



Public Procurement

2014 EU Directives: Concessions

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Introduction

Publication of a Concessions Directive: On 28 March 2014, following a three-year period of extensive negotiations, the new directive 2014/23/EU on the award of concession contracts (“Concessions Directive”)¹ was published in the *Official Journal of the European Union (OJEU)* as part of a “legislative package” reforming the EU procurement rules. On the same day, the directives 2014/24/EU (2014 Public Sector Directive) and 2014/25/EU (2014 Utilities Directive)², relating to procurement by public sector contracting authorities and utilities entities and replacing the EU procurement directives of 2004³, were also published.

The texts of the Concessions Directive and the two other directives can be downloaded by using the following link:

<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2014:094:TOC>

Deadline for implementation: The deadline for the transposition by EU Member States of the Concessions Directive into national law is 18 April 2016. In principle, the provisions of the Concessions Directive are not binding prior to the date of transposition (or prior to the date on which these provisions should have been transposed, i.e. 18 April 2016). Before that date, the award of services concessions is nevertheless subject to the general principles set out by the Court of Justice of the European Union (CJEU) in its case law, and the award of works concessions falls under the directive 2004/18/EC (2004 Public Sector Directive).

This procurement brief gives an overview on the new legal framework for the award of concessions. It is not intended to provide an exhaustive analysis of all of the provisions of the Concessions Directive. A separate procurement brief (no. 30) focuses on the 2014 Public Sector Directive and the 2014 Utilities Directive.

Reasons for enacting a directive on the award of concessions: Public procurement is one of the market-based instruments to be used to deliver the Europe 2020⁴ strategy for smart, sustainable and inclusive growth by aiming to:

- improve the conditions for business to innovate
- encourage the wider use of green procurement
- ensure the most efficient use of public funds
- keep procurement markets open EU-wide

In this context, concession contracts are seen as important instruments in the long-term structural development of infrastructure and strategic services, contributing to the progress of competition in the internal market, making it possible to benefit from private

¹ Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (*OJEU* L 94, 28/03/2014, p. 1).

² Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (*OJEU* L 94, 28/03/2014, p. 65); Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (*OJEU*, L 94, 28/03/2014, p. 243).

³ Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (31 March 2004); Directive 2004/17/EC on coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (31 March 2004).

⁴ See European Commission (3 March 2010), “Communication from the Commission – Europe 2020 – A strategy for smart, sustainable and inclusive growth”.

sector expertise, and helping to achieve efficiency and innovation. The absence of clear rules at EU level governing the award of concession contracts was considered to give rise to legal uncertainty and to create obstacles to the free provision of services, causing distortions in the functioning of the internal market. The European Commission therefore aimed to create an adequate, balanced and flexible legal framework for the award of concession contracts so as to ensure to economic operators, in particular small and medium-sized enterprises (SMEs), effective and non-discriminatory access to EU concession markets.

Whereas the award of works concessions were and still are subject to the basic rules of Directive 2004/18/EC (2004 Public Sector Directive), the award of services concessions was “merely” subject to the principles of the Treaty on the Functioning of the European Union (TFEU). The risks involved in this regulation of concessions were interpreted differently by national legislators, as has been confirmed by the extensive case law of the CJEU on some, but not all, aspects of the award of concession contracts. The Concessions Directive aims to improve legal certainty by creating a firm regulatory basis for the uniform application of the principles of the TFEU by all Member States. The EU legislator’s intention was to enact clear and simple rules applicable to the award of concession contracts above a certain threshold that, at the same time, would reflect the specificity of concessions as compared to public contracts. The rules were intended to provide a minimum level of co-ordination of national procedures for the award of concession contracts. Equally important was that these rules would ensure adequate judicial protection of candidates and tenderers in concession award procedures by bringing these procedures under the scope of the remedies directives 89/665/EEC and 92/13/EEC.

The Concessions Directive stresses the freedom of Member States to structure the provision of works or services according to their own needs, by either using their own resources, co-operating with other authorities, or outsourcing those tasks to third parties. The directive therefore does not entail the liberalisation of services of general economic interest that are reserved to public or private entities or the privatisation of public entities providing those services.

It should also be noted that the Concessions Directive does not deal with the requirement for Public-Private Partnerships (PPPs) to take the legal form of either a public contract, governed by the Public Sector Directive, or a concession, subject to the Concessions Directive.

Structure and content of the Concessions Directive

The Concessions Directive is structured in the following order:

- Recitals.
- Contents list.
- Titles containing the articles, divided into chapters that are sub-divided into sections.
- Annexes.

The recitals are not operative provisions of the directive. They provide the context and explanations for the operative provisions, which are set out in the articles. The recitals are a useful source of information to assist in interpreting the articles.

The annexes contain additional and complementary information and requirements referred to in the articles, such as the activities exercised by contracting entities and the content of concession notices.

Mandatory and optional provisions in the Concessions Directive: Most of the articles are mandatory, and Member States are therefore obliged to implement them. This is the case in particular for the definitions and the scope of the directive. Some articles are optional, which means that a Member State has a choice as to whether it will implement them or how it will implement them. This choice applies, for instance, to the rules on procedures leading to the award of a concession⁵ or to the rules concerning communication⁶.

Link to useful websites:

http://ec.europa.eu/internal_market/publicprocurement/modernising_rules/reform_proposals/index_en.htm

Content of the Concessions Directive

Title I – Subject matter, scope, definitions and threshold

The Concessions Directive regulates the award of both works concessions and service concessions to economic operators by (i) contracting authorities, or (ii) contracting entities, provided that the works or services are intended for the pursuit of one of the activities referred to in Annex II of the directive (i.e. activities in specific sectors, such as energy, public passenger transport, exploitation of geographical areas, and postal services – see below)⁷.

The notion of “contracting authorities” corresponds to that used in both the 2004 Public Sector Directive (2004/18/EC) and the 2014 Public Sector Directive (2014/24/EU) and thus also applies to the award of concession contracts by bodies governed by public law. The Concessions Directive governs the award of concessions by “contracting entities” that pursue an economic activity referred to in Annex II of the directive. These contracting entities may be state authorities, public undertakings or, exceptionally, private undertakings operating on the basis of exclusive or special rights. Such “exclusive” or “special” rights are those granted by a competent authority of a Member State by means of a law, regulation or published administrative provision that is compatible with the TFEU. Such rights limit the exercise of an activity to two or more economic operators, which substantially affects the ability of other economic operators to carry out that activity⁸. Contracting entities carrying out one of the activities mentioned in Annex II are not covered by the Concessions Directive if such rights have been granted, in accordance with the TFEU, by means of a procedure based on objective criteria and if they have been adequately published.

The activities listed in Annex II include activities related to:

- the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of electricity, gas or heat, and with the supply of electricity, gas or heat to such fixed networks;
- the provision or operation of fixed networks providing a service to the public in the transport by railway, automated systems, tramway, trolley, bus or cable car;
- the exploitation of a geographical area for the provision of airports, maritime or inland ports, or other terminal facilities to carriers by air, sea or inland waterway;

⁵ See articles 30 et seq.

⁶ See article 29.

⁷ See article 1.

⁸ See article 5 paragraphs 10 and 11.

- the provision of postal services;
- the exploitation of a geographical area for the extraction of oil or gas or for the exploration or extraction of coal or other solid fuels.

The Concessions Directive contains a number of definitions, including a definition of the terms “works concession” and “services concession”⁹. These concessions are defined as contracts for pecuniary interest concluded in writing, by means of which one or more contracting authorities or contracting entities entrust the execution of works/services to one or more economic operators for which the consideration consists either solely in the right to exploit the works that are the subject of the contract or in that right together with payment. The directive clarifies that the concept of a concession requires the transfer of an operating risk to the concessionaire in exploiting those works or services, encompassing demand risk or supply risk or both. The concessionaire is deemed to assume the 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 providing the services that are the subject of the concession. The directive does not define what is to be understood as “normal operating conditions”. However, the part of the risk transferred to the concessionaire must result in the concessionaire being exposed to the vagaries of the market. The operating risk must stem from factors that are beyond the control of the parties. Risks linked to bad management, contractual defaults by the concessionaire, or instances of *force majeure* are not decisive for the purpose of classifying the works/services as a concession, since those risks are inherent in every contract. As a consequence, where sector-specific regulations eliminate the risk by providing a guarantee to the concessionaire of breaking even in terms of the investments and costs incurred for operating the concession, the contract cannot qualify as a concession. Equally, a contract where the contractor is remunerated on the basis of regulated tariffs that are calculated in such a way as to cover all costs and investments borne by the contractor for providing the service does not qualify as a concession but rather as a public contract.

The Concessions Directive also clarifies that certain arrangements, for example where all economic operators fulfilling specified conditions are entitled to perform a given task without any selectivity (such as customer-choice systems)¹⁰, are not to be qualified as concessions. In addition, the exercise of an economic activity, where a Member State or one of its public authorities establishes the conditions by means of actions such as authorisations or licenses, where the exercise of the activity is granted at the request of the economic operator and not on the initiative of the contracting authority and where the economic operator remains free to renege on the provision of the works or services, is also not to be considered as a concession¹¹. The same is true for agreements that have as their object the right of an economic operator to exploit certain public domains or resources under private or public law, such as land or any public property, and where the state or contracting authority establishes only general conditions for their use, without procuring specific works or services¹². This rule applies, for example, to public domain or land lease contracts, which generally contain terms concerning the entry into possession by the tenant, the use to which the property is to be put, the respective obligations of the landlord and the tenant regarding the

⁹ See article 5, paragraph 1.

¹⁰ Other examples could be economic activities that are open to any interested person provided that this person fulfils certain objective criteria regulating the exercise of these activities, such as construction engineers, lawyers or taxi drivers (depending on national law).

¹¹ This rule could apply to services that, in accordance with national law, may only be carried out after having been granted a license by a state authority but where the license holder is free to decide whether to keep the license and carry out the activity concerned or to give up that particular business, e.g. taxi services or pharmacy.

¹² e.g. land developers.

maintenance of the property, the duration of the lease and the release of possession to the landlord, and the rent and incidental charges to be paid to the landlord.

The Concessions Directive applies only to works and services concessions that have a value equal to or greater than EUR 5 186 000¹³. The value of a concession is to be calculated on the basis of the total net turnover of the concessionaire generated over the duration of the contract, as estimated by the contracting authority or the contracting entity, in consideration for the works and services that are the object of the concession as well as for the supplies required for such works and services. The relevant value is the value at the moment when the concession notice is sent, and the contracting authority is therefore obliged to carry out an *ex ante* estimation of the concession contract's value. However, if the value of the concession at the time of the award is more than 20% higher than its estimated value, the valid estimate is to be the value of the concession at the time of the award. This provision aims to make it more difficult to circumvent the regulations. The provision seems to apply, however, only in cases where the value of the concessions contract at the time of the award not only exceeds its originally estimated value by more than 20% but also at the same time exceeds the threshold of EUR 5 186 000. Unless the concessions award notice has been published in accordance with the terms of the Concessions Directive, it will have to be withdrawn and published again, this time in conformity with the Concessions Directive. As is the case for public contracts, the calculation of the value of a concession contract must not be made with the intention of circumventing the regulations.

If the estimated value of a concession does not reach this threshold, its award is governed by the principles of the TFEU, i.e. free movement of goods, freedom of establishment, and freedom to provide services, as well as by consequential rules such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency, as is the case under the legal framework applicable to the award of services concessions.

Exclusions

The Concessions Directive contains a large number of exclusions from its scope, most of which correspond to the exclusions included in the other two 2014 directives. It does not apply, *inter alia*, to concessions awarded:

- on the basis of an exclusive right, in accordance with the TFEU;
- for air transport services based on the issuance of an operating license;
- by an international organisation or international financial institution and fully financed by that organisation/institution;
- in the fields of defence and security¹⁴;
- for services concerning a number of activities that are also excluded from the scope of the 2014 Public Sector Directive, e.g. acquisition or rental of land, existing buildings or other immovable property; acquisition, development, production or co-production of programme material intended for audio-visual or radio media services; arbitration and conciliation services; specific legal and financial services; loans, civil defence, civil protection and danger protection services provided through non-profit organisations; and political campaigns;¹⁵

¹³ See article 8 for full details of the method of calculation.

¹⁴ See article 10, paragraphs 4 to 7, for full details of exclusions in the fields of defence and security, as referred to in the Defence Directive 2009/81/EC.

¹⁵ See the list in article 10, paragraph 8, for full details of these exclusions.

- in relation to lottery services awarded by a Member State to an economic operator on the basis of an exclusive right.

In addition to the above-mentioned exclusions, the Concessions Directive sets out some sector-specific exclusions in the field of electronic communications and in the water sector. The latter exclusion was the subject of intense discussions during the legislative procedure across EU Member States. The directive makes it clear that concessions awarded for the purpose of providing or operating fixed networks that are intended to provide a service to the public in connection with the production, transport and distribution of drinking water, and for the supply of drinking water to such networks, do not fall within the scope of the Concessions Directive. In certain circumstances, concessions for the disposal or treatment of sewage and for hydraulic engineering projects, irrigation or land drainage are also excluded from the scope of the Concessions Directive¹⁶.

Another important exclusion concerns concessions awarded by a contracting entity to an affiliated undertaking in which at least 80% of its average total turnover in the last three years has been derived from the provision of services or works to the contracting entity or to other undertakings with which it is affiliated (group companies).¹⁷

Concessions between entities within the public sector are also excluded. This exclusion extends to both in-house procurement and “public-public” co-operation. For in-house concession awards to be excluded, the contracting authority must exercise a control over the legal person awarded the concession that is similar to the control that the authority exercises over its own departments. In addition, more than 80% of the activities of the controlled legal person must be carried out in the performance of tasks entrusted to it by the contracting entity. There must also not be any direct private capital participation in the controlled legal person, with the exception of non-controlling forms of such private capital participation, as required by national legislation in conformity with the TFEU¹⁸.

Finally, in accordance with recent CJEU case law¹⁹, concession contracts for the joint provision of public services fall outside the scope of the Concessions Directive provided that (i) they are concluded exclusively between contracting authorities or contracting entities; (ii) the implementation of that co-operation is governed solely by considerations in the public interest; and (iii) no private service provider is placed in an advantageous position vis-à-vis its competitors.²⁰

Mixed contracts

The Concessions Directive sets out specific rules on how to deal with mixed concession contracts²¹, based on the case law of the CJEU and the rules applicable to mixed contracts, as laid down by the 2014 Public Sector Directive and the 2014 Utilities Directive. In the case of mixed concession contracts that can be separated, the contracting authorities and entities are free to award separate concessions for the separate parts of the mixed contract. However, if the various parts constituting the

¹⁶ See article 12 for full details on the specific exclusions in the water sector.

¹⁷ See article 13 for further details on this exclusion.

¹⁸ See article 17 for full details concerning this exclusion.

¹⁹ Case C-480/06 *Stadtreinigung Hamburg*.

²⁰ See article 17 and recitals 45-47.

²¹ Mixed contracts are contracts containing more than one element, e.g. contracts relating to works and services or supplies and services, or contracts relating partly to activities covered by the directive and partly to activities that are not covered by the directive.

contract are objectively²² inseparable, the applicable rules must be determined with respect to the main subject of the contract at hand. Thus, a concession that has as its subject both works and services must be awarded in accordance with the provisions applicable to works concessions if the works element characterises the main subject matter of the particular contract in question, and vice versa. The distinction between works and services concessions is legally still of importance, as a different legal regime applies to the award of these two types of concessions. For example, other exclusions are available for services concessions, while for works concessions different rules on subcontracting apply. In the event that a contract involves elements of both a services concession and a supplies concession, the main subject of the contract must be determined according to the estimated value of the respective services or supplies, with the higher value denoting the main subject matter.²³

A contract that is intended to cover several activities referred to in Annex II of the Concessions Directive (concerning utilities activities) is subject to the rules applicable to the activity for which it is principally intended. The directive contains further detailed provisions concerning the applicable set of rules for mixed contracts where it is objectively impossible to determine for which activity the contract is principally intended.²⁴ The directive also contains specific rules with regard to mixed contracts having defence or security aspects. Again, the characteristics of the mixed contract at hand are decisive for the determination of the regime applicable to the award of such a contract.²⁵

Duration of the concession

The Concessions Directive stipulates that the duration of a concession must be limited, although it does not lay down a maximum duration. It does clarify that the contract period is not to be unduly lengthy, with a view to preventing market closure and restriction of competition. Concessions of a very long duration are likely to result in the closure of the market and may thereby hinder the free movement of services and the freedom of establishment.²⁶ Therefore, for concessions lasting more than five years, the maximum duration of the concession must not exceed the estimated time that a concessionaire could reasonably be expected to take in order to recoup the investments made in operating the works or services together with a return on invested capital, taking into account total investment, the asset's capacity to generate revenue, user tariffs, and the asset's operation and maintenance costs.

Economic operators, communication, confidentiality and nomenclature

The notion of an economic operator is to be interpreted in a broad manner so as to include any persons and/or entities offering the execution of works, supply of goods or provision of services on the market, irrespective of the legal form in which they have chosen to operate. The directive also makes it clear that groups of economic operators may participate in concession award procedures.²⁷

²² According to CFEU case law, the determination of inseparability is made on a case-by-case basis, taking into account the expressed or presumed intentions of the contracting authority to consider the various aspects making up a mixed contract as indivisible, supported by objective evidence justifying these intentions and establishing the need to conclude a single contract.

²³ See article 20 for full details on mixed contracts.

²⁴ See article 22, paragraph 3.

²⁵ See articles 21 and 23 for full details on mixed procurement contracts with aspects involving defence or security.

²⁶ See article 18 and recital 52.

²⁷ See article 26.

Except where the use of electronic means is mandatory (e.g. concession award notices and electronic availability of concession documents²⁸), Member States or contracting authorities are free to choose one or more of the following means of communication for information exchange: electronic means, post or fax, and oral communication. Member States may nevertheless make the use of electronic means of communication mandatory for concessions.²⁹

The Concessions Directive contains specific confidentiality provisions. Unless otherwise provided in the Concessions Directive or in national law (e.g. legislation concerning access to information), contracting authorities or entities are forbidden to disclose information that economic operators have designated as confidential including, but not limited to, technical or trade secrets and confidential aspects of the tender.³⁰

The Concessions Directive declares that the Common Procurement Vocabulary (CPV) is applicable as the nomenclature to be referred to in the context of the award of concessions.³¹

Title II – General principles and procedural guarantees applicable to the award of concessions

Unlike the 2014 Public Sector Directive, the Concessions Directive does not set out specific procedures to be followed when awarding a concession. Of course Member States are not hindered from making use of the procedures allowed by the Public Sector Directive. From a public procurement point of view, it would appear to make sense to harmonise the procedures made available for the award of concessions with those available for the award of public contracts. The Concessions Directive establishes a basic framework reflecting the general principles and procedural guarantees derived from CJEU case law aimed at ensuring transparency and equal treatment. Minimum co-ordination should be sufficient, from the view of the EU legislator, to achieve the objectives pursued by the Concessions Directive. In whatever way or form contracting authorities or contracting entities choose to organise the procedure leading to the choice of the concessionaire, they are bound to respect at all times the principles of equal treatment, non-discrimination and transparency vis-à-vis economic operators.³²

Concession notices

To ensure basic transparency, the Concessions Directive imposes on contracting authorities the obligation to publish their intention to award a concession by means of a “concession notice” in the *OJEU*. Any derogation from this advertising obligation is subject to strict conditions and, in accordance with CJEU case law, must be interpreted in a restrictive manner. The award of a concession contract without prior publication of a contract notice is therefore only permitted in cases where (i) it is clear from the outset that such publication would not trigger more competition, as objectively only one economic operator is capable of performing the task; (ii) the aim of the concession is the creation or acquisition of a unique work of art or artistic performance; (iii) competition is absent for technical reasons or due to the existence of an exclusive right or to the protection of intellectual property rights or other exclusive rights; or (iv) no (suitable) applications or tenders were submitted in response to a prior concession

²⁸ See articles 33 (2) and 34.

²⁹ See article 29.

³⁰ See article 28.

³¹ See article 27.

³² See articles 3 and 30.

procedure, provided that the initial conditions of the concession contract have not been substantially altered.³³

The Concessions Directive provides that concession notices must contain specific information including the name, address and type of contracting authority or entity, the main activity exercised, a description of the concession, conditions of participation, and time limit for the submission of applications or receipt of tenders. The directive obliges contracting authorities to use the Commission's standard forms for concession notices, which are to be transmitted electronically to the EU Publications Office for publication in the *OJEU*.³⁴ Furthermore, contracting authorities are obliged to offer, by electronic means and free of charge, unrestricted and direct access to concession documents.³⁵

Selection of candidates and award criteria

The Concessions Directive imposes rules for the selection and qualitative assessment of candidates.³⁶ These rules correspond to the requirements set for the selection of candidates for the award of works and service contracts in accordance with the Public Sector Directive, obliging contracting authorities to verify the professional and technical ability as well as the financial and economic standing of candidates and bidders on the basis of self-declarations and/or reference(s) submitted as proof. The conditions for participation must be non-discriminatory and proportionate to the subject matter of the concession, and they must be stated in the concession notice. As is the case for public contracts, economic operators must be given the possibility to rely on the capacities of other entities in concession award procedures.

Contracting authorities must establish that there are no reasons for the (mandatory and/or optional) exclusion of an economic operator from a concession award procedure. Economic operators that have been the subject of a conviction by final judgment for specifically mentioned crimes, such as fraud, corruption or participation in a criminal organisation, must be excluded from the procedure. However, an economic operator must be allowed to provide evidence to the effect that the measures it has taken are sufficient to demonstrate its reliability despite the existence of grounds for exclusion. Those measures may consist in particular of (i) organisational measures and measures concerning the personnel, such as the severance of all links with persons or organisations involved in misconduct; (ii) appropriate staff reorganisational measures; and (iii) implementation of reporting and control systems. It is left to Member States to determine the exact procedural and substantive conditions to be applicable in such cases. They are thus free to decide whether to allow individual contracting authorities to carry out the relevant assessments of economic operators or to entrust other authorities on a central or decentralised level with that task.³⁷

The Concessions Directive provides minimum time limits for the receipt of applications and tenders for the concession award procedure. The minimum time limit for the receipt of applications is 30 days from the date on which the concession notice was published. Where the procedure is organised in successive stages, the minimum time limit for the receipt of initial tenders is 22 days from the date on which the invitation to tender was sent.³⁸

³³ See article 31 for full details on concession notices and derogations.

³⁴ See article 33.

³⁵ See article 34 for further details on the electronic availability of concession documents.

³⁶ See article 38 for full details.

³⁷ See article 38, paragraph 9, and recitals 70-71 for the full details on the possibility of "self-cleansing".

³⁸ See article 39.

Concessions must be awarded on the basis of objective award criteria, linked to the subject matter of the concession and in compliance with the general principles of equal treatment, non-discrimination and proportionality. The award criteria are to be listed in descending order of importance and disclosed in advance to all tenderers. Only in exceptional circumstances is it permissible for the contracting authority to modify the ranking order of the award criteria. Exceptional circumstances could be, for example, the necessity of taking into account an innovative solution that could not have been foreseen by a diligent contracting authority, and without such a modification the award criteria would be discriminatory.³⁹

The Concessions Directive obliges contracting authorities to inform candidates and tenderers as soon as possible of decisions taken concerning the award procedure, including the name of the successful tenderer, the grounds for rejection of the other applications or tenders, and, if relevant, the grounds for a decision to not award the contract at all. At the request of the party/parties concerned, the contracting authority must inform as quickly as possible, at the latest within 15 days of receipt of the written request, any tenderer(s) that had submitted an admissible tender of the characteristics and relative advantages of the tender selected.⁴⁰

Rules on the performance of concessions – subcontracting, contract modifications, termination, monitoring and reporting

The Concessions Directive contains specific rules on subcontracting, which are similar to those provided in the Public Sector Directive. It allows or requires contracting authorities to ask a tenderer to indicate any share of the concession that it may intend to subcontract and any proposed subcontractors. The concessionaire is required to provide information concerning the subcontractors (name, contact details, legal representative) and of any changes in subcontractors working at a facility under the direct oversight of the contracting authority. This requirement, which applies for works concessions and services concessions, must be fulfilled following the award of the contract and at the latest at the beginning of the execution of the contract. Contracting authorities have discretion to extend these requirements, for example to subcontractors further down the subcontracting chain.⁴¹

The EU legislator recognises the need to provide for mechanisms that allow modifications of a concession contract during its execution, as these contracts typically involve long-term and complex technical and financial arrangements that are often subject to changing circumstances. The Concessions Directive sets out the following circumstances in which the modification of a concession contract is allowed without having to undertake a new concession award procedure⁴²:

- Modifications, irrespective of their monetary value, have been provided for in the initial concession documents in clear, precise, and unequivocal review clauses, which may include value revision clauses or options.
- Additional works or services by the original concessionaire, which were not included in the initial concession, have become necessary, but a change of concessionaire cannot be made due to either (i) economic or technical reasons (such as requirements of interchangeability or interoperability with existing equipment or services); or (ii) the significant inconvenience or substantial duplication of costs that such a change would cause for the contracting

³⁹ See article 41 for further details.

⁴⁰ See article 40.

⁴¹ See article 42 for full details on subcontracting.

⁴² See article 43 for full details on concession modifications.

authority, subject to the condition that any increase in value must not exceed 50% of the value of the initial concession (where several successive modifications are made, that limitation applies to the value of each modification⁴³).

- The required modification (i) has been brought about by external circumstances that a diligent contracting authority could not foresee; (ii) does not alter the overall nature of the concession; and (iii) involves an increase in value that does not exceed 50% of the value of the initial concession (where several successive modifications are made, that limitation applies to the value of each modification).
- A new concessionaire is replacing the initial concessionaire as a consequence of (i) an unequivocal, precise and clear review clause or option; or (ii) a universal or partial succession into the position of the initial concessionaire; or (iii) the assumption by the contracting authority itself of the concessionaire's obligations towards its subcontractors.⁴⁴
- The modifications are insubstantial.
- The value of the modification is below both of the following values: the threshold for concessions (currently EUR 5 186 000) and 10% of the value of the initial concession.

Member States must ensure that contracting authorities have the possibility, in accordance with the conditions determined by national law, of terminating a concession during its term, where one or more of the following conditions are fulfilled⁴⁵:

- A substantial modification of the concession has been made, which would have required a new concession award procedure.
- The concessionaire should have been excluded, at the time of the concession award, from the concession award procedure due to mandatory grounds for exclusion (e.g. final conviction for a criminal offence).
- The CJEU finds, in an infringement procedure, that the contracting authority has awarded a concession in breach of its obligations under the TFEU and under the Concessions Directive.

Member States must also ensure that one or more authorities monitor the application of the rules for the award of concession contracts. This new requirement for the monitoring of the implementation and functioning of the rules on the award of concession contracts should ensure the efficient and uniform application of EU law in Member States.

⁴³ It should be noted that, according to the directive's wording, the increase in value seems to apply to each modification in cases of successive modifications, regardless of any preceding increases in value of the concession itself. The directive makes it clear, however, that such consecutive modifications should not be aimed at circumventing the Concessions Directive.

⁴⁴ The scope of this exception is somewhat unclear. It would appear that this provision could justify lender "step-in" in a PPP concession project, if such a step-in were modelled in accordance with one of the restructuring measures mentioned in the provision. (An argument against such an interpretation would be that lenders do not normally fulfil the criteria for qualitative selection initially established, which is one of the requirements for this modification.)

⁴⁵ This provision is to be understood as a minimum requirement and does not hinder a Member State or a contracting authority from establishing further reasons for the (early) termination of a contract; this provision is subject to national (contract) law.

Judicial protection

One of the most significant changes in the legal regime on service concessions is that Remedies Directive 89/665/EEC on the award of public contracts and Directive 92/13/EEC on remedies for utilities procurement are also applicable to the award of concessions.⁴⁶ Unsuccessful bidders must be given the opportunity to challenge any decision taken during a concession award procedure, and they thereby enjoy the minimum guarantees set out in the remedies directives.

⁴⁶ See articles 46-47.