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**Analytical Overview of
the Legal Framework of
EU Member States
regarding the Awarding of
Concession Contracts**

NOTE



DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT A: ECONOMIC AND SCIENTIFIC POLICY

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BRIEFING NOTE

Abstract

In this Briefing Note the different approaches to the award of concessions taken in selected Member States are analysed and compared to the approach taken by the Directive Proposal issued by the Commission. Particularly the differences with regard to the definition of concessions and the different procedures are taken into account.

This document was requested by the European Parliament's Committee on Internal Market and Consumer Protection.

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EXECUTIVE SUMMARY

Background

With the publication of Directive Proposal COM(2011) 897 on 20th December 2011 the Commission opened the debate on the European regulation of the award of concession contracts. The Commission has found that in the area of concession contracts there are “different interpretations of the principles of the Treaty by national legislators and [...] wide disparities among the legislation of different Member States”. It feels the need “to provide for a minimum coordination of national procedures for the award of such contracts based on principles of the Treaty so as to guarantee the opening-up of concessions to competition and adequate legal certainty.”¹

The main problem is to draw a clear distinction between public contracts and concessions. That is *inter alia* the reason why the ECJ had to deal with a number of cases especially with regard to service concessions trying to give guidelines on distinguishing between public contracts and concessions. The analysis of the ECJ case-law, however, shows that even the ECJ does not distinguish consistently between the two types, especially when it comes to the interpretation of the term “right to exploit”. Furthermore, it is not clear from the existing rules and the ECJ case law how to award a concession complying with the fundamental rules of the Treaty.

With the European Parliament now required to develop a stance on the issue of concession contracts it has identified two main areas in which an analysis of national rules and regulations is vital in order to come to a result that takes into account the established rules in Member States.

Firstly, and most importantly, it will be decisive to determine what exactly is understood by “concession contracts”. As no piece of European regulation is in place dealing with concession contracts – besides a definition on a rather rough scale - there is room for interpretation in both national law and jurisprudence.

Many Member States have developed their own rules with regard to concessions. In order to determine a Europe-wide practice it will be helpful to look at these Member States and their specific regulations.

Secondly, another important aspect in order to uphold the principles of the Treaty is the procedures put in place. These procedures serve as safeguards of the fundamental rights guaranteed by the treaty. However, in Member States there are different procedural arrangements and it will be important to mark common aspects as well as differences in the approaches taken if a common ground is to be laid to develop minimum coordination while not entirely putting away with national proceedings and standards.

¹ Proposal for a Directive of the European Parliament and the Council on the award of concession contracts, COM(2011) 897 of 20 December 2011, Reasoning Ground 2

Summary of Findings

The analysis of existing legal frameworks in Member States with regard to concessions shows that a common Europe-wide practice does not exist when it comes to the award of concessions.

Firstly, the overwhelming majority of Member States simply did not regulate the award of concessions, leaving it to jurisprudence to make up rules to comply with. The remaining Member States have established their legislation in different legal frameworks, some within their public procurement laws, others in special concession laws and some in legislation dealing with public private partnerships. This shows already the enormous variety of approaches. However, all these legislations cover both service and works concessions and most of them provide the same or at least similar provisions for both kind of concessions.

Secondly, definitions vary even between those Member States that have chosen to provide legislation for concessions. Even though many of those Member States have obviously made an attempt to transform the jurisprudence of the ECJ, the result leads to a rather more diverse picture. Particularly the notion of risk – although common to most legislations – is treated in different ways. Both the question which risk has to be transferred to the concessionaire and what degree of this risk he has to bear is addressed in different ways. However, most legislations require the transfer of a significant part of the operating risk pertinent to the concession. Similarly, no common standard can be derived for the duration of concession contracts, although almost all Member States have limited the duration, while some even established a duration limit. As for exclusions to the application of laws most Member States have established such exceptions, many allow those for security reasons and in special sectors. These, however, vary.

Thirdly, with regard to the procedures, the selected Member States have taken two different approaches. While some simply apply the procedures for Public Procurement, others established separate concession procedures. With regard to thresholds and publication rules, almost all Member States stipulate the obligation to publish (nationally) both service and works concessions, sometimes even without any minimum value. Furthermore, the majority of the analysed Member States obligates the contracting authorities to award the economically most advantageous offer according to criteria published in the notice, for both service and works concessions and for works concessions below and above the threshold.

The comparison of the above mentioned approaches with the Directive Proposal shows that some aspects of the Proposal can be seen as in line with national legislation. In addition, some of the national procedural rules in place provide even a higher level of transparency as foreseen in the Commission Proposal, as also concessions below the proposed thresholds are covered. However, the basic definition with the notion of risk and some other aspects are regulated more narrowly than in the selected Member States' legislations.

1. SCOPE AND METHODOLOGY

This Briefing Note is looking into the two aspects mentioned above:

- definition of concessions
- award procedures.

With regard to these two aspects this Note aims at providing an overview on national laws and compares these legal regimes to the current Commission Proposal for a Directive on the Award of Concession Contracts.

As it is not possible to perform an in-depth analysis of the laws and jurisprudences in 27 Member States within the scope of a Briefing Note, the **first step** of the analysis was to classify the Member States and to define the Member States with a special legal regime with regard to concessions.

For this classification we primarily used the “Annex II – Overview of MS Legislation” provided in the 2010 Impact Assessment study issued by the European Commission services (SEC (2011) 1588 final).

Since the focus of discussion in the political arena (and in the above mentioned Annex II) is on the award of service concessions, we put the emphasis of the **second step** of this analysis on the definitions and procedures with regard to service concessions. Only those Member States with both an explicit and own legal definition of service concessions and further legal provisions dealing with service concessions were examined in-depth in order to establish clusters of common definitions and procedures. Furthermore we examined those selected Member States with regard to their legal regime for works concessions.

2. EXISTING LEGAL REGIMES

KEY FINDINGS

- Despite the different regulatory approaches a basic concept of concessions can be identified that is common to all Member States.
- Only 11 Member States have specific regulations with regard to service concessions in their national legal regimes.
- All of these Member States have also specific regulations with regard to works concessions.
- Among these Member States a variety of approaches have been taken in regulating the award of concession contracts.

In the 27 Member States of the EU different approaches to the regulation of the award of concession contracts have been taken, reaching from the absence of practically any rules to a highly specialised procedure. This briefing note is aiming at a description of the different sets of rules in force and an effort in clustering those with regard to the definition of concessions and the relevant procedures.

2.1. Classification of national legal regimes

Based on the “Annex II – Overview of MS Legislation” provided in the 2010 Impact Assessment it was possible to define several categories of Member States: those with a definition of works concessions (Category 1), those with an own legal regime regarding works concessions (Category 2), those with the 2004/18 Directive’s definition of service concessions (Category 3), those with the 2004/18 Directive’s definition of service concessions and some special provisions (Category 4) and those with an own definition and special provisions regarding service concessions (Category 5). However, as the Annex II only considers service concessions it has to be mentioned that the overview gives an incomplete picture regarding works concessions (e.g. the overview does not show the Member States having some legal provisions regarding works concessions - comparable to category 4).

To finalise the classification it was yet necessary to double check the findings of the Annex II and to look into the national legislations, as far as they could be identified: Even if the Annex II mentions special provisions concerning service concessions, the analysis showed in some cases that these were only guidelines (no laws; e.g. Ireland). Furthermore, according to Annex II Latvia and Slovenia have only a legal regime for service concessions, whereas the analysis showed that their legislations also cover works concessions.

Table 1: Classification of national legal regimes

Category 1 MS legislation only transposes Art. 1 lit. 3 and Art. 56 – 65 of Directive 2004/18/EC regarding works concessions.	Belgium, Germany (with an additional aspect in the definition referring to the length of the concession “befristetes Recht”)
Category 2 MS legislation contains an own legal regime regarding works concessions	UK, Spain, Portugal, Poland, Lithuania, Hungary, France, Czech Republic, Bulgaria, Slovakia Latvia, Slovenia
Category 3 MS legislation contains a definition of service concessions, but the definition is a simple transposition of Art. 1 lit. 4 of Directive 2004/18/EC -. There are no other legal provisions	Cyprus, Denmark, Estonia, Finland, Greece, Luxemburg, Netherlands, Sweden, UK (guidelines exist), Ireland (guidelines exist)
Category 4 MS legislation contains definition of service concessions same as in Directive 2004/18, Art. 1 lit. 4. Furthermore it contains special legal provisions concerning i.e. threshold, procedures, publication etc...	Italy, Malta, Austria, Romania (no definition in national law, but special specifications)
Category 5 MS legislation contains an own legal regime regarding service concessions (legal Definition, especially regarding risk and /or length AND special legal provisions)	Bulgaria, Czech Republic, France, Hungary, Latvia, Lithuania, Poland, Portugal, Slovenia, Slovakia, Spain

Source: FPS Rechtsanwälte & Notare – highlighted are those Member States with legal regimes for both works and service concessions.

As explained above (see Chapter 1) the following examination of the Member State legislation covers first of all those Member States with an own legislation regarding service concessions (definition AND procedural rules as defined in Category 5).

As all Member States in Category 5 have also an own legislation regarding works concessions (Category 2), we also examined the legal regime for works concessions in these Member States.

Only the UK regulates works concessions without regulating service concessions.

2.2. Overall regulatory approach

Although we have only been looking at selected Member States having national legislation dealing with concessions, three different regulatory approaches already can be determined.

These are quite clearly illustrated by the names of the legal acts in which the provisions for concessions are contained:

1. Concessions as special instruments

In 6 of the selected countries (CZ, PL, LT, BG, ES, HU) there are special Concessions Acts in force. In some of these Member States (CZ, PL, LT, BG), these Acts are dealing with concessions (both works and service concessions) while other instruments of public procurement are dealt with in separate pieces of legislation. In other Member States (HU, ES) the Concessions Act covers only concessions (works and/or services) in specific sectors, whereas all other concessions fall under the scope of the general procurement Act (see 2. below). The French “Loi Sapin” is an anti-corruption and transparency Act and deals in a special section with service concessions, whereas works concessions are covered by a different (special) law.

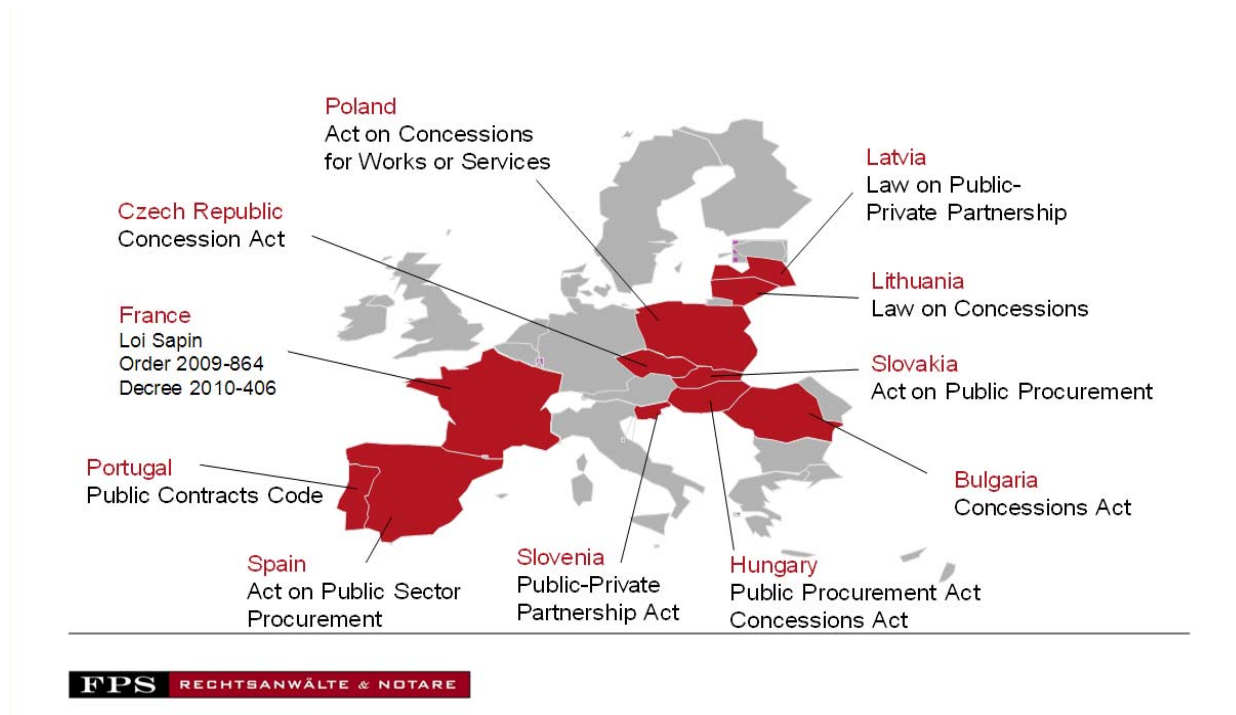
2. Concessions as public contracts

In another set of countries (PT, ES, HU) concessions are dealt with within the scope of Public Procurement laws. Concessions are in these legislations seen as public contracts serving the fulfilment of public services.

3. Concessions as public-private partnership

Thirdly, concessions are in two legislations (LV, SV) treated as a special form of public-private partnership, hence putting the entrepreneurial aspect in the centre.

Map 1: National Legislations dealing with Service Concessions



2.3. Regulatory approach regarding service and works concessions

Furthermore, there are different regulatory approaches how to deal with service and works concessions. Either there is only one set of rules for both service and works concessions, with the exception of the OJEU-publication for works concessions reaching the EU-threshold (e.g. CZ, BG, PT, PL, SK, LV, LT), or works concessions are dealt separately from service concessions (e.g. FR, ES, HU, SI). In this latter case, either both concessions are dealt in different laws (e.g. FR) or both are regulated in the same law (e.g. ES, HU, SI). In some cases there are also different set of rules for works concessions reaching the EU-threshold and those below the threshold (e.g. HU).

2.4. The basic concept of concessions

Despite the different regulatory approaches a basic concept of concessions can be identified that is common to all Member States.

1. Three-way-concept

There are always three parties involved in concession contracts

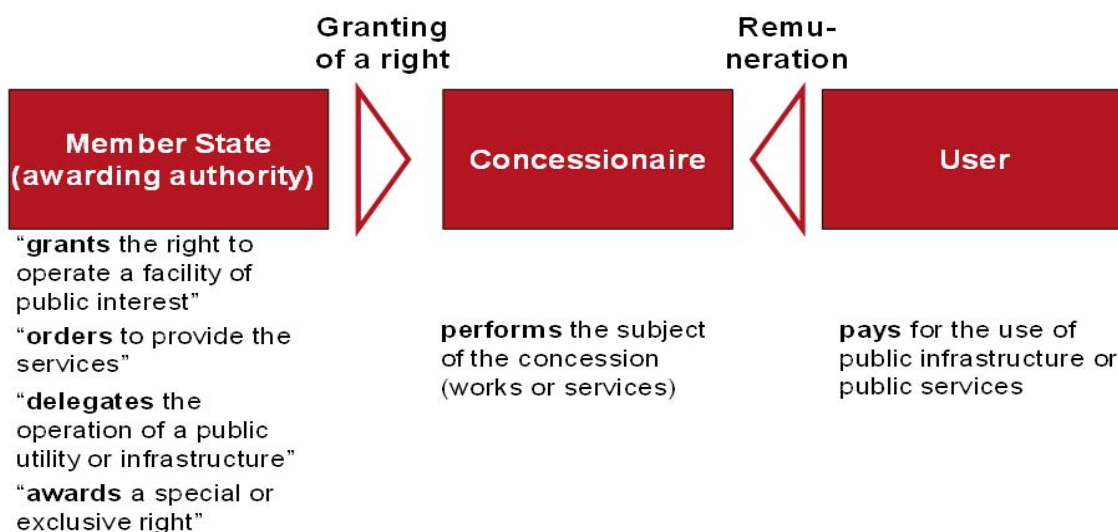
- (1) Contracting authority as grantor
- (2) Private Contractor as Concessionaire
- (3) Users of the facility/service.

A concession contract is concluded between the contracting authority and the concessionaire without any involvement of future users.

2. Remuneration by users

The specialty of concessions as opposed to simple public orders is that while the contracting authority awards the contract and grants the right to the concessionaire, the concessionaire is remunerated (at least in part) by the right to exploit the facility or the service. Eventually, it is left to the users to remunerate the concessionaire for his activity. Along with this way of remuneration the concessionaire bears at least part of the risk connected to the return on his invest.

Table 2: The basic concept of concessions



2.5. Overview of the legal framework in the selected Member States

After these first categorisations the selected Member States have been examined in depth regarding two aspects:

- Definition of concessions
- Procedural rules

2.5.1. Definition of concessions

Although there is a basic concept common to all definitions, it is necessary to examine the differences in the details.

To allow a better clustering and comparison of the different legal regimes the analysis focuses on key elements which should be addressed in the respective definitions of concessions:

- Thresholds
- Calculation of value
- Notion of risk
- Special treatment or exclusions
- Duration.

The following table gives an overview of the different provisions in place regarding the above mentioned key elements. If the table does not indicate special provisions for works and /or service concessions (mentioned as “works” or “service”), the provisions are applicable for both service and works concessions. For the details refer to Annex I.

Table 3: Overview of concessions definition in selected Member States

	Thresholds	Calculation of value	Notion of risk	Special treatment/ exclusions	Duration (prolongation)
Bulgaria	Threshold for publication in the Official Journal foreseen in Implementing Regulations (EU Threshold)	Costs for construction, management and maintenance, and the projected exploitation revenue	The bulk of risk pertinent to the management and the maintenance	Different legal regimes for different contracting authorities or sectors	Not longer than 35 years
Czech Republic	Concession Act not applicable if value less than CZK 20.000.000 (approx. 780.000 EUR), net of value added tax,	Value of the subject-matter of the contract and the estimated total revenue of the concessionaire	Substantial part of risks attaching to the enjoyment of benefits from the provision of services or the exploitation of the works	Special treatment for "major concession contracts", exclusion for certain sectors (security, telecom...)	Only for a definite period
France	Service: simplified procedure for concessions with a total value of max. 106 000 Euros or concessions no longer than 3 years and with a total value not exceeding 68 000 Euros yearly works: EU-threshold	Service : total value of the payments to the concessionaire Works : value of all the foreseeable products needed for the execution, including all works and materials provided by the public authority	n/a	Exclusion for certain kind of concessions and simplified procedure below a certain threshold	Limited, for certain sectors not longer than 20 years Prolongation rule
Hungary	EU threshold for works concessions, national threshold for works concessions: ~EUR 380T, threshold for service concessions: ~EUR 95T	highest full consideration	n/a	simplified procedures for Concessions of Part B-services	Specific period of time
Latvia	EU-threshold for works concessions	Planned total payment of the public partner	Demand and / or availability risk or significant share thereof	Exclusion for different sectors (e.g. security, communication networks)	Up to 30 years (exceptions possible) Modification rule
Lithuania	EU-Threshold for works concessions	Works: estimated value both of the execution of the works and design , and the supplies needed	All or part of operating risk	Concession rules applicable only in Sectors listed in law	Reference to return on investment Not longer than 25 years
Poland	EU threshold for works concessions Same threshold for service concessions to determine length of submission period	Service: estimated cost of services provided Works: estimated cost of construction and the estimated total values of deliveries necessary	Significant part of economic risk	Exclusion for different sectors (e.g. security, telecom...)	Reference to return on investment, Not longer than 15 years, Modification rule
Portugal	no thresholds for concessions	Maximum economic benefit	Significant and effective transfer of risk	n/a	For a certain period Modification rule
Slovakia	special concession threshold equivalent to EU-threshold	the price at which a similar or comparable object of contract is usually sold	n/a	Exclusion for water, energy waste, transport, postal sector; security and int. agr., comm. net	Agreed time Reference to fair revenue Modification rule
Slovenia	Above EU-threshold: obligation to assess the possibility of a public-private partnership EU threshold for the obligation to issue a public tender	n/a	majority of commercial risk	exceptions as laid out in Public Procurement Law: e.g. security reasons, comm.net, internat. agreem, broadcasting	Fixed period Reference to return on investment
Spain	EU-Threshold for works concessions Service: negotiated procedure applicable, if the value of the concession is below 500.000 Euro and the duration is under 5 years	Works: value of the works and the estimated value of the expenses needed for the execution of these works Service: value of all the expenses	Risk of the contract	n/a	Works : Not longer than 40 years Service : From no longer than 10 years up to 60 years depending on the specific sector Modification rule Prolongation rule

2.5.2 Procedural provisions

In addition to the definition it is also important to look at the different procedural rules the Member States have adopted. Only with proper procedural rules the EC principles as equal treatment and transparency can be enforced.

For the following overview we examined three fundamental elements with regard to procedural rules:

- Publication
- Procedures
- Selection and award criteria (especially the question if they have to be published).

The following table gives an overview of the different provisions in place regarding these three aspects. If the table does not indicate special provisions for works and /or service concessions (mentioned as "works" or "service"), the provisions are applicable for both service and works concessions. For the details refer to Annex II.

Table 4: Overview of procedural provisions in selected Member States

	Publication	Procedures	Selection and award criteria
Bulgaria	State gazette, for works concession notice to European Commission	Open, restricted, electronic auction	Obligation to publish and use selection and award criteria Economically most advantageous offer only
Czech Republic	National Information System of Public Contracts, OJEU for works concessions above thresholds	Own negotiated procedure or concession dialogue	obligation to publish and use award criteria economically most advantageous offer only
France	Service : two different publications (tender journal and sector specific publication) Works : above EU-threshold OJEU, below, free choice	Service : Similar to negotiated procedure Works : no specifications	Use of selection criteria ; no obligation to publish Works : above EU-threshold publication of award criteria, below no specifications
Hungary	works concessions: procurement gazette, OJEU above thresholds service concessions: 2 national newspapers	Same procedures as foreseen in Dir. 2004/18	Works above EU-threshold : obligation to publish and use of selection and award criteria, economically most advantageous offer only All others : No specifications
Latvia	Website of the procurement monitoring bureau; OJEU for works concessions above EU-threshold	Competition with or without selection of candidates, competitive dialogue	No specifications for selection criteria. economically most advantageous offer or lowest price , no publication required
Lithuania	National gazette, OJEU for all works concessions	Open	Obligation to use selection (when selection of tenders) and award criteria, economically most advantageous offer only, criteria to be published
Poland	Public Procurement Bulletin and locally on the contraction authority´s website, OJEU for works concessions above threshold	Special procedure equivalent to negotiated procedure	No specifications for selection criteria. Obligation to use and publish award criteria, economically most advantageous offer only
Portugal	Works within the scope of Dir. 2004/18 : OJEU irrespectively of the estimated value Utilities and services : Official Journal	Open (with negotiation), restricted or negotiated procedure	Obligation to use and publish award criteria, economically most advantageous offer or lowest price,
Slovakia	Works : OJEU and national office for public procurement Service : office for public procurement (above EU-threshold)	Open, restricted, negotiated, competitive dialogue	No specifications for selection criteria, economically most advantageous offer or lowest price, publication of criteria required
Slovenia	publication on the Internet necessary, in OJEU for works concessions reaching EU-threshold	Public tender (open procedure)	Obligation to use and publish award criteria, economically most advantageous offer only
Spain	National or regional official journal, OJEU for works above threshold	Open, restricted, negotiated, competitive dialogue	Obligation to publish and use selection and award criteria, economically most advantageous offer only

3. CLUSTERS OF REGULATORY APPROACHES

KEY FINDINGS

- Even if the legal frameworks show a great diversity, it is nevertheless possible to identify 2 to 3 clusters for every analysed aspect.
- The greatest disparities seem to exist regarding the notion of risk, due probably to the fact that the ECJ jurisprudence remains unclear in this point.
- Most of the Member States have the same or at least very similar provisions for service and works concessions. The main difference concerns the publication rule for works concessions above the EU threshold.
- There is no common Europe-wide practice with regard to concessions.

As seen above, the provisions in the selected Member States are far from being standardised. Not only are there different regulations for works and for services concessions, but there are also substantial disparities between the legal regimes.

Nevertheless, the analysis of the provisions allows for the development of certain clusters in the legislation of the Member States.

3.1. Clusters of definitions

The different national regimes described above can be grouped in different clusters when it comes to the key aspects of the definition. These clusters will be helpful when comparing existing legal regimes to the regulations contained in the Directive Proposal.

Clusters can be determined in particular with regard to:

- the notion of risk supported by the economic operator and how it is defined;
- calculation of value and thresholds
- Duration
- Any special treatment or exclusions reserved for selected actors and/or sectors of economic activity.

3.1.1. Notion of risk

The analysis of the selected Member States shows that almost all definitions include the notion of risk. In the case of France, where the notion of risk is not mentioned in the Law, at least the jurisprudence confirmed that the concessionaire has to bear a risk.

Thus, the first finding is that the Member States try to match with the ECJ jurisprudence: In *Parking Brixen*² the ECJ established its opinion that the right to exploit the service must contain a risk taking of operating the services. Especially in *Orthopädie Schuhtechnik*³ and *Eurawasser*⁴ the ECJ confirmed clearly its opinion that the provider has to take the risk of exploiting the services.

The analysis of the Member States' legislation shows, however, the different ways the ECJ rulings can be interpreted. The legislations demonstrate a great disparity both on the question, which degree of risk the concessionaire has to bear and on the question, which risks have to be defined as the "operating risk".

² ECJ, C-234/03, 27.10.2005

³ ECJ, C-206/08, 11.06.2009

⁴ ECJ, C-206/08, 10.09.2009

(1) Notion of risk

In operating a service the concessionaire could be subject to a large number of risks: demand risks, operation and maintenance risks (availability of infrastructure), political risks, force majeure. However, it is not clear from the ECJ case Law if all these risks have to be transferred and if not, which of these risks have to be transferred to fulfill the requirements of a concession. Accordingly, the Member States choose different approaches:

1. Cluster 1:

Demand risks (ES, CZ, LV)

2. Cluster 2:

Management and maintenance risks (BG, LV - alternatively or with demand risks)

3. Cluster 3:

No limitation (PT, PL, LT, SI)

(2) Degree of risk

In the same way, it is not clear from the ECJ case law, how much of the “operating risk” the service provider has to take. In *Orthopädie Schuhtechnik* the court took into account whether the provider in the situation at issue takes an actual risk and analyzed the contract in detail. In *Eurawasser* the court only stated that “it is necessary that the contracting authority transfer to the concession holder all, or at least a significant share, of the operating risk”. In contrast to *Orthopädie Schuhtechnik* the ECJ in *Eurawasser* did not consider whether the risk itself in the case at issue was significant.

In *Rescue Services*⁵ the ECJ considered the transferred operating risk as very limited, as the social security institution has to make regularly advance payments and as there is no real competition in the concerned area. Nevertheless the ECJ stated that for a service concession it is sufficient that the contracting authority transfers the full or at least a **substantial part of the (limited) risk** it has to bear. In practice, however, it makes a considerable difference if the provider has to bear a significant part of an actual risk or only a significant part of a very limited risk⁶.

The same problems can be identified in the Member States’ definition of risk. Three clusters can be determined:

1. Cluster 1:

Only one Member State refers to a “significant and effective transfer of risk” (PT), as ruled in *Orthopädie Schuhtechnik*

2. Cluster 2:

Most of the Member States ask for the transfer of a significant part of the operating risk pertinent to the concession (BG, CZ, LV, PL, SI) – Only one Member State does not mention “significant”, “substantial”, ... (LT).

3. Cluster 3:

Others only mention “the risk of the contract” (ES).

⁵ ECJ, C-274/09, 10.03.2011

⁶ The reason of the different arguments might be that two different chambers of the ECJ were responsible for the judgments (*Eurawasser*, *Rescue Services*: Third chamber, *Orthopädie Schuhtechnik*: Fourth chamber)

3.1.2. Calculation of value and thresholds

With regard to the methods governing the calculation of value of concession contracts three clusters can be determined:

1. Cluster 1: Total remuneration received

Most countries (BG, CZ, HU, PT) determine the value of a concession contract by looking at the value of the subject matter, this is to say, the total compensation received by the concessionaire regardless of the origin of the compensation (public or end-user). (BG, CZ, HU, PL). Bulgaria mixes the aspect of remuneration received with the notion of costs incurred by the concessionaire and Poland refers to the estimated cost exclusively.

2. Cluster 2: Remuneration received from the awarding entity

France and Latvia determine the value of a (service) concession looking at direct payments from the awarding entity only. The remuneration received from the exploitation of the services is not regarded.

3. Cluster 3: No specific rules

Thirdly a number of countries do not provide specific rules for the determination of the concession value (LT, SI, ES). This leads to the application of more general principles that do not take into account the specific nature of concession contracts and the principle of their remuneration.

Regarding the thresholds, the Member States adopted three approaches:

1. Cluster 1: No thresholds except the EU threshold for works concessions (5 Mio. EUR) with some variations

- In BG, LV and LT the EU threshold for works concessions only determines the obligation to publish the works concession notice in the OJEU. The other provisions are applicable irrespective to the value of the concession.
- In PL, SK and SI, the EU threshold for works concessions is, in addition, applicable for service concessions, in PL to determine the length of the submission period only, in SK and SI to determine the obligation to publish a tender notice.

2. Cluster 2: National thresholds in addition to EU-threshold for works concessions, but with differences in the details

- special (simplified) procedures applicable below a certain threshold – only for service concessions (e.g. FR, ES)
- Concessions law only applicable above certain minimum thresholds (HU, CZ), which can vary between works and service concessions (HU).

3. Cluster 3: No thresholds

Portugal does not have any threshold at all: All provisions are applicable to both works and service concessions irrespectively of their estimated value, except the OJEU-publication, which is compulsory only for (all) works concessions.

3.1.3. Duration (and prolongation/renewal)

All legislations have in common that the duration of concession contracts should be limited. Within this scope, two clusters can be established:

1. Cluster 1: specific maximum duration

A number of countries have established a maximum length for concession contracts (BU, FR, LV, LT, PL, ES). These reach from 15 years (PL) to 60 years for specific types of service concessions (ES). Spain has, additionally, established a minimum duration of ten years. Within this range a duration between 15 and 30 years is most common. There can be differences between the duration rules of service concessions and the duration of works concessions (FR- no specifications for works concessions, ES).

2. Cluster 2: no specific duration

Other countries do not have specific maximum durations. Those countries merely state that concession contracts are concluded only for "an agreed time" (SI) or that concession contracts constitute a "long-term relationship established for a fixed period".

Concerning prolongation rules only FR and ES offer some provisions. Both have in common that a prolongation should be a great exception. In both provisions prolongation is (partly) linked to any modification of the economic balance of the concession (e.g. ES: due to force majeure or actions of the administration and limited to 10 resp. 15 per cent of the initial duration, but shall not exceed the maximum duration). The French provision also refers to "reasons of common interests", but leaves it to the contracting authority (and to jurisprudence) to determine whether the conditions apply. However, in this latter case the prolongation can only be up to one year.

No Member State has renewal rules.

3.1.4. Special treatment and/or exclusions

Almost all countries have established limitations to the application of their laws governing concessions. While some countries exclude certain sectors or industries, others contain limitations with regard to security or have other criteria.

1. Special treatment or exclusions for certain sectors

- Concessions awarded by municipalities (BG)
- water (BG, FR, SK), waste water, transport, postal, energy (SK)
- Public telecommunication networks (CZ, PL, HU, LV, SK)
- financial services (CZ)
- research and development (CZ)
- broadcasting (SL)

2. Exclusions for security reasons and defence

- CZ, PL, LV, HU, LV, SK, SL

3. others

- "major concession contracts" (CZ)
- Concessions based on international agreements (PL, LV, HU, SK, SL)
- Crisis management (HU)

An entirely different approach is taken by Lithuania, limiting the scope of application of its law to certain areas mentioned enumeratively, such as energy, transport and telecommunication infrastructure, water, waste water, health care, education.... In other areas a decision of the Government of Lithuania is required to award a concession contract.

Since the provisions are extremely diverse, clear cut clusters cannot be derived that might be helpful for the further discussion. However, it is clear that there is a necessity to establish clarity as to what contracts fall within the scope of concession legislation.

3.2. Clusters for procedures

3.2.1. General approach

As far as the procedures are concerned it is possible to discern two clusters:

1. Cluster 1: Application of General procurement law (with small changes)

One part of the Member States applies more or the less the same procedures as applicable for normal public contracts (ES, PT, HU, BG). It is interesting to notice that only three of these Member States regulate concessions in their normal public procurement Law. Thus, the fact that a Member State adopts a special concessions act does not mean that it has special procedural rules.

2. Cluster 2: Special concession procurement law

The other Member States adopted a special procedure for concessions (PL, LT, LV, FR, CZ). These are all Member States with either a special concessions Act or with special rules concerning PPP.

All Member States except of France have adopted the same procedure for works and service concessions.

3.2.2. Publication

With regard to the provisions requiring publication of concession notices all Member States have established the requirement of publication for both service and works concessions in their national gazettes or in equivalent ways. Only with regard to works concessions two clusters can be established.

1. Cluster 1: Publication in OJEU for all works concessions

Two Member States require publication of all works concession in the Official Journal of the European Union (LT, PT,) regardless of the contract value.

2. Cluster 2: Publication in OJEU for all works concessions above threshold

Nine Member States require publication in the OJEU only if the estimated value of the concession is above the thresholds provided by the European Union (CZ, FR, HU, LV, SL, BG, PL, ES, SK).

3.2.3. Selection- and award criteria

With regard to the use and publication of selection and award criteria three main approaches can be determined, which show some differences between works and service concessions:

1. Cluster 1: full transparency for all concessions, both selection and award criteria have to be published and used (BG, CZ, HU (only works concessions above EU-threshold), LT, SI, ES).

2. Cluster 2: no specifications on selection criteria, only award criteria have to be published (PL, PT, SK, FR – only for works concessions above EU-threshold).

3. Cluster 3: Only a limited transparency could be identified, either because there is no obligation to publish the criteria (e.g. FR for service concessions⁷), or there are no visible specifications (LV, HU for all concessions except works above EU threshold)

Interestingly, almost all Member States with full transparency accept as only award criteria the economically most advantageous offer, except SK and PT.

3.2.4. Modification rules

Most Member States do not provide for a modification of concession contracts. However, two clusters of modification rules can be determined:

1. Cluster 1: modification of content of concession contract

Four Member States provide for the possibility to change the contents of the concession contracts if circumstances (regulatory enactments, financial or economic conditions...) change and this could not be foreseen (LV, PL, PT, ES).

2. Cluster 2: award of additional contracts

Two Member States offer the possibility to award additional contracts to the concessionaire under the prerequisite that the addition is necessary for the goal of the concession contract, a separation is not possible and the value of the addition is not more than 50 % of the initial value (PL, SK).

3.3. Conclusions

The different clusters clearly demonstrate the disparities in the existing regulations, but also show common approaches. The first main aspect is that most of the selected Member States do not differ between works and service concessions, except for the OJEU-publication of works concessions. The second main aspect is that most of the selected Member States apply their special legal regime to (works and service) concessions with a value far below the EU-threshold, sometimes even without any minimum value.

Considering the great number of Member States without a special legal regime for concessions the clusters are nevertheless only an incomplete picture of a Europe-wide practice regarding the award of service concessions. Furthermore, for a comprehensive overview it would be necessary to analyse as well those Member States with less or without regulations and the national jurisprudences (especially for those Member States without any regulations).

⁷ But see France, Jurisprudence considers publication compulsory, Annex II

4. COMPARISON OF NATIONAL RULES WITH COMMISSION PROPOSAL

KEY FINDINGS

- In some aspects the Proposal goes beyond most of the Member States' regulations.
- Some of the national procedural rules in place, however, provide a higher level of transparency as foreseen in the commission proposal, as also concessions below the EU-threshold are covered.
- As the Member States' regulations remain mostly unclear regarding the transfer of risk, the Commission Proposal would without doubt lead to more legal certainty.

In the final step of the analysis, the clusters need to be compared to the Commission Proposal. Therefore it is necessary to present the proposed provisions for the key elements that have been analysed. Secondly it is necessary to analyse whether these provisions go beyond the national provisions or if the national provisions contain regulations which should be taken into consideration in the Proposal.

4.1. EC Proposal

4.1.1. Definition

Art. 2 lit. 1 (2) Directive Proposal:

"a 'public works concession' means a contract for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, where the consideration for the works to be carried out consists either solely in the right to exploit the works that are the subject of the contract or in that right together with payment."

Art. 2 lit. 1 (7) Directive Proposal:

"'services concession' means a contract for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities or contracting entities and having as their object the provision of services other than those referred to in points 2 and 4 where the consideration for the services to be provided consists either solely in the right to exploit the services that are subject of the contract or in that right together with payment."

4.1.2. Risk

Art. 2 lit. 2 Directive Proposal:

"The right to exploit the works or services as referred to in points 2, 4 and 7 of the first paragraph shall imply the transfer to the concessionaire of the substantial operating risk. The concessionaire shall be deemed to assume the substantial operating risk where it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services which are the subject-matter of the concession.

That economic risk may consist in either of the following:

- (a) the risk related to the use of the works or the demand for the provision of the service; or
- (b) the risk related to the availability of the infrastructure provided by the concessionaire or used for the provision of services to users"

4.1.3. Calculation of value / thresholds

Art. 6 lit. 10 Directive Proposal:

"The value of concessions shall include both the estimated revenue to be received from third parties and the amounts to be paid by the contracting authority or the contracting entity."

Art. 5 lit. 1 Directive Proposal:

"This Directive shall apply to the following concessions the value of which is equal to or greater than EUR 5.000.000..."

Art. 5 lit. 2 Directive Proposal:

"Services concessions the value of which is equal to or greater than EUR 2.500.000 but lower than EUR 5.000.000 other than social services and other specific services shall be subject to the obligation to publish a concession award notice in accordance with Articles 27 and 28."

4.1.4. Duration/prolongation

Art. 16 Directive Proposal:

"The duration of the concession shall be limited to the time estimated to be necessary for the concessionaire to recoup the investments made in operating the works or services together with a reasonable return on invested capital."

The Directive Proposal does not include provisions regarding prolongation or renewal of a concession.

4.1.5. Special Treatment / Exclusions

Exclusions from the application of the Directive are foreseen in the following cases:

- concessions awarded to entities that are itself contracting entities on the basis of exclusive rights according to national law with regard to network infrastructure(Art. 8 lit. 1)
- Concessions based on international agreements (Art. 8 lit. 2)
- Concessions in the field of defence and security if security interests at threat
- with regard to immovable property, broadcasting, arbitration and conciliation services, financial services, employment contracts, Air Transport and Public passenger transport services pursuant to EU regulations (Art. 8 lit. 5)
- Concessions in the field of telecommunication (Art. 9)
- Concessions awarded to affiliated undertakings (Art. 11)
- Exemption of public-public cooperation (Art. 12 and 15)
- Concessions for research and development services under certain circumstances (Art. 21)

4.1.6. Procedures

Art. 26: OJEU-Publication is compulsory; exemptions similar to the ones for public contracts apply.

Art. 34 – 39: Special “concession award procedure” similar to negotiated procedure with prior publication (combined with competitive dialogue).

Detailed procedural rules: the publication of selection criteria is compulsory (Art. 36). The selection of the economic most advantageous offer should be the rule and all criteria have to be published (Art. 39). Detailed rules on qualification criteria, time limits, information and documentation requirements.

4.1.7. Modification rules

The Directive Proposal allows in Art. 42 for modification of the provisions of a concession if

- the modification is not substantial (less than 5 % of value) or
- the need for modification has been brought about by circumstances which could not be foreseen, it does not alter the overall nature of the concession and the increase in price is not higher than 50% of the value of the original concession.

4.2. Comparison

4.2.1. Risk

With regard to the degree of risk which shall be transferred, the definition in the proposal seems to go beyond the last ECJ rulings and to follow *Orthopädie Schuhtechnik* in requiring the transfer of a substantial operating risk. Therefore, the majority of the analyzed Member States would have to adjust their provisions. Only Portugal refers to a substantial risk. Moreover, the Proposal clarifies the different interpretations of the ECJ rulings mentioned above, which would certainly lead to more legal certainty, especially for those Member States without special legislation so far.

When it comes to the risk allocation the Proposal refers as well to the demand as to the availability risk. They do not have to be transferred both. As only Latvia adopted the same provision, all the other Member States would have to clarify their provisions. Considering that part of these provisions are far from being explicit and considering that the majority of the Member States do not define the operating risk at all, the Proposal would only lead to more legal certainty in this aspect too.

4.2.2. Calculation of value / thresholds

The Commission Proposal takes the same approach as taken by most Member States namely determining the value by looking at both the remuneration received from the contracting entities and from third parties. Those countries looking only at the remuneration received from the contracting entity would be no longer in compliance with the Directive.

Regarding the thresholds the Commission Proposal provides the same threshold for service and works concessions (with a special lower threshold for certain service concessions). For most of the Member States it should not be a problem to comply with these provisions as they already stipulate publication rules for service concessions. Nevertheless it has to be

mentioned that these national publication rules apply also for concessions of less higher value than the proposed thresholds. Thus, the Commission Proposal will not substantially affect the legal regimes in place in these Member States as it only covers a (small) part of the concessions covered by the national legal regimes.

4.2.3. Duration / prolongation

The Commission has decided to take a more flexible approach and has linked the duration to the recoup of investments and a reasonable return of invested capital only. The French provision is very similar to this approach. This provision should not pose a problem to those legislations already in place, they simply need to be adjusted. In practice it will certainly be difficult for the contracting authority to determine in advance an exact duration: the recoup of investments and the return of invested capital can be very different depending on the bidder's concept. In summary, it is agreed that a concession has to be limited in time.

4.2.4. Special Treatment/ Exclusions

A comparison of the exclusions as mentioned in the Directive Proposal with the legislation existing in Member States shows that many of those subjects of concessions that are excluded in Member States have been included as exemption in the Proposal as well. The very detailed provisions of the Proposal go beyond the level of detail entailed in most national laws. Many sectoral exclusions in the Proposal are to be found in similar ways in national law (i. e. telecommunication networks, security) whereas the exclusions with regard to public-public partnership are not to be found in the national laws.

4.2.5. Procedures

Even if the Proposal stipulates very detailed procedural rules, the analysis shows that the majority of the selected Member States do also have elaborated legal regimes, even going in some cases beyond the Proposal because they are also applicable to (works and service) concessions below the new concessions threshold.

An example is the selection of the most economically advantageous offer in accordance with the publicised award criteria. Only few Member States do not stipulate the use of criteria, or do not obligate to publish these criteria. Even if the concession has a value below the EU threshold, the contracting authorities in these Member States have to comply with almost the same provisions as foreseen in the Proposal.

The procedures also show that most of the Member States will not have any difficulties to comply with the Proposal's provisions. Some Member States do even have stricter provisions, only allowing an open procedure or leaving it to the contracting authority to justify the negotiated procedure, whereas the Proposal stipulates negotiations (as part of the "concession award procedure") as a rule.

4.2.6. Modification rules

The Proposal allows for modifications if they are below a certain value without any other prerequisites and provides for modifications under circumstances that could not be foreseen. The latter rule is known to a number of Member States, while no Member State has generally allowed modification below the value of 5 % as foreseen in the Directive Proposal.

Overall, the modification rules as contained in Art. 42 of the Proposal go beyond the rules in place in Member States.

4.3. Conclusions

As only 11 out of 27 Member States have adopted a special legislation on concessions and as these 11 special legislations are far from being standardised, it is not possible to draw a common Europe-wide practice regarding the award of concessions. Nevertheless, the analysis shows quite a few similarities the Member States' legislations and the Commission Proposal. Moreover, like the Proposal, most of the national legal regimes have almost the same provisions for works and service concessions.

However, as most of the Member States do not differ between concessions below and above the EU threshold (except for the OJEU-publication), these national legal regimes even leads to more transparency and more legal certainty for concessions in general than the Proposal, as they also cover concessions below the new concessions threshold. Only in some aspects the Proposal stipulates more detailed.

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ANNEX

I. Definitions in selected Member States

1. Bulgaria

- Definition

The Bulgarian Concessions Act of 2006⁸ defines concessions generally as “the right to operate a facility of public interest, made available by a grantor to a merchant (the concessionaire), in exchange for the latter's obligation to build and/or manage and maintain the facility subject to the concession at his/her own risk”, Art 2 (1). Service concessions have as their object “the management and maintenance of the object of the concession”, whereas Public Works Concessions have as their object “the implementation of a construction project and the management and maintenance of the of the completed facility after its becoming operational”, Art. 2 (2), (3).

Compensation shall consist of the right of the concessionaire to exploit the object of the concession and – under certain circumstances – that right in addition to a payment by the grantor, Art. 4 (1). This additional payment however shall not relieve the concessionaire of the bulk of the risk pertinent to the management and maintenance, and shall be allowed (only) in certain cases where it is necessary to ensure a socially acceptable price for the services provided, when such price is determined by an act of legislation or to allow for reconstruction in cases of force majeure, Art. 6 (2).

- Threshold

Threshold for publication in the Official Journal foreseen in Implementing Regulations to the Act, Art. 42 (3): EU threshold.

- Calculation of value

Estimated costs for construction, management and maintenance, and the projected exploitation revenue, Art. 8 Nr. 2.

- Notion of risk

Concessionaire shall not be relieved of the bulk of the risk pertinent to the management and maintenance, Art. 6 (2).

- Special treatment or exclusions

With regard to municipal concessions the rules of the Municipal Properties Act apply as well. Furthermore, the concession for the production of mineral water is governed by the Waters Act in addition to the Concessions Act Art. 5a (2).

- Length (and prolongation)

Concession agreements have an initial term not longer than 35 years, without an option for extension, Art. 10.

⁸ Concessions Act, Promulgated, SG No. 36/2.05.2006, effective 1.07.2006, amended and supplemented, SG No. 53/30.06.2006, effective 1.07.2006, supplemented, SG 65/11.08.2006, effective 11.08.2006; to be found under http://www.globalcompetitionforum.org/regions/europe/Bulgaria/Concessions_Act.pdf

2. Czech Republic

- Definition

The Concessions Act of March 2006⁹ defines the Concession Contract in Article 16 as a contract whereby the concessionaire undertakes to provide service or perform works and the contracting authority undertakes to enable the concessionaire to receive benefits resulting from the provision of the service or usage of the works, eventually combined with a monetary payment.

- Threshold

The grantor shall not be obligated to comply with the publication and procedural rules, where the estimated revenue of the concessionaire amounts to less than CZK 20.000.000 (approx. 780.000 EUR), net of value added tax, § 5 (2).

Another distinction is made at national level for major concessions (variable thresholds according to the contracting authority, reaching from 50.000.000 CZK (approx. 1.940.000 EUR) to 500,000,000 CZK (approx. 19.400.000 EUR),)

- Calculation of value

Estimated value of the subject-matter of a concession contract, and the estimated total revenue of the concessionaire ensuing from the performance of the concession contract. The estimated value of cost is not relevant for threshold.

- Notion of risk

Substantial part of the risks attaching to the enjoyment of benefits from the provision of services or the exploitation of the executed work should be borne by the concessionaire, while the distribution of other risks is to be determined in the Contract, § 16 (2).

- Special treatment or exclusions

Special treatment for "major concession contracts": they need approval of the project and of the final contract, § 20, 22, 23.

In the case of a modification of the concession contract, which leads to the increase of the estimated revenue of the concessionaire by more than 20% or in the wake of which the estimated revenue of the concessionaire equals or exceeds the amounts referred to in § 20(2), the provisions of § 23(1) and 23(2) shall apply, §23 (4), § 20.

Exclusions among others for security reasons, and certain activities such as public telecommunication networks, or if otherwise regulated (e.g. Road Transport); § 3.

- Length (and prolongation)

The concession contract may be concluded for a definite period only, § 16 (4).

⁹ Act No. 139 of 14 March 2006 on Concession Contracts and Concession Procedure, to be found under <http://www.pppcentrum.cz/res/data/004/000533.pdf>,

3. France

- Concessions are regulated in different acts: notably the so called Loi Sapin¹⁰, Order nr. 2009-864¹¹ and Decree nr. 2010-406. Service concessions fall under the scope of the Sapin Law. Works concessions fall under the scope of Order nr. 2009-864¹² and Decree nr. 2010-406. However, it is not totally clear if the Sapin Law do not cover works concessions as well. According to the findings in Annex II of the impact assessment, it seems that works concessions fall only under the scope of the above mentioned order and decree and not under the Loi Sapin.

- Definition

Art. 38 Loi Sapin: A service concession (Délégation de Service Public) is a contract under which a public authority delegates the operation of a public utility or infrastructure to a public or private entity whose revenues must substantially derive from the end-users of this utility or infrastructure.

Works concessions are administrative contracts under which a concessionaire has to carry out construction works whereby the consideration by the contracting authority for the works to be carried out consists either in the right to exploit the construction or in this right together with payment, Art. 1, Order nr. 2009-864¹³.

- Threshold

Service concessions: No threshold except art. 41 c Loi Sapin: simplified procedure for concessions with a total value of the payments to the concessionaire not exceeding EUR 106.000 or concessions no longer than 3 years and with a total value not exceeding EUR 68.000 yearly

Works concessions: only EU-threshold (EUR 4.845.000 EUR), Art. 10, 19, 27 Decree nr. 2010-406¹⁴.

- calculation of value

Service concessions: no special rules, except for the calculation of the threshold, art. 41 c: total value of the payments to the concessionaire

Works concessions: According to Art. 10, 19 and 27 Decree nr. 2010-406 the value shall mean the value of all the foreseeable products needed for the execution of the concession, including the value of all construction works, components and materials provided by the public authority.

- Notion of risk

The french jurisprudence has established that the transfer of the "risque d'exploitation" is the key element in the definition of a concession (décision Département de la Vendée du Conseil d'Etat du 7 novembre 2008). However it is still unclear how this risk should be defined in practice and which proportion of the risk has to be transferred.¹⁵

¹⁰ Law No. 93-122 of 29 January 1993 on the prevention of bribery, the transparency of economy and public procedures

¹¹ Ordonnance n° 2009-864 du 15 juillet 2009, source: impact assessment, Annex II

¹² Ordonnance n° 2009-864 du 15 juillet 2009, source: impact assessment, Annex II

¹³ Ordonnance n° 2009-864 du 15 juillet 2009, source: impact assessment, Annex II

¹⁴ Official EU-threshold applicable until 31.12.2011, it is assumed that the thresholds have been amended with effect from 1 January 2012.

¹⁵ Capitant: Le risque économique: nouveau critère de la délégation de service public?", Revue Lamy 2009

- Special treatment or exclusions:

The Loi Sapin is not applicable for concessions

a) if a private entity has a legal monopoly;

b) if the ECJ-inhouse-rules apply

c) in case of the above mentioned thresholds (simplified procedure)

d) if the concession consists in the right to manage council housings assigned to a council housing organisation.

- Length (and prolongation)

Art. 40 Loi Sapin: The concessions shall be limited. The length is determined by the contracting authority and depends on the required services. The concession shall take into account the investment the concessionaire has to make and shall not exceed the usual length of the recovery period.

In the area of drinking water, waste and wastewater treatment concessions shall not exceed 20 years. Exceptions are possible.

Prolongation of a concession is only possible:

Art. 40 (a) For reasons of common interests¹⁶. The prolongation cannot exceed one year.

Art 40 (b) if the concessionaire has to do investments not included in the initial contract, which would modify substantially the economic balance of the concession.

¹⁶ Exact legal wording : « Pour des motifs d'intérêt general" – no other specifications

4. Hungary

- There are two main legal regimes for concessions: Act No. 16 of 1991 on Concessions (CA)¹⁷ and Act No. 129 of 2003 on Public Procurement (HPPA),¹⁸ The CA governs the award of concession contracts in a few specific sectors (e.g. public roads (not motorways), local and regional utilities). For works concessions the HPPA prevails, for service concessions the CA has precedence.¹⁹ Within the HPPA there are different sets of rules for works concessions reaching EU threshold, works concessions below EU threshold and service concessions, the last two ones, however, only refer to the general rules "as appropriate" Art. 265, 266 HPPA
- Definition

Under Art. 242(4) HPPA, "Service concession involves contracting for services where the contracting authority transfers the right to exploit commercially the provision of the relevant services (the right of exploitation) for a specific period of time and the consideration is the right of exploitation or the transfer of this right together with a monetary consideration."

Under Art. 26 Public works concession is a public works contract whereby the consideration by the contracting authority for the works to be carried out consists either in the right to exploit the construction for a specified period of time or in this right together with payment.
- Threshold

EU threshold for works concessions: EUR 4.845 Mio.²⁰, Art. 31(2) HPPA, national threshold for works concessions: ~EUR 380.000, national threshold for service concessions: ~EUR 95.000

The national thresholds, however, are determined by the annual Act on Budget, Art. 244 (1).
- Calculation of value

The value of public procurement shall mean the highest full consideration, generally requested or quoted for the subject of the contract at the commencement of the contract award procedure, excluding value-added tax and calculated in accordance with the provisions of Articles 36–40 and paragraph, Art. 245.
- Notion of risk

No provisions found
- Special treatment or exclusions

See below (simplified procedures for Concessions of Part B- Services). For special areas (i. e. pipeline operation, gambling) the 1991 Act on Concessions is also applicable. General exception for public telecommunication system, security reasons and on international agreements (Art. 243, 29), special exception for the acquisition on immobile property and in cases of crisis management (Art. 243)
- Length (and prolongation)

Specific period of time

¹⁷ Source: Impact assessment, Annex II

¹⁸ Act CXXIX of 2003 on Public Procurement, no official translation: www.oecd.org

¹⁹ Impact Assessment, Annex II

²⁰ Official EU-threshold applicable until 31.12.2011, it is assumed that the thresholds have been amended with effect from 1 January 2012

5. Latvia

- Definition

Sect. 1 lit. 7 of the 2006 Law on Public Private Partnerships²¹ (LPPP) defines a service concession contract as a contract in accordance with which by an order of a public partner the private partner renders the services and as remuneration or a significant part thereof is granted the right to exploit these services and simultaneously such service exploitation risks or a significant share thereof is transferred thereto"

Works concession are defined with the same wording in sect. 1 lit. 6 LPPP.

- Threshold

Threshold for Europe-wide publication following the announcements by the European Commission in the OJEU, Sect. 56 (2) LPPP

- Calculation of value

According to Sect. 13 LPPP the expected contract value for concession contracts is to be determined as the planned total payment of the awarding authority.

- Notion of risk

Sect.1 lit. 9 LPPP defines the (building and service) exploitation risks as economic risks when the revenue of the concessionaire depends on the demand of an end-user for the service or on whether the service is being offered to an end-user in accordance with the service concession contract (availability risk) or on both these risks.

- Special treatment or exclusions

No application of the Law to awards based on international agreements, with regard to security aspects and for electronic communication networks, Sect. 3 LPPP.

- Length (and prolongation)

Sect. 60 LPPP provides for a maximum duration of a concession contract of 30 years. Exemptions may be made if it is necessary for the purpose of the agreement and the results to be achieved that are substantiated by financial and economic calculations.

²¹ Law on Public-Private Partnership, text consolidated by State Language Centre with amending laws of 25 August 2010, to be found under http://intax-info.com/pdf/law_by_country/Latvia/Law%20On%20Public%20-%20Private%20Partnership.pdf

6. Lithuania

- Definition

Art. 2 of the Law on Concessions²² (LC) defines a concession as the authorisation granted by the awarding authority to the concessionaire in compliance with the concession contract to engage in the economic activity connected with the design, construction, development, renovation, transformation, repairs, management, use and/or maintenance of infrastructure objects or to provide public services where the concessionaire assumes all or part of the operating risk and undertakes the relevant rights and duties, while the consideration of the concessionaire for the activity consists solely of the granting of the right to engage in the relevant activity and income from the activity or the granting of the right and income from the activity together with a consideration paid to the concessionaire by the awarding authority in light of the risk assumed by the latter.

- Threshold

Threshold for public works concession for contract value of more than the equivalent in LTL of the thresholds published in the Official Journal of the European Union²³, Art. 2 (8) LC.

- Calculation of value

Value for works concessions to be determined taking into account the estimated value both of the execution of the works and design (where the works are both executed and designed), and the supplies needed to carry out the works and made available to the contractor by the contracting authorities, Art. 9 (13) Law on Public Procurement²⁴, applicable through Art. 2 (8) LC.

- Notion of risk

Assumption of part or all of the operating risk, Art. 2 (1) LC

- Special treatment or exclusions

The award of concession contracts is limited to the areas mentioned in Art. 3 (2) LC

- Length (and prolongation)

Length must provide for recovery of investments but may not exceed 25 years, Art. 22 LC.

²² Law on Concessions, 10 September 1996, No I/1510, official translation, to be found: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=288609

²³ As stated in Art. 11 (3) Law on Public Procurement

²⁴ Law on public procurement of 13 August 1996, No. I-1491 (New version 22 December 2005, No. X-471), official translation, to be found <http://www.oecd.org/dataoecd/7/22/39645903.pdf>

7. Poland

- Definition

Art. 1 lit 2 of the Act on Concession for Works or Services²⁵ (AC) states that under the concession concluded the concessionaire is obliged to perform the subject of concession for remuneration, which consists of exclusively the right to use the work/service or such right with the payment by the concession-granting authority, whereby this payment may not lead to the recovery of the total expenditure incurred by the concessionaire connected with the performance of the concession.

- Threshold

Threshold for Europe-wide publication of works concession notices as specified in the Public Procurement Law²⁶; Art. 12.1 AC (the equivalent in Zloty of EUR 4.845.000²⁷), same threshold to determine the length of the submission period for service concessions.

- Calculation of value

Estimated value of the concession for services is the amount established by the concession-granting authority with due diligence, without VAT, which takes into account the estimated cost of services provided irrespective of the planned method of payment of the concessionaire's remuneration, Art. 9.2 AC

For works concessions the estimated value is assessed by taking into account the estimated cost of construction and the estimated total values of deliveries necessary, Art. 9.1 AC

- Notion of risk

The concessionaire bears the significant part the economic risk of the performed concession, Art. 1.3 AC

- Special treatment or exclusions

no application for security reasons and to telecommunication services among others, Art.4 AC

- Length (and prolongation)

Duration shall take into account the recovery of the concessionaire's expenditure and shall not be longer than 15 years for service concessions and 30 years for works concessions, exceptions are permitted if expenditure cannot be recovered within this period of time, Art.24 AC

²⁵ Journal of Laws No. 19 - 2117 - Item 101, to be found under <http://www.uzp.gov.pl/cmsws/page/?F;370>

²⁶ Act of 29 January 2004 - Public Procurement Law (Journal of Laws of 2010, No. 113, item. 759; No. 161, item. 1078 and No. 182, item 1228 and of 2011, No. 5, item 13, No. 28, item 143 and No. 87 item 484) – consolidated text prepared and translated by the Public Procurement Office, to be found under <http://www.uzp.gov.pl/cmsws/page/?F;370>

²⁷ According to § 1 Regulation of the Prime Minister of 23 December 2009 on the value of contracts and design contests imposing an obligation to submit the notices to the Office for Official Publications of the European Communities (Journal of Laws No. 224, item 1795). Official EU-threshold applicable until 31.12.2011, it is assumed that the thresholds have been amended with effect from 1 January 2012.

8. Portugal

- Definition

Decree-law 18/2008 of 29 January (the Public Procurement code - PCC)²⁸ covers works and services concessions. Art. 407 defines «services concessions» as the contract under which the concessionaire undertakes to manage for a certain period, on his own name and under his own responsibility, an activity of public service provision, where consideration consists on the financial results of that management or on a direct payment by the contracting authority (Source: Annex II Impact assessment).

Works concessions are probably also defined, but could not be identified (no translation found).

- Threshold

PCC rules are applicable to works and service concessions irrespective of their value²⁹.

- Calculation of value

The general rule is applicable: The contract value is the maximum economic benefit that according to the chosen procedure can be obtained by the contracting partner upon the performance of all obligations under the contract. In addition to the price to be paid to the contracting partner, the economic benefit shall include any kind of compensation or consideration received by the latter arising from the performance of the contract³⁰.

- Notion of risk

Art. 413 PCC: the contract shall imply a significant and effective transfer of risk to the concessionaire³¹.

- Special treatment or exclusions

No special rules found

- Length

“For a certain period”³²

²⁸ código dos contratos públicos, Decreto-Lei n.º 18/2008 de 29 de Janeiro, no translation found, www.dgap.gov.pt/upload/Legis/2008_dl_18_29_01.pdf

²⁹ International comparative legal guide Public Procurement 2011 – Portugal, p. 165

³⁰ International comparative legal guide Public Procurement 2011 – Portugal, p. 165

³¹ Impact assessment, Annex II

³² Impact assessment, Annex II

9. Slovakia

- Definition

The Slovakian Act On Public Procurement³³ (APP) defines in Article 15 concessions as “a contract of the same type as a building works/service contract except for the fact that the consideration for the building works to be carried out/the services to be performed consists either solely of the right to exploit the work for an agreed time or of that right together with payment”.

The Act however does not stipulate any special rules with regard to service concessions, but applies the general procurement rules.

- Calculation of value

No specific rules for concessions, general rules (Art. 5 APP) apply: “based on the price at which a similar or comparable object of contract is usually sold”

- Threshold

Special concession threshold of EUR 5.150.000³⁴, Art. 66 (1) APP

- Notion of risk

No mention of notion of risk.

- Special treatment or exclusions

Exclusion of concessions awarded in the energy, water, waste water, transport and postal sector, Art. 1 (2) n) APP in connection with Art. 8 (3) to Art. (9) APP; also excluded are public telecommunications networks, contracts under special security needs and contracts based on international agreements, Art. 66 (3) in connection with Art. 1 (2) a), b), e) f) APP

- Length

The duration of a concession period depends on the object of the concession contract, the amount of payment for the building works to be performed or the service to be provided, and the estimated fair concessionaire’s revenue resulting from the right to enjoy the object of the concession contract or enjoy benefits from the object of the concession contract during the concession period, Art. 66 (3) APP

³³ Act No 25/2006 Coll. of Laws on Public Procurement and on the Amendment of Certain Acts, as amended by Act 282/2006 Coll. of Laws, Act No 102/2007 Coll. of Laws, Act No 232/2008 Coll. of Laws, Act No 442/2008 Coll. of Laws, Act No 213/2009 Coll. of Laws, Act No 289/2009 Coll. of Laws, Act No 402/2009 Coll. of Laws, Act No 503/2009 Coll. of Laws, Act No 73/2010 Coll. of Laws and Act No 129/2010 Coll. of Laws; unofficial translation, to be found under: <http://www.scribd.com/doc/55518001/2010-Act-on-Public-Procurement-Slovakia>

³⁴ Official EU-threshold applicable until 31.12.2009, it is assumed that the thresholds have been amended with effect from 1 January 2012

10. Slovenia

- Definition

Article 26 of the Public-private partnership Act³⁵ (PPPA) defines a concession as a bilateral legal relationship between the awarding authority and a legal or natural person as a concessionaire, in which the awarding authority awards to the concessionaire the special or exclusive right to perform a commercial public service or other activity in the public interest, which may include the construction of structures and facilities that are in part or entirely in the public interest (hereinafter: concession partnership).

Furthermore Article 92 PPPA defines services concessions as opposed to works concessions, the only distinction being the absence of a works concession itself.

- Threshold

If the value is greater than 5.278.000 EUR³⁶ the contracting authority is obliged to assess the possibility of a public/private partnership, Art. 8 PPPA. In the case of works concessions the same threshold provides for the obligation to issue a public tender, Article 82, 83 (1) PPPA. When changes to the thresholds are published by the European Commission there shall be published in the Official Gazette, Art. 8 (5) APPP

- Calculation of value

No special provisions

- Notion of risk

The contractor keeps, assumes and manages, depending on the nature of the partnership, part of the commercial risk, Art. 71 PPPA. The concessionaire has to bear the majority of the project's commercial risk, Art. 79, 95 PPPA

- Special treatment or exclusions

Exceptions for security reasons, contracts based in international agreements and in certain sectors (telecommunication networks, broadcasting...), Art. 84 PPPA in connection with Art. 17/18 Public Procurement Act³⁷

- Length

Long-term relationship established for a fixed period. Duration shall be determined to afford the contractor stability and security of investment, a recovery on investment and a market yield, Art. 71 PPPA.

³⁵ Public-Private Partnership Act (ZJZP), to be found under http://www.mf.gov.si/fileadmin/mf.gov.si/pageuploads/javno_zas_partnerstvo/53646-ZJZP_EN.pdf

³⁶ Official EU-threshold applicable until 31.12.2007, it is assumed that the thresholds have been amended with effect from 1 January 2012

³⁷ Public Procurement Act (ZJN-2) of 23 November 2006, to be found <http://www.oecd.org/dataoecd/6/33/39647089.pdf>

11. Spain

- Definition

Article 8, Public Contracts Law³⁸ defines service concessions as the contract in which a public authority entails a juridical or physical person the management of a public service, whose provision falls within the scope of the competences of the public authority. Articles 251 and 253, a) settle down that through a concession a public administration could manage indirectly services of its own competence, whenever they could be exploited by private operators.

Art. 7 defines works concessions as a contract concerning the performance by the concessionaire of one of the works referred to in Article 6, including restoration and reparation of existing buildings and the conservation and maintenance of built elements and in which the consideration consists either solely in the right to exploit the work, or in this right together with a payment.

Works Concessions for a specific type of infrastructure (e.g., roads, railroads, and water facilities) are also regulated in the Public Works Concession Law³⁹. However, it remains unclear to which extent the newer Public Contracts Law overrules the older Concession Law, as it contains very detailed rules on works concessions.

- Threshold

For Works concessions only the EU-Threshold is applicable. No special provision for service concessions, except Art. 156: negotiated procedure applicable, if the value of the concession is below EUR 500.000 and the duration is under 5 years.

- Calculation of value

Art 88 (3) provides on works concessions that it shall be taken into consideration the value of the works and the estimated value of the expenses needed for the execution of these works.

Regarding services concessions, Art.172 b) specifies that the negotiated procedure can be used if the value of all the expenses the concessionaire has incurred to start the provision of the service is below EUR 500.000⁴⁰.

- Notion of risk

The concessionaire will assume the risk of the contract, Art. 242 (1) (works), Art. 277 (a) (services). Detailed Risk-sharing rules:

- The Law provides for certain mechanisms which contribute to mitigating to a certain extent the demand risk. For example, the so-called "reinstatement of the economic balance of the concession". This will apply in certain situations, namely when the Administration modifies for reasons of public interest the conditions of exploitation of the concession, Art. 243, 250 (works); or when by reason of *force majeure* or of actions of the Administration there occurs a substantial breach in the economic terms of the concession, Art. 258 (works), Art. 282 (service)

³⁸ Real Decreto Legislativo 3/2011, de 14 de noviembre, por el que se aprueba el texto refundido de la Ley de Contratos del Sector Público, translations made by the authors, www.boe.es/boe/dias/2011/11/16/pdfs/BOE-A-2011-17887.pdf

³⁹ Ley 13/2003 Reguladora del Contrato de Concesión de Obras Públicas (march 2010)

⁴⁰ Annex II, Impact assessment

- Only for works concessions: Regarding operation and maintenance risk, the Public Works Concession Law incorporates two features: the so-called progress clause and the introduction of bonuses and penalties related to the fulfillment of certain quality criteria. The progress clause consists of the obligation of the concessionaire to maintain and operate the public works according to the technical, environmental, and safety regulations that may be applicable at each moment. In turn, with the introduction of penalties and bonuses derived from quality indicators, the law intends to encourage the concessionaire to render the best possible service to the larger society⁴¹.
- Special treatment or exclusions
No special rules
- Length
For service concessions:
Art. 278, Including all extensions a concession cannot exceed
 - a) 50 years. A concession regarding grocery distributors shall not exceed 60 years.
 - b) 25 years, if the concession does not include sanitary services.
 - c) 10 years for concessions about sanitary services, if they are not falling under the scope of a).Art. 282 (5) Extension of 10 percent of the initial duration is possible in the case of § 282 (4) (substantial modification in the terms of the concession due to force majeure or actions of the administration). They shall not exceed the maximum length mentioned above.
For works concessions:
Art. 268, the concessions shall not exceed 40 years. Prolongation of max. 15 percent of the initial duration is possible in the case of § 258 (3).

⁴¹ José M. Vassallo and Juan Gallego, Risk Sharing in the New Public Works Concession Law in Spain

II. Procedures in selected Member States

1. Bulgaria

- (i) Publication:
Announcement in the state Gazette (Art. 41 CA)
- (ii) Procedure:
Selection of an open procedure, a restricted procedure or an electronic auction, as a supplementary procedure to the open or restricted procedure (Art. 24 CA),
- (iii) Selection and award criteria:
- Selection of candidates in accordance to selection criteria stated in the announcement (Art. 25, 26 CA)
 - Limitation of number in restricted procedure (with publication of criteria and minimum number – 5 in restricted procedure), Art. 26 (8), (9) CA
 - Selection of economically most beneficial offer (in accordance with criteria specified in the announcement – for electronic auction price only is also a valid award criterion), Art. 27, 28 CA.

2. Czech Republic

- (i) Publication:
Works concessions above EU thresholds: publication in the OJEU + National Information System of Public Contracts (single point of access).
All other (works+service) concessions: publication in the National Information System of Public Contracts.
- (ii) Procedure:
§ 7 Concession Act:
- (1) Invitation to an unlimited number of economic operators (with evaluation criteria)
 - (2) Assessment of qualifications / exclusion following the provisions of the Act on Public Contracts
 - (3) Limitation of number / not less than 3 economic operators to be invited to submit tenders
 - (4) Two options: Invitation to submit tenders (§ 8), which may be subject to negotiations OR invitation to participate in the concession dialogue (§ 10) – the purpose of which is to develop one or more suitable alternative solutions of a concession project, following the selection of one or more alternative suitable solutions, contracting authority invites to submit tenders.
- (iii) Selection and award criteria: Provisions of Public Contracts Act apply accordingly. Award criteria have to be published in the notice. Only economically most advantageous tender can be used as award criteria.

3. France

Service concessions

- (i) Publication:
in a journal/newspaper publishing tender notices and in an publication specialised in the concerned economic sector, Decree nr. 93-471 of march 1993
- (ii) Procedure:
Procedure similar to negotiated procedure with publication: first verification of suitability of candidates according to selection criteria, then call for tenders with specifications and contract documents, free negotiation of the offers, Art. 38
Art. 43: rules regarding the establishment of a special procurement commission, opening of tenders, negotiations', written recommendation for the award (award criteria are not mentioned)
Art. 44: final award decision by the (local, regional) parliament (assemblée délibérante) minimum two months after getting the documentation from the commission.
Art. 45: direct negotiations without publication only if there were no offers after former procedure with publication or no offer was accepted.
- (iii) Selection and award criteria:
No publication rules for selection or award criteria. Nevertheless the national jurisprudence⁴² seems to postulate the obligation to inform the bidders of the selection criteria before submitting the offers.

Works concessions (source: impact assessment Annex II)

- (i) Publication:
free choice of publication, depending on the character of the concession and its estimated value, Art. 12 and 27 Decree nr. 2010-406 .
- (ii) Procedures:
no specifications, but the general principles are applicable (at least above the EU Thresholds), Art. 5, 11 Order nr. 2009-864 and Art. 5 Decree nr. 2010-406.
- (iii) Selection and award criteria:
No provisions concerning selection or award criteria, but the general principles are applicable. Above the EU thresholds publication of award criteria is compulsory (transposition of Dir. 2004/18/EC), Art. 5, 11 Order nr. 2009-864 and Art. 5 Decree nr. 2010-406.

⁴² Ruling of the Conseil d'Etat « Musée de Versailles », 23.12.2009, source: impact assessment, Annex II

4. Hungary

(i) Publication:

For works concessions in the Public Sector, exceeding the EU threshold: publication in the OJEU (Art. 44 and 138 HPPA). For works concessions and service concessions in the Public Sector, above the national threshold: publication in the national Procurement Gazette (Art. 244 HPPA).

For service concessions covered by Act No. 16 of 1991 on Concessions (CA): publication in 2 national newspapers (Art. 8(1) CA).

(ii) Procedure:

The contracting authority specifies in the notice starting the procedure the type of public contract award procedure applied: open, restricted or negotiated procedure or competitive dialogue. An accelerated or framework procedure may also be applied, as well as a simplified procedure in case of ordering services listed in annex 4 (Part B-services). The contracting authority may adopt a negotiated procedure launched by the publication of a notice other than specified in Article 124 (2). The contracting authority shall adopt a negotiated procedure without a notice only pursuant to Article 125 (1), (2)

(iii) Selection and award criteria:

For works concessions reaching the EU threshold, only the criterion 'the economically most advantageous offer' can be used, Art. 141(a) HPPA. There are no specifications for service concessions or works concessions below EU thresholds. Publication rules for (selection and award) criteria are only compulsory for works concessions reaching the EU thresholds.

5. Latvia

(i) Publication rules

Sect. 38 Law on Public-Private Partnership (LPPP): Publication of a notice on invitation/inception by the Procurement Monitoring Bureau on their website. Publication in OJEU is permitted, but only obligatory for works concession above threshold, Sect. 57

Sect. 53 LPPP: notice of results to candidates specifying reasons for refusal, relative advantages of the selected tender and terms for remedy, subsequently publication of notice on website

(ii) Procedure

Three types of procedures for the award of concession contracts, Sect. 17 LPPP:

1. competition without selection of candidates
2. competition with selection of candidates
3. competitive dialogue

Competitive dialogue is applicable only if subject is particularly complicated.

The different stages of the procedures are further described in Sect. 32 LPPP for the different types of procedures. Common elements to all procedures are

- (1) development of the Regulation
- (2) involvement of Monitoring Institution
- (3) publication of a notice
- (4) submission of tenders
- (5) evaluation of tenders
- (6) negotiations on draft concession contract
- (7) publication of the results.

For the competition with selection of participants and the competitive dialogue there are additional steps in between. Selection and award criteria

no rules for selection criteria. Lowest price or economically most advantageous offer, for the latter, catalogue of possible award (evaluation) criteria in Sect. 51 LPPP with regard to, among others, quality of service, safety and environmental protection, life-time cost.

(iii) Modification and renewal rules

amendment of concession contract possible when changes in regulatory enactments or economic and financial conditions have occurred, these may not change the risk allocation of the concession contract, Sect. 63 LPPP.

6. Lithuania

(i) Publication rules

According to Art. 9 (3) Law on Concessions (LC) tendering conditions shall be published in the supplement to the national gazette. They may be circulated in other media. For works concession publication in the OJEU is foreseen in Art. 20(1) LC.

Art. 19 publication of award of concession contract in supplement to the official gazette

(ii) Procedure:

According to Art. 6 LC concessions shall be awarded following an open tender procedure. Tendering shall be held in the following phases, Art. 8:

- (1) publication of tender notice
- (2) pre/selection
- (3) submitting preliminary non/binding tenders
- (4) evaluation of preliminary non/binding tenders
- (5) submitting detailed binding tenders
- (6) evaluation of detailed binding tenders
- (7) negotiations and conclusion of the concession contract

(iii) Selection and award criteria

Selection criteria are not limited to the aspects mentioned in Art. 10 (1) LC. Award criteria are laid down in Art. 14 LC and comprise technical (technical soundness, operational feasibility, quality of service, environmental protection, social and economic effects on country or region) and financial/commercial aspects (amounts to be collected by concessionaire from users, payments to be made by awarding authority, payments by the concessionaire, life time cost et. al. These criteria have to be published, Art. 9 (3) LC

7. Poland

(i) publication rules

According to Art. 10 (2) of the Act on Concessions for Works and Services (AC) generally the notice of concession has to be published in the Public Procurement Bulletin, and locally on the authority's website. In the case of works concessions the notice has to be send to the OJEU, Art. 10 (3) AC.

(ii) Procedure:

The awarding authorities are obliged to award concession contracts in a special procedure, Art. 6 AC:

- (1) description of the subject of concession, Art. 7 AC
- (2) notice of the concession, Art. 11 AC
- (3) submission of request by interested entities, Art. 13 AC
- (4) negotiations, Art. 14 AC
- (5) delivery of concession conditions to candidates, Art. 15 AC
- (6) submission of tenders and clarification, Art. 16 AC
- (7) selection of most advantageous tender, Art. 17 AC.

(iii) Selection and award criteria

No rules with regard to selection criteria. Award criteria must be published in the initial notice, Art. 11 lit. 7 AC.

Art. 17 AC: The concession-granting authority shall choose the most advantageous tender based on tender evaluation criteria specified in the concession conditions. For these criteria it can choose from the following (non exhaustive): duration of concession, the amount of co-financing of the subject of concession from the tenderer's funds, exploitation costs of the subject of concession, the amount of payment for the service provided for the benefit of third parties exploiting the subject of concession, the quality of performance, technical value, aesthetic and functional characteristics, environmental aspects, profitability, time-limit of performance of the concession subject

(iv) modification and renewal rules

The modification of the concession contract is forbidden, unless circumstances have changed in a way that could not be foreseen, Art.23.1 AC.

With regard to works concessions an additional contract may be concluded if necessary and if the circumstances could not be foreseen, the subject may not be separated from the subject of the concession and the additional value does not exceed 50 % of the concession value, Art. 25.1 AC.

8. Portugal

(i) Publication:

Works concessions falling within the scope of Dir. 2004/18/EC: publication in the OJEU irrespectively of the estimated value of the contract.

Works concessions in the utilities sector and services concessions: publication in the national Official Journal (Diário da República) irrespectively of the estimated value of the contract⁴³.

(ii) Procedure:

The open procedure, the restricted procedure or the negotiated procedures may be used alternatively. In the open procedure the contracting authority may choose a period for the negotiation of proposals⁴⁴.

The competitive dialogue is excluded for the award of concessions in the «utilities» sector (see Art. 33 (2)). Direct awards are possible for relevant reasons of public interest (see Art. 31 (3)).

(iii) Selection and award criteria:

Award criteria are the same as for public contracts in general (source: Impact Assessment Annex II). The criteria on which the contracting authorities shall base the award of public contracts shall be either: the most economically advantageous bid; or the lowest price only. The lowest price criteria may only be adopted when the specifications determine all the remaining aspects of the contract execution only submitting to competition the price the contracting authority will have to pay. The criteria should be determined by the contracting authority and must appear in the notices and in the specifications. When more than one criterion is taken into consideration, the contracting authority shall also specify the weighting assigned to each.

(iv) Modification and renewal rules

On certain circumstances, based on the public interest demands, the award authority can propose the adjustment of the contents of the contract and these adjustments depend on the contractor's acceptance. For public works concessions, the contract modification can cause the reinstatement of the economic balance of the contract⁴⁵.

⁴³ Annex II, impact assessment

⁴⁴ International Comparative legal guide Public Procurement 2011 – Portugal

⁴⁵ International comparative legal guide Public Procurement 2011 – Portugal, p. 168

9. Slovakia

(i) Publication rules

According to Art. 67 (2) Act on Public Procurement (APP) publication of both concession and award notice is required. The concession notice concerning building works shall be sent to the Publications Office (of the European Communities) and the (national) Office (for Public Procurement), concerning services shall be sent to the Office.

(ii) Procedure

Art. 67 APP refers to Standard Procurement Procedures, no special rules with regard to concessions. According to Art. 24 APP, there are four different procedures in place:

- (1) open procedure
- (2) restricted procedure
- (3) negotiated procedure
- (4) competitive dialogue.

(iii) Selection and award criteria

no rules with regard to selection criteria

Art. 35 APP stipulates for the award of contracts either the economically most advantageous tender or the lowest price. If the former option is chosen, Art. 35 (3) APP lays out criteria that can be used, among which are quality, environmental characteristics, operating cost. The criteria shall be published along with their relative weighing or at least order of importance.

(iv) Modification and renewal rules

Art. 68 (2) APP allows for additional building works or services to be awarded directly to the concessionaire without new tender if necessary and if the circumstances could not be foreseen, the subject may not be separated from the subject of the concession and the additional value does not exceed 50 % of the concession value, Art. 68 (3) APP.

10. Slovenia

(i) Publication rules

According to Art. 42 Public-Private Partnership Act (PPPA) any partner of a public-private partnership (of which concessions are one form) shall be selected on the basis of a public tender, notice of which must also be published on the Internet. For works concession Article 82 PPPA makes obligatory the publication in the OJEU as required by the Procurement Directives. No notice is necessary if the estimated value does not reach EU-threshold⁴⁶, Art. 83 PPPA.

(ii) A public/private partnership contractor shall be selected on the basis of a public tender – similar to open procedure, Art. 42 PPPA.

- (1) Publication of tender notice, Art. 48 PPPA
- (2) Submission of application, Art. 53 PPPA
- (3) Review whether tender conditions are fulfilled, Art. 54 PPPA
- (4) Drafting of report indicating ranking of applicants, Art. 55 PPPA
- (5) Selection of contractor Art. 56 PPPA

With the exception of few special rules, in particular with regard to works concessions, the general rules of the public-private partnership act apply.

(iii) Selection and award criteria

The criteria for the selection of the most advantageous offer have to be published, Art. 48 PPPA. The publication must set out the importance and weighing of each criterion on the basis of which the most economically advantageous partner is selected. At least the order of importance must be mentioned, Art. 50 PPPA.

(iv) Modification and renewal rules

The duration may only be extended in a manner provided in advance, Art. 71 PPPA. Other rules for modification or renewal do not exist.

⁴⁶ 5.278.000 EUR=EU-threshold applicable until 31.12.2007

11. Spain

- (i) Publication of announcements: Publication must be at national level in the "Boletín Oficial del Estado" or at regional level in the "Diario Oficial de la Comunidad Autónoma" (depending on the contracting authority). Works concessions must be published at EU level in the OJEU (Article 126 Public Contracts Law).
- (ii) Procedure: As a general rule, use of an open or restricted procedure. The contracting authority shall adopt a negotiated procedure only pursuant to Article 170 and - for service concessions only – Art. 172 Public Contracts Law, (e.g. when the value of the contract is below 500.000 EUR). Competitive dialogue can be used only in case of specially complex contracts (source: Impact assessment Annex II).
- (iii) Selection and award criteria:

Bidders must comply with certain solvency and capacity requirements that may need to be proved (selection criteria). A bidding bond will normally be required, amounting to not less than 2% of the total investment amount. Selection of economically most advantageous offer only. Award criteria are the same as for public contracts in general and have to be published in the tender notice, Art. 150.
- (iv) Modification and renewal rules

"reinstatement of the economic balance of the concession". This will apply in certain situations, namely when the Administration modifies for reasons of public interest the conditions of exploitation of the concession, Art. 243, 250 (works); or when by reason of *force majeure* or of actions of the Administration there occurs a substantial breach in the economic terms of the concession, Art. 258 (works), Art. 282 (service)

NOTES

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

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