

Service concessions under the proposed Concessions Directive

Shiraz Dromi Zernitsky (i6056443)

Paula Alegria Torrellas (i6057512)

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Abstract

The paper discusses some of the main objectives pursued by the proposed Concessions Directive and assesses their relative success, in particular regarding the economic context, legal uncertainties, discrepancies regarding duration and thresholds for application, and the procedural safeguards for the award of concessions.

Keywords: Concessions; Directive Proposal; Legal Uncertainty

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Introduction

While service concessions are not governed by any of the directives regulating public procurement within the European Union, contracting authorities and contracting entities (hereinafter ‘CAEs’) concluding them are bound by the fundamental rules of the Treaty on the Functioning of the European Union, in particular Articles 49 TFEU and 56 TFEU, and with the consequent obligation of transparency where the contract concerned has a certain transnational dimension.¹ As will be discussed below, the award of service concessions has been the subject of extensive judicial interpretation which has increasingly led to legal uncertainty for both CAEs and economic operators.

As part of a modernisation package of EU public procurement legislation including the revision of the existing public procurement directives,² the Commission presented in 2011 a proposal for the adoption of a new directive on the award of service and works concession contracts by the public and utilities sector (hereinafter ‘the Concessions Directive Proposal’ or ‘the proposed directive’).³ When the proposal was published, and given the Commission’s stated aim of simplifying the public procurement regime, academic writers commented on the appropriateness of adopting a new directive dealing exclusively with concessions instead of incorporating relevant changes into the revision of the existing public procurement directives.⁴ In any event, the Concessions Directive Proposal continued under the legislative approval process, with the European Parliament currently conducting a first reading.

In this paper we will discuss some of the main objectives pursued by the Commission under the proposed directive and will assess the relative successes in addressing those aims. While the scope of the proposed directive covers both service and works concessions, this paper will focus on service concessions only given the space constrains. In particular, Section 1 will examine the

¹ Case C-274/09 *Privater Rettungsdienst* [2011] ECR I-01335, para 49.

² For a discussion of the modernization package please see Commission, ‘Modernizing European public procurement to support growth and employment’, Press Release, IP/11/1580, 20 December 2011.

³ Commission, ‘Proposal for a Directive of the European Parliament and of the Council on the award of concession contracts’ COM (2011) 897 final.

⁴ See Sue Arrowsmith, ‘Modernising the European Union’s public procurement regime: a blueprint for real simplicity and flexibility’ (2012) 3 P.P.L.R. 71; cf. Sanchez Graells, ‘What Need and Logic for a New Directive on Concessions, Particularly Regarding the Issue of their Economic Balance?’, *European Public Private Partnerships Law Review*, available at <<http://ssrn.com/abstract=2101712>> (last visited 23.05.2013).

economic factors driving the proposal, especially within the context of the economic crisis and Europe's growth plans. Under Section 2 we will consider some of the key legal uncertainties surrounding the definition of service concessions and the procedural safeguards applicable, while Section 3 will focus on the apparent inconsistencies between the text of the proposed directive and the rulings of the Court of Justice of the European Union (hereinafter 'the Court') on the duration of concession contracts. Finally, Section 4 will address some key issues regarding the proposed 'lighter' regime for the award of concessions, such as prior publication and the use of award criteria.

1. Need for a Concessions Directive in the context of the European economic crisis

Following a long recession in the European Union the Commission presented in 2010 the Europe 2020 Strategy, a ten-year growth strategy for reviving the European economy and which envisioned 'smart, sustainable, inclusive' growth through greater coordination of national and EU policies.⁵ The public procurement modernization package discussed above, which the Concessions Directive Proposal forms part of, is in turn aimed to help achieve the objectives of the European 2020 Strategy.

The need for the regulation of concessions in recessionary times lies in the fact that they constitute an important share of the economic activity in the EU. Furthermore, concessions are viewed as important vehicles in long-term development of infrastructures and strategic services as they help to harness private sector expertise, achieve efficiency and innovation.⁶

1.1 Generation of Sustainable Growth and Competition

As a measure to address the current economic crisis, the Commission indicates that the proposed directive will also improve the quality and accessibility of many socially and economically important services and increase competition for the award of concessions, thereby creating more

⁵ Commission, 'Europe 2020: A strategy for smart, sustainable and inclusive growth' (Communication) COM (2010) 2020.

⁶ Commission, 'Impact Assessment of an Initiative on Concessions' (Commission Staff Working Document) SEC (2011) 1588 final, 7.

business opportunities for EU companies and ensuring a more efficient allocation of public money.⁷ In addition, the Commission argues that the proposal will lead to a sound financial management and to best value for money, thereby benefiting CAEs and consumers.⁸

It is submitted that the regulation of service concessions at EU level, including the introduction of more concrete rules concerning their award, will not necessarily increase the number of concessions being awarded but will merely increase their transparency and reduce litigation by clarifying the distinction between contracts and concessions.

The Commission also set competition and innovation as objectives to be achieved with the proposed directive. Regarding the objective of generating more competition, it has been claimed that the directive can lead to the opposite consequence, especially in the short-run, as certain suppliers would be unable to comply with the specific procedural requirements contained therein.⁹ Regarding the objective of innovation, it has further been suggested that when a requirement for innovation is included in the advertisement of concessions, this usually results in a limited number of offers from economic operators or, as some CAEs have claimed, a complete lack of offers.¹⁰

1.2 National Laws Fragmentation

Other than generating sustainable growth and more competition, another objective pursued by the Concessions Directive Proposal is to eliminate market access barriers resulting from the discrepancies between national legal frameworks dealing with concessions. As stated in Recital 2 in the Preamble to the proposed directive, national legislators have adopted different interpretations of the obligations arising from the Treaty principles and thus there are wide

⁷ Commission, 'Impact Assessment of an Initiative on Concessions' (Commission Staff Working Document) SEC (2011) 1588 final, 7.

⁸ Commission, 'Proposal for a Directive of the European Parliament and of the Council on the award of Concession Contracts: Frequently Asked Questions' (Commission Memo) MEMO/11/932, 20 December 2011, point 5, available at <http://europa.eu/rapid/press-release_MEMO-11-932_en.htm> (last visited 23.05.2013).

⁹ W. Kahlenborn et al, '2011: Strategic Use of Public Procurement in Europe – Final Report to the European Commission', MARKT/2010/02/C, 120, available at <http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/strategic-use-public-procurement-europe_en.pdf> (last visited 23.05.2013).

¹⁰ *Ibid*, 124.

disparities among the legislation of different Member States. To remedy this, the Commission seeks to provide ‘a minimum coordination of national procedures for the award of such contracts based on principles of the Treaty so as to guarantee the opening-up of concessions to competition’.¹¹

The lack of an European common practice of awarding concessions was further highlighted with the majority of Member States found not to have regulated for the award of concessions at national level and instead relying on the evolving European jurisprudence.¹² Even where national legislation regarding the award of concession contracts does exist, the form used varies across Member States and includes public procurement laws, special concession legislation, or regulation specifically dealing with Public Private Partnerships.¹³ Furthermore, the national legislator does not always adequately transpose the Court’s rulings, thus resulting in further divergence across Member States.¹⁴ As a result, the national legal systems differ significantly as to the scope of application of the rules on the award of concessions, the level of publication and transparency standards applied, the choice of procedures, the use of selection and award criteria, and the rules concerning technical specifications.

Differing legal regimes and the uncertainty regarding the extent of the transparency obligations concerning service concessions (see detailed discussion in section 2 below) has resulted in economic operators facing a non-level playing field and missing market opportunities, and in increased legal costs both through *ex ante* consultations and litigation. According to the Commission, all these discrepancies create obstacles to the entry of non-domestic economic operators into these markets, thereby undermining the internal market.¹⁵

It is submitted that, in times of economic crisis the elimination of market access barriers can have substantial economic implications, especially since the role of concessions is likely to

¹¹ COM (2011) 897 final (n3), recital (4).

¹² European Parliament, Directorate General For Internal Policies Policy Department, Economic And Scientific Policy, ‘Analytical Overview of the Legal Framework of EU Member States regarding the Awarding of Concession Contracts’ (EP Briefing Note), IP/A/IMCO/NT/2012-09, June 2012, 7, available at <www.europarl.europa.eu/document/activities/cont/201206/20120619ATT47200/20120619ATT47200EN.pdf> (last visited 23.05.2013).

¹³ SEC (2011) 1588 final (n6).

¹⁴ *Ibid.*

¹⁵ COM (2011) 897 final (n3) 3.

become more prominent in the near future in the face of increasing constraints on public finances. Indeed, the Commission recognises that, by transferring the operating risks to an economic operator and alleviating this burden for public authorities, concessions can make it possible to carry out much needed public works and services.¹⁶

Interestingly, as part of the legislative review of the proposed directive, several national Parliaments questioned the necessity of having such a directive in the context of the subsidiarity requirement. The Commission in response claimed that the objectives pursued by the Concessions Directive Proposal could not be sufficiently achieved by Member State action alone: the coordination of procedures above a certain threshold was an important mean of complementing the internal market and would ensure efficiency and equal access to concessions. In particular, the Commission argued that leaving the regulation of concessions entirely to national action might result in divergent legislation and possibly conflicting procedural regimes, which would unavoidably increase the regulatory complexity and would pose obstacles to cross-border activity.¹⁷

The Commission's view was challenged by several Member States through the submission of a number of Reasoned Opinions. For example, Austria claimed that the Commission had failed to prove that there was a need to establish legal security by common definitions when the Court had already made such clarifications.¹⁸ In addition, Germany did not view the adoption of a Concessions Directive as necessary and added that the power to decide if a public interest task was to be performed by the municipality or by third parties had to remain in the hands of the public authorities.¹⁹ Finally, Italy claimed that regulation should be conducted and managed at

¹⁶ SEC (2011) 1588 final (n6) 7.

¹⁷ COM (2011) 897 final (n3) 4.

¹⁸ European Affairs Committee of the Federal Council, Reasoned Opinion on the Proposal For A Directive of the European Parliament and of the Council on the Award of Concession Contracts, 1 February 2012, available at <www.ipex.eu/IPEXL-WEB/dossier/files/download/082dbcc534ad5c6c013541f451eb69d6.do> (last visited 23.05.2013).

¹⁹ Bundesrat, Reasoned Opinion on the Proposal For A Directive of the European Parliament and of the Council on the Award of Concession Contracts, 2 March 2012, available at <www.ipex.eu/IPEXL-WEB/dossier/files/download/082dbcc535f09fa601361197c7811437.do> (last visited 23.05.2013).

local community level where possible as it viewed supranational regulation as providing no added value to the award of concessions.²⁰

1.3 Supporting SMEs

The promotion of Small and Medium Enterprises (hereinafter ‘SMEs’) is another cross-policy objective also pursued by the Commission in the Concessions Directive Proposal by seeking to facilitate access to the internal market to all economic operators and in particular the SME sector, which currently accounts for 99.8% of all non-financial enterprises in 2012 and represents 20.7 million businesses.²¹

The Commission claims that the lack of a clear advertising obligation regarding concessions hinders undertakings’ access to business opportunities in the internal market, especially for SMEs.²² While these barriers hamper market access to both large enterprises and SMEs, the latter do not possess the same means as the former to obtain information on business opportunities across the EU and thus it is thought that they will benefit the most from the provision of the proposed directive to advertise concession opportunities in the Official Journal of the European Union (hereinafter ‘the OJEU’).²³

While the Commission recognises that regulation of concessions at European level will have an economic impact on both CAEs (for example in publication costs and dealing with a higher number of bids) and on bidders (such as increased legal and administrative costs), it concludes that the additional costs will be compensated by the improved efficiency of the award process and by the increase in business opportunities, thus resulting in a positive net effect for operators including SMEs.²⁴

²⁰ Italian Senate, Reasoned Opinion on the Proposal For A Directive of the European Parliament and of the Council on the Award of Concession Contracts, <www.ipex.eu/IPEXL-WEB/scrutiny/COD20110437/itsen.do> (last visited 23.05.2013).

²¹ ECORYS, ‘EU SMEs in 2012: at the crossroads - Annual report on small and medium-sized enterprises in the EU, 2011/12’, Rotterdam, September 2012, 15, available at <http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/performance-review/files/supporting-documents/2012/annual-report_en.pdf> (last visited 23.05.2013).

²² Commission Memo (n8) point 13.

²³ *Ibid.*

²⁴ *Ibid.*

While the overall effect of the regulation of concessions will take some time to be assessed following the adoption of the Concessions Directive Proposal, it is submitted that the additional legal and administrative costs discussed above will constitute a greater burden on SMEs than on larger enterprises and it can also inflict a burden on the CAEs dealing with inexperienced SMEs during the tendering process.

2. Legal Certainty

One of the stated main objectives of the Concessions Directive Proposal is to provide legal certainty to CAEs and economic operators regarding the legal framework applicable to the award of concession contracts as well as the scope of application of this framework.²⁵ In the Commission's view, '[l]egal certainty is essential to any economic activity and is particularly important in the context of long-term, high-value contracts such as most concessions.'²⁶

2.1 Legal uncertainty regarding the definition of service concessions

Article 1(2)(4) of Directive 2004/18/EC (hereinafter 'the Classic Directive') defines service concessions as contracts of the same type as a public service contract except for the fact that the consideration for the provision of the services consists either solely in the right to exploit the service or in this right together with payment.²⁷ Furthermore, the award of service concessions is explicitly excluded from the scope of that directive.²⁸

Before the adoption of the Classic Directive, the only definition of concessions was found in the Public Works Directive, which also laid down specific provisions concerning the procedure for their award.²⁹ In the absence of a definition of service concessions in secondary European Union law, in 2000 the Court confirmed in the landmark case of *Telaustria* that a case-by-case approach

²⁵ COM (2011) 897 final (n3) 5.

²⁶ SEC (2011) 1588 final (n6) 11.

²⁷ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (the Classic Directive) [2004] OJ L134/114.

²⁸ *Ibid*, art 17.

²⁹ Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (Public Works Directive) [1993] OJ L199/54, art 1(d).

should be adopted to the classification of an agreement as a public service contract or a service concession, with the most important factor being the ‘conferral of a right to exploit a particular service’ as well as the simultaneous transfer to the concessionaire of ‘the principal, or at least the substantive, economic risk attaching to the performance of the service involved’.³⁰ In addition, the Court confirmed that the award of service concessions was not governed by any of the directives regulating the field of public procurement³¹ but that, nevertheless, CAEs were ‘bound to comply with the fundamental rules of the Treaty, in general, and the principle of non-discrimination on the ground of nationality, in particular.’³² However, the definition of service concessions subsequently adopted in the Classic Directive echoed that provided by the Court in *Telaustria* but excluded the concept of risk transfer to the concessionaire,³³ and adequately distinguishing between public service contracts and service concessions became of great importance in particular regarding the consequences which such a decision would have for the legality of the award procedure.

As stated in Recital 7 of the Preamble to the Concessions Directive Proposal, subsequent judicial interpretation of the concept of service concessions led to legal uncertainty among CAEs and economic operators and gave rise to numerous judgments of the Court. In particular, the Court has confirmed that the definition of service concessions has an autonomous EU meaning,³⁴ and that this may differ from the definition of service concession at national level.³⁵ To this end, the Commission included in the proposed directive a clarification on the definition of concessions and, in particular, a reference to the concept of substantial operating risk.³⁶ Indeed the

³⁰ Case C-324/98 *Telaustria* [2000] ECR I-10745, paras 30 and 37.

³¹ Although the Court in *Telaustria* dealt specifically with the Utilities Directive 93/38/EEC, the exclusion of service concessions from the Public Services Directive was subsequently confirmed in the order in Case C-358/00 *Buchhändler-Vereinigung* [2002] ECR I-4685, paras 27 and 28.

³² *Telaustria* (n30) para 60.

³³ As seen in the *travaux préparatoires* to the Classic Directive, the inclusion of a definition of service concessions was intended solely to clarify the exclusion of service concessions from the scope of that directive although it does not explain why a more detailed definition in line with the case-law was not provided. See Commission, ‘Communication from the Commission to the European Parliament pursuant to the second subparagraph of Article 251(2) of the EC Treaty concerning the common position of the Council on the adoption of a Directive of the European Parliament and of the Council on the coordination of the procedures for the award of public works contracts, public supply contracts and public service contracts’ (2003) SEC 0366 final.

³⁴ See, inter alia, *Privater Rettungsdienst* (n1) para 23 and case-law there cited.

³⁵ In fact, the Commission identified in its Impact Assessment the fact that contracts were qualifying as concessions under EU law but not considered as such by national legislators as a market entry barrier. See SEC (2011) 1588 final (n6) point 4.2.1.

³⁶ COM (2011) 897 final (n3) recital (7).

Commission acknowledges that the case-law continues to be unclear ‘in particular regarding the level of operating risk to be transferred to the economic operator.’³⁷

Furthermore, the Court has recognised that the key distinction between a service contract and a service concession lies in the consideration for the provision of the services in question.³⁸ Thus a service concession exists where the agreed method of remuneration consists in the right of the concessionaire to exploit for payment his own service and means that he assumes the risk connected with operating the services in question.³⁹ Indeed, the ‘complete absence’ of a transfer of the risks connected with the operation of the service will mean that the transaction would be classified as a service contract.⁴⁰

However, uncertainty regarding the level and type of operating risk seems to have arisen in case-law. The Court had initially confirmed that the concessionaire had to bear ‘the main, or at least the substantial, operating risk’⁴¹ and that the risk assumed could not be ‘limited’.⁴² However, the Court in *Eurawasser* confirmed that the operating risk in itself did not have to be significant but that, even if the operational risk faced by an CAE was very limited for example by reasons of public law, the determining factor for a service concession would be that ‘the contracting authority transfers to the concession holder all or, at least, a significant share of the risk which it faces’.⁴³ In addition, the Court in *Privater Rettungsdienst* confirmed that, where the remuneration of the provider comes exclusively from a third party, the transfer of a ‘very limited’ operating risk will suffice in order for a service concession to be found.⁴⁴

The proposed definition of service concessions under Article 2(1)(7) of the proposed directive follows the same definition as that contained in the Classic Directive. However, Article 2(2) includes the indispensable characteristic of the transfer of the operating risk as well as the types and level of risk to be transferred:

³⁷ SEC (2011) 1588 final (n6) 12.

³⁸ Case C-206/08 *Eurawasser* [2009] ECR I-8377, para 51.

³⁹ Case C-382/05 *Commission v Italy* [2007] ECR I-06657, para 34.

⁴⁰ Case C-234/03 *Contse* [2005] ECR I-9315, para 22.

⁴¹ Case C-451/08 *Helmut Müller* [2010] ECR I-02673, para 75.

⁴² Case C 300/07 *Oymanns* [2009] ECR I-04779, para 74.

⁴³ *Eurawasser* (n38) paras 77 and 80.

⁴⁴ *Privater Rettungsdienst* (n1) para 33.

The right to exploit the works or services [...] shall imply [sic] the transfer to the concessionaire of the substantial operating risk. The concessionaire shall be deemed to assume the substantial operating risk where it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services which are the subject-matter of the concession.

That economic risk may consist in either of the following:

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

Therefore, by defining the operational risk as ‘substantial’ and defining it as the lack of guarantee to break even on investments and costs incurred, the Concessions Directive Proposal appears to adopt a more restrictive approach than the permissive definition by the Court in *Eurawasser* and *Privater Rettugsdient*, particularly with regards to the relevance of financial risk where there is no direct remuneration from the CAE or for certain regulated markets. This view has been echoed by the comments to the current proposal by both the European Parliament and the Committee of the Regions.⁴⁵ In addition, the Council of the European Union has suggested providing greater clarification on the concept of operational risk by stating that ‘[a]n operating risk must stem from the factors which are outside the control of the parties and thus cannot result from inappropriate performance of the contract by any of the parties to the contract.’⁴⁶

Furthermore, the wording of Art 2(2) of the proposed directive confirms that the only types of risk to be considered operational are demand and availability risks. The Court in *Privater Rettugsdient* confirmed that the risk of the economic operation of the service must be understood as the ‘risk of exposure to the vagaries of the market’ and went on to identify a list of risks

⁴⁵ See EP Briefing Note (n12) point 4.2.1; and Committee of the Regions, ‘Opinion on “The award of concessions contracts”’ (Committee of the Regions Opinion) [2012] OJ C-277/74, 83.

⁴⁶ Council of the European Union, ‘Proposal for a Directive of the European Parliament and of the Council on the award of concession contracts: Presidency compromise proposal’ (Council July 2012 Comments) , 12489/12, 12 July 2012, 3, available at <<http://register.consilium.europa.eu/pdf/en/12/st12/st12489.en12.pdf>> (last visited 23.05.2013).

contained in such expression, such as ‘the risk of competition from other operators, the risk that supply of the services will not match demand, the risk that those liable will be unable to pay for the services provided, the risk that the costs of operating the services will not fully be met by revenue or for example also the risk of liability for harm or damage resulting from an inadequacy of the service.’⁴⁷ Therefore, while demand risk would qualify as a ‘risk of exposure to the vagaries of the market’, it appears that the Concessions Directive Proposal goes beyond the case-law by also providing for availability or offer risk.

2.2 Legal uncertainty regarding transparency requirements

The Court held in *Telaustria* that the Treaty principles of equal treatment and non-discrimination on the grounds of nationality imply, in particular, ‘an obligation of transparency in order to enable the contracting authority to satisfy itself that the principle has been complied with. That obligation of transparency which is imposed on the contracting authority consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed.’⁴⁸

The Court has subsequently confirmed that the obligation to follow the Treaty rules when awarding service concessions does not arise if there is no ‘cross-border interest’, such as ‘if the contract or concession cannot be of interest to an undertaking situated in another Member State, particularly by reason of a very modest economic stake.’⁴⁹ However a description of what constitutes sufficient advertising and how cross-border interest was to be determined has not been fully developed by the Court and, therefore, another stated objective of the Concessions Directive Proposal is the need to address the precise content of the obligations of transparency and non-discrimination.⁵⁰

⁴⁷ *Privater Rettungsdienst* (n1) para 37.

⁴⁸ *Telaustria* (n30) paras 61-62.

⁴⁹ Case C-203/08 *Sporting Exchange Ltd* [2010] ECR I-04695, AG Bot, para 144 and case-law there cited.

⁵⁰ COM (2011) 897 final (n3) 3.

The proposed directive addresses these shortcomings by providing specific publication and procedural requirements regarding the award of concessions. However, the applicability of the Treaty principles to concession contracts outside of the scope of the proposed directive remains in question. To this end, it is appropriate to consider in the section below the suitability of the thresholds for application contained in the Concessions Directive Proposal.

3. Thresholds

In the Concessions Directive Proposal the threshold for application of the directive is contained in Article 5 and it applies to concessions with a value equal or greater than five million euros. Furthermore, the value of the concession is not linked or conditioned on its duration but Article 16 therein states that the duration of the concession shall be limited to the time ‘estimated to be necessary’ for the concessionaire to recoup the investments made in operating the services together with a reasonable return on invested capital.

Of particular interest also is the fact that the Concessions Directive Proposal does address the procedures to be followed for concession falling below the financial threshold and/or those not having a cross-border interest.

3.1 Link to time limits

As part of the legislation and negotiation process on the Concessions Directive Proposal, the Committee of the Regions has suggested in its Opinion that there should be a link between the threshold and the time limits on the duration of concessions. Arguably, concessions can have by their very nature a long lifespan since the concessionaire must be able to recover its investments. Therefore, a five million euro value in the context of a long-term concession seems very low, which would put in the requirement to bring it within the scope of the proposed directive as inappropriate. The Committee suggested an amendment by including the condition that the threshold should apply for concessions lasting up to five years and that a higher threshold of ten million euros should apply to concessions lasting longer than 5 years.⁵¹

⁵¹ Committee of the Regions Opinion (n45) 83.

As stated above, the time limit set in Article 16 of the proposed directive is described as the time estimated to be necessary for the concessionaire to recoup the investments made in operating the works or services together with a reasonable return on invested capital. The proposal however does not provide a procedure or methodology to be used to conduct such a vague assessment nor does it clarify what would represent a reasonable return of investment.⁵² This also raises the question of whether guarantying a reasonable return under the proposed directive eliminates the risk element, which is key distinguishing feature of concessions when compared to public contracts.

The question of duration of public contracts was addressed in the *Pressetext* case, where the Court found that concluding an agreement for an indefinite period would be at odds with the scheme and purpose of Community Law governing public contracts. The Court further noted that such a contract might over time impede competition between potential service providers and hinder the application of the provisions of Community directives governing the advertisement of procedures for the award of public contracts.⁵³ Similarly in *Helmut Müller* the Court held that, with regard to the duration of concessions, ‘there are serious grounds, including the need to guarantee competition, for holding the grant of concessions of unlimited duration to be contrary to the European Union legal order.’⁵⁴ Finally, in the *Engelmann* case the Court ruled that granting a concession for a duration of up to fifteen years would be liable to impede or even prohibit the exercise of the freedoms guaranteed in the Treaty by operators in other Member State and therefore constituted a restriction on the exercise of those freedoms.⁵⁵

It is submitted that the case-law stands in contradiction to the formula for concessions duration set out in the Concessions Directive Proposal which in essence provides for an unspecified time limit which in practice could take a lot longer than the, for example, fifteen years considered in *Engelmann*.

⁵² A. Sanchez Graells (n4).

⁵³ Case C-454/06 *Pressetext* [2008] ECR I-4401, para 73

⁵⁴ *Helmut Müller* (n41) para 79.

⁵⁵ Case C-64/08 *Engelmann* [2010] ECR I-8219, para46 and case-law there cited.

3.2 Concessions falling below the threshold

As mentioned above, the Concessions Directive Proposal sets out in Article 5 the five million euro threshold for application of the scope of the directive and is silent on the provisions applicable for concessions falling below that threshold.

The question of contracts or concessions falling below the threshold of application of the Classic Directive has been repeatedly addressed by the Court. While not all the cases discussed below dealt with concessions, the applicability of the rulings is done by analogy⁵⁶ and it is submitted that they have implications on the question of concessions which will fall under the threshold of the Concessions Directive Proposal.

In a reference for a preliminary ruling the Court in *Vestergaard* established that the relevant public procurement directive procedures applied *only* to contracts whose value exceeded the threshold laid down in the directive. It did however go on to determine that this did not imply that contracts with a lower value were excluded from the scope of Community law.⁵⁷ Furthermore, in *Commission v Finland*, the Commission started proceedings against Finland on the grounds that the authority responsible for the management of Finnish government buildings had infringed fundamental Treaty rules and, in particular the principle of non-discrimination which implies the obligation of transparency while awarding a contract.⁵⁸ The Commission considered the contract as not being sufficiently advertised and therefore its award not sufficiently transparent. The question touched upon the transparency obligation imposed on a CAE when awarding a contract which falls below the threshold specified in the relevant public procurement directive.⁵⁹ Advocate General Sharpston claimed in her Opinion that the directive's threshold marks the point at which the EU legislator deliberately chose not to apply detailed publicity requirements.⁶⁰ She did recognise that in principle Community law required some degree of publicity for contracts such as the one in question but claimed that the details on its publicity should be left to national law to determine.⁶¹ She further claimed that the invitation of a

⁵⁶ C. Bovis, *EU Public Procurement Law* (2nd edition, Edward Elgar Publishing, Glos, 2012), pp. 51-52.

⁵⁷ Case C-59/00 *Vestergaard* [2001] ECR I-9505, para 19.

⁵⁸ Case C-195/04 *Commission v Finland* [2007] ECR I-335.1

⁵⁹ *Ibid*, opinion of AG Sharpston.

⁶⁰ *Ibid*, para. 85.

⁶¹ *Ibid*.

number of tenderers to participate was sufficient to discharge Finland's obligation regarding transparency in the public procurement process when the contract's value falls under the directive's threshold.⁶² However, the Court deemed the case to be inadmissible, claiming it did not have sufficient evidence to appreciate exactly the scope of the infringement of Community law by Finland.⁶³ Consequently the Court only addressed the admissibility issue and did not provide for clarifications on the threshold matter and the transparency obligation for contracts falling under it.

In a later case, *Commission v Italy*, the Court reasserted the approach taken in *Vestergaard* regarding the applicability of EU public procurement legislation to contracts falling under the threshold, acknowledging again that the Community legislature had expressly made a policy choice to exclude contracts under a certain threshold from the advertising regime and therefore did not impose any specific obligation with respect to them.⁶⁴

Nevertheless, the Court repeatedly asserted that contracts falling under the thresholds are not subject to the procedures in the directives, the CAEs are still bound by the Treaty's fundamental rules, mainly the non-discrimination on grounds of nationality obligation and transparency.⁶⁵ It did take notice that under special circumstances, such as when a very modest economic interest at stake, a contract award would be of no interest to economic operators located in other Member States. In such a case, 'the effects on the fundamental freedoms are [...] to be regarded as too uncertain and indirect' for EU primary law to apply,⁶⁶ an approach that was taken by the Court in several consecutive cases.⁶⁷

In the Classic Directive, the thresholds applicable to public contracts and works concessions demonstrate not only their economic importance, but also reflect their cross-border interest. The

⁶² *Ibid.*

⁶³ *Commission v Finland* (n58) paras 32-33.

⁶⁴ Case C-412/04 *Commission v Italy* [2008] ECR I-00619, para 65.

⁶⁵ *Vestergaard* (n57) para 19; *Telaustria* (n30); Case C-264/03 *Commission v France* [2005] ECR I-8831, para 32; and Case C-6/05 *Medipac-Kazantzidis* [2007] ECR I-4557, para 33.

⁶⁶ Case C-231/03 *Coname* [2005] I-07287, para 20.

⁶⁷ C-69/88 *Krantz v Ontvanger der Directe Belastingen* [1990] ECR I-583, para 11; Case C-44/98 *BASF AG v Präsident des Deutschen Patentamts* [1999] ECR I-6269, para 16 ; and the order in case C-431/01 *Philippe Mertens v. Belgian State* [2002] ECR I-7073, para 34.

Commission ,in its *Impact Assessment of an Initiative on Concessions*, asserts that similarly the threshold for service concessions should reflect the same interest, the extent to which economic operators from other Member States can have an interest in such concessions.⁶⁸ In all of the options discussed under the Impact Assessment, such thresholds were introduced. It is however essential to stress that the Commission goes on to say that a cross-border interest does not depend only on the economic value of the concession but also on its geographic location, the sector in question, differences in economic wealth, the frequency at which concessions are used, operational costs etc. In order to conduct such as assessment there will need to be data gathering and processing in order to establish such cross- border interest. Nevertheless, the Commission establishes that such data and information is extremely difficult, even close to impossible, to access due to the lack of transparency.⁶⁹ It is submitted therefore that that threshold contained in the Concessions Directive Proposal represents the level over which cross-border interest begins, as it does in the Classic Directive.

The Commission goes on to assert that the existing national threshold is irrelevant not just because they differ from each other, but mainly since they reflect national interests and not cross-border of the concessions.⁷⁰ The Commission deems that, following the Court’s case law, concessions falling under the threshold shall remain governed only by the Treaty principles.⁷¹

It was later asserted in the Commission’s *Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the PP Directives* that the principles of equal treatment and non-discrimination on grounds of nationality imply an obligation of transparency which, according to the Court’s case-law ‘consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of the procedures to be reviewed’.⁷² These standards apply to the award of services concessions, as to contracts below the thresholds. It was also established in the Communication that the standards derived from the Treaty apply only to

⁶⁸ SEC (2011) 1588 final (n6) 26.

⁶⁹ SEC (2011) 1588 final (n6) 26.

⁷⁰ *Ibid* 27.

⁷¹ *Ibid* 26.

⁷² Commission, ‘Commission interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives’ [2000] OJ C-179/2, 2.

contract awards having a sufficient connection with the functioning of the Internal Market, as it was established by the Court in the above rulings.⁷³

Germany challenged the Interpretative Communication on the grounds that it created new and/or specific obligations for contracts falling under the threshold contracts not subject or only partially subject to the public procurement directives, not been subject to the usual EU legislative process, deeming the Interpretive Communication therefore *ultra vires*. It further argued that it obliged Member States to publish an advertisement before the award of the contract, even though such contract may have been outside the scope of the public procurement directives. The requirement for the prior publication of an advertisement and other procedural requirements were not a new obligation, but merely stem from the provisions of existing Community Law, as interpreted by the Court. The Court stated that the Treaty principles of transparency and non-discrimination are fundamental to the workings of the internal market and all contracts should be assessed with this in mind. The mere fact that an interpretative communication does not by nature purport to be a measure intended to produce legal effects is not enough to support the conclusion that it does not produce binding legal effects, and that it was therefore necessary to examine its content. After examining the Communication the Court concluded that while the Communication did not contain new rules for the award of public contracts, and hence, did not constitute an actionable measure for the purposes of annulment proceedings.⁷⁴ Consequently, Germany lost the case.

While the Court did not annul the Communication, it did not contradict the Commission's claim that the Treaty principles of equal treatment and non-discrimination on grounds of nationality imply an obligation of transparency and entail the commitment of CAEs to provide a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of the procedures to be reviewed.⁷⁵ This reflects a certain tension between the secondary law, namely the Classic Directives, and EU primary law. Such tension lies, partly, on the fact that a directive can be very specific by laying down very detailed rules and procedures, while, on the other hand, the Treaty rules of non-discrimination, equal treatment, transparency

⁷³ *Ibid*, 3.

⁷⁴ Case T-258/06 *Germany v Commission* [2010] ECR II- 02027, para 162.

⁷⁵ Commission interpretative communication (n72) 2.

and proportionality are by nature, not specific. Harmonised secondary legislation clarifies forms and translates the provisions on the fundamental freedoms to specific rights and duties, while primary law is much more general in nature and in principle can be complied with in different ways.⁷⁶ The Concessions Directive Proposal, as the Classic Directive, defines who falls under its scope, hence, to whom the rules and procedures apply. It does not address concessions with a lower value than the threshold, resulting in legal uncertainty to the CAEs engaging in a tender for the award of such concessions.

The Committee of the Regions addressed this question in its Opinion, offering to add to the first article dealing with subject-matter and scope a third provision stating that ‘[c]oncessions with a value under the threshold should be awarded without any prior call for competition’. According to the Committee, the proposed directive should only apply to concessions affecting the internal market, deeming ones with a lower value to be of no cross-border interest, and consequently, not affecting the internal market.⁷⁷

The Court has asserted on several cases mentioned above that for contracts falling under the thresholds, general Treaty principles apply. Compelling CAEs to advertise concessions raises an important question: does the advertising obligation stem from the non-discrimination or transparency Treaty principles, or does it *de facto* apply secondary law in cases that were excluded from the scope of the secondary legislation in question? In other words, is it a case of the Court and the Commission reading onto primary law obligation emanating from secondary law?

Furthermore, going back to the Commission’s Impact Assessment linking the threshold to a cross-border interest, a question that arises is, if the threshold reflects a cross-border interest, does it deem the concessions with lower value to be of no cross-border interest? If the answer is on the affirmative, why should concessions falling below the threshold be subjected to the general Treaty principles? Furthermore, if the benchmark is not met, how can it be asserted that the national law on concession is irrelevant?

⁷⁶ A. Brown, ‘EU primary law requirements in practice: advertising, procedures and remedies for public contracts outside the procurement directives’ (2010) 5 PPLR 169, p. 171.

⁷⁷ Committee of the Regions Opinion (n45) amendment 10.

If the Commission determines that the national laws on concessions are irrelevant, and concessions under the threshold have no cross border element, under which laws are they to be governed?

It seems that the Commission missed an opportunity to provide greater legal certainty to CAEs and economic operators regarding the advertising requirements, emanating from the transparency principle, for below threshold service concessions. The legislature left a legal “gap” to be filled by Treaty provisions or principles.⁷⁸ The Commission could have incorporated an additional criterion, reflecting case-law, regarding concessions below threshold with cross-border interest, which would fall under the scope of the proposed directive, perhaps subjecting such concessions to a lighter regime, in the spirit of services under Annex II B of the Classic Directive, while providing the definition of cross-border element and the way to establish it.⁷⁹

One possibility would be to establish a procedure that would first consider whether a concession has an equal or higher value to the established threshold. An additional step would be to review whether, in a case of concessions not meeting the threshold, a cross-border element exists. The implication would be that concessions not falling under the scope of both assessments described above, would not be subjected to the general principles of the Treaty and hence the obligation advertisement in the Official Journal of the European Union.

It is submitted that incorporating such provisions into the Concessions Directive Proposal would reduce claims of judicial activism in cases where concessions clearly fall outside the scope of the directive.

4. Procedural Provisions Regarding the Award of Service Concessions

⁷⁸ B. J. Drijber and H. Stergiou, ‘Public Procurement Law And Internal Market Law’ (2009) 46 CMLR 805, 844.

⁷⁹ Under the proposed revision of the Classic Directive, a distinction into Annex IIA and IIB Services is not kept although there is a different regime applicable to Social Services. The analogy described in this paper could also be made in respect of such new regime.

The Concessions Directive Proposal introduces a procedural framework for the award of service concessions based on those currently applying to public works concessions under the Classic Directive, together with a concretization of the obligations arising from the Treaty principles as interpreted by the Court.⁸⁰ Notably, these procedural requirements will also apply to the Utilities sector for the first time, since both works and service concessions are currently excluded.⁸¹

Key procedural aspects include publication in the Official Journal, deadlines, selection and exclusion criteria, award criteria, procedural guarantees, and remedies. When compared to the classic Directive, the proposed rules do not contain a fixed catalogue of award procedures and instead CAEs must follow some procedural safeguards, mainly during the negotiations.

Of particular distinction under the new procedural rules is the publication of concession and award notices, and the introduction of award criteria for concessions.

4.1 Publication in the Official Journal of the European Union

Article 26 of the Concession Directive Proposal provides for the compulsory publication of a concession notice in the OJEU once they reach the thresholds contained in Article 5 therein.⁸² Exceptions to the publication requirement are limited, and include some of the ones contained as justification for the use of the negotiated procedure without a prior notice under the Classic Directive, namely (i) where no tenders or no suitable tenders or no applications have been submitted, (ii) where the award can only be made to a single economic operator and (iii) for new services consisting in the repetition of similar services entrusted to the original economic operator.⁸³

In addition, a concession award notice must be published pursuant to Article 27 of the Concessions Directive Proposal within 48 days of the award of the concession. This requirement

⁸⁰ COM (2011) 897 final (n3) 6.

⁸¹ Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (Utilities Procurement Directive) [2004] OJ L134/1, art 18.

⁸² For a discussion on the thresholds set by the Directive, see section 3 of this paper.

⁸³ COM (2011) 897 final (n3) art 26(5).

applies to all concessions valued above €2,500,000 with the exception of services listed in Annex X (social services).

At this juncture, it is appropriate mentioning the lighter regime applicable to social services. According to recital 21, it was deemed by the Commission that the so-called ‘services to the person’ (i.e. certain social, health and educational services) were of limited cross-border dimension and their provision varies across Member States due to different cultural traditions. Therefore, and taking into account that these services would be newly regulated, the Concessions Directive Proposal imposes only a requirement to publish a prior information notice and a concession award notice where the social service concession is valued above €5,000,000.⁸⁴

Recital 21 urges Member States to put in place national measures for the award of social service concessions which would ensure the principles of transparency and equal treatment of economic operators, while Recital 22 confirms that, even if these social services are provided by the grant of licences or authorisations, such grant must also be subject to the principles of transparency (including advertisement) and non-discrimination. However, since this ‘instruction’ to the Member states is included in the Recital and not in an article, its legally binding nature would therefore be questionable as recitals are mainly an aid to interpretation.

It is submitted therefore that these services to the person are treated as Annex IIB services are currently treated under the Classic Directive. Therefore, the same principles and inconsistencies arising from the transparency case-law discussed above will also apply to these newly regulated services, namely: forum for appropriate advertisement (when they are below the threshold) and whether a tendering process should be followed. Regarding below-threshold social service concession, perhaps the wording of Article 5 might be of help. The fact that the lower threshold of €2,500,000 is explicitly excluded for social services might indicate the EU legislature’s intention to definitely exclude such services due to their low cross-border interest. However, as the Court held in *Sporting Exchange* in the context of gaming licences, ‘the obligation of transparency appears to be a mandatory prior condition [...] irrespective of the method of

⁸⁴ COM (2011) 897 final (n3) art 17.

selecting that operator' because of the potential effect on inter-state trade is the same as in those of service concession contracts.⁸⁵

In particular, both the Parliament and the Committee of the Regions propose to remove the requirement to advertise even the prior information notice as such services have little cross-border impact and would impose a disproportionate burden on CAEs.⁸⁶ The Council has suggested widening the list of social services to encompass hotel and restaurant services, community, legal, prison and security services. Furthermore, it has included them under the scope of the remedies legislation.⁸⁷

4.2 Award Criteria

Article 39 of the proposed Concessions Directive provides for an obligation to apply objective criteria which will ensure compliance with the principles of transparency, non-discrimination and equal treatment. These criteria should prevent arbitrary decisions by CAEs and must be published in the concession notice or concession documents. It is submitted that the inclusion of the award criteria in the concession notice may limit the flexibility of CAEs too early in the process and without having examined the response from the market, since the procedural safeguards of Article 35 therein prohibit a change of the award criteria. In fact, one of the recommendations from the Committee of the Regions regarding the Commission's proposal is, in the interest of greater flexibility and in order to avoid the need to re-advertise a new concession competition, to allow for minimal adjustments to the award criteria before tenders are received and if the change has no impact on the tenderers involved.⁸⁸

It is submitted that, while this would seem like a pragmatic approach especially since negotiations may provide CAEs with greater clarity as to innovative solutions being proffered by

⁸⁵ *Sporting Exchange* (n49) para 47.

⁸⁶ Committee of the Regions Opinion (n45) 89.

⁸⁷ European Parliament, Committee on the Internal Market and Consumer Protection, 'Amendments 237-472 to Proposal for a directive', Draft Report, Philippe Juvin, PE492.669v01-00, 23 October 2012, 40-41, available at <www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-496.581+03+DOC+PDF+V0//EN&language=EN> (last visited 23.05.2013); and Council of the European Union, 'Proposal for a Directive of the European Parliament and of the Council on the award of concession contracts: General approach, 18007/12, 20 December 2012.

⁸⁸ Committee of the Regions Opinion (n45).

the market, the risk of a breach of transparency and equal treatment is all too obvious. Instead, it would be advisable for CAEs to engage in a technical dialogue or market sounding exercise before advertising a concession competition and also ensuring that the award criteria is disclosed in the concession documents rather than at the initial advertisement stage. Of course, this would have implications for the economic operators, for whom an indication of the award criteria from the outset proves useful in determining whether the concession may be of interest.

Another feature of mention is the provision of Article 39(4) which indicates that Member States ‘may provide’ for the use of the Most Economically Advantageous Tender (MEAT) award criterion and further includes an apparently exhaustive list of criteria which may be included in the overall assessment of MEAT. In its latest comments to the proposal, the Council has suggested the removal of this subsection as it implied that Member states had to specifically provide for the MEAT criterion and it was confusing.⁸⁹ It is submitted that this proposed change would be appropriate, especially in the context of the overall aim of simplification of the procurement process and, in particular, of the procedural safeguards already contained in the proposed Concessions Directive regarding award criteria, such as the objectivity and equal treatment requirements.

5. Conclusion

The proposed Concessions Directive is a welcomed addition to the modernisation of the European public procurement regime, particular, in terms of addressing the legal uncertainties which have arisen from the Court’s jurisprudence since *Telaustria* in 2000. The proposal represents a timely opportunity to codify the case-law whilst allowing for sufficient flexibility to cater for both innovative concession arrangements and future developments in the Court’s interpretation of this new secondary law instrument. Therefore, it is submitted that greater elaboration on the definition of service concessions and, in particular, the constituent elements such as operational risk, would be beneficial.

⁸⁹ Council of the European Union, ‘Proposal for a Directive of the European Parliament and of the Council on the award of concession contracts: General approach, 18007/12, 20 December 2012.

Without doubt, greater transparency in the award of concessions will benefit inter-state trade and help achieve some of the Europe 2020 Strategy goals of increased sustainable growth and competition. The purported benefits to the SMEs sector are, however, not so clear in the absence of additional packages to support the comparatively larger administrative and legal costs which SMEs face when participating in formalised tendering procedures as compared to larger enterprises. Nevertheless, it is hoped that the relatively lighter procedural approach applicable to the award of service concessions under the proposed Concessions Directive will address these difficulties.

A further potential disadvantage of the proposed Concessions Directive is the lack of recognition of the existence of short and long term concessions, particularly when faced with the fact that *all* concessions valued above five million euro are considered to fall within the *ratione materiae* of the directive. In what appears to be a contradiction of the Court's case-law regarding concessions of an indefinite duration, the proposed Concession Directive provides the duration of the concession shall be limited to the time 'estimated to be necessary' for the concessionaire to recoup the investments made in operating the services together with a reasonable return on invested capital. We submit that such an open-ended provision would pose difficulties for CAEs when concluding concessions agreements and may have important implications for the legality of the proposed project/scheme.

Finally, the prior publication requirements are in line with the increased transparency envisaged by the Commission's proposal and, despite calls for social and other specific services to the person to be exempted from such a requirement, it will remain to be seen whether such suggestions will find a place in the final directive as it is likely that considerations arising from the transparency case law would need to be considered.

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