European Commission

Concessions Directive (2014/23/EU)

Presentation of the *acquis*: EU Public Procurement legal framework

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Unit G3 *– Procurement Legislation and Enforcement*

These slides accompany the explanation of the acquis to Albania and North Macedonia and can only be used for that purpose. Their content is subject to further development of the acquis and interpretation by the Court of Justice of the European Union

Introduction

Concessions:

- constitute a form of collaboration between the public and private sector (public-private partnership) and a key tool for a wide range of economic activities

- high economic value

- unlike public contracts, at EU level they were previously only partially regulated (works concessions) or completely excluded from secondary legislation (service concessions)

Introduction (II)

- have specificities, like operating risk and extent of the required investments, that justify separate regulation
- suffered from lack of legal certainty, which gave rise to serious distortions of internal market (such as widespread direct awards)
- are now regulated in a comprehensive framework, under Directive 2014/23/EU on the award of concession contracts

Objectifs of Concessions Directive

- to establish a clear legal framework enabling contracting authorities and entities to accomplish their missions

- to ensure access by economic operators to concessions across the EU, as part of the freedoms of the internal market

"Privatisation"/externalisation is *not* the objective: public authorities remain free to carry out public task by using their own means

Concept of concession

Contract in writing for pecuniary interest by means of which:

- one or more economic operators are entrusted execution of works or provision and management of services
- consideration (remuneration) consists in right to exploit work or services (sometimes also with payment)
- there is an **operating risk**

Concept of concession (II)

Operating risk:

- involves possibility of not recouping investments made or the costs incurred (no guarantee)
- involves real exposure to vagaries of the market
- it can consist of either a demand risk, a supply risk or both
- it can be limited but it cannot be merely nominal or negligible (real exposure to possible loss)
- it stems from factors (foreseeable but uncertain) outside the control of the parties
- it is different from bad management, contractual defaults and force majeure (inherent to every contract)

Distinction from other legal setups

- In a **public contract**, an economic operator receives a fixed amount for completing a work or providing a service and is not subject to an operating risk

- In an **authorisation or licence**, an economic operator has to comply with legal conditions for carrying out an economic activity

Terminology under national law might be misleading!

Scope of application

- Both works and service concessions with a value of 5 468 000 € or higher
- Both public sector and utilities are covered
- "Light" regime for social and other services, requiring only *ex ante* and *ex post* publication
- Concessions not covered by Directive but having cross-border interest are still subject to fundamental principles under the Treaties

Exclusions

- Drinking water (supply or distribution)
- Certain concessions awarded to holders of exclusive rights
- Certain lotteries
- Public passenger transport services (Reg. 1370/2007)
- Other exclusions similar to those in Directives 2014/24/EU and 2014/25/EU

Calculation of value

- Based on total turnover of concessionaire (generated over the duration of the contract), net of VAT, as estimated by contracting authority/entity, in consideration for works and services and supplies incidental to them

- Contracting authority must provide most accurate estimated value, using an objective method specified in concession documents

- If actual value at moment of award is more than 20% higher than estimate, actual value is used for determining whether the threshold is attained

Duration

- Duration must be limited
- For concessions lasting more than 5 years, duration must not exceed the time in which a concessionaire could reasonably be expected to recoup investments made together with return on invested capital
- Member States must be able to prove link between duration and recoup of investment
- Extension of initial duration must comply with Directive's rules concerning both duration and modifications

Procedural rules and guarantees

- No obligation to follow a specific procedure – possibility for negotiation
- Obligation to respect general principles of equal treatment, non-discrimination and transparency
- Publication of notices in EU Official Journal
- Minimum time limits for receipt of tenders
- Information to interested parties on the envisaged procedure and recording of procedure
- Reduction of the number of candidates in a transparent manner and using objective criteria
- Qualitative selection and exclusion grounds

Procedural rules and guarantees (II)

Award criteria

- Compliant with general principles
- Objective, linked to the subject matter, must permit to identify the overall economic advantage and do not confer unrestricted freedom of choice
- Compulsory ranking in descending order of importance
- Possibility of including social, environmental and innovation-related aspects

Remedies Directives

- Applicable to concessions covered by Concessions Directive

Modifications and public-public cooperation

Virtually same rules as for public contracts

(but percentage for modifying concession under safe harbour is always 10%)

Public-private partnership (PPP)

- no simple definition: covers various types of contracts or other delivery models
- any form of cooperation between contracting authorities and private sector economic operators to ensure funding/construction/management/maintenence of infrastructure (works) and/or provision of services
- key features: sharing or transfer of risk to the private sector partner; usually long duration
- structure: contractual or institutional (IPPP)

Public-private partnership (PPP) II

- no legal definition in EU public procurement directives, but EU public procurement rules apply to the procedures for the award of PPPs

- PPPs can be (i) public/utility contracts; (ii) concession contracts (works or services); (iii) contracts excluded from the scope of the directives (those of cross-border interest are subject to fundamental Treaty principles: transparency, equal treatment, non-discrimination, proportionality, mutual recognition…)

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Thank you for your attention