PASS
Procurement Advice & Support Service
...the Mark of Excellence








A Guide to...

Commission Interpretative Communication on Concessions Under Community Law

Endorsed by: sopo In Local Government

Published by: BiP SOLUTIONS 25 YEARS 1984 - 2009 DELIVERING INNOVATIVE SOLUTIONS

£60

Version 1

BEST VALUE
PROCUREMENT TRAINING

Those engaged in delivering public procurement are required to carry out a range of activities as part of the procurement function. These are much more extensive than is often assumed, requiring the application of a wide variety of specialist knowledge, skills and expertise.

PASS SKILLSTRAINING

PASS Skills Training events are designed to deliver a level of training which is accessible to all

Whether you are new to procurement, an internal client or stakeholder looking for an overview of procurement issues, or have procurement experience and are looking to keep up to date with the latest developments, PASS Skills Training events have the ideal courses for you.

If you want a training course that lets you have input and actively encourages you to ask questions on issues that are important to you, while delivering the information you require, then PASS Skills Training is the ideal series of events for you.

PASS MASTERCLASS

PASS Masterclass events are specially designed for the more experienced procurement practitioner

Each PASS Masterclass event is constructed in a manner that offers delegates a greater insight into specialised procurement topics.

Many events also offer interactive sessions to help you hone your skills and develop your understanding of the topic.

For procurement professionals who want more than a seminar, PASS Masterclass offers dedicated procurement training specifically aimed at helping you to improve your knowledge and skills.

For further information, or to register your interest, please visit

www.bipsolutions.com/pass

...the Mark of Excellence

Contents

Commission interpretative communication on concessions under Community law

(2000/C 121/02)

On 24 February 1999 the Commission adopted and published a Draft Commission interpretative communication on concessions under Community law on public contracts[1] and submitted it to a wide range of bodies for consultation. Taking into account the substantial input[2] it has received following publication of the initial draft in the Official Journal of the European Communities, the Commission has adopted this interpretative communication.

1. INTRODUCTION

1. Concessions have long been used in certain Member States, particularly to carry out and finance major infrastructure projects such as railways and large parts of the road network. Involvement of the private sector has declined since the first quarter of the 20th century as governments began to prefer to be directy involved in the provision and management of infrastructure and public services.

2. However due to budgetary restrictions and a desire to limit the involvement of public authorities and enable the public sector to take advantage of the private sector's experience and methods, interest in concessions has been heightened over the last few years.

3. First of all, it should be pointed out that the Community does not give preference to any particular way of organising property, whether public or private: Article 295 (ex Article 222) of the Treaty guarantees neutrality with regard to whether enterprises are public or private.

4. Given that this form of association with operators is being used more and more frequently, particularly for major infrastructure projects and certain services, the Commission feels this interpretative communication is needed to keep the operators concerned and the public authorities informed of the provisions it considers apply to concessions under current Community law. Indeed, the Commission is repeatedly faced with complaints concerning infringements of Community law on concessions when public authorities have called on economic operators' know-how and capital to carry out complex operations. It has thus decided to define the concept of "concessions" and set out the guidelines it has followed up to now when investigating cases. This interpretative communication is therefore part of the transparency required to clarify the current legal framework in the light of the experience gained when investigating the cases examined up to now.

5. In the draft version of this interpretative communication[3], the Commission had stated that it also intended to deal with the other forms of partnership used to call upon private-sector financing and know-how. The Commission decided not to consider the forms of partnership whose characteristics are different from those of a concession as defined in this interpretative communication. Such an approach was also favoured in the input received. The wide range of situations, which are in constant flux, as revealed in the feedback on the draft interpretative communication, calls for an indepth consideraton of the characteristics they have in common. The discussion set off by the publication of the draft interpretative communication must therefore continue on this matter.

6. The comments on concessions have enabled the Commission to refine its analysis and define the characteristics of concessions which distinguish them from public contracts, in particular the delegation of services of general interest operated by this kind of partnership.

7. The Commission wishes to reiterate that this text does not seek to interpret the specific regimes deriving from Directives adopted in different sectors, such as energy and transport.

This interpretative communication (hereinafter referred to as the "communication") will specify the rules and the principles of the Treaty governing all forms of concession and the specific rules that Directive 93/37/EEC on public works contracts[4] (hereinafter "the works Directive") lays down for public works concessions.

2. DEFINITION AND GENERAL PROBLEM OF CONCESSIONS

Concessions are not defined in the Treaty. The only definition to be found in secondary Community law is in the works Directive, which lays down specific provisions for works concessions[5]. However, other forms of concessions do not fall within the scope of the directives on public contracts[6].

However, this does not mean that concessions are not subject to the rules and principles of the Treaty. Indeed, insofar as these concessions result from acts of State, the purpose of which is to provide economic activities or the supply of goods, they are subject to the relevant provisions of the Treaty and to the principles which derive from Court Case law.

In order to delimit the scope of this communication, and before specifying which regime applies to concessions, their distinctive features must be described. To this end, a brief review of the concept of works concessions as found in the works Directive should prove useful.

2.1. WORKS CONCESSIONS

2.1.1. Definition as given in Directive 93/37/EEC

The Community legislator has chosen to base its definition of works concessions on that of public works contracts.

The text of the works Directive states that public works contracts are "contracts for pecuniary interest concluded in writing between a contractor and a contracting authority (...) which have as their object either the execution, or both the execution and design, of works related to one of the activities referred to in Annex II or a work (...), or the execution by whatever means of a work corresponding to the requirements specified by the contracting authority" (Article 1(a)).

Article 1(d) of the same Directive defines a public works concession as "a contract of the same type as that indicated in (a) except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the construction or in this right together with payment".

According to this definition, the main distinctive feature of a works concession is that a right to exploit a construction is granted as a consideration for having erected it; this right may also be accompanied by payment.

2.1.2. Distinction between the concepts of "public works contract" and "works concession"

The Commission believes that the right of exploitation is a criterion that reveals several characteristics which distinguish a works concession from a public works contract.

For example, the right of exploitation allows the concessionaire to demand payment from those who use the structure (e.g. by charging tolls or fees) for a certain period of time. The period for which the concession is granted is therefore an important part of the remuneration of the concessionnaire. The latter does not receive remuneration directly from the awarding authority, but acquires from it the right to obtain income from the use of the structures built[7].

The right of exploitation also implies the transfer of the responsibilities of operation. These responsibilities cover the technical, financial and managerial matters relating to the construction. For example, it is the concessionaire who is responsible for making the investments required so that it may be both available and useful to users. He is also responsible for paying off the construction. Moreover, the concessionaire bears not only the usual risks inherent in any construction – he also bears much of the risk inherent in the management and use of the facilities[8].

From these considerations, it follows that, in works concessions, the risks inherent in exploitation are transferred to the concessionaire[9].

The Commisison notes that more and more public works contracts are the subject of complex legal arrangements[10]. As a result, the boundary between these arrangements and public works concessions can sometimes be difficult to define.

In the Commission's view, the arrangement is a public works contract as understood under Community law if the cost of the construction is essentially borne by the awarding authority and the contractor does not receive remuneration from fees paid directy by those using the construction.

The fact that the Directive allows for a payment in addition to the right of exploitation does not change this analysis. Such situations have occurred. The State therefore bears part of the costs of operating the concession in order to keep prices down for the user (providing "social prices"[11]). A variety of procedures are possible (guaranteed flat rate, fixed sum but paid on the basis of the number of users, etc.). These do not necessarily change the nature of the contract if the sum paid covers only a part of the cost of the construction and of operating it.

The definition of a concession allows the State to make a payment in return for work carried out, provided that that this does not eliminate a significant element of the risk inherent in exploitation. By specifying that there may be payment in addition to the right to exploit the construction, the works Directive states that operation of the structure must be the source of the concessionaire's revenue.

Even though the origin of the resources – directly paid by the user of the construction – is, in most cases, a significant factor, it is the existence of exploitation risk, involved in the investment made or the capital invested, which is the determining factor, particularly when the awarding authority has paid a sum of money.

However, even within public works contracts, part of the risk may be borne by the contractor[12]. However, the duration of concessions makes these risks more likely to occur, and makes them relatively greater.

On the other hand, risks arising from the operation's financial arrangements, which could be considered "economic risks", are part and parcel of concessions. This type of risk is highly dependent on the income the concessionaire will be able to obtain from the amount of use of the construction[13] and is is significant factor distinguishing concessions from public works contracts.

In conclusion, the risks arising from the operation of the concession are transferred to the concessionaire with the right of exploitation; specific risks are divided between the grantor and the concessionaire on a case by case basis, according to their respective ability to manage the risk in question.

If the public authorities undertake to bear the risk arising from managing the construction by, for example, guaranteeing that the financing will be reimbursed, there is no element of risk. The Commission considers such cases to be public works contracts, not concessions[14].

2.2. SERVICE CONCESSIONS

Article 1 of Directive 92/50/EEC on public service contract (hereinafter referred to as the "services Directive") states that this Directive applies to "public services contracts", defined as "contracts for pecuniary interest concluded in writing between a service provider and a contracting authority, to the exclusion of (...)".

Unlike the works Directive, the services Directive does not define "service concessions"[15].

With the sole intention of distinguishing service concessions from public services contracts, and therefore limit the scope of the Communication, it is important to describe the essential characteristics of concessions.

For this purpose, it would seem useful to work on the basis of factors deriving from the above-mentioned concept of works concessions which take into account the Court's case law on the subject[16] and the opinio juris[17].

Works concessions are assumed to serve a different purpose from service concessions. This may lead to possible differences in terms of investment and duration between the two types of concessions. However, given the above criteria, the characteristics of concession contracts are generally the same, regardless of their subject.

Thus, as with works concessions, the exploitation criterion is vital for determining whether a service concession exists[18]. Application of this criterion means that there is a concession when the operator bears the risk involved in operating the service in question (establishing and exploiting the system), obtaining a significant part of revenue from the user, particularly by charging fees in any form. As is the case for works concessions, the way in which the operator is remunerated is a factor which helps to determine who bears the exploitation risk.

Similarly, service concessions are also characterised by a transfer of the responsibility of exploitation.

Lastly, service concessions normally concern activities whose nature and purpose, as well as the rules to which they are subject, are likely to be the State's responsibility and may be subject to exclusive or special rights[19].

It should also be pointed out that, in the Lottomatica judgment mentioned above, the Court clearly distinguished between a transfer of responsibility to the concessionaire as concerns operating a lottery, which may be considered to be a responsibility of the State as described above, and simply supplying computer systems to the administration. In that case it concluded that without such a transfer the arrangement was a public contract.

2.3. DISTINCTION BETWEEN WORKS CONCESSIONS AND SERVICE CONCESSIONS

Given that only Directive 93/37/EEC provides for a special system of procedures for granting public works concessions, it is worth determining exactly what this type of concession is, especially if it is a mixed contract which also includes a service element. This is virtually always the case in practice, since public works concessionaires often provide services to users on the basis of the structure they have built.

As for delimiting the scope of the provisions in the works and services Directives, recital 16 of the latter specifies that if the works are incidental rather than the object of the contract they do not justify treating the contract as a public works contract. In the Gestión Hotelera Internacional case the Court of Justice interpreted these provisions and stated that "where the works [. .] are merely incidental to the main object of the award, the award, taken in its entirety, cannot be characterised as a public works contract"[20]. The problem of mixed contracts was also addressed by the Court of Justice in another case[21] which determined that, when a contract includes two elements which may be separated (e.g. supplies and services), the rules which apply to each should be applied separately.

Although these principles have been established for public contracts, the Commission considers that a similar approach should be taken to determine whether or not a concession is subject to the works Directive. Its field of application ratione materiae is effectively the same in the case of both works contracts and works concessions[22].

In view of this, the Commission maintains that the first thing to determine is whether the building of structures and carrying out of work on behalf of the grantor constitute the main subject matter of the contract, or whether the work and building are merely incidental to the main subject matter of the contract.

If the contract is principally concerned with the building of a structure on behalf of the grantor, the Commission holds that it should be considered to be a works concession.

In this case, the rules laid down by the works Directive must be complied with, as long as the Directive's applicaton threshold is reached (5,000,000), even if some of the aspects ar e service-related. The fact that the works are performed or the structures are built by third parties does not change the nature of the basis contract. The subject matter of the contract is identical.

In contrast, a concession contract in which the construction work is incidental or which only involves operating an existing structure is regarded as a service concession.

Moreover, in practice, operations may be encountered which include building a structure or carrying out works at the same time as the provision of services. Thus, alongside a public works concession, service concessions may be concluded for complementary activities which are, however, independent of the exploitation of the concession of the structure. For example, motorway catering services may be the subject of a different service concession from that involving its construction or management. In the Commission's view, if the objects of these contracts may be separated, the rules which apply to each type should be applied respectively.

2.4. SCOPE OF THIS INTERPRETATIVE COMMUNICATION

As already stated, even though concessions are not directly addressed by the public contracts directives, they are nonetheless subject to the rules and principles of the Treaty, insofar as they are granted via acts that are attributable to the State and their object is the provision of economic activities.

Any act of State[23] laying down the terms governing economic activities, be it contractual or unilateral, must be viewed in the light of the rules and principles of the Treaty, in particular Articles 43 to 55 (ex Articles 52 to 66)[24].

This communication therefore concerns acts attributable to the State whereby a public authority entrusts to a third party – by means of a contractual act or a unilateral act with the prior consent of the third party – the total or partial management of services for which that authority would normally be responsible and for which the third party assumes the risk. Such services are convered by this communication only if they constitute economic activities within the meaning of Articles 43 to 55 (ex Articles 52 to 66) of the Treaty.

These acts of State will henceforth be referred to as “concessions”, regardless of their legal name under national law.

In view of the above, and without prejudice to any provisions of Community law which might be applicable, this communication does not concern:

- acts whereby a public authority authorises the exercice of an economic activity even if these acts would be regarded as concessions in certain Member States[25];
- acts concerning non-economic activities such as obligatory schooling or social security.

On the other hand, it should be noted that, when a concession expires, renewal is considered equivalent to granting a new concession, and is therefore covered by the communication.

A particular problem arises in cases where are forms of interorganic delegation between the concessionaire and the grantor which do not fall outside the administrative sphere of the contracting authority[26]. The question of whether and to what extent Community law applies to this kind of relationship has been addressed by the Court[27]. However, other cases currently pending before the Court could introduce new elements in this respect[28].

On the other hand, relationships between public authorities and public enterprises entrusted with the operation of services of general economic interest are, in principle, covered by this communication[29]. It is true that, according to the Court's established case law[30], nothing in the Treaty prevents Member States from granting exclusive rights for certain services of general interest for non-economic public interest reasons whereby those services are not subject to open competition[31]. Nonetheless, the Court adds that the way in which such a monopoly is organised and carried out must not infringe the provisions of the Treaty on the free movement of goods and services, nor the competition rules[32]. In addition, the way in which these exclusive rights are granted are subject to the rules of the Treaty, and may therefore be covered by this communication.

3. REGIME APPLYING TO CONCESSIONS

As mentioned above, only works concessions for an amount equal to or greater than the threshold specified in Directive 93/37/EEC (EUR 5000000) are subject to a specific regime.

Nonetheless, like any act of State laying down the terms governing economic activities, concessions are subject to the provisions of Articles 28 to 30 (ex Articles 30 to 36) and 43 to 55 (ex Articles 52 to 66) of the Treaty, and to the principles emerging from the Court's case law[33] – notably the principles of non-discrimination, equality of treatment, transparency, mutual recognition and proportionality[34].

The Treaty does not restrict Member States' freedom to grant concessions provided that the methods used to do so are compatible with Community law.

The Court's case law holds that, even if Member States remain free under the Treaty to lay down the substantive and procedural rules, they must respect all the relevant provisions of Community law, and particularly the prohibitions deriving from the principles enshrined in the Treaty concerning right of establishment and freedom to provide services[35]. Moreover, the Court emphasised the importance of the principles and rules enshrined in the Tretay by specifying in particular that the public procurement directives were intended to “facilitate the attainment within the Community of freedom of establishment and freedom to provide services” and “to ensure the effectiveness of the rights conferred by the Treaty in the field of public works and supply contracts”[36].

Certain Member States have sometimes thought that concessions were not governed by the rules of the Treaty in that they involved delegation of a service to the public, which would be possible only on the basis of mutual trust (intuitu personae). According to the Treaty and the Court's established case law, the only reasons which would enable State acts which violate Articles 43 and 49 (ex Articles 52 and 59) of the Treaty to escape prohibition under these Articles are those referred to in Articles 45 and 55 (ex Articles 55 and 66). The very restrictive conditions specified by the Court for the application of these Articles are described below[37]. There is nothing in the Treaty or in the Court's case law which implies that concessions would be treated differently.

In what follows, the Commission will refer to the rules of the Treaty and the principles deriving from Court case law that are applicable to concessions covered by this communication.

3.1. THE RULES AND PRINCIPLES SET OUT IN THE TREATY OR LAID DOWN BY THE COURT

As has already been stated above, the Treaty makes no specific mention of public contracts or concessions. Several of its provisions are nonetheless relevant, i.e. the rules instituting and guaranteeing the proper operation of the Single Market, namely:

- the rules prohibiting any discrimination on grounds of nationality (Article 12(1) (ex Article 6(1)));
- the rules on the free movement of goods (Articles 28 (ex Article 30) et seq.), freedom of establishment (Articles 43 (ex Article 59) et seq.), freedom to provide services (Articles 49 (ex Article 59) et seq.) and the exceptions to those rules provided for in Articles 30, 45 and 46 (ex Articles 36, 55 and 56)[38];
- Article 86 (ex Article 90) of the Treaty might help to determine if the granting of these rights is legitimate.

These rules and principles arrived at by the Court are clarified below.

It is true that the case law cited refers in part to public contracts. Nonetheless, the scope of the principles which emerge from it often goes beyond public contracts. They are therefore applicable to other situations, such as concessions.

3.1.1. Equality of treatment

According to the established case law of the Court "the general principle of equality of treatment, of which the prohibition of discrimination on grounds of nationality is merely a specific enunciation, is one of the fundamental principles of Community law. This principle requires that similar situations shall not be treated differently unless differentiation is objectively justified"[39].

Moreover the Court asserted that the principle of equality of treatment, of which Articles 43 (ex 52) and 49 (ex 59) of the Treaty are a particular expression, "forbids not only overt discrimination by reason of nationality [...] but all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result"[40].

The principle of equality of treatment implies in particular that all potential concessionaires know the rules in advance and that they apply to everybody in the same way. The case law of the Court, in particular the Raulin[41] and Parliament/Council[42] judgments, lays down that the principle of equality of treatment requires not only that conditions of access to an economic activity be non-discriminatory, but also that public authorities take all the measures required to ensure the exercise of this activity.

The Commission considers that it follows from this case law that the principle of open competition must be adhered to.

In the Storebaelt und Walloon Buses judgments, the Court has the occasion to set out the scope of the principle of equality of treatment in the area of public contracts, by asserting on the one hand that this principle requires that all offers conform to the tender specifications to guarantee an objective comparison between offers[43] and, on the other hand, this principle is violated, and transparency of the procedure impaired, when an awarding entity takes account of changes to the initial offers of one tenderer who thereby obtains an advantage over his competitors. Moreover, the Court notes that "the procedure for comparing tenders had to comply at every stage with both the principle of the equal treatment of tenderers and the principle of transparency, so as to afford equality of opportunity to all tenderers when formulating their tenders"[44].

The Court has therefore specified in this case law concerning application of the Directives that the principle of equality of treatment between tenderers is quite separate from any possible discrimination on the basis of nationality or other criteria.

The application of this principle to concessions (which is obviously only possible when the awarding authority negotiates with several potential concessionaires) leaves the grantor free to choose the most appropriate award procedure, for example by reference to the characteristics of the sector in question, and to lay down the requirements which candidates must meet throughout the various phases of a tendering procedure[45]. However, this implies that the choice of candidates must be made on the basis of objective criteria and the procedure must be conducted in accordance with the procedural rules and basic requirements originally set[46]. Where these rules have not yet been set, the application of the principle of equality of treatment requires in any event that the candidates be chosen objectively.

The following should therefore be considered to contravene the above-mentioned rules of the Treaty and the principle of equality of treatment: provisions reserving public contracts only to companies of which the State or the public sector, whether directly or indirectly, is a major, or the sole, shareholder[47]; practices allowing the acceptance of bids which do not meet the specifications, or which have been amended after being opened or allowing alternative solutions when this was not provided for in the initial project. In addition the nature of the initial project must not be changed during negotiation with regard to the criteria and requirements laid down at the beginning of the procedure.

Furthermore, in certain cases, the grantor may be unable to specifiy his requirements in sufficiently precise technical terms and will look for alternative offers likely to provide various solutions to a problem expressed in general terms. In such cases, however, in order to ensure fair and effective competition, the specifications must always state in a non-discriminatory and objective manner what is asked of the candidates and above all the way in which they must draw up their bids. In this way, each candidate knows in advance that he has the possibility of proposing various technical solutions. More generally, the specifications must not contain elements that infringe the abovementioned rules and principles of the Treaty. The requirements of the grantor may also be determined in collaboration with companies in the sector, provided that this does not restrict competition.

3.1.2. Transparency

The Commission points out that in its case law the Court has emphasised the connection between the principle of transparency and the principle of equality of treatment, whose useful effect it seeks to ensure in undistorted competitive conditions[48].

The Commission notes that in virtually all the Member States the administrative rules or practices adopted with regard to concessions provide that bodies wishing to entrust the management of an economic activity to a third party must, in order to ensure a minimum of transparency, make their intention public according to appropriate rules.

As confirmed by the Court in its most recent case law, the principle of non-discrimination on grounds of nationality, implies that there is an obligation to be transparent so that the contracting authority will be able to ensure it is adhered to[49].

Transparency can be ensured by any appropriate means, including advertising depending on, and to allow account to be taken of, the particularities of the relevant sector[50]. This type of advertising generally contains the information necessary to enable potential concessionaires to decide whether they are interested in participating (e.g. selection and award criteria, etc.). This includes the subject of the concession and the nature and scope of the services expected from the concessionaire.

The Commission considers that, under these circumstances, the obligation to ensure transparency is met.

3.1.3. Proportionality

The principle of proportionality is recognised by the established case law of the Court as "being part of the general principles of Community law"[51]; it also binds national authorities in the application of Community law[52], even when these have a large area of discretion[53].

The principle of proportionality requires that any measure chosen should be both necessary and appropriate in the light of the objectives sought[54]. In choosing the measures to be taken, a Member State must adopt those which cause the least possible disruption to the pursuit of an economic activity[55].

When applied to concessions, this principle, which allows contracting authorities to define the objective to be reached, especially in terms of performance and technical specifications, nonetheless requires that any measure chosen be both necessary and appropriate in relation to the objective set.

Thus, for example, when selecting candidates, a Member State may not impose technical, professional or financial conditions which are excessive and disporportionate to the subject of the concession.

The principle of proportionality also requires that competition and financial stability be reconciled; the duration of the concession must be set

so that it does not limit open competition beyond what is required to ensure that the investment is paid off and there is a reasonable return on invested capital[56], whilst maintaining a risk inherent in exploitation by the concessionaire.

3.1.4. Mutual recognition

The principle of mutual recognition has been laid down by the Court and gradually defined in greater detail in a large number of judgments on the free circulation of goods, persons and services.

According to this principle, a Member State must accept the products and services supplied by economic operators in other Community countries if the products and services meet in like manner the legitimate objectives of the recipient Member State[57].

The application of this principle to concessions implies, in particular, that the Member State in which the service is provided must accept the technical specifications, checks, diplomas, certificates and qualifications required in another Member State if they are recognised as equivalent to those required by the Member State in which the service is provided[58].

3.1.5. Exceptions provided for by the Treaty

Restrictions on the free movement of goods, the freedom of establishment and the freedom to provide services are allowed only if they are justified by one of the reasons stated in Articles 30, 45, 46 and 55 (ex Articles 36, 55, 56 and 66) of the Treaty.

With particular reference to Article 45 (ex Article 55) (which allows restrictions on the freedom of establishment and the freedom to provide services in the case of activities connected, even occasionally, with the exercise of official authority), the Court has on numerous occasions stressed[59] that "since it derogates from the fundamental rule of freedom of establishment, Article 45 (ex Article 55) of the Treaty must be interpreted in a manner which limits its scope to what is strictly necessary in order to safeguard the interests which it allows the Member States to protect". Such exceptions must be restricted to those activities referred to in Articles 43 and 49 (ex Articles 52 and 59), which in themselves involve a direct and specific connection with the exercise of official authority[60].

Consequently, the exception included in Article 45 (ex Article 55) must apply only to cases in which the concessionairs directly and specifically exercises official authority.

This exception therefore does not automatically apply to activities carried out by virtue of an obligation or an exclusivity established by law or qualified by the national authorities as being in the public interest[61]. It is true that any activity delegbated by the public authorities normally has a connotation of public interest, but this stil does not mean that such activity necessarily involves exercising official authority.

As an example, the Court of Justice dismisses application of the exception under Article 45 (ex Article 55) on the basis of findings such as:

- the activities transferred remained subject to supervision by the official authorities, which had at their disposal appropriate means for ensuring the protection of the interests entrusted to them[62],
- the activities transferred were of a technical nature and therefore not connected with the exercise of official authority[63].

As stated above, the principle of proportionality requires that any measure restricting the exercise of the freedoms provided for in Articles 43 and 49 (ex Articles 52 and 59) should be both necessary and appropriate in the light of the objectives pursued[64]. This implies, in particular, that in the choice of the measures for achieving the objective pursued, the Member State must give preference to those which least restrict the exercise of these freedoms[65].

Furthermore, with regard to the freedom to provide services, the host Member State must check that the interest to be safeguarded is not safeguarded by the rules to which the applicant is subject in the Member State where he normally pursues his activities.

3.1.6. Protection of the rights of individuals

In consistent case law on the fundamental freedoms guaranteed by the Treaty, the Court has stated that decisions to refuse or reject must state the reasons and must be open to judicial appeal by the affected parties[66].

These requirements are generally applicable since, as the Court has stated, they derive from the constitutional traditions common to the Member States and enshrined in the European Convention on Human Rights[67].

They are therefore also applicable to individuals who consider that they have been harmed by the award of a concession within the meaning of the communication.

3.2. SPECIFIC PROVISION OF DIRECTIVE 93/37/EEC ON WORKS CONCESSIONS

The Commission considers it worthwhile to point out that the rules and principles explained above are applicable to works concessions. However, Directive 93/37/EEC also provides a specific system for these which includes, among other things, advertising rules.

It goes without saying that, for concessions whose value is below the threshold laid down by Directive 93/37/EEC, only the rules and principles of the Treaty are applicable.

3.2.1. The upstream phase: choice of concessionaire

3.2.1.1. Rules on advertising and transparency

Awarding authorities must publish a concession notice in the Official Journal of the European Communities according to the model laid down in Directive 93/37/EEC to put the contract up for competition at the European level[68].

A problem encountered by the Commission involves the award of concessions between public entities. Some Member States seem to consider that the provisions of Directive 93/37/EEC applicable to works concessions do not apply to contracts concluded between a public authority and a legal person governed by public law.

Nevertheless, Directive 93/37/EEC requires a preliminary advertisement for all contracts for public works concessions, irrespective of whether the potential concessionaire is private or public. Furthermore, Article 3(3) of Directive 93/37/EEC expressly states that the concessionaire can be one of the awarding authorities covered by the directive, which implies that this type of relation is subject to publication in accordance with Article 3(1) of the same directive.

3.2.1.2. Choice of type of procedure

As far as works concessions are concerned, the grantor is free to choose the most appropriate procedure, and in particular to begin negotiated procedures.

3.2.2. The downstream phase: contracts awarded by the contract holder[69]

Directive 93/37/EEC lays down certain rules on contracts awarded by public works concessionaires for works for a value of €5,000,000 or more. However, they vary according to the type of concessionaire.

If the concessionaire is an awarding authority within the meaning of the Directive, the contracts for such works must be awarded in full compliance with all the Directive's provisions on public works contracts[70].

If the concessionaire is not an awarding authority, the Directive stipulates that he must comply only with certain advertising rules. However, these rules are not applicable when the concessionaire awards works contracts to affiliated undertakings within the meaning of Article 3(4) of the Directive. The Directive also stipulates that a comprehensive list of such firms must be enclosed with the application for the concession and must be updated following any subsequent changes in the relationship between firms. Since this list is comprehensive, the concessionaire may not cite the non-applicability of the advertising rules as grounds for awarding a works contract to a firm which does not figure on the abovementioned list.

Consequently the concessionaire is always obliged to make known his intention to award a works contract to a third party whether or not he is an awarding authority.

Lastly, the Commission considers that a Member State is in breach of the provisions of Directive 93/37/EEC on works carried out by third parties if, without any invitation to tender, it uses as an intermediary a firm with which it is linked to award works contracts to third-party firms.

3.2.3. Rules applicable to review

Article 1 of Directive 89/665/EEC provides that "Member States shall take the necessary measures to ensure that [...] decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible" in the conditions set out in the Directives, "on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law".

This provision of the Directive applies to works concessions(71).

The Commission also draws attention to the requirements of Article 2(7) of Directive 89/665/EEC, which stipulates that "the Member States shall ensure that decisions taken by bodies responsible for review procedures can be effectively enforced."

This implies that the Member States must not take any material or procedural measures which might render ineffektive the mechanisms introduced by this Directive.

As for concessionaires who are awarding authorities, in addition to the obligations already mentioned above, public contracts awarded by them are subject to the obligation to state reasons laid down in Article 8 of Directive 93/37/EEC, which makes it compulsory for the awarding authority to give the reasons for its decision within fifteen days, and to the review procedures provided for by Directive 89/665/EEC.

3.3. CONCESSIONS IN THE UTILITIES SECTORS

Directive 93/38/EEC on contracts awarded by entities operating in the water, energy, transport and telecommunications sectors (hereinafter referred to as the "utilities Directive") does not have any specific rules either on works concessions or on service concessions.

In deciding which rules apply, the legal personality of the grantor as well as his activity are therefore decisive elements. There are several possible situations.

In the first case, the State or other public authority not operating specifically in one of the four sectors governed by the utilities Directive awards a concession involving an economic activity in one of these four sectors. The rules and principles of the Treaty described above apply to this award, as does the works Directive if it is a works concession.

In the second case, a public authority operating specificially in one of the four sectors governed by the utilities Directive decides to grant a concession. The rules and principles of the Treaty are therefore applicable insofar as the grantor is a public entity. Even in the case of a works concession, only the rules and principles of the Treaty are applicable, since the works Directive does not cover concessions granted by an entity operating specifically in one of the four sectors governed by Directive 93/38/EEC.

Lastly, if the grantor is a private entity, it is not subject to either the rules or the principles described above(72).

The Commission is confident that the publication of this communication will help to clarify the rules of the game and to open up markets to competition in the field of concessions.

Moreover, the Commission wishes to emphasise that the transparency which the publication of this communication provides in no way prejudices possible future proposals for legislation on concessions, if this becomes necessary to reinforce legal certainty.

Lastly, the Court, which currently has preliminary matters before it(73), may further clarify elements deriving from the rules of the Treaty, the Diretives and case law. This communication may therefore be supplemented in due course in order to take these new elements into account.

FOOTNOTES

(1) OJ C 94, 7.4.1999, p.4.

(2) The Commission wishes to thank the economic operators, representatives of collective interests, public authorities and individuals whose input helped to improve this communication.

(3) See point 2.1.2.4 of the Commission communication on public procurement in the European Union, COM(98) 143, adopted on 11 March 1998.

(4) Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ L 199, 9.8.1993, p.54).

(5) Council Directive 93/37/EEC, mentioned above.

(6) Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ L 209, 24.7.1992, p.1). Council Directive 93/36/EEC of 14 July 1993 coordinating procedures for the award of public supply contracts (OJ L 199, 9.8.1993, p.1). Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ L 199, 9.8.1993, p.84).

(7) The best-known example of a public works concession is a contract whereby a State grants a company the right to build and exploit a motorway and authorises it to earn revenue by charging tolls.

(8) Verification will have to be on a case by case basis, taking account of various elements such as the subject matter, duration and the amount of the contract, the economic and financial capacity of the concessionaire, as well as any other useful element which helps establish that the concessionaire effectively carries risk.

(9) If recovery of expenditure were guaranteed by the awarding authority without the risk involved in the management of the construction, there would be no element of risk and the contract should be regarded as a works contract rather than a concession contract. Moreover, if the concessionaire receives whether directly or indirectly during the course of the contract or even when the contract comes to an end, payment (by way of reimbursement, covering losses etc.) other than connected with exploitation, the contract could no longer be regarded as a concession. In this situation, the compatibility of any subsequent financing should be considered in the light of any relevant Community law.

(10) For example, the Commission has already been faced with cases where a consortium composed of contractors and banks undertook to carry out a project to meet the needs of the awarding authority, in exchange for reimbursement by the awarding authority of the loan taken out by the contractors with the banks, together with a profit for the private partners. The Commission interpreted these as public works contracts since the consortium did not undertake any exploitation, and therefore bore no attendant risk. The Commission came to the same conclusion in another case where, although the private partner carrying out the work was ostensibly exploiting the construction, the public authority had in fact guaranteed that he would receive compensation. The terms of this guarantee were such that the public authority in effect bore the exploitation risks.

(11) For example, if the toll for a motorway is set by the State at a level which does not cover operating costs.

(12) For example, risks arising from changes in legislation during the life of the contract (such as changes in environmental protection which make it necessary to modify the construction, or changes in tax law which disrupt the financial arrangements in the contract) or the risk of technical obsolescence. Moreover, this type of risk is more likely to arise in the context of concessions, bearing in mind that these normally extend over a relatively long period of time.

(13) It should be noted that economic risk exists where income depends on the amount of use. This holds true even in the case of a nominal toll, i.e. one borne by the grantor.

(14) In a case investigated by the Commission, although the private partner was ostensibly exploiting the construction, the public authority had guaranteed that he would receive compensation. The terms of this guarantee were such that the public authority in effect bore the exploitation risks.

(15) The absence of a reference to the concept of service concessions in the services Directive calls for some comment. Although, when preparing this Directive, the Commission had proposed including a special arrangement for this type of concession similar to the existing arrangement for works concessions, the Council did not accept this proposal. The question of wheather the granting of service concessions falls entirely under the arrangements introduced by the services Directive was therefore raised. As specified above, this Directive applies to “contracts for pecuniary interest concluded in writing between a service provider and a contracting authority”, with certain exceptions which are described in the Directive and which do not include concession contracts.

A literal interpretation of this definition, followed by certain authors, could lead to inclusion of concession contracts within the scope of the services Directive, since these are for pecuniary interest and concluded in writing. This approach would mean that the granting of a service concession would have to comply with the rules set out in this Directive, and would hence be subject to a more complex procedure than works concessions.

However, in the absence of Court case law on this point, the Commission has not accepted this interpretation in the actual cases it has had to investigate. A preliminary matter pending before the Court raises the question of the definition of service concessions and the legal arrangements which apply to them (Case C-324/98 Telaustria Verlags Gesellschaft mbH v. Post & Telekom Austria (Telaustria)).

(16) Judgment of 26 April 1994, Case C-272/91 Commission v. Italy (Lottomatica), ECR I-1409.

(17) Conclusions of Advocate-General La Pergola in Case C-360/96. Arnhem.

Conclusions of Advocate-General Alber in Case C-108/98, RI.SAN Srl v. Comune d'Ischia.

(18) In its judgment of 10 November 1998 in Case C-360/98 (Arnhem), para. 25, the Court concluded that it could not be a public service concession on the grounds that the remuneration consisted solely of a sum paid by the public authority and not of the right to operate the service.

(19) Conclusions of the Advocate-General in the Arnhem case; Conclusions of the Advocate-General in the RI.SAN Srl case; both referred to above.

(20) Judgment of 19 April 1994, case C-331/92, Gestión Hotelera, ECR I-1329.

(21) Judgment of 5 December 1989, Case C-3/88, Data Processing, ECR, p.4035.

(22) Moreover, the Court has already applied the same principle in order to delimit supply contracts and services in its judgment of 18 November 1999 on Case C-107/98, Teckal Srl v. Comune di Viano and AGAC di Reggio Emilia (Teckal).

(23) In the largest sense, i.e. the acts adopted by all public bodies belonging to the organisation of the State (local authorities, regions, departments, autonomous communities, municipalities) as well as any other entity which, even if it has its own legal existence, is linked to the State in such a tight manner that it is to be considered to be part of the State's organisation. The notion of acts of State also comprises acts which are attributable to the State, that is acts for which the public authorities are responsible, even though not adopted by them, given that the authorities can intervene to prevent their adoption or impose amendments.

(24) A similar line of reasoning should be followed for supply concessions, which must be viewed in the light of Articles 28 to 30 (ex Articles 30 to 36) of the Treaty.

(25) For example, taxi concessions, authorisations to use the public highway (newspaper kiosks, café terraces), or acts relating to pharmacies and filling stations.

(26) Similar to "in-house" relationships. The latter issue was first analysed by Advocates-General La Pergola (in the Arnhem case referred to above), Cosmas (in the Teckal case referred to above) and Alber (in the RI.SAN case referred to above).

(27) In the abovementioned Teckal case, the Court laid down that, for Directive 93/36/EEC to apply, "it is, in principle, sufficient if the contract was concluded between, on the one hand, a local authority and, on the other, a person legally distinct from that local authority", and added "The position can be otherwise only in the case where the local authority exercises over the person concerned a control which is similar to that which it exercises over its own departments and, at the same time, that person carries out the essential part of its activities with the controlling local authority or authorities" (recital 50).

(28) Cases C-94/99 ARGE and C-324/98 Telaustria referred to above.

(29) In the audiovisual sector, account should be taken of the Protocol on the system of public broadcasting in the Member States, annexed to the Treaty of Amsterdam, amending the Treaty on European Union (in force since 1 May 1999).

(30) Judgments of 30 April 1974, Case 155/73, Sacchi, and of 18 June 1991, Case C-260/89, Elleniki Radiophonia.

(31) Elleniki Radiophonia judgment mentioned above, point 10.

(32) Elleniki Radiophonia judgment mentioned above, point 12.

(33) It is worth pointing out that in the transport sector, the relevant rules on freedom to provide services are set out in Article 51 (ex Article 61) which refers to Articles 70 to 80 (ex Articles 74 to 84) of the Treaty. This is without prejudice to the fact that as the Court has consistently held, the general principles of Community law are applicable to the sector (see the judgments of 4 April 1974, Case C-167/73, Commission v. France, of 30 April 1986. Joined Cases 209/84 and 213/84, Ministère Public v. ASJES e. al., of 17 May 1994, Case C-18/93, Corsica ferries, of 1 October 1998, Case C-38/97 Autotrasporti Librandi snc v. Cuttica).

Moreover, transport services by rail, road and inland waterway are covered by Regulation (EEC) No 1191/69, as amended by Regulation (EEC) No 1893/91, which set out the mechanisms and procedures that public authorities can employ to ensure that their objectives for public transport are met.

(34) Obviously, acts and behaviour of the concessionaire to the extent that these are attributable to the State within the meaning of the case law of the Court of Justice are governed by the above rules and principles.

(35) Judgment of 9 July 1987 Joint Cases 27/86; 28/86 and 29/86, Bellini.

(36) Judgments of 10 March 1987, Case 199/85, Commission v. Italy, and of 17 November 1993, Case C-71/92, Commission v. Spain.

(37) Lottomatica judgment mentioned above. In this judgment, the Court of Justice ruled that, in view of the facts, the tasks of the concessionaire were limited to activities of a technical nature and, as such, were subject to the provisions of the Treaty.

(38) The Commission points out that restrictive but non-discriminatory measures are contrary to Articles 43 (ex Article 52) and 49 (ex Article 59) of the Treaty if they are not motivated by overriding reasons of public interest worth protecting. This is the case when the measures are neither appropriate nor necessary for achieving the objective in question.

(39) Judgment of 8 October 1980. Case 810/79, Überschär.

(40) Judgment of 13 July 1993, Case C-330/91, Commerzbank; also see Judgment of 3 February 1982, Joined Cases 62 and 63/81, Seco and Desquenne.

(41) Judgment of 26 February 1992, Case C-357/89.

(42) Judgment of 7 July 1992, Case C-295/90.

(43) Judgment of 22 June 1993, Case C-243/89, Storebaelt, point 37.

(44) Judgment of 25 April 1996, Commission v. Belgium, Case C-87/94. Walloon Buses. See also Judgment of the Court of First Instance (hereinafter referred to as the "CFI") of 17 December 1998, T-203/96, Embassy Limousines & Services.

(45) In this respect, it is worth emphasising that this Communication does not prejudge the interpretation of specific transport rules provided for by the Treaty at in current or future regulations.

(46) Thus, for example, even if the specifications provide for the possibility for candidates to make technical improvements to the solutions proposed by the awarding authority (and this will often be the case for complex infrastructure projects), such improvements may not relate to the basic requirements of a project and must be delimited.

(47) Data processing, judgment mentioned above, point 30.

(48) Walloon Buses Judgment, referred to above, point 54.

(49) Judgment of 18 November 1999, Case C-275/98, Unitron Scandinavia, point 31.

(50) Transparency can be ensured, among other means, by way of publishing a tender notice, or pre-information notice in the daily press or specialist journals or by posting appropriate notices.

(51) Judgment of 11 July 1989, Case 265/87, Schröder, ECR p.2237, point 21.

(52) Judgment of 27 October 1993, Case 127/92, point 27.

(53) Judgment of 19 June 1980, Joined Cases 41/79, 121/79 and 796/79, Testa et al., point 21.

(54) This is for example the case concerning the obligation to achieve a high level of environmental protection regarding application of the precautionary principle.

(55) See for example the judgment of 17 May 1984, Case 15/83, Denkavit Netherlands or the judgment of the CFI of 19 June 1997, Case T-260/94, Air Inter SA, point 14.

(56) Cf. the CFI's recent case law according to which the Treaty is applicable "when a measure adopted by a Member State constitutes a restriction of the freedom of establishment of nationals of other Member States on its territory and at the same time provides advantages to an enterprise by granting it an exclusive right, unless the aim of the measure taken by the State is legitimate and compatible with the Treaty and is permanently justified by overriding considerations of general interest [...]". In such cases, the CFI adds that "it is necessary that the measure taken by the State be suited to ensuring the objective it is pursuing is achieved, and does not go beyond what is required to achieve that objective." (Judgment of 8 July 1999, Case T-266/97, Vlaamse Televisie Maatschappij NV, point 108).

(57) This principle derives from case law relating to freedom of establishment and freedom to provide services (in particular in the Vlassopoulou Judgment of 7 May 1991 (Case C-340/89) and the Dennemeyer Judgment of 25 July 1991 (Case C-76/90). In the first Judgment, the Court of Justice found that "even if applied without any discrimination on the basis of nationality, national requirements concerning qualifications may have the effect of hindering nationals of the other Member States in exercising their right of establishment guaranteed to them by Article 43 (ex Article 52) of the EC Treaty. That could be the case if the national rules in question took no account of the knowledge and qualifications already acquired by the person concerned in another Member State." In the Dennemeyer Judgment the Court stated in particular that "a Member State may not make the provision of services in its territory subject to compliance with all the conditions required for establishments and thereby deprive of all practical effectiveness the provisions of the Treaty whose object is, precisely, to guarantee the freedom to provide services." Lastly, in the Webb case (of 17 December 1981, Case 279/80), the Court added that the freedom to provide services requires that "[...] the Member States in which the service is provided [...] takes into account the evidence and guarantee already produced by the provider of the services for the pursuit of his activities in the Member State in which he is established."

(58) For example, the Member States in which the service is provided must accept the equivalent qualifications already acquired by the service provider in another Member State which attest to his professional, technical and financial capacities. Apart from applying the technical harmonisation directives, agreements on mutual recognition of voluntary certification systems can constitute proof that the qualifications of enterprises are equivalent; these agreements can be based on accreditation, which provide proof that the conformity assessment body is competent.

(59) Judgment of 15 March 1988, Case 147/86, Commission v. Greece.

(60) Judgment of 21 June 1974, Case 2/74, Reyners.

(61) Conclusions of Advocate-General Mischo in Case C-3/88, Data Processing, referred to above.

(62) Judgment of 15 March 1988, Case 147/86, referred to above.

(63) Cases C-3/88 and C-272/91, Data Processing and Lottomatica, referred to above.

(64) Case T-260/94, Air Inter SA, referred to above. For example, the Court rejected the application of the exception relating to public policy when it was supported by insufficient reasons and the objective could be achieved by other means which did not restrict freedom of establishment or freedom to provide services (recital 15 of the Judgment C-3/88, Data Processing, referred to above.)

(65) Judgment of 28 March 1996, Case C-272/94, Guiot/Climatec.

(66) Judgment of 7 May 1991, Case C-340/89, Vlassopoulou, point 22.

(67) Judgment of 15 October 1987, Case 222/86, Heylens, point 14.

(68) "In order to meet the Directive's aim of ensuring development of effective competition in the award of public works contracts, the criteria and conditions which govern each contract must be given sufficient publicity by the authorities awarding contracts" (Judgment of 20 September 1988, Case 31/87, Beentjes, point 21).

(69) It should be reiterated that, under Article 3(2) of the Directive, the contracting authority may require the concessionaire to award to third parties contracts representing a minimum percentage of the total value of the work. The contracting authority may also request the candidates for concession contracts to specify this minimum percentage in their tenders.

(70) This is also the case for service concessionaires who are awarding authorities under these Directives. The provisions of the Directives apply to procedures to award concession contracts.

(71) In this context, it should be noted that Advocate-General Elmer, in Case C-433/93, Commission v. Germany, found that according to the case law of the Court (the Judgments of 20 September 1988, in Case 31/87, Beentjes, and 22 June 1989, in Case 103/88, Constanzo) "the Directives on public contracts confer on individuals rights which they may exercise, in certain conditions, directly before the national courts, vis-à-vis the State and awarding authorities". The Advocate-General also maintainted that Directive 89/665/EEC, adopted after this judgment, did not seek to restrict the rights which case law confers on individuals vis-à-vis public authorities. On the contrary, the Directive sought to reinforce "the existing arrangements at both national and Community levels ... particularly at a stage when infringements can be corrected" (second recital of Directive 89/665/EEC).

(72) Nonetheless, insofar as the concessionaire has exclusive or special rights for activities governed by the Utilities Directive, he must comply with this Directive's rules on public contracts.

(73) For example, the Telaustria case referred to above.

Delta-ets

HELPING YOUR ORGANISATION BECOME COMPLIANT

SUPPORTING BEST VALUE PROCUREMENT

Vault provides a totally secure means to store and transmit Invitation to Tender (ITT) documentation and then to receive and manage responses electronically via the internet.

Select is the national supplier information database (SID) developed to help public sector buyers manage and rationalise their suppliers for the procurement process.

delta e-tendering suite

Delta-ets is a fully supported low-cost eTendering solution that offers auditability and compliance on every occasion

Project allows you to create, manage and transmit your contract opportunities electronically. Project facilitates the compliant creation and management of all types of OJEU and non-OJEU (lower-value) contract announcements.

aXcess is a Buyer Profile service that ensures you are compliant with EU and UK Procurement Regulations.

A Buyer Profile is a dedicated online area containing procurement-related information and a wide range of contract announcements.

REGISTER FREE NOW **www.delta-ets.com**

For more information please call: 0845 270 7090 or email: psst@delta-ets.com

BiP SOLUTIONS 25 YEARS 1984 - 2009 DELIVERING INNOVATIVE SOLUTIONS

project e-notice service | aXcess buyer profile service | select supplier information database | vault secure exchange | delta e-tendering suite

FREE ENTRY

Procurex™ NATIONAL

THE PROCUREMENT EXHIBITION

9-10 March 2010
National Exhibition Centre, Birmingham

The Public & Private Sector Procurement Exhibition – Connecting Buyers & Suppliers

Recognising the changing face of public and private sector procurement, Procurex National 2010 will reflect the diversity of buyer/supplier procurement chains across the UK. Procurex National will create a forum for business development across public/private markets and the opportunity to harness best practice in all areas of purchasing.

In the current climate, best value has a far-reaching impact. Ensure that your organisation or business is embracing the efficiency saving challenge by attending this important conference.

Why attend?

- Develop new business relationships
- Access FREE procurement skills workshops
- Gain a real understanding of market trends
- Access the latest innovation
- Networking opportunities

Exhibition • Conferences • Workshops • Buyer Engagement • Networking

ORGANISED BY BIP SOLUTIONS EVENTS MANAGEMENT 25 YEARS 1984–2009 DELIVERING INNOVATIVE SOLUTIONS

Register **FREE** today at

www.procurexnational.co.uk