinguish between

a) financial impacts and

In our experience PPP models and concessions in the water sector might seem of advantage for municipalities in the first instance, but are necessarily more expensive in the middle and long run. Prices for citizens rise in order to satisfy the private interest in high profits. For example, according to the 2006 VEWA study, prices are about 20% less in (publicly dominated) Germany than in (privately dominated) France and England. According to a 2007 NUS study, prices in Germany have fallen from 2002-2007 while they have risen by 38,7% in the UK and by 15,3% in France. We also think that short-term financial advantages will often only be a sign on

⁵ The conditions of the "in-house" status have been specified by the ECJ in its judgment in the *Teckal* case (C-107/98)

unsustainable investment (less maintenance, less controls). This is why private companies in the UK have to be forced regularly to invest appropriately.

b) social impacts.

The social impact is a loss of jobs due to the rationalization which as said can be a sign of unsustainable management. Universal access is in danger when private companies take over. We refer to the situation in the UK where the authorities had to force private companies by law to stop the cut-off of citizens from water supply after cut-offs had risen to more than 21.000 in 1991.

c) environmental impacts

We think that forced competitions will be of disadvantage for the environmental impact of water management. Costly measures to protect the environment, e.g. the water sources, will be harmed. We would like to point to some figures on France (where water services are privatized mainly) and Germany (where water services are public mainly): Germany has level-3 waste water cleaning at 96%, France has 36%. In Germany, water losses are at 7% while they are at 26% in France.

24. In your opinion, what would be the social impact of entry of new operators (*e.g. non national companies / SMEs / large utilities companies*) on the concessions market in the Member State you are familiar with? Please explain.

We basically refer to the above made statements, especially in question 23. We repeat that in our view the effect would be negative in terms of quality, availability and costs. The public water management in Germany has proven to be very good even if it can be always improved, of course. We note that all known referenda on (water) privatizations have clearly voted in favour of public water services. Furthermore, forced concessions in the water sector would be favourable mainly to large utility companies like Veolia and Suez. In contrast, SMEs are presumably negatively affected by such private concessions because they can have less business opportunities in comparison to the public operation.

25. In your view, what would be the impact of a new legislation providing for compulsory advertisement of services concessions at the European level on the quality, availability and costs of provision of so-called services of general economic interest? Please explain.

We have no comment on that.

B - Specific questions

26. With reference to service concessions would you be in favour of/against EU rules providing for:

a) The obligation for the contracting authority to publish a concession notice in the Official Journal of the European Union? What should the thresholds for publication and which method should be used to calculate them?

b) The obligation to respect minimal deadlines for the presentation of applications for the concession (*e.g. not less than 52 days*);

c) The obligation for a concession holder to respect the principle of non-discrimination while selecting holders of sub-contracts (if possible, please also give your assessment of the relevant provision presently applicable to works concession holders)⁶;

d) The possibility for direct award of additional services to the original concession holder only if these services, through unforeseen circumstances, have become necessary for the performance of the originally stipulated services and if such additional services are technically or economically inseparable from or strictly necessary for the completion of the original services;

e) The possibility for the contracting authority to require the concession holder to award a minimum of 30% of sub-contracts to the third parties, or to request the concession holder to specify the percentage of services to be sub-contracted to the third parties;

f) Effective remedies for aggrieved bidders with the same guarantees as those provided under the Remedies Directives⁷?

For each of the above options, please explain your position and indicate what effects you would expect on jobs, qualifications, type of contracts, social protection and levels of wages.

We have no comment on that.

27. With reference to service concessions and public works concessions would you be in favour of/against EU rules providing for:

1. The obligation to clearly announce qualification criteria restricted to issues related to financial, economic and technical capacity of a tenderer? Please justify indicating possible effects on access to the market and competition in the sector and other specific positive/negative impacts (e.g. on innovation, consumer satisfaction, sustainability of services, public subventions, jobs).
2. The possibility for an EU operator (such as a SME) to prove it meets qualification criteria for participation in a tendering procedure, in particular by relying on the standing of other entities (other members of the consortium, sub-contractors), regardless of the legal nature of the links which it has with them, provided that it is able to show that it actually has at its disposal the resources of those entities.

⁶ See Title III, Chapters II-III of Directive 2004/18/CE

⁷ Directive [2007/66/EC](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32007L0066:EN:NOT) of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32007L0066:EN:NOT>), Council Directive [89/665/EEC](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31989L0665:EN:NOT) of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31989L0665:EN:NOT>), Council Directive [92/13/EEC](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31992L0013:EN:NOT) of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31992L0013:EN:NOT>).

3. The obligation to restrict the admissible award criteria to price and most economically advantageous tender? Alternatively, would you be in favour of introducing basic guarantees of objectivity and non-discrimination while setting award criteria?
4. Provisions on non-discriminatory use of technical specifications, e.g. as provided for in Art. 23 of Directive 2004/18/EC?
5. The limitation (with the exception of the utilities sector) of choice to that between an open procedure, a restricted procedure or competitive dialogue, as described in Directive 2004/18/EC, and admitting negotiated procedure only in exceptional situations (e.g. those currently provided for in Art. 30 of Directive 2004/18/EC) ?

Alternatively, would you be in favour of introducing basic requirements of standards and arrangements guaranteeing equal treatment and transparency in the conduct of award procedures (notably negotiated procedures)? Which requirements would you consider as the most relevant?

For each of the above options, please explain your position and indicate what effects you would expect on jobs, qualifications, type of contracts, social protection and levels of wages.

We have no comment on that.

28. The award of contracts for "non priority services",⁸ such as social services, have been partially excluded from the scope of the rules defined by Directives 2004/18/EC and 2004/17/EC in view of their specific nature and lack of cross-border interest. For these category of services the above Directives merely impose the obligation to set out technical specifications and an ex post requirement of publicity.⁹ It must be noted however that the principles of transparency and non discrimination derived from the Treaty also apply to those contracts.

In your view, do the reasons justifying the partial exclusion of non priority services from the scope of the rules on public procurement contracts also apply to services concessions? Are there any non priority services that in your opinion would justify a different treatment when awarded as services concessions?

We have no comment on that.

29. If you are aware of any problem in relation with the award of concessions other than those referred to in the questions above, or you wish to make any other remarks on a EU initiative on concessions, please describe them here (specifying whether it concerns works concessions or services concessions).

All problems have been mentioned above.

⁸ Services listed in Annex II B of Directive 2004/18/EC and Annex XVII B of Directive 2004/17/EC

⁹ See Case 507/03, COM v/ Ireland, point 25.