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Regulation of concessions – a new territory
for the Public Procurement Directives

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1. The European regulation of concessions

The regulation of concessions within the EU and particularly in the area of public procurement law has so far been very limited and scattered. This has meant that there has been some doubt over the legal status of concessions in connection with the conclusion of public concession contracts. The current Public Procurement Directive (2004/18) contains only a few provisions on concessions – Article 1 (3) and (4) (definitions of construction and service concessions, respectively), Article 17 (exclusion of service concessions from the scope of the directive), and Article 56–65 (certain rules for construction concessions). The provisions for construction concessions do not entail a procurement obligation in line with those applying for public contracts. The rules, however, contain provisions on threshold values, on publication, about deadlines, subcontracting, allocation of additional works to concessionaires as well as different provisions for different types of concessionaires. Likewise, there are exceptions in the Utilities Directive (2004/17), see Article 18. These have very much been identical to those found in the Public Procurement Directive. In the Directive on Defence and Security Procurement (Directive 2009/81) there are no rules on concessions.

Whilst the current directives' have limited relevance for concessions, this is not so in relation to Court of Justice case law, the significance of which has increased over the past 15 years. During this period of time the Court has delivered a number of judgments about concession contracts and certain other public contracts which have relevance for concession contracts. Where the directives are not applied, the main source of public entities' obligations is general EU principles and TFEU's rules on free movement. This has been clear for several decades², but in relation to concessions, the relevance was not really emphasized until the judgment in C-324/98, *Telaustria* where the Court took the first step on the long winding journey concerning obligations for public contracts which were not (or only partially) covered by the directives' procedural rules, such as concessions. This practice has been developed significantly since the *Telaustria* decision through the case law of the Court. The main features were laid down

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² See for example case 45/87, the *Commission v Ireland (Dundalk)* and case 31/87, *Beentjes*.

with the *Unitron* and *Telaustria* cases³, in which it was determined that the principles of transparency and equal treatment/non-discrimination must be complied with even where the public procurement rules do not apply.⁴ Despite the effort of the Court of Justice and the Commission on increasing knowledge and transparency on the specific obligations which contracting entities are subject to in connection with the conclusion of concession contracts, there have been many uncertainties about the legal situation. The adoption of Directive 2014/23 can be seen as a natural extension of this development.

The purpose of this article is to present selected provisions of the Concession Directive and to compare these with the provisions of the other public procurement directives.

1.1 The previous regime in brief

As mentioned above, the previous concession regime has primarily consisted of the regulation in the TFEU and fundamental principles of EU law. It is not possible to describe the current legal position in relation to all relevant decisions in just a few lines.⁵ The main characteristic of the present practice is that the Court of Justice of the European Union requires compliance with the principle of equal treatment, the non-discrimination principle and principle of transparency. Furthermore, it is emphasised that the obligation of transparency entails the establishment of an appropriate level of transparency *about* the contract and procedure and *during* the procedure. The principle of equal treatment and the non-discrimination principle entail that the procedures which are set up and applied during a tender must ensure that all participating undertakings are treated equally. For more information about the specific obligations outlined via

³ See C-275/98, *Unitron* and C-324/98, *Telaustria*.

⁴ For more information about this practice, see Andrea Sundstrand: *Public procurement – Primary Law regulating Public Contracts*, and Carina Risvig Hansen (now: Hamer): *Contracts not covered or not fully covered by the Public Sector Directive*.

⁵ Practice is so comprehensive that in recent years have given rise to doctoral dissertations, see Andrea Sundstrand: *Public procurement – Primary Law regulating Public Contracts*, and Carina Risvig Hansen (now: Hamer): *Contracts not covered or not fully covered by the Public Sector Directive*. In addition, there is a very large number of contributions of articles, see among others, Peter Braun: *A Matter of Principle(s): The Treatment of Contracts Falling Outside the scope of the European Public Procurement Directives*, PPLR, 2000, p. 39, Adrian Brown: *EU Primary Law Requirements in practice: Advertising, Procedures and remedies for Public Contracts outside the Procurement Directives*, PPLR, 2010, p. 169, Richard Craven, *EU's 2014 Concessions Directive*, PPLR., 2014 p. 188, Michael Burnett, *The New European Directive on the Award of Concession Contracts – Promoting Value for Money in PPP Contracts? European Procurement & Public Private Partnership Law Review*, 2014, p. 86 and Albert Sanchez-Graells, *What Need and Logic for a New Directive on Concessions, Particularly Regarding the Issue of their Economic Balance?* (2012) EPPPLRev., 2012, p. 94.

practice, see Andrea Sundstrand: Public procurement – Primary Law regulating Public Contracts, chapters 5–7.

A part of the obligations established are specific to the application on contract awards outside the scope of the procurement directives. In certain areas there seem to be identity between the state of law for contract awards covered by the Directives and for contract awards only covered by Primary Law. For example, this is the situation with respect to case law concerning in-house arrangements and the case law concerning changes to existing contracts. On the background of the Public Procurement Directive there has been a consistent branch of case law since C-107/98, Teckal, according to which the contracting authority has been able to award contracts to so-called in-house entities without the use of a tender procedure. Following this case law the contracting authority may award a contract to an external entity which is controlled by the contracting authority and which conducts the majority of its activities for the contracting authority, see the Teckal-case and subsequent case law. This case law has also been extended to concession contracts where the relevant question is if the TFEU (and not the directive) is applicable to such awards of contract, see C-324/07, Coditel Brabant and case C-573/07, Sea. As regard the possibilities of changing existing contracts the Court stated in C-91/08, Wall that such changes of a contract are allowed to the extent that this does not introduce significant change in the contract (see paragraph 37 and 38). This approach is in accordance with the corresponding case law within the directive (see C-454/06, Presstext). Regarding both in house-providing and changes of contracts these topics are both codified in the new Concessions Directive, even though the case law is somehow modified in the new provisions.

Although practice as a starting point is based on independent treaty provisions and principles, then, to a certain extent, there has been an overlap between the previous Public Procurement Directives' provisions and the Treaty's obligations in such a way that the previous long-standing practice regarding the Public Procurement Directives has been used as a guideline for the interpretation of the TFEU in different ways.⁶

⁶ See, for example, the cases C-359/93, the Commission v the Netherlands (UNIX) and C-458/03, Parking Brixen. This approach may be criticized, as a secondary regulation will determine interpretation of primary legislation. If the approach is used uncritically, it will conflict with the common source of law, which, of course, is untenable. See also Treumer and Werlauff: The leverage Principle: Secondary Law as a lever on the Development of Primary Community Law, in the European Law Review, 2003, p. 124 ff and before that Michael Steinicke: Varenes frie bevægelighed og offentlige indkøb, for example, p. 159 ff).

1.2 The need for separate regulation

Since the *Telaustria* case there has been a lot of focus on concessions and the specifics of the state of law for such contracts. In addition to the cases which the Court of Justice subsequently has reviewed, concessions have also been in focus in connection with the new Public Procurement Directives, both in connection with the adoption of the 2004 directives and, of course, with the 2014 directives. Furthermore, the Commission has used the tools available to them to provide an overview of the legal position for the conclusion of concession contracts and has, among other things, prepared several documents on concession contracts.⁷

Based on the current situation, there seemed to be three possible ways for the further development of the regulation of concession contracts before the work of the recently adopted Public Procurement Directives was started: First of all, the interpretation from the Court of Justice of the obligations of the Treaty could be continued as the primary basis for the development of rights and obligations for contracting authorities which want to enter into a concession contract. A continuation of this legal regime would also mean a continuation of the previous drawbacks and advantages where the greatest advantage is more flexible framework for tenders than the procurement directives, and where the biggest disadvantage has been a lack of clarity regarding the legal status.⁸ Another possibility was to allow the involvement of concessions under the already existing Public Procurement Directives. This model would result in the concessions becoming subject to the more detailed set of rules than the current flexible framework which exists in the Treaty. The model only makes sense if the entering of concession contracts becomes subject to the same framework as the entering of ordinary public contracts. The third and more balanced model of how to regulate conclusion of concession contracts is an actual set of rules with an exclusive focus on concessions. This model provides the option of a more balanced protection of both legal rights for the contracting entities (knowledge of the obligations that follow with the conclusion of a concession contract) and flexibility on conclusion of the contract.

⁷ For more information about the efforts to clarify the legal status from *Telaustria* and onwards, see Andrea Sundstrand: *Public procurement – Primary Law regulating Public Contracts*, p. 108 ff. The Commission's contributions are primarily the Green Paper on public-private partnerships and community law on public procurement and concessions, COM(2004)327, the Commission's interpretative communication on concessions in EU legislation (the Official Journal 2000/C 121/2), as well as the interpretive communication of public contracts which are not or are not fully covered by the EU public procurement rules (the Official Journal 2006/C 179/2).

⁸ The uncertain state of law is due to several factors associated with the Court's decisions. First of all submitted cases are typically answered very specifically, which does not leave more general considerations about the legal status. Secondly, the opportunities of the Court of Justice to comment on the cases depend on which cases and questions are submitted. As a result, there is a delay and a certain randomness in relation to clarifying the legal status.

As the adoption of the directive 2014/23 on concession contracts has shown, the legislator has chosen the latter solution.

The conditions that have proved to be crucial for choosing model 3 with a separate regulation through a directive of concession contracts can be seen in the 1st recital in the preamble to the Concessions Directive: “The absence of clear rules at Union level governing the award of concession contracts gives rise to legal uncertainty and to obstacles to the free provision of services and causes distortions in the functioning of the internal market. As a result, economic operators, in particular small and medium-sized enterprises (SMEs), are being deprived of their rights within the internal market and miss out on important business opportunities, while public authorities may not find the best use of public money so that Union citizens benefit from quality services at best prices. *An adequate, balanced and flexible legal framework* for the award of concessions would ensure effective and non-discriminatory access to the market to all Union economic operators and legal certainty, favouring public investments in infrastructures and strategic services to the citizen. Such a legal framework would also afford greater legal certainty to economic operators and could be a basis for and means of further opening up international public procurement markets and boosting world trade. Particular importance should be given to improving the access opportunities of SMEs throughout the Union concession markets.” (my italics) Based on the requirements in the directive, (as they appear from the preamble) a continuous regulation via the Treaty would not be adequate as the legal status and development of the Treaty cannot provide sufficient clarity about the current legal status. It is also clear that the special needs which the legislator has requested be implemented for the concession directives have made it impossible just to place the conclusion of concession contracts within the framework of one of the other directives as, for example, the procedural rules and the contracting entity’s general autonomy in relation to the conclusion of concession contracts differ from the more detailed regulation which has been requested for public contracts. Based on the requirements for the regulation of the concession contracts, only regulation of an independent directive could meet the above-mentioned goals. Paragraph 3 below provides an assessment of the prospects for achieving the goals.

2. The new regulation of concessions – directive 2014/23

The European Parliament’s and Council’s Directive 2014/23 of 26 February 2014 on award of concession contracts includes 88 recitals in the preamble, 55 articles and 11 appendices. A general and overall description of the regulation of concessions with the new directive should stipulate that it is a combination of the present practice in the area outside the scope of the Public Procurement

Directives' area (i.e., codification of practice on the basis of the TFEU) and the main provisions in the Public Procurement Directives. Certain provisions are very general and obviously codifications of the extensive case law from the Court of Justice of the European Union (see for example the cases concerning the concept of concessions and particularly the risk element),⁹ where other provisions are very close to the text versions of the articles from the other directives.¹⁰

It is outside the scope of this article to comment on all the provisions of the new Concession Directive. I have therefore decided to focus on two factors. First of all I would like to comment on the definition of concessions as it appears in the new directive. The concept of concessions is essential to determine whether a contract is covered by for example the Public Procurement Directive or the Concession Directive. In addition, the concept of concession in itself has given rise to doubt and legal uncertainty and thus a clarification of the current concept of concession will be a vital prerequisite for success of the directive.

Secondly, the following section will address the adjustment of the procurement process, including the rules for the central procurement-related matters, including tender procedures, selection and award. It turns out that there is a big difference in how the regulation of these important matters has been approached in the new directive. This is an area where the directive alternates between proximity in relation to the Public Procurement Directive and a high degree of flexibility and autonomy for the contracting entities and Member States.

2.1 The concept of concessions

The concept of concessions has previously partly been regulated by the provisions in the Public Procurement Directive and the Utilities Directive and partly by decisions from the Court of Justice. The two different legal bases has contributed with different elements to the definitions of "concession", but has also contributed to an uncertainty as to the exact content of the term concession contract. Of course the Concession Directive has been very focused on correcting this and recital 18 of directive 2014/23 writes:

"Therefore, the definition of concession should be clarified, in particular by referring to the concept of operating risk. The main feature of a concession, the right to exploit the works or services, always implies the transfer to the concessionaire of an operating risk of economic nature involving the possibility that it will not recoup the investments made and the costs incurred in operating the works or services awarded under normal operating conditions even if a part of

⁹ See section 2.1.2 . below.

¹⁰ See, for example, Article 38, (4–10) which is almost identical with Article 57 of the new public procurement directive which in detail regulates the basis for the contracting entity's exclusion of companies from the tender procedure.

the risk remains with the contracting authority or contracting entity. The application of specific rules governing the award of concessions would not be justified if the contracting authority or contracting entity relieved the economic operator of any potential loss, by guaranteeing a minimal revenue, equal or higher to the investments made and the costs that the economic operator has to incur in relation with the performance of the contract.”

The definitions of concessions (for services and building and construction, respectively) are available in Article 5(1) of the directive, where concessions are delimited on the basis of the already well-known definitions in the current regulation (directive 2004/17, Article 1 (3) and directive 2004/18, Article 1 (3) and (4)), but partly includes an addition which is a codification based on the Court of Justice’s statements about the implicit risk factor which is a part of the concept of concessions. Hereafter a concession covers a contract for pecuniary interest concluded in writing, by means of which one or more contracting authorities or contracting entities entrust the execution of works (or a service) to one or more economic operators the consideration for which consists either solely in the right to exploit the works that are the subject of the contract or in that right together with payment. It is a new element in the explicit definition, however, that 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.”¹¹

The concept of concession can then be divided into two parts. First of all, the concession includes the awarding of a *right to exercise* a construction work or a service, and secondly a concession contract implies a transfer of an *operating risk*. Notwithstanding that these two conditions can be regarded separately, the entire point of concession contracts represents a close connection between the right to exercise the service/construction work on the one side and the element of risk on the other side (see also recital 18 in the preamble). In order to help identifying the uncertainty of the concept of concessions, the extended definition of concessions is supplemented with details of the preamble, both in relation to the right of the definition and in relation to the element of risk.

¹¹ Article 5 (1) last item.

2.1.1 The right to exercise ...

In relation to the right to exercise a service or a work, it is relevant to define the exact meaning of “the right”. As the service is often directed to private users or companies – by order of the contracting entity – there may be a need to protect the contractor or the service provider from competition from other economic operators who potentially offer the same service. Therefore, there may be an actual exclusive right which is provided via the contract. As it is typically services which belong to the public sphere, the contracting authority’s granting of the assignment is sufficient in itself: typically, no other economic operators have been assigned the task of performing the service. Thus, the contractual transfer is often adequate protection in relation to the concessionaire. As appears from the preamble, it is interesting in relation to “the right to exercise” the activity that a delimitation is made in relation to corresponding models within the public sector which also exercise the right to an activity. It is pointed out that concession contracts can, but do not necessarily have to trigger a transfer of the right of ownership to the contracting authorities or contracting entities, but that the contracting authorities or entities always get the benefits of the construction works or services in question (recital 11). It is furthermore specified that e.g. the free-choice schemes which are used in several contexts within the public system in the Nordic countries, i.e. the situations where there is granted access to a potential market for all economic operators who meet certain conditions, are not regarded as concessions (recital 13). A similar situation applies to various authorisations (approval or permissions – recital 14) and the economic operator’s right to “exercise certain public areas or resources in accordance with private law or public law such as soil or public property, especially in the maritime sector, inland ports or airports” (recital 15).

2.1.2 Operating risk

The most significant change in relation to the previous directive’s definition of concessions takes place in the shape of a more explicit introduction of the concept operating risk (see recital 18 and the definition of concessions in Article 5, no. 1). In the former it is stated that “The main feature of a concession, the right to exploit the works or services, always implies the transfer to the concessionaire of an operating risk of economic nature involving the possibility that it will not recoup the investments made and the costs incurred in operating the works or services awarded under normal operating conditions even if a part of the risk remains with the contracting authority or contracting entity.” The remark stresses that the entire risk is not (necessarily) going to rest with the concessionaire, but at least a part of it will be, see also C-206/08, WAZV Gotha. The use of special rules for allocation of concessions would not be justified if the contracting

authority or contracting entity indemnified the economic operator for possible losses by guaranteeing a minimum income, which is just as substantial, or even larger than the economic operator's investments and costs in connection with the performance of the contract. At the same time it is, however, emphasised that there may be a concession contract entirely publicly financed as certain arrangements, exclusively paid by the contracting authority or entity, should be regarded as concessions when the recoupment of investments and expenses which the operator has paid for the construction work or the delivery of the service, depend on the specific demand or the delivery of the service or works. Furthermore, regarding contracts which do not involve payments to the contractor or service provider and where the contractor or service provider receives remuneration on the basis of the regulated tariffs, which have been calculated to cover all expenses and investments which are held by the contractor to provide this service, such contracts should not be covered by this directive. (recital 17).

It is furthermore emphasised that in cases where a sector-specific regulation removes the risk so that the concessionaire is guaranteed that revenues and costs and expenses in connection with the concession are balanced, there will be no concession. On the other hand, the fact that the risk in advance is limited does not mean that a concession is not possible. Recital 19 emphasises that the directive can apply to contracts in sectors with regulated tariffs or where the operational risk is limited in the contract as partial compensation is provided "including compensation in the event of early termination of the concession for reasons attributable to the contracting authority or contracting entity or for reasons of force majeure."

Finally, the legislator has found it necessary to point out that an operational risk should originate from factors outside the scope of the parties' control. In cases where a risk is the result of mismanagement, the economic operator's breach of contract, it is not decisive for the classification of concession as this is a risk which can arise in all types of contracts. On the contrary, it is specified that operational risk should be understood as "the risk of exposure to the vagaries of the market, which may consist of either a demand risk or a supply risk, or both a demand and supply risk. Demand risk is to be understood as the risk on actual demand for the works or services which are the object of the contract. Supply risk is to be understood as the risk on the provision of the works or services which are the object of the contract, in particular the risk that the provision of the services will not match demand. For the purpose of assessment of the operating risk the net present value of all the investment, costs and revenues of the concessionaire should be taken into account in a consistent and uniform manner." (recital 20)

2.2 New framework for procedures and criteria

In regard to other rules in the Concession Directive regulating framework for procedures, criteria etc. the Concession Directive includes rules inspired by the Public Procurement Directive as well as the codification of the case law from the Court of Justice. The most obvious inspiration from the Utilities Directive is the delimitation of the personal scope of application: contrary to the Public Procurement Directive, the Concession Directive covers contracts signed by the contracting authorities as well as contracts signed by other “contracting entities”. The last-mentioned concept covers units performing one of the activities mentioned in appendix II (i.e. activities belonging to the Utilities Directive) and which allocate a concession with the intention of performing one of these activities and which is either a contracting authority or a public company or other entities which hold special or exclusive rights for the purposes of performing one of the activities mentioned in appendix II.¹² Overall, contracting entities in the Concession Directive are governed by the same obligations as in the Utilities Directive. In addition the so-called joint venture-rule in the Utilities Directive¹³ has also found its way to the Concession Directive, Article 14.

Below are a number of core questions concerning tenders which the Concession Directive seems to have regulated through the use of the well-established components from the Public Procurement Directive.¹⁴

2.2.1 *Tender procedures*

The design of the tender procedures is one of the most significant areas where the Concession Directive distinguishes itself from the other procurement directives. Whereas the other procurement directives use approximately a handful of the same well-defined award procedures, there are no fixed procedures in the Concession Directive. The reason for this is available in recital 68 of the preamble of the concession directive which states: “Concessions are usually long-term, complex arrangements where the concessionaire assumes responsibilities and risks traditionally borne by the contracting authorities and contracting entities

¹² See similar in Utilities Directive 2014/25 Article 4.

¹³ See the new Utilities Directive 2014/25 Article 30.

¹⁴ In addition to the conditions which are addressed below, there are a number of other significant matters which are subject to an almost identical regulation in the Concession Directive and the Public Procurement Directive, respectively in 2014/24. See, for example the possibility of tender free public to public contracts (in house-providing and horizontal agreements – Public Procurement Directive, Article 12, the Concession Directive, Article 17), the possibility of changing contracts already concluded (Public Procurement Directive Article 72, the Concession Directive, Article 43), and the opportunities for interaction between economic operators (i.e., use of subcontracting – Public Procurement Directive, Article 71 the Concession Directive, Article 42 and the concept economic operator, including establishment of group of companies – the Public Procurement Directive Article 19, the Concession Directive Article 26).

and normally falling within their remit. For that reason, subject to compliance with this Directive and with the principles of transparency and equal treatment, contracting authorities and contracting entities should be allowed considerable flexibility to define and organise the procedure leading to the choice of concessionaire.” The lack of fixed procedures entails a similar larger need for the contracting entity to set the framework for the economic operators’ participation in the tenders. On the basis hereof, the directive lists a range of basic guarantees “as to the awarding process, including information on the nature and scope of the concession, limitation of the number of candidates, the dissemination of information to candidates and tenderers and the availability of appropriate records.” (recital 68). It is, *inter alia*, stipulated that to avoid “unfair treatment” of potential applicants, no deviation from the original conditions in the concession notice should be made.

The foundation for the procedural guarantees which are going to ensure non-discrimination and transparency in the award process is available in Article 37. Subsection 1 of the provision determines that award of a concession contract can be based on the award criteria provided that:

- the tender complies with the minimum requirements (i.e. the conditions and characteristics which the tenders must comply with) which may be determined by the contracting authority or the contracting entity,
- the tender complies with the conditions for participation as mentioned in Article 38(1) (qualification of the economic operators) and
- the tenderer is not excluded pursuant to Articles 38 (4–10) of the provisions to the extent that the conditions for exclusion not to take place has been met.

Article 37 (2) describes that the most important information for the procedure should appear from the concession notice and the other tender documents, respectively.

As is also the case for the Public Procurement Directive, the contracting authority may, according to the Concession Directive, reduce the number of applicants and tenders to a level which the contracting authority finds appropriate. Pursuant to the concession directive as well, the reduction shall be performed according to objective criteria and in a transparent manner, and likewise the final number of applicants should be large enough to ensure a proper competition, cf. Article 37 (3).

The contracting authority shall provide all participants with a description of the projected organisation of the procedure and an instructive completion deadline.¹⁵ In the event of changes, all participants must be informed.

¹⁵ See Article 37 (4).

Among the procedural guarantees, a duty is laid down for the contracting authority to ensure a suitable completion of the most important phases of the procedure by means of the instruments which are found appropriate under proper compliance with the Concession Directive's rules on confidentiality in Article 28, cf. Article 37 (5). *The instruments which the contracting entity finds appropriate* probably covers the contracting authority's choice of the elements which he finds appropriate in connection with a specific tender. Are there, for example, going to be negotiations during the process and/or will rejections of otherwise qualified companies take place before the tenders are submitted?

As the other procurement directives, the Concession Directive contains rules on the possibility to negotiate as Article 37 (6) determines that the contracting authority may negotiate with applicants and tenderers. As an important clarification of the access to negotiate it is also stated that the subject matter for the concession, the award criteria and the minimum requirements shall not be changed in the course of the negotiations.

Basically, the lack of tender procedures means that the contracting authority is allowed to compose the procedure in such a way so it fits into the specific competitive situation and the specific concession contract. As a starting point, this flexibility provides a greater degree of freedom. It is, however, the question of how much is in reality achieved in relation to the current provisions of for example in the Public Procurement Directive, or if the procedures for the award of concession contracts actually will be more or less the same.

2.2.2 The specification of the contract

The regulation of the specification of the contract is stipulated in Article 36, which begins by stating that the technical and functional requirements define the properties required by construction works and services which are linked to the subject matter of the concession. These requirements are stated in concession documents, cf. Article 36 (1). Thus, there is no more clear distinction between, on the one hand, functional requirements, and on the other hand, technical specifications/standards as seen in the Public Procurement Directive. The formulation may, however, cover both standards and similar formal instruments and more functional descriptions of the subject matter of the contract and will thus be in line with Article 23 in the current Public Procurement Directive (Article 42 in the Public Procurement Directive 2014/24). However, there seems to be an indication of a more functional approach to the description of the contract which is also emphasised by the exemplification as stated in the provision. Then, the description of the subject matter of the concession could for example include quality levels, environmental and climate performances, design for all needs (including access for disabled persons), conformity assessment, functionality, security or dimensions, terminology, symbols, testing and test methods, marking

and labelling or instructions for use. As is also the case with the other directives (and in relation to the TFEU) it is not possible to describe the task by referring to a particular product or brand, etc. In exceptional cases it is possible if the subject matter cannot be described precisely or comprehensibly in any other way and provided “or equivalent” after indication of the product is added, see Article 36 (2).

2.2.3 *The selection*

The rules governing the selection are available in the Concession Directive Article 38. In relation to the qualitative selection in the Public Procurement Directive, the rules have been toned down and made more flexible. References are made to technical or professional and financial and economic references, respectively, and it is stated that these competences can be documented via self-declaration and references. There is no express reference to the European Single Procurement Document¹⁶, but such declarations will undoubtedly be able to be used and has probably been in mind of the legislator at the reference to the self-declarations. It is only expressly required that criteria which are set up may not be discriminatory and they must be proportionately to the subject matter of the concession. It is furthermore emphasised that the tenderers can use other entities’ capacities and that the consortiums may rely on the capacities of the participants or that of others entities (third parties). Although these provisions are less detailed as the similar provisions in the Public Procurement Directive, the overall frameworks are basically identical.

Whereas the described regulation of selection in the Concession Directive is more flexible than in the Public Procurement Directive, the legislator has chosen to write the full text of directive 2014/24, Article 57 on exclusion of economic operators into Article 38 (4–10) of the Concession Directive.

The provisions include the well-known reasons for exclusion, the compulsory as well as the voluntary reasons. In relation to the current rules on exclusion in Directive 2004/18, there are, however, certain changes. This is also the case for Article 57 in the new Public Procurement Directive (2014/24). The new rules contain several mandatory grounds for exclusion as a company’s final judgment for participation in terror activities or participation in child labour and other human trafficking obligates the contracting authority to exclude the company. Similarly, the list of voluntary grounds for exclusion is extended: now, violation of environmental legislation and social legislation allow the possibility of exclusion (together with Article 30 (3)), which also applies if the contracting entity has a sufficiently plausible indicator that anti-competitive agreements have been

¹⁶ In Directive 2014/24, a detailed description of Article 59 of the future instrument for the selection process through European Single Procurement Document (ESDP).

entered among the tenderers, or if the contracting authority can show that the economic operator in connection with previous public contracts has demonstrated a behaviour which has given rise to an early cancellation or termination of the contract or the like. Finally, the EU legislators inserted a provision according to which a contracting entity may exclude a tenderer if his participation in the tender will lead to a risk of conflict of interest and this risk has not been able to be removed in any other ways.¹⁷

In relation to the voluntary options for exclusion which are available in the new Public Procurement Directive there is an option to exclude an economic operator that, in connection with an advisory function, has achieved competitive advantages which cannot be removed. It is only natural that a contracting authority applies for and receives advice in connection with the preparation of tenders, including in particular tenders for complex services or infrastructure services which can be seen within the framework of the Concession Directive. The new Public Procurement Directive (2014/24) provides an express opportunity to apply for advice for the preparation of a tender with due respect of non-discrimination and the principles of transparency. There are no similar provisions in the Concession Directive, but the opportunity to receive advice is undoubtedly present. In connection with Articles 40 and 41 of the Public Procurement Directive, Article 57 provides a possibility of exclusion of companies in situations where the companies' advisory function has given the company a competitive advantage which is irreversible and in conflict with the principle of equal treatment or which results in distortion of competition. These provisions call for a few remarks. First of all it is remarkable that a provision on technical dialogue and advice has been inserted in the Public Procurement Directive, but not in the Concession Directive. The need for any initial technical dialogue as preparation for an invitation to a tender for a public service contract does not seem to be more different than the need for preparation in connection with an invitation to a tender for a service concession. As the related provision on conflicts of interest has been inserted in both new directives (Public Procurement Directive, Article 24 and the Concession Directive, Article 35) the difference regarding technical dialogue seems even more remarkable. Secondly, the question is whether there will actually be any difference in the legal status after the Public Procurement Directive on exclusion of economic operators and the legal status after the Concession Directive. Regardless of the lack of rules on technical dialogue, the situation has to be interpreted in such a way that if a company participates in a tender, and at the same time has achieved a competitive advantage through its role as adviser in connection with preparation of the tender, the correct handling of this situation is to exclude the relevant economic operator from the tender.

¹⁷ See Article 35 the Concession Directive.

This has to be a natural consequence of the application of the principle of equal treatment; in this connection see C-21/03 and C-34/03, *Fabricom*. The principle of equal treatment will then demand, in the event of a competitive advantage in connection with a consulting assignment before the completion of a call for tenders, that the company in question is excluded from the competition. The exclusion of the company results in a third remark in relation to Article 57 (4) (f) of the new Public Procurement Directive. In this directive the access to exclusion in the described situation is stated as an opportunity (the company *can* be excluded), whereas the obligation according to the principle of equal treatment is a requirement (the company *must* be excluded). In other words, the legislator ought to have this ground for exclusion listed under the mandatory grounds for exclusion and not under the voluntary grounds for exclusion. The same applies for the ground for exclusion concerning conflicts of interest (Concession Directive, Article 38 (7) (d) and Public Procurement Directive 2014/24, Article 57 (4) (e) which is also stated to be an *opportunity* to exclude, but which should be an *obligation* to exclude.

2.2.4 Award

The Concession Directive lays down the framework for the award of the contract in Article 41. At first glance, the provision is designed very differently than the similar provision in directive 2014/24, Article 67. On closer investigation, there are, however, minor differences between the real opportunities to lay down and to use award criteria in the new Public Procurement Directive and the Concession Directive, respectively. In Article 41 (1) it is written that concessions must be awarded on the basis of objective criteria which observe the principles of Article 3, and which also ensure that the tenders are evaluated on proper competitive conditions so that the contracting authority all in all obtains an economic advantage. The wording of Article 41 is not similar to Article 67 in the new Public Procurement Directive, but the requirements in the former regarding observance of the principles so the tenders are assessed on proper competitive conditions, so the contracting authority achieves a financial advantage, as well as the possibilities to determine award criteria, is very similar to the basic requirements for the award process in Article 67. Similarly the Concession Directive Article 41 (2) strengthens the similarity with directive 2014/24: according to the established case law of the Court of Justice of the European Union, the current Public Procurement Directive and in accordance with the new directive, it is conditions for the choice of award criteria that the criteria must be linked to the subject matter of the contract, that the contracting entity does not obtain unlimited freedom of choice through the criteria and that the criteria must be accompanied by demands which allow an effective control of the tenderer's information. In

addition, Article 41 (3) of the Concession Directive also states that in relation to concession contracts as well it is possible to use several part- or sub-criteria.

The only circumstances which seem to result in an actual change in relation to the framework for the preparation of the award criteria in the Public Procurement Directive is the fact that after the Concession Directive, it is possible “just” to indicate award criteria in order of priority. According to the Public Procurement Directive (new and existing), there is still a requirement of weighting the criteria, where this is possible. In continuation hereof, Article 41 (3) of the Concession Directive also allows for an exception to change the order of the award criteria if the contracting entity receives an offer that proposes an innovative solution with an extraordinary level of functionality which a careful contracting authority or contracting entity could not have anticipated. The change of the order could then be executed in order to show consideration for the innovative solution while still requiring that no discrimination takes place due to the change. The wording of Article 41 (3) does not give any indication of when the principle of equal treatment is respected in connection with a new order of the award criteria. In the event that a new order of the criteria means that the tenderer which previously had a position to win the tender is now pushed down to a lower placement due to a change of the order of the criteria, then that’s discriminatory. Whereas the provision in Article 41 does not provide any indication of what is needed to avoid discrimination after the determination of a new order, recital 73 of the preamble states that a change of the order can take place provided that such a change ensures equal treatment of all current or potential tenderers by launching a new invitation to tender or possibly publish a new concession notice. If it is necessary to take all potential tenderers into account, it will probably often be necessary to start all over, or in a proper manner ensure that all tenderers that may have failed to take part in the first tender due to the prioritisation of the award criteria will have a real opportunity to participate subject to the changed conditions.

3. Assessment: Is directive 2014/23 a step in the right direction?

An overall assessment of the new Concession Directive is that the directive is a comprehensive mix of the more detailed directives on the one hand, and the Court of Justice’ case law concerning concession contracts on the other side. Whether the balance between the two extremities is satisfactory depends on the requirement one might have to the new regulation. However, the directive is more comprehensive and detailed than the mere compilation of the Court of Justice of the European Union’s case law on the concession area. In a number of the provisions where there seems to be a relatively high degree of autonomy and flexibility for the contracting authority or unit, it turns out that these options in

reality are closer to the essence of the formulations found in the more detailed directives than the Court's open case law. The Concession Directive is close to the current and in particular the future directives.

The great advantage that is connected to the new regulation is the establishment of improved legal certainty for the contracting authorities when using concession contracts. In relation to the definition of concessions, the Concession Directive contains useful clarification which provides a better basis for the contracting authority's decision as to whether they want to use concession contracts as an instrument instead of public contracts. With the new directive there is a large amount of identity since the same formal instruments criteria, principles, etc. are used. This ought to provide security in connection with the use of the new rules. From a practical point of view, the contracting entities will be able to see the application of their normal tender processes, also in connection with concession contracts.

From a negative perspective it also seems fair to mention that the new Concession Directive does not contribute with much more flexibility compared with the other procurement directives.

The exact application of the directive and the appropriateness of the new rules depend on the implementation of the rules in the national legal systems.

In relation to the biggest difference from the other directives, namely the lack of defined tender procedures, then first of all it can be discussed to which extent there are special conditions in relation to concession contracts which justify the different approach, and likewise it can also be considered whether the absence of public procurement procedures actually makes any major difference compared with the other directives.

It could be argued that a number of the contracts concluded within the framework of for example the Public Procurement Directive are also complex and even of a long standing nature. The Public Procurement Directive also covers large infrastructure projects, complicated IT contracts as well as different types of Public-Private Partnerships contracts. These types of contracts are also characterised by a high degree of complexity and in this way they may be comparable with concession contracts. Accordingly, it can be considered whether it would not have been sufficient to complete tenders for concession contracts within the framework of some of the well-known procedures. One possibility was either to make negotiated procedure and/or a competitive dialogue available within the framework of the Concession Directive.

With regard to the consideration of whether the lack of fixed tender procedures make a real difference for the contracting authorities, the Concession Directive's framework can be summed up so the individual building blocks in relation to the already known public procurement procedures are present in the new directive, but it is left for the contracting authority how to combine these.

The framework for designing a tender procedure on your own will be limited by the framework for deadlines, award and negotiations, which is why the freedom which basically lies in the fact that the contracting entity determines the tender process does not have full impact.

One of the most important arguments in favour of introducing specific rules for concessions is the legislator's request of improving the opportunities for SMEs' access to concession contracts. It may very well be that SMEs will benefit from the approximation of the concession rules to the other public procurement rules, which directive 2014/23 is an expression of. As concessions often are extensive and can be complicated contracts, the question is whether there actually is basis for the improvement of SMEs' access to concession contracts. Such contracts are rarely of any real interest for SMEs. However, only time will tell whether there will be a greater interest in the access to the tenders of concession contracts for SME due to the new directive.