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CONCESSIONS & PUBLIC-PRIVATE PARTNERSHIPS from an EU Public-Procurement Law Perspective

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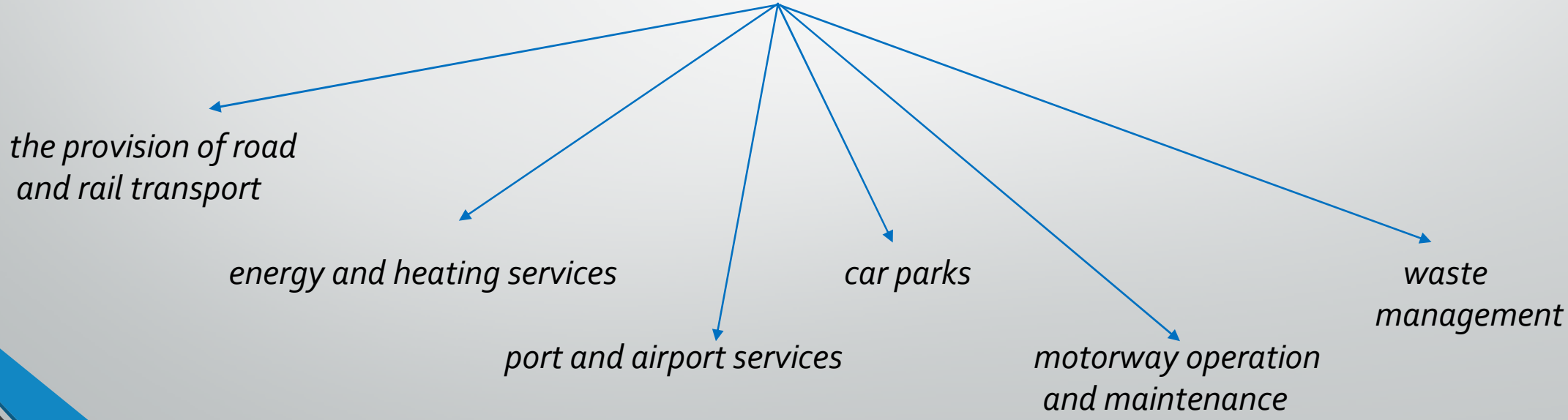
CONCESSIONS & PPPS: AN INTRODUCTION

Concessions & Public-Private Partnerships *are* ***vital investment tools*** *for the* ***procurement and development of complex infrastructure in the EU marketplace****, an area where large capital investments are necessary.*

These ***types of private-sector investments*** *include e.g.:*



THE PREVIOUS EU REGULATORY FRAMEWORK ON CONCESSIONS

I. WAS FRAGMENTED:

The EU's 2004 Public-Procurement Directives, i.e. 2004/18 and 2004/17, contained only the below few provisions

A. On public works concessions: → Directive 2004/18 art.1 para.3 and arts56-65
→ Directive 2004/17 art.1 para.3(a) and art.18

B. On services concessions: → Directive 2004/18 art.1 para.4 and art.17
→ Directive 2004/17 art.1 para.3(b) and art.18

II. BASED ON COMPLEX CASE-LAW OF THE CJEU AND DIVERGENT NATIONAL LEGISLATION

The lack of clear rules did not provide a full legal certainty for both public bodies and private consortiums, which were deteriorated from investing a large amount of money in high-risk long-term concession projects.

DIRECTIVE 2014/23 ON THE AWARD OF CONCESSION CONTRACTS, EE L 94 28.03.2014 p.1 [the EU's 2014 Concessions Directive]

A. MAIN PURPOSE:

The creation of **a stable and reliable legislative environment** capable of contributing to **new private-sector investments through concession tenders.**

B. PIONEER IMPORTANCE:

A) For the first time, a common regulatory framework is introduced which governs all concessions: i.e. **both works and services concessions are, from now on, equally subjected to the new rules.** Additionally, this concession framework is characterised as **complete,** since it applies both to the award procedure (Title II, arts30-41) and –partially– to the execution stage (Title III, arts42-45) of the future concession contracts.

B) For the first time, also, the new rules extend the Directive's scope to concession contracts **that will be concluded in the excluded sectors,** namely, the energy, transport and postal-services sectors (Recital (10)), but with the explicit exception of the water sector (art.12).

THE CONCLUSION OF A POLITICAL AGREEMENT IN LIGHT OF INTENSE REACTIONS BY THE MEMBER STATES

The introduction of the Concessions Directive successfully **realises, under a spirit of compromise, a political agreement ,** i.e. a common regulatory policy on concession ventures in the EU investment market.

A) The legal tradition of the French Law on Concessions under *"loi Sapin"*: *«la liberté de la collectivité délégante, sous réserve des obligations de publicité prévues par la loi Sapin (art.38), pour négocier avec les différents candidats intéressés…»*.
[*"Loi n° 93-122 du 29 janvier 1993 relative à la prévention de la corruption et à la transparence de la vie économique et des procédures publiques, JORF n° 25 du 29 janvier 1993 p.1588"*]

B) Some English scientists –A. Sánchez Graells (University of Bristol), M. Burnett (European PPP Forum), R. Craven (Northumbria Law School)] **have already questioned the necessity of introducing a stand-alone Directive regarding concessions,** which should have otherwise been subjected to the other public-procurement Directives 2014/24 and 2014/25.

PURPOSE OF THE SPEECH – QUESTIONS POSED

QUESTION 1:

What is the exact meaning of the legal terms "Concessions" and "PPPs" in the EU Public-Procurement Law after the establishment of Directive 2014/23/?
Explanatory remarks and problematic points of the new definition (art.5 para.1, Recitals (18)-(20) of its Preamble)

QUESTION 2:

What is the range-breadth of "Concession" and "PPP" projects that fall within Directive 2014/23 and the new rules it establishes?

SUPPORTED VIEW:

The new policy chosen by the European legislator to conceptually determine and describe the conventional phenomenon of concession is problematic particularly as regards the practical implementation and execution of the respective self-financed projects.

DEFINING CONCESSIONS & PPPs IN INTERNATIONAL INVESTMENT LAW

"Public Private Partnerships are the **alternative forms of public contracts,** which aim at the development of States' public infrastructure, especially at the procurement by their internal contracting authorities of **new (public) works or/and higher (public) services quality,** which will be constructed or provided respectively **from private-sector contractors,** who will **substantially undertake both the project's financing** and **the entrepreneurial risks for its completion,** for all the long-term contract period **(20-30 years),** being repaid for these private investments either **(directly)** from the contracting authorities on an availability basis **(PFI model)** or **(indirectly)** from the third users who will make use of the provided (by the private entrepreneur) services or goods through fees or tolls **(concession model),** or based on a **combination** of both payment mechanisms. It is easily proved that the different implementations of the PPP technique by the States internationally cannot allow an accurate record of all the different types of these contracts. In light of this practical difficulty, I would strongly suggest **the general use of the legal term 'PPPs' like an umbrella term synonymously with the definition of 'self-financed partnerships or projects' ".**

[J. Kitsos, "Construction Investments in Public Works through Public Private Partnerships", (2014) 9 EPPPL 204]

THE TOTAL ABSENCE OF THE LEGAL TERM "PPPs" FROM BOTH THE DIRECTIVE AND THE RECITALS OF ITS PREAMBLE

- **the term PPP is totally missing** from both the Directive and the Recitals of its Preamble; the same applies **to the notion of self-financing partnership**

-nevertheless, in the current stage of development of the EU public-procurement rules, the respective regulatory policy has not been expanded to all various forms of self-financing ventures in the corresponding marketplace, namely, **it has not yet proceeded to the introduction of an EU PPP Law**

- this purposeful silence can be attributed to **two hidden thoughts** of the European legislator

THE INDISPUTABLE LEGAL DIVERSITY AND PRACTICAL DIFFERENTIATION OF CONCESSIONS IN THE EU COUNTRIES

A) An overview of the respective ventures demonstrates that some EU Countries may classify certain investment projects as concessions, however, in other EU Countries these are characterised quite differently.

[Characteristic examples from the CJEU very-recent case-law:
1. *Criminal proceedings against Domenico Politanò* (C-225/15) 8 September 2016
2. *Promoimpresa srl and Others v Consorzio dei comuni della Sponda Bresciana del Lago di Garda e del Lago di Idro and Others* (C-458/14) 14 July 2016]

B) The diachronic nature of the phenomenon proves, also, that over the years the classic notion of concession is subjected to conceptual variations, the most striking example being the penetration of the PPP Law in the administrative-law system of concessions. In light of this diachronic nature, it may be the case, that the EU legislator adopts in the new Directive an exclusive reference to "concessions" in a general-wide context, in order to avoid the negative argumentation and political opposition as regards his regulatory effort to introduce for the first time complete and uniform rules on those EU self-financed partnerships that will be finally classified as concession contracts.

THE NEW DEFINITION AS INCORPORATED IN THE 28.03.2014 CONCESSIONS DIRECTIVE (art.5 para.1) AND EXPLAINED BY RECITALS ((18)-(20)) OF ITS PREAMBLE

MAIN DEFINITION

"… 'works or services concession' means a contract for pecuniary interest concluded in writing by means of which one or more contracting authorities-entities entrust the execution of works or the provision and the management of services to one or more economic operators the consideration for which consists either solely in the right to exploit the works or the services that are the subject of the contract or in that right together with payment".

CRUCIAL EXPLANATORY REMARK: "THE OPERATING-RISK CRITERION"

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

Recitals (18)-(19)-(20)

EXPLANATORY REMARKS AND PROBLEMATIC POINTS OF THE NEW CONCESSION DEFINITION

A. The "transfer to the concessionaire of the project's operating risk" as a general characteristic of concessions

B. The transfer of the "operating risk" which is no longer required to be "substantial"

C. The complete lack of reference to the financial-investment burden

D. The inclusion to the available payment mechanisms of cases where the concessionaire-investor is directly repaid by the contracting authority-entity: Practical confusion and diametrical antithesis with the CJEU's well-established (pre-Directive) case law

THE "TRANSFER TO THE CONCESSIONAIRE OF THE PROJECT'S OPERATING RISK" AS A GENERAL CHARACTERISTIC OF CONCESSIONS

* the finally-selected criterion of the "operating risk (of a concession contract)" **focuses on a very-specific part of analysis of the concession technique, which cannot be generalised** as the fundamental element of such a complex-intricate legal phenomenon

* concession projects → project-finance principles → risk matrix/register approach → **case-by-case risk-evaluation / management plan**

* **an entirely-legalistic approach** which closes its eyes to international experience as regards self-financed ventures

THE TRANSFER OF THE "OPERATING RISK" WHICH IS NO LONGER REQUIRED TO BE SUBSTANCIAL

* the hereinafter removal of the crucial adjective "substantial" from the "operating risk" inevitably leads **to a strongly-problematic path lying in the completely-opposite direction of the CJEU's case law:**
"...even if the risk run by the contracting authority is very limited, it is necessary that the contracting authority transfer to the concession holder all, or at least a significant share, of the operating risk which it faces, in order for a service concession to be found to exist. It is for the national court to assess whether there has been a transfer of all, or a significant share, of the risk faced by the contracting authority": ***Eurawasser*** **(C-206/08) [2009] E.C.R. I-08377 at [77]-[78] and [80];** ***Hans & Christophorus Oymanns*** **(C-300/07) [2009] E.C.R. I-04779 at [72]-[75]**

* this explicit demand was repeated **by subsequent Judgements:** ***Privater Rettungsdienst und Krankentransport Stadler*** **(C-274/09) [2011] E.C.R. I-01335 at [29];** ***Norma-A και Dekom*** **(C-348/10) [2011] E.C.R. I-10983 at [45], [50] and [59]**
and, thus, we can assume that the "substantial-operating-risk" criterion **has been confirmed by the Court to date:** ***Promoimpresa*** **(C-458/14), July 14, 2016 at [46],** ***Proceedings brought by Kansaneläkelaitos*** **(C-269/14) May 21, 2015 at [41]**

* **how much "operating risk"** is currently needed to be transferred to the concessionaire according to the new Concessions Directive?

THE COMPLETE LACK OF REFERENCE TO THE FINANCIAL-INVESTMENT BURDEN

* the new definition lacks **any reference to the financial burden** (*"fardeau financier"*) that must be borne by the concessionaire**, namely his contractual obligation to finance through private-capital investment (equity and debt)** the completion of the works construction and/or the services provision entrusted to him by the contracting authority-entity

* given the fiscal stringencies that the modern EU Countries face**, the most realistic choice** is generally not between a Concession-PPP and public-sector procurement of the respective infrastructure-facility, but between a Concession-PPP and no investment at all

* however, the financial-investment burden, although not separately mentioned in the new definition, can be considered, as a corresponding risk, to fall within the **(theoretical construction of the) general risk as determined by the EU legislator through the new concept of the "operating risk of a concession contract"**

THE INCLUSION TO THE AVAILABLE PAYMENT MECHANISMS OF CASES WHERE THE CONCESSIONAIRE – INVESTOR IS DIRECTLY REPAID BY THE CONTRACTING AUTHORITY – ENTITY:

Practical confusion and diametrical antithesis with the CJEU's well-established (pre-Directive) case law

- **Recital 18 last alinea** → *"At the same time it should be made clear that certain arrangements which are exclusively remunerated by a contracting authority or a contracting entity should qualify as concessions where the recoupment of the investments and costs incurred by the operator for executing the work or providing the service depends on the actual demand for or the supply of the service or asset"*
  (e.g. services concessions for R & D services under art.25)

What is the purpose of incorporating such **a broad-extended definition** of the concession contract?

- **<u>FIRSTLY,</u>** this change of policy causes serious practical confusion in comparison with PPPs:

  a) **PFI-model projects ("government-pay or availability-based PPPs")**

  b) **concession-model projects ("user-pay or usage-based PPPs")** [actually, **the system of concession is the oldest and most-widespread PPP model,** specifically, it is estimated that **concessions make up to 60% of PPPs**]

On the contrary, **this accurate legal categorisation is not adopted** in the concession definition as it is incorporated in art.5 para.1 of Directive 2014/23, where the European legislator makes **an exclusive but general reference to "Concessions".**

In certain EU Member-States, as the UK, France and Greece, **Concession and PFI-model ventures are clearly distinguished from a legal standpoint** and, therefore, the new generalised concept of concessions produces a series of practical issues.

* **SECONDLY,** this new policy, by classifying the direct and exclusive remuneration of the private-sector contractor from the contracting authority-entity as a concession**, comes in direct conflict with its well-established (pre-Directive) case law** [*Eurawasser* (C-206/08) [2009] E.C.R. I-08377 at [51], [53] and [57]]:

"A service contract involves consideration which is paid directly by the contracting authority to the service provider [*Parking Brixen* (C-458/03) [2005] E.C.R. I-08585 at [39]]... while, for a service concession, the consideration for the provision of services consists in the right to exploit the service, either alone, or together with payment.... In the light of the [present] criterion ..., the fact that the service provider is remunerated by payments from third parties, in this case from users of the service in question, is one means of exercising the right, granted to the provider, to exploit the service ... in the case of a contract for the supply of services, the fact that the supplier is not remunerated directly by the contracting authority, but is entitled to collect payment from third parties, meets the requirement of consideration laid down in art. 1(3)(b) of Directive 2004/17" [*Commission v Italy* (C-382/05) [2007] E.C.R. I-06657 at [33], *Commission v Austria* (C-29/04) [2005] E.C.R. I-09705 at [8] and [32]].

CONCLUSION:

The Concessions Directive does not restrict its scope to the utilisation of the concession model in infrastructure-procurement conventional projects, namely, it does not regulate only the payment mechanism that remunerates the concessionaire through the collection of tolls or fees which are paid to him by third users [**concession-model payment mechanism:** payments made by users of a public car park (*Parking Brixen* (C-458/03) [2005] E.C.R. I-08585 at [40])**,** of public service transport (*ANAV* (C-410/04) [2006] I-03303 at [16]) and of a teledistribution network (*Coditel Brabant* (C-324/07) [2008] E.C.R. I-08457 at [24]).

THE RANGE-BREADTH OF PPP VENTURES THAT FALL WITHIN DIRECTIVE 2014/23

A) The legal coverage by the Directive's scope of the majority of self-financed or PPP ventures in the EU investment marketplace
[note: s.II of Directive (arts10-17) adopts an extensive list of exclusions from its scope]

B) A "compulsory" classification of various self-financed ventures collectively as concessions?

C) The present speech highlights the danger that it is **rather unclear to what extent the new Concessions Directive will be applied and what is the range-breadth of self-financing projects that will fall within its scope** (i.e. self-financed PFI-model projects, shadow-tolls etc.), on the contrary, **a very-different application of the new rules is expected by various legal systems of the EU Countries** based on **different, thus intensively-problematic, interpretations** of the new concession definition.