The challenge of regulating the award of concession contracts and PPP

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Current European rules for award of concession contracts

- Works concessions are subject to less procedural requirements in Directive 2004/18 than are public works contracts
- Service concessions are excluded from the scope of Directive 2004/18
- Both works and service concessions are excluded from the scope of Directive 2004/17
Different award procedures for concession contracts

- Award of concession contracts is regulated differently from that for public contracts.

- A wide range of arguments have been expressed to justify different award procedures based on the idea that concession contracts are considered to be conceptually different from public contracts and so should not be subject to similar award rules.
Initiative on concessions – Key questions

- Is there a need for the award of concession contracts to be regulated by secondary legislation at EU level?
- If so, what kind of regulation is needed?
Is the current situation satisfactory?

- Different definitions/regimes in different Member States
- Variable application of the principles of transparency, equal treatment and non-discrimination
- Insufficient legal certainty arising from case law of the European Court of Justice
- Insufficient legal protection of tenderers
Does the award procedure for concession contracts matter in the context of PPP?

- Concession contracts are an important form of PPP (c60% of PPP are concessions)

- PPP are crucial to the delivery of Europe’s transport, energy and digital networks

- PPP are a form of public procurement which often comprise long-term high value contracts

- If PPP are not awarded by transparent and competitive procurement, the already high costs of modernising EU infrastructure are likely to become even higher
Will alternatives to secondary legislation at EU level work?

- Allowing the evolution of the legal framework by CJEU case law?
- The Commission to pursue more infringements?
- The Commission to issue an Interpretative Communication to clarify the law as it currently stands?
Need for secondary legislation at EU level?

- There are high value contracts not subject to secondary legislation
- Do nothing and alternatives to secondary legislation are options assessed as unsatisfactory by the Commission
What kind of secondary legislation?

- Stand-alone Concessions Directive
- Incorporating additional rules for the award of concession contracts (including for service concessions) into the new Public Procurement Directives
- Subjecting concession contracts to the same award procedures as those for public contracts
A Concessions Directive (or separate rules for concession contracts in the Public Procurement Directives) is based on the idea that different award procedures are justified because concession contracts are conceptually different from public contracts.

Subjecting concession contracts to the same award procedures as those for public contracts would in effect abolish the distinction between public contracts and concession contracts.
Are different rules for award of concession contracts as compared to public contracts really justified? – 1

- Is there still a need to apply Treaty principles and core public procurement principles in concession contracts?

- Is there still a need for value for money in concession contracts?

- Are different rules for award of concession contracts justified by additional risk/responsibilities accepted by the concessionaire in a concession contract as compared to the economic operator of a public contract?
Are different rules for award of concession contracts as compared to public contracts really justified? – 2

- Are different rules for award of concession contracts justified by the length of concession contracts?
- Are different rules for concession contracts justified by the source of payment to the economic operator?
- Are different rules for concession contracts justified by the greater need for negotiations on the terms of concession contracts?
Are different rules for award of concession contracts as compared to public contracts really justified? – 3

- Do similar rules for the award of concession contracts and public contracts infringe on subsidiarity?
- Are similar rules for the award of concession contracts and public contracts inconsistent with Protocol 26 of the TFEU?
- Will different rules hinder the practice of illegal direct awards?
The case for different award procedures for concession contracts must be made by those seeking to justify them.

Different procedures for the award of public contracts and concession contracts are in fact difficult to justify.

The need for secondary legislation (compliance with public procurement principles, value for money, legal certainty, protection of tenderers) could be best met by applying similar award procedures for public contracts and concession contracts.
The new rules in the draft Directive are likely to improve transparency for all concessions and will improve the legal protection of tenderers.

But... significant areas of legal uncertainty will remain.
European PPP Forum

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