

DIRECTIVE 2014/23/EU ON THE AWARD OF CONCESSION CONTRACTS AND ITS APPLICATION IN THE SHIPPING SECTOR

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In the area of the award of concession contracts there was a legal vacuum which European Courts tried to solve by clarifying some aspects related to the award of concession contracts in twenty-six pertinent judgements in that area they delivered since year 2000. Nevertheless, the situation in the area of the award of concession contracts was far from satisfactory. That alerted competent institutions of the European Union to the fact that problems connected with the award of concession contracts can not be adequately addressed on a case-by-case basis and that adoption of pertinent EU rules was necessary. Consequently, at the beginning of the year 2014 the Directive of the European Parliament and of the Council on the award of concession contracts was adopted (hereinafter: Concessions Directive). In this paper we are analysing the main elements of that Directive, such as the precise definition of concession, compulsory publication of concession notices in the Official Journal of the EU in prescribed cases, establishment of certain obligations with respect to the selection and award criteria to be followed by entities awarding concessions, regulation of modifications of concessions during their term, etc. In the paper a critical analysis of the application of the Concessions Directive in the shipping sector is also made, especially in the field of award of contracts for the provision of maritime cabotage services and contracts on providing port

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services, which are qualified as service concessions and, in that sense, are subject to the application of the Concessions Directive.

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1. INTRODUCTION

Public procurement plays a key role as one of the market-based instruments for achieving smart, sustainable and inclusive growth of the European economy while ensuring the most efficient use of public funds. In this context, concession contracts represent important instruments in the long-term structural development of infrastructure and strategic services, contributing to the progress of competition within the internal market, making it possible to benefit from private sector expertise and helping to achieve efficiency and innovation.

Concession contracts represent an important share of economic activity in the EU. However, the fact that Member States use different names for concession contracts and the current lack of transparency concerning their award renders any precise measuring of their economic and social importance difficult.¹ The European Commission estimates that over 60 % of all public-private partnership contracts in Europe can be qualified as concessions.

The impact assessment carried out by the European Commission has shown that absence or inadequacy of national rules for awarding concessions undermines the functioning of the internal market of the EU with regard to concessions, increases the risks of national favouritism, fraud and corruption in that field, and is also a source of violations of the principles of the Treaty on the Functioning of the EU (hereinafter: TFEU).

Furthermore, the public consultation conducted by the Commission services shows that one third of the participants (particularly private enterprises, associations and public authorities) were aware of cases of direct award of con-

¹ For example, 6,169 concessions were advertised in the Spanish national Official Journal between 2006 and 2010, 817 in Italy in 2008 alone, while in France approximately 10,000 concessions are presently running. See *Proposal for a Directive of the European Parliament and of the Council on the award of Concession Contracts - Frequently Asked Questions*, European Commission, MEMO/11/932, Brussels, 20 December 2011, p. 1.

cessions to private companies, without any transparency and without competition.² Additionally, over the past years, a number of Member States have had significant infrastructure projects delayed or cancelled because of inadequate procedures in the award of concessions.

Finally, there is a risk of legal uncertainty related to divergent interpretations of the principles of the TFEU by national legislators, and of wide disparities among the laws of various Member States. Such risk has been confirmed by the extensive case law of the Court of Justice of the EU (hereinafter: CJEU) which has, nevertheless, only partially addressed certain aspects of the award of concession contracts.

The number of CJEU judgments concerning concessions is on the rise (26 of them have been delivered since 2000). The CJEU has clarified several aspects related to the award of concessions and tried to address the legal vacuum in this area. That shows that the current situation is far from satisfactory and that the problems related to the award of concession contracts cannot be adequately addressed on a case-by-case basis.

Therefore, an adequate, balanced and flexible legal framework for the award of concessions would ensure effective and non-discriminatory access to the market to all EU economic operators, and to the citizens legal certainty and the favouring of public investments in infrastructures and strategic services. Such a legal framework would also afford greater legal certainty to economic operators and could be the basis for further opening up international public procurement markets. Particular importance should be given to improving opportunities of access to small and medium-size enterprises on all EU concession markets.

2. DEVELOPMENT OF THE LAW ON CONCESSIONS OF THE EU

In the law of the EU before the entry into force of the Concessions Directive, rules on concessions were part of public procurement directives. Directive 2004/17/EC regulated public procurement procedures in the water, energy, transport and postal services sectors (utilities sector) and Directive 2004/18/EC regulated public procurement procedures in the classic sectors (all sectors not covered by utilities).³ Those Directives distinguished between two types

² Direct award of a concession represents a serious violation of the TFEU principles.

³ 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,

of concessions: public services concessions and public works concessions. Only the award of public works concessions of a value equal to or greater than € 5 000 000 was subject to rules of Directive 2004/18/EC, while the award of services concessions with a cross-border interest was subject only to the basic principles of the TFEU, and in particular the principle of free movement of goods, freedom of establishment and freedom to provide services, as well as to the principles deriving from those principles, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. Accordingly, public works concessions in the utilities sector, public works concessions in the classic sector of a value under € 5 000 000, and public services concessions in both sectors independently of their value were not regulated by secondary law provisions.

The absence of clear rules at the EU level governing the award of concession contracts gave rise to legal uncertainty and barriers to entry to the concession markets of the EU.

Uncertainty with regard to the definition of concession appears already at the stage of qualification of a given arrangement as falling within the scope of the rules on public purchases. The distinction between public contracts and concessions on the one hand, and other types of agreements or unilateral acts (such as licenses and authorisation schemes) on the other hand, is unclear and stakeholders (e.g. in the ports sector) have reported that it is often difficult to know which legal regime applies to a given contract.

The current definition makes it difficult to distinguish between concessions and public contracts.⁴ Out of the twenty-six CJEU rulings on concessions since the *Telaustria* landmark judgment⁵ in 2000, thirteen rulings concerned the

energy, transport and postal services sectors, OJ L 134, 30 April 2004, p. 1. Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 coordinating of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ L 134, 30 April 2004, p. 114.

⁴ Directives 2004/17/EC and 2004/18/EC define concessions as contracts of pecuniary interest concluded between one or more economic operators and one or more contracting authorities or entities and having as their object the acquisition of works or services where the consideration consists, normally, in the right to exploit the works or services that are the subject of the contract. The execution of these works or services is subject to specific binding obligations defined by contracting authority or entity which are legally enforceable.

⁵ Case C-324/98, *Telaustria v. Telekom Austria*, [2000] ECR I-10754, where the Court stated that the contracting authorities need to comply with the TFEU principles of equal treatment and transparency when awarding concession contracts.

clarification of the notion of concession. The majority of these cases stemmed from requests by national courts for a preliminary ruling, reflecting their recurrent uncertainties or, sometimes, lack of understanding of the concept of concessions.

The Commission provided some clarity in this respect in its interpretative Communication⁶, explaining that the risk inherent in the exploitation of the work or service which the concessionaire has to bear is the essential feature of a concession. Although the case law of the CJEU shed some more light on this definition, fundamental elements, such as the level and types of risk, still remained unclear.⁷

There was also some uncertainty regarding the distinction between works concessions and service concessions.⁸ Since most works concessions also involve, to a certain extent, the provision of services, and as it is not always easy to ascertain what the main purpose of the contract was, certain works concessions were awarded as service concessions, thus unduly avoiding the application of the secondary EU rules.

Uncertainty existed also with regard to the obligations of the contracting authorities or contracting entities⁹ to apply TFEU principles of transparency, equal treatment and non-discrimination when awarding concession contracts.

Although the CJEU confirmed in *Telaustria* that the contracting entities which award concessions are bound to comply with the fundamental rules of the TFEU, it did not sufficiently explain the content of those rules. Besides, it is not easy to judge the adequacy of measures aimed at ensuring compliance with the principles of equal treatment, non-discrimination and transparency.

⁶ Commission interpretative communication on concessions under Community law (OJ C 121, 29 April 2000), pp. 2–13, point 2.1.1.

⁷ See *infra*, point 3.

⁸ See cases C-331/92, *Gestion Hotelera Internacional SA v Comunidad Autonoma de Canarias SA*, [1994] ECR I-01329 and C-220/05 *Jean Auroux and Others v Commune de Roanne*, [2007] ECR I-00385, points 36-37.

⁹ The contracting entities are regulated in the Article 7 of the Concessions Directive. Those are entities which pursue one of the activities referred to in Annex II (see *infra* footnote 26) of that Directive and award a concession for the pursuit of one of those activities and which are one of the following: state, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law, public undertakings, entities other than those, but which operate on the basis of special or exclusive rights, granted for the exercise of one of the activities referred to in Annex II.

The problem of uncertainty regarding the applicable rules has also been identified in the case of contract modification. Many stakeholders have identified this issue as an important one. Although the case-law of the CJEU applicable to modifications of public contracts also applies to concessions, the level of certainty provided by these judgments does not seem to be adequate.

The lack of legal certainty increases the risks and costs of cancellation or early termination of illegally awarded contracts¹⁰ and ultimately prevents contracting entities from using concessions where this type of contract might be a good solution. This may have the effect of reducing the uptake of private enterprises, resulting in missed opportunities for engaging private investments and know-how.¹¹

The another important consequence of legal vacuum in the field of the award of concession contracts are barriers to entry into the concession markets stemming from a divergence of national regimes, but also from unlawful practices of contracting entities due to the lack of clarity of EU rules.

Divergent national rules on concession generate costs related to legal advice and the need to acquire knowledge of specific national or even regional and local rules on the award of concession contracts. Divergent national rules on concessions which create barriers to entry or delay entry into the markets of Member States, in particular for small and medium-size enterprises, put incumbent national enterprises at a significant advantage. In that way the market stays fragmented and the rate of cross-border provision of services remains limited. This effectively means that EU citizens may not be benefiting from quality services at the best prices.

One of the fundamental problems in regard to entry barriers stemming from unlawful practice is the direct award of concession contracts with a cross-border interest. Direct awards originate from inadequate application of the principle of transparency, either by national lawmakers or by contracting entities. Direct awards have particularly negative consequences for the proper functioning of the internal market of the EU. With reference to the port sector, where concessions are widespread, the results from a survey conducted by the Institute of Transport and Maritime Management and the University of

¹⁰ In case C-503/04, *Commission v Germany*, [2007] ECR I-6153 the Court ruled that a contract awarded in breach of EU law must be terminated, see point 33.

¹¹ This is particularly the case in new Member States, where uncertainty is compounded by a lack of experience.

Antwerp for the European Seaport Organisation (ESPO) show that 14% of the respondents declared they had directly awarded contracts for port services.¹²

Another unlawful practice concerns the award of public contracts in accordance with lenient rules applicable to concessions (undermining the effectiveness of public procurement rules). Additionally, concessions are granted as licences or authorisations (usually encompassing exclusive rights), which is a breach of the TFEU principles.¹³ There is also evidence (with regard to the port sector, for instance) that the granting of concessions as licences or authorisations under conditions of non-existent or insufficient competition leads to higher prices and a reduced quality of the services provided to contracting entities and consumers, while excluding economic operators from the relevant markets.

Finally, the consultations of the Commission with the stakeholders indicate that the lack of clear rules also leads to unlawful use of non-objective selection and award criteria. This is the case when objectives unrelated to the subject matter of the contract are included in the evaluation of the best offer.¹⁴

In order to solve problems connected with award of concession contracts the European Commission issued interpretative communications on concessions on two occasions¹⁵ but neither of those documents achieved the desired

¹² The sectors of port services and waste treatment, but also water distribution, waste water and sewage, transport, energy, car parking and airport services seemed to be particularly affected by this practice. See Commission Staff Working Document, *Impact Assessment of an Initiative on Concessions*, SEC (2011) 1588 final, Brussels, 20 December 2011, p. 17.

¹³ In those cases a concession contract is wrongly qualified as a unilateral act which may be granted without a competitive procedure. Although the CJEU ruled that the granting of a licence encompassing an exclusive right had to comply with the principles of equal treatment and transparency, it also allowed for quite a wide derogation from these principles, excluding from this transparency obligation licences granted to: (1) public operators subject to direct State supervision or (2) private operators subject to strict control by the public authorities, see case C- 203/2008, *Sporting Exchange Ltd. trading as Betfair v Minister van Justitie*, [2010] ECR I-4659, point 59.

¹⁴ For instance, contracting entities may want to take into account tenderers' social commitments not related to the subject matter of the contract or relations of trust with one of the bidders.

¹⁵ The aim of the interpretative communication is to give instructions for interpretation and application of EU law. It summarises and explains the ways in which certain regulations of EU law should be interpreted, taking account of the case law. It is a political document which is not legally binding for anyone but the European Commission, who adopted it. See Commission interpretative communication on

results. That confirmed the need for adopting new legislation in that field. Between May and July 2010 the Commission held an online consultation open to the general public, and another in August and September 2010 targeting the business community, social partners and contracting entities. The consultations confirmed that the lack of legal certainty caused problems and demonstrated the obstacles that companies face with regard to market access. They also suggested that appropriate EU action should be taken. In that light the European Commission submitted to the European Parliament and to the Council on the 20th of December 2011 a proposal for the adoption of the Concessions Directive. After a coordination of those two institutions the final version of the Concessions Directive was adopted more than two years later, on the 26th of February 2014, and published in the Official Journal of the EU on the 28th of March 2014.¹⁶

3. THE MOST IMPORTANT ELEMENTS OF THE CONCESSIONS DIRECTIVE

In this paper we will analyse the most important elements of the Concessions Directive which are peculiar to this type of contract. These are:

1. A clear and precise definition of concession based on the CJEU case law. The definition contained in Directives 2004/17/EC and 2004/18/EC made it difficult to distinguish between concessions and some other public agreements, especially public contracts, authorisation and licences. Recitals of the Concessions Directive provide clarification on this point.¹⁷ As it is explained, while concessions are contracts for the procurement of works or services, licences and authorisations are acts whereby the State or a public authority establishes the conditions for the exercise of an economic activity, without providing for specific and enforceable commitments by the economic operator. The latter do not qualify as concessions and for that reason their grant is not covered by the Concessions Directive but rather by the Services Directive (Directive

the application of Community law on Public Procurement and Concessions to Institutionalised Public-Private Partnerships (IPPP), COM (2007) 6661, Brussels, 5 February 2008 and another Communication on concessions cited *supra* in the footnote 6.

¹⁶ Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, OJ L 94, 28 March 2014, p. 1

¹⁷ See recitals 14 and 15.

2006/123/EC).¹⁸ Similarly, rent or lease agreements will not be considered concessions if the consideration for using land or infrastructure by a private operator does not encompass the provision of specific works or services.

The lack of a clear and precise definition of concession has given rise to a significant number of judgements of the CJEU but they did not clarify the notion of concession because certain fundamental elements, such as the level and types of risk that is transferred to the concessionaire, still remained unclear.¹⁹

The Concessions Directive finally clarifies the definition of concession in particular by referring to the concept of substantial operating risk.²⁰ The main feature of a concession, the right to exploit works or services, always implies the transfer to the concessionaire of an economic risk involving the possibility that it will not recoup the investments made and costs incurred in operating the works or services awarded. In that sense, operating risk is defined in the Concessions Directive as a risk in exploiting works or services provided by concessionaire which includes demand or supply risk or both. The concessionaire shall be deemed to assume operating risk where, under normal operating conditions, it is not guaranteed that he will 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 involves real exposure to the vagaries of the market, such that any potential estimated loss incurred by the concessionaire must not be merely nominal or negligible.²¹ An operating

¹⁸ Directive 2006/123/EC of 12 December 2006 on services in the internal market, OJ L 376, 27 December 2006, p. 36.

¹⁹ In this matter case law is not sufficiently clear, in particular regarding the level of operating risk and categories of that risk to be transferred to the economic operator so that a contract can qualify as a concession. While demand risk for services seems to be widely accepted as relevant for the definition of a concession, there is uncertainty in regard to other categories of risk (availability, construction, legal and political, etc.). See judgments in cases C-437/07, *Commission v Italy* [2008] I-00153 i C-300/07, *Hans & Christophorus Oymanns GbR v AOK Rheinland* [2009], ECR I-04779 and C-206/08, *WAZV Gotha v Eurawasser Aufbereitungs und Entsorgungsgesellschaft mbH*, [2009] ECR I-08377.

²⁰ 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. For the purpose of assessment of the operating risk the net present value of all the investment, costs and revenues of the concessionaire should be taken into account in a consistent and uniform manner.

²¹ See Article 5 of the Concessions Directive.

risk should stem from factors which are outside the control of the parties. Risks such as those linked to bad management, contractual defaults by the economic operator or to instances of force majeure are not decisive for the purpose of classification as a concession, since those risks are inherent in every contract, whether it be a public procurement contract or a concession.

2. Coverage of works and services concessions both in the utilities sector²² and in the classic sector (all sectors not covered by utilities). Works concession are contracts 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. On the other hand, 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 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.

During negotiations on the Concessions Directive, the Commission tried to make clear at every stage that the Directive does not aim at the privatisation of any services, and reassured citizens that services, in particular water, will not be privatised. Despite all the changes to the legal text, and the contributions from all political parties in the European Parliament and the Council, the text was not satisfactory for anyone; it did not provide the reassurances that citizens expected and it potentially brought about a fragmentation in the internal market of the EU with regard to this specific sector. That is why the best solution appeared to be to remove water from the scope of the Directive, which was done.²³

²² The utilities sector in general includes water, energy, transport and postal services, but in case of Concessions Directive the water services were excluded from its scope.

²³ The scope of the Directive also excluded ambulance services performed by non-profit organisations or associations, but not patient transport ambulance services performed by those organisations or associations. Also, the Concessions Directive does not affect the freedom of Member States to choose, in accordance with EU law, methods for organising and controlling the operation of gambling and betting, including by means of authorisations. Operation of lotteries can be awarded by a Member State to an economic operator on the basis of an exclusive right granted by means of a procedure without publicity pursuant to applicable national laws, regu-

3. In order to ensure transparency and equal treatment to all economic operators Concessions Directive provides for obligation for contracting authorities and contracting entities to publish concession notices in the Official Journal of the EU, when their value is equal to or greater than a threshold prescribed in that Directive.²⁴ The latter ensures, 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.

The Concessions Directive will apply only to concession contracts whose value is equal to or greater than the threshold prescribed in that Directive, which reflects the clear cross-border interest of concessions to economic operators located in Member States, other than that of the contracting authority or contracting entity. Consequently, the method of calculating the estimated value of a concession is set out, and is identical for works and services concessions, as both contracts often cover elements of works and services. The value of a concession represents the total turnover of the concessionaire generated over the duration of the contract, net of value-added tax, as estimated by the contracting authority or the contracting entity, in consideration for the works and services being the object of the concession, as well as for the supplies incidental to such works and services. That estimate is valid at the moment at which the concession notice is sent or, in cases where such notice is not provided for, at the moment at which the contracting authority or the contracting entity commences the concession award procedure, for instance by contacting economic operators in relation to the concessions.

4. An adequate solution for dealing with changes to concessions contracts during their term, especially when they are justified by unforeseen circumstances.

The Concessions Directive has no retroactive effect. Concession contracts in place at the time of its entry into force will not be affected for their entire duration. However, an extension of their duration or any other substantial modification may qualify as a new concession and therefore will have to comply with the rules of the new Concessions Directive.

lations or published administrative provisions in accordance with the TFEU. That exclusion is justified by the granting of an exclusive right to an economic operator, making a competitive procedure inapplicable, as well as by the need to retain the possibility for Member States to regulate the gambling sector at national level in view of their obligations in terms of protecting public and social order.

²⁴ That threshold is € 5 186 000.

The Directive clarifies, in line with the case-law of the CJEU, the notion of a substantial modification of a contract during its term.²⁵ It also stipulates when a modification can be made without a new award procedure.

In particular, it provides for an exemption from the obligation to apply a new procedure for the award of concession for minor changes to the contract (those not exceeding the threshold laid down in the Directive of € 5 186 000 and inferior to 10 % of the price of the initial contract) which will always be acceptable. It also clarifies the scope of acceptable contractual clauses and sets out the conditions for modification in case of unforeseen circumstances and necessity to award additional works or services.

In that sense, the Concessions Directive prescribes that concessions may be modified without a new concession award procedure in any of the following cases: a) where the modifications, irrespective of their monetary value, have been provided for in the initial concession documents in clear, precise and unequivocal review clauses, which may include value revision clauses, or options; b) for additional works or services by the original concessionaire that have become necessary and that were not included in the initial concession where a change of concessionaire: cannot be made for economic or technical reasons such as requirements of interchangeability or interoperability with existing equipment, services or installations procured under the initial concession; and would cause significant inconvenience or substantial duplication of costs for the contracting authority or contracting entity. However, in the case of concessions awarded by a contracting authority, for the purposes of pursuing an activity other than those referred to in Annex II of the Concessions Directive²⁶,

²⁵ A modification of a concession during its term shall be considered to be substantial where it renders the concession materially different in character from the one initially concluded. In any event a modification shall be considered to be substantial where one or more of the following conditions is met: a) the modification introduces conditions which, had they been part of the initial concession award procedure, would have allowed for the admission of applicants other than those initially selected or for the acceptance of a tender other than that originally accepted or would have attracted additional participants in the concession award procedure; b) the modification changes the economic balance of the concession in favour of the concessionaire in a manner which was not provided for in the initial concession; c) the modification extends the scope of the concession considerably; d) where a new concessionaire replaces the one to which the contracting authority or contracting entity had initially awarded the concession. See Article 43 paragraph 4 of the Concessions Directive.

²⁶ Those are services connected with providing gas, heat and electricity, activities relating to the provision or operation of networks providing a service to the public in

any increase in value shall not exceed 50 % of the value of the original concession; c) where all of the following conditions are fulfilled: the need for modification has been brought about by circumstances which a diligent contracting authority or contracting entity could not foresee; the modification does not alter the overall nature of the concession; in the case of concessions awarded by contracting authority, for the purposes of pursuing an activity other than those referred to in Annex II of the Concessions Directive, any increase in value is not higher than 50 % of the value of the initial concession;²⁷ d) where a new concessionaire replaces the one to which the contracting authority or the contracting entity had initially awarded the concession as a consequence of either: an unequivocal review clause or option in conformity with point (a); universal or partial succession into the position of the initial concessionaire, following corporate restructuring, including takeover, merger, acquisition or insolvency, of another economic operator that fulfils the criteria for qualitative selection initially established provided that this does not entail other substantial modifications to the contract and is not aimed at circumventing the application of this Directive; or in the event that the contracting authority or contracting entity itself assumes the main concessionaire's obligations towards its subcontractors where this possibility is provided for under national legislation; e) where the modifications, irrespective of their value, are not substantial within the meaning of paragraph 4 of the Article 43 of the Concessions Directive (*supra*, footnote 25).

Furthermore, and without any need to verify whether the conditions set out under points (a) to (d) of paragraph 4 of Article 43 are met²⁸, concessions may equally be modified without a new concession award procedure in accordance with the Concessions Directive where the value of the modification is below both of the following values: the threshold set out in Article 8 of € 5 186 000; and 10 % of the value of the initial concession.

the field of transport by railway, automated systems, tramway, trolley bus, bus or cable, activities relating to the exploitation of a geographical area for the purpose of the provision of airports and maritime or inland ports or other terminal facilities to carriers by air, sea or inland waterway, activities relating to the provision of postal services, activities relating to the exploitation of a geographical area for the purpose of extracting oil or gas, coal or other solid fuels.

²⁷ Where several successive modifications are made, this limitation shall apply to the value of each modification. Such consecutive modifications shall not be aimed at circumventing this Directive.

²⁸ See footnote 25.

However, the modification may not alter the overall nature of the concession. Where several successive modifications are made, the value shall be assessed on the basis of the net cumulative value of the successive modifications.

5. Establishment of certain obligations with respect to the selection and award criteria to be followed by entities awarding concessions. These rules aim at ensuring that such criteria are published in advance, are objective and non-discriminatory. They are less restrictive than similar provisions applicable to public contracts. However, they restrict the selection criteria to those that are appropriate to ensure that a candidate or tenderer has the legal and financial capacities and commercial and technical abilities to perform the concession to be awarded. The Concessions Directive stipulates that all requirements must be related and strictly proportionate to the subject-matter of the contract, taking into account the need to ensure genuine competition. Also, concessions should not be awarded to economic operators that have participated in a criminal organisation or have been found guilty of corruption, fraud to the detriment of the EU financial interests, terrorist offences, money laundering, terrorist financing or trafficking in human beings. Member States should, however, be able to provide for a derogation from these mandatory exclusions in exceptional situations where overriding requirements in the general interest make a contract award indispensable. Non-payment of taxes or social security contributions should also be sanctioned by mandatory exclusion at the level of the EU.

Contracting authorities or contracting entities may exclude or may be required by a Member State to exclude from participation in a concession award any economic operator which has proven unreliable, for instance because of serious or repeated violations of environmental or social obligations, including rules on accessibility for disabled persons or other forms of grave professional misconduct, such as violations of competition rules or of intellectual property rights.²⁹ It is also stipulated that contracting authorities and contracting entities should remain free to consider that there has been grave professional misconduct, where, before a final and binding decision on the presence of mandatory exclusion grounds has been rendered, they can demonstrate by any appropriate means that an economic operator has violated its obligations, including obligations relating to the payment of taxes or social security contri-

²⁹ Grave professional misconduct can render an economic operator's integrity questionable and thus render the economic operator unsuitable to receive the award of a concession contract irrespective of whether the economic operator would otherwise have the technical and economical capacity to perform the contract.

butions, unless otherwise provided by national law.³⁰ Contracting authorities and contracting entities should also be able to exclude candidates or tenderers whose performance in earlier concessions or other contracts with contracting authorities or contracting entities has shown major deficiencies with regard to substantive requirements, for instance failure to deliver or perform, significant shortcomings of the product or service delivered, making it unusable for the intended purpose, or misbehaviour that casts serious doubts as to the reliability of the economic operator. National law should provide for a maximum duration for such exclusions.

On the other hand, award criteria should ensure compliance with the principles of transparency, non-discrimination and equal treatment and that tenders are assessed in conditions of effective competition permitting to identify an overall economic advantage for the contracting authority or the contracting entity. They may include, *inter alia*, environmental, social or innovation-related criteria.³¹ These criteria should prevent arbitrary decisions by contracting authorities and contracting entities and must be published in advance and listed in descending order of importance.³² When a contracting authority or

³⁰ Contracting authority or contracting entity is responsible for the consequences of possible erroneous decisions.

³¹ With a view to the better integration of social and environmental considerations in the concession award procedures, contracting authorities or contracting entities should be allowed to use award criteria or concession performance conditions relating to the works or services to be provided under the concession contract in any respect and at any stage of their life cycles from extraction of raw materials for the product to the stage of disposal of the product, including factors involved in the specific process of production, provision or trading of those works or services. Criteria and conditions referring to a production or provision process are for example that services being the object of the concession are provided using energy-efficient machines. In accordance with the case-law of the CJEU, this also includes award criteria or concession performance conditions relating to the utilisation of fair trade products in the course of the performance of the concession to be awarded. Criteria and conditions relating to trading and its conditions can for instance refer the requirement to pay a minimum price and price premium to subcontractors. Concession performance conditions pertaining to environmental considerations might include, for example, waste minimisation or resource efficiency.

³² “The most economically advantageous tender” criterion for the award of concessions is not mentioned in this Directive because the Commission deems that the use of that criterion, in most cases, does not permit to take into account the complexity of concession contracts. The Commission also alleges that criteria prescribed in the Concessions Directive put more emphasis on quality, environmental considerations, social issues and innovation, putting an end to the dictatorship of the lowest price.

contracting entity receive a tender which proposes an innovative solution with an exceptional level of functional performance which could not have been foreseen by a diligent contracting authority or contracting entity, the contracting authority or contracting entity may, exceptionally, modify the ranking order of the award criteria to take into account that innovative solution. In that case, the contracting authority or the contracting entity shall inform all tenderers about the modification of the order of importance and shall issue a new invitation to submit tenders.

6. No standard mandatory award procedures (negotiations are always possible) but instead establishment of certain general guarantees aimed at ensuring transparency and equal treatment (notably, in case of negotiations). These guarantees aim at ensuring that the process is fair and transparent. This solution allows Member States to prescribe more flexible procedures for awarding concessions notably reflecting national legal traditions and permitting the award process to be organised in the most efficient way.

7. Application of the Remedies Directives (Directives 89/665/EEC and 92/13/EC, as amended by Directive 2007/66/EC)³³ to all concessions covered by the Concessions Directive guarantee effective channels for challenging the award decision in court and provide minimal judicial standards which have to be observed by contracting authorities or entities.

Before bringing the Concessions Directive, concession contracts falling outside of the scope of the Classic Directive on procurement were not covered by the Remedies Directives. Hence, tenderers do not benefit from an adequate system guaranteeing effective enforcement of TFEU principles. Although some Member States (such as France, Portugal and Romania) extended the application of the Remedies Directives to service concessions, a number of other (Germany, UK, Sweden and Netherlands, for instance) have not done

³³ Council Directive 89/665/EEC of 21 December 1989, on the coordination of laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, OJ L 395, 30 December 1989, p. 33. Council Directive 92/13/EEC of 25 February 1992, on the coordination of laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunication sectors, OJ L 395, 30 December 1989, p. 33. Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, OJ L 335, 2 December 2007, p. 31.

so.³⁴ It follows that some important guarantees provided for by the Remedies Directives (such as the obligation to abstain from concluding a contract before the expiry of the standstill period or the conditions for ineffectiveness of concessions awarded directly) are not available in many Member States. As a result, potential violation of the TFEU principles cannot be adequately tackled by the aggrieved economic operators.

4. APPLICATION OF THE CONCESSIONS DIRECTIVE IN THE FIELD OF MARITIME CABOTAGE CONTRACTS

Contracts on the provision of maritime cabotage³⁵ services are qualified as service concessions and are, consequently, subject to the application of the Concessions Directive.

When the competent authority of a Member State concludes a public service contract, it has to respect the applicable procurement rules. As we mentioned above (*supra* point 2), on the 26th of February 2014 the Council and the European Parliament adopted a new Directive on the award of service concession contracts (Concessions Directive). On the same date, the Council and the European Parliament also adopted Directive 2014/24/EU and Directive 2014/25/EU (Public Procurement Directives).³⁶

³⁴ In an online consultation which was organised by the European Commission 24.9% of the respondents considered that national rules did not offer effective remedies to all parties wishing to challenge decisions awarding service concessions.

³⁵ Maritime transport services within a Member State (maritime cabotage) mean services normally provided for remuneration and in particular include:

(a) mainland cabotage: the carriage of passengers or goods by sea between ports situated on the mainland or the main territory of one and the same Member State without calls at islands;

(b) off-shore supply services: the carriage of passengers or goods by sea between any port in a Member State and installations or structures situated on the continental shelf of that Member State;

(c) island cabotage: the carriage of passengers or goods by sea between:

- ports situated on the mainland and on one or more of the islands of one and the same Member State,

- ports situated on the islands of one and the same Member State.

³⁶ 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, OJ L 94, 28 March 2014, p. 65; 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 OJ L, 28 March 2014, p. 243.

Most of public service contracts awarded in the application of Article 4 of the Regulation 3577/92 applying the principle of freedom to provide services to maritime transport within Member States (Cabotage Regulation)³⁷ constitute service concessions within the meaning of the public procurement legislation. Consequently, public service contracts on the provision of maritime cabotage services are qualified as service concessions and are subject to the application of the Concessions Directive. Therefore, Concessions Directive applies as *lex generalis* to those issues related to the conclusion and execution of the public contracts on providing maritime cabotage services, which are not regulated with the Cabotage Regulation.

In particular, by means of such contract the competent authority entrusts the provision of the maritime cabotage service to a shipowner for a certain period of time. The shipowner is obliged to provide the transport service stipulated in the contract, usually against a financial compensation by the authority. The shipowner, in principle, bears the operating risk (if this is not the case, such a contract qualifies as a public contract in the meaning of the Public Procurement Directives), encompassing the risk related to the demand for his transport services, since the competent authorities usually do not guarantee in the public service contract that the shipowner would recoup all the investments made or the costs incurred in performing his contractual obligations.

For the award of public service contracts falling within the scope of the Concessions Directive the competent authority must treat all shipowners equally and without discrimination and is required to act in a transparent and proportionate manner in order to ensure genuine competition. Moreover, the Directive lays down, among other things, an obligation to publish the concession notice and the relevant contract award notice in the *Official Journal of the European Union*.³⁸ It also establishes a number of obligations with respect to the

³⁷ Regulation No 3577/92 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage), OJ L 364, 12 December 1992., p. 7. 1. Member State may conclude public service contracts with or impose public service obligations as a condition for the provision of cabotage services, on shipping companies participating in regular services to, from and between islands. Whenever a Member State concludes public service contracts or imposes public service obligations, it shall do so on a non-discriminatory basis in respect of all Community shipowners. 2. In imposing public service obligations, Member States shall be limited to requirements concerning ports to be served, regularity, continuity, frequency, capacity to provide the service, rates to be charged and manning of the vessel. Where applicable, any compensation for public service obligations must be available to all Community shipowners. 3. Existing public service contracts may remain in force up to the expiry date of the relevant contract. (Article 4 of the Cabotage Regulation).

³⁸ Articles 31-33 of the Concessions Directive.

selection and award criteria and sets out procedural guarantees aimed at ensuring transparency and equal treatment, notably during negotiations between the competent authority and tenderers.³⁹

The Cabotage Regulation does not set any maximum duration for public service contracts. However, it follows from Article 1 and Article 4 of that Regulation that public service contracts should have a limited duration in order to allow regular and open functioning of the market, hereof the Concessions Directive is applied on that issue with the view to determine maximum duration of cabotage contracts.

If a public service contract is a concession, according to Article 18 of Concessions Directive concerning contracts with a duration greater than five years, the maximum duration of the concession must *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.*

With a view to complying with the principle of proportionality in any market intervention, Member States should choose the least distortional means, also in terms of duration, to meet the essential maritime transport needs. All EU shipowners should be regularly given the opportunity to apply for the operation of a cabotage service.

In its interpretative Communication of 2003 the Commission indicated that a public service contract of a period of more than six years does not normally meet the proportionality requirement.

However, the Commission's experience since 2003 has shown that in some cases the six-year limit puts shipowners off bidding as they consider this duration to be too short to recoup the investments in the operation of the service. Moreover, public authorities also claim that contracts of short duration might discourage shipowners from making more substantial investments, thus hampering innovation and possible improvements in the quality of the service.

For this reason the Commission believes that public service contracts lasting more than five (in case the contract is a concession within the meaning of Concessions Directive) or six years can meet the proportionality requirement provided that (1) they are justified by objective criteria, such as the need to

³⁹ In cases of contracts below the thresholds for the application of Concessions Directive a selection and award procedure is nonetheless required to meet the TFEU requirements of non-discrimination and equal treatment that imply an obligation of transparency.

recoup the investments made in operating the maritime cabotage service under normal operating conditions (e.g. investments in vessels or infrastructure) (2) and that they do not lead to market foreclosure.

According to the Commission's experience and the information provided by the public authorities, contracts of a maximum duration of 12 years could be justified in order to enable the depreciation of a significant part of costs of an average new ferry, while allowing the proper functioning of the market. In the Commission's opinion contracts of a significantly longer duration (e.g. which would allow the full amortisation of a new vessel with a return on the invested capital) could hinder competition on the maritime cabotage market.

Procedures for concluding public service contracts in the maritime sector may be over-complicated when it comes to organising services for small islands, which normally only attract local operators, so in that case simplified rules are applied.

Cabotage Regulation does not provide for a definition of small islands. A study carried out on behalf of the Commission⁴⁰, shows that small islands could be understood to mean islands where the total annual number of passengers carried by sea to and from the island is around 300 000 or fewer.⁴¹ The Commission takes the view that, the selection of a suitable operator entrusted to serve a small island could be carried out following a simple call for expressions of interest without launching a formal tender, provided that a Union-wide announcement of the service, which is very easily organised, is maintained. The Commission also takes the view that a longer duration of contracts, of 12 years, might be acceptable.

5. APPLICATION OF THE CONCESSIONS DIRECTIVE IN THE FIELD OF CONTRACTS ON PROVIDING PORT SERVICES

In the field of award of contracts on providing port services⁴² the Concessions Directive also applies as *lex generalis*. This stems from the Proposal for a

⁴⁰ ICF Consulting, *Study on Small Islands and Estuaries*, 2002.

⁴¹ The threshold of 300 000 passengers refers to a one-way count, i.e. a passenger travelling to the island and back counts twice.

⁴² The proposed Regulation apply to the provision of the following categories of port services, either inside the port area or on the waterway access to and from the ports: (a) bunkering; (b) cargo handling; (c) dredging; (d) mooring; (e) passenger services; (f) port reception facilities; (g) pilotage and; (h) towage. For more on those issues see Bulum, B., *Usluge pomorskog prijevoza i lučke djelatnosti u pravu tržišnog natjecanja Europske zajednice*, Zagreb, Inmag, 2010.

Regulation of the European Parliament and of the Council (hereinafter: Proposal) establishing a framework on market access to port services and financial transparency of ports.⁴³ That Proposal refers in the preamble and in several provisions to the Concessions Directive.

In the preamble of the Proposal it is stated that its provisions will not be imposed on cargo handling services and terminal passenger services because these services are often organised by means of concession contracts and for that reason fall within the scope of the Concessions Directive. It is explained that additional legal provisions on the award of provision of those services could undermine efforts being made to initiate a Social Dialogue at the Union level.⁴⁴

Article 7 of the Proposal which regulates the procedure for the limitation of the number of providers of port services prescribes that any limitation of the number of providers for a port service must follow a selection procedure which should be open to all interested parties, non-discriminatory and transparent. If the estimated value of the port service exceeds the threshold defined in the Concessions Directive the rules on the award procedure, the procedural guarantees and the maximum duration of the concessions as set out in the Concessions Directive apply. The threshold and the method to determine the value of the port service must be those of the relevant and applicable provisions of the Concessions Directive. It is also prescribed that, for the purposes of the proposed Regulation establishing a framework on market access to port services and financial transparency of ports, a substantial modification within the meaning of the Concessions Directive of the provisions of a port service contract during its term must be considered as a new port service contract and requires a new award procedure.

It is evident that the Concessions Directive has a very important role when it comes to the provision of port services because two kinds of such services (the cargo handling services and the terminal passenger services) completely fall within the scope of the Concessions Directive, and some important issues, such as determination of the value of the port service and substantial modification of a port service contract during its term, are also regulated with the Concessions Directive.

⁴³ Co-decision procedure between European Parliament and the Council with regard to this Proposal is still ongoing. See COM (2013) 296.

⁴⁴ Member States remain free to decide to apply nevertheless the rules of the proposed Regulation to these two services.

6. CONCLUSION

After it was established that the legal vacuum that had existed in the area of the award of concession contracts could not be filled by the case law of the European Courts, competent institutions of the EU started to work on European legislation in that area. As a result of that, the Concessions Directive was adopted in February 2014, almost four years after the European Commission started public consultations on the award of concession contracts.

With the Concessions Directive the TFEU principles, in particular the principles of free movement of goods, freedom of establishment and freedom to provide services, as well as the principles deriving from those principles, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency, become more concrete because it prescribes enforceable obligations and rights for all parties that participate in the process of award of concession contracts, and in that way influences the improvement of legal certainty and the creation of an internal market of the EU in that field.

The Concessions Directive finally clarifies the definition of concession in particular by referring to the concept of substantial operating risk. Operating risk is defined in the Concessions Directive as risk in exploiting works or services provided by the concessionaire which includes demand or supply risk or both. The concessionaire is deemed to assume an 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 involves real exposure to the vagaries of the market, such that any potential estimated loss incurred by the concessionaire must not be merely nominal or negligible.

A very important novelty is that the Concessions Directive regulates works concessions and also services concessions both in the utilities sector and in the classic sector.

In order to ensure transparency and equal treatment for all economic operators the Concessions Directive provides for an obligation for contracting authorities and contracting entities to publish concession notices in the Official Journal of the EU, when their value is equal to or greater than the threshold prescribed in that Directive. The latter ensures, 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.

The Concessions Directive has no retroactive effect. Concession contracts in place at the time of its entry into force will not be affected for their entire duration. However, an extension of their duration or any other substantial modification may qualify as a new concession and therefore will have to comply with the rules of the new Concessions Directive. The Directive clarifies, in line with the case law of the CJEU, a notion of a substantial modification of a contract during its term. It also stipulates when a modification can be made without a new award procedure.

Additionally, the Directive imposes certain obligations with respect to the selection and award criteria to be followed by entities awarding concessions. These rules aim at ensuring that such criteria are published in advance, are objective and non-discriminatory. They are less restrictive than similar provisions applicable to public contracts. However, they restrict the selection criteria to those that are appropriate to ensure that a candidate or tenderer has the legal and financial capacities and commercial and technical abilities to perform the concession to be awarded. Also, all requirements shall be related and strictly proportionate to the subject-matter of the contract, taking into account the need to ensure genuine competition. The Directive does not prescribe any standard mandatory award procedures (negotiations are always possible) but instead establishes certain general guarantees aimed at ensuring transparency and equal treatment (notably, in case of negotiations). These guarantees aim at ensuring that the process is fair and transparent. This solution allows Member States to prescribe more flexible procedures for awarding concessions notably reflecting national legal traditions and permitting the award process to be organised in the most efficient way.

Before the adoption of the Concessions Directive, concession contracts falling outside the scope of the Classic Directive on procurement (Directive 2004/18/EC) were not covered by the Remedies Directives (Directives 89/665/EEC and 92/13/EC, as amended by Directive 2007/66/EC). Hence, tenderers do not benefit from an adequate system guaranteeing effective enforcement of TFEU principles.

The Concessions Directive extends the scope of the Remedies Directives to all concessions covered by the Concessions Directive. That guarantees effective channels for challenging the award decision in court and provide minimal judicial standards which have to be observed by contracting authorities or entities.

In the field of award of contract on the provision of maritime cabotage services Concessions Directive applies as *lex generalis* on those issues related to

the conclusion and execution of the public service contracts on providing maritime cabotage services which are not regulated by the Cabotage Regulation. The most important issue is duration of those public contracts. The Cabotage Regulation does not set any maximum duration for public service contracts on providing maritime cabotage services. However, those public service contracts should have a limited duration in order to allow regular and open functioning of the market, hereof the Concessions Directive is applied on that issue with the view to determine maximum duration of cabotage contracts.

If a public service contract is a concession, according to Article 18 of the Concessions Directive in case of contracts with a duration greater than five years, the maximum duration of the concession must *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*. According to the Commission's experience and the information provided by the public authorities, contracts of a maximum duration of 12 years could be justified in order to enable the depreciation of a significant part of costs of an average new ferry, while allowing the proper functioning of the market. In the Commission's opinion contracts of a significantly longer duration (e.g. which would allow full amortisation of a new vessel with a return on the invested capital) could hinder competition on the maritime cabotage market. The Commission also takes the view that in case of small islands a longer duration of contracts, of 12 years, might be acceptable.⁴⁵

It is evident and it stems from the Proposal for a Regulation establishing a framework on market access to port services and financial transparency of ports that the Concessions Directive has a very important role when it comes to the provision of port services, because two kinds of such services (the cargo handling services and the terminal passenger services) completely fall within the scope of the Concessions Directive, and some important issues, such as determination of the value of the port service and substantial modification of a port service contract during its term, are also regulated with the Concessions Directive.

⁴⁵ See Communication from the Commission on the interpretation of Council Regulation No 3577/92 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) of 22 April 2014, COM(2014) 232, p. 19.

Sažetak

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**DIREKTIVA EUROPSKE UNIJE O DODJELI UGOVORA O
KONCESIJI I NJEZINA PRIMJENA NA UGOVORE U SEGMENTU
POMORSKOG PRIJEVOZA**

Na području dodjele ugovora o koncesiji postojala je pravna praznina koju su europski sudovi nastojali razriješiti pojašnjavanjem određenih pitanja povezanih uz dodjelu ugovora o koncesiji u okviru dvadeset i šest presuda na tom području koje su donijeli od 2000. godine do danas. Ipak, stanje na području dodjele ugovora o koncesiji bilo je daleko od zadovoljavajućeg. To je uputilo nadležne institucije Europske unije na činjenicu da se probleme povezane uz dodjelu ugovora o koncesiji ne može rješavati od slučaja do slučaja te da je potrebno donošenje europskih pravila na tom području. Tako je početkom 2014. godine donesena Direktiva Europskog parlamenta i Vijeća o dodjeli ugovora o koncesiji.

U ovom radu analiziramo temeljne elemente te Direktive, kao što su precizna definicija koncesija, obvezno objavljivanje obavijesti o dodjeli koncesije u Službenom listu Europske unije u propisanim slučajevima, utvrđivanje određenih obveza u vezi s kriterijima za odabir i dodjelu koncesije koje tijela koja dodjeljuju koncesiju moraju poštovati, reguliranje izmjena koncesija za vrijeme njihova trajanja itd.

U radu je također napravljena kritička analiza primjene Direktive o dodjeli ugovora o koncesiji u segmentu pomorskog prijevoza, posebice na području dodjele ugovora o pružanju usluga pomorske kabotaže i ugovora o pružanju lučkih usluga koji se smatraju koncesijama za pružanje usluga te su, u tom smislu, podložni primjeni Direktive o dodjeli ugovora o koncesiji.

Ključne riječi: ugovori o koncesiji, Direktiva o dodjeli ugovora o koncesiji, pomorska kabotaža, ugovori o pružanju usluga pomorske kabotaže, lučke usluge, ugovori o pružanju lučkih usluga

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