



# CONCESSIONS AND AUTHORISATIONS UNDER EU LAW: DIFFERENTIATION

**Commission Government Experts Group on Public Procurement  
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**DG GROW G3 – Procurement Legislation and Enforcement  
European Commission**

# Diversity of legal setups

Concessions

Public contracts

Authorisation schemes

Lease contracts

Confusion between concessions and authorisations is recurrent

# Definitions

## **Concession:**

contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrust the execution of works the provision or the management of services to one or more economic operators the consideration for which consists either solely in the right to exploit the works or services that are the subject of the contract or in that right together with payment

(Article 5 of Concessions Directive 2014/23/EU)

## **Authorisation scheme:**

any procedure under which a provider or recipient is in effect required to take steps in order to obtain from a competent authority a formal decision, or an implied decision, concerning access to a service activity or the exercise thereof

(Article 4 of Services Directive 2006/123/EC)

# Examples of simple differentiation

- Concession: a single economic operator is bound to build a motorway according to the specific requirements given by a public authority and can subsequently exploit that motorway
- Authorisation: any economic operator can exercise an activity in the food distribution sector provided that it fulfils the general legal requirements for that activity

# Examples of more complex differentiation

- One economic operator carries out in exclusivity an activity in a public domain, like a port
- Only a limited number of economic operators selected by the public authorities can have access to a certain activity

## Main legal references (I)

Case C-536/07, *Commission v Germany* (KölnMesse)

In a public works contract, *"the work should be executed in accordance with the requirements specified by the contracting authority; the means of that execution are immaterial"*

Case C 451/08, *Helmut Müller*

*"The concept of 'public works contracts' (...) requires that the contractor assume a direct or indirect obligation to carry out the works which are the subject of the contract and that that obligation be legally enforceable in accordance with the procedural rules laid down by national law"*

## **Main legal references (II)**

Recitals 13-15 of Concessions Directive 2014/23/EU  
(also recital 9 of Directive 2014/24/EU  
and recital 11 of Directive 2014/25/EU)

Recital 57 of Services Directive 2006/123/EC

# Main differentiation criterion

Procurement of works or services pursuant to specific legally-binding requirements

(as opposed to mere compliance with legal conditions for carrying out an economic activity)



## Other differentiation criteria

Contractual relation, with mutually binding obligations  
(also possible in lease contracts/agreements)

Initiative coming from contracting authority / entity  
(as opposed to request coming from economic operator)

Possibility for economic operator to pull out  
is limited or prohibited  
(as opposed to general freedom to do so  
and even not to use a granted authorisation)

# Terminology

A legal setup that falls within the concept of concession under EU law must be treated as such

The classification given to that legal setup under national law or by the public authority does not have consequences in relation to the application of EU public procurement rules (KölnMesse)

The national terminology might be misleading

# Consequence of differentiation: main applicable EU law

Unless an exception applies:

Both concessions and authorisations  
Articles 49 and 56 TFEU

Concessions  
Concessions Directive 2014/23/EU

Authorisations  
Services Directive 2006/123/EC  
(and / or other sectorial rules)

# Main conclusions

The procurement of specific works or services is the main differentiation criterion

A legal setup that falls within the concept of concession under EU law must be treated as such regardless of the terminology used in national law

# Thank you for your attention

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