DG Internal Market and Services

Framework Contract for projects relating to Evaluation and Impact Assessment activities of Directorate General for Internal Market and Services

Analysis of Sectors concerned by Service Concessions

Final Report

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Executive Summary

CSES has conducted an analysis of sectors concerned by service concessions over the period from mid-August to early December 2009.

The aims of this analysis were :

- *the determine the sector spread of service concessions in eight Members States (the Czech Republic, Germany, Greece, Spain, France, Italy, Portugal, the United Kingdom);*
- *to identify any sectoral issues to be taken into consideration in an assessment of the potential impact of certain legislative provisions that would bring service concessions into the public procurement framework.*

Service concessions are defined by the 'Classic' procurement Directive (2004/18/EC) as follows :

> *'Service concession' is a contract of the same type as a public service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with payment.*

The counterpart of the right to exploit the service is that the concessionaire is expected to take on a significant degree of risk in operating the service.

Service concessions are an important vehicle for promoting innovation in public services and in the ways that they are delivered.

The main conclusions on the extent of service concessions are :

- *currently there are major variations between Member States in the extent of the use of concession arrangements;*
- *the use of service concessions is growing, if only to a limited extent, in all of the Member States considered, even in those where concession arrangements have not been used widely before;*
- *there appear to be a wide range of sectors in which service concessions are arising or could potentially arise (listed in chapter 3);*
- *Some companies (Suez, Veolia, SCC) have concession contracts across different sectors and operate in a number of countries;*
- *the choice of the service concession form is less to do with sectoral considerations than with the relative advantages of this type of public private partnership, particularly as a means of encouraging innovation in services and their delivery ;*

- *there are reasons to believe that service concessions could become more widespread, as a result of a 'natural tendency' for works concessions to become service concessions, and as the demand for quality and choice in public services becomes more important;*

- *there is, however, significant difficulty in distinguishing between works concessions and service concessions in practice.*

In the examination of the potential impact of legislative provisions covering service concessions, it was apparent that there are very significant differences across the Member States in the scope of national legislative provisions and in the traditions and administrative culture associated with their use. This gives rise to strikingly different perceptions of the potential impact of any legislation.

The differences of impact that could potentially arise in different sectors appear to be one of degree rather than being of a fundamentally different nature as between one sector and another.

The following points summarise the situation as we perceive it :

<u>The situation for concessions in general :</u>

- *All those we spoke to subscribe to the core principles of transparency, equal treatment, proportionality and mutual recognition in the relations between public authorities and the private sector.*

- *It was generally agreed that one of the main potential impacts of any legislation relates to whether such legislation would promote or hinder the development of concession arrangements in the future.*

- *There is clearly a significant degree of uncertainty about the nature and status of service concessions in some Member States, though there is less uncertainty where concessions have been well-established for some time.*

- *The legal definition of 'service concessions' in the existing EU legislation is often perceived to be difficult to translate into operational terms.*

- *The objectives of procurement policy : ensuring transparency through publication, ensuring the use of fair and recognised procedures, having a level playing field through provisions on economic and financial standing etc, are all understood and generally supported;*

- *Case law, and especially the Telaustria ruling, has led to a situation where service concessions have increasingly been advertised 'voluntarily' in national official journals and in the OJEU; generally these notices and the associated procedures*

make use of the full range of procurement procedures, though they tend to involve more negotiated and restricted procedures than public procurement in general; in effect, many (service) concession procedures already use something close to normal public market procedures

- *However, it is generally agreed that concessions have areas that make them different, including the sensitivity of the public service objectives in many concession arrangements, the relationship of trust between a public authority and a concessionaire, the complexity and length of concession arrangements and the need for discussion and negotiation;*

- *Central to these differences is the responsibility for the effects of unforeseen circumstances. With public markets, these generally remain with the contracting authority; concessionaires, however, often have to shoulder the responsibility. Consequently there is a greater degree of risk associated with a concession.*

- *The major difference of opinion among those interviewed relates to the extent to which using the usual public procurement framework could accommodate the different features of service concessions.*

- *Some regard the difference between public contracts and concessions as being a matter of degree. Others see a difference in the nature of the two conceptions.*

- *Those that tend to see concessions as being significantly different from public contracts tend to see considerable disruption taking place, if concessions are brought within the public procurement framework, principally because greater risk will be perceived.*

- *The provisions relating to the tendering procedures to be adopted and the award criteria are seen as particularly difficult, but also the failure to have provisions allowing some re-negotiation of contractual terms is seen as significant.*

- *On the other side, it is argued that it is important not to have artificial incentives to use one form of public service provision over another and that a similar regime for public contracts and concessions would ensure this.*

- *It is also felt that the current situation allows abuses to arise and that these need to be tackled. In particular, it is necessary to close the 'loophole' whereby public contracts can be deemed to fall outside procurement rules if they are designated as 'service concessions'*

- *In at least one Member State, bringing service concessions into the public procurement framework could well have a greater impact on the number of public contracts than on the number of service concessions.*

Executive Summary

Sectoral Impacts :

Generally we did not find any fundamental differences between sectors. Rather we found that similar issues apply to differing degrees. Variations appear to be determined by :

- *The nature of the public service interest*
- *The public profile of the sector*
- *The complexity of the contract*
- *The size of a typical contract and the time period over which they operate*
- *The influence of legacy systems*
- *The degree of innovation expected*
- *The extent to which competition issues arise*
- *The extent to which existing legislation applies.*

The main differences in the potential impact of any legislation arise from the contrast with the current situation. If service concessions are already established and already follow something close to standard procurement procedures, the impact will not be major, but if concessions are introduced into areas where they had not previously existed or in areas where provision is currently made through public contracts or if the procedures are tightened up in areas where the granting of concessions currently does not follow standard procedures, then the impacts will be greater and will vary considerably, sometimes introducing greater competition and in other cases promoting greater innovation.

The detail of the various situations is considered in the main body of the text.

- *The biggest impacts are likely to arise if the public authorities make use of the concession option to promote innovation in the provision of core services, previously provided directly*
- *Other significant impacts may arise where procedures are currently distinctively different from those employed for public contracts*
- *The main impact overall of the greater use of concessions is on the degree of innovation that can be introduced into the provision of public services.*

The biggest social difference we have encountered is where granting concession contracts could upset existing well established structures, with their associated employment arrangements, especially when these would replace direct public provision. Here there could

be considerable social disruption and significant political impact, especially in sectors where the media is already sensitised to 'privatisation' issues.

We concluded that the main effects of the four potential legislative scenarios that we considered were as follows :

- *'No change' : The principal consequences of doing nothing would be to allow a situation of some uncertainty in some Member States to continue, along with the continuation of a 'loophole' in procurement legislation.*
- *"Light approach" : The 'light approach' would promote considerably more transparency and highlight the potential for using service concessions as a significant vehicle for public policy implementation.*

  By bringing service concessions within the framework of procurement legislation, it would promote their 'normalisation' within the administrations of contracting authorities.

  Over the longer term, as an instrument that is suited to the taking of risks and the application of innovative ideas, a greater profile for service concessions would promote innovation and productivity and ultimately economic growth and employment. In sectors like water and waste treatment especially, it would also lead to advantages for the environment.

  Greater transparency is likely to increase competition especially in the waste treatment sector and possibly also in water in some countries and in port and airport services. This effect will depend importantly on the threshold that is chosen.

  Offsetting these gains would be the social impact of greater competition at a local level.

- *"Fully fledged" approach : putting service concessions on the same footing as public service contracts would allow the choice of contractual form to be based on their intrinsic merits.*

  The major effect would depend on how the new regime was perceived. It is believed that there is a significant possibility that enterprises would perceive an increased risk and that a significant number would leave the concessions market.

  This perception would vary from one Member State to another and would also depend on how the contracting authorities reacted to the legislation.

  With a move to 'safer' public contracts, there would be a dampening effect on innovation, with the eventual consequences of lower growth and employment and some environmental improvements foregone.

  The water, waste management, port and airport administration and handling sectors and some local leisure services would be the most obvious sectors affected, and in some Member States more than others. Over the longer term, core public services

might also be affected to the extent that the potential advantages of concession arrangements would not be explored.

Public services would be less likely to keep pace with citizens' aspirations and public administrations would be less flexible in their responses.

These disadvantages would be incurred for little gain. The 'fully fledged' approach is thought to provide only marginal advantages over the light approach in terms of open, transparent and fair procedures. Case law and good practice guidance has anyway ensured that a large proportion of concession contracts follow procedures close to those that would be implemented by the fully fledged approach.

- *"Intermediate approach" an intermediate approach between the light and fully fledged approaches is theoretically possible, but would add to the list of public procurement variations and could cause confusion for only slight benefit.*

CSES also makes a series of recommendations. They include :

- *The first step is to improve transparency. At a minimum, this requires adopting the 'light' legislative approach of bringing service concessions into the public procurement framework.*
- *In the meanwhile, publication of notices of service concessions in the Official Journal should be further encouraged. In particular, a service concessions template should be created to allow them to be published more easily in a suitable form.*
- *Simplify the regime as much as possible. This will help address the issue of uncertainty.*
- *A contribution to both transparency and simplifying the legal framework could be achieved by removing the distinction in the legislation between works and service concessions.*
- *'Soft regulation' in the form of exchanges of best practice should be encouraged to address the considerable differences in the way that concessions are procured and managed across the Member States.*
- *There is already a considerable amount of good practice identified at a Member State and regional level and by the European PPP Expertise Centre. This could easily be disseminated more widely and the process reinforced.*
- *The legal definition of concessions should be supplemented by practical guidelines for those authorities wishing to make use of this form of private sector engagement with public service provision. It should cover the nature of concessions and the procedures to follow. This measure could go a long way to addressing questions of uncertainty.*

Introduction and background

1

The nature of this Report and the aims of the project are set out, together with a brief explanation of the approach adopted.

1.1 The nature of this report

This document is the Final Report setting out the results from the study entitled *"Analysis of sectors concerned by service concessions in the framework of the impact assessment of possible EU legislation on service concessions",* undertaken for DG MARKT.

The Final Report presents the main elements derived from a programme of work including desk-based analysis, consultation with our expert group, a questionnaire-based survey of authorities in the target Member States and the interviews conducted with a range of interested parties.

The presentation of these results begins with an explanation of the reasons in public policy for service concessions, followed by an account of our conclusions in relation to the first task of the project, namely a description of the sectors identified as those in which concessions are being awarded or might in the future be awarded, together with a summary of the current situation in the targeted Member States. There is then an account of the likely impacts of any legislation in the area and a consideration of the possible impacts in certain sectors. Finally conclusions and draft recommendations will be presented.

1.2 Aims and output of the study

The aims of the study are to contribute to the work being undertaken by DG MARKT in the European Commission on service concessions and, in particular, to assist the work arising out of the consultation on the Green Paper on public-private partnerships and Community law on public contracts and concessions[1].

All sectors where contracting authorities procure goods, works or services have been considered in the Czech Republic, Greece, Spain, Germany, France, Italy, Portugal, and the UK.

The results of the study were expected to :

- feed the problem definition, by providing a better description of the status quo and identifying areas where additional, particular analysis is required;
- establish a clearer view of the circumstances of specific sectors in order to help assess the situation concerning the award of concessions for non-priority services and the concessions potentially coming within the scope of application of the utilities directive;

[1] COM/2004/0327 final

- identify "sensitive" sectors, where the existing legal framework, the specific structure of the sector or particular social and political considerations would cause particular effects;

- prepare the ground for further consultations with main industry stakeholders, possibly in the form of workshops, in order to further investigate the likely impact of legislation in these sectors.

Possible legislation under consideration included variations between two basic approaches – a "light touch approach", which would consist in legislation of the same type currently applying to public works concessions, in Directive 2004/18/EC and a "fully fledged approach" which would consist of various provisions currently applied to public contracts above the current thresholds. The possibility of some intermediate position has also been considered.

Four specific tasks were set for the study :

Task 1) : The identification, out of all sectors concerned by Public Procurement, of those sectors in which service concessions either are being awarded or might be awarded in the future.

Task 2) : The description of the "baseline scenario" – resulting from a review of the identified sectors, describing their current situation in terms of the current legislative framework in each Member State and in each sector, the main characteristics of supply and demand for public service concessions, the context in which service concessions are being (or might be) awarded, and the social and political importance of the sector.

Task 3) : Identification of the main characteristics of the sectors that are likely to determine significantly the differing impacts of the various provisions of any future legislation on concessions. In selecting the significant characteristics that are most likely to determine the impacts of future legislation, different variants of the legislation had to be considered, ranging from a "light approach", which would broadly see an application of the provisions currently applicable to works concessions to a "fully fledged approach", including the following possible provisions:

- the obligation to publish a concession notice in the Official Journal of the European Union;

- the obligation to restrict qualification criteria to issues related to financial, economic and technical capacity of a tenderer,

- the prohibition to exclude tenderers wishing to rely on the capacities of a third person,

- the obligation to restrict the admissible award criteria to price and those of the economically most advantageous tender,
- the obligation to restrict the choice and order of admissible technical specifications, as provided for in Art. 23 of Directive 2004/18/EC
- the principal choice between an open or restricted procedure (or competitive dialogue), as described in Directive 2004/18/EC, or (only in case of utilities) of a negotiated procedure with publication, other procedures only in exceptional situations, as provided for in Directive 2004/18 or 2004/17.
- the prohibition to impose a specific legal form at the stage of tendering,
- the obligation to respect minimal deadlines for the submission ,
- obligations relative to treatment reserved to abnormally low tenders
- the restrictions pertaining to communication with candidates and tenderers, as provided for in Art. 42 of Directive 2004/18/EC
- the obligation to advertise specific conditions of performance of a contract, as provided for in Art. 26 of Directive 2004/18/EC.

The hypothetical impacts were not to be limited to economic implications, but also embrace e.g. social and political dimensions.

Task 4) :

a) Identification of the particular way that sectors would be affected by each of the variants in the legislation.

b) A description of the situation in the sectors identified.

The scope of the application of the analysis included all sectors that are not already subject to special treatment in public procurement legislation and specifically includes those industries that are covered by the Utilities Directive (2004/17/EC), as well as those that come under the 'Classic' Public Procurement Directive (2004/18/EC).

In addressing these tasks, the project team have sought information from a variety of sources. There is a considerable amount of documentation available on earlier discussions on service concessions and related issues. We have also consulted an academic advisory panel, composed of experts of standing in the area of public procurement law and public private partnerships. Our prime source of information however, has been a varied set of interlocutors in the European institutions and representative organisations and in the eight Member States under consideration.

Introduction and background

Public authorities with responsibility for the area have been asked to provide information through a questionnaire on the legislative framework applying in their country and on the current situation with service concessions. We have then arranged interviews with a range of Commission officials and Brussels-based organisations and in each of the eight Member States, where a further series of interviews have taken place, usually with 5 or 6 different organisations ranging from agencies responsible for the promotion of Public Private Partnerships and business associations and representatives of a variety of enterprises operating in the concessions area to legal and academic experts. Some organisations have declined to be interviewed, but generally we have had very useful input into our reflections on the central issues of this study.

1.3 Background

1.3.1 Public Procurement Legislation

The consolidation of a common framework for public procurement was one of the major achievements of the legislative programme leading up to the realisation of the Single Market in the early 1990s. By reforming earlier Directives dating from the 1970's and establishing common rules of procedure, important barriers were dismantled and public contracts were opened up to competition from across the European Community. This was achieved through the application of the principles of transparency, equal treatment, proportionality and mutual recognition in the core public procurement directives :

The Public Supplies Directive (93/36/EEC)

The Public Works Directive (93/37/EEC);

The Public Service Directive (92/50/EEC)

The Utilities Directive (93/38/EEC)

These Directives established the now familiar procedures associated with public procurement across the European Union, including the publication of calls for tender in the Official Journal, the permissible procedures to be adopted, the observation of time delays between the publication of a call and the required deadline for response, the permissible reasons for excluding tenderers and criteria relating to financial and technical capacity and the restriction of the permissible criteria for the award of a contract to the lowest price or the most economically advantageous tender.

There were a series of subsequent amendments to these Directives, but the most notable among these are undoubtedly those introduced in 2004 : the new Utilities

Directive (2004/17/EC)[2] and the consolidating 'Classic' Directive (2004/18/EC)[3] on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. These Directives reformed and consolidated the earlier Directives, taking into account developments in case law and also the results of a consultation, to which both contracting authorities and suppliers contributed. An important aim was to simplify the legislation and allow for the use of new technology to manage the tendering process, but there were also provisions to meet specific issues, such as new procedures introducing more scope for dialogue between contracting authorities and tenderers in order to determine contract conditions, the scope given to contracting authorities to be able to formulate technical specifications in terms of either performance or functional requirements, so that more innovative solutions could be encouraged, and clarification on how social and environmental criteria can be applied in awarding contracts.

A considerable amount of the detail in these Directives has been relevant for this study. At this stage it is useful to point to the distinction between different kinds of services carried over from the earlier Services Directive and listed in annexes. The distinction is between 'priority services' (listed as Annex II A) and 'non-priority services' (listed as Annex II B) and arises in that Articles 21 and 22 of Directive 2004/18/EC stipulate that the full range of procedures in the Directive (Articles 23 – 55) apply to priority services, whereas a more restricted range of procedures (Articles 23 and 35 (4)) apply to non-priority services.

More generally, it should be remembered that these reforms in public procurement legislation took place within a broader context, in which a shift in emphasis has taken place in the priorities for the future development of the Internal Market. Influenced to an important extent by the revised Lisbon agenda, but also by the prospect of the completion of the legislative programme implementing the Financial Services Action Plan, policy attention increasingly focused on the effects of Internal Market legislation on consumers and individuals. This was particularly evident in the forward looking review of the Single Market in 2006. A broadly-based consultation confirmed the need to pay closer attention to the needs of citizens and helped in the development of a new vision for the Internal Market as one in which competitiveness and innovation were driven by consumers and small businesses. This vision was expressed in 'A single market for 21st century Europe'[4] a Communication from the Commission published in November 2007 that announced a package of initiatives for implementing this new phase in EU policy.

[2] Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors

[3] Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts

[4] 'A single market for 21st century Europe' COM(2007) 724 final, 20.11.2007.

The package of initiatives included a Communication on services of general interest, including social services of general interest[5]. This Communication aimed to clarify the implementation of Community rules in the provision of important 'social' services by public authorities, saying where state aid and public procurement rules applied and helping public authorities, service providers and users to better understand and apply these rules. It emphasised a distinction between services of general economic interest, provided for remuneration such as telecommunications, energy, transport and postal services, where internal market and competition rules apply directly and 'non-economic services of general interest' such as police, justice and basic social security that are not covered by such rules. A Green Paper on services of general interest[6] had pointed out, however, that when a public authority decides to award the management of a service to a third party, it is bound to comply with the rules on public contracts and concessions, even if this service is deemed to be of general interest.

This development in turn reflected a changing landscape in the provision of public services. The clear distinction between public and private services, which was one of the assumptions on which earlier public procurement legislation had been based, has become increasingly blurred as there has been a growing appreciation that the provision of public services does not necessarily have to be made directly by public organisations and that there are in fact a variety of ways in which the public authorities and the private sector can co-operate to deliver a range of public services. Some commentators have claimed superior organisation and management skills for the private sector; others have seen advantages in the private sector's ability to raise and deploy funding beyond that possible through conventional forms of public finance. In general, however, the motivation has been to find innovative ways to provide improved services for the public and there has been increasing interest in the capability of public private partnerships (PPPs) to deliver this – an interest that has been reflected in the Commission's policy statements.

Under Community law, there is no specific system governing PPPs as such. PPPs can take different forms and consequently are covered by different legislative provisions. There has been a gradual process, however, of addressing the various issues that PPPs have raised and this process has involved the encouragement of contributions from a broad range of stakeholders.

An important stage in the development of this debate came with the publication of the Green Paper on public-private partnerships and Community law on public contracts and concessions[7] in 2004**.**

[5] 'Services of general interest, including social services of general interest: a new European commitment' COM(2007) 725 final, 20.11.2007.
[6] COM (2003)270 final.
[7] COM/2004/0327 final

The Green Paper set out a number of important distinctions relating to the different possible types of PPP and invited comment from stakeholders on where Community action would be appropriate in addressing problems, such as any perceived lack of clarity in the legislative regime. A significant part of the analysis rested on a distinction between:

- PPPs of a purely contractual nature, in which the partnership between the public and the private sector is based solely on contractual links, and
- PPPs of an institutional nature, involving cooperation between the public and the private sector within a distinct entity.

This distinction is made on the basis that the diversity of PPP practices encountered in practice in the Member States can be traced to two major models that raised different issues and required separate consideration. An important instance of the first kind of purely contractual PPP arises with the "concessive model", which is central to this study. The second kind of PPP referred to are termed 'institutionalised PPPs'(IPPPs) and involve the establishment of an entity held jointly by the public partner and the private partner. Consideration of IPPPs as such, falls outside of the remit of this study, though concessions can be granted to IPPPs, in the Commission's view[8], after the private partner has been selected in a procurement competition and there are issues about the possible use of IPPPs to subvert an open competitive process. In view of our remit, however, the main focus in what follows, as far as PPPs are concerned, will be on concession-based PPPs as opposed to other forms of 'purely contractual' PPP.

The broadly based response to the Green Paper from Member State authorities, suppliers, sectoral organisations and other interested bodies was summarised in a Report on the Public Consultation on the Green Paper[9] and in a Communication on Public-Private Partnerships and Community Law on Public Procurement and Concessions[10], both published in 2005.

In the debate following the Green Paper, some had argued that an Interpretative Communication on Concessions under Community Law published in April 2000, provided sufficient guidance, but the weight of opinion was that the Communication had failed to spell out the implications of EC Treaty principles in a sufficiently clear manner and that the current situation could easily lead to a lack of legal certainty.

[8] Interpretative Communication on the application of Community law on Public Procurement and Concessions to Institutionalised Public-Private Partnerships (IPPP)

[9] Report on the Public Consultation on the Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions - SEC(2005) 629

[10] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Public-Private Partnerships and Community Law on Public Procurement and Concessions (COM/2005/0569 final)

This conclusion was supported by the apparent diversity of practice on the ground and contracting authorities have expressed their concern that they cannot be sure if the advertisement and award methods that they adopt are compliant with EU law. Equally businesses cannot be sure that they will not face a legal challenge to the public service concessions contracts that they have been awarded and even possible cancellation. Such businesses do not enjoy the same rights and guarantees under the Public Procurement, and particularly the Remedies Directives[11] as those engaged in core public procurement contracts. Given the scale of the investment required both in bidding for and in implementing such contracts, this uncertainty could well be having a markedly deleterious effect on the market for services of this kind.

It was these circumstances that led the European Commission to consider responses at a European level to the current deficiencies in law and practice relating to concessions as well as some clarification of the situation concerning the position of IPPPs. The conclusions to the consultation following the Green Paper were therefore that it was these two main areas that needed follow-up initiatives. In the second case it was felt that an interpretative statement was appropriate and an Interpretative Communication on IPPPs[12] was in fact adopted by the Commission on 5 February 2008.

With regard to concessions, however, it was concluded that legislation would appear to be needed. The aims of such a possible action would be to eliminate legal uncertainty, increase transparency, strengthen competition, ensure equal treatment and a uniform legal framework throughout the EU and also to provide candidates and tenderers with a better legal protection.

At the same time, it was also explicitly stated that this conclusion was not intended to pre-empt the results of any impact assessment that would be conducted subsequently, in line with the normal procedures at an EU level. Under the "Better Regulation" principles, the final decision on possible legislative initiatives for clarifying, complementing or improving Community law on public service concessions is subject to an impact assessment.

It is this context that forms the immediate background to the present study in that the work being undertaken is intended to assist the Commission services in its deliberations on the nature and coverage of any legislative proposals that it is to make as a follow-up to the Green Paper and also to make some preliminary contributions to any eventual impact assessment that the Commission services may need to undertake.

Concessions and their relationship to Public Private Partnerships

[11] Directives 89/665/EEC and 92/13/EEC, as amended by Directive 2007/66/EC

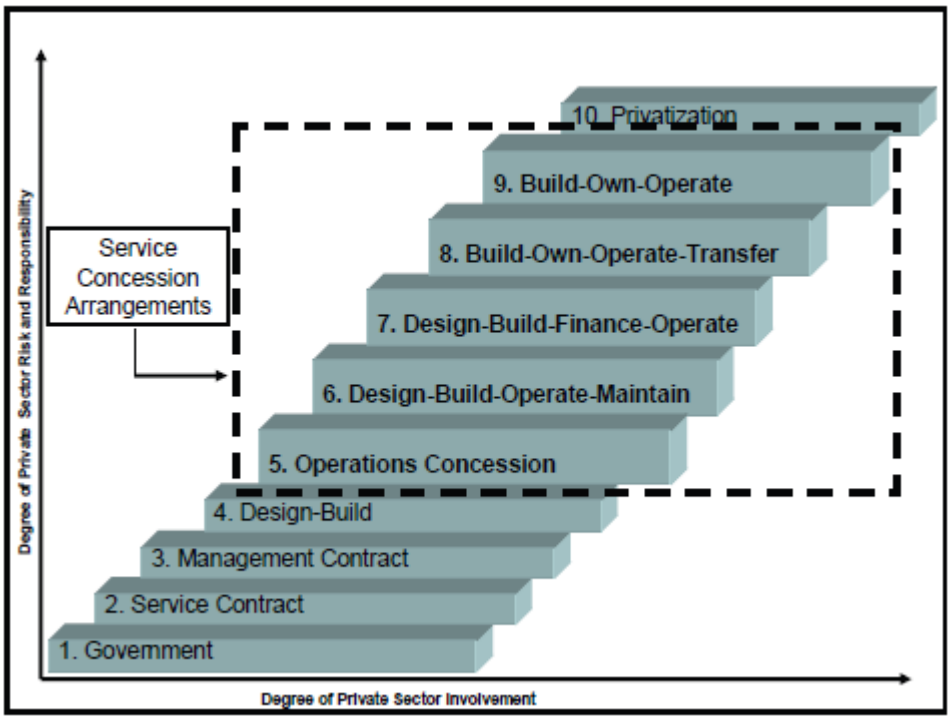
12 Interpretative Communication on the application of Community law on Public Procurement and Concessions to Institutionalised Public-Private Partnerships (IPPP).

Introduction and background

1

It should be clear that the analysis in this study will focus on issues to do with service concessions and their place within public procurement legislation and not on the wider debate on Public Private Partnerships (PPPs) However, much discussion of concessions at a policy level does take place within the context of a broader discussion of PPPs and there are a series of institutional frameworks where much of the interest is focused on PPPs. A number of Member States and, indeed the Commission itself along with the European Investment Bank, have created organisations with the remit of monitoring and/or promoting PPP developments. Furthermore there are elements in the policy debate that could very well have important implications for the development of concessions, but which are couched in broader terms and frequently explicitly refer to PPPs rather than to concessions as such.

In fact it is useful to locate service concessions in a spectrum of arrangements and activities ranging from the direct provision of services by public authorities to outright privatisation. The following diagram was produced for a consultation paper on 'Accounting and Financial Reporting for Service Concession Arrangements' issued by the International Public Sector Accounting Standards Board (IPSASB) of the International Federation of Accountants (IFA). The purpose of the consultation paper was to explain the development of thinking in the IPSAB on the treatment particularly of assets associated with concessions for accounting and financial reporting purposes. However, in doing so, it provides a clear overview account of the development of the arrangements between the public and private sectors in the delivery of complex projects, especially in various forms of Public-Private Partnerships. In particular, for present purposes, it shows different kinds of involvement of private sector entities in the delivery of services with a public interest and a progression in the degree of freedom with which the entities operate, up to a point where the services are privatised (although there can still be a significant degree of regulatory control). Service Concession Arrangements are said to relate to a series of possible situations within this spectrum.



Source : IPSASB 'Accounting and Financial Reporting for Service Concession Arrangements'

Unfortunately the diagram includes arrangements that would be classed as works concessions in EU terms, rather than service concessions, but the framework is a help nonetheless, in showing that public policy operates in an area where a progression is possible through different organisational forms involving greater or smaller degrees of freedom for the private operator in the delivery of public services. This point will be picked up subsequently in the context of current trends in policy stances.

The Nature of Service Concessions

2

In this section, the nature of service concessions is considered and a series of elements set out that it is necessary to take into account in characterising the extent of their current and future implementation and in considering the possible effects of any legislation concerning them.

2.1 Introduction

One of the core aims of the whole project is to establish in which sectors service concessions are arising in the eight Member States under consideration. This apparently straightforward empirical issue turns out to be much more of a question of perception and judgement than might initially be supposed.

In the course of our interviews with interested parties, we have encountered a considerable degree of confusion over central issues. Many are primarily concerned with public private partnerships in general and regard the nature of the contract with the private provider as only one of the elements in a complex situation. The focus of these people is simply on other matters. Elsewhere the nature of a concession itself is not clear. Although well established in some Member States, the concept and its status in law is relatively new in others and arrangements that would appear to be concessions have been established under a public contracts regime or have been regarded as falling outside of procurement legislation.

In addition, the distinction between works and service concessions is not at all clear to many. Although legislation at EU level does explicitly distinguish between service and works concessions and there has been guidance from the Commission on these matters since 2000, for many excluding service concessions from the provisions of the legislation removes the incentive to make any practical distinction at all, even at a relatively formal level. Others see no merit in the distinction, particularly in view of the practical difficulties in distinguishing between the two. Czech legislation on concessions, for instance, does not differentiate between works and service concessions. Furthermore, in the publication of tender notices or in published lists of PPPs there is generally no distinction between works or services, since the concession frequently involves both.

We need to begin our examination of the current extent of service concessions therefore by a consideration of some definitional issues.

2.1 Concessions in EU legislation

The granting of concessions by public authorities has a long history, going back to Roman times. In some of the forms apparent from the 16th century onwards, concessions often related to areas where the state claimed a monopoly, but was unable to exercise its rights directly and consequently handed over the exploitation of the monopoly to private individuals or organisations. Examples ranged from the trade in salt and tobacco to the collection of taxes. In the 19th century, concessions

were often granted to private organisations to provide and/or operate the infrastructure and services associated with "natural monopolies" – gas supply, railway networks etc. And even in modern circumstances concessions arise, where, first of all the state has a monopoly or ultimately controls a significant proportion of the provision of a good or service and secondly where, although the state allows private organisations a considerable amount of freedom in delivering the economic good in question, it nonetheless retains a distinct interest in the outcomes of the private activity and a degree of control through contractual provisions concerning these outcomes.

This continuing public interest is an important defining characteristic of a concession, for instance, distinguishing concessions from both licensing and leasing operations. In the case of licensing, the state both initially claims the right to control a certain type of economic activity and then, usually for a payment, allows private organisations to operate commercially in the area concerned, but, subject to certain safeguards, it does not impose contractual obligations on those granted a licence in terms of the expected outcomes of the licensed activity. Examples would include the granting of licences for prospecting for oil or to operate a mobile phone network.

Similarly, in the case of leasing, the state allows public assets to be used, again usually for a payment, and the leasee will usually charge for the service or goods provided, but there will be no control over the use of the assets other than to safeguard their long-term preservation in good condition and there will be no continuing state interest in the nature and quality of the goods or services provided.

In contrast, in the case of concessions a continuing public interest remains, both in terms of the aims of the good or service in question and in terms of the control the performance of the private partner. The Green Paper characterises the situation as follows : with a concession there is a 'direct link .... between the private partner and the final user: the private partner provides a service to the public, "in place of", though under the control of, the public partner'.

These 'economic' characteristics are important for determining some of the basic parameters within which concessions can operate and for identifying the sectors that are open to the granting of concessions. The reasons for the initial claim by the state to exercise a responsibility are particularly important in this context. Such rights may arise as a response to different kinds of market failure, to regulatory failure and to health and/or security considerations. But the market conditions of monopoly or oligopoly, under which concessions operate, are also important. This consideration makes the initial selection of the supplier particularly significant, since in these cases promoting competition for the concession takes the place of promoting competition within the industry.

However, the economic characterisation of concessions needs to be complemented by a consideration of their legal characteristics.

The Nature of Service Concessions

2

The consolidated procurement Directive 2004/18/EC defines concessions as follows[13] :

> 'Public works concession' is a contract of the same type as a public works contract except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the work or in this right together with payment.
>
> 'Service concession' is a contract of the same type as a public service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with payment.

In European law, a concession is, therefore, first of all, based on a contract and, secondly, is distinguished from other types of public works or public service contracts by the nature of the return earned by the supplier. In the case of a concession the return arises, at least in part, from the right to exploit the work or service, usually by charging the users, and this is associated with the assumption of a degree of uncertainty and risk for the supplier.

These distinctions help to define more clearly the relationship between concessions and the different kinds of PPP. Some PPPS, as we have seen, depend on joint organisational relationships between public authorities and private organisations – institutionalised public private partnerships. Other PPPs are of a purely contractual nature. Some of these depend on a direct payment to the private partner by the public authority, even though the private partner may bring substantial funds to the project and have considerable responsibility for developing and administering an infrastructure or service on behalf of the public authority, as in the case of PFI and similar initiatives. 'Concessive' PPPs are therefore differentiated from the other forms by a clear element of risk associated with the activity and usually a direct link between the private partner and the final user. In particular, usually though not in all cases, remuneration consists of charges levied on the users of the service, sometimes supplemented by subsidies from the public authorities.

The relationships between concessions (whether or not conceived of as a PPP) and other ways of providing publicly controlled goods and services may be illustrated in the following diagram :

[13] Directive 2004/18/EC Article 1 paragraphs ; OJ L 134/127

Concessions and other forms of provision of publicly controlled goods and services

<table>
<tr><td colspan="5">Direct public provision of goods and services</td></tr>
<tr><td rowspan="4">Economic activity under

indirect public control</td><td rowspan="3">Subject to Public

Procurement rules</td><td rowspan="2">Purely contractual</td><td colspan="2">‘Normal’ public contracts</td></tr>
<tr><td rowspan="2">Concessions</td><td>Works concessions</td></tr>
<tr><td>Service concessions</td></tr>
<tr><td colspan="3">Institutionalised Public Private Partnerships[1]</td></tr>
<tr><td colspan="4">Leasing – allowing the use of public property for private economic activity</td></tr>
<tr><td colspan="4">Licences - authorisation to conduct economic activity</td></tr>
<tr><td colspan="5">Regulated private sector commercial activity</td></tr>
</table>

[1] Note that Institutionalised Public Private Partnerships are also subject to procurement rules and may have contracts with the private partner that take the form of either public contracts or concessions.

It should be noted that certain Member States define concessions in their own national legislation[14] and these definitions do not necessarily correspond to the European definition.

2.4 Concessions and Public Procurement Law

The distinctions outlined above are important when it comes to procurement law.

The principles of transparency, equal treatment, proportionality and mutual recognition, embodied in the EC Treaty, apply to all contracts awarded by a public authority to “third parties”. In addition, there are general provisions in secondary legislation which mean that any contract for pecuniary interest concluded in writing

[14] For instance, Spain (law of 23 May 2003 on works concessions), Italy (Merloni law of 1994, as amended) and France (Sapin law of 1993)

between a contracting body and an operator, which have as their object the execution of works or provision of a service are to be regarded as a “public works or public services contract”.

The general principles of the Treaty imply certain obligations on the part of a contracting body, when seeking to arrange public contracts. In the Green Paper they are said to involve the following :

- the fixing of the rules applicable to the selection of the private partner;
- adequate advertising of the intention to award a concession and of the rules governing the selection in order to be able to monitor impartiality throughout the procedure;
- introduction of genuine competition between operators with a potential interest and/or who can guarantee completion of the tasks in question;
- compliance with the principle of equality of treatment of all participants throughout the procedure;
- selection on the basis of objective, non-discriminatory criteria.

This situation has been further strengthened by case law. In the Telaustria Judgment, for instance , the Court stated that “[the] obligation of transparency which is imposed on the contracting authority consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed”. This has led to a marked increase in the publication of notices in national journals and in the OJEU, especially in the case of France.

There is also direct reference to "works concessions" in secondary legislation, notably in Title III (Articles 56 – 65) of Directive 2004/18/EC. These provisions mainly relate to certain obligations to advertise the contract or publish notices, intended to ensure prior competition between interested operators, and an obligation regarding the minimum time-limit for the receipt of applications.

"Service concessions", however, were excluded from the provisions of the Services Directive (92/50/EEC), after objections raised in the Council, and this exclusion has been carried over into Article 17 of Directive 2004/18/EC.

Nonetheless, the general provisions of the Treaty remain and clarification of the position of concessions had already been provided by the Commission in relation to the earlier legislation carried over into the new 2004 Directives. This clarification is

to be found in the Interpretive Communication on Concessions in Community Law[15], published in 2000.

The Interpretive Communication notes that 'due to budgetary restrictions and a desire to limit the involvement of public authorities and enable the public sector to take advantage of the private sector's experience and methods, interest in concessions has been heightened over the last few years'. It then goes on to provide a definition of concessions, starting from the provisions in the secondary legislation but also taking account of case law. It comments : 'the main distinctive feature of a works concession is that a right to exploit a construction is granted as a consideration for having erected it; this right may also be accompanied by payment.' This right of exploitation is also held to imply the transfer of the responsibility for operation in as far as technical, financial and managerial matters are concerned. From these considerations, it follows that, in works concessions, the risks inherent in exploitation are transferred to the concessionaire.

Service concessions are assumed to serve a different purpose from works concessions and this may lead to differences between the two types of concession in terms of investment and duration. However otherwise, the Communication comments, the characteristics of concession contracts are generally the same. Further comments are made on service concessions in the next section, but in terms of establishing an overall definition, it should be noted that following on from the observations above, the definition of a concession used during the course of the study is that set out in Annex A, where It will be noted, a concession is said to be :

- a bilateral contract (as in the case of public contracts),
- concluded in writing between a contracting authority and an economic operator ("concessionaire"),
- concerning works or services,
- for pecuniary interest,
- in which consideration from the contracting authority consists in the transfer to the concessionaire of the right to exploit the work (or service) that is the object of the contract, or in this right together with payment, and
- in which the concessionaire assumes the risks inherent in the exploitation of the work or service.

This definition sets out an important means of distinguishing between concessions and other forms of contract entered into by public authorities.

[15] Commission Interpretive Communication on Concessions under Community Law (2000/C 121/02)

2.5 Service concessions and works concessions

As well as being able to distinguish between concessions and other types of public contract, it is important for the central analysis of this study that it is possible to distinguish between works concessions and service concessions.

Directive 2004/18/EC provides the following definition :

> 'Service concession' is a contract of the same type as a public service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with payment.'

And :

> 'Public service contracts' are public contracts other than public works or supply contracts having as their object the provision of services referred to in Annex II [of the Directive].

Service concessions would therefore appear to be concession contracts that are not works concessions and that relate to services listed in Annex II.

Where a public contract involves both goods and services, the definitions provided in Article 1(d) of Directive 2004/18/EC state that the distinction relating to which provisions apply is made on the basis of the relative value of the two components. This might suggest that in cases where a concession involves a service that is supported by substantial capital infrastructure (over 50% of the total value), this contract should be excluded from consideration.

However, relative value is neither the only nor even the most important criterion. Case law indicates that the prime purpose of a contract is the deciding factor and this is made clear in the Commission's Interpretative Communication.

This is an important practical consideration in the task of identifying the current prevalence of service concessions. As Section 2.3 of the Communication points out, a mixed contract including a service element is 'virtually always the case in practice, since public works concessionaires often provide services to users on the basis of the structure they have built'.

The Communication cites the Gestión Hotelera Internacional case, where the Court of Justice, interpreting provisions in the Directive, has stated that 'where the works [...] are merely incidental to the main object of the award, the award, taken in its entirety, cannot be characterised as a public works contract'. It also points to recital 16 of the Services Directive, where it is specified that if the works are incidental rather than the object of the contract they do not justify treating the contract as a public works contract.

In addition, when a contract includes two elements which may be separated (e.g. supplies and services), the Court of Justice has determined in another case[16] again relating to public contracts rather than concessions, that the rules which apply to each should be applied separately. The same principles apply to concessions, the Communication concludes and the position is therefore stated as follows :

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

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

> 'In this case, the rules laid down by the Works Directive must be complied with, ..., even if some of the aspects are service-related. In contrast, a concession contract in which the construction work is incidental or which only involves operating an existing structure is regarded as a service concession.'

Similarly, where the works and services elements can be separated, for instance where a project for constructing a motorway includes provisions for providing catering services, the Commission's view is that the rules which apply to each type of activity should be applied respectively.

As will be seen, these distinctions are important in determining the potential scope of service concessions. They serve as a major point of reference.

2.6 Dynamic Developments

We also have to bear in mind that the situation under consideration is one in which there are certain dynamic elements that will change what is being observed over time.

First, the nature of concessions generally implies a cyclical change. Concessions are well-suited to situations where innovation and change are required, If a public authority wishes to try out new ways of providing services, a concession arrangement can be a way of bringing in different perspectives, but also of reducing any risk. However, once the new type of service becomes established and the routines involved in its provision become well understood, the authorities can be expected to revert to public contracts as a way of delivering the service. It should be expected therefore that concessions would be observed in situations

[16] Judgment of 5 December 1989, Case C-3/88, Data Processing, ECR, p. 4035

requiring innovation and change, but might be less obviously apparent in more stable conditions.

Then there is reason to suppose that there can be shifts from works to service concessions. In the past, in concession arrangements with the conventional elements of design, finance, build, operate and maintain, the weight of the activity has focused on the construction elements and the contracts have been classified as works concessions. However, in most cases the infrastructure has a useful lifespan that is somewhat longer than the concession contract even when this runs for 25 – 30 years. In those cases where the infrastructure remains in, or is transferred to, public hands after the initial concession ceases, the service element will have a higher profile, simply because the infrastructure will largely already be in place. There is reason to think therefore that there is a structural tendency for service elements to become more significant in sectors which have previously seen mainly works concessions. This effect, first of all, indicates the possible presence of service concessions in areas where the infrastructure is already well-established, such as in the water industry or in various forms of transport. It also suggests that service concessions are likely to become more significant over time, as the new infrastructure, associated for instance with much PPP activity, becomes embedded.

This 'natural' tendency could well be reinforced by policy developments. A lot of the interest in PPPs across Europe has been because they are perceived to be a mechanism for funding and delivering a renewal of public infrastructure. Current conceptions emphasise the works component. But a greater element of service provision is already implied by the PPP concept. In the past typically, the private sector was involved only (if at all) in the construction of facilities such as prisons, hospitals, schools, and housing, whilst the management of the service (prison services, clinical services, educational services etc.) was provided mainly by the public sector in-house. If the service was contracted out, this would be to a different private firm. One of the characteristics of PPPs, however, is that both the construction of the facility and the provision of the public service are contracted out to private firms in a single contract. PPPs for prisons, hospitals, schools and public housing, among others, provide examples. Now, in an increasing number of Member States, the private sector is not only constructing the facility but also managing it, maintaining it and providing the service to final users. Or there are mixed models where the public sector provides the core services, e.g. clinical services, and the private sector maintains the facility and provides ancillary services – (e.g. Hospitals in the UK). In most of these cases, the private sector does not currently assume a degree of risk that would cause these arrangements to be regarded as concessions. However, the possibility is there

Furthermore, this tendency to a greater emphasis on the service component can only be amplified by increasingly sophisticated expectations that confront public service providers. The public, often encouraged by politicians, look beyond the provision of basic, uniform services. Even though they may cherish the public

nature of the core provision and wish to see that continue, they also expect to see improving quality, variety and choice. Increasingly, public policy has looked to private provision as, at least in part, a way of meeting these requirements. This may even include an increasing acceptance of charges either for optional additional elements or as a way of funding improved core services or more efficiently allocating the resources devoted to them.

The particular nature of these developments in policy focus and their drivers is a matter that is beyond the scope of this study. However, it is possible to ask what are the implications of a greater emphasis in policy on variety and choice and service quality and the consequent involvement of the private sector in public service delivery in the form of concession arrangements

Behind this is perhaps a changing perception of the nature of concession arrangements themselves from the traditional view derived from the role of concessions as an appropriate response to situations of natural monopoly or a distinctive way of the state discharging its public responsibilities to one where a concession is merely one of a range of policy instruments on a spectrum between the direct provision of services by a public body and complete privatisation. The issue would then be : in which sectors of public service provision are public providers likely to want to take advantage of (or avoid) the characteristics of a concession arrangement (payments according to use, flexibility in provision, additional 'creative' or innovative elements etc) that make them appropriate instruments for tackling certain problems?

The Identification of Service Concession Sectors

3

In this section the evidence is reviewed that leads to a listing of sectors in which service concessions may appear.

3.1 Identifying specific service sectors

The initial review of literature undertaken for this study and discussions with Commission staff and our expert panel suggest that a dual approach to the determination of the relevant sectors would be most fruitful. On the one side, it is possible to clarify a number of issues by proceeding from first principles. On the other, pragmatic approaches to identifying instances of activity on the ground can add further detail and contribute to the characterisation of the respective sectors.

Our analysis of the sectors in which service concessions may be said to be arising therefore begins by drawing out some practical implications from the distinctions that have been set out in the previous chapter.

3.2 Sectoral definitions and Annex II

By referring to a public service contract in its definition of service concessions, the Classic Directive brings in a reference to a specific list of sectors set out in Annex II of the Classic Directive (the same categories are listed in Annex XVII of the Utilities Directive). In addition, there is a distinction in the legislation between 'priority services' which are listed in Annex IIA and 'non-priority services', listed in Annex IIB. Annex II is reproduced as Annex B of this report.

The distinction, carried over into the Classic Directive from the earlier Services Directive, is expressed in terms of services as defined in CPC classifications. The difference between the two lists as far as the legislation is concerned is that provisions on public service contracts are more extensive in relation to Annex IIA services than they are in relation to those in the B list.

The origin of the distinction between the services on the two lists lies in the extent to which the services concerned were regarded as tradable in the context of the original construction of the Single Market.

This distinction will give rise to a series of issues that will be addressed in Chapter 6 about the sectoral impact of any extension of the provisions of public procurement legislation to cover services concessions.

However, there are more immediate issues in terms of the way that 'sectors ' are to be characterised in this study.

Generally an economic analysis of sectoral developments at a European level would make use of the NACE classification. NACE (Nomenclature générale des activités

économiques dans les Communautés européennes) is the standard framework for describing sectors on the basis of goods and services produced, common production processes or, in some instances, common raw materials. The Directives under consideration, however, make use of categories of goods and services defined in the CPC/CPV classifications, when referring to those services that are covered by the legislation.

The Central Product Classification (CPC) is an international standard for product classification established by the United Nations Statistical Division. It is used as the primary reference in defining services covered by the procurement Directives. The annexes listing service sectors, however, also refer to CPV – the EU's Common Procurement Vocabulary - which is used for categorising the goods and services that are the target of public procurement, for instance in tender notices and in the TED (Tenders Electronic Daily) database.

There is a major advantage of CPC in that its main focus is on outputs – goods and services – that are also the natural focus of procurement. It thus makes use of categories that fit 'naturally' in any discussion of procurement issues, whereas NACE categories can be defined more by the processes involved or even the nature of the materials used. Most sectoral data, however, are published making use of NACE categories and any analysis based on published data is likely to need a 'translation' from CPC to NACE categories. Tables of correspondence between the two systems do exist and the data problems can be addressed, but a choice had to be made on the prime focus for the conduct of the analysis and, in view of the way that the legislation is framed, the obvious conclusion is that it should be on CPC categories.

3.3 Framework for Sectoral Classification

The CPC classification, then, provides the main and broadest reference framework for the identification of the sectors in which service concessions are arising. Within the full list of CPC categories attention should, of course, be paid to services rather than products and within services the 'sectors' where there is a public interest, given that our prime concern is with sectors where the public authorities are active in making provision. The services set out in Annex II of the Classic Directive give us a starting point. There some 27 service types are listed, defined at a 2 to 4 digit level within the CPC categories. They are selected from CPC Sections 6 to 9 – sections of the classification, which also contain a number of purely commercial services. Furthermore, it should be noted that CPC services sometimes refer to activities that support or take place within a broader service industry. There are CPC categories for legal and accounting services, for instance, that may be provided for 'broader' services, such as the education service, the fire service or different kinds of transport. For public contract procurement, these ancillary services may well be the subject of a specific tender and even in the case of concessions, the service may relate to a specific activity within the broader service sector. However, for present

purposes, we should be aware that the categories do not quite fit as a basis for defining a 'sector'. There are a number of CPC categories, therefore, that should generally be omitted from the set of CPC categories that can provide the broad framework for listing service concession sectors.

In contrast, there is another problem that arises from the omission of certain sectors, because of the version of CPC that was used in the legislation.

The services listed in the Classic Directive were actually taken over directly from the Services Directive (92/50/EEC), adopted in 1992 as part of the programme of legislation to create the Single Market. The version of the CPC used in the early 1990s was even older, being the provisional version, CPC V1.1, finalised in 1989.

In order to provide a broad framework of reference that is relevant currently, it is necessary to review the coverage of the CPC list, particularly in the light of more recent versions of the CPC. The latest version, CPC version 2, was completed on 31st December 2008 and an examination of its current structure highlights certain 'new' services or at least services that have developed a more significant role in the last 20 years, particularly at the three digit level.

The differences in sector classification between CPC provisional (1989) and CPC Version 2 (2008) consist both of reclassifications and the addition of new categories. The main changes are as follows :

- *Transportation:* The divisions relating to transportation have been reorganised. The most visible change is in the criterion for delineating top-level categories. While the previous version of CPC subdivided transport services first according to the mode of transport, the revised proposal uses a passenger vs. freight transport split at the highest level. The intention was to enhance the analytical use of the classification.

  In CPC v2, transport services are listed under Division 64 in Section 6 on Distributive trade services.

- *Postal and courier services:* in CPC v2 these services have been categorised in Division 68 under Distributive Trade Services.

- *Financial services:* Division 71 in CPC v2 now concerns financial services exclusively (under Section 7: Financial and related services; real estate services; and rental and leasing services). No such category existed under 'CPC provisional'.

- *IT services and telecommunication services:* In CPC v2, telecommunication services have been brought under Section 8 on Business and Production Services

and the previous CPC classes for computer consulting services have been restructured to better reflect the products now being offered by the IT services industry.

The structure in Division 84 has been adapted to reflect the changed nature of the products provided by the telecommunications industry. In particular, new detail has been developed in Internet telecommunications services (group 842) a new category - Online information provision services (group 843) - has been introduced and a new separate group 846 (Broadcasting, programming and programme distribution services) has been created. This structure better reflects the outputs of the restructured telecommunications industry.

- *Waste management services:* with the increasing importance of services and products relating to the environment and, in particular, waste management services, Division 94 in CPC v2 (Sewage and waste collection, treatment and disposal and other environmental protection services) has been considerably elaborated and extended to cover hazardous and non-hazardous waste collection, treatment and disposal services and other environmental protection services. Environmental consulting services are also recognized, however under a different group (i.e. Division 83: Other professional, technical and business services).

  Health services: In the new structure, the division for health services has been restricted to human health, i.e. excluding veterinary services (now in group 835 under Professional, technical and business services) and Division 93 on health services is much more detailed and diversified.

  Dynamic growth, structural changes and increasing complexity in the health care sector led to the changes in the structure of the product classification in this Division, in order to reflect current economic realities. In the services area this classification includes: services of curative care, services of rehabilitative care, services of long-term nursing care, ancillary services to health care, prevention and public health services and health administration and health insurance.

There have then been some significant changes in the CPC structure, particularly with the inclusion of services that have become much more significant in the last twenty years. A number of the new services, including waste management (as opposed to waste disposal) online information provision services and others (especially at a three digit level) are of direct relevance to the exercise of listing service concession sectors. It can be seen, therefore, that simply by up-dating the CPC classifications and introducing CPC Version 2 definitions, a number of activities would be included under the legislation, whose status has recently been unclear.

The Identification of Service Concession Sectors

However, a more radical approach, and one that would have implications for public service contracts as well as service concessions, would be to ask what is the relevance of the distinction between the A and B lists in current circumstances ?

Any such list, as we have seen, gradually becomes outdated and introduces anomalies. Other anomalies arise because of other developments. Rail transport in list B, is subject to its own specific regulations, while the telecommunications sector referred to in list A has now largely been privatised. But more fundamentally the original justification of the distinction has long since become outmoded. The very success of the Internal Market has meant that many of the services set out in list B are now traded transnationally and contracts related to them are in fact already advertised in the Official Journal. The initial justification that additional costs imposed by procurement procedures would not be offset by gains arising from broader competition no longer applies. In addition, relating specifically to the current study, it will be seen that it is the characteristics of the relationship between contracting authority and concessionaire that are the most important consideration with concessions rather than any features that are particular to specific sectors.

3.4 Exclusions

In developing further the framework within which service concession sectors are defined, we also have to take account of the sectors that have been excluded by the remit of the study. These concern sectors that are excluded from public procurement legislation, such as those referred to in Articles 11 to 16 of the Classic Directive and others that are covered by separate legislation. The sectors excluded in this way are :

- air transport;
- shipping;
- telecommunications services;
- secret contracts and contracts requiring special security measures;
- the acquisition or rental of land, existing buildings or other immovable property (except associated financial service contracts);
- the acquisition or production of broadcasting material and contracts for broadcasting time;
- arbitration and conciliation services;
- financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments,

The Identification of Service Concession Sectors

- employment contracts;
- research and development services other than those where the benefits accrue exclusively to the contracting authority.

Certain other sectors, such a bus transport and energy provision may be excluded in Member States in which the activity concerned is directly exposed to competition on markets to which access is not restricted.

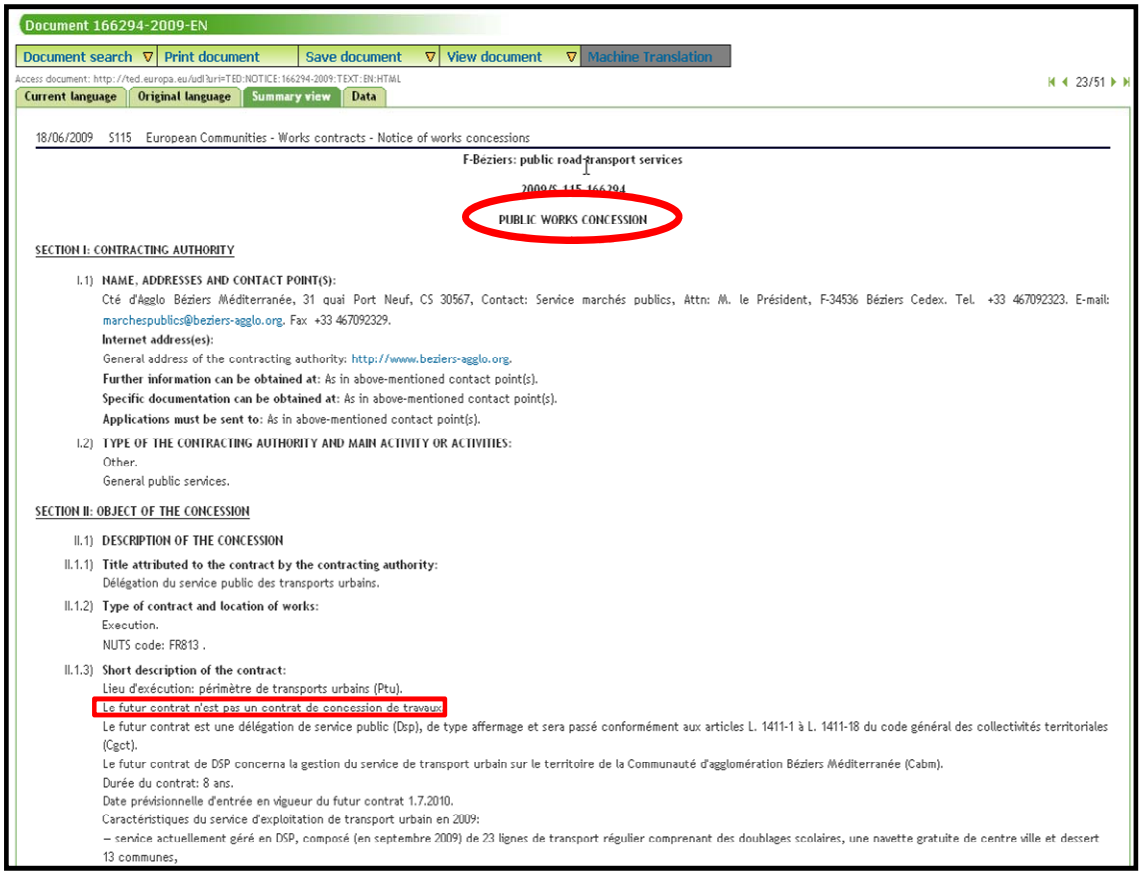
3.5 Analysis of available data

Although current legislation does not require service concessions to be advertised in the Official Journal of the European Union, it does not exclude this possibility either and examination of the Tenders Electronic Daily (TED) database shows that since 2008, some 772 service concessions have been advertised as such mainly from France - 761 from France, 9 from the UK, and 2 from Germany. Nothing was found from any of the other countries under consideration.

However, this figure almost certainly underestimates the true number of service concessions advertised in TED. With some ambiguity about the nature of a service concession and no dedicated template to advertise them, a number will be advertised using the Works Concession template, and in other cases the Public Procurement one. The extract below provides a clear example of a service concession being advertised as a works concession.

Example of a service concession tender advertised

using a works concession template



Document 166294-2009-EN

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Access document: http://ted.europa.eu/udl?uri=TED:NOTICE:166294-2009:TEXT:EN:HTML

Current language | Original language | Summary view | Data

23/51

18/06/2009 S115 European Communities - Works contracts - Notice of works concessions

F-Béziers: public road transport services

2009/S 115-166294

PUBLIC WORKS CONCESSION

SECTION I: CONTRACTING AUTHORITY

I.1) NAME, ADDRESSES AND CONTACT POINT(S):

Cté d'Agglo Béziers Méditerranée, 31 quai Port Neuf, CS 30567, Contact: Service marchés publics, Attn: M. le Président, F-34536 Béziers Cedex. Tel. +33 467092323. E-mail: marchespublics@beziers-agglo.org. Fax +33 467092329.

Internet address(es):

General address of the contracting authority: http://www.beziers-agglo.org.

Further information can be obtained at: As in above-mentioned contact point(s).

Specific documentation can be obtained at: As in above-mentioned contact point(s).

Applications must be sent to: As in above-mentioned contact point(s).

I.2) TYPE OF THE CONTRACTING AUTHORITY AND MAIN ACTIVITY OR ACTIVITIES:

Other.

General public services.

SECTION II: OBJECT OF THE CONCESSION

II.1) DESCRIPTION OF THE CONCESSION

II.1.1) Title attributed to the contract by the contracting authority:

Délégation du service public des transports urbains.

II.1.2) Type of contract and location of works:

Execution.

NUTS code: FR813 .

II.1.3) Short description of the contract:

Lieu d'exécution: périmètre de transports urbains (Ptu).

Le futur contrat n'est pas un contrat de concession de travaux.

Le futur contrat est une délégation de service public (Dsp), de type affermage et sera passé conformément aux articles L. 1411-1 à L. 1411-18 du code général des collectivités territoriales (Cgct).

Le futur contrat de DSP concerna la gestion du service de transport urbain sur le territoire de la Communauté d'agglomération Béziers Méditerranée (Cabm).

Durée du contrat: 8 ans.

Date prévisionnelle d'entrée en vigueur du futur contrat 1.7.2010.

Caractéristiques du service d'exploitation de transport urbain en 2009:

– service actuellement géré en DSP, composé (en septembre 2009) de 23 lignes de transport régulier comprenant des doublages scolaires, une navette gratuite de centre ville et dessert 13 communes,

A detailed search involving a manual check of each and every call for tender would probably reveal considerably more service concessions. Unfortunately such a detailed check was beyond the scope of the current study.

It should also be remembered that there is a marked variation between Member States in the extent to which tender notices in the Official Journal appear in the Official Journal. Eurostat's Structural Indicators on Economic Reform show, for instance, that the value of public procurement openly advertised in 2007 as a percentage of GDP, was 1.12% in Germany and 2.3% in Italy, 3.38% in France, 3.5% in Greece, 3.97% in the UK, 4.09% in Spain and 4.1% in the Czech Republic.

However, a random selection of 10 notices did provide some interesting insights. Given the results from TED, we focused on France and performed a search with the term "délégation de service public". We picked 10 notices randomly, except with a small bias to more recent examples. 6 results were from 2009 and 4 from 2005/2006.

Out of the 10 tenders picked[17], 3 were calls for the operation of urban heating systems, 2 for the operation of ports or marinas, and one for each of gas, water supply, catering, refuse collection and parking.

The award procedure varied, with 3 calls operating a restricted procedure (including one advertising as an open procedure when it was in fact restricted), two operating an open procedure and one a negotiated procedure. The award criteria are explicitly stated in half of the notices, including three which include a weighting element expressed in percentages. Two projects state that they use the principle of Most Economically Advantageous Tender. The final three do not publish any information regarding the award criteria and refer potential bidders to the delegating authority.

The quality of the information available in the calls published in 2009 is greatly enhanced compared to those of 2005/2006.

Although this is clearly not a systematic analysis, we conclude that contracting authorities wishing to engage in service concessions are using the OJEU to post notices that go well beyond the information requirements for works concessions in the Classic Directive. Furthermore, they appear to envisage procedures that relate closely to the standard features of normal public contract procurement. This initial evidence would appear to suggest that, in the case of France at least, the processes involved in many services concessions are similar to the standard procurement procedures of the Classic Directive.

In addition to information available from the Official Journal, there are other sources of information that relate to France and to other countries. As well as TED, there are national official journals and a number of databases that are available on-line that can provide information on service concessions at a national level. The following provides some indications

Germany

The Partnerschaften Deutschland PPP Projekt-Datenbank." Database shows 145 agreed and tendered PPP projects across 16 Laender over the period 2002 and 2009, 133 in civil construction and 12 in transport. The term 'concession' is not used in relation to any of them.

Greece

The website of the Special Secretariat for PPPs in the Greek Ministry of Economy and Finance lists 15 tender opportunities, since early 2007. Three of these mention

[17] Ref: 2005/S 251-248003, 2006/S 202-214714, 2006/S 7-007560, 2006/S 191-202953, 2009/S 40-058083, 2009/S 169-244358, 2009/S 111-160360, 2009/S 17-024347, 2009/S 115-166294, 2009/S 68-098213

concession arrangements, although all are works concessions. 35 tender notices relating to the provision of advisory services for the development of PPPs since 2006 suggest that there are more PPPs in the pipeline, though most of them appear to relate to public works rather than services.

Spain

Since 2006, 6169 service concessions (*concesión de servicios)* have been advertised in the 'Boletín Oficial del Estado'. However, the results included a number of contracts that appear to be public contracts or works concessions with the addition of various service elements. It has not been possible to distinguish between them, without examination case by case.

France

The figure of 10,000 concessions was quoted to us by a number of interviewees in France as the number of concessions to be found in the country. We were not able to substantiate this figure and it is contested by the French authorities, however, it does represent an estimate provided by enterprises active in the concessions field of the scale of concessions activity in France. The majority of such concessions are contracted by local authorities, of which there are a large number. There are 36,600 communes in France and 32,000 of these have a population of less than 2,000. The call for tender for small scale concessions needs only to be published in a Journal d'Annonces Légales (usually an officially accepted local newspaper) and many of the contracts do not reach the threshold for publication. Of those that do, according to the Bulletin official des annonces des marchés publics (BOAMP), more than 1,500 service concessions have been awarded since 2006.

However, since early 2008, 762 service concessions (Délégation de Service Public) have been advertised in TED, a discrepancy between the different sources which illustrates the difficulty in arriving at an accurate estimate. Furthermore, according to a study by the BIPE and the FP2E[18] (Fédération professionnelle des enterprises de l'eau), in 2007, 883 service concessions were opened for tender in the water and sewage sector, although this was higher than the annual average (around 600), since it marked the end of the cycle for contracts signed directly after the Loi Sapin came into force.

Italy

[18]‘ Les services collectives d'eau et d'assainissement en France', 3eme edition, janvier 2008, BIPE / FP2E

Public procurement in Italy is supervised by the Authority for the Supervision of Public Contracts (Autorità per la Vigilanza sui Contratti Pubblici di Lavori Servizi e Fornitore - AVCP), an independent body, which publishes analyses of the different types and regional spread of PPP and more general procurement contracts in an annual report. The results of a recent report are analysed in the next chapter.

Portugal

As of 2008, there were 46 concession-type arrangements in Portugal; 12 for roads, 1 for railway, 2 in the health sector, 18 in the water supply sector and 13 in the waste management and recycling sectors. In addition a further 20 were under selection and 5 were planned.

UK

The UK advertised 9 service concessions in TED, over the period examined, including, four for medical and social services, and one for each of the following: catering, transport, education services, waste management and sports facilities management. As will be seen later, however, there have been other instances where arrangements that might be considered to be concessions have featured in calls that have otherwise been treated as straightforward public procurement.

The Project database made available by Partnerships UK aims to provide a record of all private-public projects and it currently holds details of 913 PPP projects, primarily PFI schemes. The database is being developed further and does not claim to be comprehensive; over time it will be extended to incorporate other forms of PPP and strategic partnerships. At this stage it shows 22 projects that involve some form of concession arrangement. Most are clearly works concessions, but there are a number whose intention appears to be a service provision in areas such as waste water management, marine services, care homes and learning disability services.

Other countries have no direct source of information other than what appears in the Official Journal.

3.6 Identified Sectors

Examining the records on concession contracts makes it apparent that the task of identifying service concessions with any precision is very difficult. Carrying this further towards an identification of sectors where service concessions currently or potentially exist introduces even more complications. As was said at the beginning of this Report, discriminating between different types of contract and the different types of concession is frequently more a matter of judgement than empirical observation. It is therefore worth summarising these difficulties, as a way of

The Identification of Service Concession Sectors

indicating where caution should be exercised in relation to the services that are identified below :

Factors Complicating the Identification of Service Concessions

- **Designation :** Because service concessions are excluded from existing legislation, service concessions that do exist are not necessarily designated as such in tendering documents and contracts.
- **Correct legal status :** Some contracts that should be regarded as concessions have been drawn up, as though they were normal public contracts or lease agreements or the services are regarded as having been privatised.
- **Differentiation :** Concessions and normal public contracts are differentiated by whether or not the contractor is given the right to exploit the work or service and the degree of risk associated with this, but both can have some degree of risk and may involve direct payments by users of the service or may not and/or can involve a direct payment by the authorities. In practice, it is often difficult to say whether the service provision should be regarded as a concession or not.
- **Differentiation between Works and Service Concessions :** In a typical design-build-operate-handover arrangement, it is often difficult to know if the prime intention is focused on the construction elements or the operation. And indeed this may change during the course of a contract. It is therefore difficult to know if the original contract should have been regarded as a works or a service concession.

Particularly difficult is knowing the precise circumstances of situations where there are shadow payments – payments made directly by the contracting authority rather than the user, but which depend on the level of up-take, for which the contractor assumes the risk. But there are other difficulties, such as identifying the point at which an arrangement for incentive payments becomes the adoption of a substantial risk.

It also has to be said of course that there are very big differences between Member States in the incidence of concessions of any kind. While in some countries, as we shall see in the next chapter, there has been a slow recognition of the significance of arrangements that should probably be regarded as concessions, in France concessions have been well–established for a long time and are extensive. In the United Kingdom, there is active innovation in partnership arrangements between

the public and private sectors and there are many developments in new areas that have the characteristics of a concession.

This difference between Member States in the prevalence of concession arrangements suggests that it is in fact the policy stance of national authorities and the different business models that are applied that determine the extent of concession arrangements rather than any factors that are particular to specific types of service. The implication is that the sectoral extent of concession arrangements in the service area depends in a large measure on the inventiveness of those both contracting and directly providing services, with respect to the application of concession models.

Furthermore, the extent of service concessions as opposed to works concessions also depends on a policy stance. We have pointed to the possible shift in policy orientation from a concern to renew and develop infrastructure towards a wish to deliver high quality public services. Given that the difference between the two types of concession rests to an important extent on the intention of the contracting authority, it could be that a different policy perspective could transform works concessions into service concessions over time. The immediate consequence of this is that a good initial indication of where service concessions may arise is the sectors where the much more visible works concessions currently exist.

This consideration of shifts in policy and more general economic behaviour has one other interesting implication, namely that the extension of the phenomenon of service concessions partially depends on the creation of new service sectors. There are even areas where the concessions model itself is helping, or could potentially help, to create new areas of activity, particularly through the development of new applications for state-owned assets. This possibility arises, for instance, from the recognition of the significance of human capital and intellectual assets within the knowledge economy. Expertise in the public sector or information resources held by the state are seen as having wider possibilities than their traditional applications in areas that could have significant commercial value. This situation could arise in diverse areas ranging from the skills of public research institutions and the appreciation of the value of public data collections to an exploitation of the cultural assets held by public institutions like archives and museums. Appreciation of their value, in some instances has led to their privatisation, but in many cases there will be a continuing public interest in the assets held and a co-operation arrangement with the private sector, using the form of a concession, would be more appropriate.

Of further interest with the new areas of commercial activity are the new ways of exploiting the asset. It may be that providing a public information system on the web, for instance, allows revenue to be derived from advertising or other IT models rather than direct payments. In this case the exploitation of the concession would

not be associated with income derived from payments by the user (either directly or indirectly via the public authority), but with income from third parties who have an interest in the target group making use of the information system.

With this context in mind, it has been thought that it would be useful to distinguish between different types of sector in setting out the areas, where actual or potential service concessions have been identified.

A broad distinction has been made between four types of service concession. The first thing to say is that the different categories are not watertight. They are based on a rough distinction relating to broad characteristics that may play out differently across the Member States. They are as follows :

- *Utilities :* these are the well-established industries that provide basic public network services that have traditionally been regarded as natural monopolies and have often been organised at a national level. Users of these services have usually paid for them directly and concession arrangements have frequently been a feature associated with them, in some Member States over many years. Public contracts in these industries have been governed by the provisions of the Utilities Directives – currently 2004/17/EC rather than 2004/18/EC, which excludes both works and service concessions from its provisions

- *Established Public Services :* these are other public services that have traditionally been provided to users directly by the state, usually without a charge. They consist of essential personal services (health, education, law, security and policing, social services) or services associated with facilities that have usually been funded out of taxation. They are generally provided by agencies operating at a national or regional level. They are also for the most part relatively new areas for the involvement of the private sector, at least as far as the provision of core services is concerned and are often areas of some political sensitivity.

- *Other Services at a Municipal Level :* these are other public services which are distinguished from the previous category mainly by the fact that they are usually organised and delivered locally. Service concessions in these areas often operate at a much smaller scale than the other categories. They are identified separately, because their inclusion in the areas affected by any legislation may depend to an important extent on the threshold level that applies.

- *New Areas :* this is a category for new and emerging services, where, for instance, the concession form may offer an interesting way of promoting innovation and development, while maintaining a public interest.

The sectors identified within these categories are presented in the table below :

Service Concession Sectors			
	Service	CPC v2	Comment
Utilities			
1.	Water Supply of drinking water desalination units Waste water and sewage processing	692 6921 83327 94110	 For the provision of potable and irrigation water
2.	Energy Provision of energy through renewable resources. Heating services	83324 83324 (solar power, wind power) 69220	 to domestic and commercial establishments
3.	Transport Railway, Tramway, trolley bus, Bus Automated systems, Cable	64 64111/64210 64112/64221 64112/64221 64119	 Suburban and inter-urban
4.	Seaport and airport facilities Marine services	675/676 67511	 Providing tug and chandler services Providing facilities mainly for

	Marina services	67512	private yachts
5.	Postal Services	6811	A variety of arrangements, especially for the management of postal services and the delivery of special categories of post
6.	Broadband internet	84222	
Established Public Services			
7.	Health Patient management Patient accommodation Health insurance Catering in hospitals Pharmacies in hospitals Pathology & Laboratory services	9311 91122 91122 71322 63393/ 63399 93119 93195	Including call centres (CPC v2: 85931)
8.	Education Specialised education services Training Catering	92 92911 92919 92919	eg music tuition
9.	Judiciary systems Court Administration Prisons Prisoner delivery	 91270 91280 91280	Where payments tied to performance
10.	Employment & Social Services Employment coaching	851 8511 91122	Where payments tied to performance

	Chronic disease & injury management Care of the elderly Crèches	93221/934 93510	
11.	Motorway operation	5421/5422	
12.	Leisure Public lotteries Culture facilities Maintenance and management of public real estate Catering and other public facilities Shops etc in museums and visitor attractions	7324 96929 962/963 7221 (631/632) 91135/91136 96411	hotels and other tourist facilities motorways, airports, recreational facilities, parks etc
Other Services at Municipal Level*			
13.	Waste(Refuse) management	942/943	
14.	Library services	8451	
15.	Car parking	97990	
16.	Traffic control	91260	including collection of speeding fines
17.	Markets		
18.	Sports & leisure facilities Ski facilities and lifts Swimming pools Other facilities	9652 96520 96520 96590	
19.	Columbaria / cemeteries	9731	

20.	Organisation of fairs & festivals	91124	
New Areas			
21.	Public information and communication	83121	including web sites etc
22.	Business support services	8311/8312/8399	
23.	Public intellectual property and assets	733(9)	Allowing controlled use of pubic data, copyrighted material, designs and other intellectual assets
24.	Research & laboratory services	93195	
25.	Pharmaceutical testing	93195	

* Some services listed in other categories may be primarily provided at a municipal level, depending on institutional arrangements

Research & laboratory services are one of the excluded areas, though the increasingly commercial dimension to these services may cause this exclusion to be re-considered.

The list of service sectors set out above makes use of everyday terminology rather than that of the CPC.

It is important to say that the sectors listed above consist of areas both where concessions currently exist and where they may exist in the future. In some sectors, there is already a substantial presence of concessions in some Member States. In others there are isolated cases or other indications of a possibility for concessions to exist. In this sense their inclusion in the list has been on the basis of certain straws in the wind. In no sector are concessions extensive across the whole of the European Union. To this extent all of the sectors listed represent sectors in which there is a potential for concession arrangements rather than one in which they are already well established.

Baseline Description

4

In this section, we describe the situation in the eight Member States under consideration, pointing to evidence on the current extent of service concessions in each of them, and then describe the market characteristics of significant sectors.

4.1 Issues of definition

The aim of this section of the Report is make a contribution to the characterisation of the 'baseline' situation in the sectors and Member States under consideration. The impact assessment of any eventual legislation on service concessions will need to compare the situation that is expected to arise as a result of the legislative provisions against current circumstances, or rather against the situation that would apply in the absence of any new legislation. It is therefore important to have as clear an idea as possible of the current extent of service concessions.

Again there are considerable practical difficulties in providing accurate information of this kind, beginning with the absolute number of concession arrangements. Even with public procurement contracts in the narrow sense there are problems estimating their full extent. Public procurement is estimated to cover a significant proportion of all economic activity in the EU – some € 2,000 million or around 17% OF EU GDP. However only one fifth of this is published in the Official Journal on an EU-wide basis[19]. A large proportion of the total falls below the publication thresholds, but in spite of a steady increase in the number and proportion of contracts published at an EU level, there are also an unknown number of individual projects that fail to be published even if their value exceeds the threshold. It is still difficult therefore to provide a full characterisation of the general procurement market.

With service concessions, the fact that there is no requirement to publish notices at an EU level, means that there is no consistent source of information available on them. In addition, we have seen in the previous chapter that there are conceptual difficulties in establishing a clear target for investigations. In most Member States, contracts are not necessarily designated as service concessions and there can be conceptual difficulties in making a practical distinction between concessions and other types of public contract and between works and service concessions. There are also clearly a number of instances of arrangements that ought to be identified as service concessions, but which are regarded by the contracting authorities as something else.

A further definitional issue relates to the threshold level that applies for service concessions. Two main possibilities immediately suggest themselves. Either the threshold could be the same as that applied in works concessions or it could be the same as with service public contracts. The choice of threshold could make a substantial difference to the impact of any legislation. More immediately it also

[19] Internal Market Scoreboard No 19 July 2009. Public Procurement Supplement.

makes a substantial difference in terms of the characterisation of the baseline situation. Clearly with the lower threshold, there would be many more contracts potentially covered by legislative provisions. This would not only extend the absolute number of situations potentially affected, it would also extend the sectoral composition and increase the extent to which smaller, local and regional contracting authorities would be involved.

With these considerations, our conclusion overall is that it is only theoretically possible to give a clear account of the sectoral distribution of service concession arrangements in a situation where the definition of 'service concession' is applied a lot more consistently than it is currently. Consequently, any account that follows inevitably has to be partial and provisional.

Furthermore, because the use of the concession model is to a large extent a matter of policy choice, rather than a prescribed framework such as that which exists for public procurement more generally, there can be substantial variation in its incidence. In fact we have already seen that there is a considerable variation between Member States in the extent to which the concession model is established and applied, but it is also the case that there may be a similar degree of variation in some Member States at a regional and local level, depending on the policy stance of the relevant authorities. In this context, if we are to make progress in providing as useful a characterisation of the situation on the ground as possible, it is necessary to begin by considering the case country by country.

4.2 The evidence base

The two sources of evidence on the extent of service concessions in the Member States under consideration are essentially published sources and evidence gathered in the course of the interview programme conducted for the study.

Perhaps not surprisingly, in view of the status of service concessions and their overshadowing by a broader debate on PPPs, the initial literature review conducted for the study produced no definitive characterisations of the extent or sectoral distribution of service concessions at a European or national level. However, on the basis of indications provided in the interview programme, we have been able to investigate further the situation in particular sectors through published sources.

As has been seen in the previous section, a search of the TED database did reveal some partial information, showing a relatively large number of notices relating to service concessions published in the Official Journal and at a national level by French authorities and a smaller number by some other Member States.

In addition official journals and the web sites of a number of agencies or sections of ministries with responsibility at a national level for promoting PPPs provide information on contracts under development or concluded over a number of years.

The interviews conducted on the ground also provided details on the situation in individual Member States. While the nature of this process does not usually permit the gathering of information differentiated at a sectoral level, it has assisted the development of a characterisation in broad terms of the sectoral incidence of service concessions and has provided information on the social and political importance of public service concessions, some general characteristics of the supply and demand for them and the context in which service concessions are being or might be awarded.

Because the situation does vary considerably across the different Member States considered, setting out the results of our investigations from the various sources begins with an overall account of the situation in each country. This is followed by descriptions at a sectoral level.

4.2 The situation in the selected Member States

The Czech Republic

The concept of a 'concession' was not used in the Czech Republic prior to its application for EU membership.

The EU Directives have been transposed as Act No. 137/2006 on Public Contracts and Act No. 139/2006 on Concession Contracts and Concession Procedure (the Concession Act).

The law on concessions makes considerable cross-reference to the Public Contracts law and in fact a revision of both laws is currently being prepared, although no legislative decisions have been reached. The revised law on concessions is not likely to change much in substance, though there will be a major attempt to make the law more easily understandable and the detail of the procedural aspects will be considerably enhanced. There is the possibility of a time limit of 30 years for concession contracts.

There are no sectoral provisions in the legislation.

The Czech Concession Act makes no distinction between works and service concessions. It applies to both. The threshold is 20 million Czech crowns – about 700,000 euros.

The provisions of the Concession Act have not yet been applied. Around 10 PPP projects in the transport, justice, leisure, education and health sectors have been under active consideration for some while. The contractual form that an eventual PPP will take is one of the matters under consideration.

It may be that various other public contractual arrangements made in the Czech Republic ought to be considered as service concessions. Their status is not clear. It

was reported to us in the course of our discussions with Czech stakeholders that there is considerable uncertainty among contracting authorities on the nature and use of concessions and concession procedures.

The factors driving the potential development of service concessions are largely political and commercial. The existence of so-called 'quasi-concessions' in sectors like the water industry have been the subject of some political debate[20]. 'Quasi-concessions' are not real concessions in that the return to the contractor is more or less guaranteed through cost-plus pricing provisions. There is some pressure for these arrangements to be re-negotiated to be made into 'real' concessions.

The Structural Funds available in Central and Eastern Europe currently represent a potentially significant public investment injection, especially in the utilities sectors, that could stimulate concession arrangements, though these are more likely, initially at least, to be works concessions rather than service concessions.

There are considerable numbers of international companies represented in the Czech Republic and legal and other expert businesses, across most of the relevant sectors, that would be in a position to respond to invitations to develop proposals on service concessions. The complexity of concession arrangements and uncertainty about the application of European and national law are said to inhibit further developments.

Greece

Concession type contracts were used by the Greek state for the first time back in the second half of the 19th century and in the early 20th century for the construction and operation of important infrastructure projects (rail network, ports, Corinth canal) but also for the provision of a number of public services (tax collection, postal service, telephone services). More recently (after WWII), concessions were not used in general although some form of service concession arrangements were used for the provision of urban bus transport (OASTH – Thessaloniki) and intercity coach (KTEL) services. Both continue to operate[21].

In the last 20 years, concessions type contracts have been used for the construction of sizeable (over €1 billion) infrastructure projects (Attiki motorway, Athens Airport, a bridge connecting Peloponnese with the northern part of Greece) where the contractors were responsible for the maintenance of the infrastructure and are paid back through the payment of tolls/user fees[22]. With variations the procedures

[20] See for instance 'water industry privatisation in the Czech Republic: Money down the Drain? Transparency International Czech Republic, Prague 2009

[21] Gkitsakis Ioannis (2004), Public Works and Services Concessions - Conceptual elements, legal framework and cases, PhD thesis (in Greek)

[22] Still, in all these cases there was a significant contribution of the state in the initial capital through the Public investment programme and the Structural Funds.

followed were those applicable to public works contracts based on earlier Directives (e.g. 93/37 as transposed in the national legislation) while the final contracts were ratified by the Greek Parliament. Work concession contracts were used for the new round of infrastructure projects (national motorways, Chania airport, Thessaloniki underground) and followed the principles of the 2004/18 Directive. The General Secretariat for Public Works under the Ministry of Environment, Planning and Public Works – has been the entity responsible for these projects[23].

The legal framework covering concessions in Greece – and even more service concessions – is rather complicated. The EU Directives 2004/18/EC and 2004/17/EC were transposed to national legislation in 2007 through the presidential decrees 60/2007 and 59/2007 respectively and have served as the basis for the recent works concessions projects mentioned above[24.] At the same time, in 2005, the government introduced a new law 3389/2005 concerning Public Private Partnerships intending to develop a common legal framework and the necessary infrastructure to promote PPPs in Greece. The main objective was to attract private finance for the development of a range of public infrastructure and to secure the necessary maintenance and quality of services thereafter. The law established an Interministerial Committee to define PPP policy and to approve PPP projects and a Special Secretariat for Public & Private Partnerships (SSPPP) to identify possible projects, evaluate proposals to forward to the Inter-Ministerial Committee and to support public entities in following PPP contract award procedures.

The PPP law applies equally to work and service type contracts and has adopted – although not fully - the provisions of the 2004/18/EC Directive relating to public contracts for the selection procedures, contractual arrangements and award criteria. There is no definition nor reference to concessions per se but it is stated that "the law applies to the execution of works or the provision of services that are the responsibility of the public entities where the private contractor undertakes an important part of the risk related to the financing, construction, availability or demand of the object of the contract and the contractor is reimbursed either in the form of the availability payment provided by the public entity or by the final users". The law also sets an upper threshold of €200million, since the intention of the legislator was to attract private investment to smaller scale projects.

However, in addition to that, procedures and provisions relating to works and services concessions in other sectors and types of activity are dispersed in various laws and regulations. In the area of air and sea transport, the service of domestic lines with limited demand (for small islands) is conducted through service concession arrangements based on specific procedures described in legislation concerning the

[23] Very recently transferred under the newly created Ministry of Infrastructure, Transport and Communications.
[24] Interviews

two sectors and taking account of EU regulation 3577/92[25]. Similarly, the construction of ports and marinas and the subsequent maintenance and/or provisions of relevant services (including cargo services or services to yachts etc) are based on separate legislation. Another area where work concession arrangements have been used recently is that of the construction and operation of municipal parking lots (over 15 in number) that was based on an earlier law of 2052/1992[26].

So far the construction sector remains the prime sector involved (active in most of the above areas). Since it is driven by public sector contracts, the preference for concessions for motorways and other projects (marinas, parking) means that they represent an important part of the activity of the sector (currently estimated at around 40% and likely to increase, given the dominant views among the authorities).

There have so far been very few PPP projects approved by the Interministerial Committee. In total, 52 PPP projects for 345 infrastructures of a total value of €5.7 billion[27] are at different stages of the process before submission to the Inter-ministerial committee for approval. Almost all are of the so-called "non-retributive type" (e.g. construction and maintenance of hospitals, government buildings, schools, prisons, universities) and are based on availability payments – thus not concessions from the perspective of the Directive. Still, according to the government there is a significant exposure to risk based on strict quality criteria and penalties defined for not meeting them.

In contrast, there are only a few proposals for retributive type projects where compensation is expected to come from final users (or paid by the contracting authority based on the level of usage), and would classify as concessions. These concern waste collection, management and treatment (3 projects of a total value of €450million are in the different stages prior to approval)[28]. Other potential sectors/activities named during the interviews – although no project proposal has been submitted – include desalination units for the provision of potable and irrigation water, maintenance and management of public real estate (hotels and other tourist facilities) and the provision of energy to islands through renewable resources. The extent that the above could fall under the works or services concessions varies by the intention and level of the initial investment. Still, irrespective of whether the projects are service or work concessions, the applicable

[25] In both cases part of the recompense for the provision of the service comes from the state in some form of subsidy.
[26] Gkitsakis Ioannis (2004), Public Works and Services Concessions - Conceptual elements, legal framework and cases (in Greek), PhD Thesis and Interviews
[27] According to more recent data provided by the Special Secretariat for PPP
[28] Special Secretariate for PPPs(2008), Novelty and opportunities in the Greek PPP market, Retrieved from http://www.sdit.mnec.gr/export/sites/sdit/en/infopoint/implementation/info_memo_june_2008.pdf

procedures, as described by the law 3389/2005, are expected to follow – in essence if not completely –the fully fledged approach of public contracts.

Spain

The concession of public works and services is defined in detail under the Act on Public Sector Contracts (Ley 30/2007 de contratos del sector publico) which entered into force in May 2008 and also in the Concession Act (Ley 13/2003. Reguladora del contrato de concesión de obras públicas).

Under the law, a concession is based on the contractor financing, building and operating a public facility as well as charging directly the end user.

This Act supersedes the 1972 concession law governing road PPPs by providing a strong regulatory framework for PPPs not only in transport, but also in other sectors. However, the law states that a concessionaire also can exploit an existing public work without building it. A concession contract may cover the construction, maintenance, and operation of a new infrastructure or the maintenance and operation of an existing infrastructure. There is thus no legal distinction between work and service concessions.

Under the Concessions Act, remuneration should mainly come directly from the end-user. However, the Act also introduced the notion of shadow tolling (where the number of users for a particular service is counted and the state directly pays the concessionaire). The law also allows for public funding in addition to income from users to finance concession projects, in the form of subsidies or public loans (préstamos participativos), where the state is paid back with interest during the period of the concession.

Directive 2004/18/EC is transposed in the national legislation through Ley 30/2007 de contraltos del sector publico. The law also undertakes a revision of the structure and the contents of Spanish public procurement legislation. The use of the term 'concession' is wider that at a European level. Under Spanish law, any PPP or PFI is considered under the general term 'Concesión'. However, definitions of public works concessions are generally consistent with the European Commission's.

In addition to the central government, autonomous regions also have the autonomy and financial resources to consider PPPs for the delegation of public services (concessions). Municipal authorities can also tender out the exploitation of public services.

Key elements defining a concession include:

- The direct payment by the end-user
- Transfer of availability risk to the concessionaire

- Transfer of demand risk to the concessionaire
- The flexibility of the concession contract.

Spain has experienced significant PPP activity in a concentrated number of sectors, particularly within the road sector, but also healthcare, schools and prisons. Most of these arrangements currently concern public works rather than services[29].

With a strong local private sector market and a clear legal framework it is likely that the market for PPP and concession use will expand. There is, however, a lack of central leadership in developing a standardised procedure. Decentralisation in Spain means less transparency and potentially increasing barriers in the market for foreign competition.

Concessions are seen as flexible arrangements, shortening the time needed for developing infrastructure, allowing better use of public funds and encouraging a better cooperation between the private and the public sectors. However, some legal uncertainties, such as the possibility of challenging a contract, are perceived to be a problem.

In Spain, no publicity or specific tendering procedures are necessary for contracts under €18,000. A form of competition (without the need for publicity) between different contractors is necessary between €18,000 and €60,000 and at least local publicity is necessary for contracts above €100,000. , European thresholds, of course, apply.

France

France has experienced various forms of concession since the sixteenth century and they are currently a well-established feature of the provision of public services. Traditionally, concessions were granted in the rail, water, urban transport and road infrastructure sectors and were responsible for developing much of the existing infrastructure.

Concessions are referred to as 'Délégation de Service Public'(DSP) which indicates how concessions are perceived. They are governed by the Loi Sapin (93-122), originally passed in 1993, and amended since.

The provisions of the Loi Spain have been transposed in the Code governing local authorities (Code Général des Collectivités Territoriales) and have also been developed by court decisions (jurisprudence).

There are three main types of contract under this law:

[29] Interview with Mr Gutierez de Vera, SEOPAN.

- affermage (leasehold estate), a 'pure' service concession, where in which there is no works elements whatsoever (usually smaller scale contracts such as water provision for small municipalities)
- concession, which is similar to affermage, except that the concessionaire is in charge of the totality of the provision of a public service, including potential works elements
- 'régie intéressée' a concession type-agreement where there is no direct payment by the end-user. Risk is delegated to the concessionaire since part of the remuneration is based on performance (CE, 30 juin 1999, Syndicat mixte du traitement des ordures ménagères centre-ouest seine-et-marnais).

All three types of DSP contract fall under the European definition of service concession. The specificities that distinguish DSP from marchés publics (public contracts) are the following:

- All or 'a substantial part' of the contractor's remuneration comes directly from the end-user, or is at least performance-based[30]

- The object of the contract is the service provided to the end-user, not the contract between the public authority and the contractor[31]

- Operational risk is taken by the contractor –a number of responsibilities are taken by the contractor, such a crisis management and having to ensure the continuity of service[32]

- The contracting authority, keeps a strong supervisory role: it sets the objectives of the contract, receives an annual technical report (often checked by independent consultants) and the annual budget of the contractor for the project, which is then checked by a regional auditing chamber.

In addition, the Loi Sapin allows for a certain degree of flexibility, especially when it comes to:

- The tendering process – the preferred method being a negotiated procedure

- Contract renegotiation – once the contract has been awarded, and because of the length of the contract and technological advances, new clauses can

[30] Jurisprudence Conseil d'Etat, 15 April 1996, Préfet des Bouches-du-Rhône and 30 June 1999, SMITOM
[31] Jurisprudence Conseil d'Etat, 22 mars 2000, Epoux Lasaulce
[32] Jurisprudence Conseil d'Etat, 15 June 1994, Syndicat intercommunal des transports publics de la région de DOUAI

be added to the contract without the need for a new tendering process. The contract evolves

- The length of the concession – which can be increased, but only if justifiable on the grounds of a need for new facilities; in any event, the contract extension cannot exceed one year.

The Loi Sapin does not specify what a public service is; it is thus often debated in courts and ensures that new areas where concessions arise are under this legislative framework.

There is competition between the different types of contract to deliver a public service, the most common being

- Concession-type contracts (DSP), with a stock often estimated to be around 10,000 contracts,
- PPP (Contrats de Partenariat), with, 288 contracts advertised since 2004,
- Régie autonome or personalisée – where the contracted authority is a public body or a private one that does not take exploitation risks.

Decisions on which contract is needed depends on the type of service to be delivered as well political and economic considerations.

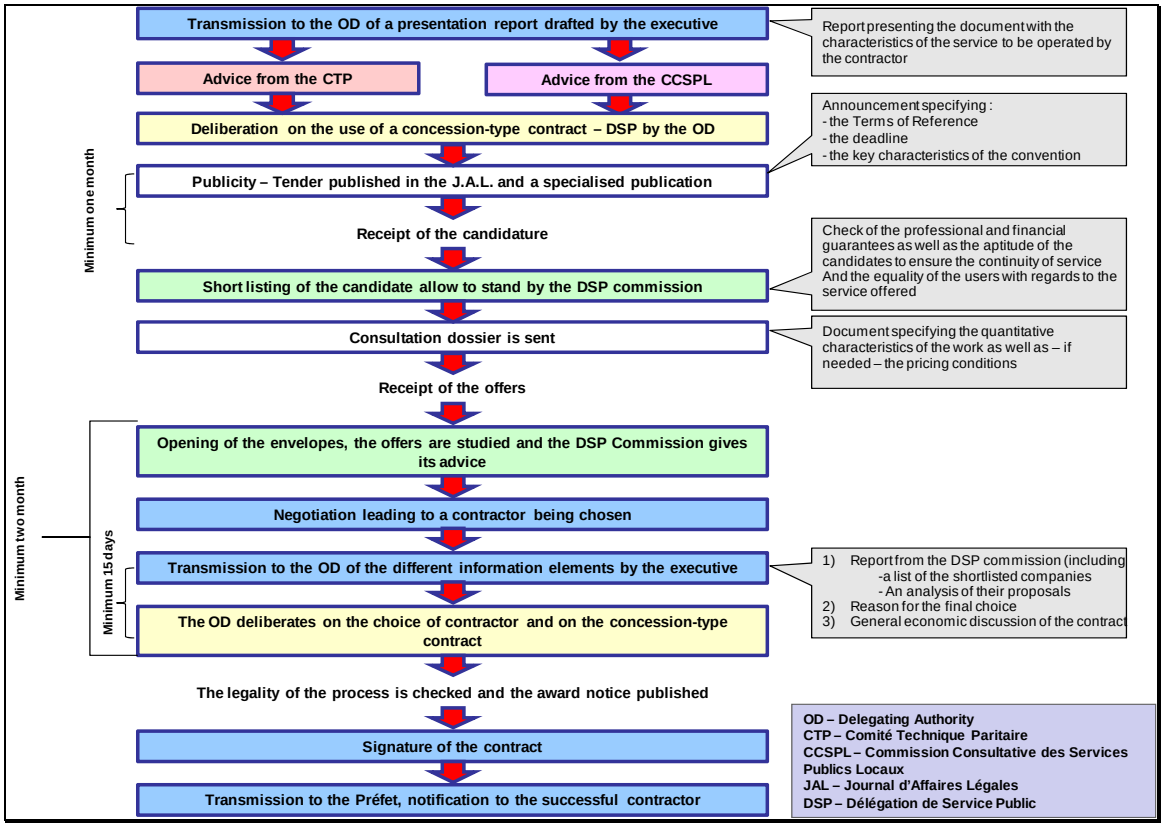
With a high level of devolution in France[33], the delegated authority is always a political actor.

The thresholds for publication of a tender is EUR 200,000 for the general sector, EUR 400,000 for 'network sectors' (ie: water, broadband...) and EUR 5 million for works concessions. These thresholds are those of the Directives, reviewed each year.

The process for awarding a concessions contract is as follows :

Tendering and awarding process for DSP

[33] France has four levels of government : the State, the region, the département and the municipality. In addition, groups of municipalities can come together to form intercommunalités, which are increasingly present in concessions. Paris (both department and municipality) and Corsica (both region and department) are managed differently.



Source: Institut de la Gestion Déléguée

PPPs have been developed in France in recent years, in contrast to traditional concession arrangements. However, according to MAPPP figures, there have only been 228 PPP contracts signed, as opposed to a stock widely asserted to be around 10,000 concession-type agreements.

The estimated stock of around 10,000 concession-type contracts in France is worth around EUR 80 billion[34]. Sectors in which concessions arise include : water and sanitation – (stock of 2,536 concessions in 2007, with around 700 contracts reopened for tender each year), waste management, urban public transport (80-90% of contracts are concession-type agreements), Inter-city transport (around 1,000 concession-type contracts) heating networks (54% of concession-type contracts, representing 83% of total volume), gas and electricity infrastructure management, parking, motorways, sports facilities, swimming pools, broadband internet (60-70% are concession-type contracts, i.e. most of France except Paris), culture (eg: Musée Jacquemart-André in Paris), crèches, columbaria/cemeteries, markets, catering (schools / hospitals).

Since 2007, 1,580 Délegations de Service Public that can be considered to be mainly local service concessions have been advertised on the BOAMP. A major part (636)

[34] Interview with the Insitut de la gestion déléguée confirmed by other interviewees

were awarded for environmental services, including 382 for waste management and 287 for water distribution. The other three sectors of importance were local transportation (201), cultural and leisure activities (282) and catering (162). Out of the notices in those five sectors advertising the awards procedure, 11% were negotiated procedure, 24% restricted tenders, 30% open tenders and 35% were an "adapted procedure", where the contracting authority freely decides how to award the contract. Procurement may only follow the adapted procedure if the value is below the European thresholds which are similar to that of public contracts:

- € 133,000 for local authorities' services
- € 206,000 for central government services
- € 5,150,000 for works (both central and local governments)

European thresholds therefore apply in addition to a national threshold of € 90,000 over which the tender must be published in the BOAMP or a Journal d'Annonces Légales. Under €20,000 no competition is necessary. In addition, the concentration of large companies involved in concessions closely following the different publication and awarding procedures ensures that any dubious contract will be flagged up.

Germany

There is no established tradition of concession arrangements in Germany and the term is used colloquially to describe a wide range of licences and permits. There is little reference to concessions in German legislation.

The transposition of the Classic and Utilities Directives was somewhat delayed in Germany and only fully transposed in April 2009 with the Law on the Modernisation of Regulations for Awarding Contracts (Gesetz zur Modernisierung des Vergaberechts).

Generally with regard to procurement, in national law, the fourth chapter of the competition law (law against distortion of competition), the award ordinance (Vergabeverordnung VgV) and contracting rules for awarding public services and works (Verdingungsordnungen VOL/A and VOL/B) are significant.

There is, however, no clear differentiation between service concessions and general or works concessions and no applicable definition of the term 'concession' in German statutory law. The running and maintenance of existing infrastructure is seen as a 'Bau-Konzession' (i.e. construction or works concession).

In 2005 a PPP Acceleration Act (Öffentliche Private Partnerschaften ÖPP-Beschleunigungsgesetz) came into force, removing some of the restrictions surrounding the implementation of PPP in Germany, mainly through changes to the

regulations on fees and tolls. The legislation, however, does not cover all legal aspects associated with the implementation of PPPs and concessions.

Generally PPPs in Germany are not seen as involving concessions. Additionally, in the water and waste sectors projects are usually regarded as public contracts rather than concessions despite the fact that life-cycle responsibility lies with the private sector.

This picture of concessions being largely separate from the normal public procurement regime is reinforced in that the award of service concessions falls outside the scope of current national legislation and regulatory jurisdiction and there is no statutory legal regime governing a tendering process. Similarly, the tendering of service concessions is not subject to legal review by procurement chambers, as is the case with public contracts. In effect, since service concessions are excluded from the Directives, they are regarded as being outside of regulatory control in Germany. Consequently, although there are a number of service concessions operating at the municipal level, they are generally subject to unclear rules and legal uncertainties for both the public and private sector partners.

This situation also gives rise to an important loophole as far as the award of contracts by the public authorities is concerned, allowing the possibility that normal public contracts can be taken out of the public procurement framework by designating them as service concessions. It has been alleged in the course of our interviews that this practice is common, especially at a municipal level. We have not been able to investigate this directly, but clearly the current institutional arrangements make this a possibility.

From a low base, the number of concession contracts in Germany has increased over the last few years and the German market offers significant potential for involvement of the private sector at the state, federal and local levels. With an appropriate legal framework service concessions could be a growing feature in Germany, although ironically the initial effect of any legislation providing clarification on the nature of service concessions and a framework for their administration more in line with the practice for public contracts could lead to marked increase in the number of public contracts processed by the normal regime rather than a noticeable increase in service concessions.

Many of the concession deals that have been completed include the construction, financing and operation of various types of facility, such as offices, storage, water parks, schools and leisure complexes, with municipalities acting as public contractor in most cases. A variety of models have been developed, particularly in the infrastructure sector. These may lead to more service concessions in due course. Currently, the transport sector remains the most likely to be involved with service concessions and hence to be included in the scope of any future domestic legislation on service concessions.

Italy

The Legislative Decree No. 163/2006 (Regulation of public procurement regarding works, services and supplies implementing Directives 2004/17/EC and 2004/18/EC) also known as Codice De Lise governs public procurement and concessions (art. 30). This Decree also rearranged and repealed the Merloni Law, Target Law (443/2001) and Decree 190. The Merloni Law (109/1994) constituted the central focus of legislation relating to PPP implementation, alongside the Target Law and Decree 190, both of which were enacted to facilitate the realisation of major infrastructure projects of national strategic importance.

Specific provisions apply to service concessions which can be awarded in the operation of sectors such as water networks (distribution) and refuse, gas, public lighting, advertising space, green spaces and sport facilities. Service concessions arise only in cases where the construction element of the project is 'of secondary importance' to the operation of the service and is only limited to the 'improvement and reorganisation' of a service provision.

However, recent changes in Italian law have the potential to increase considerably the number of concession arrangements to be found across the country. In November 2009, the Italian Parliament passed Legislative Decree 135/2009, which was directed at local public services and the involvement of the private sector. The law facilitates private participation in institutionalised PPPs and sets limits of public shareholding. It is anticipated that municipalities will be selling at least part of their shares in local utilities and other companies over the transition period up to 2012 and will have more frequent recourse to public tendering and concession arrangements. Regional laws on PPP also exist and regulate PPP contracts awarded by authorities at the local level. A number of articles of the national code refer specifically to Service Concessions, defining them using the definition in the Directive.

All concession contracts in Italy are supervised by the Autorità per la Vigilanza sui Contratti Pubblici di Lavori Servizi e Fornitore (AVCP - Authority for the Supervision of Public Contracts). The Authority was established by law 109/1994 and supervises the entire public procurement system, both at a State and at a Regional level, in order to ensure compliance with the principles of legality and transparency in awarding procedures and to promote the effective and convenient execution of contracts, and compliance with competition rules within each single tender. Local, central and regional authorities (Consip -Central purchasing body- and CNIPA included), are under the supervision of the Authority, which is an independent body. Following the last amendments of the Code, the Authority provided guidelines on Project Financing which made reference to the use of standard forms and the interpretation of 'most economically advantageous tender'.

There are two types of tendering procedure:

- Concessions under public initiative (Art. 144 Legisl. Decree 163/06) whereby the Public Administration (PA) invites tenders in a restricted/open procedure on the basis of a preliminary draft, a business plan and a concession contract. The PA evaluates the tenders received using the criterion of the most economically advantageous tender
- Concessions under private initiative (Art. 153 Legisl. Decree 163/06) whereby the project is designed and presented by a promoter on the basis of a Prior Information Notice (PIN) by the PA. Following the selection of the best proposal, the PA puts the promoter's proposals out to tender and identifies the concessionaire.

Sectors in which service concessions arise include public transport, information systems, water (around 10% of Italy's water is distributed by private companies a case where service concessions can arise; a further 10% is distributed by mixed private-public companies) and waste management.

The national PPP observatory, the Osservatorio Nazionale del Partenariato Pubblico Privato, was created in 2002 and collects and analyses data on procurement markets in a broad sense. Its figures[35] show that in 2006, there were 1,367 PPP projects, representing a total value of € 16 billion and these included 384 service concessions (28.09%), with a value of € 3.7 billion (23.6%). In 2008, there were 1,342 calls for tenders for PPPs for a total value of € 6.8 billion, 817 of which (for a total value of €482 million) were service concessions.

PPPs made up 5.5% of total procurement notices in 2008, though 20.6% by value. Service concessions accounted for 3.4% of total procurement notices, but only 1.5% of their value.

The low average value of service concessions in the country (around €800,000) is symptomatic of a country with a very fragmented market in the traditional sectors where they arise, such as water, sanitation and waste management.

Whilst the number of service concessions advertised increased to 61% of all PPP calls for tender in 2008 (up from less than 30% in 2002), the share of their value has halved from 14% to 7% of the total value of PPPs advertised.

512 of the 622 service concessions up for tender in 2008 were advertised by municipalities, representing €414.8 million (other local agencies accounted for 105 calls, representing €66.3 million). As expected from these data, the overwhelming majority of projects had a value of below €1 million (514) and only 19 were over €5 million.

[35] published in 'il mercato del partenariato pubblico privato nel 2008 ' an annual report produced by Cresme Ricerche spa in conjunction with Camera di Commercio di Roma

More than half of service concessions arise in the management of green spaces (142), sports complexes (107) and the promotion of local commerce and the craft sector (92). Compared to countries such as France and Spain, utilities are of less importance, with only 59 projects in water, gas, energy and communications and refuse collection. Other sectors of note include parking (65) and cemeteries (28).

European thresholds have been transposed in the decree law 163/2006 and apply to concession contracts in Italy. The threshold for service concessions contracted by the state is EUR 137,000, and EUR 211,000 for those contracted by local authorities. Works concessions have a threshold of EUR 5,278,000. There is no legal requirement to tender out a contract under € 20,000. Between € 20,000 and the European thresholds, the awarding authority must respect the "principles of transparency, proportionality and equal treatment" (Art. 125/11). Service contracts thus have to be published in the Official Gazette. However, those thresholds do not apply to service concessions, Art. 30 of the decree law stipulates that service concession have only to respect the principles of the Treaty, leaving the issue of national thresholds open for interpretation.

Portugal

Portugal has a long tradition of concessions in certain sectors, especially rail and roads.

The Public Contract Law (Decreto-Lei No. 18/2008 - Código dos Contratos Públicos) regulates the creation and execution of public contracts. It transposes Directives 2004/17/EC and 2004/18/EC into Portuguese legislation.

To coordinate current and future PPPs the Portuguese Government adopted Law 141/2006, superseding Decree-Law 86/2003 and defining new procedures for the appraisal procedures of public-private partnership (PPP). It recognises PPPs as a fundamental policy instrument reflecting a trend towards curbing state intervention and expenditure, and greater reliance on the expertise of the private sector to satisfy collective needs. However, the intention is that PPPs should only be used when they are clearly advantageous and satisfy various tests of efficiency and effectiveness, i.e. value for money, with a clear division of inherent risks between the public and private sectors.

Law 141/2006 is considered to provide legal certainty in Portugal.

The law requires the public entity to measure the risks and avoid future compensations to the private entities or payments that are not anticipated when the agreement is negotiated. The public entity must negotiate a PPP with a reasonable assurance of the stability of the agreement.

The difference between works and service concessions is based on the value of the infrastructure against the value of the maintenance aspect of the contract.

However, in practice, there is no legal difference between the two, even for accounting purposes.

The object of a concession contract is the right a company has to exploit the infrastructure. As concession contract is defined as:

- A long-term contract between a private entity and a public company
- Transfer of demand and availability risk to the concessionaire
- The public entity remains the owner of the assets
- The service delegated has to be of general interest (public service).

The final payment by the end user, although important is not seen as key to the contract. Some roads for instance are paid by shadow tolls, where the concessionaire's remuneration is paid directly by the government at a rate based on the traffic, with a maximum payment amount agreed.

The PPP law has created other types of agreements, such as:

- the services agreement (contrato de prestação de serviços) where the public entity continues to operate the public service and the private entity cooperates in certain services; or
- the management agreement (contrato de gestão) according to which the private entity manages a public establishment rendering services to third parties and is paid a fixed or variable amount periodically by the public entity (these type of agreements are used in the health sector)

No concession contracts have yet been signed under the new law. Concessions granted under earlier legislation are to be found in the following sectors: roads, railway projects, public transport (light railways), water and sanitation, electricity, hospitals, airports. There is a degree of political sensitivity of certain sectors, such as the health sector, where the need for an extra degree of flexibility is perceived. Most concessions in the water sector were signed before the new law came into effect and were granted to Agua de Portugal, which has a share of over 70% of the market.

The Portuguese government conceded the country's entire road network to EP, a public company for 75 years. It is thus currently EP's role to sub-concede parts of the road network to other companies.

Consideration has been given to establishing PPPs for schools or building prisons, but, in both those cases, it was decided not to proceed.

Both works and service concession are included in the Publics Contract Code (article 16.2). European thresholds for advertising therefore apply to concessions in

Portugal. However, the code introduces different thresholds for different types of contracts:

- € 206,000 for service contracts entered into by E.P.E. hospitals
- € 412,000 for service contracts in the water, energy, transport and postal services
- € 75,000 for simple service contracts

It does not introduce a specific national threshold for service concessions.

The United Kingdom

In the UK, there is no legal definition of concessions beyond the EU definition.

The Consolidated Directive (2004/18/EC) has been implemented in UK law by the Public Contracts Regulations 2006 in England, Wales and Northern Ireland and as the Public Contracts (Scotland) Regulations 2006 in Scotland. No changes to legislation, other than the transposition of the Remedies Directive, are likely in the near future.

There are no specific national provisions on concessions and no specific sectoral provisions. The distinction between works and services concessions is carried over from EU legislation.

The vast majority of investment in the UK's public services is procured through public contracts. However, Public Private Partnerships, and the Private Finance Initiative in particular, have been used to deliver some of the more complex and significant public sector infrastructure projects and programmes. Partnerships UK's Project database has records of some 913 PPP projects, primarily PFI schemes. Of these 22 are identified as concessions, though most appear to be works concessions. Concessions are thus a minor subset in the PPP landscape.

Where the concession form has been used, the procurement route has been fully competitive, both for works and service concessions, including publication of notices in the Official Journal.

Procurement of all PPPs operate within an established framework, with clear criteria for securing value for money, specific guidance and standard procedures, including standard contracts, providing a core template.

PFI comprises 10-15 per cent of total investment in public services. By April 2009, there had been 116 signed PFI projects with the total capital value of £ 12.4 billion.

Service concession contracts have been explicitly established in sectors such as waste water management, marine services, care homes and learning disability services. There are also arrangements, notably in the rail transport and water sectors, which might be considered as (heavily regulated) concessions, though they have been established following normal public procurement procedures. These arrangements are considered in more detail below. In addition, there are developments that may be classified as service concessions in a number of new areas. Some of these contracts are of relatively small scale and have usually been procured using conventional routes, but they offer an interesting indication of possible developments. They include public information and communication websites, business support services, research & laboratory services and pharmaceutical testing.

The UK Government's stated aims are to deliver world class public services and to secure value for money for the taxpayer and expanding choice for the customer. To achieve this, it is recognised that new approaches are needed, including where appropriate, alternative Public Private Partnership approaches. While no policy has been developed to promote any one form of procurement over another, the inclusion of concessions as a possible procurement option in government guidance[36] is likely to have raised their profile.

Market conditions in the UK are relatively open with the presence of a number of international companies operating in the privatised sector. Concessions have been awarded to non-national companies such as Skanska and Bouygues.

4.3 The situation in the specific sectors

It is apparent from the discussion of country situations that there is a considerable variation in the extent to which the concession form of service delivery is used and also variation in the sectors in which this form appears. There are, however, a number of sectors that figure in several Member States, albeit to a varying degree. These include notably water services and waste management. There are then others where the presence of concessions is patchier but still evident, such as ports and airports and motorway management and maintenance services. Other sectors, notably relating to energy, have seen concessions in the past, but have been opened up to competitive access by recent legislation at a European level. Beyond that there are sectors where the presence of service concessions is particular to one or two countries or where their presence is even more tentative, where we are really talking about potential concession activity or examples that should be regarded as straws in the wind.

The purpose of baseline analysis is to establish points of reference against which further developments can be measured and contrasted. In the particular context of

[36] 'Infrastructure procurement: delivering long-term value' UK HM Treasury

an impact assessment, it is necessary to establish the situation prior to an intervention since this is a platform from which any subsequent assessment of the likely or actual effects of the intervention can be made.

Describing the current situation, however, is an exercise that is capable of endless further elaboration. As elsewhere in an evaluation context, it is necessary apply the principle of proportionality

In the current situation, we are concerned with the effect of possible legislation both on sectors where concessions currently exist and also sectors where they may exist in the future.

The immediate impact of any legislation is likely to be in sectors where concessions already exist, with the longer terms effects mainly dependent on the extent to which the legislation encourages the wider use of concession arrangements. Indications of the sectors where this effect may arise are somewhat speculative, based on both apparent potential and the occasional early indication.

Furthermore, it is not entirely clear what form these concessions might take within sectors new to concessions. One of the advantages of the form is that a degree of inventiveness can used in its applications. However, there have been a few indications that it might arise more extensively, for instance, in the provision of catering services in the health and education sectors. Analysing even this narrow range of potential applications is fraught with difficulties. Existing data on the catering industry, even when it is focused on public sector provision, tends to cut across the sectors we are concerned with, and does not greatly distinguish between public provision, private provision based on public contracts and concession arrangements. Any analysis of even this small area of potential concession activity would require a relatively intensive market study.

In establishing a baseline against which to analyse subsequent changes the most useful and cost effective approach is therefore to concentrate on sectors where there are already concessions.

This conclusion is reinforced by a consideration of the resources available. Again, given the wide range of sectors in which concessions already arise and the scale of the current project, the possibilities for collecting primary data are rather restricted. Analysis therefore has to rely on secondary sources. Here, because of the public interest in the sectors concerned and the developments taking place in them, the relative amount of information available for most, though not all, of the sectors, where there are already concessions, again indicates that they should be the prime focus of attention.

For reasons therefore of relative significance and of data availability, it was decided to concentrate on the following sectors, where concessions arrangements already exist in some Member States to a significant extent :

Water

Road and Rail Transport

Ports

Airports

Motorway maintenance & management

Waste management

Leisure facilities

Car parking.

Some of the sectors turn out to have a lot less information available than the others. The particular situation in this respect will be explained below.

Note also that in the case of motorway maintenance & management, the distinction between works concessions and service concessions is not altogether clear, but as indicated earlier, it is believed that some of the concessions arrangements could increasingly have the character of service concessions and a baseline description of the existing situation with works concessions might prove to be of interest.

4.4 Sector level analysis

4.3.1 Water

According to Eurostat, water collection, purification and distribution is worth almost €39 billion in seven of the eight countries discussed in this report (no figures for Greece). There are a number of small companies in Germany Spain and Italy, where mixed public private operators are in charge of a substantial share of water services. France has a smaller number of companies of all sizes than comparable countries due to the importance of the two largest companies Veolia and Suez. The sector employs just under 168,000 people in the six countries for which data is available.

NACE: E410 - Water, collection, Purification and distribution (million euro) - 2007

Country	Employees	Turnover	Number of Enterprises					
			Total	1-9	1-19	20-49	50-249	250+
Czech Rep.	n/a	1012.6*	223*	159	115*	16*	29	n/a
Germany	37572	8996.2	1817	1163	1462*	226	n/a	n/a
Greece	n/a	n/a	n/a	0	31	38	19	n/a
Spain	29305	4870.8	1153	942	1004	56	70	23
France	33563	10876.0	294	194	210	30	35	19
Italy	25561	5096.4	858	635	686	68	77	27
Portugal	13218	1016.4	177	90	100	16	49	12
UK	26579	8103.8	127	n/a	97	n/a	n/a	17

Source: Eurostat

* 2006

In most countries, water supply is a municipal responsibility rather than a national one. Private sector involvement is common and can take different legal forms, including outright privatisation. However, there is still a high level of direct public provision of water, especially in Portugal and Italy as well as in large cities such as Madrid and Paris (from January 2010). Sometimes the provision has moved back to the public sector after being in private hands.

Responsibility and market share of water supply

	Responsible Authority	Market share of operator		
		Private	Mixed	Public
Czech Republic	Municipality	36%	45%	19%
Germany	Municipality	6%	39%	55%
Greece		45%		55%
Spain	Municipality	36%	16%	48%
France	Municipality	72%	1%	27%
Italy	Regional	10%	10%	80%
Portugal	Municipality (often through PPP)	14	2%	84%
UK		89%		11%
England and Wales	Private companies (with OFWAT acting as a regulator)	100%		0%
Scotland	Regional	0%		100%
Northern Ireland	Regional	0%		100%

Source: Water Utility Management International, 2006; EUREAU Statistics overview on Water and Wastewater in Europe – 2008.

In most countries where concessions can arise, there is a split between the ownership and responsibility for the infrastructure and for the distribution to the final user. Where this split obtains, there is the possibility of service concessions – the provision of distribution services through a concession arrangement.

The water industry is characterised by a series of subsectors, governing :

- the collection of water
- its storage
- its distribution network
- delivery to customers (domestic and non-domestic)
- the management and treatment of waste water

Service concessions provide a way of managing the delivery of water to customers. Concessions may also arise in the other areas. These are generally works concessions, though where the infrastructure is well established and in good condition, they may have more of a service concession character.

Water has features shown by other industries covered by the Utilities Directive, notably its character as a natural monopoly and a network industry and it highlights some of the issues that arise in the other sectors.

Water supply is seen as a key public service, an issue that is central to the Water Framework Directive (2000/60/EC) that provides, as its title suggests, a framework at a European level for the development of the sector across the Member states. The Directive recognises that "water is not a commercial product like any other but, rather, a heritage which must be protected, defended and treated as such." Unlike some other services of general interest, however, water supply is not subject to a self-standing regulatory regime at EU level, though specific Community rules such as public procurement, environmental and consumer protection legislation apply to certain aspects of the service.

There are a number of common elements to all water provision. All water services require the capture and storage of large quantities of water, an extensive distribution system and treatment facilities, both of the initial supply and of waste water. Many suppliers also share extensive responsibilities for the management of river systems and large areas of countryside. There are, of course, large capital requirements.

Historically, however, in spite of the common issues faced, the pattern of water supply has evolved differently in the different Member States. Its distribution systems, for instance, vary considerably between Member States, depending on the way that the service provision is organised. The UK only has 25 water services (with

an average size of 2.14 million users), whereas France has 27,000 (average of 4,000 users)[37].

In the UK, the water industry has been privatised, in the sense that the regional operators are private sector companies. The industry is tightly regulated by Ofwat in England and Wales and the Water Industry Commission for Scotland in Scotland. In Northern Ireland the industry is regulated by the Utility Regulator, which is also responsible for electricity and gas.

The programme of privatisation in the UK water industry was developed in the 1990s. It resulted in 23 areas (21 in England and Wales), each with a monopoly provider established, after a public tendering process, on the basis of a contract for 25-30 years. Of the 21 regional monopoly water companies in England and Wales, 10 provide both water and sewerage services; and 11 are water only companies. All the providers are listed on the Ofwat web site[38]. Their annual turnover is £9.2 billion and they serve 23 million customers.

Ofwat is responsible for making sure that the companies provide customers with a good quality, efficient service, by establishing prices, monitoring companies' performance and setting the companies' efficiency targets.

In Scotland, the Water Industry Commission for Scotland has a similar function, but only one company, Scottish Water, provides water and sewerage services to all household customers. However, since November 2006, all non-household customers (over 130,000 business customers) have been able to choose a licensed supplier. Scottish Water operates the publicly owned network of pipes, mains, and treatment works and acts as the wholesaler in the market, selling water and sewerage services to suppliers.

In England and Wales too, the Water Act of 2003 introduced an element of competition, by providing for non-household customers to be able to choose between suppliers and as from December 2005, it became possible for non-household customers using at least 50 megalitres (Ml) of water a year at each premise to choose their water supplier from a range of new companies. However, only one customer has taken up this opportunity.

A Review of the whole industry in the UK has recently been undertaken by Professor Martin Cave. His report on competition and innovation in water markets[39] was published in April 2009 and is currently the subject of an open consultation.

[37] Water Utility Management, October 2006
[38] http://www.ofwat.gov.uk/industrystructure/Water%20companies/
[39] Martin Cave 'Independent Review of Competition and Innovation in Water Markets : Final Report' April 2009

The Report establishes that in the 20 years since privatisation, the industry has attracted nearly £80 billion in investment, generally on favourable terms, to enhance the network and improve water and environmental quality and, as a result, drinking water is safer than ever before and more rivers and beaches are meeting the required European Union standards. However, this has come at a cost to consumers. Since 1989, household charges have risen in real terms by 42%.

The Review has adopted an integrated approach in its final report, based on both competition and regulation. It sees these dual drivers as leading to more technical and administrative innovation, which in turn are seen as the most promising source of further benefits for consumers. On the competition side at the retail end, the report argues for reducing the threshold for non-domestic consumers, but concludes that the case for competition to supply domestic consumers remains weak.

It is of interest that the report does not explicitly consider the possibility of concession arrangements at any point.

The status of the private suppliers in the UK water industry is not clear. UK regulations[40] require the granting of contracts to water companies to be governed by the provisions of the Utilities Directive and the freedom of companies to exploit their position is circumscribed to an important extent by the regulator's control over pricing and other aspects of performance. However, the residual freedom to exploit the situation commercially might be considered to give the contracts held by the water companies the character of a concession. In present circumstances, there is no pressing need to clarify this issue, but this may arise if concessions are to have a greater recognition within the legislative framework governing procurement in all its forms.

The situation In France provides a stark contrast to that in the UK. Municipal authorities are responsible for the provision of water, under the supervision of the health and environment ministries and the préfets. There is no independent regulator. Water supply and waste water services can be provided in-house by the municipalities (or group of municipalities), as IPPPs (société d'economie mixte) or can be delegated to a private operator. 72% of the population is served by private companies through service concessions[41].

France has arguably the most developed concessions system in the provision of water and it has been seen that there is an extensive network of municipal authorities with responsibility for local supply. There are, however, only three companies that now compete in offering management services for water and sewerage and they sometimes form joint ventures between themselves. Two private nationwide companies dominate the concession market, operating water

[40] The Utilities Contracts Regulations 2006; Statutory Instrument 2006 No. 6
[41] EUREAU Statistics Overview on Water and Wastewater in Europe, 2008

concessions for many local authorities: Suez/Lyonnaise des Eaux and Veolia. They are experienced in operating across a number of different public authorities and have the size and capital resources to take advantage of concession-type agreements. Local authorities have an interest in entering concession-type agreements with large companies of this kind in order to benefit from their know-how and crisis management ability. However, local authorities do have other legal options available when deciding how to provide water. In 2006, water supply and sewage accounted for € 11.8 billion. 72% of water supply and 55% of sewage revenue went to private operators. However, they only accounted for 13% of the €5.6 billion investments in the sector.

Suez and Veolia are the largest water companies in Europe and have interests in a number of Member States. Suez owns 100% of Lyonnaise des eaux, one of France's historical water companies. SAUR is France's third largest water company. In 2007, the Caisse des Dépôts et Consignations, a French public bank, controversially acquired a 47% stake in the company in a bid to prevent the company from being taken over by a foreign investor.

In Spain, the ministry of Environment is responsible for general legislation and planning of the water resources. In addition, the Consejo Nacional del Agua (National Water Council) is the country's consultative commission bringing together authorities of different administrative levels, professional and economic operators). Municipalities are responsible for water services (supply and waste water) and can manage it through:

- an in-house public company owned by the municipality
- a consortium of municipalities
- tranfering their competency to the region
- IPPP
- Service concessions

Spain has what we could call a 'mixed market'. 48% of the population is served by the public sector (cities such as Madrid), 16% through an IPPP, and the remaining 36% directly by a private operator under a concession contract. The largest private operator, accounting for half of private involvement in water distribution, is Aguas de Barcelona (Agbar), which is part-owned by Suez.

FCC is the second largest operator in the country. The company used to be under the control of Veolia until the French company sold its shares in 2004. FCC (Fomento de Construcciones y Contratas) is, at its name suggests, a large construction company involved in different area of public works and concessions, mainly construction and motorways. In 2006, Aqualia, its environmental services division (mainly involved in waste management and water) accounted for 30% of the company's revenues. Aqualia employ 4,400 people in Spain. The company operates

water services in Almería, Ávila,Badajoz, Jaén, Lleida, Oviedo, Puerto de la Cruz (Tenerife), Salamanca

The third largest water services company is Valoriza, part of one of Spain's other large construction company, Sacyr Vallehermoso. Valoriza employs over 3,500 people (including in its non-Spanish operations). It owns a minority stake in Emalsa, the Canary Island's water company and has a 95% stake in Emmasa (Tenerife) [42].

In Portugal, INAG (the Water Institute) is responsible for implementing water policy at the national level. Water provision is the responsibility of the country's 308 municipalities. The country has two types of water operator: municipal and multi-municipal ones.

Multi-municipal operators are set up between one or more municipality and Águas de Portugal (AdP), a national public company, whose largest shareholder is Parpublica. AdP owns a minimum of 51% of those operators and is responsible for investments. As of 2008, 13 regional bulk water and 15 wastewater companies had been set up by municipalities and AdP. In order to comply with competition rules, Decrees-Laws 372/1993 and 379/1993 establishing this system allow for concessions to be granted to public or private operators. As a result of this agreement, the majority of the population is either supplied directly by the municipalities or by in-house public companies (84%). Private companies excluding AdP provide water for 1.1 million people. Spanish operators are the main foreign players present on the Portuguese market, through FCC (La Lezíria del Tajo) and Sacyr Vallehermoso (AGS)

In the Czech Republic before 1993, there were 11 state enterprises (9 regional and 2 in Prague) that managed the whole sector. Privatisation of these enterprises led to a splintering of the sector into 40 district water management companies and around 1,200 operators of various sizes and ownership structures, generally under the responsibility of the municipal authorities.

Currently the Czech water industry is characterised by the existence of a series of 'quasi-concession' contracts, in which the return to the concessionaire is virtually guaranteed on a cost-plus basis. The Czech case also illustrates the significance of the relationship between the providers of water services to the final users and those responsible for the maintenance and development of the infrastructure. There are many in the Czech Republic who claim that this relationship has not been structured appropriately, with some important consequences for the future supply of water in general following the privatisation process promoted by the EBRD and the World Bank in the 1990s. Municipalities are responsible for the provision of water, which can be organised in 4 different ways:

- In-house (3% of the market)

[42] Water Companies in Europe 2007, PSIRU

- Private companies working on the basis of service contracts
- Private companies renting the infrastructure on the basis of operating contracts
- Private companies owning the network

Veolia is the largest water management company in the country with a turnover of €780 million euros in 2005 and employing over 13,000 people. Suez and FCC Aqualia are also present through local subsidiaries.

Historically in Italy, municipalities have been responsible for the provision of water services. Following a reorganisation of the sector in the 1990s, this responsibility was transferred to Integrated Water Services (Servizio idrico intergrato) corresponding to areas of optimal size (Ambito Territoriale Ottimale). This division is to change again following devolution taking place in Italy and ATO will be replaced by authorities chosen by the regions. Currently, water services can be provided either directly by the municipality or through service contracts or concessions.

The ATO appoints the water operator through:

- Delegation through a public contract tender
- In-house
- IPPP with the private partner chosen through tender

Currently, 80% of the population receives water services from a public operator, 10% through a mixed company and the remaining 10% from a private operator[43]. In November 2009, the Italian Parliament passed a law liberalizing local water provision. This is likely to make Italy one of the more interesting markets for water operators in the next few years.

Acea is the largest Italian water company, serving over 8 million people. The company is present in other sectors such as electricity. The municipality of Rome is the company's largest shareholder, with Suez owning over 9%. A number of other foreign companies are also present in Italy, although in the majority of cases, they are minority shareholders in IPPPs or in joint ventures with local companies.

Suez is present in the country through Acque SpA (Acque Toscane, Acquedotto del Fiora), Nuove Acque and Publiacqua supplying over 2 million people. Veolia is also present through a number of companies, including Acqualatina, Genova Acque, SIBA and Siciliacque. FCC won a concession for 275,000 people in 2006.

In Germany, the Grundgesetz (Basic Law – the constitution), makes municipalities responsible for water services. They fulfill this obligation autonomously and independently, and are assured a monopoly on water supply services. There are a number of ways in which the municipality can perform the service:

[43] EUREAU Statistics Overview on Water and Wastewater in Europe, 2008

- Through direct municipal management
- semi-autonomous municipal agencies
- municipal companies
- delegation
- contracts to the private sector
- IPPPs

As a result of this municipality-oriented culture, only 6% of the population received water through private companies. 55% are served by public operators and the remaining 39% through mixed companies (IPPPs).

Greece has no legal provision for the purely private operation of water services. Water is the responsibility of municipalities, except for the case of Athens and Thessaloniki, where it lies with the central government (Ministry of Environment, Planning and Public Works). The government has a majority holding in the two corporations providing water services for Athens and Thessaloniki (floated on the stock exchange) accounting for 45% of the population. The rest of the population receives water services directly from the municipalities.

4.3.2 Transport

This section considers the relatively fragmented situation in various forms of road and rail transport.

With regard to passenger and freight services on the railways, it would appear at first glance there are no concessions in this sector. Most railway systems across Europe remain in public hands and in the UK and the Czech Republic, among the countries examined, there are 'franchise' agreements and public contracts. Yet, the form of these agreements has a number of the characteristics of service concessions and if there is to be further 'privatisation', the model may be developed further.

The UK rail industry was 100% privatised in 1996, in a process that saw the separation of the national infrastructure from the operating franchises that allowed private companies to operate on certain routes. The whole system was subject to a regulator. However, the company responsible for the infrastructure, Railtrack, failed in 2001 and was effectively re-nationalised, although its replacement, Network Rail, is a nominally private "not for dividend" company. The number of franchises was cut from the original from 25 to 22 in 2000 and several franchises have also been taken back into public ownership.

The granting of franchises is governed by the provisions of the Railways Act 1993, but these in turn have given rise to the issuing of guidance by the Secretary of State on the actual procedure to be followed. This guidance is published on the Department for Transport's website[44].

[44] http://www.dft.gov.uk/pgr/rail/passenger/franchises/aguidetotherailwayfranchisep3326

The 'Guide to the Railway Franchise Procurement Process', last up-dated in May 2008, envisages a sort of restricted tender process, in which a widely publicised call for expressions of interest leads to an 'accreditation' of potential bidders, with a view to being able to issue invitations to tender to three to five accredited applicants. In awarding the franchise the Department conducts a 'Value for Money' appraisal and an assessment of the risks involved in the competing bids.

Although some of the detail stemming from the UK legislation goes further than EU legislation, the procedures followed, including the 'voluntary' use of OJEU notices, generally complies with the use of a restricted procedure under the Utilities Directive. Furthermore, as in the case of water in the UK, although the industry is tightly regulated, aspects of the franchise arrangements clearly have elements that suggest that the contract should be regarded as a concession[45].

A convenient list of companies operating trains in the United Kingdom is available on a popular website[46]. This also provides details of parent companies and the length of the franchise granted. This list should, however, be regarded with some caution, especially in view of the fact that the East Coast Main Line franchise has come under public control and the further announcement in November 2009 that the franchise company, National Express, is also to be stripped of its East Anglia rail franchise three years earlier than anticipated.

In addition, it should be noted that Chiltern Railways has been a subsidiary of Deutsche Bahn's DB Regio since 2008, running commuter services between London and Birmingham.

In the UK, both mainline and regional routes are operated by the companies with franchises, but there are also some 'light, railways that are the responsibility of local authorities. Deutsche Bahn operates rapid transit services in the Greater London area and has been named "preferred bidder" in a concession process for the operation of the Tyne and Wear Metro in Newcastle.

The British model has been followed elsewhere around the world and some of its features, particularly the separating of infrastructure from operations, had been anticipated by the 1991 Directive on the development of the Community's railways.[47], which in establishing rights of access for railway undertakings operating

[45] The position described at the time of writing the report has developed slightly with the publication by the UK's Department for Transport of a"Rail Franchise Process Manual" in January 2010. The manual stipulates a process for granting franchises, which is, for all practical purposes a negotiated procedure under normal procurement rules. The manual notes, however, that "rail franchising is viewed as a 'concession' under EU procurement rules". Furthermore, another document published in January 2010, "The Future of Rail Franchising" also refers to concession-type contracts as a possibility for the future.

[46] http://en.wikipedia.org/wiki/List_of_companies_operating_trains_in_the_United_Kingdom

[47] Council Directive 91/440/EEC on the development of the Community's railways.

international combined transport (reinforced by a subsequent Directive[48] in 2004) had required Member States to grant the rail companies independence from government and to introduce commercial management techniques, separating the management of infrastructure from transport management.

The extent of privatisation across Europe, however, has been limited. The partial privatisation of Deutsche Bahn in Germany has been anticipated for a number of years, but plans currently remain on the shelf, after a flotation was abandoned in the face of the financial crisis.

Of the other Member States under consideration, only the Czech Republic is opening to significant private involvement. There all express trains are currently operated by national rail operator Ceske Drahy. However, the Transport Ministry, which has responsibility for long-distance rail transport, has plans to open 75% of the Czech Republic to competition within the next ten years, with contracts of 10 to 14 years duration in a process of open competition. Some regional railways have already seen open competition, with companies like Student Agency, Viamont and Connex Ceska Zeleznicni contesting markets, both in commercial bids and in mounting political challenges. Ceske Drahy still carries most passengers. In 2007, this represented 182 million of the 184 million passengers carried railways within the country.

It should also be mentioned in the railway context that there are special provisions relating to the operation of services that are not commercially viable, but which have a significant wider economic or social role.

The 2007 Regulation on public passenger transport services by rail and by road[49] provides for services that are supported in the general economic interest. The regulation was introduced in response to legal uncertainty as to the rights of public service operators and the duties of the competent authorities and has provisions governing such matters as the definition of the nature of the public service obligations and the corresponding reward for meeting them, the possibility of negotiating details with some or all of the potential public service operators once tenders have been submitted, the power of the authorities to introduce emergency short-term measures in the event of a disruption of the provision of services and the duration of the contracts.

The regulation also specifies that, where a competent authority decides to grant an operator an exclusive right and/or compensation, in return for the discharge of

[48] Directive 2004/51/EC of the European Parliament and of the Council of 29 April 2004 amending Council Directive 91/440/EEC on the development of the Community's railways.
[49] Regulation (Ec) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70

public service obligations, it shall do so within the framework of a public service contract.

According to the International Association of Public Transport, the number of direct jobs in the sector can be estimated at about 1,200,000 in the European Union, with approximately 157,000 in Germany and about 160,000 in France. The total value of the sector is estimated to be worth around € 140 billion. Those figures were expected to rise due to strong recent increases in public transport use (a 10% increase in passengers in the UK between 2004 and 2008), the economic crisis and the volatility of oil prices.

Similarly to other local public services, urban transport in Germany is the responsibility of the municipalities. In the majority of cases, urban transport is financed and operated directly by the municipality. Usually the same public company that is in charge of water and waste collection (Stadtwerke) is also in charge of urban transport. Since 1999, Public Private Partnerships have started emerging in the sector. Stadtwerke are now often a de facto IPPP with private operators involved in the running of the services.

The two largest urban transport operators in Greece are the Athens Urban Transport Organisation (OASA) and the Organisation of Urban Transportation of Thessaloniki (OASTH). Both companies are owned by the Greek central government. There are no current arrangements for PPPs in the sector, let alone concessions. The main project currently is the building of the Thessaloniki metro The project is publically financed, with an additional € 200 million loan from the EIB.

Service concessions arise principally in France, where there is competition between the different types of contracts. In-house management plays an ever-growing role (four out the five contracts that changed type in the past five years have resulted in a switch to in-house operations); in addition, legislation is being passed to allow the creation of local public companies (société anonyme with solely public capital), which will facilitate the create of régie management).

The Ile de France (Paris and its region) is specific in that most of the local transport is not open for competition, with the RATP and SNCF having a monopoly in the region. The situation is evolving with service contracts being passed in the less inhabited areas of the region and the introduction of the PSO regulation that is expected to encourage competitive tendering on certain lines.

In the rest of France, local authorities can decide between providing the service themselves or delegating it to a private operator. 90% of urban public transport is delegated, mostly through service concession agreements (the rest as public contracts). In this sector, the average length of a concession is 7 years. The remaining 10% are directly operated as an Etablissement public à caractère industriel et commercial (EPIC) or as a régie with a separate legal persona from the

delegating authority. In both these cases, services will need to be contractualised as a result of Regulation 1370/07.

51 public transport networks were put out for competition in France between 2005 and 2009. 21 networks changed operators (over 41%). The majority of operators are national players (Keolis, Tansdev, Veolia, RATP) but in recent years, Car Postal (part of the Swiss postal group) and CFT (part of the Spanish Siberbus company) have won contracts[50]. Car Postal and CFT won 4 of the 11 contracts awarded between June 2008 and June 2009. The UTP (Union des Transports Publics et Ferroviaires) considers that around 30% of the transport market currently open for competition would not be open were it not for the concession-type contract allowed by the Loi Sapin. As part of the public service obligation in this sector, the concessionaire has to ensure:

- Continuity of service
- Adaptation of service (in case of increased demand etc)
- Establishment of quality indicators
- The maximum age of the rolling stock is specified in the concession contract

In Spain, municipalities are responsible for urban public transport. In most large cities, a historical operator is in charge of operating urban public transport in-house (direct management). In such cases, concessions can arise but they would generally fall under the works concessions framework. In smaller cities, there has been a drive for concessions in public transport in the past decade (indirect management). According to the Law for Public Administration Contracts, indirect contracts can take four different forms:

- Concession
- Interested management (service contract)
- 'Concierto' where the administration reaches an agreement with a private operator that had been offering similar services
- Mixed-economy companies (IPPPs)

All municipalities with a population of over 50,000 have to provide urban transport. Since 2001, this has included 116 cities, most of which (60) have a population between 50,000 and 100,000[51].

Out of the 68 largest cities in Spain, 20 transport systems were directly operated by the city council and 45 were under concession arrangements. Transport networks in the largest cities tend to be operated directly by the councils (eight out of Spain's ten largest cities), with concession operators being more prevalent in smaller municipalities. The largest operators are FCC, Veolia, and Ferrovial.

[50] Discussions with the UTP (Union des Transports Publics et Ferroviaires - France) and UTP « Rapport d'activité, juin 2008 – juin 2009 »
[51] The Spanish situation of road public transport competition, Association for European Transport, 2003

There are no service concession arrangements in public transport in Greece, Italy, Germany and Portugal. In all those countries, recent trends have been the setting up of PPPs. Genoa was the first Italian city to open its public transport to the private sector. Following the example of IPPPs in France in the 1970s and 1980s, Genoa's city council decided to sell 41% of the AMT, the local municipal company in charge of urban transit (buses, trolleybuses, light metros, funiculars) to Transdev.

In Portugal, PPPs have emerged in the transport sector (mainly motorways and rail transport). The most recent examples of a PPP in the sector are Motro Sul do Tejo tram system and the Metro Ligeiro do Mondego. However, in the country, PPP has traditionally been a driver for investment in infrastructures and 'service' oriented PPPs are still relatively under developed.

Finally in the UK, urban transport systems have been privatised and operate on a competitive basis.

4.3.3 Ports

There are over 1000 seaports in Europe handling 3.5 billion tonnes of cargo a year and 350 million passengers and employing 350,000 people in the ports themselves and in directly related services. Some 700 ports handle less than 1 million tonnes and only 10 handle more than 50 million tons. The top 10 ports are Rotterdam, Antwerp, Hamburg, Marseille, Bergen, Le Havre, Grimsby, Genoa, Tees & Hartlepool and London[52].

Ports clearly constitute a significant element in the commercial infrastructure of many EU Member States and require considerable investment, both in the port facilities in a narrow sense and also in the associated transport and storage facilities. Consequently, their activities have a direct impact on their local and regional economies. However for many years, ports have also been seen in a much broader logistical context. They are a major element in complex commercial distribution systems, linked to inland storage hubs that are located strategically with respect to significant markets and areas of large population concentration. These networks extend widely across different areas of Europe and are dominated by complex interactions between large logistics companies, other commercial interests and the planning and general public authorities. In fact, ports find themselves to be at an intersection of various interests – the complex distribution networks just mentioned, but also powerful and partially overlapping shipping interests that are themselves generated by the activities of large commercial companies and their alliances, diverse operating agreements and the dynamics of mergers and acquisitions.

[52] Source : European Sea Ports Organisation

Commercial control of ports that have pivotal roles in distribution and shipping networks can potentially confer considerable economic advantages and therefore poses important questions for competition policy. At the same time, there are large risks in these markets. Large investments are required in container and other facilities and the competitive situation is relatively dynamic. There is a steady stream of innovation in cargo and passenger handling systems and in the business models adopted by the commercial players. The position of particular ports is also relatively susceptible to the ebbs and flows of general economic activity. There is therefore scope for the involvement of commercial organisations that are prepared to take risks and concession arrangements are apparent in a number of countries. Whether these are technically works or service concessions will depend on the nature of the investment required in any one place, but in almost every case there will be a significant service element in any concession arrangement.

The considerations mentioned above and some of the following detail were analysed in 2004-5 in a 'Factual Report on the European Port Sector'[53], commissioned by the European Sea Ports Organisation (ESPO) and written by Professors Theo Notteboom and Willy Winkelmans at the University of Antwerp. Of particular interest for the current study is the detail on the legal and institutional arrangements in seven of the eight Member States under consideration[54]. Unfortunately in the restricted timeframe of this study, it has not been possible to follow through any institutional changes in these arrangements that have taken place since the factual report was published, but the broad description of the situation at a national level is thought still to apply.

Most German seaports are not independent entities, legally or economically. Their land and water surfaces mainly belong to the territorial authorities (Land or municipality). There are no port authorities that cover all the public functions relating to the port. Instead, these functions are covered by various departments of the territorial authorities as part of their general administration.

In the case of Bremen, (Bremenports GmbH & Co. KG) Lower Saxony (Niedersachsen Ports GmbH & Co. KG – 'NPorts') and Mecklenburg-Vorpommern, private limited partnerships, 100% owned by the federal Laender, have been created to administer their ports and also operate commercially beyond the Land boundaries. These organisations are responsible for investment decisions.

The management of passenger terminals is performed by private enterprises. They rent port sites from the state to provide their services.

[53] Prof. Dr. Theo Notteboom & Prof. Dr. Willy Winkelmans 'Factual Report on the European Port Sector' ITMMA – University of Antwerp, 2005.
[54] The Czech Republic, of course does not have sea ports.

Cargo handling activities are mainly carried out by private enterprises in which the territorial authorities often have a share or even full control (e.g. HHLA in Hamburg and BLG Logistics in Bremen). Tariffs are determined by market price and without interference of the local authorities. In Schleswig-Holstein and Niedersachsen access is granted through tendering or after negotiations, in Mecklenburg-Vorpommern market access is non-discriminatory.

Towage and mooring are the responsibilities of the private sector.

In Greece, Law n° 2932/2001 established the General Secretariat of Ports and Harbour Policy in the Ministry of Mercantile Marine. The General Secretariat has the responsibility for the overall planning of the national harbour policy, ensuring the growth of Greek ports, development of modern infrastructure and international competition in the port services market.

In 1999 the port authorities of Piraeus and Thessaloniki were transformed into limited companies (law n° 2688/99). This was followed in 2001 by the establishment of the port authorities of Alexandroupolis, Volos, Elefsis, Igoumenitsa, Heraklion, Kavala, Corfu, Lavrion, Patras and Rafina as limited companies (law n° 2932/2001). The Hellenic Ports Association co-ordinates the twelve main ports. Since these laws Greek ports have acted as commercial enterprises, with considerable autonomy and operating in a free market with competition on price.

According to the law of 2971/2001[55], the port authorities have the right to use concession contracts with private entities, following open competition procedures, for developing the ports or the provision of cargo and other related services subject to a fee payable to the Port Authority. Examples of such concessions are the Astakos terminal in Western Greece and more recently Pireaus and Thessaloniki. There are proposals for similar developments in other ports in the future.

In Greece marinas for private yachts and similar vessels are relatively important and a legal framework for concessions in this area was established by law 2160/1993. According to this law a tourist port can be created by a public or a private body directly or by the Secretariat for the development of Tourist Ports at the Ministry of Economics. In the latter case, the execution of any construction works, the operation, maintenance and facilities management, along with the financial exploitation of the facilities can be conceded to public or private companies following an open call for tender procedure on the basis of procedures and criteria defined by the law.

[55] Gkitsakis Ioannis (2004), Public Works and Services Concessions - Conceptual elements, legal framework and cases (in Greek), PhD Thesis and Interviews

Similarly the operation and maintenance of a number of pre-existing marinas has been through a concessions framework, where the concessionaire is required to pay annual fee.

Some 10-15 marinas (of a value between €10-25 million) are being managed by the private sector on the basis of either works (where construction has been involved) or service concessions. However some of these marinas remain public entities – the local development companies of municipalities or the Hellenic Tourism Development Corporation (company wholly owned by the state) are the concessioners and they rent specific facilities to private companies for a long period56.

In Spain, there is a distinction between ports of strategic importance – 'Ports of General Interest' – that according to the Spanish Constitution (Article 149.1.20), belong exclusively to the State and ports of refuge, sports, leisure and other ports of a non-commercial nature which autonomous regional communities may control. There are 47 Ports of General Interest, managed by 27 Port Authorities, with the Spanish State Ports Agency "Puertos del Estado" responsible for coordination and efficiency control. Puertos del Estado depends on the Spanish Ministry of Public Works and Transport and is charged with the execution of the Government's port policy. The President of the port authority and a significant percentage of members of the Board of Directors of the port authority are usually appointed by the autonomous regional communities.

The Port Authorities have their own legal personality and ownership of property and capacity to act within the bounds set for private enterprise. They must be run as businesses on the basis of commercial criteria and promote their competitive position within an open, global market. The particular or exclusive use of public property is allowed through leasing or concessions under public sector contracting regimes while port services provided by private operators are organised through a private contracting regime.

Legislation does not envisage a limitation on the number of port services where these are provided by the private sector, although, in practice, market conditions have tended to produce an oligopoly or monopoly. Additionally objective reasons such as lack of space, safety or environmental regulations etc may lead to a limitation being placed on the number of participants. In the specific case of pilotage, there is sole service provider in each port, through which qualified staff operate.

Any port service that is provided, however, requires prior authorisation and is subject to the regulatory provisions of Puertos del Estado and the port authorities. Generally the authorisation procedure is that of an open competition and an application can be made at any time. Only if there is a limit on the number of

[56] http://www.nomarhiapeiraia.gr/Templates/deltia_tipou/2005/1/10.htm (in Greek)

participants is a tender procedure established. Maximum periods for the provision of port services are laid down :

- pilotage: 10 years;
- mooring : 8 years;
- towage: 13 years;
- cargo handling services: 8 years (without investment), 10-15 years (with investment in equipment and mobile equipment) and 30-35 years (with investment in fixed installations or infrastructure);
- waste reception services: 8 years (without investment) and 12 years (with investment).

In France, under the 1983 decentralisation of powers to the regions, six of the main metropolitan seaports (Marseille, Le Havre, Dunkerque, Rouen, Nantes-St-Nazaire, Bordeaux)[57], accounting for ¾ of the total national tonnage were given autonomous management structures in accordance with the provisions of Book I, Title I of the Seaports code. These ports renamed "Grands Ports Maritimes[58]" (GPM) have been organized as State public undertakings with both administrative and commercial competences and enjoying specific legal status and financial independence under a Chief Executive Officer appointed by the Council of Ministers, on proposal by the Minister responsible for seaports. Under certain conditions, GPMs are authorised to develop economic partnerships by taking shares in private (or public) companies or groups of companies.

GPMs have considerable freedom in determining how they are managed and this may include granting concessions to private sector interests. Port authorities do not generally provide services that could be handled on a commercially viable and non discriminatory basis by a competent external operator, whether private or public. Passenger services are operated on a commercial basis with public and private companies renting facilities. Other services include cargo handling, pilotage, towage, mooring and ancillary port services (water supply, bunkering etc). Providers of nautical services are allowed to enter the market if they have the capacity to answer all current potential demands by port users. There may be a capacity threshold constraint for towage operators (particularly in ports where some ships may require three tugboats at once). Cargo handling services are regarded as being of a purely commercial nature with no public service obligations and there is generally free access to the market of each port. No authorisations are necessary for buying or renting available space. Granting exclusive rights to the use of quays and related areas are negotiated on a first come first served basis as long as infrastructure and

[57] Guadeloupe has the same status.
[58] Also including la Rochelle

space remain available for creating dedicated terminals. When this is no longer the case, port authorities organise normal tendering procedures for selecting new operators of new dedicated terminals.

Provision was also made in the 1980's for twenty-one other 'ports of national interest', which accounted for a further 20% of national tonnage to remain under State control up until 2007. Under Law n° 2004-809 of 13 August 2004 on liberties and local responsibilities, all these ports were handed over to regional and local authorities. In addition there were fifty commercially active seaports already under local control.

Although there has been no legal obligation, premises and equipment in non-autonomous seaports have commonly been run by local Chambers of Commerce and Industry (CCIs) on the basis of long term concessions (up to 50 years) from the State or the Département. Every Chamber is a public administrative body created under State supervision, with powers to represent its business members and to receive delegation for carrying out public services, including the provision of facilities and management in ports, airports, commercial and industrial land developments. Under the transfer of powers with Law n° 2004-809, it was envisaged that all concessions and leases previously contracted for ports would remain valid under the new governing body, whatever their length. However these bodies have considerable freedoms in looking for new and different arrangements and the position of CCIs is expected to change.

In Italy, the basic legislation on ports is law n° 84/94 passed in 1994, although it has been modified in a number of respects since then. Seaports are defined as public domain, state owned and inalienable.

Law 84/94 established port authorities with a public legal status, but with administrative autonomy and a fair degree of budgetary and financial autonomy as well. The port authority has the power to lease parts of the port territory (with or without facilities) in a 'concession' to private firms. The port authorities in general are responsible for port administration, but are not allowed to carry out port operations and related activities, either directly or as a shareholder in a private company. Economic activities (cargo loading and unloading, services supply to ships, etc.), are entrusted to private parties.

Management of passenger terminals etc. is subject to a public tender procedure and a concession is granted for a limited period of time.

To carry out port operations and related services a prior authorisation from the port authority is needed. For cargo-handling services the port authority sets out the maximum number of authorisations that can be granted and then is required by law to ensure maximum competition. Usually, authorisations are for one year, but can be extended.

The towage service is in fact assigned to private enterprises through deeds of concession under Article 101 of the Navigation Code. The maritime authority establishes, in agreement with the port authority, the service's local rules (the number and the characteristics of the tows authorised etc.) and determines the corresponding amount tariffs.

In general, mooring is governed by the Maritime Navigation Code and is carried out by a "mooring-team" – a co-operative of providers that has an exclusive right de facto for that port. Self- handling can be carried out by smaller craft.

Ancillary port services are carried out on the basis of a short-term (usually one year) concession,

In Portugal, the five main ports are Aveiro, Leixões, Lisbon, Setúbal and Sines. Following the 1997 White Paper on Ports and Maritime Transport, public port authorities (established as 100% publically owned private companies) have had responsibility for the ownership of the land and facilities of these ports and for overall administration, while operational services have been provided by private companies on the basis of concession contracts, following public tenders.

The remaining commercial ports are grouped under three public institutions (Instituto Portuário do Norte, Instituto Portuário do Centro e Instituto Portuário do Sul). These public institutions are administered by government-appointed management boards, but have legal personality and administrative and financial autonomy, subject to overall governmental control. They are self-financing through charges levied, though bank loans form a source of funding.

The passenger terminals are run directly by the port authorities.

Freight handling at all Portuguese ports is carried out by licensed stevedoring firms acting as private firms. The right to use port infrastructure and equipment is conceded to stevedoring firms on the basis of competition and such concessions must comply with the legal arrangements for the award of the public service for freight movement at port wharves and terminals, as laid down in Decree-Law No 324/94 of 30 December 1994. The concessions are awarded by a contract, preceded by a public tender, which can have a negotiated procedure with publication of the announcement or be a restricted tender. The duration of the concession contracts for cargo handling vary between 20 and 30 years. The Decree-Law no. 324/94 fixes the concession term according to required investment at no longer than 30 years.

Pilotage is provided directly by the port authorities. Towage is carried out directly by the port authority in only one port; in the other ports it is provided by private entities, duly authorised by the relevant port authorities. Authorisation can take the form of a license valid for one year or a concession for up to 10 years. The mooring

service is provided in certain ports by the port authorities, while in others this service is undertaken by authorised private entities.

In the UK, there are approximately 1000 ports and terminal facilities. Of these, over 650 have statutory powers and about 120 are commercially active. Much of the trade, which handles around 95% of UK import and export tonnage, is concentrated in the largest ports, with the top fifteen ports handling nearly 80% of all traffic.

British ports were privatised to a large extent in the 1980's. National government intervention is largely restricted to regulation.

Some ports such as Manchester (Peel Holdings) and Felixstowe (Hutchison UK) have always been privately owned. The publicly owned British Transport Docks Board was privatised in 1981 and is now known as Associated British Ports. The group owns and operates 21 ports around the UK, including Hull, Immingham and Southampton.

All together, company owned or privatised ports account for just under two thirds of UK port tonnage and 14 of the 20 largest ports. These ports operate as normal private sector companies, raising commercial funding for investment on commercial terms, borrowing on their assets or by issuing shares. They pay dividends to their shareholders.

One quarter of the industry by tonnage, however, is operated as trust ports. These are independent statutory bodies, governed by a board of Trustees charged with promoting the well being of the port to meet the needs of the users and stakeholders. Any surpluses generated are ploughed back into improving facilities.

Only 20 trust ports have an annual turnover above £1million. Several have negligible income, derived in some instances from activities such as tourism and car parking.

A number of trust ports are important in specific markets. Dover is Europe's busiest ferry port, handling in excess of five million vehicles annually and over 15 million passengers. It accounts for about £80 billion of trade each year and supports around 22,000 jobs locally. Some important trust ports such as the Port of London and the Harwich Haven Authority only provide conservancy and pilotage, with cargo handling undertaken by independent operators.

Local authorities manage over two hundred minor facilities in the Scottish Highlands and Islands and a few commercially significant ports are municipally owned. Sullom Voe and Flotta provide specialised oil facilities and are amongst the largest in the UK in terms of tonnage handled.

4.3.4 Airports

There are some 400 airports across Europe in 46 countries. Members of the main association of airport operators, ACI EUROPE (accounting for over 90% of

commercial air traffic in Europe), handled 1.47 billion passengers in 2007, 17.4 million metric tonnes of cargo and 20.8 million aircraft movements. Of the main EU airports, London Heathrow is ranked third in the world with 67 million commercial passengers handled and Paris Charles de Gaulle is fifth with 61 million passengers in 2008. Frankfurt/Main (53 million passengers), Madrid Barajas (51 million passengers) and Amsterdam Schiphol (47 million passengers) follow as ninth, eleventh and 14th respectively[59].

Historically most European airports were developed under state ownership; the large national airports generally being owned by the national state, but the regional airports frequently owned by regional or municipal authorities.

In 1987, the United Kingdom privatised BAA, making it responsible for the three main London airports and four regional airports. All the assets of the airports concerned were handed over to BAA, so that the only remaining element of public control is through regulation.

This move set the scene for similar developments worldwide in which BAA gained control of other airports, including Naples Airport, leaving it as one of the biggest international participants in the airport industry. A recent examination of BAA's position by the UK's Competition Commission, however, led to recommendations in March 2009[60] that two of the three London airports be divested, plus either Edinburgh or Glasgow.

Elsewhere in Europe privatisation has continued, with Rome and Frankfurt being privatised on the BAA model. In the case of Frankfurt, this has led to the emergence of another company offering airport management services around the world – Fraport, which, for instance was part of the Northern Capital Gateway consortium that won a 30-year concession to develop, modernize and operate St Petersburg's Pulkovo Airport in June 2009. Amsterdam Schipol and Copenhagen airports have developed a similar role.

The prevalent privatisation model consists of establishing a company whose shares are offered on the stock exchange. In the case of BAA, 100% of shares were sold. In Germany, Greece and Italy, however, this process has been partial, with only a minority of shares being offered. France and Spain in the meanwhile have retained airports under government control (although managed by Chambers of Commerce and Industry in the case of France) and in the other countries smaller airports are retained in public ownership, sometimes on a concessions basis.

Concessions are therefore evident in the overall management of airports. They may also arise in the handling of passengers, baggage and freight and in the running or

[59] European Commission 'Analyses of the European Air Transport Market Annual Report 2008'
[60] Competition Commission BAA airports market investigation A report on the supply of airport services by BAA in the UK 19 March 2009

leasing out shopping 'concessions' of various kinds, car parking and rental and banking and catering etc. The precise organisation of these processes determines whether service concessions in the sense of this study arise. Often the facilities are open on a commercial basis to any service operator who wishes to provide them. On other occasions, however, the availability can be restricted and the authorities are required to organise competitive tendering.

The form of the concession and other arrangements that arise is determined to an important extent by legislation at a European level.

The Directive on airport charges[61] 2009/12/EC was adopted on March 11th 2009. This Directive established common principles for the levying of airport charges at Community airports, regulating the essential features of the charges and the way they are set for all EC airports above a minimum annual size of five million passenger movements.

Member States have to ensure that airport charges do not discriminate among airport users, although charges can take into account issues of public and general interest, including environmental issues, as long as this is done in a relevant, objective and transparent way. Member States will publish a list of the airports on their territory to which this Directive applies. This list will be based on data from the Commission (Eurostat) and shall be updated annually.

In the case of the groundhandling services, Community legislation[62] was established in the late 1990's that affects the way that procurement procedures are conducted.

The Groundhandling Directive established procedures which aimed to ensure free access to the market by suppliers of such services. Broadly the Directive required that, if Member States wished to limit the number of suppliers authorised to provide these services, at least one of the authorised suppliers could not be directly or indirectly controlled by the managing body of the airport or a major airport user. The selection of the authorised suppliers had to be through the normal tender procedures, but in addition, the Directive stipulated that any standard conditions or technical specifications to be met by the suppliers had to be established following consultation with the Airport Users' Committee and be relevant, objective, transparent and non-discriminatory. A public service obligation could be included in the standard conditions or technical specifications for airports serving peripheral or developing regions, after notification was made to the Commission. The choice of suppliers also has to be a matter of consultation with the Airport Users' Committee and selection of suppliers can be for a maximum period of seven years.

[61] Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on airport charges

[62] Council Directive 96/67/EC of 15 October 1996 on access to the groundhandling market at Community airports.

In developing these services, Member States may 'reserve for the managing body of the airport or for another body the management of the centralised infrastructures used for the supply of groundhandling services whose complexity, cost or environmental impact does not allow of division or duplication ...' This would favour a concession arrangement.

The effects of the Directive in increasing competition for these services and in reducing handling prices have been well established in a series of studies. However, there is also a perception that modifications to the framework need to be made. Consequently in March 2003 the Commission services published a Consultation Paper on issues to be addressed in a revision of the Directive and a report from the Commission on the Directive [63] was published on 24/01/2007.

A study by the Airport Research Centre on the Impact of the Directive on Ground Handling Services up to 2007[64] was published in February 2009. This study provides considerable detail on which airports have liberalised regimes and which have restricted access in the various services across a number of Member States.

The companies providing handling services can vary considerably in size and organisational nature. The most recent annual report of the Commission's 'Analyses of the European air transport market' (2008) provides some partial information on some of the main companies active in the market. It highlights four companies: Aviapartner an independent company based in Brussels, SAS Ground Services, owned by SAS Group and based in Stockholm, Menzies Aviation a subsidiary of a logistic service provider John Menzies plc based in Edinburgh and Swissport , owned by Grupo Ferrovial, a large construction group based in Madrid. Swissport has 30,000 employees, Menzies Aviation 14,000 and Aviapartner 6,000.

4.3.5 Waste management

Traditionally, waste (refuse) management was a relatively straight forward process, with refuse collected and disposed of in landfill or incinerators. Much of the private involvement would be on the basis of a straightforward public contract and concession arrangements that arose would usually be on the basis of shadow pricing or performance related payments.

With the increased political and social focus on climate change and other environmental issues in local communities, alternative 'greener' ways of disposing of refuse, such as recycling, waste to energy or composing have played an increasing role. An important step was made with the Waste Framework Directive

[63] A Report from the Commission on the application of Council Directive 96/67/EC of 15 October 1996 (COM/2006/0821 final)
[64] Airport Research Centre 'Study on the Impact of Directive 96/67/EC on Ground Handling Services 1996-2007' Feb 2009

(2008/98/EC), which introduced recycling targets and the prioritisation of waste management.

The sector is increasingly organised around a series of subsectors involving :

- Waste collection
- Transit
- Sorting
- Incineration
- Recycling and compositing
- Landfill

Eurostat does not provide figures that are easily accessible on the industry as a whole. Those that are available relate to recycling, but although they do not give the full picture, they do provide indications of the relative sizes of waste management in different countries.

NACE DN 371&2 Recycling[65], 2007

Country	Employed FTE	Turnover 2007	Number of Enterprises					
			Total	1-9	10-19	20-49	50-249	250 +
Czech Rep	5487	1021.3	725	n/a	n/a	n/a	n/a	n/a
Germany	10765	8151.9	1631	1007	453	84	n/a	n/a
Greece	n/a	n/a	n/a	0	0	n/a	n/a	0
Spain	6479	2146.4	284	145	52	n/a	18	n/a
France	27563	10966.5	4869	4238	341	218	87	12
Italy	12207	5625.1	2481	1976	340	135	n/a	n/a
Portugal	2755	663.7	416	343	35	30	8	0
UK	19049	8942.8	1960	1539	225	130	61	5

Source: Eurostat

FEAD (Fédération Européenne des Activités de la Dépollution et de l'Environnement - European Federation of Waste Management and Environmental Services is the European association that represents the European waste management industry. FEAD's members are national waste management associations covering 19 Member

[65] Metal, non-metal waste and scrap

States. They have approximately a 60% share in the household waste market and handle more than 75% of industrial and commercial waste in Europe. Their combined annual turnover is approximately € 54 billion.

FEAD represents about 3,000 companies with activities in all forms of waste management. These companies employ over 295,000 people who operate around 1,800 recycling and sorting centres, 1,100 composting sites, 260 waste-to-energy plants and 1100 controlled landfills.

The fastest growing type of waste is municipal waste (waste collected by the municipality, i.e. household and some commercial waste), although the amount generated varies across Europe :

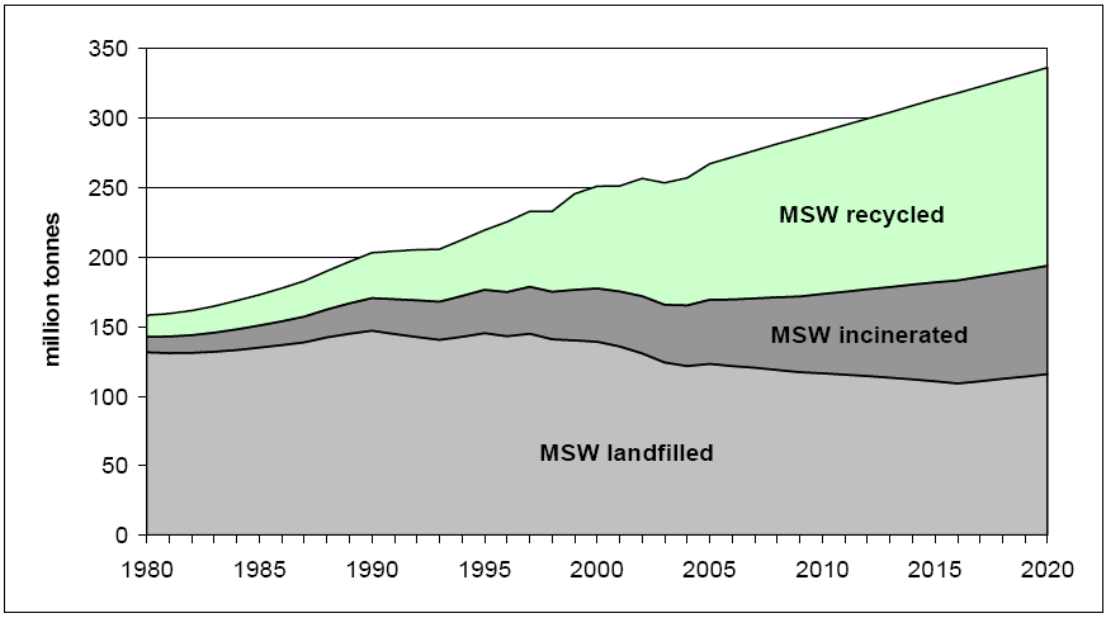
Annual Municipal Waste, 2007

	Tonnes per capita
Czech Republic	294
Germany	564
Greece	448
Spain	588
France	541
Italy	550
Portugal	472
United Kingdom	572
EU (27 countries)	522

Source: EUROSTAT, 2009

The change in the patterns of treatment of municipal waste can be illustrated as follows :

Municipal Solid Waste produced in EU-27



Source: ETC/RWM working paper 2008/1 - on behalf of EEA

The European market in waste management is dominated by four companies that are well established in the different sectors in which concessions arise: Veolia, Suez (France), FCC and Urbaser, part of the ACS group[66] (Spain). There has been a significant move toward concentration in recent years benefitting the larger companies, which is reflected in the market share of the three largest operators, accounting for 57% of the Spanish market, 47% of the French and 38% of the German market. Only the UK is significantly different with less than a quarter of the market managed by one of the three largest companies.

Main refuse management companies in Europe, 2007

Company	Home Country	EU countries in which the company operates	Employees (Waste)	Sales €m (Waste)
Veolia/Onyx	France	Austria, Belgium, Czech Republic, Denmark, Estonia, France, Germany, Hungary, Ireland, Italy, Poland, UK	64 900	6 600
FCC	Spain	France, Portugal, Spain, UK, Austria, Czech Republic, Hungary, Poland, Slovakia	53 263	2 836
Suez	France	Belgium, Czech Republic, Denmark, Finland, France, Germany, Hungary, Ireland, Italy, Luxembourg, Netherlands, Poland, Portugal, Romania, Spain, Sweden, UK	35 000	5 000
Urbaser (ACS)	Spain	France, Portugal, Spain, UK	30 000	1 275
Remondis	Germany		17 100	2 900

[66] ACS is involved in a number of large public works such as the high speed rail link between Figueras and Barcelona

Cespa (Ferrovial)	Spain	Portugal, Spain	14 508	823
Lassila & Tikanoja	Finland	Estonia, Finland, Latvia, Sweden	8 805	436
AVR/Van Gansewinkel	The Netherlands	Belgium, Czech Republic, France, , Ireland, Netherlands, Poland, Portugal and UK	5 527	1 030
Nicollin	France	Belgium, France, Portugal	4 950	248
Shanks	UK	Belgium, Netherlands, UK	3 470	509
Alba	Germany	Germany, Poland	3 000	1 100
CNIM	France	Czech Republic, France, Italy, UK	2 789	522
Ragn-Sells	Sweden	Denmark, Estonia, Poland, Sweden	2 628	348
Saubermacher	Austria	Austria, Croatia, Czech Republic, Hungary, Slovenia	2 600	200
Novera (Equest)	Bulgaria		1 800	
Becker	Germany	Austria, Croatia, Czech Republic, Germany, Poland	1 800	
Séché	France	France, Spain, Hungary	1 564	379
Delta	The Netherlands	Belgium, Netherlands	1 137	336

Source: PSIRU, 2007

In France, Suez Environnement and Veolia (Vivendi) control more than 75% of firms active in this sector. However, the level of the competitive intensity is higher than these figures suggest. Generalist and independent operators, small and medium sized enterprises (for instance : Edinord Synergie Environnement in the Region Champagne-Ardenne), nationwide enterprises (SAUR - Coved group) and enterprises specialised in industrial waste treatment lead the competition. The sector represents 350 private companies, with 2,650 establishments and employing 73,000 people. It has 10 billion euros in sales turnover. There are 1,166 treatment sites, with 64 million tonnes of waste collected, 74 million tonnes of waste treated (50% on the basis of concessions) and 30 million tonnes of waste recovered.

According to industry sources, landfill accounts for one third of non recycled waste, the rest being incinerated.

Concessions do not tend to arise at the waste collection stage, where there are well established routines that are carried out on the basis of service contracts. The more complex processes of waste treatment in the more specific sense are more suitable for concessions and an estimated 50% of the treatment subsector is operated on a concession basis. Concessions are particularly concentrated in the incineration area, where the technology can be complex and where revenues can arise from the sale of electricity.

Baseline Description

Waste collection is very competitive – even at the large city level – waste treatment and incineration has larger companies, but although the numbers of competitors are smaller the markets are still very contestable

An instance of the competition in the market is provided by the recent awarding of waste collection in Paris. Veolia was only awarded two arondissements out of the 12 where the service is tendered out (8 going to Derichebourg and the remaining two to Groupe Pizzorno). The competitiveness of the smaller waste management companies ensures that markets competition is fierce.

Landfill is still the most common way of managing waste in the Czech Republic. In 2003, the government adopted a Waste Management Plan to reduce the proportion of landfill in waste management and increase recycling. The aim of the plan is to increase the recovery of municipal waste to 50% by 2011. As a means of achieving this goal, no incineration plants nor new landfill site can be funded by the state. The plan clearly identified public/private financing as a means of financing the necessary investments needed to help the country achieve its aims in waste management.

Czech legislation uses the concept of "authorized person" to whom waste management can be delegated. In 2002, the regional distribution of "authorized companies" in the sector was very un-homogenous, with only two companies employing more than 500 people (both in Prague).

Number of "authorized companies, 2002

Number of employees	**none**	**1 to 9**	**9 to 49**	**50 to 99**	**100 to 499**	**500 and more**	**Total**
Capital City of Prague	133	69	10	4	4	2	222
Central Bohemian Region	55	22	23	4	3	0	107
Southern Bohemian Region	24	19	14	3	1	0	61
Plzeň Region	27	19	14	4	1	0	65
Karlovy Vary Region	15	4	7	0	1	0	27
Ústí Region	28	20	12	3	7	0	70
Liberec Region	5	12	10	4	0	0	31
Hradec Králové Region	5	9	19	1	1	0	35
Pardubice Region	6	8	11	4	2	0	31
Vysočina	5	5	5	2	2	0	19
Southern Moravian Region	18	22	17	5	3	0	65
Olomouc Region	24	10	7	2	2	0	45
Zlín Region	17	9	12	2	2	0	42
Moravian and Silesian Region	88	27	9	2	4	2	130
Total	450	255	170	40	33	2	950

Source: Waste Management Plan of the Czech Republic

The largest waste company is ASA, a subsidiary of FCC. The company collects and treats waste for 1,171,000 people and 17,500 companies. Other foreign groups include AVR/Van Gansewinkel, FCC, Jacob Becker (Germany), Saubermacher (with SITA)

In Germany, waste management is a responsibility of the local authorities. However, the Länder play an important role having to ensure the implementation of the Closed Substance Cycle and Waste Management Act[67]. The Act gives precedence to prevention of waste creation rather than recovery and this in turn takes precedence over disposal. The green policies of the German Government have ensured a rapid expansion of the industry. Most of the development took place in new recovery and waste management technologies. Waste management works very much in the same way as water services: they are a responsibility of the municipality and are generally operated either directly by the municipality or through IPPPs. Service concessions are almost non-existent.

Waste management in Germany is worth an estimated € 12 billion. According to calculation for the PSIRU, in 2007 municipalities had a 37.5% market share of the sector. Remunicipalisation is apparent and is a trend that is expected to continue in the near future. Sources in large European companies involved in the sector have confirmed the difficulty of entering the German market, precisely because of municipalisation.

The largest private companies are Remondis (part of the Rethmann group), Onyx (Veolia), Sita (Suez) and Alba. Other more specialised companies are important in Germany, such as Dualen Systems Deutschland, which controls 90% of the packaging recycling market.

In Italy, the national definition of waste is in accordance with the Legislative Decree No 152/2006 and Council Regulation (EEC) No. 259/93 adopted from Council Directive 75/442/EEC on Waste. Award procedures in waste management take place in line with the Code of Contracts (dlgs 163/2006). In effect, there are almost no refuse collection contracts with private companies that really fit the European definition of concessions. Project financing and concessions are used, nevertheless, in building and managing refuse management plants.

In 2005, 40% of waste collection and 28% of waste treatment was operated by private companies. None of the large European waste management companies are Italian and only a few of the main players operate in the country.

[67] Gesetz zur Förderung der Kreislaufwirtschaft und Sicherung der umnweltverträglichen Beseitigung von Abfällen, 27 Sewptember 1994, last amended by the Act of 3 May 2000

As of 2002, legal landfill sites only covered 53% of the Greek population, the remainder were served by over 1,400 illegal landfill sites. 91.2% of the legally collected waste was also disposed of in landfills or open dumps (in the case of small islands). Only 8.8% of total waste was recycled. In order to comply with the targets set out in the different EU Directives on landfill and recycling, the private sector has recently started to play a role in the country. In 2007 a PPP was approved for the "Implementation of infrastructure for the Integrated Waste Management System in the Region of Western Macedonia", a network of 10 waste and recycling transfer stations and one landfill. Because of the critical lack of waste management infrastructure in the country, PPPs that are likely to arise in the sector will be focused on designing and building as well as on operating the service.

Municipal solid waste (MSW) disposal is one of the most important environmental problems in Portugal. The basic principles of waste management in Portugal are prevention, reuse, recovery and disposal. According to a 2003 enquiry on waste management, only 4% of waste was collected separately (allowing for recycling). 68% of waste was disposed of in landfill. Only 3% of the country's waste was recycled in addition to 8% of organic waste recovery. Because of the low added-value of waste management in the country, private actors are not very apparent in concessions arrangements. FCC, Urbaser and Cespa (all three Spanish companies) are the most prominent foreign companies operating in the sector.

In the UK, waste management is governed by the Environmental Protection Act 1990. Amongst other provisions, the Act establishes "waste disposal authorities" responsible for waste collection and treatment in a particular area as well as granting licenses to companies entitled to perform in the sector and waste collection authorities, responsible for collecting waste and delivering to the waste disposal authority.

The Department for Environment, Food and Rural Affairs (Defra) is the ministry with overall responsibility. The British government has identified Public Finance Initiatives (PFIs) as the optimal finance source to increase investment in the sector and reduce waste. According to Defra's statistics, the share of waste disposed of in landfills has fallen from 79% to 50% between 2000 and 2008. Over the same period, recycling has grown from 12% to 37% and incineration from 9% to 11%. There are no concession type agreements for waste management in the UK. However, due to the large element of private sector involvement, a number of foreign companies are present in the market. They include Veolia, FCC, Suez and Urbaser. Shanks and Biffa are the only British companies of note

4.3.6 Motorway management and maintenance

The motorway sector is of interest not because of the extensive presence of service concessions currently, but because it represents an area where the focus could plausibly shift from works concession (construction and development) to service

concession (operation and maintenance). As yet, however, no motorway in the European Union has been awarded as a service concession after an initial period as a works concession.

In 2004, the European motorway network had a total length of 63,839 km (including both tolled and non-tolled roads). Italy, France and Portugal are the EU members in which most motorways are tolled, although even in countries with motorways are generally non-toll, there are exceptions (a section of the M6 in the UK) and a fee is paid to use certain structures (such as bridges).

Identifying data on the companies that have been involved in motorway construction is not possible directly from the usual statistical sources. The figures in the following table relate to the construction of highways, roads, airfields and sport facilities. However, in many cases, the companies involved in constructing motorway facilities are also in involved in large civil engineering and construction projects in the other areas, the figures are still of interest. 360,000 people are employed in the sector, with a turnover of €66 billion.

NACE F4523 – Construction of Highways, Roads, Airfields and Sports Facilities (2007)

Country	Employees	Turnover 2007	Number of Enterprises
Czech Republic	30112	4792	1051
Germany	75924	9937.6	2781
Greece	:	2245.2*	
Spain	96492	17853.5	1686
France	76730	17872.6	1667
Italy	42936	10102.2	5180
Portugal	26696	3345.5	731
UK	41239	7199.7	3023

Source: Eurostat

Germany has a long tradition of motorways. In the 1980's the government policy was to ensure that no German household would be situated more than 10 kilometres away from a motorway. With over 12,600 km of motorways, Germany has the largest European network, and is third only to the United States and China in the world.

Although motorways have traditionally been financed by the state, there have been recent developments involving private companies in the managing and building of certain aspects of the network. As of December 2009, two concessions had been awarded with a further four announced between 2009 and 2011. The total value of the 6 first PPPS will reach € 1.3 billion.

In 2005, Toll collect Gmbh was created to collect tolls from trucks over 12 tonnes through a satellite system. The systems generated € 3.66 billion in 2008. The Spanish model of motorway development is similar to that of France or Italy, with a large number of consortia managing a fairly developed network. As of 2008, there were 34 companies operating a total of 3,334 km of autopistas. There is a limit on the scope for the development of concession-type agreements in Spain since there is an extensive network of free autovias, built and operated directly by the state. The largest motorway operator is Abertis, who also owns assets in France and Portugal. There is to date, very limited foreign penetration in the Spanish motorways market, mainly because of the expertise of Spanish companies in this domain.

T.E.O. is the Greek motorway agency responsible for the financing and managing of the 916 km of motorways in the country. TEO is a public company, under the authority of the Ministry of Infrastructure and was until recently the only operator in the country. The great majority of Greek motorways have been built with government and European funds, with TEO responsible for collecting tolls from users. The trend has recently changed with concessions being awarded for the building of new infrastructure. The main projects are:

- Elevsina - Corinth - Patra - Pyrgos – Tsakona motorway (366 km) by an international consortium (HOCHTIEF PPP Solutions 35%,, Eliniki Technodomiki 20%, J&P/Avax 16.25%, Vinci 13.75%, Aegek 10%, Athena 5%)

- Central Greece Motorway led by the Greek GEK Group (33,33%), with a substantial participation by two Spannish companies Cintra and Grupo ACS (33,33% each).

Motorways have traditionally been one of the main areas where concessions arose in France. Recently, and especially since the 'Grenelle Environnement' which took place in October 2007, the government decided to freeze the construction of new motorways and the scope for new projects has dramatically reduced. In 2008 however, three new motorways were announced as part of the national economic recovery plan.

The market is managed by eight motorway consortia, with another six companies managing specific engineering structures. The sector employs over 16,000 people and turned over €7.9 billion in 2008. Despite the clear dominant position of French companies in the sector, there is a healthy amount of foreign participation. Directive 1999/62/CE, aimed to reduce the advantage of existing concessionaires by allowing for part of an infrastructure project's financing to come from the State, but entry into the motorway exploitation market has in fact been on the basis of joint ventures or privatisation, rather than through a change of concessionaire.

Consortia	Main Shareholders	Turn-over (2008)
ASF / ESCOTA	VINCI Concessions	€ 3,239.3 million

	(France)	
APRR / AREA	Eiffage (France) Macquerie (Australia)	€ 1,833.7 million
Sanef / SAPN	Abertis (Spain)	€ 1,367.6 million
COFIROUTE	VINCI Concessions (France) Colas (France)	€ 1,077.1 million
Other (including engineering structures)		€ 413.4 million

The Italian state has conceded the management of the whole motorway network, as well as "roads of national interest" to ANAS S.p.A a public company. In turn ANAS has the competence to sub-concede parts of the network. ANAS has retained the management of 900 of the 6,500 km of motorways in Italy. It also has shares in a number of national motorway companies and participates in transborder projects such as the Mont-Blanc and Frejus tunnels. The remaining 5,600 km are conceded to 23 different companies. The largest concessionaire is *Autostrade per l'Italia*, formerly the public motorway company, now owned by Atlanitia, with over 2,800 km. None of the other 22 operators manages more than 350 km of motorways.

In Portugal, the government has conceded the entire road network to *Estradas de Portugal SA* (EP) for a period of 75 years. Technically this did not apply to motorways that were already conceded but EP will be administering these motorways at the end of a concession period if no new agreement has been made. EP is thus responsible for sub-conceding parts of the networks to other operators. Brisa is by far the largest motorway operator in the country with a network of 1,100 km out if a total of 1,663 km. Acendi of Spain is the second largest operator and the only foreign concessionaire of any importance in the country.

In the UK, motorways have historically been funded publically. The use of some structures (tunnels and bridges) is paid for directly by the end-user. In addition, the M6, the first privately funded stretch of motorway opened in 2003. The operating company (Midlands Express Limited) is a 100% subsidiary of the Australian Macquarie group.

4.3.7 Leisure & Parking facilities

Leisure and parking facilities appear to be two areas where there are a large number of concessions at a local level. As always, the concession form is more used in some Member States than in others.

Mainly because of their local and fragmented nature, the markets for these facilities have not been researched, as far as we could determine and It has proved to be very difficult to identify secondary sources on the sectors.

In the case of leisure facilities, there is some coverage of the management through concession-type arrangements of some concert halls (Zenith) in France). Zenith are very specific facilities which started to emerging in the early 1980's. They have strict terms of reference, including a provision that the management of the hall must be limited to renting out rather than the direct organisation of concerts. There are 16 Zenith in France, all of which are operated through concessions.

There is a little more information available on parking facilities in general, but less so on their management through concessions or other forms of public contract. The number of parking spaces has increased, with the number of vehicles and with a growing concern to manage traffic and reduce congestion in cities. Public parking is often provided by local authorities across Europe, but equally there have always been private companies also offering parking facilities of various kinds. Concession arrangements have sometimes been used by local authorities who see the benefits of private management, while wishing to retain ultimate control over parking as part of their planning responsibilities.

The sector has traditionally been fragmented but it has consolidated over the past ten years. The first car parks built on the basis of concessions in the 1970s and 1980s saw their agreement come to term in 2000, which partially prompted the move to more consolidation. Vinci Park is by far the largest car park company, with over 650,000 parking spaces managed in the EU, including 460,000 in France. Concessions account for 61% of Vinci's parking spaces in France, and 14% for the rest of the EU. Parking concessions can last up to 50 years (as is the case in Lille for the 'Grand Place' and the 'Place du Peuple Belge' parking lots. Other important parking operators include Effia, which belongs to the SNCF and specialises in train station parking, Epolia (formerly of Effiage), Q Park.

NCP is the market leader in the provision of parking services in the UK, supplying over 200,000 spaces in more than 700 locations. The company began by buying locations for parking and offering facilities on a private basis, but in the last ten yeras, it has changed from being a property owning company to one that is more focused on providing a service, which now includes managing provision for a number of local authorities and providing enforcement services, vehicle removals and debt recovery.

There are differences between European countries in the management of on-street parking spaces. In France for instance, parking offenses are covered by criminal law (droit pénal) and are thus part of the sovereign (régalien) duties of the state, which means that management of on-street parking cannot be the object of a concession. In other countries, such as Belgium or Spain, parking offenses are under

administrative law. It is therefore possible for on-street parking management to be conceded by the local authority to a private company.

Potential Impacts of Legislation

5

In this chapter the potential impact of a series of different legislative scenarios is considered and the characteristics identified that are likely to determine that impact. In selecting the significant characteristics that are most likely to determine the impacts of future legislation, the different variants of the legislation range from a "light approach" to the "fully fledged approach"

5.1 Methodological Approach

The previous two chapters have provided an indication of the current and potential extent of service concessions in the eight Member States under consideration. In this and the following chapter, there will be a concentration on the potential impacts of a series of alternative legislative propositions on the development of the use of service concession contracts, and particular impacts on specific service sectors.

The evidence for the analysis that follows has been gathered both in a review of publicly available information and also in a series of interviews with public bodies, business organisations, enterprises and local experts in the targeted Member States. There is also discussion drawing on the analytical distinctions of earlier chapters.

As before, the main focus of interest has been service concessions arising in the areas covered by the Classic Directive (2004/18/EC), but also those arising in areas covered by the Utilities Directive (2004/17/EC) - the water, energy, transport and telecommunications sectors. Other sectors excluded by both these Directives have not been considered.

The analysis will proceed through various steps, beginning with the intended effects of legislation in this area in the application of the principles of the EU Treaty, going on to explain the different possible legislative scenarios and then exploring the perceptions of some of the main players in this area, before setting out the main potential effects of any legislation at a general level. The following chapter will pick up some of these conclusions and examine the situation at a sectoral level.

It will be seen that an account of the differing perceptions of the nature of concession arrangements plays an important part in the analysis, since perceptions inform the motivation of the different actors and help determine their possible reactions to any legislation.

The approach adopted in the analysis has naturally been considerably influenced by the general framework for impact assessment adopted by the European Commission[68]. This framework is rather broader in scope than the current exercise, but the aim nonetheless is to observe its principles, as far as possible, and to shape the outputs of the study so as to provide material that could be of use for any eventual broader exercise.

[68] Impact Assessment Guidelines (SEC(2009) 92

This approach implies that the study had to keep in mind the main problems that any action is intended to address and have a clear view of the objectives of the specific policy measures under consideration. It also required that in examining the relative advantages and disadvantages of the main policy options, the possibility of non-action be considered. Similarly, the analysis of impacts should distinguish between more immediate consequences, medium-term results and longer-term outcomes.

To provide an overview of the context in which this analysis would take place, a sketch was made of the intervention logic under consideration. A description of an 'intervention logic' sets out the basis for a given policy or programme and its anticipated effects. It shows what the policy is supposed to achieve and how it is supposed to achieve it, by pointing to the intended causal relationships between aims and objectives, inputs and outcomes.

Intervention Logic

In the broad public procurement area under consideration, the regulatory regime and established practice derive initially from provisions in the Treaty on European Union. Article 2 of the Treaty states the overall aims of the European Union, which in the context of the study are also the global objectives of the legislation in question :

> 'a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States'.

In pursuit of these aims, Article 3 states that the Community shall have 'an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital'.

In giving effect to the four freedoms, articles 28 to 30 and 43 to 55 of the Treaty, establish a series of intermediate objectives, prohibiting quantitative restrictions between Member States and establishing provisions that govern the freedom of establishment and to provide services. Article 6 forbids any discrimination on the basis of nationality.

Case law interpreting these provisions has taken the process further and specified a series of principles that give effect to the provisions of the Treaty. These are the principles of transparency, equal treatment, proportionality and mutual recognition and they have become the basic principles governing the operation of the Internal Market and the markets for public contracts in particular.

The principles of equal treatment and non-discrimination mean that the rules apply equally to all and that it is not permissible to discriminate against anyone, particularly by excluding them from public procurement markets arbitrarily. Together these two principles have been taken to imply an obligation of transparency which in turn has been interpreted as an obligation to ensure a degree of advertising sufficient enough to enable the market to be competitive.

The principle of proportionality means that any measure chosen by the awarding authority must be necessary and appropriate for the attainment of the goals and the principle of mutual recognition means that the Member States and the contracting authorities must recognise the technical specifications and controls established in another Member State.

These principles have then been taken to define the specific objectives of measures giving effect to the objectives of the Treaty in public procurement legislation covering 'the award of contracts by public bodies. This is explicitly stated, for instance in Recital 2 of Directive (2004/18/EC), where the coordination of national procedures for the award of such contracts is seen to be 'advisable' for public contracts above a certain value. At this point subsidiary objectives are taken into account, such as the objective of providing legal certainty in circumstances where it is not entirely clear how the higher level principles should be applied in practice.

The legislation then established a series of operational objectives by specifying actual procedures that should be followed. These include :

- *The publication of a notice :* the obligations to publish a concession notice in the Official Journal of the European Union and to respect minimum deadlines for the submission are a practical contribution to transparency and non-discrimination in both a legal and an economic sense.

- *The type of Procedure :* specifying the permissible procedures (open, restricted, and competitive dialogue and negotiated - in the case of utilities) again contributes to transparency and non-discrimination and in economic terms helps to reduce transactions costs

- *Criteria for the award of contract :* the obligation to restrict the admissible award criteria to price and those of the economically most advantageous tender contribute to equal treatment and transparency and in economic terms focus attention on price and (in the second case) also quality.

- *The Use of Non-restrictive Conditions :* the obligations, such as those to restrict qualification criteria to financial, economic and technical capacity and to restrict the choice and order of admissible technical specifications, together with prohibitions, such as those relating to the imposition of a specific legal form at the stage of tendering or the exclusion of tenderers wishing to rely on the capacities of a third person all contribute practically to promoting effective

competition, for instance by assisting the participation of SMEs and also give practical effect to the principles of proportionality and mutual recognition.

- *Scope* : the specification of thresholds gives a practical indication of when tenders need to be advertised at a European level in the Official Journal and by prompting this course of action tends to promote transparency.

Other provisions in the legislation contribute to other objectives, in line with the overall approach. Art. 26 of Directive 2004/18/EC, for instance, allows for social and environmental considerations, but in a way that is transparent and non-discriminatory.

There is thus a hierarchy of objectives that determine the course of the policy intervention stemming originally from provisions in the Treaty down to those governing very practical measures concerning the format used in tender documents. In this way the legislative provisions cause action on the ground that gives effect ultimately to the global objectives.

The first effects that are evident ('outputs' in evaluation terminology) are those such as the publication of tender notices in the Official Journal in a way that complies with the requirements of the Directives. Other effects of a broader nature correspond to other levels in the hierarchy of objectives. Thus the intention of the legislation is to generate certain 'results' from the legislation, such as greater competition in public markets, a situation approximating to full information, a reduction of barriers to entry and the consequent effects of lower prices and better quality. These effects in turn are expected to contribute to longer term outcomes, corresponding to global objectives, such as a high level of employment and non-inflationary growth.

These are the intended effects of procurement policy in general and the same logic applies in principle to concessions and service concessions in particular. Clearly concessions may be thought to have characteristics that make them more appropriate as an instrument in specific circumstances. In addition it may be a matter of policy on the part of some national administrations to have greater private sector involvement in the delivery of public services. However instrumental considerations and even the policy stance referred to do not as such impinge on the broad procurement logic outlined. The question will therefore be whether or not additional provisions governing the (instrumental) use of service concessions will continue to give rise to, or will enhance, the achievement of the overall objectives of the policy outlined. There is then the question of whether there are particular circumstances and especially particular sectors where the general situation does not apply.

In relation to the latter, it was necessary to take account not only the intended effects of the legislation, but also any unintended effects. By definition almost,

these are difficult to identify ex ante, but considering the situation of particular sectors is one way of approaching the issue.

5.2 Possible legislative provisions

Overall therefore the approach will be to examine the nature of the intended consequences of the provisions under consideration and also their wider effects following the guidance provided by the Commission. It is important in this process that a degree of flexibility is built into the procedures used to investigate effects, in order to allow for the unexpected. For these purposes, the best approach is to make use of a structured set of interviews with parties who will be affected by any legislation. The focus of the discussion in these interviews had to be the detailed provisions that CSES was asked to consider. These were formulated in the shape of four possible scenarios :

Alternative Legislative Provisions under Consideration

- **A1 : No change.** No change to the Classic Directive (2004/18/EC), under which service concessions are explicitly excluded from the provisions of the Directive, nor to the Utilities Directive (2004/17/EC), where a similar situation applies.
- **A2 : "Light approach".** The 'light' approach would consist of applying to service concessions the provisions that currently apply to works concessions under the Classic Directive (articles 56 – 65), with appropriate adjustments for services (value of thresholds etc).

  These provisions may be summarised as :

  Scope :
  - would apply to contracts above the normal service thresholds

  Publication of Notice :
  - obligation to publish a concession notice in the Official Journal of the European Union;
  - the obligation to respect minimum deadlines for the submission

  Subcontracting :
  - Allowing contracting authorities to require a minimum amount of sub-contracting or to be informed of the amount of sub-contracting proposed.
  - Specifying rules under which (sub-)contracts are awarded by concessionaires which are not themselves contracting authorities.
- **A3 : "Fully fledged approach".** A 'fully fledged' approach would consist of applying to service concessions other provisions that currently apply to public

procurement under the Directive. These would be :

Publication of Notice :

- obligation to publish a concession notice in the Official Journal of the European Union;
- the obligation to respect minimal deadlines for the submission
- restrictions pertaining to communication with candidates and tenderers, as provided for in Art. 42 of Directive 2004/18/EC

Type of Procedure :

- the principal choice between an open or restricted procedure (or competitive dialogue), as described in the Classic Directive, or (only in the case of utilities) of negotiated procedure with publication, other procedures only in exceptional situations, as provided for in Directives 2004/18/EC or 2004/17/EC.

The Use of Non-restrictive Conditions :

- obligation to restrict qualification criteria to issues related to financial, economic and technical capacity of a tenderer,
- obligation to restrict means of evidence to be required to prove technical capacity of a tenderer to a closed catalogue,
- prohibition to exclude tenderers wishing to rely on the capacities of a third person,
- the prohibition to impose a specific legal form at the stage of tendering,
- obligation to restrict the choice and order of admissible technical specifications, as provided for in Art. 23 of Directive 2004/18/EC
- obligation to advertise specific conditions of performance of a contract, as provided for in Art. 26 of Directive 2004/18/EC (allowance of special conditions, e.g. social and environmental considerations)

Award of contract :

- obligation to restrict the admissible award criteria to price and those of economically most advantageous tender,
- obligations relative to treatment reserved to abnormally low tenders

- **A4 : "Intermediate approach".** An 'Intermediate' approach would consist of an approach that would apply the provisions of the 'light' approach, plus other provisions among those being considered under the 'fully fledged' approach.

Note that the study was not asked to consider the possibility that there could be separate legislative provisions for concessions.

The approach adopted in the course of the interviews was to set out our understanding of the current situation in the country concerned, to establish if this corresponded to the perceptions of the interviewees and then to consider the implications of each of the four scenarios. Naturally there was a diverse set of responses, some in a lot more detail than others. The following sections begin with the most general.

5.3 The perceived effects of different legislative scenarios

There is general recognition of the treaty principles of transparency, equal treatment, proportionality and mutual recognition among those interviewed for this study. It is widely felt that it is important to establish a situation in which concessions are seen to operate in a fair, transparent and even-handed way.

A shared objective of all those who see a positive role for private involvement in public service provision is to ensure that any new legislative regime should encourage the further development of concession arrangements rather than hinder them. The first differences of opinion therefore relate to whether or not applying the legislative provisions under consideration would help matters or rather hinder further use of the concession form.

Significant differences about the desirability of any legislation have been presented to us. These views are important in informing any judgement about the likely reaction to any eventual implementation of legislative provisions. They tell us something about the motivation of those affected by the legislation and their likely perception of the consequences of legislation for the management of concession contracts. They therefore colour perceptions about the nature and extent of impacts from the possible legislative provisions.

Essentially the arguments divide into two positions. One argues that concessions, and service concessions in particular, are significantly different from public contracts and that, if any legislation at all is to be contemplated, it should make restricted use of public procurement provisions or preferably should be the subject of separate legislation with a separate regulatory regime. The other sees no essential difference between public contracts and concession arrangements, but rather different points on a continuum of public provision. This second position tends to regard the position of service concessions currently as an anomaly within

the public procurement regime and tends to see merit in introducing legislative provisions that will bring them into the existing framework. Within this position, some go on to emphasise the importance of removing any incentive in the legislative provisions to favour one form over another on any grounds other than the intrinsic merits of the case.

These significantly different conceptions of the nature of concessions emphasise different potential effects arising from any legislation. Exploring the possible impacts of any legislation, then, clearly requires an understanding of the two perspectives. A brief summary of their main characteristics is provided in the following paragraphs

'Fundamental difference' conception

The position taken by organisations such as the European Centre of Employers and Enterprises providing Public services (CEEP) and by Member States that have a well established tradition of concession arrangements (and national legislation covering them) is that concessions are fundamentally different from public contracts, because of the public service obligations associated with them. They tend to refer to the nature of services of general public interest and the ethos that characterises them – a situation that is explicitly recognized in the Lisbon Treaty. This commitment to public service is said to be an important distinguishing factor from the situation that applies with public contracts. Delivering health care, even in countries where it is more and more market oriented, is different from providing pencils.

In addition, the detailed nature of concessions is said to contrast with that of public contracts, particularly in the following ways :

- The right to exploit the service that is the basic differentiating factor of service concessions arises as a counterpart to the acceptance of risk by the concessionaire. Risk implies unknowns and uncertainty, so the very definition of a concession implies a distinction between public contracts and concessions that is based on the impossibility in the case of concessions of stipulating all the conditions that will apply

- Concessions are typically of much greater complexity and involve much greater volumes than public contracts. This is even more the case with service concessions than with works concessions, because of the variability of the conditions in which services are delivered

- In contrast to those granted public contracts, concessionaires are usually given an exclusive right to exploit a market. This carries extra responsibilities that have to be managed effectively and the concessionaire is therefore required to meet certain public service obligations

- Service concessions relating to services of general interest require the concessionaire to be embedded in the provision structure made up of providers, the authorities, users, supervisory authorities and 'public opinion'. In these circumstances concessionaires are seen as part of what the state is doing for its citizens. Maintaining the confidence of citizens is of major importance and this requirement cannot be captured in public contracts drawn up according to normal public procurement procedures. There are important implied responsibilities. Concessions can usually only work on the basis of trust between the parties and the creation of a relationship that procurement procedures make difficult to establish. The significance of this relationship can be given legal expression in principles such as that of intuitu personae and affectio societatis, in the case of France.

- Situations which concessions address cannot be adequately described in tender specifications. It is impossible to foresee at the publication of a contract notice all the potential developments that can arise during the term of the concession. In contrast, the terms of public contracts have to be foreseen at the time of tendering. This requirement is an important limitation of the public procurement framework

- One of the consequences of this is that if circumstances change under a public contract and the terms of the contract no longer directly apply, this is a problem for the contracting authority. If this occurs under a concession, it is a problem for the concessionaire.

- Concessions tend to be long term in order to allow an adequate return to the investor, but this increases the chance that circumstances will change. Public contracts can also be for long periods, but in this case the contractor does not have the responsibility for adjusting to the change.

- Similarly, in concession negotiations, the nature of the initially expressed requirement can be changed, as more innovative proposals are made. Some degree of negotiation over terms is often the prerequisite for a successful outcome. A response to a call for tender proposing a different set of aims and objectives would, if accepted, invalidate the procedure

- Even the competitive dialogue procedure does not suit the situation of concessions. There are drawbacks, such as the need to divulge commercially sensitive information, but more fundamentally, it is not possible to encapsulate in a requirement document the differing company visions that are so important for innovative solutions

- A contracting authority should be able to monitor and interact with a service provider in a concessions arrangement in ways that go beyond the strict

requirements of the contract. This requires a degree of flexibility on both sides that is not compatible with a public contract

- If a public contract fails, the contracting authority can simply republish the call for tender. The consequences of a failure of a concession are much more serious.

The position of concessionaires, in contrast to contractors with 'normal' public contracts, is established in national laws, as we have seen, especially in the case of France, where case law has re-inforced the distinguishing characteristics. A case in 2000[69], for instance, established that the object of a concession contract is the service provided to the end-user, as opposed to the details of the contract between the public authority and the contractor. An earlier case[70] had already established that operational risk in a concession is assumed by the contractor, along with responsibility for crisis management and ensuring the continuity of service. French legal practice allows, therefore, some restricted modification of contractual terms, without invalidating the original contract.

It is these elements of flexibility that are emphasised by those who hold the 'fundamental difference' position, even when procedures are followed that are apparently close to normal public procurement procedures. We have seen that in France, for instance, many concession contracts are concluded, after procedures that appear to follow normal public procurement routines, and in a considerable number of cases, even following the full open procedure. Nonetheless in all these cases, under French law, the responsibilities of concessionaires differs from those that would arise under a 'normal' public contract and the (small) degree of flexibility allowed under French law still applies and is regarded as important by those involved in the market.

A commonly stated perception associated with this position is that a focus on public procurement rules is, in fact, the wrong approach since they concentrate on the conditions governing the selection of the contractor rather than the conditions under which the contract is implemented. A more fruitful approach in this view would be to develop arrangements and standard practice relating to the resolution of issues that arise during the course of a contract. This situation is already partially recognised in the special provisions of the Regulation applying to public passenger transport services.

The practical significance of these distinctions is greatest when it comes to the circumstances in which the concession form is most often applied, namely when an innovative approach or solution is required. Innovation, almost by definition,

[69] Jurisprudence Conseil d'Etat, 22 mars 2000, Epoux Lasaulce
[70] Jurisprudence Conseil d'Etat, 15 June 1994, Syndicat intercommunal des transports publics de la région de DOUAI

implies risk, precisely because the full range of expected outcomes is not known in the same way as when tried and tested solutions are applied. Concessions provide for the contracting authority a way of sharing that risk, but they inevitably require some degree of flexibility that a conventional procurement contract does not allow.

'Difference of degree' conception

In contrast, the position taken by organisations such as Business Europe and by countries that have a less well established tradition of concession arrangements (and national legislation covering them) is that concessions are less different from public contracts than sometimes suggested and that there is more of a continuum in the different ways of providing public services.

This position is characterised by the following:

- There is a tendency to see the public procurement regime as being capable of greater flexibility than that attributed to it by the opposing position
- Less of a distinction is seen between public contracts and concession arrangements in terms of commitment to public service. Supplying pencils may not require a commitment to public service, but empathy with the ethos of a public authority could well be expected of a contractor designing an information system
- It is argued that it is rarely possible to foresee all the relevant circumstances in contractual relationships and trust is necessary in all cases. Furthermore, the selection procedures for public contracts allow contractors to seek proof of the standing and capacity of potential suppliers and this can be used as the basis for establishing trust
- Contractual arrangements can have provisions for adjustments in certain circumstances, without invalidating the original contract
- There are major advantages for contractors of addressing the legal uncertainty surrounding service concessions
- It is important to provide clear procedures for contracting authorities within a framework that is as uniform as possible
- There should be concern to avoid 'artificial' incentives of a bureaucratic nature to use a contract rather than a concession or vice versa as opposed to a decision on the intrinsic merits of the case
- Separate legislation could cause legal uncertainty as to which set of rules would apply, inhibiting the development of concession arrangements or increasing the time to negotiate and implement contracts

- The public procurement framework is in fact already being satisfactorily used for service concessions in a number of instances in several Member States, especially since the Telaustria case underlined the importance of advertising service opportunities.

- In many cases 'open' or 'restricted' procedures are used, suggesting that the need for negotiated may be overstated.

Furthermore, there are examples of public contracts (under the PFI initiative, for instance) that are of great complexity and of long duration but that are still subject to the usual public procurement procedures

It should be said that there were significant variations on these positions. Some people who were relatively happy to use established procedures in practice were nonetheless reluctant to see these provisions become compulsory. Some said this would make the system less flexible and less capable of accommodating genuinely innovative approaches and solutions. Others feared that a formalised system would provide the grounds for more legal challenges to award decisions, both at the time of making them and subsequently. In some cases the value of extending the use of the concession form was challenged on the grounds that it was intrinsically a more open form of relationship between the authority and the contractor and was therefore more open to judgement and interpretation and that this could undermine the selection of contractors on a fair and objective basis.

It is not surprising that such different conceptions give rise to differing perceptions of the nature of the likely impacts of the various possible legislative provisions. The following sections therefore outline a range of potential impacts arising from specific provisions.

5.4 The potential impacts of the four legislative scenarios.

The four scenarios set out in section 5.2 will be considered successively below. There will be attention paid to specific provisions within each scenario. We should remark again, however, that the major differences encountered in opinions on possible impacts related mainly to the third 'fully-fledged' scenario level.

The main consequence anticipated by both positions was that legislative action or the lack of it could potentially spoil the market for concessions and inhibit the further development of this form of public private partnership, with serious consequences for the future quality and extent of public services and the social consequences that follow from this. A number of interlocutors were also keen to stress the role of concessions as an instrument for encouraging innovation in all aspects of the service to be delivered. Concession arrangements first of all encourage innovation in the services actually delivered, but they also encourage innovation in the delivery processes. The opportunity to exploit the service clearly

offers the incentive for such innovation, but the freedom to try new solutions is also appreciated. Furthermore, such innovations can have wider ramification in the economy as a whole, but the extent of this depends on the dissemination mechanisms. Almost by definition, an innovation begins as a single instance. Its ultimate impact depends on how quickly and how widely it can be disseminated. It could be argued then that as well as promoting the initial instance of innovation, the concession mechanism also plays an important part in its dissemination, especially in the early stages when further testing in the differing circumstances of a new concession is encouraged and when the concession form encourages potential concessionaires to exploit the competitive advantage of their innovatory development.

At stake therefore is not only the extent to which concession arrangements can contribute to new and better public services, but also the extent to which powerful procurement mechanisms can stimulate innovations that can ultimately have wider benefits to the economy as a whole. The fundamental issue is therefore which of the approaches under consideration is more likely to maintain and further encourage the development of the concession form or which may in contrast undermine this form of public private relationship and lead to a reduction in the use of the concession arrangement for the delivery of services.

A1 : No change

The possibility of leaving the legislative provisions as now was thought likely to have negative consequences, largely because of the uncertainty in the current position that could give rise to legal challenges and also lead to hesitation in making use of concession arrangements on the part of the officials of contracting authorities, because they are not clear which procedure to follow. There was also the argument that differing provisions in relation to service contracts and concessions created inefficiencies in that there were artificial incentives to choose one form rather than the other. These inefficiencies could grow in importance along with the potential increase in the prevalence of concession arrangements.

The current situation of service concessions is also something of an anomaly. They are covered by the general provisions of the Treaty, but are excluded from secondary legislation. This exclusion leads to them to be disregarded in some instances, allowing them in the case of Germany, for instance, to fall outside of the normal administrative processes governing procurement. There is even the danger that public service contracts could be designated as concessions in order to avoid the usual procedures.

On the other side, there are clearly many public service contracts awarded following normal public procurement procedures that are actually concessions. The lack of a clear distinction between the two hinders the development of good practice in procurement and playing to the relative strengths of each form.

The force of the uncertainty argument and the lack of clarity in some instances were recognised even by many of those who in general oppose the idea of bringing service concessions within the public procurement framework. Their solution would be to have a separate regime for concessions and their fear is that imposing a public procurement framework could damage existing concession and near-concession arrangements by making them unworkable and causing the private partners to withdraw from the market. A second line of argument is that even if new concession arrangements were to be viable under a public procurement regime, the process of introducing this new regime would cause considerable disruption in the provision of services of public interest, many of which are vitally important to citizens and communities.

There would appear to be an acknowledgement, therefore, among those interviewed, that no change is not really an option. The nature of the change, however, is still very much an open question.

A2 : "Light approach"

The 'light' approach would consist of applying to service concessions the provisions that currently apply to works concessions under the Classic Directive (articles 56 – 65), with appropriate adjustments for services (value of thresholds etc).

There was little opposition expressed to the idea of a legislative provision obliging contracting authorities to publish a service concession notice in the Official Journal of the European Union, since this was generally recognised as a direct way of promoting transparency in concession markets. Even those who were opposed to any further legislation in this field at a European level recognized that this was something that they could live with.

However, the effects of such a relatively simple development could be quite significant. First of all, it would promote greater clarity about the nature of the contract that the contracting authority wished to enter into and over time a tendency for the differing strengths and advantages of the two contract forms (public contract and concession) to emerge more clearly, leading to greater efficiency in the use of these instruments.

Secondly, the enhanced recognition, of 'service concessions' within the framework of procurement legislation would prompt the Member States and contracting authorities to review their administrative procedures and practical guidance and to bring service concessions within their normal procurement operational frameworks. This ironically might have greater impact on public contracts than on concessions, at least initially. Currently some public contracts are deemed to be service concessions and thus to fall outside of the public procurement framework (even if in principle they are covered by the provisions of the Treaty). Greater

recognition of service concessions could bring these false service concessions back into the normal procurement framework.

It is difficult to say what the effect of this development might be. We heard allegations that the practice of designating public contracts as service concessions was particularly prevalent in Germany and Italy, especially in the context of the granting of contracts to former in-house teams. This might be part of the explanation of the relatively low proportionate value of procurement contracts openly advertised in these countries that was referred to section 3.5.

Greater transparency overall, however, would create greater interest from private sector providers both in individual projects and in the idea of concessions in general and consequently the possibility of more innovative approaches and greater choice and efficiency in the public services. It may be that more information on concession opportunities may work to the advantage of larger firms which are in a stronger position to seek opportunities in locations that are distant from their home base, including those in other countries. The result therefore may be that greater competition and increased efficiency could also be accompanied by greater supplier concentration, but this effect would vary from sector to sector. It is most likely to occur in relation to local concessions, in sectors like parking and leisure services since larger companies already are in a position to gain knowledge of larger potential concession arrangements.

Appropriate notices might not necessarily have the same form as the current tender notices for works concessions and there were some minor concerns about possible administrative costs and delays, but none of these effects were considered to be major.

Similarly in this context, the appropriate threshold was not the significant issue that it would be in a more fully-fledged context, but the feeling was that a light approach would imply a threshold of around that of works concessions.

Provisions relating to subcontracting, including the specification of rules under which (sub-)contracts are awarded by concessionaires that are not themselves contracting authorities, again were not thought to have major consequences, though they were seen by some to reduce the flexibility that was needed for successful concession arrangements.

A3 : "Fully fledged approach"

A ‘fully fledged’ approach would consist of applying to service concessions other provisions that currently apply to public procurement under the Directive. In broad terms the ‘fully fledged’ approach would bring service concessions directly into the public procurement framework and it is therefore on these provisions that the different positions outlined above mainly focus.

A pragmatic argument in favour of a fully fledged approach is that it appears that 'normal' public procurement procedures are already being applied in the processes leading to concessions in a number of Member States. What could be the objection to formalising this position, especially when many see the elimination of legal uncertainty as a major benefit arising as a consequence of the adoption of a clear regime with the 'fully fledged' elements? The consequences, those in favour of bringing concessions into the same frameworks as public procurement contracts argue, are a wider participation by the private sector, the promotion of greater competition and innovation and improvement in the choice and the quality of public services They point to the benefits identified as resulting from the creation of a single procurement market across the EU[71] and generally see the standard public procurement provisions as giving practical effect to the principles of transparency, equal treatment, proportionality and mutual recognition. Those in favour therefore wish to see exactly the same provisions applying as in service contracts. All the more so, since they also wish to eliminate the possibility of any procedural distortion favouring one form rather than the other.

Those who take this position also tend not to see any great significance in variations between the different sectors concerned or believe that the procurement provisions can be applied flexibly enough to accommodate these variations. They point to the fact that EU public procurement legislation has been in place for many years now and that consequently any provisions that there are at a national level tend to build around the general procurement provisions rather than contradict them. National provisions may, for instance, stipulate maximum length of contract, about which EU procurement legislation says nothing or establish a lower level threshold than at a European level.

Similarly, they tend not to anticipate any substantial administrative burden even from applying all the provisions of the 'fully fledged' approach. Most of the enterprises in a position to bid for service concessions, including smaller enterprises at a local level, are already involved in public contracts and are used to procurement procedures. Applying similar procedures in the case of concessions would involve little extra cost. Arranging concessions is relatively complex in any case and the additional costs incurred by complying with the procurement provisions would be minimal, they argue, both for the contracting authority and the contractor, when compared with the other costs involved and especially when set against the potential legal costs associated with any action arising from legal challenges to service concession contracts as currently arranged.

Those who believe that there is a fundamental difference between public service contracts and public concessions clearly take a different view and argue that problems should be foreseen in relation to a number of the provisions.

[71] See, for instance, 'Evaluation of Public Procurement Directives' Europe Economics 2006

On the threshold level to be adopted, it is argued that adopting the same level as for service contracts would be failing to recognise a fundamental difference in the scale and scope of service concessions and would draw in many relatively small-scale, mainly local, concession arrangements that could cause considerable disruption to local services, including eventually in employment terms and conditions, and require a major investment in training and a costly development of new procedures, all constituting a major administrative burden.

A core issue, though, relating to all concessions, is that even though in many cases all concerned are happy to follow something close to the normal procurement procedures, the fact that legislation does not currently require the procedures to be followed makes a difference. It means that there is an extra degree of flexibility in the system, which those who see concessions as being fundamentally different from public contracts regard as being crucially important.

The question of appropriate flexibility arises in other forms. It is widely recognised that a flexible process allowing negotiations between the partners at various stages leading up to a contract is necessary for many service concessions. Those in favour of public contract rules see scope in a negotiated procedure or a competitive dialogue for such a flexibility, those opposed see a series of difficulties. They say that the presumption that a negotiated procedure is an exception rather than the rule inhibits its use and argue that a competitive dialogue procedure has several faults. While it may be appropriate for dealing with some aspects of the technical and financial complexity evident in many concession arrangements, it does not allow for the organisational complexity that characterises much service provision to be taken into account. The basic problem they see with the competitive dialogue is that at a certain point the contracting authority has to decide which of the suggested solutions it prefers to adopt and then proceed as with an invitation to tender based on that solution. This approach, it is argued does not take into account the nature of the process by which a concession contract is drawn up. It requires participants to make their ideas and innovative approaches public, with no legal protection or compensation for their investment in the creation of intellectual assets. But it also fails to take into account that the innovatory approaches characteristic of a concession proposal, especially in the service area, are not just a matter of technical innovations, but of a distinctive approach or 'vision'. This vision has to be deeply rooted in company culture to be convincing and it is not possible to ask other companies to adopt the vision, often developed over many years, proposed by one particular company.

Different procedures, it is argued, are required for service concessions and, above all, procedures that deal not only with the selection of the contractor, but with the situation over the life of the concession. It is necessary to have arrangements that allow changes in contractual terms, including variations in the tariff or prices charged, without there being grounds for legal challenge to the contract.

Considerable costs are anticipated from a fully-fledged approach for some firms, especially at a local level that may be operating concessions as their sole activity. They will be unused to the procurement procedures, since service concessions have previously been excluded from the provisions of the legislation, and will need to learn the new procedures, train staff and spend more time on these aspects of the arrangement of a concession. It could be that because of their lack of experience in this area they will lose work that they are otherwise perfectly capable of delivering. This will entail a certain amount of disruption, sometimes with significant social consequences at a local level. Furthermore, it is felt that the detailed procedural provisions could actually give rise to more legal challenges and their associated costs, since there would be more specific grounds on which to mount such a challenge.

Overall, introducing procedures that are inappropriate for service concessions and, in particular not having appropriate procedures that cover both selection and subsequent modification of concession arrangements, it is argued, will again discourage private sector involvement or lead to unsustainable positions for concessionaires, with subsequent business failures and significant consequences for their employees, but also for the users of public services. Depending on the sector concerned, these may be vital services and a collapse in their provision, because of an inability to respond to changing market and other circumstances, may have very serious consequences for individuals and communities.

On the use of non-restrictive conditions, governing the grounds on which potential contractors may be excluded from selection processes, there is less disagreement. With the long period that these provisions in public procurement legislation have been in place, they have generally become well-established and accepted. Provisions designed to outlaw arbitrary exclusions and to establish a level playing-field involve processes that are familiar to large numbers of businesses involved in bidding for public contracts and even commercial contracts to some extent. The obligations to restrict qualification criteria to issues relating to the financial, economic and technical capacity of a tenderer and to restrict the required means of evidence and the choice and order of admissible technical specifications are also all seen as fair, as long as they are not implemented with bureaucratic inflexibility. Ensuring that a specific legal form cannot be imposed at the stage of tendering and allowing tenderers to rely on the capacities of a third person are positively welcomed. Therefore, although the detail of each of the provisions is particular they are all generally regarded as familiar and acceptable and no-one reported any problem with these measures as such. The only objection was to them as part of the overall ‘fully-fledged ‘package and even in this context they were overshadowed by concern about the other provisions.

The only area relating to non-restrictive conditions where possible problems were highlighted concerned the obligation, as provided for in Art. 26 of Directive 2004/18/EC, to advertise specific conditions of performance of a contract. These

provisions relate to the specification of special conditions, particularly to take account of social and environmental considerations. It was pointed out that these provisions were first introduced in the Directive of 2004 and that their implementation is still being worked out in practice. Considerations of this kind are of particular importance in the delivery of services of public interest and would generally have a central place in a concession arrangement, especially for sectors such as water, where environmental issues are of major significance. It was felt that it is not clear that Article 26 is the appropriate way to address them.

It is also clear that this type of consideration can vary considerably from one sector to another, both in terms of overall significance and of the nature of the specific issues that it is important to address. To this extent they constitute an element of differentiation between sectors.

The provisions relating to the award of a contract are clearly another area where divergent views are expressed by those taking the two different positions on the nature of service concessions. The provisions involve an obligation to restrict the admissible award, either to the criterion of price or that of 'economically most advantageous tender'.

It is generally recognized that service concession contracts cannot be awarded on the basis of price alone. The quality of the service to be provided is of prime importance. The differences therefore arose in relation to the question of whether or not the application of the term 'economically most advantageous tender' was sufficient or appropriate for the circumstances of service concessions.

Again those in favour of bringing service concessions within the framework of procurement legislation tended to think that the term could be interpreted flexibly enough to cover the circumstances of concessions and pointed to examples of where this had been done.

Those generally opposed to the idea argued that there was a tendency for the criterion to be applied in a mechanical way, pointing to the common use of more or less arbitrary formulae for weighting different components in the overall decision. It was felt that this approach is totally inappropriate to service concessions, where the price component, though important, is overshadowed by quality considerations and the need to meet important public service obligations. Even the inclusion of the word 'economically' in the criterion was challenged, as possibly leading to a downplaying of the public service objectives. Furthermore, it was felt that the formal award process militated against the establishment of the critical element of trust that was seen to be of central importance in a relationship between contracting authority and contractor that had to persist over many years.

Finally, it was believed that the formal award process in particular could give rise to a 'Winner's Curse' market failure, where there is a tendency for the eventual price

agreed to be below the 'correct' market price, a situation that can be especially serious in the case of concessions, where the consequent underfinancing over an extended period could seriously compromise the service delivery.

A4 : "Intermediate approach"

A fourth scenario was also discussed with interviewees, which considered the possibility of an intermediate position between the 'light' and the 'fully-fledged' positions. This was understood to involve a configuration that would apply the provisions of the 'light' approach, plus other provisions among those being considered under the 'fully fledged' approach.

The response to this suggestion was generally that it did not make much sense, given the fundamental differences of perspective that were evident. Those who favoured bringing service concessions within the public procurement framework argued that it was important to have all the normal elements of public procurement included in the legislation, particularly in order to avoid artificial incentives to use one form rather than another. Those who see service concessions as being fundamentally different from public contracts, either wanted to have minimal legislative provisions or a separate framework and equally saw little sense in a mixed environment.

Having said this, there are clearly some elements in the fully fledged package that pose more difficulties than others. As we have seen these are mainly the provisions relating to the procedures to be adopted and award criteria. Others, relating to non-restrictive conditions, pose less of a problem.

There might even be an advantage therefore in introducing other non-controversial elements alongside the provisions of the 'light' approach. As has been observed already, there is a general acceptance, after long use in public procurement in general, of provisions designed to outlaw arbitrary exclusions and to establish a level playing-field. Obligations to restrict qualification criteria to issues relating to the financial, economic and technical capacity of a tenderer and to restrict the required means of evidence and the choice and order of admissible technical specifications are widely observed and are familiar to most of those concerned. Including these provisions would not generally increase the administrative burden, but would reinforce good procurement practice in the minority of cases, where the relevant processes are not applied and would clarify the legal position, including that for any firm seeking a remedy for a deficient contracting process. The provisions banning the imposition of a specific legal form at the stage of tendering and allowing tenderers to rely on the capacities of a third person could be particularly useful in this context. The counter-argument to the inclusion of 'non-controversial' elements in the legislative package is that it would only make a difference in marginal cases (since most authorities would make use of the normal procurement framework anyway), but it would add yet another variant to the mix

of provisions that can arise under public procurement legislation. There is already a variety of different provisions, depending on whether the project falls under the Classic or the Utilities Directive, which type of service is concerned and whether it involves a works or a service concession. There is a strong case for bringing the provisions for service concessions into line with those for works concessions, but if the provisions governing them are to be different, the advantages of greater coherence in the legislation are lost. It has to be remembered that in this context that many of those involved in drawing up the documents for a tendering process are not procurement experts and find the differing provisions confusing. This especially applies to those who might be thinking of using the concession form for the first time.

There were, however, a number of suggestions from both sides concerning other provisions that have been omitted from consideration in the previous three scenarios.

The first of these concerned the time period over which a concession is granted. There were different views over whether or not service concessions needed a time period similar to that of works concessions in order to be economically viable. Those arguing that service concessions were inevitably complex organisationally tended to argue that longer periods were necessary. However, this is an area where there is clearly the possibility of abuse and although there was not much support for fixing a maximum time limit, it was suggested that there could be provision, as in Czech law, for an external justification and audit of decisions to grant a concession for a time period above a certain level. Review bodies, as defined by Remedies Directive[72], might fulfill this function.

The second consideration concerned provisions for renegotiating contractual conditions, including price, during the course of a concession contract. The argument widely rehearsed and supported is that over the typically long duration of a concession contract both the external circumstances and the objectives of the contracting authority can change significantly and new opportunities can arise for introducing innovations into the service delivery. Adjusting to these circumstances goes well beyond the normal demand risk that concessionaires are expected to face. Provision therefore needs to be made for governing contractual changes and in a way that does not call into question the award of the original contract.

Failure to address this possibility could put intolerable strains on the necessary trust between the two main parties in a concession contract, undermine the concessionaire's commitment to the broader objectives inherent in providing a public service and eventually lead to contract or business failure with all its

[72] Council Directive of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (89/665/EEC)

consequences. Over the longer term, not making provision for revision of the terms of a concession contract could again act as a major constraint on private sector participation in concession arrangements and a constraint on innovation in service delivery.

Another issue that was mentioned concerns the privileged position that characterises most concession contracts and is a further point of difference from service contracts. This position arises because of the exclusive rights granted to a concessionaire, effectively creating a monopoly provision. Along with the exclusive rights there is an exclusive responsibility, which means that if a concession fails there can be particularly dramatic consequences for particular communities. At the same time the granting of exclusivity, establishes the concessionaire in a strong market position, which may then be extended to concessions in other areas. There is an issue of competition therefore overall and over the long term a possible reduction of the contestability of specific concession markets. Those opposing the extension of the procurement framework therefore argue that moves in this direction may ironically have the perverse effect of reducing competition, particularly by squeezing out smaller providers.

This chapter has pointed to significantly divergent perceptions of the possible effects of legislation to cover service concessions. The possible consequences of introducing especially the 'fully-fledged' scenario, are seen to range from virtually negligible to substantial or even dramatic. There are important differences, however, between Member States, in that in those Member States where concessions or near-concessions are well established, a greater and potentially more disruptive impact is anticipated, whereas in those where concessions are not used extensively the emphasis is on the creation of conditions that will encourage a greater use of the concession arrangement for future service delivery. The latter, of course, is a transition that is easier to manage.

The analysis has largely presented the different perspectives that were encountered during the course of our investigations, with a view to explaining the likely reactions to any legislation, but it may be not an entirely naive question to ask which of the two main perspectives is correct ?

First, we should note that the core positions are not completely contradictory. There is some recognition, even among those who see service concessions as being distinctively different, that current uncertainties need to be addressed. And there is some consensus about where the key issues lie. There are, however, clearly differences that remain between the two positions and this might be explained either by a lack of coherence in the arguments of one of them or in the fact that, in spite of the use of a common reference framework in the legislation, they are actually referring to different situations.

The core issue is whether or not the uncertainty and information asymmetries that are bound up with ideas of innovation and risk that are in turn intimately associated with the very nature of a concession, can be accommodated in the standard public procurement procedures. The public service obligation that has particularly forceful expressions in some Member States, and is closely associated by them with the concept of a concession, adds to the degree of uncertainty in concession arrangements, to the extent that the nature of the obligations cannot be committed to statements in legal documents. It is argued therefore that because the contracting authority (usually the state in some form) may have a call on a concessionaire over and beyond the specific requirements of the contract, there must be a degree of flexibility that would not be appropriate in (or indeed could invalidate) a public contract. Similarly, the asymmetric information associated with the innovative solutions that are often expected from concession arrangements again leads to a difficulty in committing central elements to paper – in this case the requirements of the contracting authority. Again the question is : do procedures – tendering procedures - allow sufficient flexibility for this asymmetry to be accommodated ? And this is a question of practice.

So, the main difference between the positions appears to be the extent to which it is believed that the public procurement regime is flexible enough to allow these key issues to be adequately covered. It is here that the administrative cultures at a national level make a big difference. It is our strong impression from the discussions we have had with interested parties that there are significant differences in the way that the provisions of the procurement legislation are implemented. This possibility is, of course, built into any European legislation, but we were struck by the extent to which there would appear to be very little exchange of practice in this area. To an important degree, the problem would appear to be that to bring service concessions into the public procurement framework really would pose difficulties in countries where the framework is usually operated relatively inflexibly, but would cause less problems in Member States where there is more equitable solutions are more accepted.

5.5 Implications of the evidence

In view of the conclusions in the previous section, answering the question 'what would be the impact of introducing the four possible regimes under consideration?' has an answer that is somewhat qualified. The response does appear to depend on a series of other considerations, particularly, how flexibly the provisions of the procurement regime are implemented. However, it is useful to summarise the possible impacts as follows :

- *'No change' :* The result of doing nothing and leaving the situation as it is would, of course, be not to have the benefits associated with the other approaches, while also avoiding the drawbacks. The principal consequences,

however, would be to allow a situation of some uncertainty to continue, along with the possibility that the current exclusion of service concessions for the legislation would continue, in spite of general obligations under the Treaty, to provide a 'loophole' in some Member States for those who wish to avoid the application of procurement legislation to public contracts.

- *"Light approach" :* The 'light approach' would put service concessions in the same position as works concessions (the exact relationship depending on the threshold chosen).

The result of requiring a publication notice under the 'light approach' would be to promote considerably more transparency and highlight the potential for using service concessions as a significant vehicle for public policy implementation.

Such a move would recognise in legislation developments that have taken place in case law over recent years and bring service concessions within the framework of procurement legislation. In so doing it would promote the incorporation of service concessions into contracting authorities' structures, processes and procedures, stimulate the development of practical guidance on the use of service concessions etc and generally bring service concessions into the overall policy framework.

The immediate impact on contracting authorities and enterprises involved in concession arrangements would be negligible, since the practice of publishing notices and even complying with other elements of the procurement framework is already fairly widespread.

Ironically, the greatest early impact may be on public contracts that have been designated service concessions in order to avoid procurement procedures.

Over the longer term, as an instrument that is suited to the taking of risks and the application of innovative ideas in services themselves and in their delivery processes, a greater profile for service concessions would promote innovation and productivity and ultimately economic growth and employment. In important areas for the environment, where service concessions are common, such as the water sector and waste treatment especially, encouraging innovatory processes will also lead to advantages for the environment.

Greater use of service concessions could speed up innovation in public service delivery and lead to improved public services, with higher quality and greater choice. Use of concessions in the new areas outlined could provide a boost to the creative economy, with all its benefits in terms of locally generated and sustainable growth.

The impacts in specific sectors will be further examined in the next chapter, but it can already be seen that, by highlighting concession opportunities that have hitherto gone unremarked, greater transparency through the announcement of concession projects is likely to increase competition especially in the waste treatment sector and possibly also in water in some countries and in port and airport services. This effect will depend importantly on the threshold that is chosen. Where it is apparent, it is likely to increase competition from larger enterprises and may lead to an increase in concentration, at the expense of smaller local enterprises. This will not necessarily decrease the contestability of markets and could lead to economies of scale and benefits for local communities in terms of cheaper services.

Offsetting these gains would be the social impact of greater competition at a local level.

For new areas of activity in public services, such as medicine and health, the market entrants are also likely to be larger companies, although less so in the 'new areas' where relatively small IT projects are possible. The former areas in particular can be very sensitive politically, as will be seen in the next chapter. Any development of service concessions in these areas is likely to cause a certain amount of social disruption, as directly employed staff in core central services are replaced by private sector employees.

- *"Fully fledged" approach :* the fully fledged approach would basically put service concessions on the same footing as public service contracts. An advantage of this approach would be to remove any artificial incentive to use one form of contractual relationship with the private sector rather than the other. The choice would be on the intrinsic merits of the contractual form in particular situations.

  It would, however, put service concessions in a different position from works concessions, unless the provisions for works concessions were also changed – a possibility that we have not considered.

  A 'fully fledged' approach would reinforce the use of standardised procedures across Europe. The impact in terms of administrative burden for most companies affected would be negligible, since they already use these procedures for public contracts or indeed already use them for concessions. For some smaller companies, however, used to looser procedures in arranging local concessions, the full procurement regime could come as something of a shock and initially at least would add a considerable administrative burden and possibly place such a firm at a disadvantage.

The 'fully fledged' approach would also deliver the benefits outlined for the light approach in terms of bringing service concessions into the administrative culture of contracting authorities, and probably with greater force.

The major effect however, would depend on how the new regime was perceived and specifically whether it was thought that the provisions of the Directive, especially in relation to the tendering procedures and the award criteria, would be likely to increase significantly the risks involved in concession contracts. This perception would vary from one Member State to another and would also depend on how the contracting authorities reacted to the legislation and whether they were able to indicate that their procedures would be adapted.

In theory the extra perceived risk could be compensated for by higher payments, in which case implementing the 'fully fledged' approach could lead to higher costs for public authorities.

In practice, we are informed, many companies would simply withdraw from the concessions market. The effects of this are the opposite of those outlined as the benefits of the lighter approach. There would be a dampening effect on innovation, with the eventual consequences of lower growth and employment and with the particular effect of foregoing environmental improvements. There may even be negative short term employment effects as companies withdraw from particular markets, although the general perception is that there would generally be a substitution towards 'safer' public contracts.

The water, waste management, port and airport administration and handling sectors and some local leisure services would be the most obvious sectors to be affected, and in some Member States more than others. Over the longer term, core public services might also be affected to the extent that the potential advantages of concession arrangements would not be explored.

In social terms, too, therefore, there could be negative effects over the longer term. Public services would be less likely to keep pace with citizens' aspirations and public administrations would be less flexible in their responses. In some Member States where concessions are not seen as privatisation, while public contracts are, there could be greater opposition to private sector involvement in the development of public services.

The extent of these effects depends quite critically on the extent of the identified reaction to the hypothesised legislation. Nonetheless the direction of the change is quite clear.

Some also suggest that there may be an increase in litigation if the fully fledged approach is taken, since the grounds for challenging award decisions would be

greater, but this is offset by those who claim that a better definition of procedures would reduce the scope for challenges of this kind.

These disadvantages, it is argued would be incurred for little gain. The 'fully fledged' approach is thought to provide only marginal advantages over the light approach in terms of open, transparent and fair procedures. Case law and good practice guidance has ensured anyway that a large proportion of concession contracts follow procedures close to those that would be implemented by the fully fledged approach. The contestability of the markets reinforces this process with substantial companies willing and capable of challenging procedures and decisions that do not comply with the principles of the Treaty.

Furthermore, legislation, as such, would do little to address the differences in practice that are already evident in the implementation of existing legislation

- *"Intermediate approach"* an intermediate approach between the light and fully fledged approaches is theoretically possible, in that it might be possible to add certain provisions from the fully fledged package to the provisions of the light approach. These might include the provisions relating to the use of non-restrictive conditions, for instance, to which we came across no objections. In this case there would be minor improvements in procedure, given that these procedures are often used anyway and an impact on those authorities that do not currently apply usual procurement practice. If, on the other hand the additional provisions related to such matters as the procurement procedure or award criteria, the effects would be as indicated for the fully fledged approach, since the same signals would be given about an increase in the risk associated with a concessions contract.

The main objection to the idea of a mixed approach is that yet another variation in procurement conditions would be added to the already extensive list and this would simply add complication and confusion for little benefit.

Sectoral Impacts of Potential Legislation

6

The intention in this chapter is to take the previous analysis a step further and examine the sectoral impact of the possible variants in legislation and especially to identify sectors that could be affected in a particular way by the legislation. It should be noted, however, that we were not able to identify any sector where sectoral characteristics make such a difference that special consideration for that sector is needed.

6.1 Introduction

We have seen in the previous chapters that there are important variations in the extent to which service concessions arise in different sectors, but equally significant variations across countries in the extent to which concession arrangements are used in general and within any particular sector. The current chapter will attempt to spell out the implications at a sectoral level of the different legislative scenarios on service concessions. In view of the variations just referred to, it will not be possible to paint a consistent picture across any particular sector. With some further elaboration of the arguments and making use of illustrative examples from a number of sectors, however, the positions developed in the previous chapter will be able to provide a framework for analysing how the differing circumstances play out on the ground across the Member States.

Our overall impression from our interviews, it has to be said, is that sectoral differences as such are not a major concern or, at least, it is thought that that they can be accommodated within any eventual legislative framework adopted. The overwhelming weight of the arguments and evidence presented to us has concerned the nature of the regime that might be envisaged. The sectoral themes have been decidedly subsidiary. Nonetheless there have been a series of factors identified that can distinguish between the situation in different sectors that will add to the analysis in the subsequent sections.

6.2 A framework for sectoral analysis

We saw in Section 5.1 how the legislative framework relating to public procurement generally was derived from articles in the Treaty that set the aim of achieving sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, along with a high level of employment and of social protection, equality between men and women, and a high level of protection and improvement of the quality of the environment. The rationale for public procurement legislation at a European level has always been that open public markets operating across borders would contribute to a higher level of competitiveness, and consequently a greater efficiency and lower costs for public services than had previously been the case, and hence real benefits for the public

purse and for citizens and consumers. Empirical studies[73] appear to point to evidence that the anticipated effects have indeed been observed.

The legislation relating to concessions broadly follows the same intervention logic, except that it has been seen that the concession form allows and in fact encourages innovation in both outputs and delivery processes. Assuming for a moment that the legislative balance is struck in a way that encourages the use of the concession form, the economic, social and, in some instances, environmental benefits would arise from better quality and variety in the services, as much as, or even more than, from pressure on prices, especially in the short run. This is not the whole story and normal public procurement can encourage innovation too, especially with the use of the competitive dialogue procedure, but there is a more dynamic conception of the benefits arising from concessions than in the simpler case of public markets and a more diverse range of potential impacts.

This contrast between the nature of the benefits arising from the two forms of public contract would lead to the effects of any legislation playing themselves out in different ways in particular markets, depending on the previous situation. There are a number of possibilities, broadly depending on:

- whether or not there is already procurement taking place;
- whether or not there are already concessions, and if so,
- whether or not concessions broadly conform to the current procurement legislation or largely ignore it.

The different situations can be explained as follows :

1) *sectors where there is no public procurement currently :* in this case the concession form would be used in circumstances where public services have previously been provided directly. The reason this could arise is that the public authorities might wish to take advantage of the opportunities for innovation in service provision that the concession form offers (with a limitation on the risk implied for the authorities). There are the following consequences :

a) greater innovation in the service provision made i.e. an effect on the range and quality of services

b) the introduction of competition between concessionaires that may manifest itself in a reduction of costs as well as a greater variety and quality of services

[73] Europe Economics 'Evaluation of Public Procurement Directives', September 2006

2) *sectors where there has been public procurement previously, but no concessions*: in this case, it is envisaged that the announcement effect of legislation and greater legal clarity might encourage more contracting authorities to make use of the concession form. There are the following consequences :

a) because there is already a competitive market, as a result of firms competing for public contracts, there is generally little additional pressure on prices and costs and therefore no direct efficiency savings in the short term

b) there are the effects of innovation on the markets - greater quality and variety and, over the longer term, possibly efficiency savings

3) *sectors where there have been concessions previously :* in this case, there are two other possibilities :

i) *where procedures have broadly conformed to standard procurement procedures* : here there would be little effect overall; in this instance something close to a public procurement regime already applies and this would continue to be the case; the existing benefits of concession arrangements would therefore continue to arise. The position of some individual companies may be strengthened, for instance, in seeking a remedy, and this may have more general beneficial effects over the long run

ii) where procedures have not conformed to standard procurement procedures : here there would be an increase in competition, leading to greater innovation and also possibly greater price competition, even in the short run.

Of course, failure to strike the right balance in the legislation and a consequent discouragement of the concessions form would mean a failure to take up the advantages possible in situations 1) and 2), but also particularly negative effects in situation 3). Here there could be a reduction in the number of concessions and a reversion either to public contracts or direct public provision. In either case, the advantages of concessions, especially in the form of innovatory developments in services and their delivery, would be lost.

A series of considerations have determined which form of service delivery has been generally used in the past. These include :

- *Sectors covered by existing legislation*.

  Some industries, previously or currently in the public sector, have legislation at a European or national level that promotes open competition and thus inhibits

the use of the concession form with an exclusive relationship with a single supplier. Such legislation either encourages outright privatisation, as in the case of telecommunications or the opening up of networks to competition for service delivery, as in the case of energy markets.

Other sectors, notably transport, are covered by separate legislation, which has other legislative provisions. This legislation can also arise at different levels, including the European level, and can impact on the procurement context in different ways. Usually it does not promote or hinder the concession form as opposed to public markets, but it can include provisions that directly determine how the procurement process operates. This in turn involves either provisions that take the European framework further, for instance by stipulating the time period over which contracts may extend or, less frequently, provisions in national legislation that are actually in conflict with provisions at a European level, at least until they are subject to a legal challenge.

Finally there are provisions that impinge upon procurement processes by imposing certain constraints. Articles 7 – 9 of the Landfill Directive[74], for instance, require that potential providers of waste management services should have permits to operate, issued and managed in compliance with the terms stipulated in the articles. Although these permits are open to anyone who can fulfil the required conditions, they have the effect of restricting the number of firms that can respond to any particular call for tender or expression of interest.

Legislation therefore either takes a sector out of the range of concession arrangements altogether or operates at a detailed level in particular sectors in ways that may influence the attractiveness or otherwise of an invitation to submit a proposal.

- *The nature of the public service interest*

  Some services are clearly vital in the sense that that the health and life of citizens literally depends on their availability (as in the case of water and health services). Others are vital economically in that normal economic processes cannot be continued without them. These might include transport networks and postal services. Others, such as education, are important but less immediately so, in the sense that their interruption for a while would be unfortunate but not life-threatening. Others are clearly more peripheral, such as some of the new services identified in Chapter 3.

[74] Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste

It is also the case that some services involve a broader responsibility for providing a public good than others. While all industries these days need to take their environmental impact seriously, the water industry has a special responsibility for managing a series of public goods, over and above the delivery of water to individual households and business premises. Others have social responsibilities.

- The nature of the public interest in differing sectors helps determine whether or not there is a sensitivity about how they are delivered – generally, the more vital they are the more sensitivity there is about the delivery arrangements employed. This has meant that direct provision of certain services has continued to be employed and in countries where concessions are seen as an extension of public service, this form has been more in evidence than public contracts.

- *Public profile and the intensity of the public interest*

  An additional dimension to the intrinsic public interest in a sector is the extent to which certain sectors, sometimes as a result of past failings, have a profile in the media or in public debates that makes developments particularly sensitive.

  This interest can have an additional effect, restricting, for instance, the extent to which a contractor can exercise a right to exploit a market. Frequently in these areas of public interest there are direct public controls on prices and other aspects of delivery. This can limit the scope for a concession-type arrangement, restricting the procurement form to normal public contracts.

- *Complexity*

  Both the existing legislative and regulatory framework and the differing nature of the public service interest across sectors are factors determining the degree of complexity of contracts and may encourage contracting authorities towards a concession arrangements rather than public contracts, especially as long as the former continue to have extra degrees of freedom associated with them. However, they are not the only considerations. The variability in the needs of service users and, of course, the degree of innovation required in the service delivered, the charging structure, the skill level and training needed by the staff providing and managing the service, the premises and facilities needed and how much of these are provided by the contracting authority are all elements that can vary enormously between one sector and another and help determine the likelihood of one contractual form being used rather than another.

- *Size and duration of typical contract*

The size of a contract, whether this is growing, stable or declining and the amount of investment in staff, staff training and premises required can affect issues such as the appropriate procedure, the length of contract and the need for renegotiation. These again are factors that can affect the contractual form chosen.

- *Legacy systems*

  The situation inherited from earlier concessions, or from earlier delivery and organisation of the service directly by the public, or the way that privatisation or part-privatisations has been carried out, can all have a considerable effect on the legal constraints faced by the contracting authorities and potential concessionaires and determine whether concessionaires would be able to access infrastructure and whether or not they would have to provide it themselves. These considerations again help determine which delivery form is appropriate and in this instance, whether or not a works or a service concession is in question.

  This situation also varies considerably from one country to another.

- *The degree of innovation expected*

  In some sectors in which user expectations are developing rapidly and especially in some of the new areas emerging, there is considerable pressure on contracting authorities to seek innovative developments in delivery and management mechanisms and even in the nature of the service delivered. This process is particularly sensitive to the tendering procedures adopted and to the way that intellectual assets are attributed and managed. Some of this can be dealt with by contractual detail, but other aspects need an appropriate procedure to be dealt with effectively.

- *Competition issues*

  The natural monopoly that traditionally gave rise to concessions is still echoed in the granting of exclusive rights that characterises many concession arrangements. These exclusive rights can have important effects for market competition in some sectors where a monopoly position can be established beyond the concession market. This may have implications for the degree of control exercised and hence the fundamental appropriateness of a concession form in particular circumstances.

A number of these considerations will be seen to come into play in the examination of particular sectors.

6.3 The situation in particular sectors

Similarly to the situation where we established a baseline for a future assessment of the effects of any legislation, the information that is available on specific sectors for purposes of making judgements about their relative susceptibility to the differing provisions of any legislation, varies considerably in extent and depth. In some sectors, especially where there has been some controversy over the involvement of the private sector, there is reasonably extensive coverage in the literature and in the media of the general policy issues. Other sectors, however, have been ignored and in almost all cases a detailed consideration of the impact of procurement frameworks is missing.

It is possible however, to apply some of the considerations outlined in the previous section to particular sectors and thereby highlight further the nature of the differences that arise from their specific circumstances. We will conduct this analytical process by applying systematically the distinction between the different markets on which legislation may impact in terms of the extent to which public procurement or concessions already exist.

6.4 Sectors with no public procurement currently

In earlier chapters, there was comment on the potential for the use of service concession arrangements to respond to the need perceived by some public service providers for greater quality, variety and flexibility in core public services. Many of these services are currently provided directly by state employees.

It was also seen that there may be a possibility for developing concession arrangements in certain new sectors, where the form could allow interesting exploitation of state assets.

In both cases, and as when establishing a baseline, identifying in which sectors exactly, service concessions may arise in the future is extremely difficult and essentially speculative. Our list of actual and potential sectors for service concessions is very much an area where the potential is greater than any actual current practice of granting concessions.

As has been outlined, in the area of existing public service provision, this potential has been associated with responses to a perceived shift in attitudes towards public services and the increased demand for quality and choice. Because these are new areas, however, there is little track record and, as in other areas, the legal status of service concessions makes identification of cases difficult.

However, this category does concern public services where there is usually a well established ‘normal’ procurement system for other goods and services. Concessions with the highest profile would arise in areas where there was previously direct provision by public services, but in some instances, it may be a matter of using concessions rather than public contracts and in most cases the concessions would be

developed against a background of experience in operating the normal procedures of procurement.

In developing an account of the likely impacts of any legislation in these areas, the approach will be to examine the issues arising in a particular case anb then to see how far these can be generalised to other potential cases

The health care systems of the Member States provide an example where public-private co-operation is being extended into services that were previously regarded as being primarily of a public nature. Other similar areas are those where there is also a strong public service interest, such as education, social care, the prisons and the judicial system and where there are significant political and social sensitivities. These arise in particular because the nature of the service provided suggests that it is inappropriate to apply the profit motive directly and private involvement is often seen as subverting the public ethos. These are also areas where there are already substantial numbers of people employed in well established structures and where changing to private or semi-private organisational forms can entail considerable disruption for all concerned. The development of concession arrangements in these areas can therefore have considerable political and social implications.

Nonetheless budgetary pressures and the wish to make use of private sector expertise in management functions and private sector funds in developing infrastructure and service provision have made public authorities contemplate new arrangements, including concession arrangements, where the continuing public interest is seen as a more appropriate solution than outright privatisation. Frequently though, in view of the sensitivities, the new arrangements have related more to back-office functions than to front-line service delivery.

Health care systems in all EU Member States are relatively complex and differ considerably with regard to the detail of their provision. However, all Member States have some form of public national health system and all seek to ensure near universal access to a comprehensive service. Analysis cited by Hervey[75] shows that approximately half of the Member States have a social insurance, or ‘‘Bismarckian,’’ health care system, while the other half have a taxation-based, or ‘‘Beveridgian,’’ national health system. Ultimately, both taxation and private funding play some role in the financing of every system, but the principles of equal access and solidarity in funding arrangements also play a part.

All Member States face challenges to their existing health care systems arising from demographics (older populations), changing disease patterns (multi and chronic disease outstripping infectious disease), new expensive technologies and changing

[75] Tamara K. Hervey ‘The European Union’s governance of health care and the welfare modernization agenda’ Regulation & Governance (2008) 2, 103–120

consumer and patient expectations. Health systems are also becoming increasingly expensive as the care provided becomes more complex and expectations rise. In this context, governments are looking for ways to reduce expenditure and involving the private sector in new and different ways is one of the avenues being explored.

Furthermore, there is an increasing element of elective provision in many medical systems. Cosmetic surgery and 'life-style' treatments are perceived as being different from core medical provision, while medical tourism and the wider use of facilities are seen as opportunities for bringing more private income into the system.

Some Member States have regulations that restrict private delivery of public services in the sector. However, PPP arrangements that focused initially on the development and provision of new facilities have begun to lead to a consideration of concession arrangements that are more focused on the management of facilities and systems. This is an area where it is difficult to see the difference between works and service concessions and to establish any assessment of the extent of existing concession-based service provision.

However, a clear example of a development where a service concession might arise is provided by the advertisement from the UK's Department of Health that appeared in the EU Official Journal in June 2006. In a 'step change' that would see the National Health Service (NHS) moving 'from a service provider to a commissioning-led organisation' private organisations were asked to propose how they might take over responsibility for buying healthcare for patients from hospitals, private clinics and charities. The value of the services was estimated to be worth up to £64 billion. Thes work is currently handled by local NHS managers employed by Primary Care Trusts.

The notice invited companies to begin a competitive dialogue about how they could benefit patients by taking over the purchasing of healthcare for millions of NHS patients. The idea was that private firms would have responsibility for deciding which treatments and services would be made available to patients - and whether NHS or private hospitals would provide them. It was believed that the greater purchasing power of big healthcare management consortiums would lead to a considerable saving for the NHS. Initially there would be a four-year framework agreement covering the whole of England that individual Primary Care Trusts could take advantage of.

The notice was subsequently withdrawn, after considerable political and media interest, and it is not clear whether or not a concession arrangement would have been the contractual form chosen, but the example clearly provides an indication of potential developments in this area.

In terms of the elements that could potentially make a difference to the way that concession commissioning procedures operate, the following points are relevant :

Existing legislation : in some Member States existing legislation restricts the involvement of the private sector in the provision of core public services. In some cases, as we saw in chapter 4, the responsibility of the central state or local government is enshrined in the Constitution. This responsibility, however, can often be discharged through other agencies and through contracts with the private sector.

The nature of the public service interest: it is clear that the public interest element and the sensitivities associated with it are significant in sectors such as health and that these sensitivities have to be taken into account. There is also the question of the introduction of pricing mechanisms, which are often associated with developments of the kind envisaged. Even if these pricing mechanisms are indirect, they represent a change in culture for the organisations concerned and sometimes for the users and this can of itself be a matter of political sensitivity.

The public profile of the sector : the public profile of the sector could mean that the degree to which the contractor is free to exploit the service is severely restricted, to the extent that a concession form, as opposed to a public contract, becomes highly difficult to implement. Similarly, it is difficult to see how direct pricing can be introduced, so a shadow pricing system would be a significant feature.

Complexity and size of typical contract : frequently the type of concession that is envisaged in these sectors is one where administrative, supporting or ancillary services are seen as areas that could potentially benefit from outside, private sector intervention, but it would be unusual to see the core professional services – the services provided directly by medical practitioners, teachers, legal professionals etc – being provided on the basis of a concession. Nonetheless there has to be interaction between the core and supporting services and this adds a dimension of complexity to what, in the example cited, was already a very large contract

Legacy systems : the systems into which concession arrangements are being introduced are often relatively large, with a long history in many cases and with distinct organisational cultures. They represent significant challenges.

The degree of innovation expected : the concept of innovation and particularly organisational innovation is central to the development of service concessions in these areas, but the effects of attempts to introduce change, especially in working practices, can be very unsure. There can often be significant motivational issues the consequences of which are difficult to predict.

Competition issues: as was seen with earlier privatisations, when concessions take over often relatively large areas of public service, there is a potential problem of creating an effective monopoly for the private sector supplier.

Once more, we see that the example from a particular sector illustrates some of the general points that have been raised previously in relation to the need for flexibility

with concession arrangements, but none of them suggest that a particular element in the procurement framework needs specific adjustments to take account of the sector's particularities.

In summary, a number of issues are illustrated by this particular example and the wider range of possibilities in the area :

- The essential nature of the service again makes the handling of procurement processes very sensitive
- A degree of trust between the contracting authority and the concessionaire is again of great importance
- The contracts are complex and required dialogue between the contracting authority and the concessionaire
- But nonetheless conventional procurement processes were deemed to be appropriate, including, in the case cited, an announcement in the Official Journal and the use of the competitive dialogue procedure
- This was in spite of the large size of the contract
- Furthermore, the time span over which the contract was to operate was relatively short.
- Shadow price arrangements are likely to figure prominently.

The conclusion from this particular case is that a service concession arrangement might be feasible, but its complexity could make the costs of developing the new system relatively large and there could be considerable organisational disruption. The social and political implications of this are considered subsequently, but generally the cost implications of introducing such an approach are significant.

Against this are the potential gains from introducing an element of competition where there has been none previously and the gains to be derived from more innovative approaches to the service provided and the way that it is delivered. Given the scale of the services under consideration, these gains could be substantial, although there is absolutely no way of estimating them without detailed consideration of a particular case.

On the basis of this example, the question then arises of the extent to which a similar process could apply in other sectors. Education would appear to offer similar possibilities and similar issues would arise. Again, the extent to which freedom to exploit a market would be possible raises the fundamental question of whether or not the concession form, would be appropriate at all, but it is possible to conceive of special educational services being organised separately (for example sports activities

and field trips) and sold to schools. It is interesting that in this case the costs of disruption to the existing system are likely to be less than in the healthcare example, mainly because the services envisaged are additional to the existing core provision rather than replacing it.

The administration of justice is another central area where some concession arrangements might be envisaged. However, here again, the sensitivity of the central activity restricts the areas where there might be private sector involvement. There have been well publicised examples of private companies building and operating prison facilities, but the scope for exploiting this market is rather restricted and there is a tendency for the provision to be on the basis of public contracts. However, there might be a case for an experimental approach with certain specific groups, in which the rewards to the contractor depended on the successes achieved.

The social impact of development of concessions in areas of public provision where they are not currently present is probably the most significant of all the scenarios under consideration, mainly because the change in organisational arrangements would be most dramatic in this case.

The main social impact is expected to revolve around employment issues. Under the hypothesis being considered companies from the private sector would take over activities previously provided by staff directly employed by the public sector. The private companies might take on some of the staff previously employed by public sector, but not necessarily all of them, especially if the objective is to introduce a new approach the service in question. Over the longer term, the changes in the circumstances even of those who continue to provide the service could be quite dramatic. Public sector jobs tend to be less well remunerated than private ones but they do sustain a certain quality of life and provide security with regards to long-term employment, pension and, in certain countries, social security rights. A move from public to private employment could have negative effects on the employment stability and well-being of the staff, while having positive effects on productivity.

Those gaining from the change will be different from the groups that lose out and there may be a tendency for the less skilled to be the main losers. In this respect, unless measures are taken to counteract the effects, there could be detrimental effect on social cohesion and the diversity of the employed population.

Over the longer term, concessions in the circumstances under consideration could be expected to reduce costs and provide benefits to the tax payer. The reduction of costs can arise either from a genuine increase in efficiency or by reductions in the wages and conditions of employees. Which of these possibilities actually applies can only be judged on a case by case basis, but there is the possibility of negative distributional effects counteracting benefits to the public as consumers and tax payers.

There are also political aspects to take into consideration. The political reaction to concession-type contracts in sectors such as healthcare and education could be quite negative.

The environmental effects of the areas under consideration are not as obvious as in some of the other areas to be examined later, but may be part of the innovatory approach to provision that would be expected of concessions.

An altogether different area where concessions might arise where they do not exist currently is in relation to the 'new areas' indicated in chapter 3. Again it is a matter of a potential development rather than one that is currently evident on a wide scale. It may however, be quite significant especially for the Information and Communication Technologies sector and the creative industries.

Public information and communication provides an example of a wide range of such emerging services. Their characteristics are that they are often in underdeveloped areas, where private input can bring in a new type of service or take existing services off in a new direction, sometimes on an experimental basis. In all cases, however, there remains a continuing public interest that inhibits the outright privatisation of the service. Frequently these services make use of public assets (especially in digital form) over which the state wishes to retain control – such as items in the collection of a museum, but which can be exploited for particular commercial purposes. Sometimes there can be revenue benefits, through a payment for the use of the assets or revenue-sharing, especially if the public authority wishes to retain close supervision of the quality of the service provided. Furthermore the form of exploitation of the service may be different from that which arises in concessions in other areas.

An illustrative case is one where a public authority has an on-line information and communication system with a substantial local or national audience. The system may have been developed by a private sector web designer and manager on the basis of a normal public contract. However the possibility might arise for the site to be exploited commercially and a private partner might be considered for this element. To this extent, there is a new market, where none existed previously.

The public authority could well wish to retain control of the core content of the site and its presentation and may wish to signal that the commercial aspects are managed by a separate organisation, but it may also be interested in a share in the potential revenue. The exploitation of the site could be by some subscription arrangement, but in line with prevalent on-line business models, it is more likely to be associated with advertising or promotional opportunities or with the use and commercial exploitation of information generated by users.

The following factors help to characterise such an arrangement :

Existing legislation: some existing legislation relating to intellectual property rights is relevant, although legislation in this area often struggles to keep up with the technological developments. Of specific concern is the role of the right to protect an extending range of intellectual property in procurement procedures that tend to promote transparency. This is a particular issue for the use of the competitive dialogue process.

The nature of the public service interest : this may often arise from a concern to preserve the asset or facility as a public good, in perhaps both the general and the technical sense of this term or a concern to see that the asset is used in appropriate circumstances. Frequently the nature of the public interest is only beginning to be appreciated.

Complexity and size of typical contract : contracts in this area may be relatively small and not necessarily of great complexity. Innovation in application is what characterises them.

Legacy systems: almost by definition legacy systems are not much of an issue for this area, except in a technical sense of there being a need to maintain the integrity of the original asset.

The degree of innovation expected : innovation is at the heart of this type of concession. It is the justification for the use of the concession form.

Competition issues: competition issues may arise when exclusive rights are given to exploit the asset. The length of the contract will be an issue here.

In summary then, the following issues arise :

- Although the service will not generally be as sensitive as with the provision of vital services, there are nonetheless sensitive aspects of this type of service that have parallels with other types of concession
- In as far as many of these services are new or are already being provided for public authorities by private companies, the political and social implications of extending the use of concessions arrangements would not be as significant as in the other areas considered
- The developmental aspects of the provision may require contracts to be altered
- The exploitation of the service often will not arise from payments for use, either direct or shadow, but from other forms of exploitation
- The justification for the granting of exclusive rights may need careful consideration, in the light of the application of competition rules

- While in certain respects the competitive dialogue procedure would appear to be made for this type of situation, issues to do with commercial confidentiality and intellectual property rights may make its use difficult.

- In other respects the normal public procurement rules would seem to apply fairly directly, in the application of the provisions for a level playing field, for instance

- The potential financial scale of such arrangements could vary considerably raising questions concerning appropriate valuation processes and the appropriate thresholds.

Other examples in the new areas would relate more specifically to the exploitation of the assets – particularly the digital assets - held by public authorities and their exploitation in a series of environments, from publishing and electronic content to their use as inputs into research. The concession form precisely opens up the possibility of all sorts of uses.

It has to be said that concessions in these areas are undoubtedly relatively restricted in current circumstances. The point, however, is that there are already examples of them occurring – though not necessarily using the concession form - and they could well grow rapidly in significance in the near future.

In terms of the impacts of such developments, their significance lies in their potential role in ICT, the creative sector and the biological and medical sciences, that is, areas of the economy where some of the more dynamic developments are taking place across Europe and areas that are at the heart of the Lisbon Strategy. It is impossible to gauge the extent of any such an impact, but it would be positive and possibly significant. Furthermore the costs of developments in these areas, including the social costs, would be minimal and may even generate income for the public owners of the assets and lead to the development of new skills. The alternative in many cases would be to do nothing and simply leave the assets unutilised.

Impact Summary

It would appear then that there is a significant but unquantifiable possibility that the greater use of concessions in areas where there are neither public contracts nor concessions at the moment could lead to innovation in a variety of forms and possibly both better and more varied public services and greater efficiency. There are, however, important constraints on the extension of private provision in core public services. Furthermore, a possible downside is that these developments could cause a certain amount of disruption for those employed by the state in those sectors (health, education etc) where these services are currently delivered directly. In other new sectors, this effect would not be apparent.

In terms of the effects of the four different legislative scenarios, clearly doing nothing would mean that these anticipated effects would only emerge more slowly, if at all. The light regime, in contrast, is likely to have a certain announcement effect; bringing service concessions more clearly within the public procurement framework will highlight them. By also providing greater legal certainty, it would make it easier to undertake their use. The arguments of the previous chapter apply directly to the circumstances considered here and the light approach is considered to be the most favourable to the encouragement of the risk-taking that is inherent in the areas under consideration.

Similarly, the arguments relating to the application of the fully-fledged scenario also apply directly. There is a danger that if this scenario is applied, it will be perceived as introducing an extra degree of risk in a situation where there are already many unknowns and this could deter private sector companies from bidding for concession contracts, especially in the short run.

The mixed scenario is more difficult to assess. As has been pointed out, there are some possible advantages, but there is also a danger that it may cause confusion with little extra gain, especially for organisations that are unused to procurement procedures or only used to the application of different procedures in another context.

6.5 Sectors with public procurement, but no concessions

The reaction to legislation in those markets where public procurement processes are already well-established is likely to be markedly different from the situation where these processes are not currently common. Equally the impacts from any legislation on service concessions are likely to be different.

In this case, it is matter of the contracting authorities making a policy choice between different forms of public contract. It is assumed that the announcement effect of the legislation and greater legal clarity would encourage more contracting authorities to make use of the concession form. The areas concerned would generally be less sensitive in terms of public perceptions and would primarily be where the authorities are looking for more innovative solutions than those provided under public contracts. It would also be necessary for the authorities to be prepared to concede the right to the contractor to exploit the situation for commercial gain in return for this extra degree of innovation and risk taking.

In broad terms, because there is already a competitive market, as a result of firms competing for public contracts, there would be little additional pressure on prices and costs and therefore no direct efficiency savings in the short term.

The main effects would be those resulting from the innovation introduced into the markets - greater quality and variety in the services and hence greater choice for the

consumer. Over the longer term, the innovations may also give rise to efficiency savings, though since concessions tend to cost more overall, this would not be a short term motivation.

The main areas where such developments could take place are those where there are already concession arrangements in other Member States. A distinction has to be made at a sectoral level therefore between those countries that already have concessions (which will be considered later) and those where concessions are not currently a major feature. In Chapter 4 a series of sectors were considered in which there are already concessions operating. These were :

Water

Road and Rail Transport

Ports

Airports

Motorway maintenance & management

Waste management

Leisure facilities

Car parking.

The first four industries fall under the Utilities Directive, as far as European legislation is concerned, whereas the others are covered by the Classic Directive. In each of the sectors covered by the Utilities Directive, there are examples of the use of public contracts and concessions and also of direct provision by public authorities. The position varies considerably, as was seen in chapter 4, even within Member States. However, to the extent that public contracts exist in these sectors that may be replaced with service concessions, the impact is most likely to be felt in the degree of innovation that arises.

The situation is more clearly illustrated in the case of waste management, one of the areas where concessions are clearly being used to promote innovation.

(Waste) Refuse disposal is an example of a service that has often been delivered by local municipalities on the basis of a public contract, but where there is potential for growth in the use of concessions.

Traditionally, as has been remarked, refuse management was a relatively straight forward process, with refuse collected and disposed of in landfill or incinerators. Much of the private involvement would be on the basis of a straightforward public contract and concession arrangements that arose would usually be on the basis of shadow pricing or performance related payments. Experiments with introducing direct charging for refuse disposal services have generally run into the problem of an increased incidence of fly-tipping - the dumping of waste in unauthorised locations –

and it is thought that further developments in this direction are unlikely for some time.

The increased political and social focus on climate change and other environmental issues in local communities, has prompted authorities to seek alternative 'greener' ways of disposing of refuse, such as recycling, waste to energy or composting and the Waste Framework Directive (2008/98/EC), which introduced recycling targets and the prioritisation of waste management has played an important part in promoting these developments across Europe.

'Green' intentions and the restrictions on landfill arising from the Directive have led to a search for innovative solutions that often require new technology and generally involve investment in facilities, plant and training. The pattern of the concessions arrangements in refuse treatment is of some interest in this context. As we have seen, it tends to be concentrated in treatment and particularly in incineration, with little evidence of it in actual collection, where public contracts are the norm. Again we see that where processes and procedures are established and well understood, the authorities tend to opt for a public contract. It is in areas where new developments are required that concessions come into their own. There is reason to believe that recent developments could well be prompting an exploration of more innovative solutions through the use of concessions.

Summarising the particular characteristics of the sector:

Existing legislation : the Waste Framework and Landfill Directives have had a major impact in the area and in the latter case this has meant that suppliers have to conform to higher standards and obtain permits to operate.

The nature of the public service interest: refuse management is not an essential 'life or death' service in the same way as water provision, although an interruption in its provision can have considerable ecological and political repercussions, as was evident in the waste management crisis in Naples in 2008. Furthermore, experiments have shown that there is a certain resistance on the part of the public to paying for refuse services directly, though there is a little more tolerance of the idea if it is associated with recycling, for instance, by having differentiated prices for different types of refuse bags. The reluctance to pay, however, does put a certain constraint on concession arrangements in the collection area and for this and other reasons they are not much used there.

Another issue that might arise from any extension of concession arrangements in the sector is the potential impact on in-house or former in-house teams. There has been the suggestion that some arrangements labelled service concessions are really public contracts that have been designated as concessions in order to avoid transparent procedures.

Complexity and size of typical contract : again as we have seen , concessions tend to be concentrated in areas of relative complexity within the sector, but this is to be expected. Otherwise the industry is relatively decentralised and some of the contracts are small in contrast to those in other sectors. The issue that this raises is the question of the threshold level to be established.

Legacy systems : refuse collection, landfill sites and their problems are part of the legacy of the industry, but a legislative framework at European and national levels is providing clear rules and objectives.

The degree of innovation expected : innovative activity is concentrated in certain sub-sectors, as has been noted, where there is greater scope to employ new technology. However, concessions are not entirely absent in the collection area, when, for instance, there are experiments with hydraulic collection systems and where different schemes are employed to encourage waste separation, with a view to recycling.

Competition issues : competition in the industry varies across the sub-sectors. In most Member States, refuse collection is very competitive with lots of enterprises active in local markets. Treatment has fewer players but according to participants is highly contestable.

Summarising the issues that arise in this market, we can highlight the following :

- The local nature of the service provision
- The nature of the service, which although not vital in the same sense as some of those mentioned in the previous two categories is nonetheless sensitive
- The relationship between in-house and private providers and the potential impact of any legislation on this relationship
- The significance of environmental considerations and the pressure this exerts for innovation in waste disposal and collection.
- The threshold that would be appropriate for such services
- The degree of contestability in these markets and the opportunities for small and medium size enterprises to participate
- The extent to which different forms of contract can encourage or discourage innovation
- The increasing complexity of these contracts and therefore the extent to which public procurement procedures and award criteria are appropriate

In the example of waste recycling, there are sector-specific issues and indeed legislation that is encouraging change and providing a greater space for concessions in areas previously covered by public contracts. In this case, we see concessions as a response to a need to find new and more acceptable solutions to the environmental issues that arise with waste management. Other examples are more diffuse and there is not the same systematic tendency for innovative solutions to be needed, but nonetheless there will be many specific instances arising where there is the possibility of turning to the concession form as a response to a particular need for an innovative approach.

One of the possible consequences of an increased reliance on concessions rather than public contracts is that the competition felt by local and smaller suppliers from companies with the management capacity and track record to mount relatively complex, innovative proposals will intensify, leading over time to a greater concentration of suppliers. Some of the existing larger suppliers could very well be in a good position to take advantage of developments of this kind. This would not necessarily lead to a decline in the contestability of markets; in fact the opposite might be the case, especially, if the greater use of concessions also led to an increase in the average size of the contract.

The social consequences of such a development are not that clear. If the same companies are competing for concessions rather than for public contracts, the social impacts will be less pronounced than in the case where concessions are replacing direct provision by public authorities. However, there may be a tendency over time for smaller and local companies to be squeezed out of the markets, with some concentrations of impact. This might be counterbalanced by a take-up of the workforce by successful incomers, especially if new skills are imparted and wider opportunities provided as part of this process.

In the waste sector, we saw that environmental requirements are driving the search for new solutions and in as far as the introduction of concessions responds to these requirements they will have a positive environmental impact. This factor will also be a consideration in the water sector and, possibly in road and rail transport and other areas.

Impact Summary

The greater use of concessions in areas where public contracts had previously been the main vehicle of service delivery makes sense particularly where the objective is to achieve innovatory solutions to new technical or organisational problems or to find better and more varied ways of providing public services. The advantage of concessions as a form of public contact promoting innovation is most apparent in this case.

The disruption for those currently employed in companies delivering services through public contracts would definitely be less than in the previous case where

concessions replaced the direct provision of services, but there would also be less scope for improvements in efficiency and lower prices, especially in the short run.

There is likely to be a gradual replacement of smaller and local companies as the greater organisational capacity of larger companies with experience of concession arrangements came into play. This would mean a greater concentration of business power, but not necessarily a diminution in the contestability of markets.

Environmental impacts, especially in the waste management and water sectors would be positive.

In terms of the effects of the four different legislative scenarios, doing nothing would remove a possible incentive for innovation. The light regime, on the other hand would promote concessions as an alternative to public contracts among actors on both sides of public procurement and allow a framework with sufficient flexibility to reassure those considering the extra risks involved.

The possible disadvantages of the fully-fledged scenario might be magnified in this context, where it is a question of persuading actors to depart from the well-established and understood processes of 'normal' public procurement to become involved in dealing with the issues and uncertainties associated with a concession. Applying the same procedures as those that have previously been used with public procurement contracts would appear to be making no allowances for the extra risks involved. Similarly the mixed scenario is particularly likely to cause confusion with little extra gain, with organisations that are used to the full procurement procedures in the context of public contracts finding that there are differing requirements for concessions contracts, some of which have the force of legislation behind them while others are provisions that the contracting authority just happens to have chosen to make use of.

6.6 Sectors with concession arrangements currently

Where there are already service concession arrangements operating currently, a distinction is necessary between those situations where, in broad terms, existing public procurement procedures are followed, but with a small degree of flexibility, and those situations where little attempt is made to conform to the public procurement framework. Clearly there are a number of intermediate positions possible, but the two extremes will facilitate the making of the significant distinctions.

6.7.1 Standard procurement procedures

It has been seen that in a significant number of cases, where service concession arrangements already exist, their creation now makes use of procedures that are close to those followed for normal public procurement. The important difference is

that there is a degree of responsibility assumed by the contractor that is over and above that usually assumed under normal public procurement and a consequent need on both sides for a small degree of flexibility in relation to the contracts. It is this situation that we examine first, initially in relation to industries covered by the Utilities Directive and then in other industries coming under the Classic Directive.

In those industries covered by the Utilities Directive where the delivery service has not been fully opened up to competition, earlier discussion has shown that there is extensive use of the concession form in some Member States. The water industry provides a good example and, although it has its particularities it also has features that are relevant to other industries covered by the Utilities Directive.

There are a number of common elements to all water provision. All water services require the capture and storage of large quantities of water, an extensive distribution system and treatment facilities, both of the initial supply and of waste water. Many suppliers also share extensive responsibilities for the management of river systems and large areas of countryside. There are, of course, substantial capital requirements. However, in many areas the well-established infrastructure or a division of responsibilities allows a service element to be clearly identified and, in some cases at least, we are able talk confidently of service concessions as opposed to works concessions. This service element is focused on the delivery of water to customers.

Existing legislation : although the public interest in water and environmental considerations has led to a substantial legislative framework relating to the water industry at European and national levels and major compliance requirements, there have not been any legislative developments other than those that have designated water as falling under utilities legislation that affect the way that procurement processes work. This is in contrast to legislation relating to transport, for instance, that stipulates particular provisions or legislation relating to energy supply and telecommunications, which by introducing major elements of competition have removed these sectors from the procurement framework.

The fact that water, like some of the other industries under consideration, is covered by the Utilities Directive (2004/17/EC) rather than the Classic Directive (2004/18/EC) makes a certain amount of difference in how legislation covering concessions would apply. First of all, both Works and Service Concessions are excluded from the Utilities Directive (Article 18) rather than simply Service Concessions. We have seen that in practice procedures similar to those governing public procurement are in fact applied in the sector in relation to concessions, so this difference between the Directives is not of major importance. The fact that the Utilities Directive does not envisage the use of a competitive dialogue procedure, however, may be of greater significance, in that the contrast with the innovative potential of concessions is even stronger than in the case of the Classic Directive.

The nature of the public service interest : Water is a sector of some sensitivity and is seen as a key public service. The Water Framework Directive (2000/60/EC) states that "water is not a commercial product like any other but, rather, a heritage which must be protected, defended and treated as such." Unlike some other services of general interest, however, water supply is not subject to a self-standing regulatory regime at EU level, though specific Community rules such as public procurement, environmental and consumer protection legislation apply to certain aspects of the service.

In most countries the way that water is provided is highly sensitive at a political level. This is clearly because of the essential nature of the service and the potential consequences of any mismanagement. It is also because problems of management generate a momentum of their own. The legacy of the industry itself and its public profile become factors in determining how contracts can be formulated and place a huge emphasis on the degree of trust that the contracting authority has to have in a concessionaire.

This sensitivity manifests itself in certain requirements that take the supplier beyond the realm of normal commercial operations. In a most obvious way, for instance, water suppliers cannot in many situations simply turn off the supply of water to anyone who does not pay water bills.

Similarly, in all countries, environment considerations have become more and more prominent over a number of years. Like any established company a water concessionaire has to respond to public concerns in these areas. However concessionaires may well have to go further than the principles of corporate social responsibility would suggest, especially in countries with a developed sense of public service obligation, where it may be necessary to go significantly beyond contractual requirements in certain circumstances.

Complexity and size of typical contract : Complexity and the associated risk are one of the major reasons for the use of the concession form. When the processes of an industry are well known and the routines of the delivery of a service well-established, it is more cost effective for a contracting authority to use normal public contracts. This is why the concession form is well-adapted to situations where innovation and change are required and complexity arises for that reason. It is also helpful in situations where organisational complexity is apparent. The water sector needs to become more innovative, in the face of environmental requirements and the possible consequences of climate change, such as the increased risk of flooding, but there are also demands for organisational innovation. It is interesting that there are large differences across Europe in the scale at which the sector operates. We have seen, for instance, the difference between the UK, where the sector is organised into relatively large units, based to some extent on river systems and France where there are thousands of municipalities with responsibility for water supply. We have also seen that there is a tendency to have vertical integration in the

sector, so that the companies responsible for the collection and initial treatment of water and then its storage and distribution are also responsible for retail delivery and then the management of waste water and sewage. Attempts to disengage the various parts of the supply chain have not so far progressed significantly. This integration and in any event the need for interaction between the various sub-sectors, already means complexity in organisational arrangements and hence complexity in contracts. The demands for innovation in response to environmental considerations add to this complexity. It should not be surprising therefore that concessions are evident in the sector and that the sector represents an example of the difficulties that can arise in procurement procedures and award criteria. It cannot be said however that the complexities are such that special consideration is necessary for the industry, over and above that which applies in the case of concessions generally.

The sector does, however, represent a case where it is sometimes difficult to make a distinction between works and service concessions. On occasions the distinction is clear, but given the integrated nature of a lot of the provision, the attribution of revenues is not always that straightforward and the distinction between new investment in infrastructure and improvements to support a service is difficult to establish.

Legacy systems : because of the way that the water industry was 'privatised' in the past in countries like the UK and the Czech Republic, there are structures that complicate the application of concession arrangements as understood at a European level. In the UK, for instance, there is a continuing intention to introduce competition between providers, which would be an added dimension if a concessions model were to be more directly taken up and in the Czech Republic, the question of the responsibility for infrastructure investment has been complicated by the situation that results from the way that privatisation was originally carried out. However, these are largely practical difficulties as opposed to difficulties in principle inhibiting the application of the concession form.

The degree of innovation expected : as was seen in the section on complexity, the degree of innovation in both technology and the design of structures and in the organisation of the industry, especially in the face of environmental issues, is such that the concession form has a natural and growing place in the water sector.

Competition issues : there is a high degree of concentration in the industry, especially in France and attempts to introduce greater competition in the UK have progressed slowly. However, participants in the industry argue that markets can be made contestable and are in fact very competitive, when a concessions framework operates effectively.

In summary, therefore, the issues that are particularly highlighted by the water industry are:

- The essential nature of the service
- The degree of trust that is necessary between the contracting authority and the concessionaire
- The complexity of contracts
- The large investment that is necessary
- The time span over which concessions operate
- The need for innovative solutions to a series of issues, especially those arising from environmental concerns
- The fact that water falls under the Utilities Directive, where a competitive dialogue procedure is not available
- The inter-relationship between works and service elements.

These considerations have not shown any impact that is peculiar to the sector, but they do show that the water sector exhibits the issues that have frequently been raised as characteristic of concessions in general. In particular, they point to the need for flexibility. The complexity of requirements for instance is widely held to mean that introducing the competitive dialogue procedure would not be sufficient to accommodate this need, and that something nearer the negotiating procedure is required as a standard practice. The political sensitivities of the contracts imply a need to be able to change details in the contract over the period of the concession. In the countries, where the concept of intuitu personae applies, this is crucial for determining the on-going nature of the contract.

Other sectors covered by the Utilities Directive, where concessions are an important form in some Member States include transport, ports and airports.

In the case of road and rail transport, we have seen in Chapter 4 that the 2007 EU Regulation on public passenger transport services by rail and by road[76] governs the provision of services that are supported in the general economic interest. The regulation defines the nature of the public service obligations and the corresponding reward for meeting them. It also specifies that, where a competent authority decides to grant an operator an exclusive right and/or compensation, in return for the discharge of public service obligations, it should do so within the framework of a public service contract. The regulation is also of interest in that it appears to address

[76] Regulation (Ec) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70

some of the issues that can arise in the context of service concessions relating to the negotiation of contracts, the introduction of short-term measures in the event of a disruption of services and the duration of the contracts. However, the regulation does not address the situation where transport services are provided on a commercial basis rather than in the general economic interest.

In the rail sector, there would appear to be scope for concession arrangements in some countries, depending on a policy stance on how far the contractor would have the freedom to exploit the service, but the only major instance where this may be regarded as happening currently is the 'franchises' granted in the UK. In the road transport and related sectors, however, concessions are more extensive, especially in France and Spain, where they are generally established following procedures that are close to those standard in public procurement.

In the case of ports and airports, there are examples of the general facilities being operated on a concessions basis, but more particularly, concession arrangements have been seen to be used in the case of handling services, especially in the case of airports after the Groundhandling Directive. Many of these services that involve concessions are established following regular procurement procedures.

Although concessions have also been a feature in the energy sector in the past, legislation at a European level designed to promote competition in delivery limits the scope for service concession arrangements in the future.

In areas that come directly under the Classic Directive, we have seen that there are large numbers of concession arrangements in some Member States in parts of the waste management sector. The motorway maintenance sector is a rather particular case, since here it is a matter of existing works concessions possibly taking on more of the character of service concessions, but again, in those countries where such arrangements exist, they largely conform to procurement practice. The leisure facilities and car parking sectors are, however, somewhat different and these will be considered in the next sub-section

6.7.2 Non-standard procurement procedures

It has been suggested that a different situation is likely to arise in markets where the procedures for granting concessions do not follow - in important respects - the standard procedures for public procurement. We have pointed to the possibility that certain contracts are designated as service concessions precisely to avoid the standard procedures. It may be that in many of these instances, the so-called concessions are not really concessions at all.

In other cases, especially at a local level, it is felt that the exclusion of service concessions from the Directives means that there is freedom to apply procedures that differ markedly from those required in the case of normal public procurement.

We have referred to the widespread existence of concession arrangements relating to local services such as the management of leisure facilities and parking facilities. Some of these arrangements have been established following normal procurement arrangements. Indeed, it appears that a large number have been established using the open procedure. We know about these cases because calls for tender are published, either in the EU's Official Journal or in national equivalents. There has been reference, however, during our discussions with interested parties to a much larger group of concession arrangements, mainly at a local level, where there has been no published call at EU or national level and presumably there have also been other divergences from established procurement procedures. We are in no position to know how extensive this category of concession is in reality. . The possible impact of the legislation will clearly depend on the extent to which the claims we have heard are well-founded.

It will be useful in this context to consider some of the characteristics of the leisure and parking facilities that are the object of concession arrangements.

Leisure facilities are provided by local authorities across Europe and can take various forms, from outdoor playing fields, race tracks and other exercise facilities through to a range of indoor facilities.

Parking facilities mostly consist of dedicated parking structures, but may extend to on-road parking bays and the management of other aspects of traffic control.

Existing legislation : national legislation may require local authorities to provide sports and leisure facilities and other aspects of legislation will cover responsibilities for health and safety and related issues.

Similarly, parking facilities may be required by national legislation as part of town planning regulations. National legislation may also determine the extent to which the private sector can be involved. Where parking matters are covered by criminal law, for instance, the scope for private involvement may be limited.

In both cases the responsibilities of the local authority may be discharged by concession arrangements.

The nature of the public service interest: the provision of leisure facilities can be a very important matter for the individuals that make use of them, but the public interest is not as significant an element as in some of the other sectors that have been considered. Parking is in a similar position.

Users would usually expect to pay for these services. The risk for the local authority is the extent to which the facilities are used.

Both types of facility can be operated on a purely commercial basis, but local authorities may wish to retain control, in the case of leisure facilities, to ensure relatively open access and in the case of parking, to ensure that it forms a coherent part of planning developments.

In some instances, however, both types of facility may have an important impact on the local economy and local small businesses in particular may rely on them to attract customers.

The public profile of the sector : leisure and parking facilities may have a high public profile locally and be a matter of some political sensitivity at that level. Their management can also be a matter of some controversy.

Complexity and size of typical contract : as compared with other types of concession arrangement, the management of these facilities is generally not particularly complex and the size of individual contracts can be relatively small. Indeed, we have seen that there are concessions in these sectors that arise after the use of an open or restricted procedure, which implies that there is little scope for negotiation of the terms under which the concession is granted. This would suggest that complexity is often not a characteristic of this type of contract.

Legacy systems : some of the facilities have been in existence for quite a long time and play an important part in local life.

The degree of innovation expected : some degree of innovation could well be required, especially in the development of leisure facilities and the encouragement of their use by a wider range of the population.

Competition issues: both types of facility are often managed by smaller businesses, sometimes only operating in one particular location, but especially in the case of parking, private sector providers may operate on a considerably broader scale. Often they are companies established at a national or international level.

In summary, the issues that are particularly highlighted by the leisure and parking facility industries are:

- Local sensitivities, but not essential services
- Relatively straightforward operational requirements
- Some degree of innovation often required
- Risk primarily related to the take-up of the services

The impact of any legislation in the two areas referred to, where concessions are already in operation, depends on the extent to which the particular concessions have already been subject to procurement procedures or something similar.

Where this has been the case, legislation of the right form would have little additional effect and the existing benefits of the concession arrangement would continue to arise. If the form of the legislation implemented, however, leads to a perception of a higher degree of risk, the existing concessions could be put in question and operators in these areas might look for higher compensation or might not enter into concession agreements at all, forcing the authorities to rely on normal public contracts.

On the other hand, where legislation brings into the public procurement framework service concessions that have not previously been subject to the main aspects of the procurement regime, the effects would be more noticeable.

For these cases, especially if the legislation triggered an adoption of procedures closer to those established for normal public procurement, there would be an initial increase in the administrative burden as firms unused to procurement procedures had to prepare the necessary documentation etc. This would be followed by an increase in competition, whose significance would depend on the actual extent of concessions not currently using the standard procedures, but which could see competition in some national and in local markets becoming noticeably sharper, with benefits for taxpayers in terms of reduced prices and better quality and choice. Over the longer term the increased competition could also induce more innovation, as competitors seek to offer better solutions and improved services.

If larger established companies move into local markets as a result of this process there could be an increase in concentration in the industry, though not necessarily a decline in contestability. This may be accompanied by some loss of employment at a local level, especially if more efficient processes are introduced. There could therefore be some important effects at a local and regional level, initially causing locally important disruption, with the sort of social effects referred to in the case where concessions replace direct provision, but eventually as a result of the introduction of new business and sector specific skills, possibly beneficial effects on the local economy.

The search for environmental improvements are seen to be an important part of the motivation for the use of concessions in the water sector, but in other sectors this is not so immediately apparent. Nonetheless any encouragement of innovative approaches, these days, may well stimulate environmental improvements as part of the solution provided.

The curious impact remarked on earlier should also be raised at this point. It could be that one of the consequences of bringing service concessions into the

procurement framework is that contracts that are currently designated as service concessions could on closer inspection turn out to be normal public contracts. One consequence therefore of any legislation is that there will be an increase in the number of calls for tender for normal public procurement rather than for concessions. This could have an important effect, especially at a local level, with eventual benefits in the form of greater efficiency, lower costs and less of a tax burden, but at the cost of an increase in the administrative burden, especially for smaller suppliers, some social disruption, as existing suppliers lose contracts, and possibly a greater concentration eventually among suppliers.

Impact Summary

The impact of any legislation on areas where there are already service concessions is a major consideration. An important distinction has been made between the areas, where the awarding of concessions already follows procedures that are close to those used in 'normal' public procurement and those where these procedures are not followed. In the former case, if the legislation does not discourage concession arrangements, there would be no great change, especially in the shorter term. In the latter case, however, greater competition would ensue, bringing important benefits, though possibly at the cost of some disruption especially at a local level.

A possible increase in the number of calls for tender for 'normal' public procurement may also result.

It is in this area, however, that the consequences of a 'wrong' approach to the legislation would be most evident. If any new legislation is perceived as increasing the risks associated with concessions to an appreciable extent, the danger is that there would be a withdrawal from those parts of the market where concessions currently exist and a greater reliance on public contracts. This would represent a serious discouragement of innovatory developments.

The social consequences of any legislation would mainly be evident in those markets where the procedures followed are not those that are standard in the area of public procurement. Here disruption of existing arrangements could lead to employment churn, especially at a local level, and the danger, as seen in other cases, of distributional effects and the exclusion of the less skilled from the labour market.

Environmental effects are closely related to the extent of the encouragement of innovatory developments, particularly in certain sectors, like water and waste management.

In terms of the effects of the four different legislative scenarios, to summarise, doing nothing would mean that the current situation where there are already concessions in operation would continue, with perhaps a gradual increase in the number of contracts that follow something close to the normal procurement procedures.

The light regime is likely to speed up this process by having a direct effect on markets where service concessions have not been subject to the disciplines of the procurement regime. In these cases there is likely to be an increase in competition with the corresponding benefits in efficiency and also in the quality and variety of the services provided, for the benefit of citizens as consumers and tax payers. There may, though, be some disruption in labour markets that might be significant at a local level.

The application of the fully-fledged scenario is likely to have its greatest effects in this area, causing a contraction of concession activity, if the legislation is widely perceived as introducing an extra degree of risk.

The mixed scenario is again likely to cause some confusion though it may have some merit in encouraging those who are reluctant to adopt something close to the full procedure in practice to move in that direction.

6.7 Conclusions on sectoral impacts

Our overall conclusion on the possible sectoral impacts of the proposed legislation is that, although there will be a variation across differing sectors in the significance of the impact of some the common features of concession arrangements, neither our discussions with experts and representatives of sectoral organisations nor an a priori approach to identifying possible problems have revealed any circumstances where the differential impact is such as to merit special consideration.

The main differences at a sectoral level have been seen to arise from differences in the way that services are currently provided (direct/public contracts/concession) and, where concessions already exist, the extent to which standard procedures are already followed. These differences have been explained in the previous sections and examples cited among the main sectors that have been under consideration. However, by way of presenting a summary of these conclusions and also of applying them consistently to the sectors identified as actually and potentially giving rise to concession arrangements, the final section of the analysis in this report will present a systematic overview of the impacts of the main legislative scenarios on the sectors that have been identified.

In the following pages, we set out systematically the conclusions of the earlier analysis. We begin with the effects of ‘no change’ in the legislative regime and go on to consider the effects of the light and fully-fledged approaches. In each case we consider differing possibilities with regard to the contractual circumstances that currently govern the provision of these services. We do not consider a mixed regime, since the consequences of this are likely to be more or less those of either the light or the fully-fledged case, depending upon which elements are included.

It can be seen initially that a no change situation will mean that the use of the concessions will continue to be inhibited, with a depressing effect on innovation in particular, and no application of competitive pressures. There are no particular economic and environmental effects in this scenario, other than those that arise from a failure to make use of concessions to stimulate innovation. The following sections follow a similar logic, arriving at different conclusions because of the differing assumptions.

The main positive effects are indicated in relation to the light approach, while the fully-fledged approach is shown as having potentially significant and negative consequences arising from a heightened perception of risk.

By way of summary comment on a mixed regime, we have argued that the potential confusion arising from yet another procurement regime may outweigh any advantages for suppliers in circumstances where contracting authorities are not conforming to standard procurement practice, as established by legislation relating to 'normal' public procurement.

Finally in terms of the table presentation, it should be said that in this summary overview, a few additional 'common sense' assumptions have been made that could conceivably be challenged. For instance, we have assumed that the scope for product innovation in the water industry is rather limited by the nature of the product.

Overall, it will be seen that the tables present the conclusions that have been arrived at in the course of the analysis in a relatively stark form. A significant amount does depend on the extent to which any legislation would cause perceptions of risk to change. There is no way that predictions can be made in relation to these matters with any high degree of certainty. We have, however, based our assumptions about reactions to be expected on a consistent message that has been evident in many of our discussions with interested parties in the Member States covered by the study.

No Change

Service Concession Sectors						
Utilities						
Sector	Economic impacts				Social & Environmental Impacts	Comments
	Direct provision	Only public contracts	Concessions – Standard procedures	Concessions – Non-standard procedures		Utilities Directive
Water	0 Competition 0 Concentration 0 Prices - Innovation - Output quality - Process 0 Consumer choice	0 Competition 0 Concentration 0 Prices - Innovation - Output quality - Process 0 Consumer choice	0 Competition 0 Concentration 0 Prices - Innovation - Output quality - Process 0 Consumer choice	0 Competition 0 Concentration 0 Prices - Innovation - Output quality - Process 0 Consumer choice	Employment Skills Inclusion Local Environmental Standards Technology	Water Framework Directive (2000/60/EC)
Energy						Restricted scope for further concessions; markets open to competition
Transport Railway	Limited scope for concessions, where service directly	0 Competition 0 Concentration 0 Prices	None currently	None currently	Employment Skills Inclusion	Regulation on Public Service

	provided	- Innovation - Output quality - Process 0 Consumer choice			Local Environmental Standards Technology	
Bus	0 Competition 0 Concentration 0 Prices - Innovation - Output quality - Process 0 Consumer choice	0 Competition 0 Concentration 0 Prices - Innovation - Output quality - Process 0 Consumer choice	0 Competition 0 Concentration 0 Prices - Innovation - Output quality - Process 0 Consumer choice	0 Competition 0 Concentration 0 Prices - Innovation - Output quality - Process 0 Consumer choice	Employment Skills Inclusion Local Environmental Standards Technology	
Seaport and airport facilities	0 Competition 0 Concentration 0 Prices - Innovation - Output quality - Process 0 Consumer choice	0 Competition 0 Concentration 0 Prices - Innovation - Output quality - Process 0 Consumer choice	0 Competition 0 Concentration 0 Prices - Innovation - Output quality - Process 0 Consumer choice	0 Competition 0 Concentration 0 Prices - Innovation - Output quality - Process 0 Consumer choice	Employment Skills Inclusion Local Environmental Standards Technology	Directive on airport charges 2009/12/EC Ground handling Directive 96/67/EC
Postal						Postal Services Directive

Services						2008/06/EC
Motorway operation	0 Competition 0 Concentration 0 Prices - Innovation - Output quality - Process 0 Consumer choice	0 Competition 0 Concentration 0 Prices - Innovation - Output quality - Process 0 Consumer choice	0 Competition 0 Concentration 0 Prices - Innovation - Output quality - Process 0 Consumer choice	(Works) Concessions currently covered by Classic Directive	Employment Skills Inclusion Local Environmental Standards Technology	Classic Directive 2004/17/EC Motorways could be managed directly by public authorities, on the basis of a public contract by private firms or of a works concession
Other Services at Municipal Level*						
Waste management	0 Competition 0 Concentration 0 Prices - Innovation - Output quality - Process 0 Consumer choice	0 Competition 0 Concentration 0 Prices - Innovation - Output quality - Process 0 Consumer choice	0 Competition 0 Concentration 0 Prices - Innovation - Output quality - Process 0 Consumer choice	0 Competition 0 Concentration 0 Prices - Innovation - Output quality - Process 0 Consumer choice	Employment Skills Inclusion Local Environmental Standards Technology	Waste Framework Directive (2008/98/EC) Landfill Directive 1999/31/EC
Car parking	0 Competition 0 Concentration 0 Prices	0 Competition 0 Concentration 0 Prices	0 Competition 0 Concentration 0 Prices	0 Competition 0 Concentration 0 Prices	Employment Skills Inclusion	Concessions with standard procedures are relatively rare in this sector

	- Innovation - Output quality - Process 0 Consumer choice	- Innovation - Output quality - Process 0 Consumer choice	- Innovation - Output quality - Process 0 Consumer choice	- Innovation - Output quality - Process 0 Consumer choice	Local	
Sports & leisure facilities	0 Competition 0 Concentration 0 Prices - Innovation - Output quality - Process 0 Consumer choice	0 Competition 0 Concentration 0 Prices - Innovation - Output quality - Process 0 Consumer choice	0 Competition 0 Concentration 0 Prices - Innovation - Output quality - Process 0 Consumer choice	0 Competition 0 Concentration 0 Prices - Innovation - Output quality - Process 0 Consumer choice	Employment Skills Inclusion Local Environmental Standards	Concessions with standard procedures are relatively rare in this sector
Other local services	0 Competition 0 Concentration 0 Prices - Innovation - Output quality - Process 0 Consumer choice	0 Competition 0 Concentration 0 Prices - Innovation - Output quality - Process 0 Consumer choice	0 Competition 0 Concentration 0 Prices - Innovation - Output quality - Process 0 Consumer choice	0 Competition 0 Concentration 0 Prices - Innovation - Output quality - Process 0 Consumer choice	Employment Skills Inclusion Local Environmental Standards Technology	
Established Public Services						

Sectoral Impacts of Potential Legislation

	Economic impacts		Social & Environmental Impacts	Comments
	Direct provision	Only public contracts		
Health	0 Competition 0 Concentration 0 Prices - Innovation - Output quality - Process 0 Consumer choice	0 Competition 0 Concentration 0 Prices - Innovation - Output quality - Process 0 Consumer choice	Employment Skills Inclusion Local Environmental Standards Technology	
Education	0 Competition 0 Concentration 0 Prices - Innovation - Output quality - Process 0 Consumer choice	0 Competition 0 Concentration 0 Prices - Innovation - Output quality - Process 0 Consumer choice	Employment Skills Inclusion Local Environmental Standards Technology	
Justice systems	0 Competition 0 Concentration 0 Prices - Innovation - Output quality	0 Competition 0 Concentration 0 Prices - Innovation - Output quality	Employment Skills Inclusion Local	

	- Process 0 Consumer choice	- Process 0 Consumer choice		
Employment & Social Services	0 Competition 0 Concentration 0 Prices - Innovation - Output quality - Process 0 Consumer choice	0 Competition 0 Concentration 0 Prices - Innovation - Output quality - Process 0 Consumer choice	Employment Skills Inclusion Local	
New Areas				
	Economic impacts		Social & Environmental Impacts	Comments
	Direct provision	Only public contracts		
Public information and communication	0 Competition 0 Concentration 0 Prices - Innovation - Output quality - Process 0 Consumer choice	0 Competition 0 Concentration 0 Prices - Innovation - Output quality - Process 0 Consumer choice	Zero or positive social and environmental effects	

Business support services	0 Competition 0 Concentration 0 Prices - Innovation - Output quality - Process 0 Consumer choice	0 Competition 0 Concentration 0 Prices - Innovation - Output quality - Process 0 Consumer choice	Zero or positive social and environmental effects	
Public intellectual property and assets	0 Competition 0 Concentration 0 Prices - Innovation - Output quality - Process 0 Consumer choice	0 Competition 0 Concentration 0 Prices - Innovation - Output quality - Process 0 Consumer choice	Zero or positive social and environmental effects	
Research & laboratory services	0 Competition 0 Concentration 0 Prices - Innovation - Output quality - Process 0 Consumer choice	0 Competition 0 Concentration 0 Prices - Innovation - Output quality - Process 0 Consumer choice	Zero or positive social and environmental effects	

Light Touch Approach

Service Concession Sectors						
Utilities						
Sector	Economic impacts				Social & Environmental Impacts	Comments
	Direct provision	Only public contracts	Concessions – Standard procedures	Concessions – Non-standard procedures		Utilities Directive
Water	+ Competition ! Concentration - Prices + Innovation 0 Output quality + Process 0 Consumer choice	0 Competition + Concentration 0 Prices + Innovation 0 Output quality + Process 0 Consumer choice	0 Competition 0 Concentration 0 Prices 0 Innovation 0 Output quality 0 Process 0 Consumer choice	+ Competition + Concentration - Prices + Innovation 0 Output quality + Process 0 Consumer choice	+ Employment - Skills - Inclusion - Regional + Environmental + Standards + Technology	Water Framework Directive (2000/60/EC)
Energy						Restricted scope for further concessions; markets open to competition
Transport Railway	Limited scope for concessions, where service directly	0 Competition + Concentration ? Prices	None currently	None currently	- Employment - Skills - Inclusion	Regulation on Public Service

	provided	+ Innovation + Output quality + Process 0 Consumer choice			+ Regional = Environmental - Standards	
Bus	+ Competition + Concentration ? Prices + Innovation + Output quality + Process + Consumer choice	0 Competition + Concentration 0 Prices + Innovation + Output quality + Process + Consumer choice	0 Competition 0 Concentration 0 Prices 0 Innovation 0 Output quality 0 Process 0 Consumer choice	+ Competition + Concentration - Prices + Innovation + Output quality + Process + Consumer choice	+ Employment + Skills 0 Inclusion 0 Regional + Environmental 0 Standards + Technology	
Seaport and airport facilities	+ Competition ! Concentration - Prices + Innovation + Output quality + Process + Consumer choice	0 Competition + Concentration 0 Prices + Innovation + Output quality + Process + Consumer choice	0 Competition 0 Concentration 0 Prices 0 Innovation 0 Output quality 0 Process 0 Consumer choice	+ Competition + Concentration - Prices + Innovation + Output quality + Process + Consumer choice	0 Employment 0 Skills 0 Inclusion 0 Regional + Environmental 0 Standards 0 Technology	Directive on airport charges 2009/12/EC Ground handling Directive 96/67/EC
Postal Services						Postal Services Directive 2008/06/EC

Motorway operation	+ Competition + Concentration ? Prices + Innovation + Output quality + Process 0 Consumer choice	0 Competition + Concentration 0 Prices + Innovation + Output quality + Process 0 Consumer choice	0 Competition 0 Concentration 0 Prices 0 Innovation 0 Output quality 0 Process 0 Consumer choice	(Works) Concessions currently covered by Classic Directive	- Employment 0 Skills 0 Inclusion 0 Regional + Environmental 0 Standards 0 Technology	Classic Directive 2004/17/EC Motorways could be managed directly by public authorities, on the basis of a public contract by private firms or of a works concession
Other Services at Municipal Level*						
Waste management	+ Competition + Concentration - Prices + Innovation + Output quality + Process 0 Consumer choice	0 Competition + Concentration 0 Prices + Innovation + Output quality + Process 0 Consumer choice	0 Competition 0 Concentration 0 Prices 0 Innovation 0 Output quality 0 Process 0 Consumer choice	+ Competition + Concentration - Prices + Innovation + Output quality + Process 0 Consumer choice	+ Employment + Skills 0 Inclusion + Local + Environmental + Standards + Technology	Waste Framework Directive (2008/98/EC) Landfill Directive 1999/31/EC
Car parking	+ Competition + Concentration - Prices + Innovation + Output quality	0 Competition + Concentration 0 Prices + Innovation + Output quality	0 Competition 0 Concentration 0 Prices 0 Innovation 0 Output quality	+ Competition + Concentration - Prices + Innovation + Output quality	0 Employment 0 Skills 0 Inclusion 0 Local	Concessions with standard procedures are relatively rare in this sector

	+ Process 0 Consumer choice	+ Process 0 Consumer choice	0 Process 0 Consumer choice	+ Process 0 Consumer choice		
Sports & leisure facilities	+ Competition + Concentration - Prices + Innovation + Output quality + Process + Consumer choice	0 Competition + Concentration 0 Prices + Innovation + Output quality + Process + Consumer choice	0 Competition 0 Concentration 0 Prices 0 Innovation 0 Output quality 0 Process 0 Consumer choice	+ Competition + Concentration - Prices + Innovation + Output quality + Process + Consumer choice	0 Employment 0 Skills 0 Inclusion 0 Local 0 Environmental 0 Standards	Concessions with standard procedures are relatively rare in this sector
Other local services	+ Competition + Concentration - Prices + Innovation + Output quality + Process + Consumer choice	0 Competition + Concentration 0 Prices + Innovation + Output quality + Process + Consumer choice	0 Competition 0 Concentration 0 Prices 0 Innovation 0 Output quality 0 Process 0 Consumer choice	+ Competition + Concentration - Prices + Innovation + Output quality + Process + Consumer choice	+ Employment + Skills 0 Inclusion 0 Local 0 Environmental 0 Standards 0 Technology	

Established Public Services				
	Economic impacts		Social & Environmental Impacts	Comments
	Direct provision	Only public contracts		

Health	+ Competition ! Concentration - Prices + Innovation + Output quality + Process + Consumer choice	0 Competition + Concentration 0 Prices + Innovation + Output quality + Process + Consumer choice	Employment Skills Inclusion Local Environmental Standards Technology	
Education	+ Competition ! Concentration - Prices + Innovation + Output quality + Process + Consumer choice	0 Competition + Concentration 0 Prices + Innovation + Output quality + Process + Consumer choice	Employment Skills Inclusion Local Environmental Standards Technology	
Justice systems	+ Competition ! Concentration - Prices + Innovation + Output quality + Process + Consumer choice	0 Competition + Concentration 0 Prices + Innovation + Output quality + Process + Consumer choice	Employment Skills Inclusion Local	

Employment & Social Services	+ Competition ! Concentration - Prices + Innovation + Output quality + Process + Consumer choice	0 Competition + Concentration 0 Prices + Innovation + Output quality + Process + Consumer choice	Employment Skills Inclusion Local	
New Areas				
Public information and communication	+ Competition ! Concentration - Prices + Innovation + Output quality + Process + Consumer choice	+ Competition 0 Concentration - Prices + Innovation + Output quality + Process + Consumer choice	Zero or positive social and environmental effects	
Business support services	+ Competition ! Concentration - Prices + Innovation + Output quality + Process	+ Competition 0 Concentration - Prices + Innovation + Output quality + Process	Zero or positive social and environmental effects	

	+ Consumer choice	+ Consumer choice		
Public intellectual property and assets	+ Competition ! Concentration - Prices + Innovation + Output quality + Process + Consumer choice	+ Competition ! Concentration - Prices + Innovation + Output quality + Process + Consumer choice	Zero or positive social and environmental effects	
Research & laboratory services	+ Competition ! Concentration - Prices + Innovation + Output quality + Process 0 Consumer choice	+ Competition 0 Concentration - Prices + Innovation + Output quality + Process 0 Consumer choice	Zero or positive social and environmental effects	

Fully-fledged Approach

Service Concession Sectors						
Utilities						
Sector	Economic impacts				Social & Environmental Impacts	Comments
	Direct provision	Only public contracts	Concessions – Standard procedures	Concessions – Non-standard procedures		Utilities Directive
Water	0 Competition 0 Concentration 0 Prices - Innovation 0 Output quality 0 Process 0 Consumer choice	0 Competition 0 Concentration 0 Prices - Innovation - Output quality - Process 0 Consumer choice	- Competition - Concentration - Prices - Innovation - Output quality - Process - Consumer choice	- Competition - Concentration - Prices - Innovation - Output quality - Process - Consumer choice	Employment Skills Inclusion Local Environmental Standards Technology	Water Framework Directive (2000/60/EC)
Energy						Restricted scope for further concessions; markets open to competition
Transport Railway	Limited scope for concessions, where	0 Competition 0 Concentration	None currently	None currently	Employment Skills	Regulation on Public Service

	service directly provided	0 Prices - Innovation - Output quality - Process 0 Consumer choice			Inclusion Local Environmental Standards Technology	
Bus	0 Competition 0 Concentration 0 Prices - Innovation 0 Output quality 0 Process 0 Consumer choice	0 Competition 0 Concentration 0 Prices - Innovation - Output quality - Process 0 Consumer choice	0 Competition 0 Concentration 0 Prices - Innovation 0 Output quality 0 Process 0 Consumer choice	0 Competition 0 Concentration 0 Prices - Innovation 0 Output quality 0 Process 0 Consumer choice	Employment Skills Inclusion Local Environmental Standards Technology	
Seaport and airport facilities	0 Competition 0 Concentration 0 Prices - Innovation 0 Output quality 0 Process 0 Consumer choice	0 Competition 0 Concentration 0 Prices - Innovation - Output quality - Process 0 Consumer choice	- Competition - Concentration - Prices - Innovation - Output quality - Process - Consumer choice	- Competition - Concentration - Prices - Innovation - Output quality - Process - Consumer choice	Employment Skills Inclusion Local Environmental Standards Technology	Directive on airport charges 2009/12/EC Ground handling Directive 96/67/EC

Postal Services						Restricted scope for further concessions; markets open to competition Postal Services Directive 2008/06/EC
Motorway operation	0 Competition 0 Concentration 0 Prices - Innovation 0 Output quality 0 Process 0 Consumer choice	0 Competition 0 Concentration 0 Prices - Innovation - Output quality - Process 0 Consumer choice	- Competition - Concentration - Prices - Innovation - Output quality - Process - Consumer choice	(Works) Concessions currently covered by Classic Directive	Employment Skills Inclusion Local Environmental Standards Technology	Classic Directive 2004/17/EC Motorways could be managed directly by public authorities, on the basis of a public contract by private firms or of a works concession
Other Services at Municipal Level*						
Waste management	0 Competition 0 Concentration 0 Prices - Innovation 0 Output quality 0 Process 0 Consumer choice	0 Competition 0 Concentration 0 Prices - Innovation - Output quality - Process 0 Consumer choice	- Competition - Concentration - Prices - Innovation - Output quality - Process - Consumer choice	- Competition - Concentration - Prices - Innovation - Output quality - Process - Consumer choice	Employment Skills Inclusion Local Environmental Standards Technology	Waste Framework Directive (2008/98/EC) Landfill Directive 1999/31/EC

Sectoral Impacts of Potential Legislation

Car parking	0 Competition 0 Concentration 0 Prices - Innovation 0 Output quality 0 Process 0 Consumer choice	0 Competition 0 Concentration 0 Prices - Innovation - Output quality - Process 0 Consumer choice	- Competition - Concentration - Prices - Innovation - Output quality - Process - Consumer choice	- Competition - Concentration - Prices - Innovation - Output quality - Process - Consumer choice	Employment Skills Inclusion Local	Concessions with standard procedures are relatively rare in this sector
Sports & leisure facilities	0 Competition 0 Concentration 0 Prices - Innovation 0 Output quality 0 Process 0 Consumer choice	0 Competition 0 Concentration 0 Prices - Innovation - Output quality - Process 0 Consumer choice	- Competition - Concentration - Prices - Innovation - Output quality - Process - Consumer choice	- Competition - Concentration - Prices - Innovation - Output quality - Process - Consumer choice	Employment Skills Inclusion Local Environmental Standards	Concessions with standard procedures are relatively rare in this sector
Other local services	0 Competition 0 Concentration 0 Prices - Innovation 0 Output quality 0 Process 0 Consumer choice	0 Competition 0 Concentration 0 Prices - Innovation - Output quality - Process 0 Consumer choice	- Competition - Concentration - Prices - Innovation - Output quality - Process - Consumer choice	- Competition - Concentration - Prices - Innovation - Output quality - Process - Consumer choice	Employment Skills Inclusion Local Environmental Standards Technology	

Established Public Services						
	Economic impacts			Social & Environmental Impacts	Comments	
	Direct provision	Only public contracts				
Health	0 Competition 0 Concentration 0 Prices - Innovation - Output quality - Process 0 Consumer choice	0 Competition 0 Concentration 0 Prices - Innovation - Output quality - Process 0 Consumer choice		Employment Skills Inclusion Local Environmental Standards Technology		
Education	0 Competition 0 Concentration 0 Prices - Innovation - Output quality - Process 0 Consumer choice	0 Competition 0 Concentration 0 Prices - Innovation - Output quality - Process 0 Consumer choice		Employment Skills Inclusion Local Environmental Standards Technology		
Justice systems	0 Competition 0 Concentration 0 Prices	0 Competition 0 Concentration 0 Prices		Employment Skills Inclusion		

	- Innovation 0 Output quality 0 Process 0 Consumer choice	- Innovation 0 Output quality 0 Process 0 Consumer choice	Local	
Employment & Social Services	0 Competition 0 Concentration 0 Prices - Innovation 0 Output quality 0 Process 0 Consumer choice	0 Competition 0 Concentration 0 Prices - Innovation 0 Output quality 0 Process 0 Consumer choice	Employment Skills Inclusion Local	
New Areas				
	Economic impacts		Social & Environmental Impacts	Comments
	Direct provision	Only public contracts		
Public information and communication	0 Competition 0 Concentration 0 Prices - Innovation 0 Output quality 0 Process	0 Competition 0 Concentration 0 Prices - Innovation 0 Output quality 0 Process	Zero or positive social and environmental effects	

	0 Consumer choice	0 Consumer choice		
Business support services	0 Competition 0 Concentration 0 Prices - Innovation 0 Output quality 0 Process 0 Consumer choice	0 Competition 0 Concentration 0 Prices - Innovation 0 Output quality 0 Process 0 Consumer choice	Zero or positive social and environmental effects	
Public intellectual property and assets	0 Competition 0 Concentration 0 Prices - Innovation 0 Output quality 0 Process 0 Consumer choice	0 Competition 0 Concentration 0 Prices - Innovation 0 Output quality 0 Process 0 Consumer choice	Zero or positive social and environmental effects	
Research & laboratory services	0 Competition 0 Concentration 0 Prices - Innovation 0 Output quality 0 Process	0 Competition 0 Concentration 0 Prices - Innovation 0 Output quality 0 Process	Zero or positive social and environmental effects	

	0 Consumer choice	0 Consumer choice		

Key :

0 : Neutral effect

+ : Positive effect

- : Negative effect

? : Unknown effect

! : Not relevant

Note that social and environmental effects that may be relevant are indicated, but the nature of the effect depends on the particular scenario, requiring a similar set of tables to those setting out the economic effects. More detail is provided in the main text.

Sectoral Impacts of Potential Legislation

Conclusions & Recommendations

7

This section provides an overview of the main conclusions of the study and also makes a series of recommendations for the Commission to take into account in its ongoing work in the area.

7.1 Conclusions

Broadly, this study set out to examine two issues :

- the extent of service concessions in the eight Members States targeted;
- the sectoral issues to be taken into consideration in any assessment of the potential impact of certain legislative provisions that would bring service concessions into the public procurement framework.

The study was conducted over a relatively brief period and cannot claim to be comprehensive. However, we did find that:

In relation to the extent of service concessions :

- currently there are a major variations between Member States in the extent of the use of concession arrangements;
- the use of service concessions is growing, if only to a limited extent, in all of the Member States considered, even in those where concession arrangements have not been used widely before;
- some companies (Suez, Veolia, SCC) have concession contracts across different sectors and operate in a number of countries;
- there appear to be a wide range of sectors in which service concessions are arising or could potentially arise;
- these sectors have been listed in chapter 3.
- the choice of the service concession form is less to do with sectoral considerations than with the relative advantages of this type of public private partnership;
- concessions are a particularly interesting solution in situations where the future development of services requires, or could benefit from, innovative approaches to the services themselves or the processes that deliver them; an innovative approach inevitably involves a degree of risk;
- there are reasons to believe that service concessions could become more widespread, as a result of a 'natural tendency' for works concessions to become

service concessions, and as the demand for quality and choice in public services becomes more important;

- there is, however, significant difficulty in distinguishing between works concessions and service concessions in practice;

- the distinction between different types of services in Annex II of the Classic Directive and its counterpart in the Utilities Directive is outmoded and makes little sense particularly as far as concessions are concerned.

In relation to the potential impact of legislative provisions covering service concessions :

As well as major differences across the Member States investigated with regard to the extent of the use of concession arrangements, there are very significant differences in the scope of national legislative provisions and in the traditions and culture associated with their use. This gives rise to strikingly different perceptions of the potential impact of any legislation.

The differences of impact that could potentially arise in different sectors appear to be one of degree rather than being of a fundamentally different nature as between one sector and another. That is, there are differences in the relative significance of characteristics that can generally be ascribed to concessions in the delivery of public services, but not fundamentally different characteristics as such.

Furthermore, the situation in particular sectors cannot be explained without an account of considerations that affect service concessions in general. The following points therefore summarise the situation as we perceive it :

The situation for concessions in general :

- All those we spoke to subscribe to the core principles of transparency, equal treatment, proportionality and mutual recognition in the relations between public authorities and the private sector.

- It was generally agreed that one of the main potential impacts of any legislation relates to whether such legislation would promote or hinder the development of concession arrangements in the future.

There is clearly a significant degree of uncertainty about the nature and status of service concessions in some Member States, though there is less uncertainty where concessions have been well-established for some time.

- The legal definitions of ‘service concessions’ in the existing EU legislation are often perceived to be difficult to translate into operational terms.

- The aims behind the provisions in the 'fully-fledged' approach that would apply the usual public procurement rules, are understood and in principle supported. That is, the objectives of ensuring transparency through publication, ensuring the use of fair and recognised procedures, having a level playing field through provisions on economic and financial standing etc are all understood and generally supported;

- Case law, and especially the Telaustria ruling, has led to a situation where service concessions have increasingly been advertised 'voluntarily' in national official journals and in the OJEU; generally these notices and the associated procedures make use of the full range of procurement procedures, though they tend to involve more negotiated and restricted procedures than public procurement in general; in effect, many (service) concession procedures already use something close to normal public market procedures

- However, it is generally agreed that concessions have areas that make them different. These include :

    - the importance and sensitivity of the public service objectives in many concession arrangements;

    - the difference in respect of the responsibility adopted; if the circumstances of a public contract change, this is a problem for a contracting authority, if the circumstances of a concession change, this is a problem for the concessionaire;

    - the significance of the relationship of trust between a public authority and a concessionaire, recognised in some Member States in the legal principle of intuitu personae;

    - the need for procurement procedures that allow this trust to develop;

    - the necessity to have procedures that can allow for the complexity of concession arrangements and the need for discussion and negotiation;

    - the elements of risk and uncertainty about future developments that are intrinsic to the concession concept and that make concessions a useful vehicle for managing innovation;

    - the length of time over which a concession extends;

    - the possibility and greater significance of market failures of the winner's curse type;

- the need for re-negotiation and/or step-in arrangements during the course of the contract, to allow for dramatic changes in circumstances or potentially disastrous failures of service delivery in sensitive areas;
- the need for award criteria that put a lot of emphasis on the quality of the service proposed.

- The major difference of opinion among those interviewed relates to the extent to which using the usual public procurement framework could accommodate these differences.
- Some regard the difference between public contracts and concessions are being a matter of degree. Others see a difference in the nature of the two conceptions.
- Some even argue that in focusing on the contracting process, public procurement-type legislation would divert attention from the delivery of the service, which is felt to be central in the case of concession agreements.
- Those that tend to see concessions as being significantly different from public contracts tend to see considerable disruption taking place, if concessions are brought within the public procurement framework, principally because greater risk will be perceived.
- The provisions relating to the tendering procedures to be adopted and the award criteria are seen as particularly difficult, but equally failure to have provisions covering issues like the need to allow some re-negotiation are also seen to be problematic.
- On the other side, it is argued that it is important not to have artificial incentives to use one form of public service provision over another and that a similar regime for public contracts and concessions would ensure that this problem would not arise.
- It is also felt that the current situation allows abuses to arise and that these need to be tackled. In particular, it is necessary to close the 'loophole' whereby public contracts can be deemed to fall outside procurement rules if they are designated as 'service concessions'
- One impact from bringing service concessions into the public procurement framework in at least one Member State could well be greater in relation to public contracts than in relation to service concessions.
- There is a need for greater transparency, especially since there is exemplary practice observable elsewhere.

- The objective of achieving greater transparency in the whole range of services delivered by the private sector for the public authorities could be to adopt the 'light' approach, extending the current provisions relating to works concessions to service concessions.

- If this approach is to be adopted, it would be as well to re-consider the distinction between works and service concessions. Operationally this distinction is often difficult to establish.

- The appropriate threshold to adopt in this case would be an issue. Adopting the same threshold as for works concessions might be justified in view of the value of many service concession contracts and would have a smaller initial impact.

- There is little prospect of consensus on the broader range of provisions that address equal treatment, proportionality and mutual recognition.

- In practice, however, a good part of the spirit and letter of the 'Classic' and Utilities Directives are implemented in concession procedures.

- Nonetheless Member States, as is their right, implement the public procurement Directives taking into account national traditions, procedures and practices; this leads to distinct differences in the flexibility with which procurement procedures work, but there appears to be little dialogue between officials operating the different national systems.

- 'Soft regulation' through the exchange of best practice and the development of guidelines and other documents providing guidance and clarification could be an alternative to legislation in these areas and an important way of encouraging a convergence of practice .

Sectoral Impacts

When it comes to sectoral differences, there are a number of sectors that are excluded from consideration in the current Directives.

Generally we have found that across the different sectors similar issues apply to differing degrees rather than there being fundamental differences between sectors. In examining different sectors there were variations in the extent to which the following factors applied :

  - The nature of the public service interest
  - The complexity of the contract
  - The size of a typical contract and the time period over which they operate

- The influence of legacy systems
- The degree of innovation expected
- The extent to which competition issues arise
- The extent to which existing legislation elsewhere applies.

More significant on a systematic basis in determining the nature and extent of impact was the situation that new concessions would replace. If service concessions are already established and already follow something close to standard procurement procedures, the impact will not be major, but if concessions are introduced into areas where they had not previously existed or in areas where provision is currently made through public contracts or if the procedures are tightened up in areas where the granting of concessions currently does not follow standard procedures, then the impacts will be greater and will vary considerably, sometimes introducing greater competition and in other cases promoting greater innovation. The detail of the various situations has been considered.

The biggest difference we have encountered is where granting concession contracts could upset existing well established structures, with their associated employment arrangements, especially when these would replace direct public provision. Here there could be considerable social disruption and significant political impact, especially in sectors where the media are already sensitised to 'privatisation' issues and/or at a local level. However, these effects are at a different level from those being considered in this study, which primarily concern the impacts arising from the use of one legal framework rather than another.

We concluded that the main effects of the four potential legislative scenarios that we considered were as follows :

- *'No change' :* The principal consequences of doing nothing would be to allow a situation of some uncertainty in some Member States to continue, along with the continuation of a 'loophole' in procurement legislation.

- *"Light approach" :* The 'light approach' would promote considerably more transparency and highlight the potential for using service concessions as a significant vehicle for public policy implementation.

  By bringing service concessions within the framework of procurement legislation, it would promote their 'normalisation' within the administrations of contracting authorities.

  There would be an insignificant increase in the administrative burden. Ironically, the greatest early impact may be on public contracts that have been designated service concessions in order to avoid procurement procedures.

Over the longer term, as an instrument that is suited to the taking of risks and the application of innovative ideas, a greater profile for service concessions would promote innovation and productivity and ultimately economic growth and employment. In sectors like water and waste treatment especially, it would also lead to advantages for the environment.

Greater use of service concessions could speed up innovation in public service delivery and lead to improved public services, with higher quality and greater choice. Use of concessions in the new areas outlined could boost the creative economy and in a number of other strategic sectors.

Greater transparency is likely to increase competition especially in the waste treatment sector and possibly also in water in some countries and in port and airport services. This effect will depend importantly on the threshold that is chosen. Where it is apparent, it is likely to increase competition from larger enterprises and may lead to an increase in concentration, at the expense of smaller local enterprises. This will not necessarily decrease the contestability of markets and could lead to economies of scale and benefits for local communities in terms of cheaper services.

Offsetting these gains would be the social impact of greater competition at a local level.

"Fully fledged" approach : the fully fledged approach would put service concessions on the same footing as public service contracts, allowing the choice of contractual form to be based on their intrinsic merits.

It would, however, put service concessions in a different position from works concessions.

The impact in terms of administrative burden for most companies affected would be negligible, since they already use these procedures for public contracts or indeed already use them for concessions. Some smaller companies, would face a much more significant burden.

The major effect however, would depend on how the new regime was perceived. It is believed that there is a significant possibility that enterprises would perceive an increased risk and that a significant number would leave the concessions market.

This perception would vary from one Member State to another and would also depend on how the contracting authorities reacted to the legislation.

With a move to 'safer' public contracts, there would be a dampening effect on innovation, with the eventual consequences of lower growth and employment and some environmental improvements foregone.

The water, waste management, port and airport administration and handling sectors and some local leisure services would be the most obvious sectors affected, and in some Member States more than others. Over the longer term, core public services might also be affected to the extent that the potential advantages of concession arrangements would not be explored.

Public services would be less likely to keep pace with citizens' aspirations and public administrations would be less flexible in their responses.

The extent of these effects depends critically on the extent of the identified reaction to the hypothesised legislation. Nonetheless the direction of the change is quite clear.

These disadvantages would be incurred for little gain. The 'fully fledged' approach is thought to provide only marginal advantages over the light approach in terms of open, transparent and fair procedures. Case law and good practice guidance has anyway ensured that a large proportion of concession contracts follow procedures close to those that would be implemented by the fully fledged approach.

- *"Intermediate approach"* an intermediate approach between the light and fully fledged approaches is theoretically possible, but would add to the list of public procurement variations and could bring confusion for only slight advantages in relation to strengthening the position of those unjustifiably excluded by contracting authorities that do not follow standard procedures.

7.2 Recommendations

The main recommendations flow from the previous analysis. They are the following :

- The first step is to improve transparency. At a minimum, this requires adopting the 'light' legislative approach of bringing service concessions into the public procurement framework that currently applies to works concessions.

- In the meanwhile, publication of notices of service concessions in the Official Journal should be further encouraged. In particular, a service concessions template should be created to allow them to be published more easily in a suitable form.

- Simplify the regime as much as possible. This will help address the issue of uncertainty.

- A contribution to both transparency and simplifying the legal framework could be achieved by removing the distinction in the legislation between works and service concessions.

- At first, the threshold level for concessions as a whole would have to be that applying to works concessions and this would reduce the initial impact.

- Further research into the value of concessions contracts should be undertaken in order to throw light on the question of the appropriate threshold.

- This research should include a review of the methods for valuing contracts.

- It should also be recognised that the distinction between different types of services in Annex II of the Classic Directive, and its counterpart in the Utilities Directive, is outmoded and makes little sense, particularly as far as concessions are concerned.

- The other provisions of the 'fully fledged' approach are important for assuring access and a level playing field and for reducing opportunities for abuse. However, until the particular circumstances and requirements of concessions have been addressed, it would be unwise to introduce them into the legislation.

- This does not mean that nothing should be done. 'Soft regulation' in the form of exchanges of best practice should be encouraged to address the considerable differences in the way that concessions are procured and managed across the Member States.

- There is already a considerable amount of good practice identified at a Member State and regional level and by the European PPP Expertise Centre. This could easily be disseminated more widely and the process reinforced.

- There is a need over the longer term to address the particular characteristics of concessions and recognise them either explicitly in legislation or by accommodating interpretations of the general procurement provisions.

- In any event, the legal definitions of concessions should be supplemented by practical guidelines for those authorities wishing to make use of this form of

private sector engagement with public service provision. It should cover the nature of concessions and the procedures to follow. This measure could go a long way to addressing questions of uncertainty.

Annexes

The following documents are annexed to the Report :

Annex A: Definition of service concessions

Annex B: Services set out in Annex II of the Classic Directive

Annex C: Country summary descriptions

Definition of 'Concession' in EU legislation.

A public works/service concession is a contract of the same type as a public works/service contract except for the fact that the consideration from the contracting authority for the works to be carried out/for the provision of the services consists either solely in the transfer of the right to exploit the works/service that is the object of the contract, or in this right together with payment.

The right to exploit the works/service implies a transfer to the concessionaire of a substantial part of the risks inherent in operating the works/service.

Exploitation includes the right for the concessionaire to collect fees from the users of the works/service, if the service is provided upon payment.

Payments made by contracting authorities in return for work carried out or services provided must not eliminate a substantial part of the risks inherent in exploitation.

The definition contains the following elements :

- a bilateral contract (like in the case of public contracts),
- concluded in writing between a contracting authority and an economic operator ("concessionaire"),
- concerning works or services,
- for pecuniary interest,

in which consideration from the contracting authority consists in the transfer to the concessionaire of the right to exploit the work (or service) that is the object of the contract, or in this right together with payment, and

in which the concessionaire assumes the risks inherent in the exploitation of the work or service.

Services in Annex II of the Classic Directive

B

ANNEX II A (1)

Category No	Subject	CPC Reference No (1)	CPV Reference No
1	Maintenance and repair services	6112, 6122, 633, 886	From 50100000 to 50982000 (except for 50310000 to 50324200 and 50116510-9, 50190000-3, 50229000-6, 50243000-0)
2	Land transport services (2), including armoured car services, and courier services, except transport of mail	712 (except 71235), 7512, 87304	From 60112000-6 to 60129300-1 (except 60121000 to 60121600, 60122200-1, 60122230-0), and from 64120000-3 to 64121200-2
3	Air transport services of passengers and freight, except transport of mail	73 (except 7321)	From 62100000-3 to 62300000-5 (except 62121000-6, 62221000-7)
4	Transport of mail by land (3) and by air	71235, 7321	60122200-1, 60122230-0 62121000-6, 62221000-7
5	Telecommunications services	752	From 64200000-8 to 64228200-2, 72318000-7, and from 72530000-9 to 72532000-3
6	Financial services: (a) Insurance services (b) Banking and investment services (4)	ex 81, 812, 814	From 66100000-1 to 66430000-3 and from 67110000-1 to 67262000-1 (4)
7	Computer and related services	84	From 50300000-8 to 50324200-4, From 72100000-6 to 72591000-4 (except 72318000-7 and from 72530000-9 to 72532000-3)
8	Research and development services (5)	85	From 73000000-2 to 73300000-5 (except 73200000-4, 73210000-7, 7322000-0)
9	Accounting, auditing and bookkeeping services	862	From 74121000-3 to 74121250-0
10	Market research and public opinion polling services	864	From 74130000-9 to 74133000-0, and 74423100-1, 74423110-4
11	Management consulting services (6) and related services	865, 866	From 73200000-4 to 73220000-0, From 74140000-2 to 74150000-5 (except 74142200-8), and 74420000-9, 74421000-6, 74423000-0, 74423200-2, 74423210-5, 74871000-5, 93620000-0

(1) In the event of any difference of interpretation between the CPV and the CPC, the CPC nomenclature will apply.

Services in Annex II of the Classic Directive

Services in Annex II of the Classic Directive

B

Category No	Subject	CPC Reference No (1)	CPV Reference No
12	Architectural services; engineering services and integrated engineering services; urban planning and landscape engineering services; related scientific and technical consulting services; technical testing and analysis services	867	From 74200000-1 to 74276400-8, and from 74310000-5 to 74323100-0, and 74874000-6
13	Advertising services	871	From 74400000-3 to 74422000-3 (except 74420000-9 and 74421000-6)
14	Building-cleaning services and property management services	874, 82201 to 82206	From 70300000-4 to 70340000-6, and from 74710000-9 to 74760000-4
15	Publishing and printing services on a fee or contract basis	88442	From 78000000-7 to 78400000-1
16	Sewage and refuse disposal services; sanitation and similar services	94	From 90100000-8 to 90320000-6, and 50190000-3, 50229000-6, 50243000-0

(1) CPC Nomenclature (provisional version), used to define the scope of Directive 92/50/EEC.
(2) Except for rail transport services covered by category 18.
(3) Except for rail transport services covered by category 18.
(4) Except financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments, and central bank services.
Also excluded: services involving the acquisition or rental, by whatever financial procedures, of land, existing buildings, or other immovable property or concerning rights thereon; nevertheless, financial services supplied at the same time as, before or after the contract of acquisition or rental, in whatever form, shall be subject to this Directive.
(5) Except research and development services other than those where the benefits accrue exclusively to the contracting authority for its use in the conduct of its own affairs on condition that the service provided is wholly remunerated by the contracting authority.
(6) Except arbitration and conciliation services.

Services in Annex II of the Classic Directive

B

ANNEX II B

Category No	Subject	CPC Reference No	CPV Reference No
17	Hotel and restaurant services	64	From 55000000-0 to 55524000-9, and from 93400000-2 to 93411000-2
18	Rail transport services	711	60111000-9, and from 60121000-2 to 60121600-8
19	Water transport services	72	From 61000000-5 to 61530000-9, and from 63370000-3 to 63372000-7
20	Supporting and auxiliary transport services	74	62400000-6, 62440000-8, 62441000-5, 62450000-1, From 63000000-9 to 63600000-5 (except 63370000-3, 63371000-0, 63372000-7), and 74322000-2, 93610000-7
21	Legal services	861	From 74110000-3 to 74114000-1
22	Personnel placement and supply services (1)	872	From 74500000-4 to 74540000-6 (except 74511000-4), and from 95000000-2 to 95140000-5
23	Investigation and security services, except armoured car services	873 (except 87304)	From 74600000-5 to 74620000-1
24	Education and vocational education services	92	From 80100000-5 to 80430000-7
25	Health and social services	93	74511000-4, and from 85000000-9 to 85323000-9 (except 85321000-5 and 85322000-2)
26	Recreational, cultural and sporting services	96	From 74875000-3 to 74875200-5, and from 92000000-1 to 92622000-7 (except 92230000-2)
27	Other services (2)		

(1) Except employment contracts.
(2) Except contracts for the acquisition, development, production or co-production of programmes by broadcasting organisations and contracts for broadcasting time.

Country Details – Service Concessions

Member State	Czech Republic
1. Member State Authorities	
1.1 Government Departments/ Agencies responsible for Concessions/ PPP	The regulatory body competent for public procurement is the Czech Competition Office "Urad pro ochranu hospodarske souteze" The Ministry for Regional Development has operational responsibility for public procurement. The PPP Centrum was created in 2004. In cooperation with the Ministries of Finance and Regional Development, the PPP Centrum has created a Czech country-specific PPP Process Methodology, which provide the basic guidelines for the preparation and implementation of PPP projects. The methodology aims to establish a transparent procurement procedure that will ensure value for money. Central Government has a series of PPP pilot projects.
1.2 Regional Competences/ Variations	Local authorities and municipalities are responsible for a lot of public service provision in the Czech republic, but are currently making little use of concession arrangements.
2. Legislation	
2.1 Law relating to Concessions	Concept of 'concession' not used prior to application for EU membership. EU Directives transposed as Act No. 137/2006 on Public Contracts and Act No. 139/2006 on Concession Contracts and Concession Procedure (the Concession Act). Revisions of both laws are currently under consideration.
2.2 Provisions relating to (Service) Concessions	As well as Act No. 139/2006 on Concession Contracts and Concession Procedures, there are specific provisions on concessions in the Act No. 13/19997 Coll. on Terrestrial Communication from October 2003. These provisions were put into the legislation to make it possible to build highways and motorways with the use of PPP. These provisions set out the basic principles of the division of responsibilities between private and public bodies and include the required content of the concession contract.
3. Definitions	
3.1 Terminology relating to (Service) Concessions *(in original language and English)*	
3.2 National Definition of Concession	The Concessions Act does not differentiate between work concessions and service concessions, i.e. all rules apply to both types of concessions. The threshold is 20 million Czech Crowns – 700, 000 euros

3.3 National Definition of Service Concessions	
4. Sectoral Coverage	
4.1 List of Sectors covered by national Concessions Legislation	No specific reference to sectors
4.2 List of Public Service Sectors covered by Procurement Legislation	Those of the Directive Annex II (A and B)
4.3 Other Sectors not mentioned in Legislation	
5. Special Features	
5.1 General Remarks	There is little experience or implementation of PPP projects in the Czech Republic to date, however, the use of concessions and PPP may increase over the next five to ten years as the new regulations become established and as national and local Government competencies and experience develop. The Czech Government supports the use of PPP and wishes to encourage foreign participation across sectors.
5.2 Principle Variations from Conception at EU level	Unlike Directive 2004/18/EC, the Concessions Act does not define "public works concession" and "service concession", and refers only to a concession contract. The definition is implied from the fact that the contract is awarded by the public authority, and that the authority undertakes to allow the concessionaire to perform the work / service and reap the benefits from the provision of such services, or use of the executed work, and / or to enjoy a part of the consideration.
6. Evidence	
6.1 Procurement Context	The involvement of the public and private sectors working in "partnership" to deliver various key services can be described as active in the Czech Republic. There are a number of projects in different stage of preparation. Given the limited volume of PPP activity it is the case that participation of foreign players is currently small. The volume of PPP activity needs to be attractive enough for foreign players to consider participating – both in terms of the project size and also in terms of the public authority experience and competence within sectors. There are around 300 small scale projects in procurement
6.2 on Sectors with PPP Activity	PPP pilot projects in transport, justice, leisure, education and health sectors. None yet implemented. Many projects in the area of waste water / drinking water and waste management. Road toll project implemented Rail link to Prague Airport /Prague – Kladno railway line upgrade 500 BOT project for a 30km section of the D3 motorway 367
6.3 on Sectors with	No activity as yet explicitly covered by the concessions legislation.

Concessions	
6.4 General Evidence on the Extent of Service Concessions	In terms of provision of services (e.g. waste / drinking water, waste, regional transport) there are many concession contracts in place that have been operating successfully for several years already. At the local level there are a few smaller projects of a PPP nature, such as energy performance contracting schemes, public lighting services and the security maintenance at army munitions storage depots.
6.5 Value of (Service) Concessions	The capital value of the pilot projects is around €1,190 million in total
6.6 Other indicators of the Extent of (Service) Concessions (*e.g. No. of contracts/suppliers etc*)	

Member State	**Germany**
7. Member State Authorities	
1.1 Government Departments/ Agencies responsible for Concessions/ PPP	The "OPP Deutschland AG" is the competent PPP agency at federal level. It replaces the PPP Task Force which ceased its activities on 28 February 2009. The newly created agency is responsible for advising the federal government, states and municipalities on questions in relation to PPP projects. Federal, state and local governments have a majority shareholding in the company. In fact, due to the federal structure in Germany, with some competencies at *Laender* level, it has been crucial to include the *Laender*. Other agencies include the Public PPP Steering Committee, the Federal Association for Transport Infrastructure Financing (VIFG). There are PPP units in eight regions across Germany. Each of these bodies is tasked with developing know-how and standardisation of practice.
1.2 Regional Competences/ Variations	Some regions are proactive in driving PPP activity forward, such as North Rhine Westphalia, where a PPP approach and pilot projects have been developed. In Hessen, the objectives and procedures of public construction and real estate management have been redefined towards confining the public sector to its core competencies and towards an increased involvement of the private sector in the construction and operation of public facilities.
8. Legislation	
2.1 Law relating to Concessions	The transposition of the Classic and Utilities Directives was somehwat delayed in Germany and only fully transposed in April 2009 with the Law on the Modernisation of Regulations for Awarding Contracts (Gesetz zur Modernisierung des Vergaberechts). Generally with regard to procurement, in national law, the fourth

	chapter of the competition law (law against distortion of competition), the award ordinance (Vergabeverordnung VgV) and contracting rules for awarding public services and works (Verdingungsordnungen VOL/A and VOL/B) are significant. In 2005 a PPP Acceleration Act (Öffentliche Private Partnerschaften ÖPP-Beschleunigungsgesetz) came into force, removing some of the restrictions surrounding the implementation of PPP in Germany, mainly through changes to the regulations on fees and tolls. The legislation does not cover all legal aspects associated with the implementation of PPPs and concessions.
2.2 Provisions relating to (Service) Concessions	The award of service concessions falls outside the scope of current German jurisdiction. There are a number of service concessions in existence at the municipality level, which are subject to unclear rules and legal uncertainties for both the public and private sector partners.
9. Definitions	
3.1 Terminology relating to (Service) Concessions *(in original language and English)*	• Öffentlich-Private Partnerschaft (ÖPP) – PPP • Konzession - Concession • Dienstleistungskonzession – Services Concession
3.2 National Definition of Concession	There is no generally applicable definition of the term in German statutory law. However, in a 2007 report, the BMVBS defines a concession as a type of PPP model according to which the contractor bears the economic risk for providing a service. This is how the (service) concession is distinguished from the (service) contract. In exchange for bearing the risk he has the right to finance his cost by means of user fees. He is in a contractual relationship with the user. The term is colloquially used to describe a wide range of licences and permits, although it is hardly used in statutory provisions themselves. In the general use of the term, a concession may describe: a public licence or permit which is required for certain commercial activities; a public licence or permit which grants an exclusive right to render certain services of public interest in a defined area, or a licence or permit to use certain public goods. There is no legal definition of PPP. PPP is an overarching term which tends to refer to different types of cooperation between the public/private sectors.
3.3 National Definition of Service Concession	According to the 2007 BMVBS report described above, the term 'services concession' is defined similarly to the term 'concession' with the added emphasis on services in facility management, operation or financing. However, there is no definition of services concessions under German statutory law, nor is there a statutory legal regime governing their tender by public authorities. In the same way, the tendering of service concessions is not subject to the system of legal review by the procurement chambers which has been established in Germany in

	order to implement the corresponding EU Directives.
10. Sectoral Coverage	
4.1 List of Sectors covered by national Concessions Legislation	BMVSB's PPP project database categorises the projects into transport (air, train, ship & road); movables (i.e. IT, vehicles, and furniture) and civil construction (e.g. education, sport, administration)
4.2 List of Public Service Sectors covered by Procurement Legislation	Those of the Directive Annex II (A and B)
4.3 Other Sectors not mentioned in Legislation	
11. Special Features	
5.1 General Remarks	Germany's PPP initiative draws heavily on the UK experience – seen in Germany as somewhat of a pioneer in the area. The number of PPP and concession contracts in Germany has increased over the last few years and the German market continues to offer significant potential for involvement of the private sector at the state, federal and local levels. A variety of models have been developed, particularly in the infrastructure sector. There is considerable uncertainty, however, in some sectors at the local level where the regulations and processes are unclear regarding service concessions. There is also concern that the development of PPP centres at different Government levels and in different regions is leading towards a fragmentation of practices. Nevertheless, it is envisaged that the use of PPP and concessions will continue to grow in Germany.
5.2 Principle Variations from Conception at EU level	The definition of a works concession is in line with the definition provided in Article 1 Paragraph 3(a) of Directive 2004/18/EC and in Article 1 Paragraph 3(a) of Directive 2004/17/EC.
12. Evidence	
6.1 Procurement Context	In the water and waste sectors all projects are regarded as public contracts (rather than concessions) despite life cycle responsibility with the private sector.
6.2 on Sectors with PPP Activity	Institutional PPP projects (e.g. joint ventures between public and private sector organisations) have been implemented in the water and energy supply sectors and in the waste and waste disposal sectors, where there are a large number of projects involving the private sector. The BMVBS. (2009). "PPP Projekt-Datenbank." Database http://www.ppp-projektdatenbank.de/ shows 145 agreed and tendered PPP projects across 16 laender over the period 2002 and 2009, 133 in civil construction and 12 in transport.
6.3 on Sectors with Concessions	Deals completed in 2005 include construction, financing and operation of various types of facilities, such as offices, storage, water parks,

	schools and leisure complexes, with municipalities acting as public contractor. PPP schools projects constitute a major share of the PPP market in Germany, accounting for just under 30% of current PPP project value. 2 models in the transport infrastructure sector: • The F-Model enables tunnels and bridges to be built and operated by private sector partners under a concession agreement. • The A-Model allows private partners to have responsibility for construction, financing, operation and maintenance of motorway extensions. The private partner receives Heavy Goods Vehicle toll revenue for the relevant motorway sections as compensation for the construction and operation of the motorway. The key difference is that under the A-Model the private partner does not directly collect a toll from the users.
6.4 General Evidence on the Extent of Service Concessions	According to a study undertaken by the Deutsches Institut für Urbanistik, twice as many PPP contracts were concluded in the construction sector in 2004/2005 as in the preceding years. Between 2000 and 2005 around 150 projects had been contractually agreed, with many more in the pipeline, covering a range of sectors such as health, schools, prisons, transport, waste and water.
6.5 Value of (Service) Concessions	Overall, around 90 PPP construction projects have been completed, amounting to a total investment volume of around 1.4 billion Euros. There are approximately 120 projects in preparation totalling an investment of six billion Euros. (main sectors: construction, transport, IT and administrative modernization) Investment at the federal/Land level averages €70 million per project, while at the municipal level the average investment is around €16 million. Current municipal PPP projects are estimated to be worth around €3 billion of investment.
6.6 Other indicators of the Extent of (Service) Concessions (*e.g. No. of contracts/suppliers etc*)	BMVSB's PPP project database[77] does not differentiate between the various types of PPP model. Hence, it is impossible to determine which ones are (services) concessions. Nevertheless, between 2002 and 2009 a total of 145 PPP projects have either been carried out (129) or tendered (16). 25% of municipalities have used PPP as a means for investment and delivery

Member State	**Greece**

13. Member State Authorities	
1.1 Government Departments/ Agencies responsible for Concessions/ PPP	The Interministerial Committee for Public & Private Partnerships (IM PPP Committee) is a collective governmental body that defines and specialises in PPP policy, approves PPP projects for the provision of infrastructure and the delivery of services by private funds that fall under Law 3385/2005, and coordinates and monitors the implementation of PPP projects. The Interministerial PPP Committee comprises as regular members the Minister of Economy and Finance, the Minister of Development, and the Minister of the Environment, Planning and Public Works, and as special members the Minister or Ministers overseeing each of the Public Entities participating in a Partnership. The Minister of Economy and Finance chairs this Committee, oversees its work and is responsible for submitting respective recommendations to the Committee. The Interministerial PPP Committee makes its decisions following proposals by the Special Secretariat for Public & Private Partnerships (SSPPP). This Secretariat is responsible for : * the identification of the works or services which might be constructed or provided through Partnerships and be included under the provisions of Law 3389/2005, * the evaluation of the proposals submitted by public entities and their subsequent forwarding to the Inter-Ministerial PPP Committee for approval, * the promotion of the construction of works or the provision of services through the Partnership framework, * the facilitation and support of Public Entities in pursuing contract award procedures, as defined in Law 3389/2005, for the selection of Private Entities, * the monitoring of the implementation of Partnership Contracts. The Ministry of Environment, Planning and Public Works (General Secretary for Public Works) is responsible for projects falling under its remit (mainly motorways and other major infrastructure projects-airports) – For each of these projects a separate law is drafted and voted by the parliament
1.2 Regional Competences/ Variations	Municipalities are responsible for concessions concerning parking facilities but they rely on the support of Special Secretariat for PPP.
14. Legislation	
2.1 Law relating to Concessions	Presidential Decree 60/2007 implements Directive 2004/18/EC Law 3389/2005 concerning PPPs can also cover both works and services concessions type contracts in the same way (no differentiation) – For public works (motorways) procedures based on public contracts

	legislation (93/37 in the past and 2004/18) but contracts ratified by separate laws voted by the Parliament. Other areas/sectors (parking, ports/marinas, air and sea transport) governed by special legislation.
2.2 Provisions relating to (Service) Concessions	Law concerning PPP treats services and works in the same way and applies the same more demanding framework that is close to PP
15. Definitions	
3.1 Terminology relating to (Service) Concessions *(in original language and English)*	Follows EU definition (Presidential decree)
3.2 National Definition of Concession	*From P.D 60/2007 – Translation from Directive 2004/18/EC: «Σύμβαση παραχώρησης δημοσίων έργων» είναι μια σύμβαση η οποία παρουσιάζει τα ίδια χαρακτηριστικά με μια δημόσια σύμβαση έργων, εκτός από το γεγονός ότι το εργολαβικό αντάλλαγμα συνίσταται είτε αποκλειστικά στο δικαίωμα εκμετάλλευσης του έργου είτε στο δικαίωμα αυτό, σε συνδυασμό με καταβολή αμοιβής.*
3.3 National Definition of Service Concession	From P.D 60/2007 – Translation from directive 2004/18/EC : «Σύμβαση παραχώρησης υπηρεσιών» είναι μια σύμβαση η οποία παρουσιάζει τα ίδια χαρακτηριστικά με μια δημόσια σύμβαση υπηρεσιών, εκτός από το γεγονός ότι το εργολαβικό αντάλλαγμα συνίσταται είτε αποκλειστικά στο δικαίωμα εκμετάλλευσης της υπηρεσίας είτε στο δικαίωμα αυτό σε συνδυασμό με την καταβολή αμοιβής.
16. Sectoral Coverage	
4.1 List of Sectors covered by national Concessions Legislation	List of sectors in Presidential decree follows that of Directive 2004/18/EC Law 3389/2005 on PPP excludes those activities that according to the constitution are provided exclusively by the state (defence, policing, justice)
4.2 List of Public Service Sectors covered by Procurement Legislation	
4.3 Other Sectors not mentioned in Legislation	
17. Special Features	
5.1 General Remarks	The focus has been on PPPs that fall under the 3389/2005 legal framework. While possible under the 3389/2005, most PPPs so far are not concessions as defined by the Directive as in all cases there is no demand risk (payment directly from the final users) and there is only availability risk with a minimum government guarantee. The areas where there are some payments by users (e.g. catering

	facilities in hospitals) are only minor part and are not linked with the actual service provided. The payment received is linked with specific quality criteria set and penalties are high . Areas where there are user fees are motorways (but did not follow 3389/2005), parking spaces, marinas and are also expected in the areas of environmental management (water supply, waste management). Again the procedures followed according to law 3389/2005 are not those described in the Directive but rather the more extended "fully fledged" public works procedures.
5.2 Principle Variations from Conception at EU level	PPP have two types – they can be concessions as defined in the Directive based on demand risk or availability risk based on Eurostat definition. The procedures applied however are not those of the Directive for works concessions but more elaborate procedures close to the fully fledged approach for PP.
18. Evidence	
6.1 Procurement Context	The government continues to roll out its programme for additional investment in public infrastructure. It has announced a €5.7bn investment plan for non-public infrastructure with a possible 350 smaller-scale projects in the pipeline across a range of areas such as schools, police and fire stations and office accommodation. There is also an intention to introduce PPP to the health sector. There is an identifiable plan for the roll-out of PPP, involving transport, schools and then hospitals. All will be based on availability risk approach as all are seen as non-retributive and thus not viable from a private sector perspective. (possible exception waste management) The Special Secretariat for PPPs in the Ministry of Economy and Finance has a website in which tenders for PPPs and for advice services relating to PPPs are advertised. http://www.sdit.mnec.gr/en/
6.2 on Sectors with PPP Activity	Tourism (conference centres), Public administration (government buildings), Environment (waste management and treatment), Justice (prisons and courts), education (schools and universities), Health (hospitals), Port services, Defence, Transport (motorways), Real-estate development
6.3 on Sectors with Concessions	Motorways in the form of works concessions. 6 projects of 7billion through concession. 5 million for PPPs are around 5% of the total public investment programme. A number of municipal parking (works concessions) , marinas (construction and/or maintenance and services)
6.4 General Evidence on the Extent of Service Concessions	Very few if any. Waste collection and management projects (3 project although none of them implemented so far) but is unclear whether service or works concession. Air and sea transport services to small islands with limited demand (but they have a different status following EU regulation and are also based on service concession although they are governed by a separate legal framework.

6.5 Value of (Service) Concessions	52 PPP projects (concessions) for 345 infrastructures until 8/2009 with a value of 5.7billion approved by SSPPP (construction and maintenance type) Depending on the cost of the infrastructure could be considered service or works (varies) Additional 6 motorways projects (works concessions) of a total of over 7billion from MinEnv and Public Works 3 waste management projects of €450million
6.6 Other indicators of the Extent of (Service) Concessions (*e.g. No. of contracts/suppliers etc*)	Large number of application to SSPPP from municipal authorities for parking (works concessions) Preparation of contract supported by technical experts through public support programme (interest in the area of waste management and desalination units)

Member State	**Spain**
19. Member State Authorities	
1.1 Government Departments/ Agencies responsible for Concessions/ PPP	There is currently no central PPP Task Force or Unit overseeing the development of practices in delivering PPP and concession contracts. Spain is one of the few EU Member States that have not established such a body.
1.2 Regional Competences/ Variations	The autonomous regions are important players in the PPP market. The decentralisation of financial resources and decision-making (devolution) has enabled the regions to consider PPP models for investment in works and services. This enables regions to develop their own strategies and infrastructure investment programmes. The regions have autonomy to choose process and funding models.
20. Legislation	
2.1 Law relating to Concessions	**Ley 30/2007 de contratos del sector publico (Act on Public Sector Contracts; entered into force in May 2008)** transposes into Spanish legislation Directive 2004/18/EC for the award of public works contracts, public supply contracts and public service contracts. In addition, the new Act undertakes a revision of the structure and the content of Spanish public procurement legislation and introduces the competitive dialogue procedure. This Act also introduces into Spanish law the Public Private Partnership contract (PPP). The concession of public works and services is defined in detail under the Concession Act (Ley 13/2003 Reguladora del Contrato de Concesión de Obras Públicas), which regulates concession agreements

	for public works. The Concession Act came into force in August 2003. This Act supersedes the 1972 concession law governing road PPPs by providing a strong regulatory framework for PPPs not only in the transport, but also in other sectors.
2.2 Provisions relating to (Service) Concessions	The Concession Act introduces the shadow toll, the concept of availability risk and the different sources of financing for the concessionaire. There is also the express regulation of financial and economic balance statements. The concession is based on the concessionaire building and charging consumers for the use of the public facility. A concession contract may cover the construction, maintenance, and operation of a new infrastructure or the maintenance and operation of an existing infrastructure. In addition, the law regulates new private funding sources to finance concession projects: senior and subordinated loans, the issue of bonds and other securities, securitization, mortgaging of the concession assets and shares, etc. In the PPP type of contract, the private promoter is responsible for the construction and maintenance of the public facility, excluding the commercialisation. It can therefore be a mechanism for administrators to assign to the private sector a diversity of activities which did not fit under the former types of contracts.
21. Definitions	
3.1 Terminology relating to (Service) Concessions *(in original language and English)*	Under Spanish law, any PPP / PFI is considered under the general legal term of “Concesión”.
3.2 National Definition of Concession	Spanish Law establishes that any type of PPP falls mainly under the concept of concession, with full demand risk transferred to the private sector in most cases.
3.3 National Definition of Service Concession	
22. Sectoral Coverage	
4.1 List of Sectors covered by national Concessions Legislation	No sectors are mentioned
4.2 List of Public Service Sectors covered by Procurement Legislation	Those of the Directive Annex II (A and B)
4.3 Other Sectors not mentioned in Legislation	No sectors are mentioned
23. Special Features	

5.1 General Remarks	Spain has experienced significant PPP activity in a concentrated number of sectors, particularly within the road sector. With a strong local private sector market and a clear legal framework it is likely that the market for PPP and concession use will expand. There is a lack of central leadership in developing a standardised procedure. Decentralisation in Spain creates less transparency and potentially increasing barriers in the market for foreign competition.
5.2 Principle Variations from Conception at EU level	The Spanish definitions of public works concessions and service concessions are generally consistent with the EC's definitions included in the Communication; the Commission's Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions, of 30 April 2004 (COM(2004) 327 final) ("Commission's Green Paper"), or Directives 2004/17/EC and 2004/18/EC. There is however a relative difference between the Spanish and EC definitions. For works concessions under Spanish law, the concessionaire can sometimes only exploit the public works without constructing it (i.e. existing public works can be entrusted to a concessionaire even decades after the initial project construction).
24. Evidence	
6.1 Procurement Context	Existing competition at the local level, as in France and Italy, could be seen as a barrier to penetration of the market by foreign companies. There have been some instances of foreign companies entering the Spanish market but these have been limited. Spanish companies, particularly within the construction and infrastructure markets, are among the strongest in Europe. Spanish contractors, such as Cintra, Dragados and Ferrovial, have penetrated markets across the EU and elsewhere, particularly in the road sector. The administrative process can sometimes be opaque, particularly at the local level and due to the fragmentation of practices, creating therefore further barriers to entry.
6.2 on Sectors with PPP Activity	Most PPP activity has traditionally occurred and continues to take place in the road sector. In the rail sector, despite significant investment earmarked for the next 15 years, few deals were closed between 2002 and 2005. Two underground lines in Malaga have been built with investment of €4 billion. Several regional authorities are considering PPP structures for light and heavy rail schemes, including Madrid, Valencia and Andalucia. In December 2004, the Spanish Public Works Ministry (Ministerio de Fomento) presented the draft of an ambitious New Strategic Transport and Infrastructure Plan for 2005-2020 (Plan Estratégico de

	Infraestructuras y Transporte (PEIT)), for which a budget of €249 billion was agreed for the 15-year period. Areas of prominent PPP activity include healthcare, schools and prisons. A €250 million hospital project in Madrid has been completed, along with a further eight hospital schemes, totalling investment of more than €500 million. Other healthcare schemes are being developed elsewhere in Spain. PPP projects have also expanded to prisons and government buildings.
6.3 on Sectors with Concessions	31 road and 1 railway projects completed between 1997 and 2002 under the Spanish concession model governed by Law 13/1996 on tax, administrative and social order measures, Royal Decree 704/1997 on legal, budgetary and financial regime of administrative works contract.
6.4 General Evidence on the Extent of Service Concessions	
6.5 Value of (Service) Concessions	The Community of Madrid launched a €250 million hospital project and will tender out another seven hospitals for a total investment of more than €700 million under its 2003-2007 plan.
6.6 Other indicators of the Extent of (Service) Concessions (*e.g. No. of contracts/suppliers etc*)	Around €90 billion of investment will be through PPP contracts in the road (€16 billion), rail (€22 billion), port (€21 billion) and air (€15 billion) sectors. In addition a new public sector body was created (Sociedad Estatal de Infraestructuras de Transporte Terrestre) to deliver funding to the rail and road sectors. 15 schemes either closed, in finance or in tender during 2005, with a total investment value of more than €8 billion.

Member State	**France**
1. Member State Authorities	
1.1 Government Departments/ Agencies responsible for Concessions/ PPP	The DAJ (Direction des affaires juridiques of the Ministère de l'économie, de l'industrie et de l'emploi - Ministère du budget, des comptes publics et de la fonction publique) is in charge of all issues relation to concessions in France The DGCL (Direction générale des collectivités locales – Ministère de l'intèrieur) is in charge of supervising PPPs and concessions for localadministrations. The PPP taskforce (MAPPP: Mission d'Appui a la realisation des contrats de partenariat) assists the Ministry of Economy as well as local government bodies in the preparation and negotiations of

	Contrats de Partenariat. The Ministry of Health is supported by a health sector task force MAINH (Mission Nationale d'Appui à l'Investissement Hospitalier). There are also organisations within the legal and defence sectors to assist and advise on issues relating to the implementation of PPP projects.
1.2 Regional Competences/ Variations	France has five tiers of Government, the state, region, department, 'commune' and in recent years, the 'intercommunalités' (group of communes). A process of decentralisation has been taking place since the 1980s with the aim of ensuring that activities are carried out at the appropriate level. Paris and Corsica both have a different status. Projects serving local needs tend to be managed at the local level, while projects of national importance are managed by national Government, overseen by the relevant Ministry.
2. Legislation	
2.1 Law relating to Concessions	Concession contracts (Délégation de Service Public – DSP) are governed by the modified Loi Sapin (1993). In addition , a number of laws, such as the Loi MURCEF (2001) added provisions to the legislation.
2.2 Provisions relating to (Service) Concessions	Article 38 of Law n°93-122 of 29 January 1993 (Loi Sapin) as far as concessions awarded by the State and its public bodies are concerned, and, in the same terms; article L.1411-1 of the Local Authorities Code (Code Général des Collectivités Territoriales) as far as concessions awarded by local authorities and their public bodies are concerned. The Loi Sapin imposes a time limit on all public concession contracts. Contracts are to be renewed periodically, which implies competition between the outgoing and other private operators bidding for the same project. Ordinance No. 2009-864 relating to public works concession contracts amends No.2004-559 by introducing a social dimension to works concessions by obliging adjudicating bodies to take into account objectives of sustainable development and SME access.
3. Definitions	
3.1 Terminology relating to (Service) Concessions *(in original language and English)*	Délégation de Service Public - Delegation of public service
3.2 National Definition of Concession	Under a concession agreement the public entity entrusts to the concessionaire the construction and / or operation of a public infrastructure and / or public service, where the remuneration of the

	concessionaire is substantially linked to the proceeds of the operation of the service / infrastructure. There are no substantial differences between the French legal definition and that of the EC, except maybe the fact that the French courts may, in some circumstances, put a stronger emphasis on the origins of the concessionaire's remuneration. The term 'concession' in France only refers to one type of Délégation de Service Public.
3.3 National Definition of Service Concession	All contracts under which a legal public body entrusts the handling of a public service for which it is responsible to a public or private delegate whose remuneration is substantially linked to the financial results of the exploitation of the service (Loi MURCEF, 2001)
4. Sectoral Coverage	
4.1 List of Sectors covered by national Concessions Legislation	The Loi Sapin does not state specific sectors covered by the legislation. In effect, this has had the advantage of ensuring that concession-type contracts have emerged in sectors which were not thought of when the law was drafted.
4.2 List of Public Service Sectors covered by Procurement Legislation	Those of the Directive 2004/18/EC Annex II (A and B)
4.3 Other Sectors not mentioned in Legislation	n/a
5. Special Features	
5.1 General Remarks	The traditional approach to concessions and PPPs in France has recently been reviewed and modernised with a growing awareness for the advantages that PPPs entail, however, according to MAPPP figures, there are only 228 PPP contracts signed, as opposed to a stock of around 10,000 concession-type agreements
5.2 Principle Variations from Conception at EU level	No variations.
6. Evidence	
6.1 Procurement Context	There is little international participation within the French infrastructure market because of strong competition at the local level between a number of large companies, particularly in the construction and water / waste sectors. These companies are successful both in France and overseas, capitalising on their DSP experience gained in France. Some of these companies are multi-disciplinary and large, resulting in greater efficiency, lower costs and possibly lower margins, thus creating stern competition for any potential new market entrants from outside of

	France. However, in recent years, a growing number of foreign companies have appeared on the market, with the public transport (CFT – Spain, Carte Postale – Switzerland) and water and waste management being cases in point.
6.2 on Sectors with PPP Activity	France has experience with one type of PPP in particular, within the infrastructure sector, whereby the concessionaire is able to collect revenues from user tolls / fees – this has mainly been applied to toll highway projects). In the health sector, which is generally covered by legislation that inhibits PPP arrangements, care of the elderly comes under another regime and offers scope for contrats de partenariat. The MAPPP website has lists of contrats de partenariat : http://www.ppp.bercy.gouv.fr/
6.3 on Sectors with Concessions	Typically, there are many concession agreements in the following sectors (percentage of concession-type contracts by sector): Water and sanitation Waste management Urban public transport (80-90%) Inter-city transport (1,000 concessions) Heating networks (54% - 83% in volume) Gas and electricity Parking Motorways Sports facilities Swimming pools Broadband internet (60-70% ie most of France except Paris) Culture Crèches Columbaria / cemeteries Markets Catering (school/hospital) Ski and areal lifts
6.4 General Evidence on the Extent of Service Concessions	Concession-type contracts are one of the different administrative tools local authorities can use to finance a project. In this respects it competes with other types of contracts but remains the most popular type of arrangement.
6.5 Value of (Service) Concessions	And estimated EUR 80 billion
6.6 Other indicators of the Extent of (Service) Concessions (*e.g. No. of*	France has a number of companies that are highly involved in service concessions and keen on having either a 'concession directive' or, at

contracts/suppliers etc)	minimum, ensuring that concession do not enter Public Procurement legislation. They are present in a number of sectors in which service concession arise and include Veolia, Suez and Vinci. In late 2005, a total of 35 projects were to be implemented as 'contrat de partenariat' (partnership contract), eight within the transport sector, and the remainder covering a broad range of sectors. Additionally, a further ten projects were to be governed by the state and 30 projects to be developed by local authorities.

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Member State	Italy

1. Member State Authorities	
1.1 Government Departments/ Agencies responsible for Concessions/ PPP	The Italian Ministry of Economy and Finance. The organisation of public procurement in Italy is decentralised. The Authority for the Supervision of Public works/service Contracts (Autorita per la Vigilanza sui Contratti Pubblici di Lavori, Servizi e Fornitore) is an independent administrative authority dealing with concession contracts in all sectors to ensure compliance with the principles of transparency and fair competition in tendering procedures. Other supervising authorities include Consip's (Central organisation of procurements through framework contracts) price and quality benchmarks, CNIPA's (Technical and economic consulting on ICTs) economic and technical instructions and the Ministry of Infrastructures. The Italian PPP taskforce (Unità Tecnica per la Finanza di Progetto (UTFP)) was established under legislation in 1999 and began operations in July 2000. It provides expertise and assistance to public administrations in identifying projects capable of attracting private sector investment and in tendering those projects. The Cassa Depositi e Prestiti (CDP), originally a public body, offers advisory services in the project finance sector though charges a fee for advice. In January 2006 ISPA (Infastrutture SpA) merged into the CDP.
1.2 Regional Competences/ Variations	Municipalities, provinces and towns in Italy have financial autonomy and some regions (Lombardy, Veneto, Friuli Venezia Giulia, Puglia and Sicily) have already implemented their own PPP legislation and Regional Laws. Bodies have also been established at the regional level. In Lombardy a joint stock company owned by the Lombardy Region was created (Infrastrutture Lombarde SpA) with the aim of assisting in the implementation of infrastructure programmes in the region. This body is now responsible for the award and management of major concession contracts in the health and transport sectors
2. Legislation	
2.1 Law relating to Concessions	The Legislative Decree No. 163/2006 (Regulation of public procurement regarding works, services and supplies implementing Directives 2004/17/EC and 2004/18/EC) also known as Codice De Lise. Since July 2006 the Merloni Law, Target Law (443/2001) and Decree 190 have been rearranged under and repealed by Decree No. 163/2006. Article 30 of the law relates specifically to service concessions. The Merloni Law (109/1994) constituted the central focus of legislation relating to PPP implementation, alongside the Target Law and Decree 190, both of which were enacted to facilitate the realisation of major infrastructure projects of national strategic importance. Public service concessions are ruled by article 112 to 123 of legislative decree 267/2000, which have been amended a number

	of times, most recently by law 135/2009 voted in November 2009.
2.2 Provisions relating to (Service) Concessions	Regional laws on PPP also exist and regulate PPP contracts awarded by authorities at the local level. The procurement route for the awarding of concession agreements for the construction and management of public works under the Merloni Law (Art. 19, second para) has substantially remained the same. However the characteristics of public works concessions are now defined under Art. 143 of the Codice De Lise (163/2006) and the role and duties of the sponsors (promotori) are defined under Art. 153 of the same decree. Pursuant to Art. 153, the indicative notice to be published by the awarding authority shall also indicate the criteria under which the proposals will be evaluated, which the sponsor must take into account. Service concessions are regulated by art.30 of the Public Contracts Code Decree 163/2006 available from: http://www.anticorruzione.it/Portals/altocommissario/Documents/Legislazione/d.lgs.%2012%20aprile%202006,%20n.%20163.pdf
3. Definitions	
3.1 Terminology relating to (Service) Concessions *(in original language and English)*	Concessione di servizi publici (Public services concession) Concessione di lavori publici (Public works concession)
3.2 National Definition of Concession	The Italian definition of public works concession is generally consistent with the one contained in the Public Procurement Directives and Communication. The texts of Article 3(11) and 15(ter) of the Code and Article 1(3) of the Directive 2004/18/EC are slightly different, since the Code contains a detailed indication of the activities, which are the object of the concession, while the Directive 2004/18/EC only defines public works concessions as "contracts of the same type as a public works contract".
3.3 National Definition of Service Concession	*Art. 12*: Service Concessions are contracts of the same nature as public service contracts, except in that the provision of services consists either solely of the right to exploit the service or the right plus payment.
4. Sectoral Coverage	
4.1 List of Sectors covered by national Concessions Legislation	Works concessions covered in art. 143 par.1 The main purpose of the Legislative Decree 163/2006 ('Public Contracts Code') is to consolidate in a single piece of legislation the framework applying to public works contracts, public supplies contracts, and public services contracts.
4.2 List of Public Service Sectors covered by Procurement Legislation	Those of the Directive Annex II (A and B)
4.3 Other Sectors not mentioned in Legislation	There are specific regulations for the energy and gas sectors which are exempt from the provision of decree law 135/2009 Awarding procedures in the waste sector are ruled by article 199 to 206 of decree law 152/2006.

5. Special Features	
5.1 General Remarks	Despite the complex legislative structure the PPP market is strong and growing in Italy. The lack of a standardised approach could be acting as a barrier to market entry for foreign players, resulting in continued growth within the local private sector market.
5.2 Principle Variations from Conception at EU level	The Code distinguishes between executive design and definitive design. Both activities can be granted by a public works concession, while the definitive design is not included in the possible object of public works contracts. In other words, in the case of public works contracts, the definitive design is identified by the awarding authority, while in case of concessions, it may be granted to the concessionaire. Directive 2004/18/EC does not make such distinction. The above differences between the Code and the Directive 2004/18/EC are in line with the distinction between public works contracts and works concessions contained in the Communication. Article 3(12) of the Code and Article 1(4) of Directive 2004/18/EC, which define public service concessions, are exactly the same. Also the definition of public service contract contained in the Code (which is referred to in the definition of public service concessions) is exactly the same as the one contained in Directive 2004/18/EC (Article 1(2)(d) and its Annex II as compared to Article 3(10) and Annex II of the Code).
6. Evidence	
6.1 Procurement Context	To date, political momentum has been firmly behind PPPs. Ongoing private sector involvement in the delivery and management of these services is, however, highly dependent upon the commitment to PPPs of the political party or parties in charge at both national and local levels of Government at any one time.
6.2 on Sectors with PPP Activity	Transport has been the most active sector in the Italian PPP market between 2000 and 2005 with rail and road projects reaching financial close
6.3 on Sectors with Concessions	The pipeline for private sector involvement within the transport sector is extensive. In 2006 ANAS (the public sector authority in the motorway sector) approved a master plan comprising seven new road infrastructures with a value of €10.4 billion. There are also a number of light rail projects in the pipeline: -Milan Metro Line 5 (€504 million) and Line 4 (€788 million); - Rome Underground Line C (€2.5 billion) and Line D (€1.8 billion); and, - Sicily Taormina Light Rail (€31 million). - Minimetro Perugia Light Rail (€445 million); - Florence Light Rail (€290 million); and, - A3 Salerno – Reggio Calabria Motorway sections 1, 5, 6 and 7 (circa €2.1 billion in total). In 2005 alone there were 19 transport infrastructure initiatives underway and over 200 car park PPP projects.
6.4 General Evidence on the	In 2005 alone there were over 200 car park PPP projects.

Extent of Service Concessions	
6.5 Value of (Service) Concessions	The average PPP project value in Italy is low – the PPP Task Force state that 90% of projects between 2000 and 2005 had a value of below €20 million. The success rate of PPP projects reaching evaluation stage between 2002 and 2004 was low also – only 200 out of 1400 potential PPP projects reached adjudication stage.
6.6 Other indicators of the Extent of (Service) Concessions (*e.g. No. of contracts/suppliers etc*)	Two major projects were finalised during 2005 – the Basso and Alto Valdarno Waste Water Projects (€781 million) and the Sicilacque Water distribution Project (€564 million). There are also a number of major projects in the pipeline including the Sicily Water Projects (€1.3 billion, €502 million and €290 million) and the Naples Water Waste Project (€115 million). According to recent research, there is no foreign participation in small-scale projects of less than €20 – €50 million in value

Member State	**Portugal**
1. Member State Authorities	
1.1 Government Departments/ Agencies responsible for Concessions/ PPP	PPP law in Portugal has defined a supervisory and interventionist role for the Gabinite de Acompanhamento do Sector Empresarial di Estado, Parcerias Público-Provadas e Concessões of the DGFT General directorate of Fincance and Treasury - Ministry of Finance, which, together with the Ministry of the sector concerned, is involved in all phases of the definition, preparation, competitive tendering, auditing and modification of PPPs. The Ministry for Public Works, Transports and Telecommunications has a general competence on Public Procurement legislation for transports. The ministry of Health has the same for hospitals. Parpública - Participações Públicas (SGPS) S.A. - is a public holding company with responsibility for managing the State's portfolio holdings, notably in companies under a privatization process. In addition the company provides technical assistance to the government on the setting-up of PPPs namely concessions. It also acts as a consultant of the Ministry of Finance. Parpública's president and board of directors are appointed by the council of ministers. Despite this, the current president has been in place for over 20 years, ensuring the stability of the organisation.
1.2 Regional Competences/ Variations	
2. Legislation	
2.1 Law relating to Concessions	The Public Contract Law (Decreto-Lei No. 18/2008 - Código dos Contratos Públicos) regulates the creation and execution of public contracts. It transposes Directives 2004/17/EC and 2004/18/EC into Portuguese

	legislation. To coordinate current and future PPPs the Portuguese Government has adopted Law 141/2006, superseding *Decree-Law 86/2003* defining new appraisal procedures for public-private partnership (PPP). It recognises PPPs as a fundamental policy instrument reflecting a trend towards curbing state intervention and expenditure, and greater reliance on the expertise of the private sector to satisfy collective needs. However, the intention is that PPPs should only be used when they are clearly advantageous and satisfy various tests of efficiency and effectiveness, i.e. value for money, with a clear division of inherent risks between the public and private sectors. The law clearly requires the public entity to measure the risks and avoid future compensations to the private entities or payments unforeseen when the agreement was negotiated. The public entity must negotiate a PPP with a reasonable assurance of the stability of such agreement.
2.2 Provisions relating to (Service) Concessions	The Public Contract Law mandates public entities (central or local administration) to carry out public procurement when the award value is greater than a given amount. These public procurements can be public works contracts, public works concessions, public service concessions, lease or the acquisition of movable property, or acquisition of services. Private sector companies use project finance as a means of funding large projects off balance sheet. The private companies create a special purpose vehicle (SPV), which consists of the consortium shareholders and is created as an independent legal entity that enters into contractual agreements with a number of other parties necessary in a project deal. The public entity – the state and other public entities – awards the SPV an agreement (public works concession agreement or public service concession agreement) granting it an exclusive ownership of a specific facility or asset for a certain number of years. At the end of the agreement the asset is handed back to the public sector. The agreement usually entitles the SPV to build, finance and operate for a fixed period of time, although there are variants. Restricted and Open Procedures have been traditionally the most widely used procurement routes in Portugal. Taking advantage of the two-phase process, Restricted Procedure has been favoured for projects in which there is a significant risk regarding the possible outcome, technology or knowledge of the project being tendered in order to select the right set of skills that mitigate these risks.
3. Definitions	
3.1 Terminology relating to (Service) Concessions *(in original language and English)*	Concessão (concession)or contrato de gestão (management contract) in the health sector
3.2 National Definition of Concession	The PPP law has created other types of agreements, such as: (i) the services agreement (contrato de prestação de serviços)

	where the public entity continues to operate the public service and the private entity cooperates in certain services; or (ii) the management agreement (contrato de gestão) according to which the private entity manages a public establishment rendering services to third parties and is paid a fixed or variable amount periodically by the public entity (these type of agreements are used in the health sector)
3.3 National Definition of Service Concession	A service concession occurs when more than 50% of the total value of the project is
4. Sectoral Coverage	
4.1 List of Sectors covered by national Concessions Legislation	No sectors are mentioned in the legislation
4.2 List of Public Service Sectors covered by Procurement Legislation	No sectors are mentioned in the legislation
4.3 Other Sectors not mentioned in Legislation	
5. Special Features	
5.1 General Remarks	There is enthusiasm for the PPP concept, given the infrastructure needs and high deficit level.
5.2 Principle Variations from Conception at EU level	There is no variation between PPPs and concessions.
6. Evidence	
6.1 Procurement Context	The financial crisis has had an impact on PPP/PFI procurements in Portugal. Since early 2009. However, both the number of project and their value has increased in 2009.
6.2 on Sectors with PPP Activity	Road Infrastructures (toll, availability tax and SCUT projects), the future Airport Project for Lisbon, High speed rail links within Portugal and from Lisbon to Madrid, healthcare. In 2004 and 2005 the Portuguese government planed to procure 10 hospital projects as design, build, finance, and operate (DBFO) PPPs. These projects are ruled by the new legislation concerning PPPs and by specific legislation applicable to PPPs in the health sector. Parpública's website has a list of past and running concessions in different sectors : http://www.parpublica.pt/pppscontratadas.html The Portuguese Court of Auditors is the national authority in charge of supervising all public expenses. Its website contains reports assessing the performance of different concessions contracts.
6.3 on Sectors with Concessions	Service concessions have been granted in the rail transport sector. A PPP arrangement governing the development of a health service call centre was initiated in 2004.

6.4 General Evidence on the Extent of Service Concessions	Prior to the financial crisis, Portugal had a very ambitious infrastructure plan, featuring a number of high-profile projects such as 5 stretches of TGV (fast trains infrastructure), 10 hospitals, meeting EU requirements for renewable energy and a schools refurbishment programme. The pipeline is coming under scrutiny for political and economic reasons, however, given the complexity of these projects, it is expected that most of them will be procured under the Competitive Dialogue procedure.
6.5 Value of (Service) Concessions	High Speed Rail Project: €13bn
6.6 Other indicators of the Extent of (Service) Concessions (*e.g. No. of contracts/suppliers etc*)	25 current projects as of January 2007.

Member State	**United Kingdom**
1. Member State Authorities	
1.1 Government Departments/ Agencies responsible for Concessions/ PPP	**HM Treasury's Corporate and Private Finance Team** sets PPP and complex procurement policy for England. (http://www.hm-treasury.gov.uk/ppp_index.htm) The team is responsible for: • policy development and delivery; • approving all PFI projects before procurement commences – this role will soon extend to approving all PPP projects in advance of procurement; • development of, and amendments to, the standard PFI contract (currently at version 4). HM Treasury must approve any derogations from this contract; • providing support to major PPP projects; • producing PFI statistics. Each Government department has its own Private Finance Unit (PFU), which is responsible for delivering their programme of PPP projects. **The Office of Government Commerce** (OGC) was established in 1999 as a central procurement organisation, promoting efficiency in government procurement procedures. The OGC's Policy and Standards Framework covers all the key procurement policies to which contracting authorities are expected to adhere. (www.ogc.gov.uk)

1.2 Regional Competences/ Variations	The Welsh Assembly in Wales, the Scottish Executive in Scotland and the Northern Ireland Assembly have devolved responsibilities relating to public procurement, though they have mainly established parallel institutions to those in England and differences are a matter of emphasis (or variations to recognise local law). There are no material differences from England in relation to concessions.
2. Legislation	
2.1 Law relating to Concessions	The Consolidated Directive (2004/18/EC) has been implemented in UK law by the Public Contracts Regulations 2006 in England, Wales and Northern Ireland, (coming into force on 31st January 2006) and as the Public Contracts (Scotland) Regulations 2006 in Scotland. There are no specific national provisions on concessions.
2.2 Provisions relating to (Service) Concessions	None
3. Definitions	
3.1 Terminology relating to (Service) Concessions *(in original language and English)*	(Service) Concession
3.2 National Definition of Concession	No legal definition of concessions beyond EU definition: '"public works concession contract" means a public works contract under which the consideration given by the contracting authority consists of or includes the grant of a right to exploit the work or works to be carried out under the contract' (Public Contracts Regulations 2006)
3.3 National Definition of Service Concession	None
4. Sectoral Coverage	
4.1 List of Sectors covered by national Concessions Legislation	Not applicable
4.2 List of Public Service Sectors covered by Procurement Legislation	Those of the Directive Annex II (A and B)
4.3 Other Sectors not mentioned in Legislation	
5. Special Features	
5.1 General Remarks	The vast majority of investment in the UK's public services has been and will continue to be, procured through conventional means. However, public private partnerships, and the Private Finance Initiative

	in particular, have been used to deliver some of the government's most complex and significant public sector infrastructure projects and programmes. The UK has delivered over 650 projects via the PFI, which is appropriate where there are major and complex projects with significant ongoing maintenance requirements. Since 1997 the UK Government has established clear criteria for where PFI is likely to provide better value for money than other forms of procurement and made a number of policy reforms to ensure that PFI continues to deliver value for money. As a result the UK's PFI programme is supported by a considerable body of specific guidance, such as standard contracts and value for money guidance, that has become a core template in how to procure a PFI scheme successfully. Both works and service concession contracts have been awarded as part of the UK's PFI/PPP programme. The award of these contracts have followed a fully competitive route in line with UK policy of achieving value for money and following the EC Treaty and the EC procurement rules, where appropriate.
5.2 Principle Variations from Conception at EU level	None.
6. Evidence	
6.1 Procurement Context	The public sector spends over £125 billion a year on procurement according to the review in 2007 entitled 'Transforming government procurement'. In Scotland and in Northern Ireland, there are minor differences of emphasis, in terms of procedures and sectors targeted. Wales has a pattern closer to that in England. Partnerships UK has a database which aims to provide an evidence base for all projects with a public-private focus (primarily PFI) within the UK. http://www.partnershipsuk.org.uk/PUK-Projects-Database.aspx
6.2 on Sectors with PPP Activity	PFI comprises 10-15 per cent of total investment in public services. By April 2009, there had been 116 signed PFI projects with the total capital value of £ 12.4 billion. Sectors include roads and public transport, waste management services, hospital and health services, education and defence, but also fire services.
6.3 on Sectors with Concessions	Transport, both roads and railways. Water company contracts may also be regarded as concessions. In all cases standard procurement procedures are followed leading up to contracts..
6.4 General Evidence on the Extent of Service Concessions	None held centrally.
6.5 Value of (Service) Concessions	No separate information held centrally.

6.6 Other indicators of the Extent of (Service) Concessions (*e.g. No. of contracts/suppliers etc*)	No separate information held centrally.