

Key messages

1. Core principles of subsidiarity / local autonomy / free choice of organization are upheld in all public procurement rules and also in specific provisions for public-public cooperation

- Under European law, local autonomy is preserved. None of our public procurement proposals interfere with the freedom of public authorities to decide how to **organise the way they carry out their public service tasks**.
 - Public authorities remain **entirely free to decide on the direct provision of works or services to the public or on the outsourcing** of such provision to third parties.
 - Local autonomy also concerns the conditions in which these services are provided (quality standards etc).
- However, **if a local authority decides to outsource to third parties** (for instance, entities involving private capital), the **basic principles of transparency and non-discrimination** as safeguarded in the Treaty, **must be respected**.
 - Our **public procurement rules** ('classic' directive; utilities directive; concessions directive) all serve the purpose of guaranteeing these basic fundamental principles, whether through detailed rules (as for the general procurement framework) or through a light and flexible legal framework (concessions).
- The case of **public-public cooperation is in principle exempted** from the application of this legislation, and hence from the requirement of competitive tender. This has been subject to extensive case-law, nevertheless many stakeholders and also EP (Rühle report) have requested further clarification.
 - To facilitate understanding of the current case-law on exemption for public-public cooperation, Commission published a **staff working paper in October 2011**.
 - The **revision of the public procurement rules** propose **specific provisions for public-public cooperation which codify this European case-law** in view of enhancing legal certainty for all stakeholders.

In sum, public-public cooperation is exempt from competitive tendering if it does not serve a commercial purpose, there is no private capital involved and the public authorities exercise analogous control over the cooperation/entity carrying out the public service tasks.

2. Proposal for a directive on the award of concessions

- The directive proposal aims at enhancing **legal certainty** for contracting authorities and

business, and at ensuring effective and equal access of the European undertakings to economic opportunities related to concessions, and hence favours the **emergence of a real Internal market** in the sector of concessions.

- The concessions directive does not specifically target the **water sector**. It establishes the **horizontal rules** applicable to the award of such contracts **regardless of the sector**.
- However, again, **the autonomy of public authorities is not questioned** in terms of the organization and the requirements for the provision of water services.
 - These rules will not affect the freedom of public authorities to use their own resources or to outsource – the proposal does not intend to liberalise any sector. The proposal **does not aim at imposing outsourcing or privatisation** of public service tasks. Public authorities will remain entirely free to decide on the direct provision of water services.
 - Member states or local authorities **remain competent to determine the conditions** in which water services are provided. Notably, they will be able **to define** quality, health or environment **standards** and **to determine the fee**. Our proposal does not include any obstacle to exercising these competences. *(e.g. in law)*
- The proposed rules will only apply **if the public authority decides to outsource to third parties**.
 - Not only is it highly desirable to ensure **transparency** and that the contract is awarded to the operator who guarantees maximum service **reliability** and **continuity** and the best **conditions** of service provision, in such a case (especially in the case of such a precious good as water);
 - The proposed rules clarify and concretise the Treaty principles and the applicable case law of the Court.

In order to ensure further clarity around these rules, we propose a **light and flexible legal framework** for the award of concessions

- the proposal aims at ensuring **transparency, effective access** to market for companies (especially SME's) and respects the **autonomy** and **flexibility** for local authorities.
- in order to safeguard this flexibility and not to increase administrative burden for local authorities, the proposal does not prescribe any procedure for the award of concessions.
- the rules will also apply only above the **threshold of 5 million euros** (compared to average value and duration of contracts)

We made research on water supply in member States. It shows that **contractual arrangements vary significantly** even within the same member State.