

**Aiming at a “flexi-security” regime for service concessions in Europe**

Veolia Environnement provides services of general interest and is active in areas of drinking water distribution and wastewater treatment, energy efficiency services, collection, sorting and recycling of waste as well as public passenger transportation.

A significant portion of Veolia’s turnover comes from local authorities (aka “municipal” clients compared to “industrial” clients). Close to 75% of the company’s turnover is done within the European Union.

As such, Veolia is particularly sensitive to the legal regime on service concessions in European law and wishes to contribute to the legislative initiative on concessions announced by the European Commission.

**I. The reform of the legal regime on concessions: an initiative to be part of a political project for Europe**

The European Commission’s legislative initiative on service concessions should not be restricted to a technical dimension but must support a political project for Europe.

In this perspective, the initiative on service concessions must pursue four objectives:

- contribute to the completion of the internal market and to the regulated opening up to competition of new services;
- in terms of services of general interest, strengthen a high-level public service European model in which management through a service concession constitutes an alternative to both in-house management and to privatisation;
- establish a tool for long term investment needed by the European economy, in the context of public finance crisis;
- facilitate, in particular for the fast evolving businesses in the environmental services, the emergence of European networks of excellence, gaining credentials within the European market and able to answer the needs of emerging global markets.

It will then be necessary for the Commission to offer a “flexi-security” regime for service concessions: this regime should conciliate the ability to negotiate between parties and a strict respect of fundamental principles of transparency and non-discrimination.

## II. Aiming at a “flexi-security” regime for service concessions in Europe

### A. *The status of service concessions within the European Union must be strengthened and secured*

The legal regime of service concessions in European law is barely developed:

- the secondary Community legislation (“public procurement” directives) merely contains a definition of what a concession is;
- service concessions are otherwise submitted to the general principles of treaties, as clarified by Court of Justice rulings: transparency and equal treatment.

However, the service concession is one of the legal translations of Private Public Partnerships the development of which is strongly encouraged by the European Commission as a tool to improve public services efficiency, as a source of private financing and as an instrument for exiting the crisis<sup>1</sup>.

The expected positive effects of service concessions in the internal market remain subject to the existence of a clear legal framework securing Member States in their national legislation as well as local authorities in their capacity as granting authorities, that they can use service concessions in full compliance with EU law.

In order to ensure a full understanding of the stakes of the service and to adjust the proposals of the tenderers as close as possible to the expectations of the local authorities and to the needs of such service, it is appropriate to conciliate the legal certainty of the procedure and the ability to negotiate between parties.

For this reason, service concessions must be backed by a **“flexi-security” approach** enabling the proper implementation of two fundamental principles of EU law, without future regulation impeding the **necessary adjustments throughout the duration of the concession contract** in order to take into account the evolution of needs of the service or of rules applying to this granted activity.

**Veolia is in favour of setting up a flexible legal basis at European level susceptible of facilitating the recourse to concessions**, in particular in Member States with a lack of national legislation in terms of concessions. In this perspective, the Commission’s commitment for a “light ” legislative initiative is a positive sign: *“Clear and proportionate rules will improve market access for EU undertakings by ensuring transparency, equal treatment and a level playing field for economic operators. They will also promote public/private partnerships and boost the potential for delivery of better value for money for users of services and for contracting authorities... The Commission’s legislative initiative will aim to create a supportive EU framework for this type of public-private partnership **without placing an excessive burden on local authorities**”.*<sup>2</sup>

As part of this « light approach » retained by the Commission, it is necessary, however, to pay particular attention to the link between the future regime for service concessions and the one currently in force for works concessions. This link must take into account the evident economic differences that exist between both service concessions and works concessions and avoid **a strict alignment of the future regime of service concessions to the current regime of works concessions**.

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<sup>1</sup> Communication from the European Commission 19 November 2009 on developing PPPs (COM(2009) 615).

<sup>2</sup> Communication from the European 27 October 2010 *Single Market Act* (COM(2010) 608).

***B. The provisions of the future European legal regime of service concessions must combine legal certainty and flexibility***

**1. Definition**

Veolia notes that the current definition of concessions in “public procurement” directives 2004/17 and 2004/18 did not hamper neither the recourse to concessions in Europe nor the recognition by the Court of Justice of the distinction between concession and public procurement.

Veolia does not therefore ask for a modification of the definition of concessions. However, if the Commission was to consider supplementing this definition, such a modification should be the opportunity to **further clarify the distinction between concession and public procurement**.

Furthermore, if the transfer of the operating risk from the contracting authority to the concessionaire is a characteristic of any concession, a new definition could be based on the qualitative approach by the Court of Justice without quantifying the significant share of this operating risk in the text of such legislative initiative. The Court clearly describes a service concessions contract *“where the supplier assumes all, or at least a significant share, of the operating risk faced by the contracting authority, even if that risk is, from the outset, very limited on account of the detailed rules of public law governing that service”*.<sup>3</sup>

**2. Link between service concessions and works concessions regimes**

**a) Concessions awarding procedure**

The awarding of concession contracts must be carried out in the strict respect of the principles of European law on transparency and equal treatment. This imperative **does not require that the legislative initiative of the Commission defines at European level the awarding procedure of a concession**.

In this regard, the wording in force for works concessions is a good reference as it brings to Member States the flexibility needed for developing the use of the concessive tool.

**b) Public notice at European level**

Establishing a public notice at European level for service concessions is a useful reformation. It would contribute to reinforcing transparency of the concessions market in Europe.

For the sake of enhancing the legal certainty of concluded concession contracts, Veolia recommends referring to a **single methodology when calculating** the public notice threshold for both service and works concessions. This threshold should be based on the total turnover generated throughout the duration of the contract.

The current threshold level for works concessions (€4.850.000) would be a satisfactory reference for establishing a single public notice threshold for both service and works concessions.

**c) Subcontracting**

The provisions currently in force for works concessions in terms of subcontracting are unsuitable to service concessions. It would be **legally inconsistent** with the liability regime of the concessionaire for the **legislative initiative of the Commission to give a contracting authority the ability to make subcontracting compulsory for the operation of a service concession and to impose a tendering procedure for the choice of subcontractors**.

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<sup>3</sup> ECJ ruling of 10 September 2009, Case C-206/08 (Gotha/Eurawasser); see also ECJ Case C-271/09 (Stadler) of 10 March 2011.

Service concessions are indeed characterised by the global liability of the concessionaire towards the contracting authority throughout the duration of the contract in terms of effectiveness and quality of the services provided to the end-user. It is worth mentioning that several contracting authorities are even prohibiting the use of subcontracting in service concession contracts.

When major works are identified within the specifications of the concession, the future operator has no other choice, if he is not able to do them himself, than to partner with a construction company whose price is included in the offer. The obligation for concessionaires to open a formal competition after having signed the concession contract does not correspond to the practical constraints of fixing a definite price in the main offer.

### ***C. The scope of the future European legal regime on concessions must be coherent***

#### **1. Public transportation**

The Commission has the responsibility of giving its legal interpretation of the relationship between regulation 1370/2007 regarding public transportation services for passengers, also known as “PSO Regulation”, and the legislative initiative on concessions.

As rules for public procurement for transportation derive from directive 2004/17, transportation concessions could be derived from the provisions of the European legal regime on concessions without affecting the implementation of the PSO regulation.

#### **2. Drinking water and waste water treatment**

Veolia would like to draw the attention of the Commission to the necessity of a common regime for service concessions for drinking water distribution and service concessions for waste water treatment<sup>4</sup>, two similar activities. Indeed, drinking water distribution services fall within the scope of directive 2004/17 whereas waste water treatment services fall within the scope of directive 2004/18.

Furthermore, the condition for the application of directive 2004/17 allows for confusion as the contracting authority is no longer the network operator (“*provision or operation of fixed networks*”)<sup>5</sup>.

For service concessions, this creates legal uncertainty and inequality of treatment between service providers.

#### **3. Priority and non-priority services**

At last, the scope of the future **regime on concessions must not be limited to “priority services”**<sup>6</sup> within the meaning of “public procurement” directives.

Indeed, the existing distinction in “public procurement” directives between “priority services” (subject to full provisions of the “public procurement” directives) and “non-priority services” (only subject to provisions on technical specifications and publication of an award notice) is not suitable for service concessions.

Maintaining this distinction would significantly restrict the scope of service concessions (essentially within service sectors such as waste, waste water treatment and passenger transportation - excluding railways). It would exclude sectors such as drinking water, rail transport, heating networks, port services, etc., which are naturally likely to be subject to concession contracts.

Such a situation would be contrary to the objective of creating a single market for concessions in Europe.

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<sup>4</sup> Directive 2004/17 only applies to procurement “linked to disposal and treatment of waste water” when awarded via entities also carrying an activity in the drinking water sector (article 4.2.b).

<sup>5</sup> Article 4 of Directive 2004/17.

<sup>6</sup> “Priority” services are found in annexes II A of directive 2004/18 and XVII A of directive 2004/17.