

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

**POLICY DEPARTMENT**  
ECONOMIC AND SCIENTIFIC POLICY **A**



Economic and Monetary Affairs

Employment and Social Affairs

Environment, Public Health and Food Safety

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**Internal Market and  
Consumer Protection**

**The Award of  
Concession Contracts**

WORKSHOP





DIRECTORATE GENERAL FOR INTERNAL POLICIES  
POLICY DEPARTMENT A: ECONOMIC AND SCIENTIFIC POLICY

## WORKSHOP

# The Award of Concession Contracts

Brussels, 10 May 2012

## PROCEEDINGS

### Abstract

The workshop set out to clarify questions and problems pertaining to the award of concessions contracts. For this purpose it focused on four main topics: the characteristics and problems of the award of concessions contracts from an economic perspective, the legal perspective on the Commission's proposal, the risks of corruption and collusion related to concessions contracts, and legal definitions of concessions in the Member States.

This document was requested by the European Parliament's Committee on the Internal Market and Consumer Protection.

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## **LINGUISTIC VERSIONS**

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## **CONTENTS**

<b>1. PROGRAMME</b>	<b>5</b>
<b>2. SPEAKERS' BIOGRAPHIES</b>	<b>6</b>
<b>3. SUMMARY OF THE WORKSHOP ON "THE AWARD OF CONCESSIONS CONTRACTS"</b>	<b>7</b>
<b>4. PRESENTATIONS</b>	<b>15</b>
4.1. Stéphane SAUSSIER	17
4.2. Prof. Dr. Jan ZIEKOW	23
4.3. Tina SØREIDE	29
4.4. Fabian SCHMITZ-GRETHLEIN	35



## 1. PROGRAMME



PARLAMENTO EUROPEO EVROPSKÝ PARLAMENT EUROPA-PARLAMENTET  
EUROPÄISCHES PARLAMENT EUROOPA PARLAMENT ΕΥΡΩΠΑΪΚΟ ΚΟΙΝΟΒΟΥΛΙΟ EUROPEAN PARLIAMENT  
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## Workshop on the Award of Concessions Contracts

**Organised by Policy Department A**

**Thursday 10 May 2012, 15.00-17.00**

**Venue: European Parliament, Brussels  
Altiero Spinelli building, ASP 3E-2**

**15.00-15.10** **Introductory remarks:** Rapporteur Mr Philippe JUVIN, MEP

**15.10-15.25** **An economist's view on concessions**

Prof. Stéphane SAUSSIÉ

**15.25-15.40** **Defining concessions: a lawyer's view on the Commission proposal for a directive on the award of concessions contracts**

Prof. Jan ZIEKOW

**15.40-16.00** **Questions & Answers**

**16.00-16.15** **Examples of specific dysfunctions in the award of concessions contracts: corruption, market closure and others:**

Dr. Tina SØREIDE

**16.15-16.30** **An overview of Member States' current regimes in the area of awarding concession contracts:**

Fabian SCHMITZ-GRETHLEIN

**16.30-16.50** **Questions & Answers**

**16.50-17.00** **Summary and closing remarks by rapporteur Philippe JUVIN, MEP**

## 2. SPEAKERS' BIOGRAPHIES

### **Prof. Dr. Stéphane Saussier**

Stéphane Saussier is Professor of Business Economics and Public Policy at the Sorbonne Business Graduate School. His research interests include contracting practices and public private partnerships. He is running a research group on the Economics of Public Private Partnerships at the Sorbonne. His publications include many articles in international reviews such as the Journal of Economic Behavior and Organization, The Review of Industrial Organization, The Journal of Transport and Economic Policy, Utilities Policy, International Journal of the Economics and Business.

### **Prof. Dr. Jan Ziekow**

Prof. Ziekow, born in Berlin (Germany), is currently the Director (CEO) of the German Research Institute for Public Administration (since 2001). He is also Member of the United Nations Committee of Experts on Public Administration, President of the German Section of the International Institute of Administrative Sciences, Head of the Institute for Regulatory Impact Assessment and Evaluation and Member of various parliamentary and Government-Commissions and Committees. As a Consultant for various governments Prof. Ziekow works in the fields of constitutional and administrative law, modernization of the Public Sector, reform of local and ministerial administration, new forms of governance, better regulation, impact assessment and evaluation, Public Private Partnerships and other forms of cooperation, regulation of infrastructures and others. One of his main fields of interest is public procurement law.

### **Dr. Tina Søreide**

Dr. Tina Søreide is post doctoral research fellow in law & economics at the University of Bergen, Faculty of Law, on a three year leave from her post as Senior Researcher at Chr. Michelsen Institute (CMI), Norway. Her research interests challenges associated the political economy of sector governance and business-related crime, such as corruption and collusion. She teaches political economy at the University of Bergen, Department of Economics. From 2008 to 2010 she was employed by the World Bank, Washington D.C to work on the Governance and Anti-Corruption (GAC) agenda and sector regulation. Søreide holds a PhD in Economics from The Norwegian School of Economics and Business Administration (NHH), completed in 2006. She has a Master in Economics from The University of Bergen, Norway.

### **Fabian Schmitz-Grethlein**

Mr Fabian Schmitz-Grethlein is working as a lawyer in public and administrative law at FPS Rechtsanwälte & Notare in Berlin. Following his studies at Humboldt University in Berlin he received legal training among others at the Senate Chancellery in Berlin and the European Commission in Brussels. After his State Examination in 2007 he was admitted to the bar and has subsequently worked as a lawyer specialised in public administrative and public procurement law.

### 3. SUMMARY OF THE WORKSHOP ON "THE AWARD OF CONCESSIONS CONTRACTS"<sup>1</sup>

**MEP Philippe Juvin**, IMCO Rapporteur for the dossier on award of concessions contracts, welcomed all participants and presented the workshop's programme. In the light of the European Commission's proposal for a Directive of the European Parliament and the Council on the award of concessions contracts (further referred to as "the Directive" or "the proposal of the Directive"), which is currently considered by the European Parliament, the purpose of the workshop is to clarify certain issues, in particular the question of definitions of concessions. After introducing the panel of speakers, Mr Juvin gave the floor to the first panellist.

#### Session 1

**Prof. Dr. Stéphane Saussier**, Professor of Economics at IAE - Sorbonne Graduate Business School, presented an economist's perspective on concessions. He started with an overview of the main characteristics of concessions contracts, such as involvement of important investments, transfer of risk from public authority to private operator, high level of uncertainty and long-term duration. In particular, he emphasised the fact that concessions contracts are incomplete contracts that require renegotiation as it is impossible to anticipate all future events. Prof. Saussier then went on to discuss the problems associated with the award of concessions contracts. One important question is that of the margin of discretion left to public authorities in their choice of a private operator. One main aspect is how rigid or flexible the rules of the call for tender should be with regard to determining all criteria in advance. Studies indicate that rigid rules create difficulties due to the complex and incomplete nature of concessions contracts. Further problems identified in economic literature are aggressive bidding and the winner's curse, referring to the situation where the winning bid is not made by the most efficient operator but by the one with the most optimistic bid, which later will be difficult to implement. There are also problems related to collusive and corrupt behaviour. Moreover, Prof. Saussier highlighted the problems related to renegotiations of contracts. Evidence shows that renegotiation of contracts is the rule rather than the exception, which stems from the incomplete nature of concessions contracts. With regard to potential solutions to these problems, he suggested public authorities should be granted (limited) discretionary power in selecting the operator so that they could be able to reject offers which are downright unrealistic. Furthermore, the choice of the partner should not be exclusively based on economic criteria, but also on the bidders' reputation. Transparency is extremely important in renegotiations and as a means to counter favouritism. Finally, some problems may be solved by contractual solutions. Examples of this are defining ex ante the rules for renegotiations; new kinds of contractual agreements following the idea that concessions contracts should not be awarded based on price but on the net value; and the LPVR solution, in which the duration of the contract is determined by the demand and the respective revenues faced by the operator. Relating these findings to the Commission proposal, Prof. Saussier concluded that a specific Directive would be needed indeed. However, in his opinion, the Directive should be a light one allowing for transparency and flexibility for public authorities, both in terms of award procedures and renegotiations.

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<sup>1</sup> Please also refer to the enclosed Powerpoint presentations. The audio recording of the workshop is available at <http://www.ipolnet.ep.parl.union.eu/ipolnet/cms/pid/1382>

The second panellist, **Prof. Dr. Jan Ziekow**, Director of the German Research Institute for Public Administration, presented a lawyer's perspective on the proposal of the Directive. Despite not being fully convinced by all arguments brought forward by the Commission, Prof. Ziekow pointed out two main reasons why a Directive is necessary in his opinion. Firstly, the transfer of risk is not a guarantee for sufficient competition. Secondly, from a practical point of view, analysing ECJ jurisprudence on concessions may be too complex and time-consuming for smaller public authorities. Therefore, a uniform system could create legal certainty and a level playing field, provided that the Directive is consistent, in line with ECJ jurisprudence, and leaves a margin of discretion to awarding authorities. Concerning the scope of concessions, however, Prof. Ziekow mentioned the need for some improvement. Especially with regard to the transfer of substantial operating risk, he recommended to stick more clearly with ECJ principals, since the current proposal could be understood in a way that it extends the scope of concessions too far and blurs the line with public procurement, in his opinion. As for the matter of calculating the value of contracts, he deemed the proposed threshold of EUR 5 000 000 to be appropriate, given that services concessions are often expected to provide for long-term security of supply and quality. From a practical perspective, however, Prof. Ziekow referred to the problem that the threshold may be exceeded quite quickly when the aggregated value of different services and works contracts is calculated. Therefore, he recommended the aggregated value should only be calculated when the technical and economic functions of concessions are the same. Subjecting smaller concessions to an additional threshold (EUR 2 500 000 to 5 000 000) is unnecessary, in his opinion, as it does not lead to any further legal protection. Moreover, Prof. Ziekow discussed the need for clarification and more flexibility regarding the duration of concessions contracts. Inter alia, he pointed to the fact that long-term contracts and investments benefit from better financial conditions and better interest rates. These benefits could be passed on to consumers. On the question of exemptions for certain sectors, he commented that even if a sector does not have exemptions, this does not automatically lead to liberalisation. Local authorities may still choose to provide a service themselves. Nevertheless, in sectors concerning vital services where there are only few players, such as water supply, granting concessions to private operators may have negative effects on the quality of services. As regards the Directive's provisions on transparency, Prof. Ziekow welcomed the rules, but also indicated some potential for further simplification. Furthermore, he commented on the usefulness of the requirement to publish and weight award criteria and pointed out that contracts should not be awarded on the basis of the economically most advantageous tender. Finally, Prof. Ziekow concluded with a recommendation going further than the current proposal of the Directive concerning the modification of concessions contracts. In his opinion, all changes that are necessary to fulfil the original goal of a contract should be permitted without launching a new award procedure.

#### **Questions and answers: Session 1:**

Mr **Juvin** opened the discussion with several questions. With regard to criteria of procedure and the matter of discretion of public authorities to choose their own award criteria, the Rapporteur wanted to hear the speakers' opinions about the need to publish precisely all criteria used; the need to put them into order of priority; and the need to weight them, as well as to publish the weighting to be used afterwards. He raised the concern that, e.g., for concessions in very specialised areas, if everything is fixed in advance, public authorities run the risk of missing innovations, which the professional across the table might propose to them, because they are not knowledgeable enough in the field. His second question pertained to the economic and legal effects that the prioritising and weighting of criteria would have, and in particular the consequences of not publishing the prioritisation.

Answering Mr **Juvin's** questions, Prof. **Saussier** explained that the requirements to publish and weight criteria are a means of reducing public authorities' discretion in order to prevent favouritism and corruption. Yet, he emphasised clear and precise rules also make it easier for companies to collaborate with one another and to fix things among themselves. Giving vague criteria that are not in order or weighted, would make it difficult for companies to predict who would win a bid. Another argument in favour of leaving a margin of discretion to public authorities is that concessions contracts are long-term relationships and not purely business relationships. As to the economic consequences of fixing criteria in advance and risk of missing out on innovative solutions, he pointed out that the public sector generally has to carry out studies before opening a call for tender, in order to assess possibilities and alternatives and to clarify what is expected from the private partner in terms of characteristics of the service or technical characteristics. Giving unclear information on expectations may cause private operators to increase the price and is likely to put off small operators. Prof. **Ziekow**, on the other hand, insisted the requirement to announce criteria emerged from the duty of transparency and, therefore, is binding. In his opinion, it is more the question what should be specified in advance with respect to creating a level playing field for all competitors. Hence, publishing criteria and their order should be binding, whereas it should remain non-binding to announce the assessment matrix, as the Directive currently foresees. Moreover, he stated that the Directive might be a little vague, but certainly does not exclude taking innovation into account, since it also stipulates a functional description of services outlining the essential objectives of the contract for the operator.

**MEP Heide Rühle** commented that transparency is the best weapon against corruption, but questioned whether the Directive really establishes transparency. In her opinion, the proposal provides for transparency vis-à-vis other bidders or competitors, but not vis-à-vis the public, citizens or consumers, which would be crucial for the fight against corruption. Secondly, Mrs Rühle raised concerns about the definition of service concessions with regard to risk. Especially for services of general economic interest (SGIs), risk is never transferred completely. For vital services like water supply, for instance, the public sector always has to provide guarantee for the provision of these services. She, therefore, asked how to establish a definition of concessions that recognises the peculiar nature of services of general interest, which are different from port services, for example. Thirdly, Mrs Rühle voiced doubts that services that are provided by grids or networks (which is often the case for infrastructure projects) are of cross-border interest at all. In her view, operators from other Member States hardly bid for the provision of a service within a grid without having a local daughter company. Similarly, it seemed unlikely to her that a Member State would choose a supplier from another country, who does not have a local branch.

Prof. **Saussier** answered that the current proposal is not aimed at providing transparency. Rather, it is focused on decreasing the discretionary margin of the public sector and reducing the ability to renegotiate contracts in a substantial way, as this would otherwise undermine competition at the time of awarding the contract.

Furthermore, he agreed there is never a total transfer of risk and explained that a contract has to be renegotiated when it reaches the point where the private operator can no longer generate revenue. The question is whether this could have been foreseen in advance. If the operator put himself in a difficult situation on purpose to renegotiate the contract, this should not be granted. Instead it might be better to let the operator go bankrupt and replace him. In cases where the contract is significantly imbalanced due to an external shock that were not anticipated by the partners, however, it should be able to renegotiate. Prof. **Ziekow** agreed with Mrs Rühle that the questions of SGIs and the concept of the "Gewährleistungsstaat" (ensuring state) lie at the heart of the problem.

The responsibility to provide services to consumers has to remain in the hands of the state and has to be guaranteed in the concessions contract, whereas the question of allocating economic risk comes three levels lower.

Replying to Mr **Juvin's** concern that, for example for water supply, concessions may be granted to the detriment of consumers, Prof. **Saussier** illustrated the lack of transparency on this issue by the example of France, where local public authorities grant concessions and the information is not made public. Existing data suggests there is an increase in prices by 30 per cent. However, these often concern concessions granted for very specialised water services (e.g. highly polluted areas that require large investments). For concessions which are comparable in terms of areas and features, the prices charged by public and private operators seem equivalent.

Commenting on Mr **Juvin's** further question whether public organisations in all Member States are required by law to subject concessions contracts to consumer organisations, Prof. **Ziekow** explained that – except from the freedom of information acts - no such law exists in Germany, but there is a considerable level of public monitoring at the local level. Moreover, he didn't see any valid argument for withholding concessions contracts from public scrutiny.

Referring to remark made during a recent public hearing on concessions that the proposed Directive would practically prevent privatisation, **MEP Barbara Weiler** stated that the decision to make use of private operators for specific investments should be left to public authorities. Further, Mrs Weiler wanted to know which part in the Directive is so strict that it would exclude such choices.

In response, Prof. **Ziekow** expounded that the proposal of the Directive does not rule out privatisation. However, there are limitations with regard to the constellation of functional privatisation where a mixed economy company would be created and the delivery of the service would be transferred to that company. The proposal bases itself on the jurisprudence of the ECJ which made clear on several occasions that such constellations are not permissible at the moment without a tendering procedure, even for service concessions. Additionally, Prof. Ziekow pointed to problems of cooperation between public bodies and non-profit organisations resulting from the fact that current ECJ jurisprudence does not allow for 'inhouse' contract awarding even if the private partner is a non-profit organisation.

## Session 2

**Dr. Tina Søreide**, post doctoral research fellow in law and economics at the Faculty of law, University of Bergen, talked about the risks of corruption and collusion in connection to concessions contracts. She described concessions as a useful tool to regulate market failures, because one can combine the benefits of market forces with regulatory conditions for the protection of consumer interests. As the benefits of efficient investments are on the side of the firms, companies have an incentive to perform well. However, Dr. Søreide emphasised there are trade-offs in sector regulation that may become a political issue or hide undue influence to the benefit of a few. Competitive pressure may trigger both positive and negative responses in these markets. On the positive side, there is improvement of technology, efficiency, service and quality. The downside however, is undue influence, lobbying, and even corruption and collusion. Indeed, Dr. Søreide gave many examples of such practices in several sectors in EU Member States and pointed out that most of these cases have occurred despite procedural rules for the award of concessions. The question why certain sectors are more exposed to corruption than others can be explained by sector-specific and governance characteristics.

With regard to sector characteristics, the complexity of contracts and financial setup hampers outsider's ability to understand contracts and to compare offers, and in some settings there are not victims' ready to react to weaknesses. For example, a small price change may not have big impact on individual consumers and thus, may not trigger reaction even if weaknesses are revealed by transparency mechanisms. The profits for firms may nevertheless be considerable if there are many consumers. Moreover, the award of concession contracts can be subject to a political trade-off between revenues and consumer benefits. Some companies might be granted certain market powers, enabling them to make better offers. Safe revenues are attractive for decision-makers even if it leads to higher prices for consumers. When it comes to undue influence for market benefit, Dr. Søreide emphasised how corruption and collusion often go hand in hand and there are many loopholes in these sectors that can be exploited – despite well-designed procedures. In terms of governance issues, in certain sectors the provision of vital services and utilities is of particular political interest, because governments are still considered to be responsible even when the service is provided by a private company. It should also be noted how ties to the political elite may pay off for companies in these sectors, since political decisions influence the rents that businesses obtain. Another factor is that undue influence may be hidden behind the diversity of goals behind sector governance, such as creating employment, environment, etc. Thus, if decision-makers have a national champion, they will always find a reason to justify their decision. Coupled with weak third-party monitoring of political and sector decisions, this allows politicians to easily get away with pushing through their personal agenda. In this light, Dr. Søreide stressed the new Directive should take into account that the political game is as important as the award mechanisms. Consequently, it should also take into account general integrity mechanisms and the bigger set of checks and balances. For this reason, Dr. Søreide argued that the Directive should not only include transparency requirements for prices, services and deals, but also the politics involved in the award of concessions contracts.

Regarding legal concerns with the Directive, she welcomed the proposal – most concerns are addressed in line with updated understanding of 'best practice' for this form of governance. The Directive and the harmonisation of laws will play an important role in making undue influence and deviation from legal principles more visible across the EU member states. However, Dr. Søreide pointed out that there are some areas where the Directive can be further improved. Among other things, she highlighted that issues of political accountability are not sufficiently addressed and that the proposal of the Directive

seems to take benevolent politics for granted. In addition Dr. Søreide pointed out experience has shown that implementation process is more important than the details of procedural rules. The more comprehensive the set of procedures, the more effort it will require to bring them into everyday practice. A simpler set of procedures can be as efficient *if* combined with clear allocation of responsibility. Dr. Søreide stressed how decision-makers would need to have *ex post* responsibility for their decisions, if the Directive were to leave a lot of flexibility to them. Finally, Dr. Søreide pointed out one point in which the proposal of the Directive is too strict: Debarring companies completely from the market that have already been in front court for corruption or collusion seems too strict and impractical. If the market is already an oligopoly, excluding a company from it would impede competition even more. For this reason, she suggested to discuss the time frame for debarment and past performance of these companies.

**Fabian Schmitz-Grethlein**, Lawyer for public and administrative law, at FPS Rechtsanwalte & Notare, provided an overview of Member States' current legal frameworks in the area of concessions contracts. As a starting point, Member States were grouped into five categories according to their legislative regimes (see slide 2 of presentation for categories).

In the following, his presentation focused on the fifth category, which includes Member States that have developed their own legal definitions of service concessions. One interesting aspect for these countries is the position of regulations on service concessions in the wider regulatory framework. Three different approaches were identified. The first is to include the award of service concessions in the framework of public procurement; the second is to regulate them in connection to public private partnerships; and the third is to develop own national legislation on service concessions.

Turning to legal definitions, Mr. Schmitz-Grethlein pointed out that the basic concept of concessions is relatively simple and defined in the same way by all Member States. There are always three players: a Member State granting a right to a concessionaire, who in turn gets compensation from the user for providing a service. However, even within the fifth category, the legal definitions of what is to be considered as service concession vary considerably in the details across Member States. In some countries, the understanding of concessions contracts focuses on the rights granted to a concession-holder, while in other Member States like France or Latvia, the definitions stress the obligation and responsibility of the concession-holder to provide a service. In terms of remuneration for the provision of services, the definitions in the different Member States are again relatively similar.

As the differences in the legal definitions of concessions also explain the different stances Member States take on the proposal of the Directive, Mr. Schmitz-Grethlein presented some aspects in more detail. As pointed out by previous speakers, in many legal definitions of concessions the distribution of risk is the decisive element. Yet, Member States of the fifth category vary considerably in this aspect. Apart from countries that do not mention the notion of risk at all, there are two approaches to the question which forms of risk that has to be borne by the concessionaire represent the constitutive element for services concessions. In some Member States, legislation defines risk in commercial or economic terms. In others, laws refer to the operating risk. However, Mr. Schmitz-Grethlein pointed out that these two concepts cannot be clearly separated from each other. Moreover, he observed that the proposal of Directive fails to provide clear definitions of these types of risk and how they are to be separated. Besides variation with regard to the type of risk, national legislation also differs in the degree of risk that concession-holders are expected to take for a contract to be treated as concessions contract. This lack of a common understanding of the degree of risk to be taken creates legal uncertainty to the extent that the same concessions contract could be interpreted differently in Member States. As

regards the duration of concessions, all national laws foresee a time limit, but differ with respect to the permissible length of contracts, so that duration varies considerably across MS and sectors. Further, Mr. Schmitz-Grethlein observed that Member States use different concepts for the calculation of value. To illustrate this point, he gave two examples. The Czech Republic, for instance, defines value as the estimated value of the contract's subject matter and the concession-holders estimated total revenue. Latvia, on the other hand, defines the value by the total payment made by the public partner. As a result, the types of contracts that are considered as services concessions vary considerably between these Member States. Lastly, the biggest differences can be observed in terms of exemptions. Some Member States do not foresee exemptions at all, some have positive lists, and others regulate exemptions by sector.

The variation in the details described leads to quite different results in Member States and it needs to be discussed whether this is an argument for harmonising concessions law or whether it is actually a reason to consider national circumstances. Finally, Mr. Schmitz-Grethlein concluded that despite commonalities in Member States as regards the basic aspects of services concessions, the significant differences in the details of legal definitions impede cross-border operation.

Therefore, a European framework for services concessions seems desirable. However, the question how detailed such a framework should be is a political one and up to the MEPs to decide.

### Questions and Answers: Session 2

In the question and answer session following the second round of presentations **Mrs Weiler** asked whether, out of all the MS analysed, there is one national regime that has a relatively optimal and consistent set of rules? **Mr. Schmitz-Grethlein** answered that he does not consider any national regime to be ideal and that all national systems have deficits. Moreover, one needs to bear in mind that there are national peculiarities in every regulatory framework so that there is no system that could have Europe-wide practical application. He mentioned that newer legislative frameworks, especially in the Baltic Member States, are particularly interesting due to their high degree of regulation, which may, nevertheless, be too high in some areas. Yet, there are other Member States which have too strict or too little regulation, but none of them strikes the right balance. **Prof. Saussier** added that he is not sure whether an optimal solution actually exists and that it is perhaps more important to see whether the introduction of regulation brings about improvement. He also voiced his optimism that the Directive will succeed in improving the current situation.

In the following, **Mrs Weiler** addressed the German panellists and asked them to comment on the German situation, where (services) concessions are not regulated by national laws. **Prof. Ziekow** answered that indeed the system works, although Germany does not have legislation on concessions. There are many reasons why the market functions well in a MS despite the absence of a regulatory system. This largely depends on the relation between institutions and control mechanism, which possibly create transparency and control. However, this does not automatically mean that all MS without national legislation do well. This is the basic reason for creating a Europe-wide binding regulatory framework. Even if one would take the view that a European Directive on services concessions is not necessarily needed, one could not categorically rule out the usefulness of a light and flexible European framework. He maintained that the mechanisms that exist - from local authority level supervision up to supreme audit institutions - do provide for transparency. Yet, this does not necessarily mean that in certain areas or above certain levels a greater opening up to competition in Europe would not make sense.

In the final comments from the **European Commission**, **Mrs Szychowska** from **DG Internal Market and Services** thanked the EP for the opportunity to listen to these different views on the dossier. Her conclusions derived from this workshop are that there is a general agreement on the need for a European set of rules on concessions contracts. As the rules are there, it is a matter of the intensity or degree of regulation. While there is a need for transparency, at the same time it is a question of curbing Member States' discretion in awarding concessions contracts. With regard to renegotiations, she emphasised they are not only about discussions between the bidder and public authorities, but also about third parties which do or do not have access to renewed contracts. Therefore, the Commission's proposal is already lighter than what the ECJ suggests, but the Directive is necessary because otherwise the markets will be closed for other bidders. Concerning corruption, the Mrs Szychowska stressed that even if it is not only about the rules of the game, the rules are still very important. In public procurement, many complaints are launched by private parties, which is possible due to the rules on transparency.

Thus, the Commission is confident that rules on concessions will create greater transparency and contribute to denouncing corruption to a greater extent. Moreover, presentation highlighting the diversity of national rules confirmed the Commission's starting point for the proposal of having to consider the differences that exist between Member States. Finally, the Mrs Szychowska welcomed that the proposal is regarded as a means of simplification as opposed to having 27 sets of rules in the

## **4. PRESENTATIONS**



## 4.1. Stéphane SAUSSIÉ

1

**WORKSHOP ON THE AWARD OF  
CONCESSION CONTRACTS**

**An Economist's View on Concessions**

---

**Stéphane Saussier**  
(Sorbonne Business School)  
<http://www.webssa.net>

European Parliament, 10/5/2012

2

**Starting Point: What are Concession  
Contracts?**

- Main characteristics of concessions are:
  - ✓ Transactions that usually involve important investments
  - ✓ Risk transfer (Especially the risk of demand)
  - ✓ High level of uncertainty
  - ✓ Long-term agreements
    - ✓ (e.g. Millau Viaduc, 78 years long contracts)

↳ **Incomplete contracts (Williamson 1985)**

↳ Concession contracts are clearly specific compared to public contracts!

What kind of problems do they generate?



3

## What are the Problems Associated With The Award of Concession Contracts? (1)

- The natural way to award a concession contract is through call for tenders in order to foster competition.
- **One question: rigid or flexible rules of the game?**
- The recent economic literature suggests that **call for tenders with rigid rules** perform poorly when projects are complex, contractual design is incomplete and there are few available bidders on the market (Bajari-McMillan-Tadelis 2009)
- **WHY?**

4

## What are the Problems Associated With The Award of Concession Contracts? (2)

- Main problems identified by the economic literature:
  - **Low-balling strategy**: offers containing promises difficult to meet, for the sole purpose of winning the contract
  - **Winner's curse**: optimistic bidding
  - **Renegotiation issues**
  - Collusive agreements
  - Favouritism and corruption

5

## What are the Problems Associated With The Award of Concession Contracts? (3)

- **Renegotiations are the rule, not the exception**
  - 1 000 concession contracts signed in Latin America between 1980 and 2000 – more than 40% are renegotiated less than 2 years after their signature on average (Guasch [2004]).
  - Renegotiation rate of 121 PFI contracts signed before 2000 in the UK has been estimated at 55% (NAO [2001]) but the House of Commons (2011) pointed out the fact that one drawback of English PFIs is their rigidity.
  - A recent study on Car Park concessions in France found out that the *frequency* of renegotiation is once every two years on average and seem to be profitable to consumers (De Brux & al 2011).
  - Engel, Fisher, et Galetovic (2011) found concerning transport concessions signed since 1991 in the United States that “six out of twenty projects have undergone a major change in the initial contractual agreement, favouring the concessionaire, and two additional projects have pending renegotiations” ((2011), page 11).
  - ...

6

## What are the Problems Associated With The Award of Concession Contracts? (4)

- **What to think about renegotiations?**
- Renegotiation can be justified as soon as you need to adapt the contract to unanticipated events.
- They can also reflect opportunism and/or corruption.
- They can arise because of too flexible contracts
- They can arise because of too rigid contracts
- **They arise because contracts are imperfect** (i.e. incomplete)



## What are Potential Solutions?

What the theory suggests is that:

- A (limited) discretionary power of the buyer (at the selection stage) is necessary!
- Reputation of bidders should enter into criteria!
  - Select the one you know you will be able to (re)negotiate with because you will renegotiate for sure! This is a long term partnership...
  - Some empirical studies confirm this proposition: Pacini and Spagnolo [2011], Bajari-McMillan-Tadelis 2009

But then how to avoid favoritism and bad renegotiations?

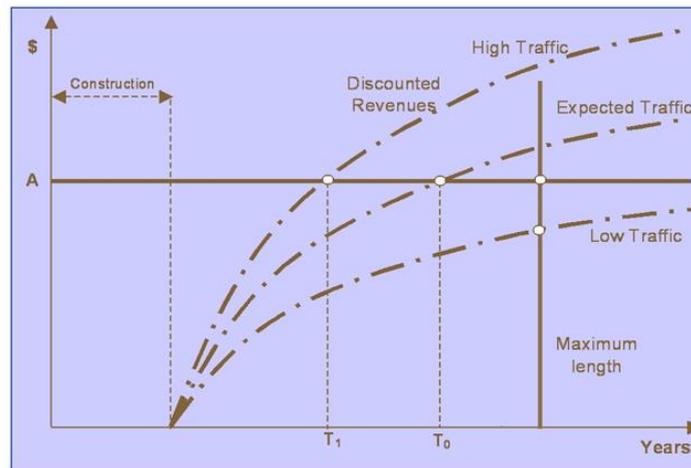
## What are Potential Solutions?

- How to avoid favoritism and bad renegotiations?
  - Find the right level of transparency without favoring collusion strategies!
  - Given their potential negative effects on governance and efficiency, renegotiations should be extremely open and transparent procedures!
    - To improve on transparency, the contract may envisage calling a third party, e.g. an arbitrator, an independent commission, or a group of experts, to evaluate the case and seek to conciliate the needs of both parties without too much harm for the consumers
- Find contractual solutions!
  - Anticipate *ex ante* how you will renegotiate *ex post*
  - New kinds of contractual agreements are to be found and start emerging
  - Contract duration and LPVR

9

## What are Potential Solutions?

- Contract duration: the LPVR solution



10

## Implications For the New Directive

- Do we need a directive? Yes
- Do we need a specific directive? Yes
- What kind of directive?
  - A light one
    - There is no point establishing rigid rules for award procedures: this would not assure fair competition between competitors and this would not favour efficiency of concession contracts because actors anticipate that such contracts are generally renegotiated ex post
    - Rigidifying renegotiations ex post is not a solution. It would stick partner in bad deals as soon as contracts are misaligned with their environment + risk premium.
  - A light directive, coupled with more transparency is needed to permit flexibility without strategic behaviours from economic actors.



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## To know more...

### International Conference "Contracts, Procurement, and Public-Private Arrangements" - Paris, May 30 & 31 - 2012

Publié le ven, 06/01/2012 - 17:04



This conference focuses on the recent developments in contract theories. Papers are invited on all topics of contract theories including: *Relational contracting, transaction costs, renegotiations, incentives, attribution mechanisms, incomplete contracting, contract design, benchmarking, privatization, corruption, institutions.*

Papers presented may be theoretical or applied. A special attention will be given to proposals addressing issues related to procurement and public-private arrangements. The conference will bring together academics, policymakers and practitioners to discuss those issues. The conference format will be designed to facilitate informal interactions among participants and promote future collaborations.

<http://chaire-ePPP.org>

## 4.2. Prof. Dr. Jan ZIEKOW



DEUTSCHES FORSCHUNGSINSTITUT FÜR ÖFFENTLICHE VERWALTUNG SPEYER  
GERMAN RESEARCH INSTITUTE FOR PUBLIC ADMINISTRATION SPEYER

### European parliament – Workshop on the award of concessions contracts

A lawyer's view on the Commission proposal for a directive on the award of concessions contracts

Univ.-Prof. Dr. Jan Ziekow

Deutsches Forschungsinstitut für öffentliche Verwaltung Speyer  
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### I. There is a need for the proposed directive.

- ▶ Transfer of operating risk alone does not guarantee sufficient competition.
- ▶ Analyzing ECJ case law comprehensively is beyond the means of small sized authorities. A clear **system** would reduce risks and improve legal certainty.

## I. Requirements:

- Conclusive and consistent
- Margins of flexibility
- Continuity with principles of ECJ case law

## II. Definition of scope

- Defining transfer of substantial operating risk by the guarantee to recoup the investments or the costs
  - reduces the scope of public procurement procedures inappropriately
  - does not match ECJ case law
- Better: Sticking to the flexible assessment concept of ECJ

### III. Thesholds and duration

#### 1. Tresholds

- ▶ 5 Mill. Euro is appropriate
- ▶ Aggregated value of an entirety of works or services, even if purchased through different contracts?
  - Difference to calculation of values of public service contracts (only contracts with same content)
  - Recommendation: Aggregation of value merely if concession fulfil same economic and technical function
- ▶ Second treshold (2,5 to 5 Mill. Euro) unnecessary

#### 2. Duration

- Art. 16: time to recoup the investments made in operating the works and services
  - +reasonable return of invested capital
- More flexibility necessary:
  - stable charges for citizens in a long term perspective
  - amortization of innovations

## IV. Further issues

### 1. Sector exemptions?

- ▶ Rejecting exemptions does not mean liberalization
- ▶ But: Possibly negative effects on the quality of vital services (e.g. water supply)?

### 2. Transparency rules

- ▶ Compulsory publication in EU Official Journal appropriate
- ▶ Simplification possible

### 3. Award criteria

- ▶ Indicating relative weighting of criteria or listing criteria in descending order of importance is required by the Treaty.
- ▶ Criterion of the most economically advantageous tender restricts flexibility.

#### 4. Modification of concessions

- ▶ **Recommendation:** All modifications necessary for reaching the original goals of the concession should be admissible without new award procedure.

Thank you for your attention



### 4.3. Tina SØREIDE

European Parliament, 10/5/12: Workshop on concessions contracts

## RISKS OF CORRUPTION AND COLLUSION IN REGULATED SECTORS

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**Tina Søreide**

Economist at the University of Bergen & Chr. Michelsen Institute (CMI), Norway

## The case for state intervention

Free market less *efficient* in some sectors

Concessions: regulatory conditions and market

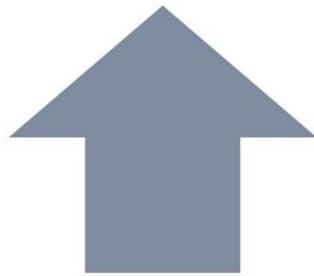
Competitive pressure on providers

- technology/service delivery
- prices, profits
- organizational flexibility

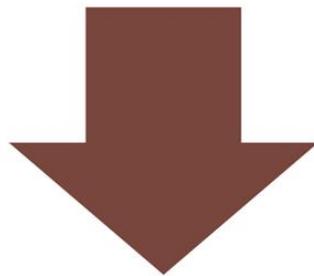
Response in the markets?

*Seek ways of reducing the competitive pressure?*

## Response to competitive pressure



Technology  
Efficiency  
Service  
Quality



Undue influence  
Lobbyism  
Corruption  
Collusion

## Relevant concern in Europe?

We don't *know* much, but...

- Corruption in the award of **water** contracts
- Removal of **rubbish** contracts & organized crime
- Gas** pipeline concessions, undue influence from/at political level
- Siemens penalized for corruption, several sectors
- Electricity** supply in Europe & EC antitrust investigations
- Construction for concessions-based operations; undue influence, corruption, collusion (ex **roads**, **power cables**)
- ICT** – several cases of abusing dominant position
- Several EC **air freight** cases (recent EC case of collusion in freight forwarding services)

## Why are these sectors more exposed?

### (i) *Sector characteristics*

- Complex contracts and financial setup
- Difficult to compare price-quality combinations
- Many consumers, no victims (small details, big profits)
- Better terms (market power), better offer from the firm
- The 'benefit of' corruption and collusion combined
- Hidden violation of award mechanisms vs. legitimate deviation (rules of exception)

## Why are these sectors more exposed?

### (ii) *Governance issues*

- Essential services & government responsibility
- Politically important sectors (voters + business abroad)
- Capital investment (private/public) + risk sharing
- Rents depend crucially on political decisions
- Multiple goals behind sector governance
- 'National champions' and public/private quasi monopolies
- Weak third party monitoring of sector/political decisions
- Secret agendas -- *played out unnoticed ?*

## Warnings

The political game - *as important as award mechanisms !*

- Integrity mechanisms / checks and balances
  - Independent regulator (national level)
  - Competition authority (EC/ECN)
  - Transparency (Art. 26-30 + Annex v-VII + politics)
  - Supreme audit institution (sector performance audits)
  
- Performance made visible
  - Prices, service provision, deals (proposal vs regulation?)
  - Resistance (who's against consumer-friendly solutions?)
  - Undue ties; decision-makers & firms (lobby, ownership, etc)
  - Beware of 'commercial politics'!

## Regarding the law

(i) *Generally*

A good proposal, *however....*

a) Political accountability issues not addressed (*and maybe it shouldn't*, but democracy is not enough to fill the gap)

b)... We don't know much about the optimal sector-level response to weak or unpredictable performance at the political level

c) Legal transplants literature: *The implementation process matters more than the details of procurement law!*

## Regarding the law

### (ii) More specific concerns

- Similar rules and legal certainty (visible deviation from principles)
- Criteria; decided, well-defined and ranked (Art 32 + 39 and politics)
- Renegotiation and end-of term decisions (Art 42+ 43)
- Ex post responsibility for ex ante decisions (process vs performance?)
- Ex ante and ex-post regulation matter for procurement (stabilization?)
- Number of bidders, not enough for competitive outcome (what is?)
- Responses to illegal influence (complete debarment; too strict?)

Tina.Soreide@CMI.no

Thanks for your attention!



**Note:** Large parts of the contents have been developed in research collaboration with Prof. Antonio Estache, ULB – ECARES, Brussels. All arguments will be written up in a briefing note for the Committee on Internal Market and Consumer Protection of the European Parliament.



## 4.4. Fabian SCHMITZ-GRETHLEIN

**An overview of Member States' current regimes  
in the area of awarding concession contracts**

Workshop on the award of concessions contracts

European Parliament

Rechtsanwalt Fabian Schmitz-Grethlein

Brussels, 10th May 2012

Dieser Bericht ist nur für den Empfänger bestimmt. Er darf nicht ohne vorherige schriftliche Zustimmung von FPS Rechtsanwälte & Notare, Partnerschaftsgesellschaft, außerhalb der Organisation des Empfängers ganz oder auszugsweise vervielfältigt oder weitergeleitet sowie dessen Inhalt kommuniziert werden.

Dieses Material wurde von FPS im Rahmen einer mündlichen Diskussion eingesetzt. Es gibt nicht den gesamten Verlauf der Diskussion wieder.

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**In order to categorize we approached the legislation of member states first and established five categories with regard to the legal handling of concessions in national law**

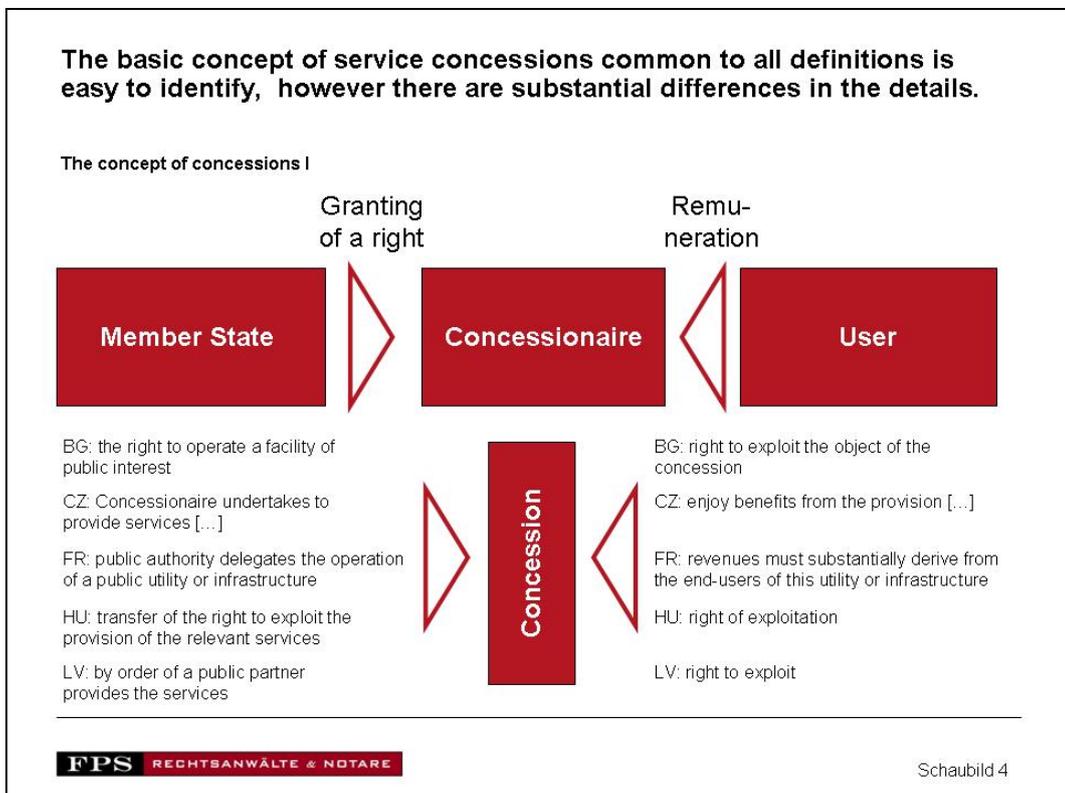
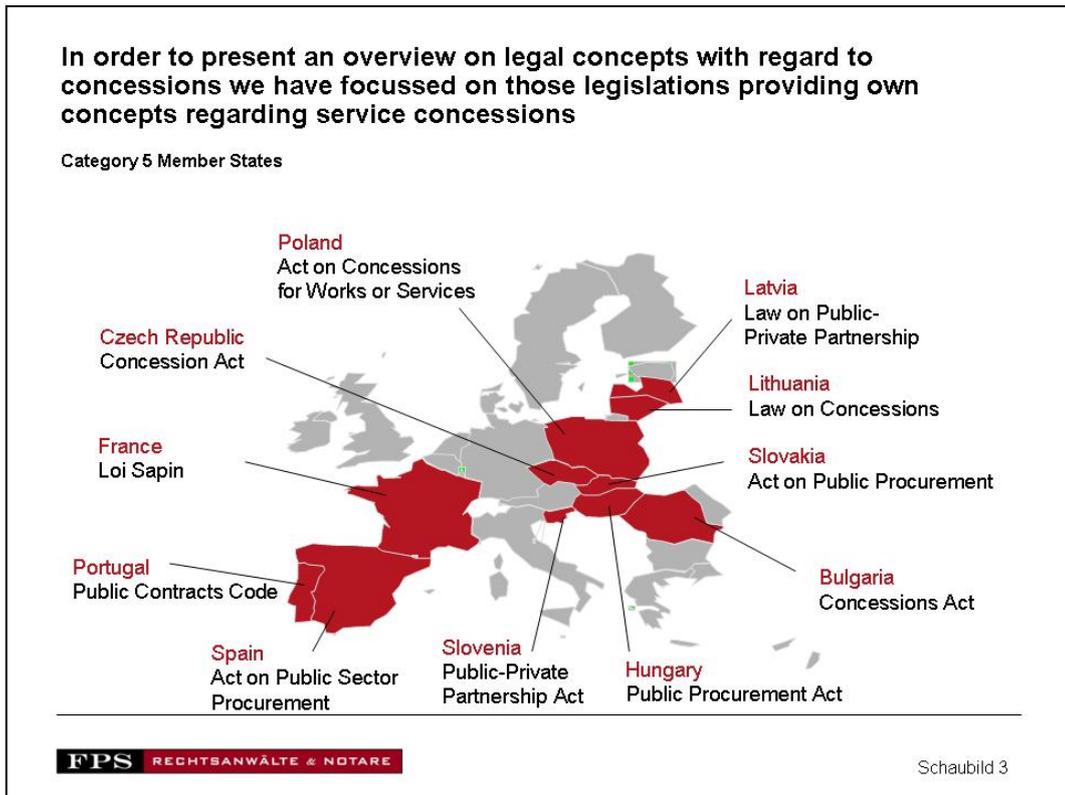
**Legal definitions in national legislation**

<p><b>Category 1</b> Only Works Concession defined, simple transposition of Art. 1 lit. 3 of Directive 2004/18 EC</p>	Belgium, Germany
<p><b>Category 2</b> Own legislation concerning works concessions (as far as Annex II of the Impact assessment mentioned works concessions)</p>	Bulgaria, Czech Republic, France, Hungary, Lithuania, Poland, Portugal, Spain, UK
<p><b>Category 3</b> Definition of service concessions – transposition of Art. 1 lit. 4 of Directive 2004/18 EC but no other provisions</p>	Cyprus, Denmark, Estonia, Finland, Greece, Luxemburg, Netherlands, Sweden, UK
<p><b>Category 4</b> Definition of service concessions same as in Directive 2004/18, Art. 1 lit. 4 AND provisions concerning i.e. threshold, procedures, publication etc...</p>	Italy, Irland, Malta, Austria, Romania
<p><b>Category 5</b> Own definition of service concessions, especially regarding length and/or risk AND special legislation</p>	Bulgaria, Czech Republic, France, Hungary, Latvia, Lithuania, Poland, Portugal, Slovakia, Slovenia, Spain

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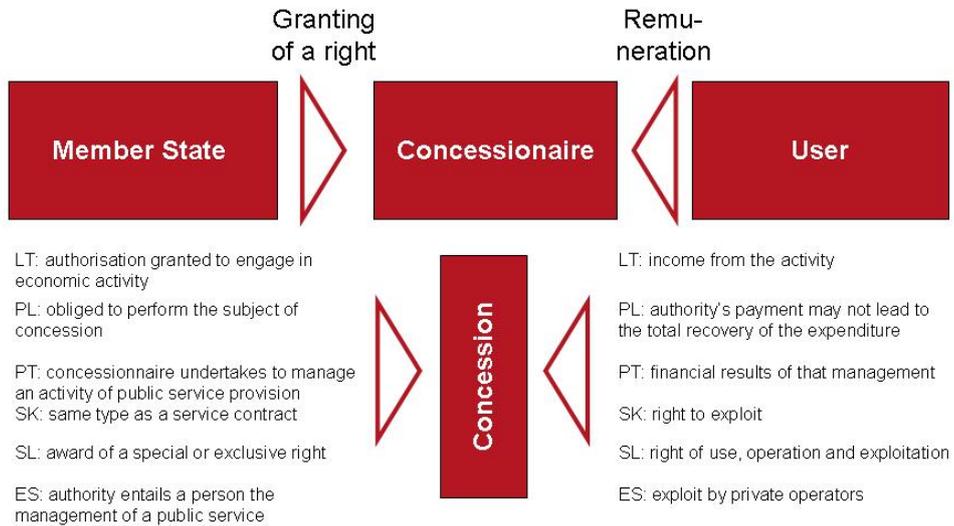


Schaubild 2



The basic concept of service concessions common to all definitions is easy to identify, however there are substantial differences in the details.

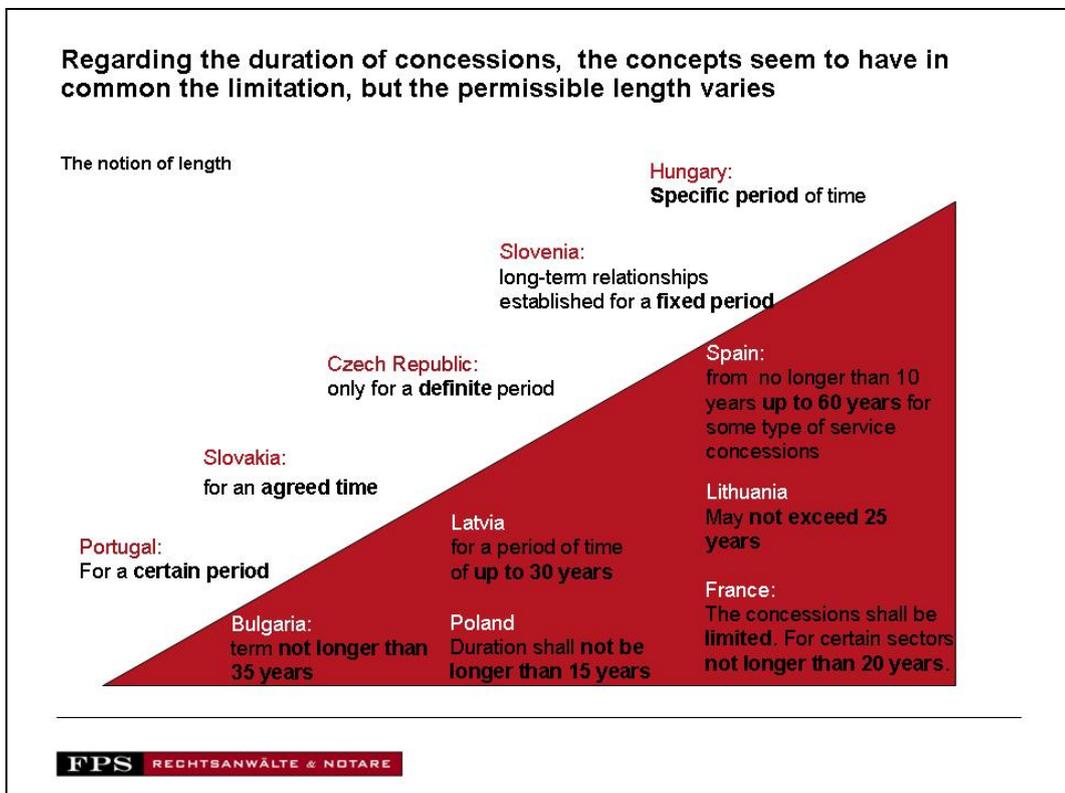
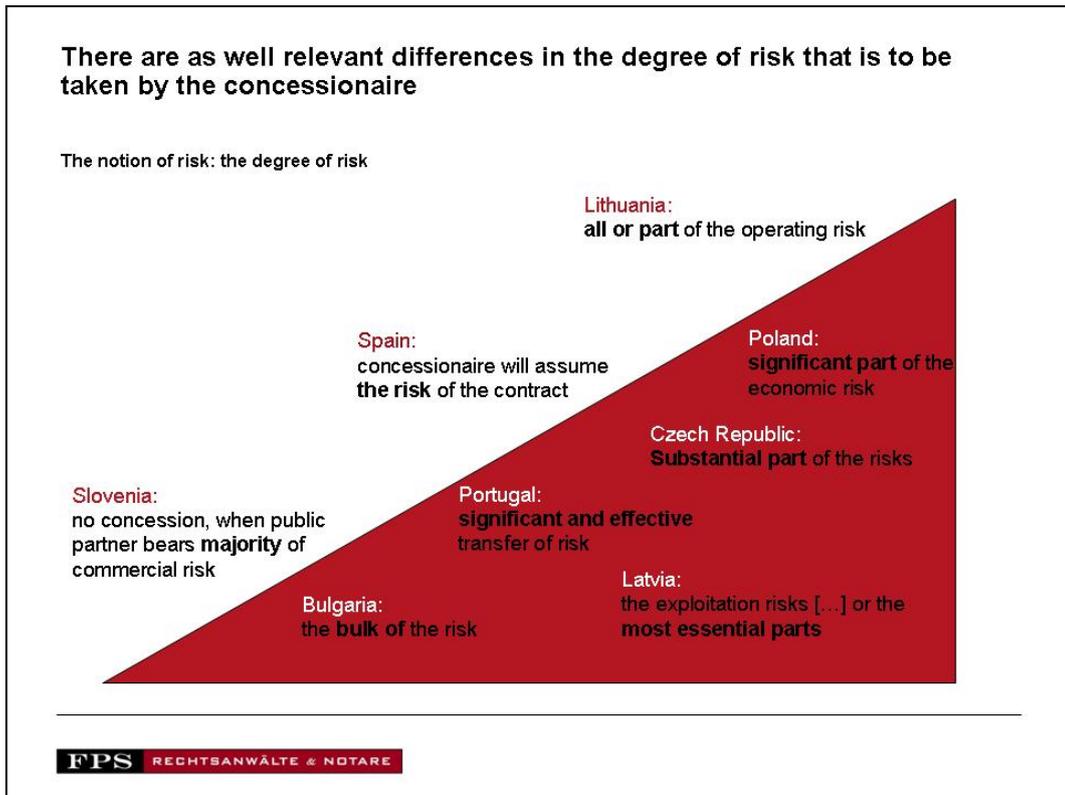
The concept of concessions II



Although most definitions entail the notion of risk, there are relevant differences in the definition and scope of the risk to be transferred

The notion of (operational) risk as the key element for the distinction between concessions and public contracts





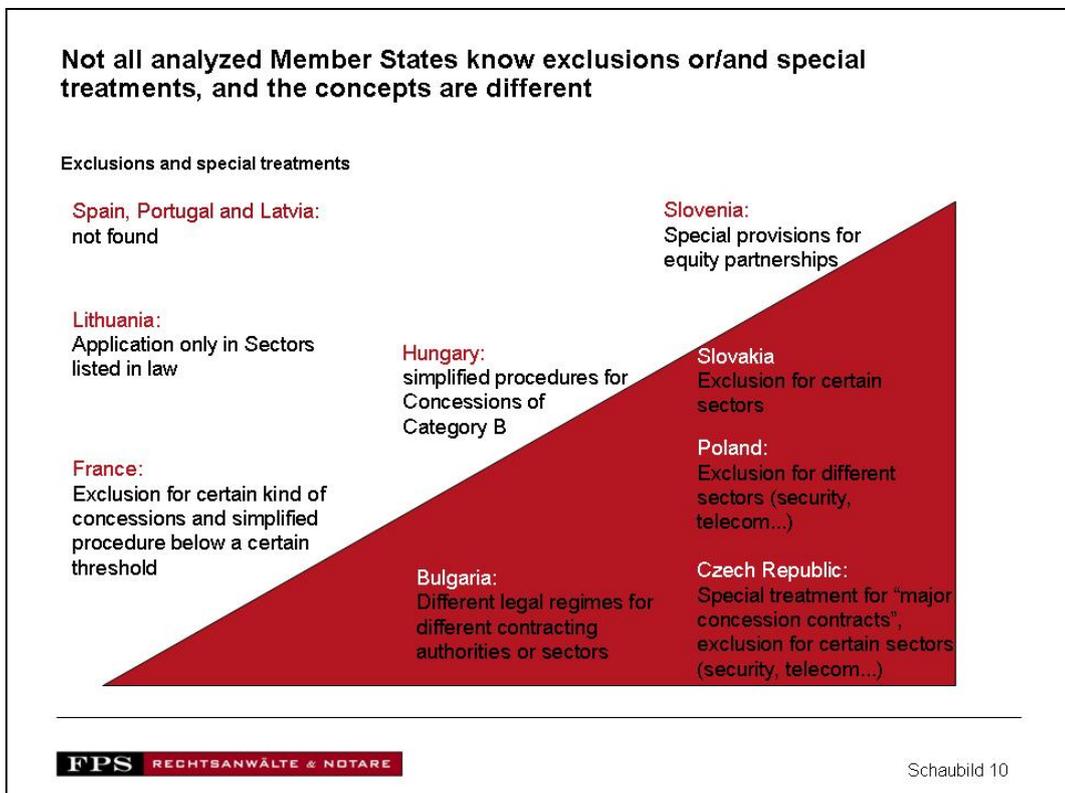
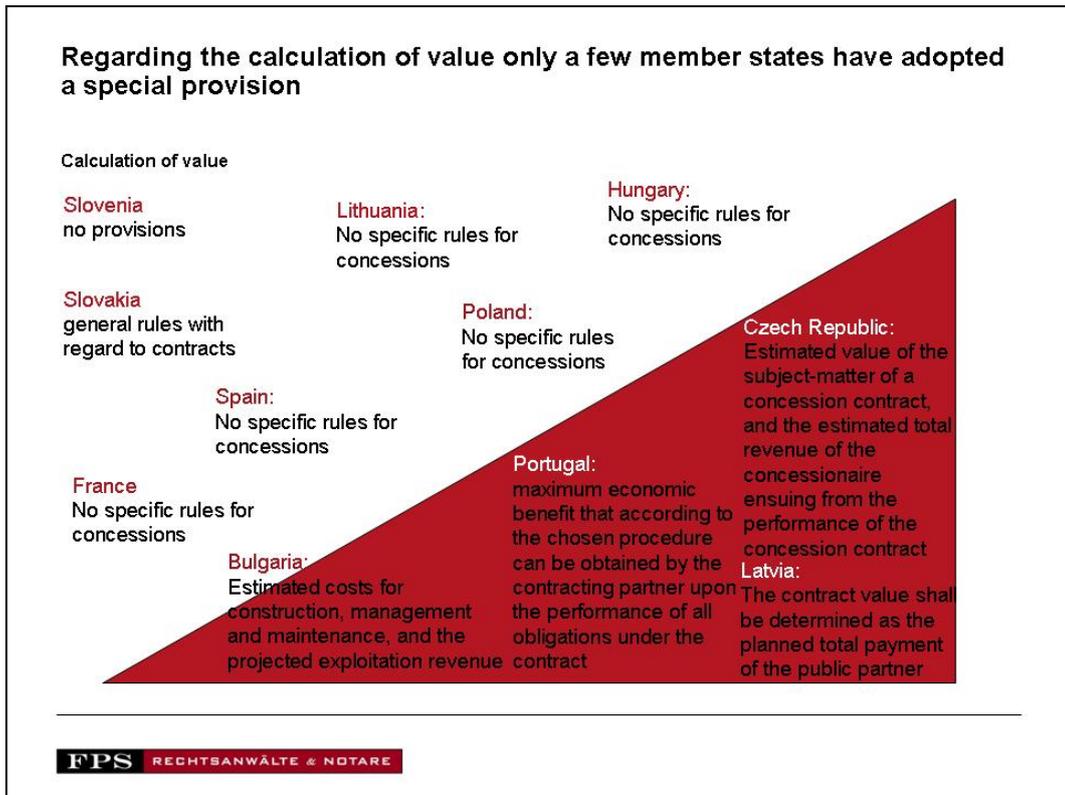


Schaubild 10

Thank you for your attention!



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