An overview of Member States' current regimes in the area of awarding concession contracts

Workshop on the award of concessions contracts

European Parliament

Rechtsanwalt Fabian Schmitz-Grethlein

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In order to categorize we approached the legislation of member states first and established five categories with regard to the legal handling of concessions in national law.

**Legal definitions in national legislation**

<table>
<thead>
<tr>
<th>Category 1</th>
<th>Belgium, Germany</th>
</tr>
</thead>
<tbody>
<tr>
<td>Only Works Concession defined, simple transposition of Art. 1 lit. 3 of Directive 2004/18 EC</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Category 2</th>
<th>Bulgaria, Czech Republic, France, Hungary, Lithuania, Poland, Portugal, Spain, UK</th>
</tr>
</thead>
<tbody>
<tr>
<td>Own legislation concerning works concessions (as far as Annex II of the Impact assessment mentioned works concessions)</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Category 3</th>
<th>Cyprus, Denmark, Estonia, Finland, Greece, Luxemburg, Netherlands, Sweden, UK</th>
</tr>
</thead>
<tbody>
<tr>
<td>Definition of service concessions – transposition of Art. 1 lit. 4 of Directive 2004/18 EC but no other provisions</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Category 4</th>
<th>Italy, Irland, Malta, Austria, Romania</th>
</tr>
</thead>
<tbody>
<tr>
<td>Definition of service concessions same as in Directive 2004/18, Art. 1 lit. 4 AND provisions concerning i.e. threshold, procedures, publication etc…</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Category 5</th>
<th>Bulgaria, Czech Republic, France, Hungary, Latvia, Lithuania, Poland, Portugal, Slovakia, Slovenia, Spain</th>
</tr>
</thead>
<tbody>
<tr>
<td>Own definition of service concessions, especially regarding length and/or risk AND special legislation</td>
<td></td>
</tr>
</tbody>
</table>
In order to present an overview on legal concepts with regard to concessions we have focussed on those legislations providing own concepts regarding service concessions.

Category 5 Member States

- **Poland**
  - Act on Concessions for Works or Services

- **Czech Republic**
  - Concession Act

- **France**
  - Loi Sapin

- **Portugal**
  - Public Contracts Code

- **Spain**
  - Act on Public Sector Procurement

- **Slovakia**
  - Act on Public Procurement

- **Latvia**
  - Law on Public-Private Partnership

- **Lithuania**
  - Law on Concessions

- **Bulgaria**
  - Concessions Act

- **Slovenia**
  - Public-Private Partnership Act

- **Hungary**
  - Public Procurement Act
The basic concept of service concessions common to all definitions is easy to identify, however there are substantial differences in the details.

The concept of concessions

- **Granting of a right**
  - Member State
  - Concessionaire
  - BG: the right to operate a facility of public interest
  - CZ: Concessionaire undertakes to provide services […]
  - FR: public authority delegates the operation of a public utility or infrastructure
  - HU: transfer of the right to exploit the provision of the relevant services
  - LV: by order of a public partner provides the services

- **Remuneration**
  - Concessionaire
  - User
  - BG: right to exploit the object of the concession
  - CZ: enjoy benefits from the provision […]
  - FR: revenues must substantially derive from the end-users of this utility or infrastructure
  - HU: right of exploitation
  - LV: right to exploit
The basic concept of service concessions common to all definitions is easy to identify, however there are substantial differences in the details.

The concept of concessions II

<table>
<thead>
<tr>
<th>Granting of a right</th>
<th>Remuneration</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Member State</strong></td>
<td><strong>User</strong></td>
</tr>
<tr>
<td>LT: authorisation granted to engage in economic activity</td>
<td>LT: income from the activity</td>
</tr>
<tr>
<td>PL: obliged to perform the subject of concession</td>
<td>PL: authority’s payment may not lead to the total recovery of the expenditure</td>
</tr>
<tr>
<td>PT: concessionnaire undertakes to manage an activity of public service provision</td>
<td>PT: financial results of that management</td>
</tr>
<tr>
<td>SK: same type as a service contract</td>
<td>SK: right to exploit</td>
</tr>
<tr>
<td>SL: award of a special or exclusive right</td>
<td>SL: right of use, operation and exploitation</td>
</tr>
<tr>
<td>ES: authority entails a person the management of a public service</td>
<td>ES: exploit by private operators</td>
</tr>
</tbody>
</table>
Although most definitions entail the notion of risk, there are relevant differences in the definition and scope of the risk to be transferred. The notion of (operational) risk as the key element for the distinction between concessions and public contracts.

- **Slovakia and Hungary**: do not mention the notion of risk.
- **France**: “risque d’exploitation”*
- **Slovenia**: commercial risk.
- **Poland**: economic risk of the performed concession.
- **Portugal**: transfer of risk.
- **Spain**: the risk of the contract.
- **Bulgaria**: the risk pertinent to the management and maintenance.
- **Latvia**: the exploitation risks.
- **Czech Republic**: the risks attaching to the enjoyment of benefits from the provision of services or the exploitation of the executed work …
- **Lithuania**: operating risk.

* defined in jurisdiction only
There are as well relevant differences in the degree of risk that is to be taken by the concessionaire.

The notion of risk: the degree of risk

- **Lithuania:** all or part of the operating risk
- **Poland:** significant part of the economic risk
- **Czech Republic:** substantial part of the risks
- **Spain:** concessionaire will assume the risk of the contract
- **Portugal:** significant and effective transfer of risk
- **Bulgaria:** the bulk of the risk
- **Latvia:** the exploitation risks [...] or the most essential parts
- **Slovenia:** no concession, when public partner bears majority of commercial risk
- **Lithuania:** all or part of the operating risk
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Regarding the duration of concessions, the concepts seem to have in common the limitation, but the permissible length varies.

The notion of length

**Czech Republic:** only for a **definite** period

**Slovakia:** for an **agreed time**

**Bulgaria:** term **not longer than 35 years**

**Latvia:** for a period of time of **up to 30 years**

**Poland:** Duration shall **not be longer than 15 years**

**Hungary:**
- **Specific period** of time

**Slovenia:**
- long-term relationships established for a **fixed period**

**Portugal:** For a **certain period**

**Spain:** from **no longer than 10 years up to 60 years** for some type of service concessions

**Lithuania:**
- May **not exceed 25 years**

**France:**
- The concessions shall be **limited**. For certain sectors not longer than **20 years**.
Regarding the calculation of value only a few member states have adopted a special provision

<table>
<thead>
<tr>
<th>Country</th>
<th>Calculation of value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Slovenia</td>
<td>no provisions</td>
</tr>
<tr>
<td>Slovakia</td>
<td>general rules with regard to contracts</td>
</tr>
<tr>
<td>France</td>
<td>No specific rules for concessions</td>
</tr>
<tr>
<td>Spain</td>
<td>No specific rules for concessions</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>Estimated costs for construction, management and maintenance, and the projected exploitation revenue</td>
</tr>
<tr>
<td>Lithuania</td>
<td>No specific rules for concessions</td>
</tr>
<tr>
<td>Poland</td>
<td>No specific rules for concessions</td>
</tr>
<tr>
<td>Hungary</td>
<td>No specific rules for concessions</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>Estimated value of the subject-matter of a concession contract, and the estimated total revenue of the concessionaire ensuing from the performance of the concession contract</td>
</tr>
<tr>
<td>Latvia</td>
<td>The contract value shall be determined as the planned total payment of the public partner</td>
</tr>
</tbody>
</table>
Not all analyzed Member States know exclusions or/and special treatments, and the concepts are different

Exclusions and special treatments

**Spain, Portugal and Latvia:**
not found

**Lithuania:**
Application only in Sectors listed in law

**France:**
Exclusion for certain kind of concessions and simplified procedure below a certain threshold

**Bulgaria:**
Different legal regimes for different contracting authorities or sectors

**Slovakia:**
Exclusion for certain sectors

**Hungary:**
simplified procedures for Concessions of Category B

**Slovenia:**
Special provisions for equity partnerships

**Poland:**
Exclusion for different sectors (security, telecom...)

**Czech Republic:**
Special treatment for “major concession contracts”, exclusion for certain sectors (security, telecom...)

**Slovenia:**
Special provisions for equity partnerships
Thank you for your attention!