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Concession contracts

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CONCESSION CONTRACTS

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Contents

List of abbreviations

PPP – Public-Private Partnership

EIB – European Investment Bank

EC – European Commission

ESA 2010 – European System of Accounts 2010

EU – European Union

PFI – Private Finance Initiative

OIReScon – Independent Office for the Regulation and Supervision of Procurement

GDP – Gross Domestic Product

CJEU – Court of Justice of the European Union

1. Summary

1.1. Purpose of the Study

This study has been conducted at the request of the European Commission (DG GROW, Unit D2 – Public Procurement) as part of the process of evaluating and potentially revising Directives 2014/23/EU, 2014/24/EU and 2014/25/EU (the Public Procurement Directives). Its aim is to provide insights, based on available evidence, for possible future amendments to Directive 2014/23/EU.

The report on the functioning of Directive 2014/23/EU, published in 2023 ([1]), highlighted that while the Directive has helped to harmonise national legislation, its implementation varies across Member States. In particular, the varied use of the term ‘concession’ and the inconsistent interpretation of ‘operating risk’ undermine legal clarity and market access.

Within this context, the study seeks to improve the clarity and consistency of the concepts of ‘concession’ and ‘operating risk’, as well as the rules related to the duration of concessions and the reversion of assets upon expiry. It pays particular attention to the circumstances under which operating risk is effectively transferred to the concessionaire. This is especially the case when the right to operate is combined with payments from the contracting authority. It also focuses on the formulation of criteria—including possible quantitative criteria—to determine when such transfers are sufficient for the contract to fall within the scope of Directive 2014/23/EU rather than Directive 2014/24/EU.

The study also analyses the interrelationship between Directive 2014/23/EU and Regulation (EU) No 549/2013 (the ESA Regulation), given that the transfer and allocation of risk is a key element for the accounting classification of concessions—and their impact on the public deficit and debt—and for their legal distinction from other contract types.

Finally, the report examines the application of the key elements of the concession contract during the implementation phase, with particular attention to contractual amendments and economic and financial rebalancing. It puts forward proposals for boosting legal certainty for both contracting authorities and economic operators.

([1]) European Commission, *Report from the Commission to the European Parliament and the Council on the functioning of Directive 2014/23/EU on the award of concession contracts and on the impact on the internal market of the exclusions set out in Article 12*, COM(2023) 460 final.

1.2. Methodology

This study is primarily based on a legal methodology, guided by the classical idea of the legal system as an ordered and coherent whole, whose constituent concepts must fit together harmoniously ([2]). From this perspective, this research analyses the current legal framework and puts forward proposals for its improvement. At its core is an analysis of European public procurement law, the 2014 Directives and, specifically, Directive 2014/23/EU ([3]). It also examines the case law of the Court of Justice of the European Union (CJEU), which underpins the key concepts of the concession system and its evolution to this day.

The study has used the accounting framework of the ESA 2010 Regulation and Eurostat decisions as benchmarks. Rather than a subject of analysis, they are intended as points of comparison: the legal definition of concessions and the assignment of risks cannot be understood today without considering the interaction between legal and accounting spheres.

The analysis has been supplemented by an examination of the national legislation of several Member States, which offers varying regulatory responses to common problems and enables the identification of best practices. Specific references have also been made to European sectoral legislation that affects concession contracts, such as Regulation (EC) No 1370/2007 on public transportation ([4]), Regulation (EU) 2020/852 on taxonomy ([5]), and Directive (EU) 2023/1791 on energy ([6]).

([2]) N Bobbio, '*Teoria dell'ordinamento giuridico*', Giappichelli, Turin, 1960; E. Schmidt-Aßmann, '*Das allgemeine Verwaltungsrecht als Ordnungsidee*', Springer, Berlin-Heidelberg, 1998.

([3]) Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts; Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC; and Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC.

([4]) Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70.

([5]) Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 (Text with EEA relevance).

([6]) Directive (EU) 2023/1791 of the European Parliament and of the Council of 13 September 2023 on energy efficiency and amending Regulation (EU) 2023/955 (recast) (Text with EEA relevance).

Finally, the study also involved conducting a series of interviews with experts in the fields of public procurement, public-private partnerships (PPPs) and concessions, system operators, judges and funding institutions, in order to cross-check and validate the preliminary conclusions against actual practices in the concessions market. The study has also drawn on various evaluation reports, including those published by the European Commission, the European Court of Auditors and the European Investment Bank.

2. Key Points of the Report

Concession contracts are complex, long-term contracts. In works concessions, the concessionaire builds an infrastructure and operates it for a specified period of time. In service concessions, the operator takes on the management of a specific service. Traditionally, the public sector has used concessions to build major infrastructures and to provide a variety of public services.

These contracts represent a genuine collaboration or partnership between public and private sectors, which pool efforts, technical expertise and financial resources to achieve objectives of general interest. The EU has long encouraged this type of partnership as an effective means of executing large-scale and complex projects ([7]). Within the broad range of PPP models, Directive 2014/23/EU constitutes the first specific and systematic European legislation of a particular form of PPP: works concessions and service concessions.

It is essential to have a clear framework of rules and concepts. Economic operators require stable legal concepts, whose content is grounded in legal doctrine and practice, without giving rise to major disputes ([8]). The lack of clarity in Directive 2014/23/EU regarding certain aspects linked to the definition of concession contracts should be addressed in a future review of the current framework. However, precisely because of the importance of maintaining regulatory stability, this intervention may be selective, limited to those aspects that have given rise to the greatest doubts regarding their interpretation, such as the definition of operating risk and the conditions for its effective transfer.

The absence of a clearly defined concept of concessions in EU law has been partly mitigated by the use of the concepts and categories included in Regulation (EU) No 549/2013 of the European Parliament and of the Council of 21 May 2013 on the European System of National and Regional Accounts in the European Union (hereinafter, the ESA-2010 Regulation) ([9]). Similar conceptual categories undoubtedly coexist in both spheres —that is, the legal sphere and the ESA-2010 accounting framework. In Directive 2014/23/EU, the concept of a concession based on 'operating risk transfer' makes it possible to distinguish concessions from works contracts and services contracts. Moreover, the application of the

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([7]) See, for example, European Commission, *Europe 2020: A strategy for smart, sustainable and inclusive growth* COM(2010) 2020 final.

([8]) European Investment Bank, *EPEC Guide to Public-Private Partnerships* (2026) 112: 'A PPP project or programme stands the greatest chance of success when it is prepared, procured and delivered within a legal framework that is clear, stable and supportive of complex, long-term PPP investment arrangements.'

([9]) It is also likely that European co-legislators took the ESA's terminological framework into account, as demonstrated by the constant reference to 'availability risk' throughout the procedure for the adoption of Directive 2014/23.

ESA-2010 Regulation is based precisely on the transfer of certain risks in order to establish the accounting treatment of the transaction and whether the economic assets and liabilities associated with the contract should be recorded in the general government balance sheet or be excluded from it.

Public contracts are a highly significant source of public debt, insofar as decisions in this area may directly affect national accounts and deficit and debt levels ([10]). The close relationship between the ESA-2010 Regulation and European legislation on concessions advises strengthening the coherence between the two levels to avoid interpretive discrepancies.

The technical and financial complexity of these procurements also requires a highly rigorous and professional planning and contract preparation phase, in addition to refined control and monitoring mechanisms during their implementation. Experience has shown a weakness in the preliminary study phase, which is subsequently carried over into the contractual implementation phase and results in an inefficient use of public resources ([11]).

Another key to consider when regulating concessions is their duration. Linking concession terms solely to financial criteria is problematic in view of achieving strategic public procurement objectives. This approach has become increasingly insufficient in a context where critical infrastructures with major impacts are built and managed through concessions. Discussions have begun on solutions to make the duration criterion more flexible by incorporating additional factors. In this vein, it is proposed to move towards a model in which the duration of concessions is no longer a purely financial variable.

The review of the European framework for concessions should also take into account the roles played by these contracts in mobilising substantial investment in critical sectors such as transport, energy, water, waste management and social

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([10]) European Court of Auditors, *Public-Private Partnerships in the EU: Widespread shortcomings and limited benefits* (Special Report No 9/2018, 2018) 10 *"Public-Private Partnership (PPP) projects harness both the public and the private sector to provide goods and services which are conventionally supplied by the public sector, while easing the stringent budgetary constraints placed on public expenditure*" (our emphasis). The European Commission has emphasised the same point in the European Commission *Report from the Commission to the European Parliament and the Council on the functioning of Directive 2014/23/EU on the award of concession contracts and on the impact on the internal market of the exclusions set out in Article 12*, COM(2023) 460 final, noting that "When public authorities need to mobilise private capital and know-how to complement scarce public resources, concessions can be a very attractive way of carrying out projects of public interest, *while limiting public debt*" (emphasis added).

([11]) See inter alia European Court of Auditors, Public-Private Partnerships in the EU: Widespread Shortcomings and Limited Benefits (Special Report No 9/2018), which identifies weaknesses in the planning phase of concession projects, including preliminary analyses based on overly optimistic scenarios and the selection of contractual arrangements without prior comparative analysis. See also Section 6 below.

infrastructure. The decisions made in these contracts have an impact that extends for decades on the management of concession assets and infrastructure, as well as on the services associated with them. This long-term nature, combined with the binding requirements of the European sustainable finance framework, suggests that environmental sustainability should form part of the initial design of the concession itself ([12]). Furthermore, the emergence of European preference mechanisms, supply chain security or product origin requirements, as well as initiatives to boost the internal market, reflects a shift towards a new procurement model. Concessions are especially impacted by this transformation due to their reliance on complex, globalised supply chains and their long-term financing structures.

Directive 2014/23/EU provides an initial European regulatory framework based on minimal coordination. However, a decade after its adoption, the practical experience gained from its implementation highlights certain structural shortcomings of this model of minimal coordination. A framework with greater regulatory density and rules tailored to the specific nature of these contracts would strengthen legal certainty for economic operators and awarding authorities, thus promoting a more balanced and efficient European concessions market. This shift towards greater regulatory requirements is in line with the evolution of European public procurement law to date ([13]).

A review of the rules on contractual amendments and, specifically, the introduction of provisions on the rebalancing of concessions would help to endow the system with greater legal certainty. This need is accentuated when one considers that concession contracts are, by their very nature, long-term contracts, particularly exposed to changes in economic, technical or regulatory conditions that cannot always be accurately anticipated at the time of awarding ([14]). To this may be added the current global context, marked by a high degree of uncertainty, volatility in energy markets, geopolitical tensions, dependence on strategic supply chains and the reconfiguration of international trade relations. Against this backdrop, the provision of a more developed regulatory framework for the implementation phase is not only desirable but necessary to guarantee the long-term stability and feasibility of concession projects.

([12]) See also Section 3.2.2 below, where the close relationship between concession contracts and the European sustainable finance framework, in particular the Taxonomy Regulation (EU) 2020/852, is further developed.

([13]) European Union law has gradually incorporated new contract types and regulatory areas. Thus, for example, the rules on contractual performance were only recently incorporated into the latest package of European public procurement Directives of 2014.

([14]) This idea is well expressed by the notion of concession contracts as open-ended or incomplete contracts.

3. Background

3.1. Public-private partnerships and concessions

The European Union has shown great interest in promoting public-private partnerships as a means of delivering infrastructure and public services. However, this has not resulted in the adoption of specific PPP legislation, being addressed only in *soft-law* documents, specifically Commission Communications and Green Papers. In 2004, the European Commission defined PPPs as "*forms of cooperation between public authorities and the world of business which aim to ensure the funding, construction, renovation, management or maintenance of an infrastructure or the provision of a service*" ([15]). The Commission drew a distinction between two PPP models: institutional and contractual. In the first, the partnership between the public and private sectors materialises as a separate entity (a mixed-ownership entity). In the second, two sub-types were identified by the Commission. On the one hand, 'concessions', where the private partner derives its remuneration from the users of the facility or service. In this sub-type, the private partner provides a service to the public 'in lieu of' the government, although it remains subject to the government's control ([16]). On the other hand, the so-called 'Private Finance Initiative' (PFI) ([17]), in which the private partner undertakes *"to carry out and administer an infrastructure for the public authority (for example, a school, a hospital, a penitential centre, a transport infrastructure)."* What distinguishes this second sub-type is that the private partner's remuneration *"does not take the form of charges paid by the users of the works or of the service, but of regular payments by the public partner. These payments may be fixed, but may also be calculated in a variable manner, on the basis, for example, of the availability of the works or the related services, or even the level of use of the works*" ([18]).

Subsequently, this model for contractual PPPs, drawn up by the Commission in 2004, was adopted and refined in accounting terms by Eurostat, within the

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([15]) European Commission, *Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions*, COM(2004) 327 final, para 1, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52004DC0327

([16]) European Commission (n 15).

([17]) In fact, the PFI is the most typical example of this second category, and its name derives from a British government programme launched to modernise public infrastructure using private funding.

([18]) European Commission (n 15), para 23.

framework of the European System of Accounts ([19]). Within this context, and for the purposes of monitoring budgetary discipline and the correct transfer of assets, Eurostat restricts the concept of PPPs to the PFI model and draws a clear distinction between PPPs and concessions based on the main source of the economic operator's revenue. These rules have been consolidated in Regulation (EU) No 549/2013 (the ESA 2010 Regulation). Within this framework, construction risk constitutes a structural element common to all contracts covered by its scope. Interpreting this framework also requires consideration of Eurostat's successive statements, from which general guidelines that shed light on their application to other scenarios can be drawn. These criteria have been set out in The *Manual on Government Deficit and Debt: Implementation of ESA 2010 (2022 edition)* (hereafter, MGDD). As a very brief summary, the ESA 2010 Regulation establishes that PPPs are complex, long-term contracts between two entities, one of which is normally a company (or a group of companies, whether private or public) referred to as the operator or partner, and the other usually a general government entity referred to as the grantor. As defined in ESA 2010, PPPs involve significant capital expenditure by the company to create or renew fixed assets, which it then operates and manages in order to produce and provide services to either the general government unit (using the terminology of the ESA 2010 Regulation) or to the general public on behalf of said government unit. The ESA 2010 Regulation clarifies that normally, when the contract expires, the public authority (granting authority) acquires legal ownership of the fixed assets, which are typically associated with certain public services—such as schools, universities, hospitals and prisons—or, more generally, with infrastructure. PPPs are therefore long-term contracts under which a new asset is built or an existing asset is significantly refurbished, after which the private entity manages the facility or service ([20]). In light of the above, PPPs differ from concessions in that *the infrastructure is financed predominantly by payments from the public authorities, whereas in concessions, remuneration is mainly derived from user payments.*

This background highlights a significant difference in both the regulatory intensity and the approach. PPPs are defined by means of non-binding instruments, based on broad categories and essentially serving a guiding function. For its part, Directive 2014/23/EU has limited scope, as its subject matter is confined exclusively to concession contracts, without extending to other forms of PPPs. Furthermore, it is general in nature, establishing principles rather than detailed

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([19]) For a more detailed discussion of the ESA 2010 Regulation and its influence on the formulation of the definition of a concession, see section 4.3, 'Operating risk: a "mosaic" concept', which is devoted to an analysis of the concept of operating risk.

([20]) See Regulation (EU) No 549/2013, Annex A, paragraph 20.276, which states that PPPs "involve significant capital expenditure by the company to create or renew fixed assets, which it then operates and manages to produce and provide services." The reference to 'facility or service' in the text above should therefore be understood as referring to the asset and the service associated with its management and operation.

rules. Conversely, a comprehensive approach that includes concessions as well as other forms of PPPs may be found in the accounting sphere. Furthermore, this accounting framework has been established through European legislation, supplemented by Eurostat decisions and an extensive and detailed Manual on Government Deficit and Debt, which together form a coherent and operational technical *corpus*. Furthermore, the concepts of PPPs and concessions within the ESA 2010 framework, and the criteria for defining them, have remained substantially stable over time for the purpose of ensuring a consistent classification of transactions and their accurate depiction in terms of public deficit and debt.

From the perspective of national legislation, some Member States have opted for broader regulatory frameworks that include concession contracts but also various forms of public-private partnerships ([21]). This is the case in French law ([22]), Portuguese law ([23]) and Italian law, amongst others ([24]).

Recap

([21]) A similar approach can also be observed in the legislation of some EU candidate countries. For example, Ukraine's recently adopted public procurement legislation distinguishes between concessions and PPPs: Law of Ukraine 'On Public-Private Partnership' No 4510-IX (19 June 2025), Article 5. https://zakon.rada.gov.ua/laws/show/4510-20

([22]) Under French law, concession contracts are defined in Articles L1120-1 to L1122-1 of the Public Procurement Code. For their part, PPPs (marchés de partenariat) are a specific category of public contracts, with a broad scope ('comprehensive mission') and bear similarities to concessions (duration determined by the investment payback period, a certain sharing of risks). However, the successful bidder receives, in return, a payment spread over the entire duration of the contract in accordance with pre-defined performance targets (Article L2213-8 of the Public Procurement Code).

([23]) In the case of Portugal, the Public Contracts Code, adopted by Decree-Law No. 18/2008 of 29 January, generally regulates public contracts, including works and services concession contracts. Public-private partnerships (*parcerias público-privadas*), meanwhile, are governed by a specific legal framework set out in Decree-Law No. 111/2012 of 23 May, which applies to long-term collaborative arrangements in which the private partner assumes, in whole or in part, responsibilities for investment, financing, operation and associated risks. In these cases, the award procedure is subject to the Public Contracts Code, whilst the PPP regime adds specific requirements regarding preparation, justification of the model, economic and financial assessment, risk matrix and institutional monitoring. Of particular note is the involvement of the Technical Unit for Project Monitoring (UTAP), which acts as a technical body providing support, monitoring and economic and financial control of PPPs.

([24]) In Italy, PPPs (*partenariati pubblico-privati*) are a general contractual category regulated by Article 174 of the Public Procurement Code (Legislative Decree 36/2023). Concessions, on the other hand, are a specific form of PPP regulated by Article 176 et seq of the aforementioned Code.

Based on the above analysis, it appears to be clear that concessions are a central form of PPP, but they do not represent all their possible forms. PPPs are proving to be a necessary instrument for organising complex projects involving infrastructure, facilities and the provision of public services. There are various combinations that enable various degrees of coordination of financing, investment, management, risk-sharing and public oversight. From this perspective, it would seem that any future European discussion on PPPs should not be limited exclusively to concessions but rather assess the merits of considering a broader and more flexible framework for the various forms of public-private partnerships.

3.2. The first systematic regulation of concessions in Europe: have the objectives been met?

3.2.1. Background

Until the adoption of Directive 2014/23/EU, EU law lacked a specific and systematic regulatory framework for works and services concession contracts ([25]). However, the Directive does not provide a comprehensive regulatory framework; or in other words, it is not as fully developed as the other Public Procurement Directives ([26]). During the legislative debate leading up to its adoption, MEP Philippe Juvin, rapporteur for the proposal, aptly expressed this idea when he highlighted that the Directive adopts a 'light approach'. The legislation does indeed lay down general requirements, and, where it is more specific (for example, regarding the modification of concessions), it varies little from the classic Directive ([27]). This is paradoxical given that one of the arguments in favour of harmonising concessions was precisely the need to design an *ad hoc* framework to address the distinctive nature of public contracts. However, this paradox does not call into question the need for specific rules on concessions.

([25]) Prior to the adoption of Directive 2014/23, service concessions were expressly excluded from the 2004 Public Procurement Directives. By contrast, certain provisions of the European Directives did apply to works concessions, for example, those related to advertising.

([26]) See P Bogdanowicz, R Caranta and P Telles (eds.), *Public-Private Partnerships and Concessions in the EU. An Unfinished Legislative Framework*, Edward Elgar, Cheltenham/Northampton, 2020.

([27]) Critically, on the limited added value of a standalone instrument, see Sue Arrowsmith, *The Law of Public and Utilities Procurement: Regulation in the EU and UK, Volume 2* (Sweet & Maxwell 2018) 5; Albert Sanchez Graells, 'What Need and Logic for a New Directive on Concessions, Particularly Regarding the Issue of Their Economic Balance' (2012) 2 EPPPL 94. See also Piotr Bogdanowicz, 'Regulation of PPPs and concessions in European Union law – different but equal?' in Piotr Bogdanowicz, Roberto Caranta and Pedro Telles (eds), *Public-Private Partnerships and Concessions in the EU: An Unfinished Legislative Framework* (Edward Elgar 2020) 5–7.

These contracts present distinct features—in particular, the dependence of remuneration on exploitation and the inherent difficulty of anticipating market conditions and user preferences over time—which justify an *ad hoc* legal framework. Such a framework has simply not yet been fully developed ([28]).

It is worth recalling the objectives pursued by the European legislator with the adoption of Directive 2014/23/EU, and to compare them to European concession market practices over the last decade in order to identify shortcomings and propose improvements to the legislation. Directive 2014/23/EU sought to establish a clear regulatory framework that would serve as an incentive for public-private investment in strategic infrastructures and services, offering the best value for money. In other words, the reform was primarily intended to clarify the concept of a concession contract and strengthen the European concessions market ([29]). It must now be analysed whether this objective has been achieved in light of the experiences of the last decade and the available quantitative data.

To this end, it is especially useful to consult the evaluation reports with verified data that have been published to date, such as the report drawn up by the European Commission on the functioning of Directive 2014/23/EU, published in July 2023 ([30]). The report provides a comprehensive overview of the concessions market in the European Union, displaying an upward, albeit gradual, trend in the number of concession contracts. This increase notwithstanding, the data reveal that competition remains limited, as the average number of bids per tender continues to fall short of the levels recorded in 2016. The report also notes that unclear interpretation and incorrect application of the rules are still detected by the vast majority of Member States. Alongside this report, other general studies highlight specific characteristics of concessions, as well as trends shared with public procurement ([31]). Among these, the significant fragmentation of the market

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([28]) In this regard, Ximena Lazo Vitoria, 'El futuro del mercado concesional en Europa' (2013) 154 CEFLegal: Revista Práctica de Derecho 137; Richard Craven, 'The EU's 2014 Concessions Directive' (2014) 23(4) Public Procurement Law Review; Roberto Caranta, 'The Changes to the Public Contract Directives and the Story They Tell about how EU Law Works' (2015) 52 Common Market Law Review.

([29]) Without prejudice to other objectives also pursued by the Directive, such as, for example, promoting the opening up of the concessions market and strengthening competition at European level by addressing existing fragmentation between various national legal systems; combating certain unlawful or dysfunctional practices in the award of concessions that have been repeatedly identified at EU level (direct award of concessions or the use of non-objective criteria in selection procedures); or the extension of guarantees of judicial review to concession contracts (extension of the scope of the Remedies Directive).

([30]) European Commission, *Report from the Commission to the European Parliament and the Council on the functioning of Directive 2014/23/EU on the award of concession contracts and on the impact on the internal market of the exclusions set out in Article 12*, COM(2023) 460 final.

([31]) European Court of Auditors, *Public-Private Partnerships in the EU: Widespread Shortcomings and Limited Benefits* (Special Report No 9/2018, 20 March 2018); E Auriol and is especially noteworthy. Additionally, reports produced by European organisations, governments and national authorities in various Member States help to complete this overview with data on the status of the concessions market ([32]).

3.2.2. The evolution of the concessions market following the adoption of Directive 2014/23/EU

The evolution of the concessions market following the adoption of Directive 2014/23/EU has four main features. First, an asymmetric expansion of the market, characterised by a high degree of geographical and sectoral fragmentation. Second, the limited variation observed in the number of bidders. Third, the concentration of a very significant number of concessions at sub-central level. Fourth, its structural dependence on private financing, the conditions of access to which have been significantly transformed by the European sustainable finance framework.

With regard to the first of these features, the available data show that, between 2012 and 2019, the estimated value of concessions awarded in the European market amounted to approximately 238,000 million euros, showing a clear upward year-on-year trend: from 8,800 million euros in 2012 to 70,600 million in 2019, peaking at 80,400 million in 2018 ([33]). Further insight is provided by the

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S Saussier, *Private Participation in Infrastructure: What Role for Public–Private Partnerships?* (CEPR Press 2025); European PPP Expertise Centre, *Market Update 2022: Review of the European PPP Market in 2022* (European Investment Bank, 2023); European Court of Auditors, *Public Procurement in the EU: Less Competition for Contracts Awarded for Works, Goods and Services in the Ten Years up to 2021* (Special Report No 28/2023, 2023); European Commission, *Study on the Measurement of Cross-Border Penetration in the EU Single Market for Services* (Publications Office of the European Union 2021).

([32]) European Investment Bank and National Evaluation Office, *Report on Strategic Recommendations: Revitalisation of the Concession Market in Spain and Institutional Development of the ONE* (November 2025) https://www.hacienda.gob.es/rsc/one/otra-documentacion/informe-recomendaciones-estrategicas.pdf; Oficina Independiente de Regulación y Supervisión de la Contratación, *Informe especial de supervisión relativo a los contratos de concesión en 2022* (November 2023) https://www.hacienda.gob.es/RSC/OIReScon/informes-especiales-supervision/ies-concesiones2022.pdf; H Maurey, *Expiry of motorway concessions: learning from the past to prepare for the future* (Senate, October 2024) https://www.senat.fr/fileadmin/Presse/Documents_pdf/Rapport_provisoire_autoroutes.pdf; Autorité de régulation des transports, *Rapport sur les marchés* (July 2025) https://www.autorite-transports.fr/wp-content/uploads/2025/07/rapport-marches.pdf; Tribunal de Contas, *Auditoria à execução financeira da concessão rodoviária em regime de SCUT na Ilha de São Miguel* (Relatório No 12/2023–FS/SRATC, 1December 2023) https://www.tcontas.pt/pt-pt/ProductosTC/Relatorios/RelatoriosAuditoria/Documents/2023/rel012-2023-sratc.pdf

([33]) European Commission, *Commission Staff Working Document accompanying the Report from the Commission to the European Parliament and the Council on the functioning of* breakdown of concessions according to the value of the contracts awarded. In contracts under 200 million euros, concessions accounted for 3 percent of the total value; by contrast, this proportion reached 18.9 percent for contracts above this threshold ([34]).

This expansion was not distributed evenly across Member States. While most states increased their use of concessions following the expiry of the transposition deadline for Directive 2014/23/EU, growth was mainly concentrated in France, Italy, Germany and Spain. France occupies a particularly prominent position, both in terms of the volume of post-Directive concessions and its contribution to the overall increase observed.

Alongside the territorial concentration of the concessions market, the available data also display a low degree of cross-border integration. This characteristic is not unique to concessions; rather, it is evident across the whole of European public procurement. In the case of concessions, low cross-border participation is also noted, despite the fact that this type of contract accounts for a greater relative share of high-value awards. This suggests that the existence of a common European legal framework has not necessarily led to significant cross-border integration of the concessions market, whose dynamics remain largely linked to domestic markets and locally established operators ([35]).

The reports examined also reveal contrasting trends between works concessions and service concessions. While works concessions display a downward trend,

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Directive 2014/23/EU on the award of concession contracts and on the impact on the internal market of the exclusions set out in Article 12, SWD(2023) 267 final (28 July 2023), 6–7; London Economics Europe and Spark Legal, *Study on the Implementation of the Concessions Directive: Final Report* (Publications Office of the European Union 2021), Figure 41.

([34]) European Commission, *Commission Staff Working Document accompanying the Report from the Commission to the European Parliament and the Council on the functioning of Directive 2014/23/EU*, SWD(2023) 267 final (28 July 2023), 37–38; European Commission, Directorate-General for the Internal Market, Industry, Entrepreneurship and SMEs, *Study on the Measurement of Cross-Border Penetration in the EU Public Procurement Market*, prepared by Prometeia SpA, BIP Business Integration Partners and Economics for Policy—a Knowledge Centre of Nova School of Business and Economics, Lisbon (Publications Office of the European Union 2021), 66, Table 2-13, and 78, Table 2-28.

([35]) See European Commission, Directorate-General for the Internal Market, Industry, Entrepreneurship and SMEs, *Study on the Measurement of Cross-Border Penetration in the EU Public Procurement Market* (2021), 66, Table 2-13, and 78, Table 2-28. Indeed, in the case of concessions, cross-border participation in the strict sense stands at 2.4 percent by number of contracts and 1.6 percent by value for contracts below 200 million euros; and at 3.4 percent by number and 3.9 percent by value for contracts above that threshold. The same study distinguishes this cross-border participation in the strict sense from indirect participation through entities established locally but belonging to foreign business groups. Available at: https://single-market-economy.ec.europa.eu/publications/study-measurement-cross-border-penetration-eu-public-procurement-market_en there is significant growth in the latter ([36]). In particular, service concessions outnumbered works concessions throughout the period under analysis, and their share of total concession awards rose from 66 percent in 2012 to 74 percent in 2016 and 92 percent in 2019 ([37]). This difference may be explained by a normal trend towards a transition from models focused on infrastructure construction to those orientated toward the management and operation of existing infrastructure. This means that, once major public works have been completed, the focus of public authorities tends to shift towards the optimisation, maintenance and improvement of the associated services. Added to this is the fact that, in certain cases, the profitability of concessions—particularly for construction projects—is not sufficiently attractive to the market, which may reduce economic operators' interest in this type of contract. Meanwhile, many service concessions—especially at sub-central level—involve the provision of mandatory public services, which may explain their relatively greater prevalence.

The second feature relates to the limited level of competition observed in the concessions market. The market's growth has not been accompanied by an increase in the number of bidders. In the specific field of concessions, the available data do not allow us to conclude that Directive 2014/23/EU has led to a significant increase in competition. According to the Commission's 2023 Staff Working Document, the average number of bids per concession stood at around 2.44 during the period 2016–2021. A separate study on the implementation of Directive 2014/23/EU estimated an average of 2.9 bids in the period prior to the Directive and 2.7 in the subsequent period. This trend is, in any case, consistent

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([36]) The CPV sectoral analysis included in the Commission's evaluation report confirms the importance of concessions linked to the provision of services. In particular, it identifies the 'services for citizens' category as having the highest number of concessions awarded during the period 2016–2021, with 1,699 award notices. This category includes catering and canteen services, recreational, cultural and sporting services, health and social services, educational services and other local services. The group's geographical concentration is equally significant: France accounts for 53 percent of award notices, followed by Spain at 12.6 percent and Italy at 11 percent. See European Commission, *Commission Staff Working Document accompanying the Report from the Commission to the European Parliament and the Council reviewing the functioning of Directive 2014/23/EU on the award of concession contracts and on the economic effects on the internal market of the exclusions set out in Article 12* SWD(2023) 267 final (28 July 2023) 41–45.

([37]) This trend is also consistent, from the broader perspective adopted by the European PPP Expertise Centre of the European Investment Bank, with the recent composition of the European PPP market. Although these reports do not refer exclusively to concessions within the meaning of Directive 2014/23/EU, but rather to PPP transactions that have reached financial close, their data highlight the significance of projects linked to the provision of public services and social infrastructure. In 2024, transport was the leading sector by value, whilst education was the leading sector by number of transactions. See European PPP Expertise Centre, *Market Update: Review of the European Public-Private Partnership Market in 2024* (March 2025) 1–4. https://www.eib.org/en/publications/20250010-market-update-review-of-the-european-public-private-partnership-market-in-2024 with the general evolution of the European public procurement market, in which the European Court of Auditors has noted a decline in competition during the decade 2011–2021: the proportion of procedures with a single tender rose from 23.5 percent to 41.8 percent, and the average number of tenderers per procedure fell from 5.7 to 3.2.

As regards the size of successful bidders, the data show a partially positive trend, although this is still insufficient. The share of SMEs in concession awards increased gradually in terms of the number of award notices, rising from 22.4 percent in 2016 to 31.6 percent in 2021, with an average of 29.2 percent over the period 2016–2021. However, this improvement must be viewed within the context of the economic value of the contracts. SMEs are mainly awarded lower-value concessions, while large companies account for the bulk of the market in economic terms. Indeed, large companies secured approximately two-thirds of the awards by number, and these concessions accounted for nearly 92 percent of the total market value during the period under analysis.

These figures reveal a concessions market that is still marked by low levels of competition and significant corporate concentration in terms of value. This situation may limit competitive pressure and reduce incentives for innovation, service quality improvements or cost optimisation. However, this conclusion should be framed with caution: low competition and market concentration do not in themselves imply the existence of anti-competitive practices, but they do highlight the structural difficulties in achieving a more open, competitive and integrated concessions market. Overall, territorial and sectoral concentration, limited cross-border integration, low levels of competition and the limited participation of SMEs in terms of value reveal a market that is growing but still far from realising its full potential as a European concessions market.

In regard to the third feature—the concentration of concessions at sub-central level—the various reports examined show that the majority of concessions were put out to tender by local and regional authorities. These bodies accounted for a volume of concessions far greater than that awarded by state or federal authorities, thus confirming the decisive role played by the sub-state level in the European concessions market. This is an especially significant finding since concessions are technically complex contracts that require specialised expertise in project preparation, financial structuring, risk allocation, defining quality indicators and monitoring of contractual performance. Precisely for this reason, the strong market presence of local and regional authorities underscores the need to establish stable mechanisms for technical assistance and institutional support, especially for those bodies with smaller administrative structures or less experience in drafting this type of contract ([38]). One possible way to strengthen

([38]) As a recent expression of a broader concern at local level, some local authority associations in Bavaria and Baden-Württemberg have called for the European regulatory simplification agenda to specifically address local authorities as the implementing level. The document emphasises that European public procurement law can severely limit local action due to the complexity of its rules and requirements, to the extent that many authorities, regardless of these capacities is to promote technical bodies to support the structuring, financing, tendering and monitoring of concession projects ([39]).

With regard to the fourth feature, the structural dependence of concessions on private financing has acquired new significance in recent years. Unlike ordinary public procurement, where funding is generally provided by the public sector, in concessions, the private operator puts up the capital. Concessions are, ultimately, financial projects. They are capital-intensive, with a high level of leverage and dependent on long-term external financing. Their feasibility therefore depends on the conditions of access to credit.

As of now, this factor is of paramount regulatory importance ([40]). Lenders are obliged to align their lending with the European framework for sustainable finance, in particular the Taxonomy Regulation (EU) 2020/852 and Environmental, Social and Governance (ESG) criteria. A concession project that is not consistent with these parameters will either secure financing on less favourable terms or fail to secure it at all. Sustainability has become a prerequisite for bankability. Furthermore, this requirement does not end with the initial project design: financiers monitor the concessionaire's performance throughout the entire contract term.

Directive 2014/23/EU and the European sustainable finance framework operate under separate sets of principles ([41]). This lack of alignment generates additional costs: the tender specifications set by the contracting authority may not necessarily align with those required by funding bodies, thus making projects more expensive or unable to secure funding. As a matter of fact, some Member

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their size and level of professional expertise, are forced to rely on external advisers to conduct European tendering procedures with legal certainty. In this context, it proposes a 'local omnibus' approach to simplification, aimed at reducing administrative burdens and establishing more manageable procedures for local authorities. Europabüro Baden-Württemberg et al., *A Modern EU Public Procurement Law for Strong Local Authorities: Demands from Local Authorities in Bavaria and Baden-Württemberg* (26 January 2026). https://www.europabuero-bw.de/wp-content/uploads/2026/02/EN-Positionspapier-Vergaberecht-1nl_jm-1.pdf

([39]) See Section 4.6 below, 'Strengthening professionalisation in the field of concessions and specific expertise in risk assessment'.

([40]) On the need to adapt the European public procurement framework to the new regulatory and economic context, see J M Gimeno Feliú, *La necesaria revisión de la normativa de contratación pública en Europa. Una nueva y moderna hoja de ruta en clave geoestratégica global*, Revista General de Derecho Administrativo 71 (2026).

([41]) Some Member States have already made progress in this regard. In France, Decree No. 2022-767 of 2 May 2022, issued pursuant to Article 35 of Law No. 2021-1104 of 22 August 2021 (Climate and Resilience Act), stipulates that the annual report submitted by the concessionaire to the granting authority must include a description of the environmental protection measures implemented and the integration of economic activity into the performance of the contract (Article R. 3131-3 of the Code de la commande publique). This provision is scheduled to apply by August 2026 at the latest.

States have already drawn up practical guidelines that align the rules on procurement with European sector-specific legislation ([42]). The review of the Directive provides an opportunity to coordinate these two spheres ([43]).

Recap

The above analysis reveals a European concessions market that is growing but is still constrained by structural limitations, especially with regard to territorial and sectoral distribution, cross-border integration, levels of competition and participation of SMEs. To this may be added the significant influence of local and regional authorities that has also been noted; they account for a substantial proportion of the concessions awarded, as well as the structural dependence of the concessions market on private capital, access to which is currently conditioned by the European framework for sustainable finance.

Based on the analysed data, a number of recommendations may be formulated in order to guide the regulatory framework:

Firstly, measures to facilitate greater effective competition and the reduction of unnecessary burdens should be promoted.

Secondly, given the technical, financial and legal complexity of concession contracts, it seems particularly important to strengthen the technical assistance and institutional support mechanisms available to contracting authorities.

Thirdly, as noted above, concessions at sub-central level frequently relate to the provision of mandatory public services, with relatively limited levels of risk and often a significant public contribution. These characteristics could justify the introduction of an *ad hoc* regulation for this type of concession. This approach would enable their specific features to be taken into account, as well as the constraints faced by the contracting authorities involved.

Fourthly, the review should take into account the European framework for sustainable finance and legislative initiatives aimed at resilience, some of which already expressly cover concessions. The concessions market's structural dependence on private capital makes this consideration particularly advisable.

([42]) See IMPIC – Instituto dos Mercados Públicos, do Imobiliário e da Construção, *Manual da articulação das regras do Código dos Contratos Públicos com Instrumentos Legislativos Europeus*, Lisboa, February 2026.

([43]) See, in particular, the Proposal for a Regulation of the European Parliament and of the Council establishing a framework of measures for the acceleration of industrial capacity and decarbonisation in strategic sectors and amending Regulations (EU) 2018/1724, (EU) 2024/1735 and (EU) 2024/3110 (Industrial Accelerator Act), COM(2026) 100 final, 4 March 2026.

4. The concept of a concession contract

4.1. Context: the concessionaire's remuneration and the object of the concession as traditional contract elements

According to legal scholarship, concessions are complex contracts ([44]). Their performance spans considerable periods of time and is subject to economic, technical, regulatory and social changes that cannot always be anticipated at the time of awarding ([45]).

In its traditional form, a concession has been defined as a contract whose object is to carry out works or provide a service, and where the concessionaire's consideration essentially consists of the right to exploit said project or service. In EU law, this definition was already set out; for example, in Council Directive 93/37/EEC on the coordination of procedures for the award of public works contracts. There, works concessions were defined as *"a contract of the same type as that indicated in (a) except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the construction or in this right together with payment"* (Article 1(d)). By contrast, in works contracts and services contracts, the consideration takes the form of a price paid by the contracting authority.

Another highly notable feature of concession contracts has been the traditional concept of public service. Indeed, in several Member States, the concession has been the quintessential form of public service management. In other words, the subject matter of the contract is an activity which has been placed under public ownership (*publicatio*) and the management of which is subsequently entrusted to a third party via a concession contract ([46]). Consequently, the 'management'

([44]) For a comprehensive overview, see G. Fidone, *Il risultato dei contratti pubblici complessi* (Giappichelli 2025).

([45]) Put simply, the concept of an 'incomplete contract' helps to explain that, in complex, long-term contracts—as is often the case with concessions—it is not always possible to foresee from the outset all the situations that may arise during their performance. On this approach, see Oliver Hart, 'Incomplete Contracts and Control' (2017) 107(7) *American Economic Review* 1731, 1731.

([46]) Thus, for example, in Spain, the concession has traditionally been a form of the so-called public service management contract (now expressly repealed by the legislation transposing Directive 2014/23). In France, the traditional 'délégations de service public' are now a form of concession (where their purpose is the management of a public service and they are put out to tender by a local authority or a local public body). See *the Public Procurement Code*, Article L 1121-3, and *the General Code of Local Authorities,* Article L 1411-1.

of these public services–that is, services aimed at the general public–must, in all cases, meet standards of quality, regularity and affordability.

In contrast, Directive 2014/23/EU has opted for a completely different approach by broadening the scope of concessions to cover both public and non-public services ([47]). In doing so, it has blurred the two relatively clear distinctions included in the traditional understanding of a concession contract. Firstly, the boundary between concession contracts and public contracts no longer lies in the subject matter of the contract (public works, public services) but rather in the risk transferred to the concessionaire. Practical application has shown, however, that the line separating concessions from public works and services contracts is a fine one and is not always sufficiently clear. This is especially the case when the contract involves public contributions of a certain magnitude or when the operating risk is low. Secondly, it erases the boundary between contractual concessions and authorisations or public domain concessions ([48]). Fully aware of this overlap between the aforementioned concepts, the 2014 legislator included certain clarifications to help distinguish between them. Thus, for example, Recital 15 of Directive 2014/23/EU states that agreements which grant an economic operator the right to exploit certain public assets or resources—such as land or public property—fall outside its scope of application where the contracting authority *establishes only general conditions for their use* ([49]). Conversely, where specific conditions (public service obligations) are imposed, the arrangement would fall within the contractual scope ([50]).

Therefore, the 'basic' concept on which the European legislator relied prior to 2014 to establish a harmonised definition rested on the two elements indicated above, namely, the remuneration and the subject matter of the concession. As already noted, the central objective of Directive 2014/23/EU was to clarify the concept of the concession contract, *with special emphasis on risk transfer as a structural element that distinguishes it from public contracts (Recital 18 of*

([47]) On the transposition of Directive 2014/23/EU on service concessions and the adoption of this broad approach in various national legal systems, see Ximena Lazo Vitoria (ed.) and Ana Isabel Peiró Baquedano (coordinator), *Service Concessions in the EU: A Comparative Study of the Transposition of Directive 2014/23 on the Award of Concession Contracts into National Law* (Thomson Reuters Aranzadi 2018).

([48]) See Pim Huisman, Etienne Poltier and Steven Van Garsse (eds), *Concessions and Similar Instruments in the EU and Beyond* (Larcier-Intersentia 2025). This work adopts an approach that extends beyond Directive 2014/23/EU, drawing on experiences from both the European Union and third countries.

([49]) For its part, Recital 14 sets out interpretative criteria for distinguishing a concession from an authorisation. The CJEU judgement of 14 July 2016, *Promoimpresa* and *Melis*, joined cases C-458/14 and C-67/15, is useful for distinguishing service concessions from authorisations for the economic exploitation of public assets.

([50]) And whether this constitutes a contract or a concession depends on whether or not the operating risk has been transferred.

Directive 2014/23/EU). The absence of clear criteria regarding the type and extent of the risks to be assumed by the concessionaire was considered one of the main shortcomings of the system, which justified the European legislator's intervention in this area.

Consequently, Directive 2014/23/EU establishes a harmonised concept of 'concession', building on one of the traditional elements and adding a new element, namely the 'transfer of operating risk' from the contracting authority to the concessionaire.

Thus, in Article 5(1), Directive 2014/23/EU sets out one of the traditional elements of the concession concept and its most characteristic feature, namely that the concessionaire's consideration consists of the right to exploit the works or services, regardless of whether it is accompanied by a payment. It establishes the following two concepts:

Works concession: *"means a contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrust the execution of works to one or more economic operators the consideration for which consists either solely in the right to exploit the works that are the subject of the contract or in that right together with payment*" (Article 5(1)(a)).

Services concession: *"means a contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrust the provision and the management of services other than the execution of works referred to in point (a) to one or more economic operators, the consideration of which consists either solely in the right to exploit the services that are the subject of the contract or in that right together with payment*" (Article 5.1(b)).

The above definition is supplemented (for both types of contracts) by the final paragraph of Article 5.1, which states:

"The award of a works or services concession shall involve the transfer to the concessionaire of an operating risk in exploiting those works or services encompassing demand or supply risk or both. The concessionaire shall be deemed to assume operating risk where, under normal operating conditions, 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. The part of the risk transferred to the concessionaire shall involve real exposure to the vagaries of the market, such that any potential estimated loss incurred by the concessionaire shall not be merely nominal or negligible;".

Given that terminological clarification is the *leitmotif* of the new Directive, from a regulatory drafting perspective, it is worth noting that a substantial part of the concept—in particular, the definition of operating risk—is set out in Recitals 18 to 20 of Directive 2014/23/EU rather than in its natural setting, namely the enacting provisions. Indeed, aspects that constitute the defining core of the concept—such as the characterisation of demand risk and supply risk—as well as 'structural pillars' of the design, such as the idea that operating risk must stem from factors beyond the parties' control, are included in sections that lack regulatory value. This approach hinders the practical application of the concept and creates interpretative uncertainty, insofar as it relocates elements that should be part of the legal rule itself to the recitals.

This legislative technique is, moreover, not entirely consistent with the Union's own guidelines on legislative quality. Thus, the Joint Practical Guide of the European Parliament, the Council and the Commission expressly states that recitals serve to justify regulatory alternatives, but have no legally binding force and, therefore, cannot replace the substantive provisions; the essential elements of the legislation must be incorporated into the enacting provisions ([51]). In the same vein, the Interinstitutional Agreement on Better Law-Making emphasises the need to ensure that EU legislation is clear, consistent and simplified, which implies the correct placement of regulatory content in the enacting sections ([52]).

From this perspective, any review of the regulatory framework should consider explicitly including the defining elements of the content and scope of operating risk, thus strengthening legal certainty and the uniform application of the concept.

4.2. Characteristics of operating risk

The key element in the legal classification of these contracts is the effective transfer of 'operating risk', that is, the risk arising from the operation of the works or services covered by the concession. Therefore, there is no concession contract–this legal classification cannot be applied–without an *effective* transfer of operating risk. Following the adoption of Directive 2014/23/EU, operating risk transfer has become the distinguishing feature between a works contract and a works concession, and between a services contract and a services concession.

That said, operating risk should not be confused with the general principle that every contractor bears the ordinary risks inherent in the performance of the contract (*principio de riesgo y ventura*). The latter is a general principle of public procurement: every contractor bears the ordinary risks of the contract, that is, the

([51]) European Parliament, Council of the European Union and European Commission, *Joint Practical Guide for Persons Involved in the Drafting of European Union Legislation* (Publications Office of the European Union 2015), para 10, p 31. https://op.europa.eu/en/publication-detail/-/publication/3879747d-7a3c-411b-a3a0-55c14e2ba732

([52]) Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making [2016] OJ L 123/1 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32016Q0512(01) financial consequences of its performance in accordance with the agreed terms. By contrast, operating risk implies that the concessionaire's remuneration derives from the actual operation of the works or the service and is therefore subject to the uncertainties of that operation. The contractor carries out the work in return for a guaranteed price; the concessionaire recovers their investment through the operation of the works or services. Therefore, the presence of the general principle that every contractor bears the ordinary risks inherent in the performance of the contract does not, in itself, allow a contract to be classified as a concession ([53]).

Operating risk, as a newly constructed legal category, has required a period of assimilation and interpretative consolidation. This process has been heavily influenced by the significant heterogeneity in national legal traditions, by the different meanings attributed to the term 'concession' in national legislation ([54]) and also, albeit to a lesser extent, by the delayed transposition of Directive 2014/23/EU in several Member States ([55]). This has hindered the setting of common criteria on one of the most complex issues related to concessions: the identification, measurement and effective transfer of risk to the concessionaire. In any case, these difficulties are not unique to Directive 2014/23/EU but are indicative of a broader problem that has been highlighted in the literature on PPP ([56]).

([53]) Ximena Lazo Vitoria, 'El riesgo operacional como elemento delimitador de los contratos de concesión' in José María Gimeno Feliú (ed), *Estudio sistemático de la Ley de Contratos del Sector Público* (Aranzadi 2018) 517–544.

([54]) See Pim Huisman, 'EU Added Value of the Concessions Directive: Observations and Recommendations regarding Directive 2014/23/EU' in Soledad de la Rosa (ed), *Public Contracts in Legal Globalization Network = Réseau Contrats publics dans la Globalisation juridique: Evaluation of the 2014 Public Procurement Directives: Answer to the Call for Evidence Ref. Ares(2024)8928678* (2025), 6–8.

([55]) It is likely that the delayed transposition has held up the development of common interpretative criteria, as it postponed the date from which national legislators began to apply the new regime. The delay, in any case, is a proven fact: the deadline for transposition was 18 April 2016 and there was widespread non-compliance. In May 2016, the Commission launched infringement proceedings against 21 Member States for failing to transpose the new rules on public procurement and concessions, and by December 2016, the number of Member States subject to such proceedings had risen to 25. See European Commission, "Enforcement and implementation" (Public procurement, DG GROW). https://single-market-economy.ec.europa.eu/single-market/public-procurement/enforcement-and-implementation_en

([56]) In this regard, a comprehensive literature review on the management, allocation and transfer of risks in public–private partnership schemes highlights the persistence of significant weaknesses in this area; see Mouhcine Tallaki and Enrico Bracci, 'Risk allocation, transfer and management in public–private partnership and private finance initiatives: a systematic literature review' (2021) 34(7) *International Journal of Public Sector Management* 709–731, doi:10.1108/IJPSM-06-2020-0161. This review includes, amongst other things, contributions which highlight that risk "remains a major and underdeveloped research issue" (Andon, 2012, p. 905), as well as the lack of data to assess the efficiency of these schemes and the difficulty

Notwithstanding these difficulties, it is necessary to ensure an interpretation of the concepts set out in Directive 2014/23/EU that guarantees their uniform application, based on their context and the intended purpose. In this regard, the CJEU has ruled that the concepts of 'services concession' and 'services contract' are autonomous concepts under EU law and, as such, must be interpreted uniformly throughout the territory of the Union. The legal characterisation of a particular contract under the law of a Member State is not relevant for determining whether said legal transaction is a concession or a services contract and whether it falls within the scope of the 2014 Public Procurement Directives. In the Court's view, the essence of a concession is *"… by the grant to the concessionaire of the right, possibly together with a price, to operate the services which are the subject matter of the concession, the concessionaire enjoying, in the framework of the contract which has been concluded, a certain economic freedom to determine the conditions for the operation of the services which are granted to it and assuming, at the same time, the risk associated with operating those services"* (Case C-486/21 *Sharengo,* EU:C:2022:868, paragraph 60).

Operating risk, which is the criterion selected by the European legislator to define the essence of a concession, is a risk of an *economic* nature. This nature was already highlighted in the Draft Concessions Directive, as well as in the communications and interpretative documents that preceded its adoption ([57]). It has now been expressly set out in the text; in particular, the European legislator states that the main characteristic of a concession—the right to exploit—necessarily entails transferring an operating risk of *an economic nature* to the concessionaire (Recital 18, our emphasis).

This risk is *economic* in nature insofar as the concessionaire's consideration must be derived substantially from operating the infrastructure or providing the service. It must involve genuine exposure to market uncertainties so that potential losses are not merely nominal (Article 5(1), Directive 2014/23/EU). Consequently, when the contracting authority guarantees the bulk of the revenue, this logic of operation is undermined, and with it, the very classification of the contract as a concession. Operating risk is identified as the uncertainty inherent in the economic operation of the infrastructure or service, and this, as indicated above, is the distinction between concessions and traditional public contracts, where

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of measuring the effective transfer of risk to the private sector (NAO, 2018), highlighting the structural difficulties associated with identifying and measuring it.

([57]) Among many other references, it has been noted that "risks arising from the operation's financial arrangements, which could be considered 'economic risks' are part and parcel of concessions. This type of risk is highly dependent on the income the concessionaire will be able to obtain from the amount of use of the construction and is a significant factor distinguishing concessions from public works contracts." See European Commission, Commission Interpretative Communication on Concessions under Community Law [2000] OJ C121/2, 4.

consideration is in the form of a payment and there is therefore no market exposure in the sense described here.

It is worth highlighting one oft-overlooked element of the definition. Article 5.1 requires that the absence of a guarantee of recovery be assessed 'under normal operating conditions'. The transfer of operating risk is therefore assessed on the basis of the assumption of a normal market. The concessionaire assumes the uncertainties inherent in a normally functioning market, but not situations of abnormality or extraordinary changes in circumstances. This distinction has a significant systemic consequence: situations of abnormality are not part of the transferred risk and, where applicable, are addressed by the concession's rebalancing mechanisms, an issue discussed later in this work.

Defining this operating risk presents significant difficulties both in terms of its scope and especially its quantification, since it relies on legally ([58]) indeterminate concepts whose interpretation and measurement criteria lack uniformity. Some supervisory bodies have highlighted the interpretative uncertainties arising from the definition of operating risk in Directive 2014/23/EU. Thus, it has been pointed out that, in light of the legislation alone, concepts such as the requirement that the *"potential […] loss is not merely nominal or negligible*" lack sufficient clarity, raising questions regarding their scope and quantification (in particular, what should be the magnitude of such a loss or whether scenarios whose probability is remote should be considered), as well as the provision that *"it is not guaranteed to recoup the investments made or the costs incurred"*. The latter does not necessarily imply the existence of losses, as this condition may also be met in situations of zero or near-zero profit. Such aspects make it difficult to ascertain whether there has been an effective transfer of operating risk and contribute to an inconsistent application of the concept ([59]).

Additionally, Directive 2014/23/EU requires operating risk to be beyond the control of the parties: *"an operating risk should stem from factors which are outside the control of the parties*" (Recital 20) ([60]). Consequently, as stated further on in this recital, risks linked, for example, to bad management, contractual defaults by the economic operator or instances of force majeure, are not decisive

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([58]) For example, normal operating conditions, the lack of a guarantee of return on investment or cost recovery, actual exposure to market uncertainties, or the fact that potential losses are not merely nominal.

([59]) Oficina Independiente de Regulación y Supervisión de la Contratación, *Propuestas para el proceso de evaluación de las Directivas de contratación pública* (2025). https://www.hacienda.gob.es/RSC/OIReScon/estudios-guias-protocolos/evaluacion-directivas.pdf

([60]) It must be emphasised once again here that a feature as important as this, if it is to be retained in future legislation, should not be included merely in a recital of the Directive, but should form part of what it actually is, namely the concept of operating risk.

for the purposes of classifying a contract as a public contract or as a services concession, since these risks are, in fact, inherent in any contract ([61]).

This requirement implies that the relevant risk for the purposes of classifying the contract must be determined by exogenous factors linked to the functioning of the market and not to the behaviour of the parties. This requirement reflects the exogeneity condition set out in Recital 20 of Directive 2014/23/EU, which establishes that the risk transferred to the concessionaire must arise from factors beyond the control of the parties. From this perspective, and as a first approximation, this would seem to reduce operating risk to demand risk, as the prime expression of market uncertainty ([62]). Conversely, this requirement has raised serious issues of compatibility with the other risk identified by Directive 2014/23/EU (the so-called supply risk), whose meaning and scope are far from clear.

On the other hand, it should be borne in mind that the CJEU has on several occasions referred to the concessionaire's exposure to 'market uncertainties' as an expression of operating risk. Thus, for example, the CJEU judgement in Eurawasser (Case C-206/08) states that the risk *"is inherent in the economic operation of the service*" and that the decisive factor is that the concessionaire is effectively 'exposed' to those uncertainties ([63]). However, these considerations must be interpreted within the specific context of the dispute. The Court's central concern was not so much to develop a general definition of operating risk but rather to clarify that the existence of a concession is not ruled out where, due to the characteristics of the sector of activity (water), the concessionaire's exposure to market uncertainties is necessarily very limited.

Within the framework of the ESA-2010 Regulation and its Implementation Manual, the risk inherent in concessions is also characterised as a commercial operating risk. However, this risk has a dual dimension. On the one hand, it is an exogenous risk, linked to market factors such as end-user demand, which is clearly connected to demand risk. On the other hand, it also has an internal dimension, linked to the concessionaire's asset management and maintenance

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([61]) A critical analysis of this wording can be found in T. Pez, 'Le risque, les concessions et les marchés', *RFDA* 2016, 237–251. The author points out that the requirement that the risk must stem from factors over which the parties have no control contradicts the very essence of the risk assumed—chance is suffered, risk is assumed—and is inconsistent with the characterisation of the concession as an incentive-based contract: incentives serve precisely to reduce risk, and this presupposes a certain degree of control by the concessionaire over the relevant factors.

([62]) See G Greco, 'La direttiva in materia di concessioni' (2015) *Rivista italiana di diritto pubblico comunitario* 1100, 1100–1101, considers that the requirement set out above is easily reconcilable with demand risk, since this depends on the behaviour of third parties (service users), but the same does not apply to supply risk.

([63]) Case C-206/08 *WAZV Gotha v Eurawasser,* ECLI:EU:C:2009:540, paras 66 and 67.

performance, which relates to availability risk ([64]). In this regard, it is stated that: "*the concessionaire must bear most of the commercial risk, which depends both on external factors (demand from end-users, their 'willingness-to-pay', etc.), and on its own performance in managing and maintaining the assets*" ([65]).

In light of this background, the requirement in Directive 2014/23/EU that operating risk should stem exclusively from external factors appears to reflect only part of the reality of the concession sector, especially when the concessionaire's remuneration consists of payments linked to the availability of the infrastructure or service.

Directive 2014/23/EU does not require transferring all of the operating risk, but rather a substantial part thereof. To emphasise this point, the Draft Directive referred to 'substantial operating risk'. This means that part of the risk may not be transferred; that is to say, it remains with the contracting authority (Recital 18). That said, the question lies in how to determine the extent of risk that may be considered 'substantial'. In other words, the issue is to resolve the problem of quantifying the respective risk transfer. In this regard, the Directive sets out a basic criterion by stating that *"The application of specific rules governing the award of concessions would not be justified if the contracting authority or contracting entity relieved the economic operator of any potential loss, by guaranteeing a minimal revenue, equal or higher to the investments made and the costs that the economic operator has to incur in relation with the performance of the contract*" (Recital 18). And, to reiterate this point, it states that *"Where sector-specific regulation eliminates the risk by providing for a guarantee to the concessionaire on breaking even on investments and costs incurred for operating the contract, such contract should not qualify as a concession within the meaning of this Directive*" (Recital 19, first part).

These guidelines should serve to assess the effective transfer of operating risk, especially when the contracting authority makes public contributions. This issue is of growing practical relevance. It should also be borne in mind that the achievement of energy transition and climate change objectives is leading to an increasing mobilisation of public funding in strategic sectors ([66]). In this context,

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([64]) In concessions, the focus is on demand risk, which is the quintessential expression of commercial operating risk. Availability risk, where it arises, is of a secondary or complementary nature, and its presence is not inherent to the concession model, unlike in the context of PPPs, where it functions as an independent criterion for statistical classification.

([65]) See Eurostat, *Manual on Government Deficit and Debt – Implementation of ESA 2010* (2022 edition, Publications Office of the European Union 2023), Part 6, section 6.3, para 23, 368.

([66]) In this regard, for example, the *Kieler Subventionsbericht 2024* highlights that, in Germany, energy and climate policy has become one of the main recipients of federal public funding, driven in particular through the *Klima- und Transformationsfonds*. See Kiel Institut für Weltwirtschaft, *Kieler Subventionsbericht 2024*, pp. 19, 26.

it cannot be ruled out that such funding may also, in certain cases, be channelled through public contributions included in concession contracts ([67]). This circumstance underscores the need for clear criteria to determine when such contributions are compatible with an effective transfer of operating risk and when, on the contrary, they shift the economic operating risk inherent in the operation of the concession back to the contracting authority. This aspect must be interpreted in light of Directive 2014/23/EU and CJEU criteria. Thus, for example, in the CJEU judgement of 10 November 2011 (Case C-348/10, Norma-A Dekom), the Court held that there is no risk transfer because the contracting authority compensates the service provider for operating losses, as well as other related expenses. Additionally, a separate payment was made to the awardee, this time with regard to operating profits. In the Court's view, these payments (compensating for losses and guaranteeing a certain level of profit) preclude the operating risk from being regarded as transferred.

Furthermore, it may also be inferred, albeit implicitly, from CJEU case law that the contracting authority's contributions must not become the primary source of the concessionaire's revenue. Thus, in the case of Sharengo ([68]), having verified the transfer of operating risk to the concessionaire ([69]), the Court considers that this conclusion is not affected by the public contributions made because *"the Municipality of Ljubljana does not seek to protect the concessionaire against any risk of losses"*, given that *"and in which the revenue of that economic operator will derive essentially from the fees paid by the users of that service constitutes a 'services concession'"*.

Directive 2014/23/EU does not set any quantitative parameter to determine the maximum level of public support compatible with the effective transfer of operating risk, especially when this support is channelled through remuneration or compensation mechanisms. This lack of guidance introduces significant

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([67]) These usually take a wide variety of forms, including: shadow tolls, investment grants, fixed payments, etc.

([68]) Case C-486/21 *Sharengo,* ECLI:EU:C:2022:868. The Court examines a service concession put out to tender by the City Council of Ljubljana (Slovenia) in 2020. The subject matter of the contract is the creation and management of an electric vehicle hire and car-sharing service within the municipal area of the aforesaid City Council, with the successful bidder required to provide and manage the fleet of electric vehicles (preventative and corrective maintenance; fleet renewal) as well as the network of locations providing access to the electric vehicles and the respective charging points. The tender involves substantial investment, including the purchase of 200 electric vehicles for setting up the aforementioned rental and car-sharing scheme.

([69]) The concessionaire assumes the demand risk and that of the accessibility and availability of the electric vehicle hire and car-sharing scheme. Furthermore, it assumes all technical, technological and financial risks arising from the implementation of the investment measures and other related activities, as well as those arising from the provision of the electric vehicle hire and car-sharing service, including risks to the profitability of the investments made (para 36).

uncertainty as to when public contributions cease to be ancillary and instead serve to neutralise the risk, thereby blurring the line between a concession and a public contract.

For possible regulatory solutions in this area, the following sectors, which have been specifically addressed in EU law, may be considered as benchmarks.

Firstly, public passenger transport by rail and road. Regulation (EC) No 1370/2007 stipulates that the competent authorities may intervene to ensure public passenger transport services of general interest which the market would not provide or would not provide to the same extent or under the same conditions, without public funding ([70]). To this end, it permits the assigning of exclusive rights and public service compensation. This specific provision demonstrates that public funding may be treated much more flexibly when it responds to public service obligations that have been previously defined and are, of course, subject to objective and transparent parameters ([71]).

Secondly, energy performance contracts also provide a useful reference. Their use has been promoted by the European legislator under Directive (EU) 2023/1791, and their statistical treatment has been the subject of a specific Eurostat guide. In such contracts, the existence of public payments linked to energy savings does not, in itself, preclude their possible off-balance-sheet treatment ([72]). However, financing, loans, guarantees or other forms of public support remain relevant in determining whether the operator retains the status of economic owner of the asset and bears the majority of the risks and benefits ([73]).

([70]) The application of the special scheme under Regulation No 1370/2007 presupposes, however, that the contract constitutes a service concession within the meaning of Article 5(1)(b) of Directive 2014/23/EU, that is to say, that it involves the transfer of a genuine operating risk to the operator, a point which is for the national court to verify. Case C-684/23 *Latvijas Sabiedriskais Autobuss*, ECLI:EU:C:2025:90, para 43.

([71]) See Regulation (EC) No 1370/2007 of the European Parliament and of the Council on public passenger transport services by rail and by road and Council Regulations (EEC) Nos 1191/69 and 1107/70 [2007] OJ L 315/1, Articles 1(1), 2(e)–(g), 3(1), 4(1)(b), 6(1) and the Annex. See also Commission Communication, *Interpretative Guidelines on Regulation (EC) No 1370/2007 on public passenger transport services by rail and by road* [2023] OJ C 222/1, paragraphs 1 and 2.1.1.

([72]) In practice, a significant number of contracting authorities—particularly at local level—have structured energy performance contracts as service concessions. The specific statistical treatment developed by Eurostat for these contracts illustrates how sector-specific practice can shape regulatory interpretation.

([73]) See Directive (EU) 2023/1791 of the European Parliament and of the Council on energy efficiency and amending Regulation (EU) 2023/955 (recast) [2023] OJ L 231/1, Articles 29(4) and 29(5). See also Eurostat, Guidance Note: Recording of Energy Performance Contracts (EPCs) in Government Accounts (19 September 2017); Eurostat and the European Investment Bank, A Guide to the Statistical Treatment of Energy Performance Contracts

Thirdly, within the framework of the ESA 2010, there are specific rules on the impact of public contributions on risk transfer for both concessions and PPPs. In the case of concessions, the MGDD considers the relative weight of public co-financing and other public payments compared with payments made by end-users, to the extent that it excludes the statistical classification as a concession when the former exceeds the latter over the term of the contract, and records the asset on the public balance sheet when the public authority covers the majority of the construction or renovation costs. In the case of PPPs, the Eurostat/EPEC Guide also uses quantitative thresholds for public financial support, distinguishing between moderate, high and very high levels of public support, and automatic on-balance-sheet recognition ([74]).

Recap

Within this context, and by way of summary, it should be noted that public funding is not, in itself, incompatible with risk transfer to the economic operator. However, it does require clear rules to assess its scope and purpose. A public contribution aimed at guaranteeing public service obligations, mobilising investment linked to energy or climate objectives, or supplementing the funding of a concessionary infrastructure project is not the same as a contribution that neutralises the concessionaire's exposure to losses or guarantees the recovery of its investments and costs.

In line with the above, the introduction of a quantitative threshold could also be considered.

For example, a maximum percentage of public contribution to investments or costs, above which it is presumed that there is no substantial transfer of risk. This type of solution offers advantages in terms of legal certainty, ease of implementation and regulatory harmonisation. Setting a threshold would improve consistency with the above-mentioned criteria used in the ESA 2010 accounting framework ([75]). Although these application criteria serve a strictly accounting

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(Publications Office of the European Union 2018) 11–13, section 14.1 ('Government financing'), 121–126.

([74]) See Eurostat, *Manual on Government Deficit and Debt – Implementation of ESA 2010* (2022 edition, Publications Office of the European Union 2023), Part 6, section 6.3.1.5.2, 'Payments in concession arrangements', paras 27–28, 369–370, and section 6.3.1.5.3, paras 36–39, 370–371. For PPPs, see also Eurostat and the European PPP Expertise Centre, *A Guide to the Statistical Treatment of PPPs* (Publications Office of the European Union 2016), topic 14.4, 'Authority/government participation in financing', 121–123; Eurostat, *Clarification on the Application of a Guide to the Statistical Treatment of PPPs: Responses to Frequently Asked Questions* (20 June 2022), questions 2, 13 and 16.

([75]) In the field of accounting, Eurostat's decisions within the framework of the ESA have used a threshold of around 49 percent public funding as a benchmark for delineating risk between the public and private sectors. The Italian experience clearly illustrates the evolution of this criterion at the contractual level: the 2016 code (Articles 165(2) and 180(6) of Legislative purpose, they demonstrate the feasibility of using graduated quantitative benchmarks associated with different levels of public funding.

However, there are also certain drawbacks to setting a rigid limit. Specifically, it may introduce an excessively formalistic approach, ill-suited to reflect the economic complexity of certain projects. Furthermore, it could give rise to undesirable ‘contractual engineering’ effects, aimed at artificially falling below the threshold without any actual risk transfer, thereby replicating the very problems it aims to avoid.

An intermediate alternative might consist of introducing indicative thresholds or *rebuttable* presumptions, combined with a qualitative risk transfer analysis. This option would make it possible to preserve the required flexibility without sacrificing a greater certainty in defining the concept of a concession.

Decree 50/2016) incorporated the 49 percent public contribution threshold as a distinguishing feature between a concession and a public contract; the current code (Legislative Decree 36/2023) has abolished this, separating the legal classification of the contract from its accounting treatment: in accordance with Article 177.7, Eurostat’s decisions apply ‘solely for the purposes of public accounting’, so that a higher contribution does not preclude classification as a concession, although it excludes its off-balance-sheet treatment. See G. Fidone, ‘*Il risultato dei contratti pubblici complessi*’, Giappichelli, Turin, 2025, 310–311 and 357–358.

4.3. Operating risk: a 'mosaic' concept

The rules on operating risk set by the European legislator ([76]) are the result of an effort to systematise and synthesise the criteria and solutions previously set out by the CJEU ([77]). At the same time, these rules cannot be understood without taking into account the influence of the categories specific to the European System of Accounts (ESA 2010), which have helped to define the typology of risks and their treatment in terms of allocation and transfer.

Consequently, this is a hybrid regulatory framework that draws on elements from both case law and the accounting framework, resulting in a 'mosaic concept' that, as seen below, does not always exhibit sufficient internal consistency. From CJEU case law, it mainly draws upon service concessions criteria, as a large proportion of the cases analysed by the Court in the period prior to Directive 2014/23/EU focused on distinguishing them from services contracts. Conversely, the ESA-2010 Regulation includes elements designed for works concessions, but also other elements specific to a different conceptual category, namely PPPs. In brief, the key aspects of both areas may be summarised as follows:

A study of CJEU case law reveals a gradual shift in the criteria used to determine the existence of a concession ([78]). In this regard, a distinction may be made between an initial, stricter phase, in which the Court required the operator to be clearly and significantly exposed to the operating risk, considering this to happen when the users themselves provide consideration to the concessionaire. Conversely, if the consideration is paid by the contracting authority, the CJEU classifies the arrangement as a services contract ([79]).

In a subsequent stage, the CJEU adopts a more flexible interpretation, using the criterion of exposure to market uncertainties, provided the concessionaire's investment and expenses are not guaranteed by the contracting authority. This approach allows a concession to be recognised even if the level of transferred risk is, in practice, very low. This second interpretation by the CJEU arose in the context of public services contracts such as water supply or the provision of emergency services to a local population, where market risk is logically very

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([76]) For example, exposure to market uncertainties, limited risk, risk of debtor insolvency, and right of exploitation, amongst thers.

([77]) By 2011, that is to say, the start date of the initiative that would lead to the future Concessions Directive, the CJEU had handed down 25 judgements on this subject, and just over half (13) concerned the definition of a concession contract.

([78]) F Hernández, 'The Evolving Concept of Works and Service Concessions in European Union Law' (2016) 25 *Public Procurement Law Review, Issue 2,* 51–60.

([79]) Case C-458/03 *Parking Brixen GmbH v Gemeinde Brixen and Stadtwerke Brixen AG,* ECLI:EU:C:2005:605, paras 39 and 40.

limited and, more importantly, payments are made by the public authorities themselves. The CJEU has consistently held that it would be unreasonable to require the contracting authority or entity to assume economic risks greater than those existing in the sector in accordance with its applicable legislation. In its own words: "*It is not unusual that certain sectors of activity, in particular sectors involving public service utilities, such as the distribution of water and the disposal of sewage, are subject to rules which may have the effect of limiting the financial risks entailed.[…] it must remain open to the contracting authorities, acting in all good faith, to ensure the supply of services by way of a concession, if they consider that to be the best method of ensuring the public service in question, even if the risk linked to such an operation is limited*." ([80]). The CJEU has confirmed the above-mentioned doctrine in relation to the tender for emergency services for the municipal association (Passau) ([81]), holding that the transfer of a 'very limited' operating risk by the contracting authority is sufficient for the arrangement to be regarded as a services concession ([82]).

([80]) Case C-206/08 *WAZV Gotha v Eurawasser,* ECLI:EU:C:2009:540, paras 72 and 74. That judgement concerned the contractual classification (services concession) granted by the contracting authority – an association of municipalities (WAZV Gotha) – for the indirect provision of services falling within its remit: ensuring the supply of drinking water and the disposal of wastewater for the population residing within its territory. The appellant company (Eurawasser) argued precisely that "*there is no significant risk which can be transferred to the supplier by the contracting authority*" (paragraph 64), which, in its view, should lead to the contract being classified as a services contract rather than a concession. This amounts to saying that there are sectors of activity (e.g., basic public services) in which *a concession arrangement would not be possible* precisely because, as has been stated, there is no operating risk or, if one prefers, *sufficient or significant scope for commercial exploitation.* However, the Court of Justice, as indicated above, does not accept this line of argument, taking the view that even in sectors such as the supply of drinking water and the disposal of wastewater–characterised by extensive public regulation (compulsory connection and use, pricing based on the principle of cost recovery, paragraph 26(2) of the Eurawasser judgement, C-206/08)–it remains possible to resort to the concessionary model. It states in this regard that *"it would not be reasonable to expect a public authority granting a concession to create conditions which were more competitive and involved greater financial risk than those which, on account of the rules governing the sector in question, exist in that sector*", adding immediately afterwards that *"In such circumstances, as the contracting authority has no influence on the detailed rules of public law governing the service, it is impossible for it to introduce and, therefore, to transfer risk factors which are excluded by those rules.*"

([81]) Case C-274/09 *Privater Rettungsdienst und Krankentransport Stadler v Zweckverband für Rettungsdienst und Feuerwehralarmierung Passau,* ECLI:EU:C:2011:130.

([82]) In particular, the CJEU considers it relevant that: (a) negotiations to set the price of services "entail the risk that the service provider may face restrictions imposed during the term of the contract". This is so, as it clarifies further on, because 'the social security bodies with which the selected service provider has to conduct those negotiations consider it important, in view of their legal obligations, that the *usage prices be set as low as possible*; that provider therefore runs the *risk that those prices will not be sufficient* to cover all operating costs' (paragraph 40). (b) The operator's costs are not fully covered. In this regard, the Court notes that "if the operator's actual costs exceed, over a given period, the probable costs on the basis of which the usage fees were calculated, that operator may find itself in a deficit situation and be forced to obtain pre-financing from its own resources"; (c) There is a certain

Risk transfer and allocation within the European System of Accounts (ESA 2010) constitutes another key reference point for understanding the development of the European idea of a concession ([83]). In this context, identifying the risks assumed by the economic operator plays a decisive role in determining whether the assets linked to a transaction (concessions and PPPs) should be recorded on or off the public balance sheet and, consequently, in assessing their impact on public deficit and debt levels.

In the case of PPPs, the ESA 2010 rule centres on the effective transfer of three main risks: construction, demand and availability. In order for the assets linked to the transaction not to be recorded on the public balance sheet, the economic operator must assume the construction risk and, additionally, either the demand risk or the availability risk. Availability risk is explained by the fact that, in such transactions, it is usually the government who pays for the service, meaning that risk transfer cannot always rest on the operator's direct exposure to end-users. This is especially the case in so-called 'cold' services—such as prisons, hospitals, educational establishments or administrative buildings—where users do not pay the operator directly nor freely decide the level of service utilisation under market conditions. In such cases, availability risk acts, so to speak, as a substitute for exposure to demand. This means that the operator is paid on the basis of the actual availability of the asset or service and that it meets the agreed standards; therefore that any lack of availability or failure to meet said standards will result in a significant fall in public payments ([84]).

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risk of non-payment. Although the majority of service users are social security beneficiaries, a not inconsiderable proportion of them are uninsured or privately insured; (d) There is no exclusive service provision clause in favour of the concessionaire (risk of facing competition from other operators).

([83]) Massimo Ricchi, 'Sistema e semantica del PPP, la Finanza di progetto e le concessioni nel nuovo Codice (D.Lgs. 36/2023)' in GF Cartei and M Ricchi (eds), *Finanza di Progetto, PPP e Concessioni. Interpretazioni generative e sviluppo integrato* (Editoriale Scientifica 2024) 21, 29 and 31.

([84]) Regulation (EU) No 549/2013 of the European Parliament and of the Council on the European System of National and Regional Accounts of the European Union [2013] OJ L 174/1, Annex A, Chapter 20, paras 20.283 and 20.284, identifies, amongst the main elements of risk and benefit, construction risk, availability risk and demand risk. Paragraph 20.284 stipulates that the risks and benefits lie with the operator where the construction risk and the demand or availability risk have been effectively transferred. See also Eurostat, *Manual on Government Deficit and Debt – Implementation of ESA 2010* (2022 edition, Publications Office of the European Union 2023), Part 6, section 6.4.3.2, 'Assessment of the Risks and Rewards Borne by Each Contracting Party', paras 35–49, 389–391, esp paras 38–42 and 47–49. In particular, the Manual identifies three main categories of risk in PPPs—construction, availability and demand—it specifies that demand risk does not normally apply where the end user has no freedom of choice regarding the service provided by the asset, as is the case with prisons and, under certain conditions, with hospitals or educational establishments; and it stipulates that assets shall be recorded off the public balance sheet only if the operator assumes the construction risk and, in addition, either the availability risk or the demand risk. On the scope of availability risk, see also ibid, section 6.4.4.2, 'Assessment of the risk', paras 99–101, 399, where it is stated that public payments must

Conversely, in the context of concessions under the ESA 2010, the analysis focuses on the transfer to the concessionaire of two main risks: construction risk and demand risk. Both must be assumed by the concessionaire in order for the concession asset to be kept off the public balance sheet. This arrangement reflects the two key features characterising the statistical treatment of the concession: the existence of a significant investment in the asset and the recovery of said investment through revenue mostly derived from end-users. Hence, demand risk plays a central role. Concessions are related to 'hot' infrastructures or concession assets, where there is actual demand and a direct economic relationship with users, such that the concessionaire is exposed to the actual level of use of the asset. Within this framework, availability does not function as a standalone risk equivalent to that of PPPs, but rather as a necessary condition for the materialisation of demand and the generation of revenue. Consequently, public payments linked to availability will only be permissible provided they do not alter the basic rule set out above. Under the terms of the Manual, such payments must be scrutinised because they may 'directly or indirectly' replace user payments and because, if—together with other forms of public funding—they exceed the payments made by end-users, the transaction "*is not considered a concession from a statistical point of view*" ([85]).

Within this context, it may be argued that the definition of concessions under EU law must be sufficiently broad to encompass all possible forms of concessions, ranging from those with a high level of demand risk to those where such risk is residual or non-existent and the economic model relies on public payments linked to availability. A potential review of Directive 2014/23/EU could adopt this aspect as its starting point, recognising this diversity without forcing it to fit into categories designed for a single model.

4.4. Operating risk and the typology of risks in Directive 2014/23/EU

Operating risk is a general category or overarching concept that groups together various risks that may arise in a concession under a single heading. Within this category, various risks coexist—to varying degrees, depending on the sector and the conditions of the market in question—including, amongst others, financial,

depend on the actual level of availability guaranteed by the operator and that penalties for non-compliance must not be merely symbolic or cosmetic.

([85]) Regulation (EU) No 549/2013 of the European Parliament and of the Council on the European System of National and Regional Accounts of the European Union [2013] OJ L 174/1, Annex A, Chapter 20, para 20.280; Eurostat, *Manual on Government Deficit and Debt – Implementation of ESA 2010* (2022 edition, Publications Office of the European Union 2023), Part 6, section 6.3.1.5.2, paras 23, 27–28, 369–370, and section 6.3.1.5.3, paras 35, 41–42, 370–372.

demand, operational, competition, default, technological, availability and, where applicable, construction risks. Hence, it is necessary to identify the specific risk matrix on a case-by-case basis in order to properly assess the possible courses of action and decide on the one that best serves the public interest ([86]).

Within this context, Directive 2014/23/EU specifies the risks to be transferred for a contract to be classified as a concession. This is a significant development since, until then, the CJEU, whose case law is largely followed by the European legislator, had not pinpointed these risks. Directive 2014/23/EU establishes that operating risk is transferred when the concessionaire bears: (a) the demand risk; (b) the supply risk; or (c) both (Article 5(1)). Additionally, Directive 2014/23/EU provides a definition of said risks in its Recital 20: *"An operating risk should be understood as the risk of exposure to the vagaries of the market, which may consist of either a demand risk or a supply risk, or both a demand and supply risk. Demand risk is to be understood as the risk on actual demand for the works or services which are the object of the contract. Supply risk is to be understood as the risk on the provision of the works or services which are the object of the contract, in particular the risk that the provision of the services will not match demand."*

The definitions used in Recital 20 are not especially clear ([87]). This aspect is, by far, the one that has posed the greatest challenge as regards interpretation for legal practitioners, especially regarding terms of supply risk ([88]).

Demand risk represents the best-known and, consequently, the least contentious part of Article 5(1) of Directive 2014/23/EU. It refers to the risk of use, also termed 'traffic' in some Commission documents, which occurs when the concessionaire's consideration is derived from the amounts paid for using the infrastructure (motorway) or the service (public transport), which is operated by the concessionaire. Consequently, the *number of users* of the infrastructure or the corresponding service is a key factor in the relevant economic analysis of the concession. This is because the transfer of demand risk implies that the concessionaire's *consideration* must derive from usage, demand or patronage.

([86]) In this regard, Marco Caldeira, 'A distribuição de riscos nas concessões' (2025) 12(1) *e-Publica* 118, 125–126, emphasises that there is no single concession model or single risk-sharing matrix, and therefore the allocation must take into account the specific characteristics of each project.

([87]) A critique of the tautological nature of the definitions can be found in Ximena Lazo Vitoria, 'El riesgo operacional como elemento delimitador de los contratos de concesión' in José María Gimeno Feliú (ed.), *Estudio sistemático de la Ley de Contratos del Sector Público* (Aranzadi 2018) 517, 532.

([88]) This was highlighted at an early stage by the European PPP Expertise Centre (EPEC) in '*PPPs and Procurement: The Impact of the New EU Directives*' (2016), 18–24.

Demand risk transfer occurs regardless of whether the concessionaire is paid by users or by the contracting authority itself (shadow toll linked to usage) ([89]). What matters is not the source of the revenue, but that it is genuinely linked to the operation of the infrastructure or the respective service ([90]).

One of the most problematic aspects of concession regulatory frameworks concerns the definition of the meaning and scope of ‘supply risk’. Clarifying this is a key task, as the ability to structure concession contracts (consideration of the concessionaire, effective transfer of concession risk) depends on it, especially in relation to those services where *the risk of non-utilisation is non-existent or very limited*. It is also worth noting that throughout virtually the entire legislative debate, the term 'availability risk' ([91])—as developed under the ESA 2010 framework—was used rather than 'supply risk', which is the term that appears in the finally adopted text ([92]). Since the adoption of Directive 2014/23/EU, this aspect has attracted academic attention ([93]). For the purposes of this report, it is worth

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([89]) As clarified in Directive 2014/23/EU of the European Parliament and of the Council on the award of concession contracts [2014] OJ L 94/1, Recital 18.

([90]) An example of this arrangement can be seen in the Portuguese road concession under the SCUT scheme—Sem Cobrança para o Utilizador, that is, with no direct charge to the user—on the island of São Miguel, with remuneration paid by the government based on actual traffic levels recorded. Furthermore, the Court of Auditors highlights that the concessionaire waived availability payments in its BAFO—proposing an availability fee of 0 euros—and concludes that it assumed the full demand risk. See Court of Auditors, *Audit of the financial implementation of the SCUT road concession on the island of São Miguel* (Report No. 12/2023 – FS/SRATC, 15 December 2023), pp. 23, 27.

([91]) See the proposal drawn up by the European Commission, *Proposal for a Directive of the European Parliament and of the Council on the award of concession contracts* COM(2011) 897 final, Article 2(2), which specified that economic risk may be of two types: *“a) the risk related to the use of the works or the demand for the provision of the service*; *(b) the risk related to the availability of the infrastructure provided by the concessionaire or used for the provision of services to users.*”

([92]) The background to the proceedings before the European Parliament sheds little light on the matter, as the original term (‘availability’) was replaced by the new one (‘supply’) by means of Amendment No 8, *the* justification for which is as follows: *“The definition and meaning of ‘availability risk’ set out in Article 2(2) are not very clear. The proposed new recital seeks to link it to the concessionaire’s decisions regarding its investments for the performance of the concession.”* If this were the case, then the supply risk would fall within the concessionaire’s sphere of decision-making, specifically with regard to investments appropriate to the subject matter of the contract. However, at the same time, this definition does not sit well with the requirement set out in one of the recitals of the Directive, namely that operating risk must not depend on the concessionaire’s own actions.

([93]) Among many other contributions, see T Pez, ‘Le risque, les concessions et les marchés’, op. cit.; F L Hernández González, ‘The Evolving Concept of Works and Service Concessions in European Union Law’, op. cit.; A Huergo Lora, ‘El riesgo operacional en la nueva Ley de Contratos del Sector Público’ (2017) 4 *Documentación Administrativa: Nueva Época* 31; L Torgal, ‘Sobre a nova definição europeia de concessão (Diretiva 2014/23/UE)’, in P Costa Gonçalves and L Torgal (eds), *Estudos em Homenagem a Mário Esteves de Oliveira* (Almedina 2017) 1073–1110; X Lazo Vitoria, ‘El riesgo operacional como elemento highlighting the interpretative approach that has gradually become established in practice.

To try to fit together the pieces of this ‘conceptual jigsaw’ of operating risk and make the system workable, it may be said that, in practice, supply risk has frequently been recast as availability risk, taking as a reference the above-mentioned ESA 2010 framework. According to this interpretation, the concessionaire must meet certain availability or quality standards, such that its consideration depends on the actual degree of compliance with these standards while being subject to automatic and sufficiently significant deductions when the standards are not met. However, this approach poses certain difficulties. Firstly, because in the ESA 2010 availability risk operates as a fully independent risk in PPPs, whereas in concessions it plays a more limited role and is subordinate to demand risk. Secondly, when a concession is structured primarily around public availability payments, the distinction between this contract type and a traditional public contract can become blurred, insofar as the supply risk approximates the risk of the operator’s failure to fulfil its contractual obligations ([94]). Thirdly, because its incorporation into the scope of Directive 2014/23/EU does not sit comfortably with the requirement that operating risk must stem from factors beyond the parties’ control, insofar as availability or quality standards are also linked to the way in which the concessionaire organises and manages the service provision.

In line with the interpretative approach described above, availability risk is extensively used when drafting concession contracts, especially for major infrastructure projects. In this regard, a recent report by the European Investment Bank, based on an analysis of concessions in several Member States (France, Germany, Portugal, Ireland and Spain), notes that, in most cases, *“operating risk tends to be identified with availability risk, as defined in accordance with ESA*

delimitador de los contratos de concesión’, op. cit.; J Kitsos, ‘Defining Concessions in EU Public Procurement Law: Has Directive 2014/23 Missed Another Opportunity for Conceptual Clarification?’ (2018) 43(4) *European Law Review*.

([94]) This difficulty has significant practical consequences. From a legal perspective, it means that contracts initially classified as concessions under Directive 2014/23/EU may, following an analysis of their actual economic structure, reveal that the operating risk has not in fact been transferred, thereby opening the door to their reclassification as public works or services contracts.

From an accounting perspective, the same difficulty is present in the application of the ESA 2010 standards: where the main risks lie predominantly with the government, the asset must be recorded on the public balance sheet, with the consequent impact on public deficit and debt. For example, the empirical data available for Italy illustrate this reality: according to the ISTAT monitoring report covering the period 2010–2024, 92 percent of all PPP transactions analysed—which include PPPs in the strict sense, energy performance contracts and concessions—have been classified as *on-balance-sheet*. See DIPE-ISTAT, *Relazione sull'attività svolta dal DIPE nell'anno 2024 in materia di Partenariato Pubblico Privato e Finanza di Progetto* (June 2025) Appendix, 44–52.

2010 criteria, that is, as those risk transfer parameters relevant for the purposes of the accounting classification of off-balance-sheet assets” ([95]).

Operating risk transfer must reflect the economic reality of the contract and not merely consist in a formal allocation of risks. When the contractual structure is designed by artificially selecting or allocating certain risks with the primary aim of avoiding effective market exposure—which could be described as *cherry-picking*—the very basis of the concession is undermined. In such cases, the allocation of risk ceases to represent a genuine transfer of economic uncertainty to the concessionaire and instead becomes an artificial construct designed to formally comply with the requirements of the Directive. This not only raises doubts as to the contract’s compliance with the legal framework governing concessions, but also blurs the essential distinction between concessions and traditional public contracts, which is based precisely on the effective assumption of the risk arising from the operation.

Recap

To conclude, in conceptual terms, the above analysis permits the following considerations to be formulated:

- The concept of a concession under Directive 2014/23/EU is built on the basis of CJEU case law, whilst incorporating elements of ESA 2010, both from the system governing concessions and that applicable to PPPs.
- The resulting system is hybrid in nature and partially incomplete.
- The definition of operating risk should be reviewed, and there are various regulatory alternatives for doing so. Firstly, the term ‘supply risk’ could be replaced by ‘availability risk’. In this way, the concessionaire’s consideration would be based on infrastructure usage (demand) or on compliance with quality indicators previously set by the contracting authority and applied automatically. This regulatory option would resolve a conceptual problem that has hindered the correct application of Directive 2014/23/EU from the outset. Moreover, no structural changes forcing economic operators to adapt to new terminology would be introduced, thereby promoting conceptual stability. Availability risk should be based on the concept developed in the ESA 2010, which would help to strengthen the overall consistency of the system. However, as explained, within the ESA framework, availability does not operate in the same way in PPPs as it does in concessions. Consequently, its incorporation into the Directive would

([95]) European Investment Bank, *Informe recomendaciones estratégicas: Revitalización del mercado concesional en España y desarrollo institucional de la ONE* (National Evaluation Office), November 2025.

require a specific adaptation to concessions. Secondly, a broad formulation of operating risk could be adopted, one that is not limited to fixed categories of risk. The definition would be based on elements that are already present in the Directive and derived from CJEU case law (e.g., the absence of a guarantee of return on investment). The list of risk types (demand, availability, etc.) would be purely illustrative. This option recognises that operating risk is not limited to the categories explicitly set out. Depending on the sector, it may also encompass different risks (for example, construction).

- The resulting regulation must be broad enough to cover all types of concession contracts: from those with high demand risk to those operating with captive demand, where demand risk is negligible or non-existent.
- A definition based on the concessionaire's exposure to uncertain economic outcomes—in which the specific risk types serve as illustrative examples rather than as rigid legal criteria—would provide a more practical and adaptable framework for the bidding process and project implementation.

4.5. Level of risk assumed and project profitability

The profitability of concessions must be adequate, understood as that which, without generating excessive returns or compromising the efficient use of public resources, is sufficient to attract economic operators and make private participation feasible. However, this profitability cannot be set uniformly for all concession types. Future legislation may be based on the idea that the expected profitability of the contract—expressed, where appropriate, through the internal rate of return (IRR) or another equivalent indicator—should be adjusted according to objective reference indicators. In particular, these indicators could relate to the sector of activity, the level of operating risk actually assumed, the extent of public funding, and the degree of innovation or technical uncertainty involved in the project.

Thus, in concessions where the concessionaire assumes significant exposure to operating risk, or in those requiring innovative or technologically complex solutions, higher profitability thresholds would be justified. Conversely, in schemes with significant public support and reduced risk exposure, a more moderate rate of return may be justified, provided it remains sufficient to ensure the project’s feasibility and attractiveness to the market.

4.6. Strengthening professionalisation in the field of concessions and specific expertise in risk assessment

The complexity of concession contracts and public-private partnership mechanisms in general calls for particular attention to be paid to professionalisation in this specific field. It is especially necessary to strengthen the technical, legal and economic skills of the professionals responsible for their preparation, award and monitoring, as well as to promote a strategic approach based on market knowledge and the appropriate allocation of risks. These capabilities are not always uniformly available across all contracting authorities. Indeed, we must start from a basic fact: the European concessions market is, to a large extent, a market for local public services. As outlined in the analysis of the evolution of the concessions market following the adoption of the Directive, the majority of concessions are put out to tender by local and regional authorities. Recent empirical studies show that renegotiations of contracts awarded by regional and local authorities tend to result in greater increases in contract amounts than those awarded by national authorities, suggesting a need for strengthened institutional capacity at this level ([96]). Efforts to enhance professionalisation must therefore be directed, as a matter of priority, at this territorial level.

Alongside the strengthening of internal teams, it is advisable to promote specific forums for risk analysis and assessment that enable expert knowledge in this field to be brought together from the initial stages of the project. In this regard, certain national experiences, such as those of Germany and Ireland, demonstrate the usefulness of specialised risk assessment workshops involving experts in construction, maintenance, operations and finance. These tools facilitate the early identification of risks, reduce the likelihood of errors in estimation and allocation, and help ensure greater consistency between the risk matrix, the economic and financial model and the contractual documents ([97]).

One possible way to boost these capacities is to promote technical support organisations that provide assistance in drafting, financing, tendering and follow-up of concession projects. The case of the National Development Finance Agency in Ireland serves as a noteworthy example ([98]). It provides financial

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([96]) E Auriol and S Saussier, *Private Participation in Infrastructure: What Role for Public–Private Partnerships?* (LTI Report 4, CEPR Press 2025), 91–92. https://cepr.org/publications/books-and-reports/private-participation-infrastructure-what-role-public-private

([97]) European Investment Bank (n 95).

([98]) G Sheppard and M Beck, *Transparency Trade-Offs in the Operation of National Public-Private Partnership Units: The Case of Ireland's National Development Finance Agency* advice and technical support to public authorities regarding investment projects, including PPPs, and is involved in financial structuring, procurement, tender evaluation, value-for-money analysis and contractual monitoring processes. Within the housing sector, the NDFA has advised certain local authorities on housing developments and social housing projects promoted by the Department of Housing, Local Government and Heritage ([99]).

One regulatory solution is the one adopted by Italian law. There, the conclusion of concession and PPP contracts is made conditional upon the awarding authority being pre-qualified (Article 174(5) of Legislative Decree 36/2023). Furthermore, it requires the presence of at least one person with three years' experience in managing economic-financial plans and risks (Articles 3.5 and 5.5 of Annex II.4 of the aforementioned Code).

It is also essential to develop specialised roles and specific training programmes that enable the competent handling of these contracts, which are more complex than traditional ones. In this regard, it would be advisable to align these capabilities with the European ProcurCompEU framework ([100]), while also considering the inclusion of a *specific competence related to risk assessment and the planning, management and supervision of concession projects*, given their growing importance and technical specificity within public procurement ([101]). Finally, the creation of specialised support units has been proposed, at both national and European levels. These units would provide expert knowledge, technical assistance to smaller organisations, and greater standardisation of procedures ([102]).

(2023) 42(4) Journal of Accounting and Public Policy, Article 107111, 1–17. https://doi.org/10.1016/j.jaccpubpol.2023.107111

([99]) National Development Finance Agency, "Who We Are". https://www.ndfa.ie/about/who-we-are; National Development Finance Agency, "Financial Advisory Services". https://www.ndfa.ie/services/financial-advisory-services; National Treasury Management Agency, *Annual Report 2022 (2023)* 31–33 (regarding its involvement in housing and *social housing PPP* projects).

([100]) European Commission, ProcurCompEU: The European Competence Framework for Public Procurement Professionals (Publications Office of the European Union, 2020).

([101]) In this regard, the Chaire de droit des contrats publics Lyon 3 Jean Moulin University has recommended the development of specialised roles or services for *risk management* and *contract management*, both within contracting authorities and among economic operators, as well as the training of professionals on both sides in the identification and assessment of risks. See F Lichère, F Melleray and L. Richer (eds), *Répartition et traitement des risques dans la commande publique*, Rapport, Chaire de droit des contrats publics, Université Jean Moulin – Lyon 3, July 2024, operational recommendations 1 and 2, 241–243. https://chairedcp.univ-lyon3.fr/rapport-repartition-et-traitement-des-risques-dans-la-commande-publique

([102]) E Auriol and S Saussier, *'Private Participation in Infrastructure: What Role for Public–Private Partnerships?'*, 92.

5. The duration of concessions and the reversion of assets

Article 18 of Directive 2014/23/EU establishes that "*the duration of concessions shall be limited. The contracting authority or contracting entity shall estimate the duration on the basis of the works or services requested.*" For concessions exceeding five years, "*[…] the maximum duration of the concession shall not exceed the time that a concessionaire could reasonably be expected to take to recoup the investments made in operating the works or services together with a return on invested capital taking into account the investments required to achieve the specific contractual objectives.*" ([103]). As Recital 52 makes clear, this rule aims "*to prevent market foreclosure and the restriction of competition*", since "*very long-term concessions may lead to market foreclosure, thereby hindering the free movement of services and the freedom of establishment*."

Tying concession terms exclusively to the financial logic of investment recovery and profit generation overlooks the potential of these contracts to meet strategic social and environmental objectives of public procurement. This approach, which revolves around project financing, overlooks the fact that concessions manage critical infrastructure with a significant impact on decarbonisation, biodiversity protection, resilience and social cohesion. Conversely, a broader assessment approach has traditionally been used by the European Commission in the context of funding investment projects—specifically through the Structural and Cohesion Funds—which requires applying a cost-benefit analysis that extends beyond mere financial profitability ([104]). In this regard, the Guide cited in the previous footnote has been used as a methodological reference for the preparation and evaluation of major projects. It explicitly differentiates between a project's financial analysis—which focuses on its cash flows and financial sustainability—and economic analysis, the aim of which is to assess the project's contribution to social well-being. To this end, it stipulates that economic analysis must be based on the conversion of market prices into shadow prices and on the identification and valuation of social costs and benefits, including, where applicable, relevant externalities (for example, environmental impacts, effects on congestion or safety) throughout the project's time horizon. This methodological approach highlights that the evaluation of public investments should not be limited to strictly

([103]) This requirement addresses a real problem with many concessions put out to tender in the past, whose duration proved to be excessively long. For example, in the case of motorway concessions in France, a comprehensive evaluation report on the model noted that "The main weakness of historical concession contracts lies in their duration", see Sénat, Préparation de l'échéance des contrats de concessions autoroutières, Rapport d'information n° 65 (2024–2025, 23 October 2024). https://www.senat.fr/rap/r24-065/r24-065.html

([104]) See European Commission, Directorate-General for Regional and Urban Policy, *Guide to Cost-Benefit Analysis of Investment Projects* (Publications Office of the European Union 2014). https://ec.europa.eu/regional_policy/sources/studies/cba_guide.pdf financial criteria but must include a broader perspective of socio-economic efficiency.

In Spain, the need to review the traditional criterion regarding the duration of concessions has been highlighted. It has been pointed out that this limitation may be inconsistent with certain principles of public procurement, especially its strategic role, and it is therefore recommended that the strict connection between the duration and the amortisation of the capital investment be made more flexible. The review of other factors such as the specific characteristics of the sector or project, performance against the strategic objectives pursued, the level of operating risk actually assumed by the contractor in the execution of the concession, or the socio-economic costs and benefits of the project, has also been recommended ([105]).

Strictly linking the duration of the concession to the payback period—that is, a predominantly quantitative approach—raises a number of practical problems that highlight the limitations of this criterion as the sole parameter for setting the concession term. For example, it is not uncommon for the payback period and, by extension, the duration of the concession thus set, to differ from the useful life of the contract's assets. This disconnection is especially evident in equipment-intensive sectors, where assets such as refuse collection vehicles, bins or buses have a useful life that exceeds the time horizon defined by the strict logic of investment payback, leading to potential economic and environmental inefficiencies and moving away from life-cycle-oriented management.

([105]) Oficina Independiente de Regulación y Supervisión de la Contratación (OIReScon), *Propuestas para el proceso de evaluación de las Directivas de contratación pública* (2025) 30. https://www.hacienda.gob.es/rsc/oirescon/estudios-guias-protocolos/evaluacion-directivas.pdf;
Oficina Independiente de Regulación y Supervisión de la Contratación (OIReScon), *Valoración del Informe de evaluación de las Directivas de la contratación pública* (2026) 16. https://www.hacienda.gob.es/rsc/oirescon/estudios-guias-protocolos/aportaciones-oirescon.pdf;

For its part, the Chamber of Concessionaires and Businesses linked to the Public Sector in the scope of Public Infrastructure, Equipment and Services (CCIES) supports this proposal, arguing that "Article 18(2) of the Concessions Directive is extremely restrictive. This applies to all types of concessions, but particularly to service concessions where the value of capital expenditure (CAPEX) is not significant. If the duration of concessions depends solely on financial amortisation, this prevents the public authorities from using the contract to transform services and align them with environmental sustainability, technical innovation and positive social impact objectives. In the CCIES's view, the term should allow for the development of strategic elements and socio-economic benefits that improve value for money in the long term." See Cámara de Concesionarios de Infraestructuras, Equipamientos y Servicios Públicos (CCIES), *Propuesta para la revisión de la Directiva 2014/23/EU sobre Adjudicación de Concesiones* (January 2026).

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Furthermore, this approach fails to provide adequate incentives for asset maintenance. When the duration of the concession is set on the basis of a relatively short payback period, the concessionaire may lack incentives to invest in upkeep or maintenance in the medium and long term, especially in the final stages of the contract. This situation is particularly problematic in the case of essential infrastructures and facilities, where insufficient maintenance can result in declining service quality and the premature deterioration of assets, with negative effects from both an economic and a public-interest perspective ([106]).

From the contracting authority's perspective, this model also fails to provide adequate incentives. In many legal systems, preliminary feasibility studies that include economic, social or environmental factors are required, which allow for a broader view of the project to be incorporated. However, this analytical depth is not carried over when determining the duration of the concession, which is set according to an essentially quantitative criterion linked to the investment payback. This creates a disconnection between a planning phase that incorporates a comprehensive view of the project and a final decision that reduces said complexity to a purely financial logic, neglecting other values that are of public interest and weakening the incentives to integrate them effectively into the concession design.

Another aspect closely linked to the above is the regime governing the reversion of assets at the end of the concession. Determining the conditions under which these assets must be handed over to the contracting authority—especially their state of repair and functionality—is of key importance from a general interest perspective ([107]). However, a model which sets the duration mainly on the basis

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([106]) For its part, the EIB 2026 (n 8) 64, linking this aspect to the allocation of risks, has emphasised that "if lenders are guaranteed to have their loans repaid or equity investors are guaranteed a return irrespective of the performance of the project, they will have little incentive to assess, manage or mitigate risks (*such as a project company delivering the project facilities late or over budget*)" (emphasis added).

([107]) The issue of the reversion of assets is currently of special practical relevance in a context where numerous large-scale infrastructure concessions are nearing their end, thus requiring specific attention to be paid to the conditions under which the assets are handed over to the public sector. For example, in the case of motorways in France, the seven historic concessions—which account for more than 90 percent of the concessionary network—will expire between 2031 and 2036. Upon the expiry of these concessions, the revertible assets—which constitute virtually all of the concession's assets—revert to the State free of charge, with the concessionaire being obliged to bear the costs of the investments necessary to return them in 'good condition'. However, the contracts merely use this expression without providing an operational definition. As the Transport Regulatory Authority (ART) has pointed out in its reports on the economics of motorway concessions, this lack of clarity prevents a concrete assessment of the condition of the assets and may weaken concessionaires' incentives to make the necessary investments during the final phase of the contract, highlighting the need to define this standard more precisely in order to protect the State's financial interests. See *Préparation de l'échéance des contrats de concessions autoroutières*, Rapport d'information n° 65 (2024–2025, 23 October 2024). https://www.senat.fr/rap/r24-065/r24-065.html of investment payback may weaken the concessionaire’s incentives to maintain the assets properly, especially in the final phase of the contract.

Within this context, reversion cannot be regarded as a mere ancillary matter but requires specific attention and, where necessary, the setting of more precise rules to ensure proper asset maintenance throughout the term of the concession as well as their correct handover upon expiry, thus preventing the transfer of costs related to these assets to the public sector.

6. Strengthening the preparation phase of the concession contract

In a 2018 report, the European Court of Auditors highlighted serious weaknesses in the preparation phase of concessions [108]. Indeed, concessions have repeatedly suffered from insufficient preparation, especially with regard to contractual design, the identification and quantification of risks, and the realistic projection of operational profits.

The experiences of various Member States suggest that this phase constitutes the true 'Achilles' heel' of the concession model. It is at this stage where key decisions regarding the contract structure must be taken, and inadequate or insufficiently rigorous preparation may seriously jeopardise the subsequent development of the concession. Specifically, errors related to demand forecasting, risk allocation or the economic and financial structuring of the contract tend to manifest during the execution phase as contractual imbalances, a deterioration in the quality of services or infrastructure and, ultimately, negative impacts on public finances.

Within this context, the preparation phase gains a central importance, insofar as the feasibility of the concession project is established at this stage, and the conditions defining its operation throughout the entire life cycle are set [109].

In this regard, some Member States have developed institutional support and oversight mechanisms for the concessions preparation phase. For example, in Spain the National Evaluation Office (ONE), which is a part of OIReScon, serves as an example of *ex ante* oversight of the financial sustainability of concession contracts for certain works and services, as well as of the agreements to restore economic and financial balance that must be adopted during their implementation. In addition to its oversight role, the ONE has also helped to develop criteria and methodological materials for the improved preparation of concession dossiers, especially by means of guides on requests for reports,

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([108]) In this regard, Special Report No. 9 of 2018 by the European Court of Auditors, *'Public-private partnerships in the EU: widespread shortcomings and limited* benefits', is highly illuminating; it points out that for most of the projects audited*, 'the PPP option was chosen without any prior comparative analysis, to demonstrate that it was the one maximising value-for-money.*' It also highlights weaknesses in planning: preliminary analyses based on *"overly optimistic* scenarios" and the choice of contractual arrangement *"without any prior comparative analysis of alternative options*". European Court of Auditors, *Special Report No 9/2018: Public-private partnerships in the EU: widespread shortcomings and limited benefits* (2018). https://www.eca.europa.eu/en/publications?did=45153

([109]) European Investment Bank (n 8), 10 et seq., emphasises the importance of the project preparation phase.

feasibility studies and value-for-money analyses ([110]). Meanwhile, the case of Fin Infra (*Mission d'appui au financement des infrastructures*) in France may be cited, amongst others, as an example of an institutional mechanism for advice and technical support. This is a national-level service body attached to the Directorate-General for the Treasury, established in 2016, which advises public bodies on the legal and financial structuring of public investment projects, especially when complex contracts such as concessions or *marchés de partenariat* are used ([111]).

These experiences show that improving the concession model does not depend solely on substantive legislation, but also on the existence of specialised institutional capacities that are able to support the economic, legal and financial preparation of these contracts.

([110]) See Oficina Nacional de Evaluación (ONE), *Información institucional y repositorio de informes.* https://www.hacienda.gob.es/en-GB/Oirescon/Paginas/one.aspx; Its website publishes the mandatory reports issued, as well as supporting materials for preparing applications, including the *Guía de ayuda para la solicitud y modelos de estudio de viabilidad* y la *Metodología y guía de Valor por Dinero (VpD)*.

([111])See Ministère de l'Économie, des Finances et de la Souveraineté industrielle, énergétique et numérique, Fin Infra, *Les missions de Fin Infra*. Fin Infra's remit is defined by Decree No. 2016-522 of 27 April 2016 and includes, amongst other functions, providing advice on the choice of contractual arrangement, financial structuring, project bankability, best market practices and the optimisation of existing contracts. See also Fin Infra, *Rapports d'activité*, in particular the *Rapport d'activité 2024*, which details the work carried out by this body on infrastructure projects. https://www.economie.gouv.fr/fininfra/comprendre-fin-infra/les-missions-de-fin-infra; https://www.economie.gouv.fr/files/files/directions_services/fininfra/RA_2024_FININFRAv11%20web.pdf

7. The implementation phase of concessions: towards a regime tailored to long-term contracts

7.1. Background

The results of the European Commission's public consultation, published in March 2026 in the Factual Summary Report on the Public Consultation on the Revision of the Public Procurement Directives, show that a significant proportion of the calls for reform in the field of concessions focus on the contract execution phase. Specifically, a majority of the responses received (58 percent) identified the need to introduce additional rules regarding the performance of concession contracts, placing this area above other structural elements such as duration (55 percent) or even the very definition of a concession and of operating risk (44 percent).

This finding is especially telling: after more than a decade of implementation, the key regulatory gaps identified by practitioners lie not in the awarding phase, but in the challenges that emerge throughout the execution of the concession, where aspects such as contractual amendments, adaptation to changed circumstances, or the maintenance of the initial economic conditions take on central importance ([112]).

The European legislator has incorporated rules on contractual amendments into the 2014 Directives for the first time. These reflect CJEU case law, which extended the general principles of public procurement to the contractual execution phase. However, despite these judicial efforts, there remained considerable uncertainty regarding the circumstances and limits of contractual amendments ([113]). The 2014 codification responds, to a large extent, to this need for certainty. However, the provisions contained in the three Directives—Directive 2014/23/EU, Directive 2014/24/EU and Directive 2014/25/EU—have not resulted in any substantive differentiation between their respective systems ([114]). It should be emphasised that there are virtually no differences between the systems governing the modification of concessions and that governing public contracts

([112]) European Commission, Directorate-General for the Internal Market, Industry, Entrepreneurship and SMEs, *Factual Summary Report on the Public Consultation on the Revision of the Public Procurement Directives* (2026).

([113]) See J M Hebly and P Heijnsbroek, 'When Amending Leads to Ending' in Gustavo Piga and Steen Treumer (eds), *The Applied Law and Economics of Public Procurement* (Routledge 2013) 163, 180.

([114]) See the very similar provisions contained in Article 43 of Directive 2014/23/EU, Article 72 of Directive 2014/24/EU and Article 89 of Directive 2014/25/EU.

([115]), despite the complex and long-term nature of the latter, which might have justified specific legislation ([116]). Furthermore, the European Commission itself had pointed out that these contracts, "*Since they concern a service spread out in time, […] must be able to evolve in line with changes in the macro-economic or technological environment, and in line with general interest requirements*", thereby seeking to justify specific rules ([117]). The same idea is also emphasised in Recital 75 of Directive 2014/23 itself: "*Concession contracts typically involve long-term and complex technical and financial arrangements which are often subject to changing circumstances.*" For this reason, it has been emphasised that the flexibility required in concessions should result in a regime distinct from the rules on contractual amendments ([118]).

7.2. Modification of concessions

7.2.1. The approach to the legislation

Under EU law, the regime governing contract amendments is based on a strengthened concept of the immutability of the essential terms of the award. This results in limited scope for amending the content of the contract during its performance in order to maintain competition and equal treatment, pursuant to CJEU case law ([119]). This approach has entailed a restriction on the public

([115]) Article 43 of Directive 2014/23/EU sets out a list of circumstances in which a concession may be amended, which corresponds to those laid down in Article 72 of Directive 2014/24. For the origin of the provisions cited and, in particular, on the (failed) attempt to establish a more flexible legal framework for contract modification in the case of concessions, see Isabel Gallego Córcoles, 'La modificación de los contratos en la cuarta generación de Directivas sobre contratación pública' in José María Gimeno Feliu (ed.), *Las nuevas directivas de contratación pública: Ponencias sectoriales X Congreso de la Asociación Española de Profesores de Derecho Administrativo* (Thomson Reuters Aranzadi 2015) 107, 134.

([116]) This argument has traditionally been upheld in legal doctrine. For a general overview, see M Burnett, 'PPP during the Contract Execution Phase – A Need for Greater Certainty in Community Law' (2008) 2 *European Procurement & Public Private Partnership Law Review* 51, 53.

([117]) European Commission, *Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions* COM(2004) 327 final, para 47.

([118]) In Caranta's words, 'If flexibility were taken seriously, given that these are complex, long-term contracts, concessions should be easier to amend during their execution than standard public procurement contracts.' See Roberto Caranta, *Coherence in the EU Public Procurement Directives* (Research Report for the European Commission, August 2025) 114. He had previously set out the same argument in Roberto Caranta, 'The Changes to the Public Contract Directives and the Story They Tell about How EU Law Works' (2015) 52 *Common Market Law Review* 429.

([119]) Case C-454/06 Pressetext Nachrichtenagentur GmbH v Republik Österreich (Bund) and Others, ECLI:EU:C:2008:351, a landmark case concerning the amendment of public contracts. Broadly speaking, legal scholars have welcomed the fact that the 2014 Directives authorities' traditional powers to tailor the concession to new general interest requirements and to ensure the continuity of public service ([120]).

Furthermore, the regime for contractual amendments included in the 2014 Directives is also a response to cases of malpractice highlighted in various reports and studies that were carried out at the time of the Directives' adoption ([121]). There is especially an underlying concern to prevent contractual amendments from being used to alter, after the fact, the initial tendering conditions, which may favour renegotiations capable of distorting the outcome of the tender or circumventing the application of the award rules.

During the adoption phase of Directive 2014/23, an attempt was made to introduce a clear distinction between the rules governing amendments to works and services concession contracts and those applicable to public contracts. On the one hand, by making the possibility of amending a concession a general principle ([122]) and, on the other, by increasing the thresholds for so-called de

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incorporated the case law previously developed by the CJEU on contractual amendments in a more coherent and structured manner, thereby enhancing the clarity and legal certainty of the applicable regime. See Vincent P. Wangelow, 'EU Public Procurement Law: Amendments of Public Works Contracts After the Award Due to Additional Works and Unforeseeable Circumstances'. (2020) 15(2) *European Procurement & Public Private Partnership Law Review* 108, 121.

([120]) On the traditional recognition of this power in administrative law, see *Compagnie générale française des tramways* (Conseil d'État, 11 March 1910, No 16178), where the possibility was recognised of requiring the concessionaire to make changes to the organisation of the service granted (number of departures and timetables), due to requirements linked to the proper provision of the public service.

([121]) On the risks associated with the abusive use of contractual amendments during the performance of the contract, particularly from the perspective of corruption, the inefficient use of public resources and the impact on competition, see, for example, OECD, *OECD Principles for Integrity in Public Procurement* (OECD Publishing 2009) 9–11, 15; European Commission, *Report from the Commission to the Council and the European Parliament: EU Anti-Corruption Report* COM(2014) 38 final, 20, 24, 26, 34–35.

PwC, Ecorys and Utrecht University, *Identifying and Reducing Corruption in Public Procurement in the EU: Development of a Methodology to Estimate the Direct Costs of Corruption and Other Elements for an EU Evaluation Mechanism in the Area of Anti-Corruption* (report prepared for OLAF/European Commission, 30 June 2013) 149–151.

([122]) The proposal was that, as a general rule, concessions could be amended by means of an addendum to the original contract, without the need to launch a new public tender. The introduction of the principle of the amendability of concessions was subject to an exception only in cases of substantial amendments. See Committee on the Internal Market and Consumer Protection, *Report on the Proposal for a Directive of the European Parliament and of the Council on the Award of Concession Contracts* (session of 1 February 2013).

minimis amendments ([123]). However, as noted, this attempt was unsuccessful, and the system ultimately adopted effectively places public contracts (Directive 2014/24) on an equal footing with concessions (Directive 2014/23). The result is even paradoxical in the context of de *minimis* amendments. Works contracts have a wider margin (15 per cent, Article 72(2) of Directive 2014/24/EU) than concessions (10 percent, Article 43(2) of Directive 2014/23/EU), despite the fact that the latter are longer-term and more complex contracts.

This system is essentially structured around the idea that any modification requires a new tender procedure, except in the exhaustive cases harmonised by the 2014 Directives, which codified the previous case-law criteria ([124]). Following the adoption of the 2014 Directives, the CJEU has confirmed this approach, ruling that Article 43 of Directive 2014/23 "*[…] provides for exhaustive harmonisation of the circumstances in which, on the one hand, concessions may be modified without it being necessary for that purpose to organise a new concession award procedure […] and in which, on the other hand, such an award procedure is required in the event of modification of the terms of the concession*" ([125]).

Article 43 of Directive 2014/23/EU sets out the circumstances in which a concession may be amended without a new tender procedure, divided into six categories: amendments provided for in the concession documents by means of clear, precise and unequivocal review clauses (Article 43(1)(a)); additional works or services (Article 43(1)(b)); amendments arising from circumstances that a diligent contracting authority could not have foreseen (Article 43(1)(c)); change of concessionaire (Article 43(1)(d)); non-substantial amendments (Article 43(1)(e)); and amendments of a minor nature or *de minimis* (Article 43(2)). Scholarly analysis of this model has focused primarily on the rules applicable to public contracts which are subject to Directive 2014/24/EU, with little attention paid to the specific features of its application in the context of concessions.

Broadly speaking, the new framework (Article 72 of Directive 2014/24) has been received positively, although certain areas for improvement in the legislation have been identified ([126]). Special attention has been drawn to the need to clarify the meaning of the 'overall nature of the contract' and how it differs from the concept

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([123]) See, for example, Opinion of the European Committee of the Regions—'The Award of Concessions contracts', 96th plenary session, 18–19 July 2012, OJ C 277, 13 September 2012 (amendment 30, Article 42).

([124]) For a general overview, see Hélène Hoepffner, 'La modification des contrats de la commande publique' (2016) 2 *Revue française de droit administratif* 280.

([125]) Joined Cases C-721/19 and C-722/19 *Sisal SpA and Others v Agenzia delle Dogane e dei Monopoli and Ministero dell'Economia e delle Finanze*, ECLI:EU:C:2021:672, para 31.

([126]) See Wangelow (n 119), 121–124; P Bogdanowicz, 'Modification of Directives and Contract Modifications: Article 72 of Directive 2014/24/EU Revisited' in Willem Janssen, François Lichère and Kirsi-Maria Magga (eds), *Reforming EU Public Procurement: Proposals for the Reform of Directive 2014/24/EU* (Edward Elgar 2026) 253, 254.

of a ‘substantial amendment’. To this should be added the need to clarify another especially relevant concept in the field of concessions: that of “*circumstances which a diligent contracting authority could not have foresee.*”

In practice, the definition of these vague legal concepts initially depends on the assessment made by the contracting authority for each specific case, an assessment which is, where appropriate, subject to review by the national court. For its part, the CJEU has made several rulings on the regime governing amendments to concessions, although without establishing general criteria that would fully resolve the aforementioned lack of clarity. This is due, at least in part, to the specific terms in which the respective questions referred for a preliminary ruling have been formulated. Furthermore, within the framework of preliminary ruling proceedings, the Court usually specifies the interpretative criteria derived from EU law, while it is for the national courts to verify whether they apply in the light of the circumstances of the main proceedings. In this way, case law helps to define the general framework of interpretation but does not always eliminate the margins of uncertainty arising from its application to specific concession cases.

One such example may be found in the CJEU judgement of 29 April 2025 ([127]) concerning the need to amend a concession for a reason not provided for in the tender documents (Article 43(1)(c) of Directive 2014/23). Specifically, the modification involved extending certain concession contracts for service areas on German motorways to include electric vehicle charging points ([128]). The Court notes that when contracting authorities are faced with unforeseeable external circumstances ([129]), “*they must have a certain degree of flexibility in order to be able to adapt the concession to those circumstances without a new award procedure*” ([130]). And that the modification of a concession is a ‘need’ in accordance with Article 43(1)(c) and Recital 76 of Directive 2014/23 “*where such (unforeseen) circumstances require the initial concession to be adapted in order to ensure that the proper performance of the obligations arising from it may*

([127]) Case C-452/23 *Fastned Deutschland GmbH & Co. KG v Die Autobahn GmbH des Bundes*, ECLI:EU:C:2025:284.

([128]) The new service giving rise to the amendment consists of “the construction, maintenance and operation of high-power electric charging infrastructure for the needs of vehicles”.

([129]) In this case, the “unforeseeability” stems from the fact that, at the time the concessions were granted (1996 and 1998), the need for high-power electric charging infrastructure at service areas on federal motorways could not be foreseen, nor that a legal framework would be adopted requiring such infrastructure to be installed.

([130]) Prior to the 2014 Directives, the CJEU had ruled on several occasions to assess adjustments based on circumstances arising after the contract was concluded. See Case C-24/91 *Commission v Spain,* ECLI:EU:C:1992:134; Case C-318/94 *Commission v Germany,* ECLI:EU:C:1996:149; Case C-496/99 P *Commission v CAS Succhi di Frutta SpA,* ECLI:EU:C:2004:236; Case C-454/06 *Pressetext Nachrichtenagentur GmbH v Republic of Austria (Federal Government) and Others,* ECLI:EU:C:2008:351; and Case C-549/14 *Finn Frogne A/S v Rigspolitiet ved Center for Beredskabskommunikation,* ECLI:EU:C:2016:634.

continue" (paragraphs 71 and 75) ([131]). In this regard, it has been noted that the amendment must be *funktional notwendig* to ensure the proper performance of the original concession under the new circumstances ([132]). In other words, the modification to the concession to include fast-charging infrastructure had to be needed to ensure the proper functioning of service stations and rest areas.

Subsequently, however, on 6 March 2026, the referring court, the Higher Regional Court of Düsseldorf, found that the requirement of 'need' had not been met. According to the German court, this was because petrol stations and service areas could continue to operate without the operators additionally providing fast-charging infrastructure. It therefore held that these agreements did constitute a substantial amendment to the original concession ([133]).

A second example may be found in the CJEU judgement of 7 November 2024, Adusbef (Case C-683/22), concerning the collapse of the Morandi Bridge in Genoa, which claimed 43 lives. This gave rise to proceedings for serious breach of the maintenance and upkeep obligations related to the motorway network for which the concessionaire, Autostrade per l'Italia (ASPI), was responsible. However, the Ministry in question and the concessionaire agreed to a settlement which closed the aforesaid proceedings (without formally declaring a breach) and amended the concession contract. The first preliminary ruling was formulated in broad ([134]) or 'ambiguous' terms ([135]). The Court held that a breach of contract cannot, in itself, be regarded as a circumstance which a diligent contracting authority could not have foreseen within the meaning of Article 43(1)(c) of Directive 2014/23 and, therefore, could not justify a contractual amendment (FJ. 64). However, it is also true that the Court chose not to transpose this conclusion verbatim into the operative part of the judgement, instead articulating an approach that shifts the national court's scrutiny towards compliance with the

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([131]) It should be noted, however, that the issue of the preliminary ruling did not strictly concern the definition of unforeseeable circumstances, but rather the applicability of the European regime governing contractual amendments to contracts initially awarded outside the scope of the Directives, an issue which the Court refers to in Article 43 of Directive 2014/23/EU.

([132]) A Hartwecker, 'Boxenstopp beim EuGH: Altverträge überholen den Wettbewerb' *Vergabeblog.de* (16 February 2026) No 73517.

([133]) Oberlandesgericht Düsseldorf, 'Agreement on fast-charging infrastructure at managed service areas on federal motorways not in compliance with public procurement law' (press release, 6 March 2026) *Justizportal Nordrhein-Westfalen.* https://www.justiz.nrw.de/presse/2026-03-06

([134]) Specifically, the question was whether EU law permits 'the interpretation of national legislation to the effect that a contracting authority may carry out a procedure for the subjective and objective amendment of an existing motorway concession or its renegotiation, without assessing or ruling on the obligation to initiate a public tender procedure'.

([135]) According to Advocate General Campos Sánchez-Bordona in *Adusbef – Associazione difesa utenti servizi bancari e finanziari* (Case C-683/22), ECLI:EU:C:2024:376, paragraph 43. https://infocuria.curia.europa.eu/tabs/affair?lang=es&searchTerm=c-683%2F22

principle of good governance and the obligation to assess, in advance and with reasons, the reliability of the concessionaire.

Following the Court of Justice's ruling, it fell to the Lazio Regional Administrative Court to apply the interpretative criteria laid down by the CJEU in the main proceedings. By final judgement of 31 March 2025 (judgement No 6464/2025), the Lazio Regional Administrative Court dismissed Adusbef's appeal against the settlement agreement between the Ministry and ASPI. It reasoned that the obligation to assess the concessionaire's reliability arises only if there is a substantial amendment of the concession. In this case, it considered that no such modification had taken place: neither the change in ASPI's shareholding nor the new commitments undertaken altered the essential elements of the original concession. In this way, it could be said, the Regional Administrative Court avoided ruling on whether the serious breach of maintenance obligations required such prior scrutiny.

The examples set out demonstrate different approaches. The German referring court denied that the 'need' under Article 43(1)(c) was met and classified the modification as substantial. For its part, the Italian court concluded that no substantial amendment was apparent, which rendered the prior reliability check inapplicable, pursuant to the terms required by the CJEU. In short, the case law cited shows that the Court of Justice plays a key role in defining the interpretative criteria applicable to Article 43 of Directive 2014/23/EU. However, the specific application of said criteria depends, to a large extent, on the assessments of national courts in the light of the circumstances of the main proceedings.

7.2.2. Future prospects

Against the backdrop of Directive 2014/23, a potential review of the European regime on contractual amendments once again places the question of which regulatory model is best suited to the nature of concessions at the heart of the debate. The duration of these contracts, their technical and financial complexity, and their particular exposure to economic, technological or regulatory changes raise doubts as to the suitability of the model currently in force. Specifically, the framework based on concession amendments included in advance and those arising from unforeseeable circumstances has not always provided a fully satisfactory solution in practice. In very long-term contracts, it is extraordinarily difficult to anticipate precisely, clearly and unequivocally—in accordance with the requirements of the European legislator—the specific adjustments that may be needed during the contract's performance. This reflects, almost word for word, the doctrine set out in the aforesaid judgement of the CJEU *in Succhi di Frutta v Commission*, according to which the principles of publicity and its corollary, that of transparency, require that "*all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the notice or contract documents so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret* *them in the same way and, secondly, the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the relevant contract.*" In other words, altering the content is lawful because all tenderers knew or ought to have known—exercising 'ordinary care'—that the performance of the contract might entail its modification. However, as has been explained, a generic provision is not sufficient; rather, it is necessary to set out in detail the hypothetical scenarios for contractual alteration ([136]).

The difficulty in meeting the aforementioned standard does not necessarily stem from a lack of diligence by the contracting authority, but rather from the growing volatility of the economic, technological and social context in which concessions operate. Changes in user habits, new technical or regulatory requirements, or transformations linked to environmental and digital targets may require more flexible adaptation mechanisms than those that are currently provided for. Recent economic evidence also points in the same direction. A study based on notices of contractual amendments published on TED between 2016 and 2023 has concluded that renegotiations are not in themselves a sign of contractual failure. In many cases, they constitute a means of adapting to inevitable disruptions in long-term contracts ([137]). The same study warns of an indirect effect of the current framework. Faced with the difficulty of renegotiation, awarding authorities tend to draw up excessively lengthy and rigid contracts, which attempt to anticipate every possible scenario. This rigidity increases transaction costs and hinders subsequent adaptation ([138]).

Recap

In this context, it is worth outlining some avenues that may be explored by a potential review of the amendment system.

- The first would be to clarify the undefined legal concepts in Article 43. At present, their specification relies largely on the case-by-case assessment of contracting authorities and national courts. The

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([136]) See Case C-496/99 P *Commission v CAS Succhi di Frutta SpA*, ECLI:EU:C:2004:236, paragraphs 111 and 118–121. Although the case concerned a public supply contract, the Court's criteria have been applied to the general regime governing contractual amendments subsequently enshrined in the 2014 Directives. In particular, the requirement that the tender conditions be formulated in a clear, precise and unambiguous manner explains the rule now set out in Article 43(1)(a) of Directive 2014/23/EU. Its application to the concessions sector, however, poses specific difficulties, given the duration, complexity and exposure of these contracts to economic, technical or regulatory changes that are not always foreseeable at awarding time.

([137]) E Auriol and S Saussier (n 96) 6–7, 93 onwards.

([138]) E Auriol and S Saussier (n 96) 93–95.

experience analysed in this chapter illustrates the risk of divergent outcomes between Member States ([139]).

- The second approach would involve expressly recognising the duration of the concession as a criterion for assessing unforeseeability. Article 43(1)(c) requires the need for modification to arise from circumstances that could not have been foreseen by a diligent contracting authority. This standard is currently applied uniformly to all contracts, regardless of their duration. However, the ability to foresee is not the same in a short-term contract as in a concession spanning several decades. The longer the time horizon, the more difficult it is to anticipate the circumstances that will affect performance. In such timeframes, technological changes, regulatory changes or changes in user habits are beyond the scope of the initial forecast. This assessment is not lost on the Directive. Recital 76 expressly notes that contracting authorities may encounter unforeseeable external circumstances, "*in particular where the performance of the concession covers a long period*". It would not, therefore, be a matter of introducing something new, but rather of incorporating into the main text that which is already recognised by the preamble.

- The third approach would be to review the threshold for de *minimis* modifications. As noted, concessions have a lower margin (10 percent) than works contracts (15 percent). Bringing them into line could be regarded as a technical correction, consistent with the longer duration and greater complexity of these contracts.

Ultimately, this is not a matter of altering the stability of the rules or the structure of Article 43. It is a matter of recognising the specific nature of concessions and equipping them with the tools for adaptation that are required due to their duration and complexity.

7.3. Economic and financial rebalancing of concessions

Directive 2014/23 does not expressly regulate mechanisms for economic and financial rebalancing in the event of unforeseen changes during the performance of a contract ([140]). For its part, the CJEU has recently ruled that no right of the

([139]) Wangelow (n 119) 121 and 124.

([140]) During the drafting of Directive 2014/23/EU, an attempt was made to introduce an explicit provision on maintaining the economic equilibrium of concessions. However, this proposal was rejected on the grounds that "the purpose of the request can be fully met by the application of paragraphs 5 and 6 of Article 42 relating to possible modifications either provided for in a contract or necessitated by unforeseen circumstances". Council of the European Union, Note from the General Secretariat to the Permanent Representatives Committee, *Proposal for a Directive of the European Parliament and of the Council on the* concessionaire to the restoration of economic and financial balance (Articles 5 and 43) may be inferred from Directive 2014/23, as will be analysed below. Consequently, the provisions of Directive 2014/23 may be described as incomplete or insufficient.

Maintaining economic and financial equilibrium is a classic concept in concessions law and entails the possibility of rebalancing the relevant contract in response to a change in circumstances that alters the initial agreement ([141]). The goal is to maintain "*a fair balance between what is granted to the concessionaire and what is required of them*" ([142]), and this concept has been reinforced over time. Long-term contracts have revealed the contractor's status as a genuine partner of the public administration. This emphasises the need to maintain the financial balance of the contract in order to achieve the public purpose it pursues. It also ties in with the understanding of public contracts from the perspective of the right to good governance ([143]).

It should be clarified that this compensation does not alter the defined rules of operating risk transfer, as laid down in Directive 2014/23 for classifying a contract as a concession. This is because such a transfer is required under 'normal operating conditions' ([144]). By contrast, the compensation included in the concept of economic and financial rebalancing is intended to guarantee the feasibility of the concession when faced with new factors that were not part of the original concession arrangement.

Traditionally, the grounds permitting this rebalancing have included the *ius variandi* and the *factum principis*, that is to say, grounds attributable to the contracting authority. The *ius variandi* refers to the power to amend the contract when such amendment has an economic impact upon the contract ([145]). The *factum principis* refers to certain public decisions adopted for a purpose other than those related to the contract but which indirectly result in an imbalance in

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award of concession contracts – General approach, doc. 16412/12, Brussels, 26 November 2012, Annex, Part 2, para. 10.

([141]) See, amongst others, Mário Aroso de Almeida, 'Apontamento sobre o problema da repartição do risco e do reequilíbrio financeiro nos contratos de concessão', in Paulo Otero, Carla Amado Gomes and Tiago Serrão (eds.), *Estudos em Homenagem a Rui Machete* (2015) 685.

([142]) As in the case of *Compagnie générale française des tramways* (Conseil d'État, 11 March 1910, No 16178).

([143]) See José María Gimeno Feliu, 'Riesgo y ventura del contrato público en tiempos de incertidumbres y la necesidad de garantizar el principio de "honesta equivalencia"' (2022) 5 Boletín del Observatorio de Contratación Pública.

([144]) See Recital 18 of Directive 2014/23/EU.

([145]) In the case of *ius variandi*, this refers to situations where the contracting authority amends the contract to the detriment of the concessionaire.

the concession ([146]). Events that fall outside of what is considered normal contract risk—i.e., force majeure and unforeseeable risk—also constitute grounds for rebalancing.

The possible inclusion of specific rules regarding economic and financial rebalancing—should this be the solution ultimately adopted—would help to complete the European regime governing concessions and provide a harmonised response to these contractual performance issues. In concession contracts related to infrastructure or the provision of essential public services, these rules should be designed in a manner that is consistent with their purpose, which is none other than to preserve the continuity of the contract when there is a substantial change in the conditions that were initially envisaged.

Thus, if the economic and financial equilibrium has been established *ex ante* according to a specific risk distribution, the emergence of circumstances that go beyond that framework should lead to an effective rebalancing by means of appropriate and proportionate offsetting. Otherwise, the rebalancing system would risk becoming a purely formal instrument, incapable of addressing the real needs of adjusting long-term contracts.

This need to establish effective mechanisms for economic and financial rebalancing is now heightened by a context of increasing economic and geopolitical instability characterised by cost volatility (especially energy costs), disruptions to supply chains, and regulatory uncertainty. In long-term contracts, such as concessions, these disruptions cannot be considered exceptional; rather, they are part of an environment that exceeds all reasonable forecasts made at the time of tendering. Within this scenario, the lack of adequate adjustment mechanisms not only risks compromising the feasibility of the contract but also discourages participation by economic operators, especially in capital-intensive sectors. Consequently, the inclusion of rebalancing clauses is not merely a matter of contractual fairness but constitutes an essential functional element for ensuring the economic feasibility of projects and, ultimately, the very sustainability of the concession model.

This becomes evident when analysing the responses adopted by Member States in the wake of the COVID-19 pandemic, to quote one example. The diversity of solutions and the difficulties faced by both legislators and national courts highlight the absence of a sufficiently clear operational framework to address claims for compensation in the context of concessions. In particular, there have been rigid interpretations of the rules governing contract amendments and a refusal to classify the pandemic as a case of *force majeure* for the purposes of compensation—although it has been recognised as such for other legal purposes—as well as the adoption of *ad hoc* emergency regulations to establish compensation mechanisms. Additionally, in some cases, the basis for

([146]) This category typically includes general regulatory changes that entail a change in the economic conditions for the performance of the contract.

compensation has been shifted from damage arising directly from the pandemic to measures adopted by public authorities, in a manner akin to the *factum principis* principle.

The likelihood of further health emergencies, sudden cost fluctuations or supply chain disruptions makes it advisable to define a set of harmonised rules to strengthen the concessions market.

In March 2025, the CJEU also ruled on the effect of unforeseen circumstances not attributable to the concessionaires on the economic balance of the contract ([147]). Specifically, on the extension of contracts agreed by the Italian legislature after expiry, accompanied by the imposition of a fee not originally provided for in the extended concessions ([148]). An especially relevant point is that the Court holds that Articles 5 and 43 of Directive 2014/23 do not preclude the adoption of domestic rules or measures by Member States "*where unforeseeable events beyond the control of the parties significantly affect the operating risk, while those conditions persist and for as long as is necessary to restore, where appropriate, the initial operating conditions of the concession*" ([149]).

The CJEU thus implicitly recognises the possibility—and even the reasonableness—of establishing compensation mechanisms in favour of concessionaires when unforeseeable circumstances beyond their control arise that significantly affect the initial balance of the contract. However, the scope of this recognition must be kept within proper limits, as Directive 2014/23/EU does not contain specific provisions on this matter. In fact, the Court goes only as far as permitted by the wording of the Directive: it merely states that Articles 5 and 43 do not preclude Member States from adopting measures aimed at compensating the concessionaire in such cases.

As previously noted, this judgement reinforces the desirability of moving towards a harmonised legislation for this type of situation which, moreover, may become increasingly common. Ultimately, the aim would be to ensure that economic operators are preemptively aware of the applicable framework for addressing

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([147]) Joined Cases C-728/22 to C-730/22 *Associazione Nazionale Italiana Bingo — Anib, Play Game Srl and Others v Ministero dell'Economia e delle Finanze, Agenzia delle Dogane e dei Monopoli,* ECLI:EU:C:2025:200.

([148]) Concession contracts were also affected by the COVID-19 pandemic. However, the CJEU does not rule on whether the pandemic constitutes an unforeseeable event for the purposes of justifying the restoration of the concessionary balance, as the question was not raised in those terms.

([149]) According to Advocate General Ms Laila Medina, in her Opinion of 4 July 2024, ECLI:EU:C:2024:582, para 82, failure to recognise the national authority's power to rebalance the concession could infringe Article 43 of Directive 2014/23 itself, thereby jeopardising the effectiveness of EU law.

such situations and, simultaneously, to provide greater certainty to awarding authorities as regards possible measures to be adopted in these circumstances.

In any event, these are specific cases that apply only when the relevant conditions are met. The aim is not to establish an ‘ordinary guarantee’ in favour of the concessionaire, which would run counter to the principle of ‘risk and reward’ that governs contract performance. Similarly, this type of compensation would not cover imbalances arising from errors in feasibility studies or other defects in the contract preparation phase ([150]). That said, it is reasonable to make provisions for some compensation mechanism in case of abnormal circumstances that are capable of disrupting the initial balance of the concession. And this, as clarified by the CJEU, is to ensure that the concession can continue to be performed correctly ([151]).

7.4. Progress clause

‘Progress clauses’ are commonly included in concession contracts precisely due to their long duration. These clauses may be defined as mechanisms that require the performance of the contract to be in line with technical progress or developments. Sometimes they are set out in the contract itself, while others are derived from specific regulatory frameworks ([152]). Unlike grounds for economic and financial rebalancing, these clauses are not triggered by an unforeseeable change but rather respond to a logic of continuous adjustment. However, in any case, their application poses the challenge of adjusting the contract to technical developments without compromising its performance. It especially requires determining how any cost increases entailed by such an adaptation may be borne, while also ensuring the proper provision of the service and the continuity of the concession throughout its entire term.

Some national legal systems provide for sector-specific provisions. This is the case in French law, especially in the energy sector, which provides for the awarding authority to terminate the concession early when the continued provision of the service no longer serves the economic or technical interest, or when public interest warrants its restructuring according to new methods, based

([150]) This is expressly provided for in Spanish legislation, which excludes from the rebalancing of the concession any failure to meet the demand forecasts set out in the Administration’s study or in any study that may have been conducted by the concessionaire (Article 270 of the LCSP).

([151]) See Case C-452/23 *Fastned Deutschland GmbH & Co. KG v Die Autobahn GmbH des Bundes*, ECLI:EU:C:2025:284, para 82.

([152]) Should the clause be included in the contract itself, it would be treated as a clause provided for under Article 43(1)(a) of Directive 2014/23, related, for example, to adaptation to technological changes, and must be taken into account when calculating the estimated value of the contract.

on scientific or technological advances ([153]). Spanish law recognises the right of the concessionaire to withdraw from the concession in the event that the incorporation of technical advances that significantly improve operations renders the contract extraordinarily onerous ([154]). A different perspective is set out in the Communication from the Commission to the Council and the European Parliament, 'Developing the trans-European transport network: Innovative funding solutions - Interoperability of electronic toll collection systems' (COM(2003) 132 final), which presents 'progress clauses' as instruments designed to facilitate the participation of private capital in infrastructure projects. In this context, these clauses are linked to the introduction of quality indicators and are conceived as mechanisms enabling the investor to recoup the initial investment over the entire term of the project, thereby promoting greater efficiency in resource management and better coordination between the public and private sectors.

This background highlights the existence of different regulatory approaches: some frame performance clauses as incentive mechanisms linked to the profitability of the investment, while others address them more indirectly, through contract adjustment or even termination mechanisms. All of this prompts reflection on the advisability of exploring more systematic approaches to the execution of concessions.

7.5. Final considerations

The experience gained highlights the fundamental importance of the concession execution phase in ensuring the proper provision of services and the execution of works. Specifically, issues related to contractual amendments, rebalancing and the incorporation of technical advances are of decisive importance, insofar as they determine the feasibility of the contract and the quality of the service. Within this context, the review of Directive 2014/23/EU offers an opportunity to provide a more coherent and effective response to the challenges inherent in the implementation of concessions, drawing in particular on the solutions developed by the CJEU and on the experience of Member States' legislation. All of this is aimed at ensuring the appropriate quality of the works and services, as well as the proper provision of the service throughout the term of the concession.

([153]) See *Décret n° 99-742 du 27 août 1999*, Annexe II, art. 32. https://www.legifrance.gouv.fr/loda/id/LEGITEXT000005628454

([154]) Ley 9/2017, de 8 de noviembre, de Contratos del Sector Público, Article 270(4).

8. Conclusions and recommendations

This study has analysed the concept of a concession and, in particular, the definition of operating risk included in Directive 2014/23/EU, in light of the CJEU case law, the economic and accounting framework of the European System of Accounts (ESA 2010) and the experience gained over the last decade of the Directive's implementation. The analysis shows that, while the concept of a concession has helped to provide the European concessions system with greater autonomy and uniformity, conceptual uncertainties remain which suggest that certain clarifications should be introduced in a future revision. The study has also addressed the importance of a robust contractual preparation phase and prior project assessment, as well as the need to strengthen the technical capabilities of contracting authorities. It has also examined the regulatory conditions of concession terms, especially with regard to investment payback and the reasonableness of the concession period. Finally, the study analyses the system governing concession amendments and the possible incorporation of rules on economic and financial rebalancing, in light of the CJEU case law. These are areas of particular relevance in long-term contracts that are subject to economic, technical and regulatory changes.

A summary of the recommendations, based on the analysis conducted in this study, is set out below.

1. Redefine the concept of operating risk

The review could focus on replacing 'supply risk' with 'availability risk', in accordance with the ESA 2010 concept adapted to the concession context, or on a broad formulation based on judicial elements already present in the Directive, with a list of risks provided for illustrative purposes only. In any event, the resulting definition should cover all types of concession contracts, including those where the concessionaire's consideration does not depend on the volume of use.

A definition based on the concessionaire's exposure to uncertain economic outcomes—in which the specific risk types serve as illustrative examples rather than as rigid legal criteria—would provide a more practical and adaptable framework for the bidding process and project implementation.

2. Define the scope of public contribution in concessions.

Establish clear rules to assess the scope and purpose of the public contribution and its compatibility with an effective transfer of operating risk. The review could focus on introducing a maximum quantitative threshold, using the criteria developed under the ESA 2010 as a benchmark, or on an intermediate solution based on indicative thresholds or rebuttable presumptions, combined with a qualitative analysis of risk allocation. In any case, the legislation should draw distinctions based on the purpose of the contribution, differentiating between those aimed at ensuring public service obligations or mobilising strategic investments and those that neutralise the concessionaire's exposure to losses.

3. Ensure a systematic approach to the relationship between Directive 2014/23/EU, the ESA 2010 Regulation and sector-specific legislation.

Coordinate the various regulatory frameworks in line with the concept of the legal system as a whole.

When a contracting authority decides to award a concession, it is not merely choosing a mode of management: it is also taking a decision with direct impact on national accounts and levels of public deficit and debt. Directive 2014/23/EU and the ESA 2010 Regulation currently operate separately, with similar but not identical categories, which gives rise to difficulties related to interpretation. The review could focus on aligning the risk categories used at both levels or, at the very least, on mechanisms for coordinated interpretation. In any case, the legal classification and the accounting classification should be based on compatible criteria, thereby preventing the contradictory treatment of the same contract.

It is also necessary to ensure coordination between the provisions of Directive 2014/23/EU and sector-specific legislation on concession contracts.

4. Develop tools to ensure the correct application of operating risk.

The European legislator has chosen to define concessions based on an economic criterion, namely the transfer of operating risk. This cannot be determined using abstract categories but must necessarily be assessed *ad casum*, that is to say, by considering the specific operating possibilities of the works or services subject to the concession. Over the years since its implementation, the provisions set out in Directive 2014/23/EU have proved insufficient to ensure a consistent application of its provisions. It would be advisable to adopt methodological guidelines to ensure a consistent and less uncertain application. Similarly, it would be advisable to adopt explanatory guides with comprehensive sector-specific criteria and examples, which would function as a living repository with regular updates.

5. Incorporate criteria to determine the reasonable rate of return on concessions.

Future regulation should incorporate criteria for determining the reasonable rate of return on concessions, avoiding a one-size-fits-all approach and adjusting it according to objective variables such as the sector, the level of operating risk actually assumed, the extent of public funding, and the degree of innovation or uncertainty associated with the project. To this end, the IRR could continue to be used as a benchmark indicator, albeit supplemented by these factors, in order to ensure a suitable balance between risk and return.

6. Strengthen professional standards in the field of concessions.

Strengthen the technical, legal and economic capabilities of the professionals responsible for the preparation, award and monitoring of concessions. Within the framework of ProcurCompEU, the review could focus on developing specific expertise in risk assessment and in the structuring, management and supervision of concession projects. Consideration may also be given to instruments such as specialised risk assessment workshops or the requirement for prior qualification of the granting authority – practices already in place in some Member States. This strengthening should target local and regional authorities as a priority, since they account for the bulk of the European concessions market.

7. Introduce a simplified regime for less complex concessions.

Establish simplified rules for concessions operating with captive demand or with a low demand risk, which are common in the field of local public services (see Section 3.2.2 above). These are contracts with a simpler economic structure, for which the tendering process may be organised through more streamlined procedures with fewer administrative burdens, thus facilitating the participation of SMEs and easing the burden on smaller contracting authorities. The review could focus on an *ad hoc* system within the Directive itself.

8. Moving beyond an exclusively financial criterion in determining the duration of concessions.

It should be established as a principle that the duration of concessions is not determined exclusively on the basis of the payback period, that is to say, from a financial or quantitative perspective, but rather incorporates a broader perspective that considers all relevant factors of public interest. Specifically, it should:

a) Incorporate substantive criteria for setting the contract term. Consideration should be given not only to the investment payback but also to factors such as the life cycle of the assets, the fulfilment of strategic objectives (including those of a social and environmental nature), and the socio-economic costs and benefits of the project.
b) Strengthen consistency between contractual planning and design. The due justification of the concession term in the preliminary feasibility studies should be set as a requirement, ensuring that the economic, social and environmental considerations incorporated at that stage are effectively reflected in the final structure of the contract.

9. Harmonise the rules governing asset reversion in concessions.

It should be established as a principle that concession assets must be reverted to the public sector in an adequate state of repair and functionality and, where applicable, with a sufficient remaining useful life to ensure the continuity of the service. Furthermore, there should be an obligation to establish effective monitoring and control mechanisms during the term of the concession—such as periodic audits or performance indicators linked to maintenance—as well as contractual instruments to ensure compliance.

Based on this principle, two regulatory alternatives may be considered:

a) Minimal regulation

European legislation could define, at least in general terms, what is meant by 'adequate state of repair', establishing minimum obligations that are applicable to all concessions. This would make it possible to set a common standard, reduce the risks of under-maintenance and guarantee a basic level of protection of the public interest, without preventing the necessary sector-specific adaptations.

b) Specification in contractual documents

Alternatively—or additionally—the legislation could require concession contracts to include specific clauses on the condition of the asset upon reversion, set out using verifiable technical indicators customised according to asset type (infrastructure, equipment, vehicles, etc.). This approach would enable greater sector-specific adaptation while maintaining a common framework of requirements.

In either of these two scenarios, it would be advisable to supplement the legislation with the development of guidelines at European Commission level (for example, guides, toolkits) incorporating technical and methodological criteria applicable to various asset types. These guidelines may include condition indicators, assessment methodologies and best practices, contributing to a more consistent and effective application of the reversion requirements across various Member States. This would prevent the transfer of deferred costs to the public sector and ensure proper asset maintenance.

10. Strengthen dialogue with the market during the preparation phase.

Incorporate tools into the preparation phase that enable a better understanding of the market and the available solutions. In this regard, preliminary market consultations—properly structured and fully respecting the principles of transparency and equal treatment—can play a key role. Through these mechanisms, contracting authorities can test their initial approaches against economic operators, identify existing technical capabilities and obtain valuable information to define the subject matter of the contract, its financial structure and the allocation of risks. All of this helps to improve concession design quality and to strengthen the technical and economic feasibility of the project.

11. Plan for a mandatory preliminary control or consultation phase.

Plan for a mandatory *ex ante* control phase to verify the coherence, consistency and reliability of the main elements underpinning the concession design. This review should especially focus on the quality of the feasibility studies, the soundness of the assumptions used, and the accurate estimation of demand and costs, as well as the correct allocation of risks and the overall consistency of the contract's economic and financial structure.

12. **Clarify and adapt the rules governing concession amendments.**

The revision of the Directive could clarify the undefined legal concepts in Article 43, especially that of circumstances that cannot be foreseen by a diligent contracting authority. The specific nature of concessions—their duration and complexity—should be expressly recognised in this framework, incorporating the rationale of Recital 76 of Directive 2014/23/EU into the body of the text. It should also be considered whether the threshold for *minimis* amendments could be aligned with that established for works contracts.

13. **Supplement the Directive's framework with rules regarding economic and financial rebalancing.**

Directive 2014/23/EU does not currently provide for the economic and financial rebalancing of concessions. This constitutes an incomplete regulatory framework within a key aspect of the performance of these contracts. The review could consider incorporating harmonised rules in this area, recognising specific circumstances for rebalancing, such as unforeseeable risk, *force majeure* and causes attributable to the contracting authority (*ius variandi* and *factum principis*). These rules should not be structured as an ordinary guarantee in favour of the concessionaire, which would be incompatible with operating risk transfer, nor should they be extended to errors made during the preparation phase. Where appropriate, their application could be supported by specialised supervisory mechanisms, in line with the institutional strengthening proposed in the sixth recommendation.

A final reflection

Large-scale public projects require the simultaneous mobilisation of funding, innovation and specialised technical expertise. Hence, public-private partnerships have become a structural pillar of contemporary public policy. They offer a veritable toolbox of options, of which concessions are one of the most noteworthy. A possible review of European legislation could assess the merits of a broader approach that would enable the inclusion of different forms of public-private partnerships.

9. ANNEXES

9.1. ANNEX I. Bibliography

Aroso de Almeida M, ‘Apontamento sobre o problema da repartição do risco e do reequilíbrio financeiro nos contratos de concessão’, in Otero P, Gomes CA and Serrão T (eds), *Estudos em Homenagem a Rui Machete* (Edições Almedina 2015) 680–692.

Arrowsmith S, ‘Revisiting the Case against a Separate Concessions Regime in the Light of the Concessions Directive: A Specific Directive without Specificities?’, in Amtenbrink F, Davies G, Kochenov D and Lindeboom J (eds), *The Internal Market and the Future of European Integration: Essays in Honour of Laurence W Gormley* (Cambridge University Press 2019) 370–396.

Arrowsmith S, *The Law of Public and Utilities Procurement: Regulation in the EU and the UK*, vol 2, 3rd edn (Sweet & Maxwell 2018).

Auriol E and Saussier S, *Private Participation in Infrastructure: What Role for Public–Private Partnerships?* (LTI Report 4, CEPR Press 2025). https://cepr.org/publications/books-and-reports/private-participation-infrastructure-what-role-public-private

Autorité de régulation des transports, *Rapport sur les marchés* (July 2025). https://autorite-transports.fr/wp-content/uploads/2025/07/avis-n2025-054-vnc.pdf

Bobbio N, *Teoria dell'ordinamento giuridico* (G Giappichelli 1960).

Bogdanowicz P, Caranta R and Telles P (eds), *Public-Private Partnerships and Concessions in the EU: An Unfinished Legislative Framework* (Edward Elgar Publishing 2020).

Bogdanowicz P, ‘Regulation of PPP and concessions in European Union law – different but equal?’, in Bogdanowicz P, Caranta R and Telles P (eds), *Public-Private Partnerships and Concessions in the EU: An Unfinished Legislative Framework* (Edward Elgar Publishing 2020) 1–16.

Bogdanowicz P, ‘Modification of Directives and Contract Modifications: Article 72 of Directive 2014/24/EU Revisited’, in Janssen W, Lichère F and Magga K-M (eds), *Reforming EU Public Procurement: Proposals for the Reform of Directive 2014/24/EU* (Edward Elgar Publishing 2026) 253–265.

Burnett M, ‘PPP during the Contract Execution Phase – A Need for Greater Certainty in Community Law’ (2008) 3(2) *European Procurement & Public Private Partnership Law Review* 51–53.

Burnett M, 'A New EU Directive on Concessions – the Right Approach for PPP?' (2014) 23(1) Public Procurement Law Review 1–14.

Caldeira M, ‘A distribuição de riscos nas concessões’ (2025) 12(1) *e-Pública* 118–126.

Cámara de Concesionarios de Infraestructuras, Equipamientos y Servicios Públicos (CCIES), *Propuestas para la revisión de la Directiva 2014/23/UE sobre adjudicación de concesiones* (January 2026).

Caranta R, ‘The Changes to the Public Contract Directives and the Story They Tell about How EU Law Works’ (2015) 52(2) *Common Market Law Review* 391–459.

Caranta R, *Coherence in the EU Public Procurement Directives: A Study into the Internal Coherence between the Objectives, the Principles and the Provisions in the EU Public Procurement and Concessions Directives* (Publications Office of the European Union 2025).

Caranta R and Fričová V, 'EU Procurement and Concessions Law' in Roberto Caranta and Albert Sanchez-Graells (eds), *European Public Procurement: Commentary on Directive 2014/24/EU* (Edward Elgar Publishing 2021).

Cátedra de Contratación Pública Ecológica, *Informe de contratación pública ecológica 2025* (Universidad de Alcalá and Fundación Biodiversidad 2025). https://compraverde.web.uah.es/wp-content/uploads/2025/09/INFORME_CPV25.pdf

Committee of the Regions, 'ECOS-V-030, 96th Plenary Session' (18–19 July 2012) amendment 30, art. 42.

Committee on the Internal Market and Consumer Protection, *Report on the proposal for a directive of the European Parliament and of the Council on the award of concession contracts*, A7-0030/2013 (1 February 2013).

Conseil d’État, *Fiche 13 – Contrats de concession*, in *Guide des outils d’action économique* (édition 2025–2026, 21 January 2025).

Craven R, ‘The EU’s 2014 Concessions Directive’ (2014) 23(4) *Public Procurement Law Review* 188–201.

Dipartimento per la Programmazione e il Coordinamento della Politica Economica (DIPE), *Relazione sull’attività svolta dal DIPE nell’anno 2024 in materia di Partenariato Pubblico Privato e Finanza di Progetto* (June 2025).

Dorrego A, ‘El colapso de la colaboración público-privada en España’ (2024) 2(2) *Cuadernos de Derecho Regulatorio* 219–229.

Düsseldorf Higher Regional Court, ‘Agreement on Fast-Charging Infrastructure at Managed Service Areas on Federal Motorways Not in Compliance with Public Procurement Law’ (press release, 6 March 2026), *Justizportal Nordrhein-Westfalen*. https://www.justiz.nrw.de/presse/2026-03-06

Europabüro der bayerischen Kommunen and Europabüro der baden-württembergischen Kommunen, *A Modern EU Public Procurement Law for Strong Local Authorities: Demands from Local Authorities in Bavaria and Baden-Württemberg* (26 January 2026). https://www.europabuero-bw.de/wp-content/uploads/2026/02/EN-Positionspapier-Vergaberecht-1nl_jm-1.pdf

European Commission, ‘Commission interpretative communication on concessions under Community law’ [2000] OJ C 121/2.

European Commission, *Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions*, COM(2004) 327 final (30 April 2004).

European Commission, *Europe 2020: A Strategy for Smart, Sustainable and Inclusive Growth*, COM(2010) 2020 final (3 March 2010).

European Commission, *Proposal for a Directive of the European Parliament and of the Council on the award of concession contracts*, COM(2011) 897 final (20 December 2011).

European Commission, *Report from the Commission to the Council and the European Parliament: EU Anti-Corruption Report*, COM(2014) 38 final (3 February 2014).

European Commission, Directorate-General for Regional and Urban Policy, *Guide to Cost-Benefit Analysis of Investment Projects: Economic Appraisal Tool for Cohesion Policy 2014–2020* (Publications Office of the European Union 2015). https://ec.europa.eu/regional_policy/sources/studies/cba_guide.pdf

European Commission, Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, *Proposal for a Regulation establishing a framework of measures for the acceleration of industrial capacity and decarbonisation in strategic sectors and amending Regulations (EU) 2018/1724, (EU) 2024/1735 and (EU) 2024/3110*, COM(2026) 100 final (4 March 2026).

European Commission, *Report on the Impact of Directive 2014/23/EU on the Award of Concession Contracts* (2018).

European Commission, Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, *ProcurCompEU: The European Competency Framework for Public Procurement Professionals* (Publications Office of the European Union 2020).

European Commission, Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, *Study on the Measurement of Cross-Border Penetration in the EU Public Procurement Market* (Publications Office of the European Union 2021).

European Commission, ‘Commission Staff Working Document accompanying the Report from the Commission to the European Parliament and the Council on the functioning of Directive 2014/23/EU on the award of concession contracts and on the impact on the internal market of the exclusions set out in Article 12’, SWD(2023) 267 final (28 July 2023).

European Commission, ‘Commission notice on interpretative guidelines concerning Regulation (EC) No 1370/2007 on public passenger transport services by rail and by road’ [2023] OJ C 222/1

European Commission, 'Evaluation of the 2014 Public Procurement Directives: Answer to the Call of Evidence' Ref Ares(2024)8928678 (2024).

European Commission, Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, *Factual Summary Report on the Public Consultation on the Revision of the Public Procurement Directives* (2026).

European Court of Auditors, *Public Private Partnerships in the EU: Widespread shortcomings and limited benefits* (Special Report No 9/2018, 2018).

European Court of Auditors, *Public Procurement in the EU: Less Competition for Contracts Awarded for Works, Goods and Services in the Ten Years up to 2021* (Special Report No 28/2023, 2023).

European Investment Bank and Oficina Nacional de Evaluación, *Informe de recomendaciones estratégicas: revitalización del mercado concesional en España y desarrollo institucional de la ONE* (November 2025).

European Investment Bank (EIB), *Market Update – Review of the European Public-Private Partnership Market in 2024* (2025). https://www.eib.org/en/publications/20250010-market-update-review-of-the-european-public-private-partnership-market-in-2024

European Parliament, Council of the European Union and European Commission, *Joint practical guide of the European Parliament, the Council and the Commission for persons involved in the drafting of European Union legislation* (Publications Office of the European Union 2015). https://op.europa.eu/en/publication-detail/-/publication/3879747d-7a3c-411b-a3a0-55c14e2ba732

European Parliament, Council of the European Union and European Commission, ‘Interinstitutional Agreement on Better Law-Making’ [2016] OJ L 123/1. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32016Q0512(01)

European PPP Expertise Centre (EPEC), *Market Update – 2022: Review of the European Public-Private Partnership Market in 2022* (European Investment Bank 2023).

European PPP Expertise Centre (EPEC), *EPEC Guide to Public-Private Partnerships* (European Investment Bank 2026).

European PPP Expertise Centre (EPEC), *PPPs and Procurement: the New Directives* (European Investment Bank 2016).

Eurostat and European PPP Expertise Centre, *A Guide to the Statistical Treatment of PPPs* (September 2016).

Eurostat, *The Recording of Energy Performance Contracts in Government Accounts* (19 September 2017).

European Investment Bank and Eurostat, *A Guide to the Statistical Treatment of Energy Performance Contracts* (Publications Office of the European Union 2018).

Eurostat, *Clarification on the Application of a Guide to the Statistical Treatment of PPPs: Responses to Frequently Asked Questions* (20 June 2022).

Eurostat, *Manual on Government Deficit and Debt – Implementation of ESA 2010 – 2022 edition* (2023).

Fidone G, *Il risultato dei contratti pubblici complessi* (Giappichelli Editore 2025).

Fleta-Asín J, Muñoz-Sánchez F and Gimeno-Feliú JM, 'Does the Past Matter? Unravelling the Temporal Interdependencies of Institutions in the Success of Public–Private Partnerships' (2022) 27(7) *Public Management Review* 1830–1856. https://doi.org/10.1080/14719037.2022.2125558

Fuchs C and Ziniel T, 'Service Concessions in Austria' in Lazo Vitoria X and Peiró Baquedano AI (eds), *Service Concessions in the EU: A Comparative Study of the Transposition of Directive 2014/23 on the Award of Concession Contracts into National Law* (Thomson Reuters Aranzadi 2018) 55–86).

Fuertes López M, 'Los riesgos del riesgo de explotación (crítica a la jurisprudencia del Tribunal de Justicia de la Unión Europea sobre las concesiones de servicio público y los contratos de servicios)' in *Observatorio de los Contratos Públicos 2012* (2012) 197–238.

Gallego Córcoles I, 'La modificación de los contratos en la cuarta generación de Directivas sobre contratación pública' in Gimeno Feliu JM (dir), *Las nuevas directivas de contratación pública: Ponencias sectoriales X Congreso de la Asociación Española de Profesores de Derecho Administrativo* (Thomson Reuters Aranzadi 2015) 107–134.

Gimeno Feliu JM, ‘Riesgo y ventura del contrato público en tiempos de incertidumbres y la necesidad de garantizar el principio de “honesta equivalencia”’ (2022) 5 *Boletín del Observatorio de Contratación Pública*.

Gimeno Feliu JM, ‘La necesaria revisión de la normativa de contratación pública en Europa: una nueva y moderna hoja de ruta en clave geoestratégica global’ (2026) 71 *Revista General de Derecho Administrativo*.

Greco G, ‘La direttiva in materia di “concessioni”’ (2015) 5 *Rivista italiana di diritto pubblico comunitario* 1095–1126.

Hart O, ‘Incomplete Contracts and Control’ (2017) 107(7) *American Economic Review* 1731–1752.

Hartwecker A, ‘Boxenstopp beim EuGH: Altverträge überholen den Wettbewerb’ (Vergabeblog.de, 16 February 2026) No 73517.

Hebly JM and Heijnsbroek P, ‘When Amending Leads to Ending’ in Piga G and Treumer S (eds), *The Applied Law and Economics of Public Procurement* (Routledge 2013) 163–180.

Hernández González FL, ‘The Evolving Concept of Works and Service Concessions in European Union Law’ (2016) 25 *Public Procurement Law Review*.

Hoepffner H, ‘La modification des contrats de la commande publique’ (2016) 2 *Revue française de droit administratif*.

Huergo Lora A, ‘El riesgo operacional en la nueva Ley de Contratos del Sector Público’ (2017) 4 *Documentación Administrativa: Nueva Época* 31–51.

Huisman P, ‘EU Added Value of the Concessions Directive: Observations and Recommendations regarding Directive 2014/23/EU’ in de la Rosa S (ed), *Public Contracts in Legal Globalization Network: Evaluation of the 2014 Public Procurement Directives: Answer to the Call of Evidence Ref. Ares(2024)8928678* (2025) 6–8.

Huisman P, Poltier E and Van Garsse S (eds), *Concessions and Similar Instruments in the EU and beyond* (Larcier-Intersentia 2025).

Instituto dos Mercados Públicos do Imobiliário e da Construção (IMPIC), *Manual da articulação das regras do Código dos Contratos Públicos com Instrumentos Legislativos Europeus* (2026).

Kiel Institut für Weltwirtschaft, *Kieler Subventionsbericht 2024: Hohe Subventionen trotz Haushaltsengpässen* (Kieler Beiträge zur Wirtschaftspolitik No 48, 2024).

Kitsos J, ‘Defining Concessions in EU Public Procurement Law: Has Directive 2014/23 Missed Another Opportunity for Conceptual Clarification?’ (2018) 43(4) *European Law Review* 549–568.

Krause O, ‘Transposition of the Directive 2014/23/EU with regard to service concessions in Germany’ in Lazo Vitoria X and Peiró Baquedano AI (eds), *Service Concessions in the EU: A Comparative Study of the Transposition of Directive 2014/23 on the Award of Concession Contracts into National Law* (Thomson Reuters Aranzadi 2018) 119–148).

Lazo Vitoria X, ‘El futuro del mercado concesional en Europa’ (2013) 154 *CEFlegal: Revista Práctica de Derecho* 137–174.

Lazo Vitoria X, ‘El riesgo operacional como elemento delimitador de los contratos de concesión’ in Gimeno Feliu JM (ed), *Estudio sistemático de la Ley de Contratos del Sector Público* (Thomson Reuters Aranzadi 2018) 517–544..

Lazo Vitoria X (ed) and Peiró Baquedano AI (coordinator), *Service Concessions in the EU: A Comparative Study of the Transposition of Directive 2014/23 on the Award of Concession Contracts into National Law* (Thomson Reuters Aranzadi 2018).

Lichère F, Caranta R and Treumer S (eds), *Modernising Public Procurement: The New Directive* (Djøf Publishing 2014).

Lichère F, Melleray F and Richer L (dirs), *Rapport-Répartition et traitement des risques dans la commande publique: 7e Rapport de la Chaire de droit des contrats publics* (Chaire de droit des contrats publics, Université Jean Moulin Lyon 3 2024). https://chairedcp.univ-lyon3.fr/rapport-repartition-et-traitement-des-risques-dans-la-commande-publique

London Economics Europe and Spark Legal, *Study on the Implementation of the Concessions Directive – Final Report* (Publications Office of the European Union 2021).

Maurey H, *Échéance des concessions d’autoroutes : tenir compte des erreurs du passé pour préparer l’avenir* (Rapport d’information No 65, Sénat 2024). https://www.senat.fr/fileadmin/Presse/Documents_pdf/Rapport_provisoire_autoroutes.pdf

National Development Finance Agency, 'Financial Advisory Services'. https://www.ndfa.ie/services/financial-advisory-services

National Development Finance Agency, 'Who We Are'. https://www.ndfa.ie/about/who-we-are

National Treasury Management Agency, *Annual Report & Financial Statements 2022* (2023) 31–33.

Oficina Independiente de Regulación y Supervisión de la Contratación (OIReScon), *Informe especial de supervisión relativo a los contratos de concesión en 2022* (OIReScon 2023). https://www.hacienda.gob.es/rsc/oirescon/informes-especiales-supervision/ies-contratacion-estrategica2022.pdf

Oficina Independiente de Regulación y Supervisión de la Contratación (OIReScon), *Informe Anual de Supervisión 2024: Módulo I. Las cifras de la contratación pública en 2023* (OIReScon 2024). https://www.hacienda.gob.es/rsc/oirescon/informe-anual-supervision-2024/ias2024-modulo1.pdf

Oficina Independiente de Regulación y Supervisión de la Contratación (OIReScon), *Informe anual de actuaciones 2024* (OIReScon 2025). https://www.hacienda.gob.es/rsc/oirescon/informe-anual-actuaciones/informe-anual-actuaciones-2024.pdf

Oficina Independiente de Regulación y Supervisión de la Contratación (OIReScon), *Propuestas para el proceso de evaluación de las Directivas de contratación pública* (OIReScon 2025). https://www.hacienda.gob.es/rsc/oirescon/estudios-guias-protocolos/evaluacion-directivas.pdf

Oficina Independiente de Regulación y Supervisión de la Contratación (OIReScon), *Valoración del Informe de evaluación de las Directivas de la contratación pública* (OIReScon 2026). https://www.hacienda.gob.es/rsc/oirescon/estudios-guias-protocolos/aportaciones-oirescon.pdf

Organisation for Economic Co-operation and Development (OECD), *OECD Principles for Integrity in Public Procurement* (OECD Publishing 2009).

Organisation for Economic Co-operation and Development (OECD), *Concessions and PPPs* (SIGMA Public Procurement Brief 18, September 2016). https://www.sigmaweb.org/en/publications/concessions-and-ppps_74715f69-en.html

Organisation for Economic Co-operation and Development (OECD), *Recommendation of the Council on Principles for Public Governance of Public-Private Partnerships* (OECD/LEGAL/0392, 2025).

Pez T, ‘Le risque, les concessions et les marchés’ (2016) 2 *Revue française de droit administratif* 237–252.

Prometeia SpA, BIP Business Integration Partners and Economics for Policy – Nova School of Business and Economics Lisboa, *Study on the Measurement of Cross-Border Penetration in the EU Public Procurement Market: Final Report* (Publications Office of the European Union 2021).

Public Contracts in Legal Globalization Network, *Evaluation of the 2014 Public Procurement Directives: Answer to the Call of Evidence Ref. PwC EU Services and Ecorys, with the support of Utrecht University, Identifying and Reducing Corruption in Public Procurement in the EU: Development of a Methodology to Estimate the Direct Costs of Corruption and Other Elements for an EU Evaluation Mechanism in the Area of Anti-Corruption (Report prepared for the European Commission, OLAF 2013)*

Ricchi M, ‘Sistema e semantica del PPP, la Finanza di progetto e le concessioni nel nuovo Codice (D.Lgs. 36/2023)’ in Cartei GF and Ricchi M (eds), *Finanza di Progetto, PPP e Concessioni: Interpretazioni generative e sviluppo integrato* (Editoriale Scientifica 2024).

Sánchez-Graells A, ‘Article 1 of Directive 2014/23/EU: Subject-matter and Scope’ in Steinicke M and Vesterdorf PL (eds), *Brussels Commentary on EU Public Procurement Law* (Nomos/Hart Publishing 2018) 1109–1110.

Sanchez-Graells A, ‘What Need and Logic for a New Directive on Concessions, Particularly Regarding the Issue of Their Economic Balance?’ (2012) 7(2) *European Procurement and Public Private Partnership Law Review* 94–104.

Schmidt-Aßmann E, *Das allgemeine Verwaltungsrecht als Ordnungsidee: Grundlagen und Aufgaben der verwaltungsrechtlichen Systembildung* (Springer 1998).

Sheppard G and Beck M, 'Transparency Trade-Offs in the Operation of National Public Private Partnership Units: The Case of Ireland’s National Development Finance Agency' (2023) 42(4) Journal of Accounting and Public Policy art. 107111, 1-17. https://doi.org/10.1016/j.jaccpubpol.2023.107111

Tallaki M and Bracci E, ‘Risk allocation, transfer and management in public–private partnership and private finance initiatives: a systematic literature review’ (2021) 34(7) *International Journal of Public Sector Management* 709–731

Torgal L, ‘Sobre a nova definição europeia de concessão (Diretiva 2014/23/UE)’ in Costa Gonçalves P and Torgal L (coordiators), *Estudos em Homenagem a Mário Esteves de Oliveira* (Almedina 2017) 1073–1110.

Tribunal de Contas, *Auditoria à execução financeira da concessão rodoviária em regime de SCUT na Ilha de São Miguel* (Relatório No 12/2023–FS/SRATC, 15 December 2023). https://www.tcontas.pt/pt-pt/ProdutosTC/Relatorios/RelatoriosAuditoria/Pages/detalhe.aspx?dset=2023

Van Garsse S, ‘Service Concessions in Belgium’ in Lazo Vitoria X and Peiró Baquedano AI (eds), *Service Concessions in the EU: A Comparative Study of the Transposition of Directive 2014/23 on the Award of Concession Contracts into National Law* (Thomson Reuters/Aranzadi 2018) 87–103.

Wangelow VP, ‘EU Public Procurement Law: Amendments of Public Works Contracts After the Award Due to Additional Works and Unforeseeable Circumstances’ (2020) 15(2) *European Procurement & Public Private Partnership Law Review* 108–121.

9.2. ANNEX II. List of Case Law

Case C-810/24, Urban Vision SpA, ECLI:EU:C:2026:69.

Case C-715/23, Farmacija, ECLI:EU:C:2025:548.

Case C-452/23, Fastned Deutschland GmbH & Co KG v Die Autobahn GmbH des Bundes, ECLI:EU:C:2025:284.

Joined Cases C-728/22 to C-730/22, Anib and Others, ECLI:EU:C:2025:200.

Case C-266/22, CRRC Qingdao Sifang Co Ltd v Municipiul Bucureşti, ECLI:EU:C:2025:162.

Case C-684/23, SIA Latvijas Sabiedriskais Autobuss, ECLI:EU:C:2025:90.

Case C-652/22, Kolin İnşaat Turizm Sanayi ve Ticaret AŞ v HŽ Infrastruktura d.o.o., ECLI:EU:C:2024:916.

Case C-683/22, Associazione difesa utenti servizi bancari e finanziari, ECLI:EU:C:2024:936.

Case C-186/22, Sad Trasporto Locale SpA, ECLI:EU:C:2023:795.

Case C-292/21, CNAE and Others, ECLI:EU:C:2023:32.

Case C-486/21, Sharengo najem in zakup vozil d.o.o. v Mestna občina Ljubljana, ECLI:EU:C:2022:868.

Case C-332/20, Roma Multiservizi SpA and Rekeep, ECLI:EU:C:2022:610.

Joined Cases C-721/19 and C-722/19, Sisal SpA and Others v Agenzia delle

Dogane e dei Monopoli and Ministero dell'Economia e delle Finanze, ECLI:EU:C:2021:672.

Case C-549/14, Finn Frogne A/S v Rigspolitiet ved Center for Beredskabskommunikation, ECLI:EU:C:2016:634.

Joined Cases C-458/14 and C-67/15, Promoimpresa and Melis, ECLI:EU:C:2016:558.

Case C-348/10, Norma-A SIA and Dekom SIA v Latgales plānošanas reģions, ECLI:EU:C:2011:721.

Case C-274/09, Privater Rettungsdienst und Krankentransport Stadler v Zweckverband für Rettungsdienst und Feuerwehralarmierung Passau, ECLI:EU:C:2011:130.

Case C-206/08, WAZV Gotha v Eurawasser, ECLI:EU:C:2009:540.

Case C-454/06, pressetext Nachrichtenagentur GmbH v Republik Österreich (Bund) and Others, ECLI:EU:C:2008:351.

Case C-458/03, Parking Brixen GmbH v Gemeinde Brixen and Stadtwerke Brixen AG, ECLI:EU:C:2005:605.

Case C-496/99 P, Commission v CAS Succhi di Frutta SpA, ECLI:EU:C:2004:236.

Case C-318/94, Commission v Germany, ECLI:EU:C:1996:149.

Case C-24/91, Commission v Spain, ECLI:EU:C:1992:134.

Compagnie générale française des tramways, Conseil d'État, 11 March 1910, No 16178.

9.3. ANNEX III. About the author and acknowledgements

Ximena Lazo Vitoria is a professor of Administrative Law at the University of Alcalá. Her primary line of research is the legal framework governing concessions, public-private partnerships and strategic public procurement.

Since 2021, she has been a member of the Plenary Session of the *Oficina Nacional de Evaluación* (National Evaluation Office - ONE), a specialised body within the *Oficina Independiente de Regulación y Supervisión de la Contratación* (Independent Office for the Regulation and Supervision of Procurement - OIReScon) of the Spanish Ministry of Finance, responsible for the *ex ante* evaluation of concession contracts. An expert in public procurement, she has published numerous research papers on the subject, including editing the collection *Service Concessions in EU Procurement Law: A Comparative Study* (Aranzadi, 2018). Since 2025, she has been a member of the European Commission's Stakeholder Expert Group on Public Procurement.

In the field of strategic public procurement, she heads the Chair in Green Public Procurement at the University of Alcalá and the Biodiversity Foundation, under the Ministry for Ecological Transition and the Demographic Challenge (MITECO), and coordinates the interdisciplinary Green Public Procurement Research Group at the University of Alcalá. She is also heavily engaged in knowledge transfer by the organisation of the International Congress on Green Public Procurement and Climate Change, now in its sixth edition, and the Eco Talks – bimonthly specialist seminars on SDG 12, Target 7. She is a member of the PERSEA Network on Sustainable Public Procurement (EU–LATAM), where she jointly organises various scientific activities intended to boost cooperation between Europe and Latin America, including the publication of two edited volumes (Thomson Reuters, 2024; and Tirant lo Blanch, 2025).

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