

PROPOSAL FOR A DIRECTIVE
ON THE AWARD OF CONCESSION CONTRACTS

OBSERVATIONS BY ASECAP MEMBERS



ASECAP FULL MEMBERS			Companies*	Km*
Austria		ASFINAG Autobahnen- und Schnellstraßen- Finanzierungs-Aktiengesellschaft	3	2.175,7
Croatia		HUKA Hrvatska Udruga Koncesionara za Autoceste s naplatom cestarine	4	1.240,7
Denmark		SUND & BAELT Holding A/S	2	34
Spain		ASETA Asociación de Sociedades Españolas Concesionarias de Autopistas, Túneles, Puentes y Vías de Peaje	33	3.365,51
France		ASFA Association professionnelle des Sociétés Françaises concessionnaires ou exploitantes d'Autoroutes et d'ouvrages routiers	19	8.847,4
Greece		TEO Fonds Routier National Hellénique	8	1.658,5
Hungary		AKA Alföld Koncessziós Autópálya Zrt.	5	1.081
Ireland		ITIA Irish Tolling Industry Association	8	329
Italy		AISCAT Associazione Italiana Società Concessionarie Autostrade e Trafori	23	5.689,1

Norway		NORVEGFINANS Norske Vegfinansieringsselskapers Forening	41	872
Netherlands		N.V.Westerscheldetunnel	1	20
Poland		AWSA Autostrada Wielkopolska	3	300
Portugal		APCAP Associação Portuguesa das Sociedades Concessionárias de Auto-Estradas ou Pontes com Portagens	7	1.701,3
United Kingdom		Macquarie Motorway Group	1	42
Serbia		Public Enterprise "Roads of Serbia"	1	603
Slovenia		DARS Družba za avtoceste v Republiki Sloveniji, d.d.	1	606,6
ASECAP ASSOCIATE MEMBERS			Companies*	Km*
Germany		TOLL COLLECT GmbH	1	12.788
Morocco		ADM Société Nationale des Autoroutes du Maroc	1	1.096
Slovak Republic		NDS Národná diaľničná spoločnosť	1	415,1
Czech Republic		KTS KAPSCH Telematic Services	1	1.318,6
TOTAL ASECAP NETWORK			164	44.183,51

*Source: 2011 ASECAP Statistical Bulletin



1. THE EUROPEAN ASSOCIATION OF OPERATORS OF TOLL ROAD INFRASTRUCTURES (ASECAP)

ASECAP is the European Association of Operators of Toll Road Infrastructures. It is the sole pan-European organization that brings together members spanning more than 44.000 km of motorways, bridges and tunnels, from 20 countries¹. The network of ASECAP's members thus constitutes a large part of the Trans-European Road Network.

ASECAP's mission is to promote tolling as the most efficient tool to finance the construction, operation and maintenance of motorways and other major road infrastructures. ASECAP and its members are committed to:

- Exchanging information and experience, participating in research programmes and further developing and enhancing the direct “user-payer” toll system as an instrument of a sustainable, safe and environmentally friendly transport policy.
- Strengthening the efficiency of their networks and permanently improving the level of services provided to the European citizens, by keeping up with the latest technology developments and the best operational practices.

2. PRELIMINARY CONSIDERATIONS

The main aim of the proposed Directive is to clarify the legal framework applicable to the award of concessions, clearly defining its scope of application.

More specifically, the proposed legislation aims at establishing a clear legal framework in order to guarantee the legal certainty that contracting authorities and contracting entities require, so as to ensure actual access to the market for concessions to all European enterprises, contributing thus towards the development of public-private partnerships – for which concessions are a privileged instrument – that have become even more necessary in light of the economic and financial difficulties facing Member States.

¹ Source: ASECAP Statistical Bulletin 2011.

ASECAP's members:

- Share the view that the proposed Directive should aim at opening the market to fair, transparent and undistorted competition.
- Support all efforts aimed at eliminating any legal uncertainty related to the extent to which concession contracts regulate the relations between the contracting parties and at restricting the arbitrariness of contracting decisions. To this end, it is important to introduce elements that guarantee the **certainty of concession contracts** signed between parties, in particular as regards the extent to and the conditions under which terms of the contracts may be modified or not, in terms of their economic-financial equilibrium.
- Believe that the risk transfer to the concessionaires is a crucial market condition. However, the legal framework should allow the concessionaire to rely on the necessary flexibility during the performance phase, as well as after the termination of the concession, relating both to possible contractual modifications – which appear natural given the contracts' long term duration – and contract performance procedures.
- Consider that equal market conditions should be treated equally while different conditions should be treated differently and thus express their strong concern that the awarding criteria for works concessions and service concessions – even though different by their nature – are covered by the same legal framework.
- Consider, as a crucial point, that a clear differentiation must be maintained between public works contracts and concession contracts, with respect to the need for the latter, as they are long-term contracts, **to be able to adapt and to conform to the developments of the service offered to the users**.

3. SPECIFIC COMMENTS

A. Definitions (Article 2)

The proposal seems to consider that the concessionaire must not have any type of guarantee for investment recovery.

In concession contracts, however, it is mandatory that the return of the investment for the construction of a public infrastructure be somehow assured by the contracting authority. Otherwise, the possible termination of the concession for reasons beyond the performance of the concessionaire would give rise to an unjustified enrichment of the contracting authority.

Moreover, for the concession project to be eligible for financing, the public authority must guarantee the payment of the infrastructure whose ownership is transferred, notwithstanding the responsibilities, application of penalties or damages that may apply in case of non-compliance by the concessionaire.

The Directive must thus duly reflect this point, as it is essential for the viability of the project to obtain funding from financing institutions.

Finally, the Directive must bring about the necessary guarantees for the concessionaire regarding the preservation of the economic and financial equilibrium of the concession, in cases where this equilibrium would be affected to the detriment of the concessionaire by actions falling under the responsibility of the contracting public authority or other public authorities, or by events that were unpredictable when the contract was signed and that are beyond the correct performance of the concessionaire. To this end, the Directive must ensure the necessary rebalancing mechanisms, such as deadline extensions, rate increases or compensatory allowances.

B. Methods of calculating the estimated value of concessions (Article 6)

The estimated value of the concession is a crucial yet complex matter of the awarding contract. Based on the necessary cooperation between the contracting parties to establish a common calculation methodology, the estimated value of the concession should reflect the additional annual turnover from the beginning of the concession contract to its end.

C. Duration of the concession (Article 16)

As proposed, the duration of concessions should indeed be limited to the estimated time needed for the concessionaire to recoup the investments made in operating the works or services, together with a reasonable return on invested capital.

In order to be able to undertake major infrastructure works that require long repayment periods (60 years or more), the Directive should specify explicitly that the term of the concessions shall exclusively be limited by the time estimated to be necessary to recoup investments and obtain a reasonable industrial profit.

D. Groups of economic operators (Article 22)

In the Commission's proposal, Article 22 of the draft Directive *inter alia* indicates that "*Contracting authorities and contracting entities may establish specific conditions for the performance of the concession by a group, provided that those conditions are justified by objective reasons and proportionate*".

This provision appears too generic and may cause misunderstandings, in particular as regards the intended meaning of "*specific conditions*", which remains unclear. The provision in question risks legitimising the introduction, at national level, of bans on the performance of contracts or parts thereof through subcontracting.

E. Subcontracting (Article 41)

According to Article 41 of the draft Directive as proposed by the Commission, which is the sole provision dealing with subcontracting by the concessionaire, the awarding administration may ask or may be required by a Member State to ask the tendering concessionaire to indicate, in its offer, the share of the contract it intends to subcontract, as well as the proposed subcontractors.

It would be advisable to make explicit in the Directive that the EU legislator's objective pursued through the provision on subcontracting is to bring about more flexibility and simplification.

In fact, the concessionaire assumes the so-called "substantial operating risk". Consequently, the concessionaire must be left free to perform the long-term contract by organising and adjusting to the market conditions as the concessionaire believes most suitable within the full respect of the contract signed.

In simple terms, this implies that the risk taker, i.e. the concessionaire, must have the flexibility to perform the contract directly, availing itself also of affiliate companies, or by freely subcontracting works and/or services to third parties. The concessionaire should also be free to perform the contract directly by availing itself of enterprises that belong to its business group.

Consequently, the concessionaire should not be required to comply with any prior advertising obligation in this regard, or to respect any terms governing subcontracting to third parties, because any such obligation would constitute unjustified market interference in case the concessionaire possesses all the means and the capacity to perform the contract within its own organisation.

F. Modification of concessions during their term (Article 42)²

Article 42 of the draft Directive proposed by the Commission introduces, first of all, the general principle according to which a substantial modification to the contract during its performance normally triggers a new award procedure (paragraph 1). Moreover, a definition of what constitutes a “substantial modification” is provided (paragraph 2), while also cases where contractual modifications are not considered as “substantial” and do not therefore require a new award procedure are provided (paragraphs 3, 4 and 5). Lastly, conditions are provided under which a new award procedure is exceptionally not required notwithstanding a substantial modification (paragraph 6).

However, the related provisions require the three following clarifications:

1. The provisions governing substantial modifications should not apply to concessions already existing prior to the entry into force of the Directive, in cases where such modifications would occur after the entry into force of the directive.
2. The complementary works described in paragraph 6 of the article, for which a derogation is accepted under point (c) when the price increase does not exceed 50% of the value of the original concession, should be assessed against the estimated value of the concession as defined in Article 6. For public works concessions, the value of additional works shall not exceed 50% of the value of the total amount of public works performed under the considered concession contract.
3. Where modifications aim at compensating the risks of price increases resulting from price fluctuations (Paragraph 7) or resulting from the restoration of the economic and financial equilibrium of the concession (Paragraph 2) following the detrimental effects of actions falling under the responsibility of the contracting authorities or of unpredictable events beyond the correct performance of the concessionaire, these modifications should not be considered as substantial modifications.

² The comments regarding Article 42 of the draft Directive on the award of concession contracts also apply *mutatis mutandis* to Article 72 (« Modification of contracts during their term ») of the European Commission’s Proposal for a Directive on public procurement.

G. Termination of concessions (Article 43)³

The drafting of Article 43 of the draft Directive as proposed by the Commission creates great legal uncertainty. More precisely, incorrect action by the administration of a Member State should not lead to damages for the concessionaire and should thus never be sanctioned by the termination of the concession.

Therefore, point c) of this article should be deleted: without prejudice to the effects of a ruling of the Court of Justice of the EU on national legislation, it is required for the sake of legal certainty that the possible termination of a contract falls exclusively under the national jurisdiction of each Member State and that the grounds for termination are defined in national legislation.

³ The comments regarding Article 43 of the draft Directive on the award of concession contracts also apply *mutatis mutandis* to Article 73 (« Termination of contracts ») of the European Commission's Proposal for a Directive on public procurement.

4. RELATED AMENDMENTS

A. Article 2 – Definitions

1. (unchanged)

2. *The right to exploit the works or services as referred to in points 2, 4 and 7 of the first paragraph shall imply the transfer to the concessionaire of the substantial operating risk. The concessionaire shall be deemed to assume the substantial operating risk where it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services which are the subject-matter of the concession.*

That economic risk may consist in either of the following:

(a) the risk related to the use of the works or the demand for the provision of the service; or

(b) the risk related to the availability of the infrastructure provided by the concessionaire or used for the provision of services to users.

This remains without prejudice to guarantees for the concessionaire and related rebalancing mechanisms to ensure the preservation of the economic and financial equilibrium of the concession, in cases where this equilibrium would be affected to the detriment of the concessionaire due to actions falling under the responsibility of the contracting public authority or other public authorities, or due to events that were unpredictable when the contract was signed and that are beyond the correct performance of the concessionaire.

B. Article 6 – Methods of calculating the estimated value of concessions

1. ~~The calculation of the~~ estimated value of a concession shall be the result of the additional annual turnover from the beginning of the concession contract to its end based on the total amount payable, net of VAT, as estimated by the contracting authority or the contracting entity, including any form of option and any extension of the duration of the concession.

2. ~~The estimated value of a concession shall be calculated as the value of an entirety of works or services, even if purchased through different contracts, where the contracts are part of one single project. Indications for the existence of one single project consist in overall prior planning and conception by the contracting authority or contracting entity, the fact that the different elements purchased fulfil a single economic and technical function or that they are otherwise logically interlinked.~~

~~Where the contracting authority or the contracting entity provides for prizes or payments to candidates or tenderers it shall take them into account when calculating the estimated value of the concession.~~

3. The choice of the method used to calculate the estimated value of a concession shall not be made with the intention of excluding it from the scope of this Directive. A works project or an entirety of services shall not be subdivided with the effect of preventing it from falling within the scope of this Directive, unless justified by objective reasons.

4. This estimate shall be valid at the moment at which the concession notice is sent, or, in cases where such notice is not foreseen, at the moment at which the contracting authority or the contracting entity commences the concession award procedure, in particular by defining the essential characteristics of the intended concession.

~~5. With regard to public works concessions and works concessions, calculation of the estimated value shall take account of both the cost of the works and the total estimated value of the supplies and services that are made available to the contractor by the contracting authorities or entities provided that they are necessary for executing the works.~~

6. Where a proposed work or purchase of services may result in concessions being awarded at the same time in the form of separate lots, account shall be taken of the total estimated value of all such lots.

7. Where the aggregate value of the lots is equal to or exceeds the threshold laid down in Article 5, this Directive shall apply to the awarding of each lot.

8. Contracting authorities or contracting entities may award concessions for individual lots without applying the provisions on the award provided for under this Directive, provided that the estimated value net of VAT of the lot concerned is less than EUR 1 million. However, the aggregate value of the lots thus awarded without applying this Directive shall not exceed 20% of the aggregate value of all the lots into which the proposed work or the proposed purchase of services has been divided.

~~9. The value of services concessions shall be the estimated total value of services to be provided by the concessionaire during the whole duration of the concession, calculated in accordance with an objective methodology which shall be specified in the concession notice or in the concession documents.~~

~~The basis for calculating the estimated concession value shall, where appropriate, be the following:~~

~~(a) for insurance services: the premium payable and other forms of remuneration;~~

~~(b) for banking and other financial services: fees, commissions, interest and other forms of remuneration;~~

~~(c) for design services: fees, commission payable and other forms of remuneration;~~

10. The value of concessions shall include both the estimated revenue to be received from third parties and the amounts to be paid by the contracting authority or the contracting entity.

C. Article 16 – Duration of the concession

The duration of the concession shall exclusively be limited to the time estimated to be necessary for the concessionaire to recoup the investments made in operating the works or services together with a reasonable return on invested capital.

D. Article 22 – Groups of economic operators

1 to 3. (unchanged)

4. Contracting authorities and contracting entities shall not establish specific conditions for participation of such groups in concession award procedures which are not imposed on individual candidates. In order to submit an application or a tender, these groups shall not be required by the contracting authorities or contracting entities to assume a specific legal form.

Contracting authorities and contracting entities may establish specific conditions for the performance of the concession by a group, provided that those conditions are justified by objective reasons and proportionate and that they do not prohibit the performance of contracts or parts thereof through subcontracting. Those conditions may require a group to assume a specific legal form once it has been awarded the contract, to the extent that this change is necessary for the satisfactory performance of the concession.

E. Article 41 – Subcontracting

- A new recital (“whereas”) should be introduced to stress the objective of the Directive aimed at ensuring the necessary flexibility and simplification required for concessionaires.
- The requirement to indicate subcontractors at the time of the offer should be eliminated, or, at least, the concessionaire should be given the possibility to update the list of subcontractors during the performance of the contract⁴, in which case the second paragraph of Article 41 should read as follows:

2. Paragraph 1 shall be without prejudice to the question of the principal economic operator’s liability and without prejudice to the ensuing possibility for the concessionaire to update the information referred to in paragraph 1 during the performance of the contract.

- If the requirement to indicate subcontractors is to remain, it would be advisable to clarify that the tendering concessionaire shall not be obliged to make reference in its tender to enterprises that have grouped together to secure the concession or enterprises that are affiliates. To this effect, the following paragraph should be added:

3. For the purpose of paragraph 1, enterprises that have grouped together to secure the concession or enterprises that are affiliates shall not be considered as subcontractors.

- Finally, if the requirement to indicate subcontractors is to remain, it would be advisable to introduce a recital clarifying the aim of this requirement (which cannot be the introduction of limitations related to subcontracting).

F. Article 42 – Modification of concessions during their term

In addition to the amendments to Article 42 as outlined below, a specific recital should be added to the Directive in order confirm the principle that the Directive only applies to future concessions, and to clarify the related principle of the intangibility of existing contracts. In addition, a second specific recital should be added in order to clarify that the award of certain complementary works to the concessionaire should not require a new award procedure (cf. paragraph 6) so as to avoid uncertainty in the future.

⁴ Requiring the concessionaire to pre-indicate, in its offer, the names of the parties which it may avail itself of after an undefined – and possibly very long – period of time, is an element of rigidity and it would be unrealistic to expect that such subcontractors indicated at the time of the offer would remain the same throughout the duration of the contract, which may run for 30 or 40 years or possibly even longer.

Article 42 should be amended as follows:

1. *A substantial modification of the provisions of a concession awarded after the entry into force of this Directive during its term shall be considered as a new award for the purposes of this Directive and shall require a new concession award procedure in accordance with this Directive.*

2 to 4. (unchanged)

5. *Concession modifications shall not be considered substantial within the meaning of paragraph 1, where they have been provided for in the concession documents or in the contract in clear, precise and unequivocal review clauses or options. Such clauses shall state the scope and nature of possible modifications or options as well as the conditions under which they may be used. They shall not provide for modifications or options that would alter the overall nature of the concession.*

6. *By way of derogation from paragraph 1, a substantial modification shall not require a new concession award procedure where the following cumulative conditions are fulfilled:*

(a) the need for modification has been brought about by circumstances which a diligent contracting authority or entity could not foresee

(b) the modification does not alter the overall nature of the concession

(c) in case of concessions awarded by contracting authorities where any increase in price is not higher than 50% of the value of the original concession, this value being estimated at the time of approval of the modification. For public works concessions, the value of additional works shall not exceed 50% of the value of the total amount of public works performed under the concession contract in question.

Contracting authorities or contracting entities shall publish in the Official Journal of the European Union a notice on such modifications. Such notices shall contain the information set out in Annex VII and be published in accordance with the provisions of Article 28.

7. (unchanged)

8. Without prejudice to paragraphs 2 and 7, modifications aimed at compensating the risks of price increases resulting from price fluctuations or resulting from the restoration of the economic and financial equilibrium of the concession following the detrimental effects of actions falling under the responsibility of the contracting authorities or of unpredictable events beyond the correct performance of the concessionaire shall not be considered as substantial modifications.

G. Article 43 – Termination of concessions

Member States shall ensure that contracting authorities and contracting entities have the possibility, under the conditions determined by the applicable national contract law, to terminate a concession during its term, where one of the following conditions is fulfilled:

(a) the exceptions provided for in Article 15 cease to apply following a private participation in the legal person awarded the contract pursuant to Article 15 (4);

(b) a modification of the concession constitutes a new award within the meaning of Article 42;

~~*(c) the Court of Justice of the European Union finds, in a procedure pursuant to Article 258 of the Treaty, that a Member State has failed to fulfil its obligations under the Treaties by the fact that a contracting authority or entity belonging to that Member State has awarded the concession in question without complying with its obligations under the Treaties and this Directive.*~~