e-Competitions
National Competition Laws Bulletin

December 2012

The Italian Supreme Administrative Court addresses the differences between the notions of service concession and public procurement of services (Università degli Studi di Roma Tre v International Airport System)

Italy, Regulated sectors, Judicial review, Concession, Public undertaking, Services

Italian Supreme Administrative Court (Consiglio di Stato, Sect. VI), 4 september 2012, judgement n. 4682, Università degli Studi di Roma Tre c. IAS - International Airport System s.r.l.

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I. Introduction

The judgment of the Italian *Consiglio di Stato* addresses once more the differences between the notions of service concession and public procurement of services.

These main differences, as set up by several ECJ's sentences, consist in the different allocation of economic risk and in the different regime of liability.

The other main issue highlighted in this case is the publicity of the contract notice and his effects on the participation and on the rules of competition.

As well known a legal definition of service concession has already been provided by the EU law [1], nonetheless a new directive on concessions is right now at discussion for a further harmonization of the different legal concepts of concession in the Member States [2].

II. The facts of University Roma Tre case

The judgment concerned the proper qualification of a public contract signed by an Italian public body (*Università degli Studi di Roma Tre*) [3] with an undertaking for the installation and running of dispensers of food and drinks in its spaces.

The University used a negotiated procedure [4] to select the contractor, since the contract for

providing these kind of services to the end-users was assumed as service concession. The service at the stake is directly delivered to the third-users through the use of University's spaces.

An entrepreneur (*IAS - International Airport System s.r.l.*) who wasn't invited to the negotiated procedure because of a previous litigation with the University itself, asked the administrative Court to declare void the tender procedure for not having provided the prior publication of a contract notice to award a public procurement of services, which was, according to the claimant, the proper qualification of the public contract [5].

The *Tar Lazio* first instance administrative court declared void the award procedure on the basis that the contract was effectively a procurement of services and, therefore, the procedure adopted was considered incorrect.

III. The decision of the Court: main differences between service concession and public procurement of services

The *University Roma Tre* appeal against the decisionhas been allowed. The installation and running of dispensers of food and drinks in the University's spaces has to be qualified as a service concession rather than a public procurement of services and, therefore, is consistent with the Italian legal framework using a negotiated procedure to award the contract without prior publication of the contract notice.

The EU notion of service concession - the Italian legal system provides other three main types of concession (public works concession [6], public goods concession [7] and the public service concession) [8] - has been implemented into the IPCC [9]: "*Service concession is a contract of the same type of 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*" [10].

Indeed the main characteristic of the concession and the main differences with a public procurement of services, relies on the type of remuneration for the services provided, that is, on the two profiles of the allocation of the risk (on the concessionaire) and on the regime of liability (with the third users) [11].

According to both European and national settled case-law, a shift of the economic risk of the exploitation from the public administration to the concessionaire modifies the qualification of the agreement which is then a concession rather than a public procurement of services.

It's not defined from the ECJ's case law how much of the risk should be taken by the service provider: from *Parking Brixen* [12] the ECJ established that the right to exploit the service must tranfer a risk to the service provider. The following cases, especially *Orthopädie Schuhtechnik* [13] and *Eurawasser* [14], confirmed clearly that the provider has to take the risk of exploiting the services, but a definition of the amount of such risk.

In *Orthopädie Schuhtechnik* the Court took into account whether the provider in the situation at issue takes an actual risk and then analyzed the contract in detail; in *Eurawasser*the ECJ more significantly stated that *«it is necessary that the contracting authority transfer to the concession*

holder all, or at least a significant share, of the operating risk«.

Last, in the *Privater* [15] case the Court considered the transferred operating risk in a case where it's really limited: the firm were acting in an area - social security - where there was no real competition: nevertheless the ECJ stated that for a service concession it is sufficient that the contracting authority transfers the full or at least a substantial part of the (limited) risk it has to bear.

Even if it makes still a considerable difference if the provider has to bear a full actual risk or only a significant part of a limited risk [16], the finding of ECJ on concession have progressively came common value in the national courts' jurisprudences [17], as the present case affirms too.

With regard to the degree of risk which shall be transferred, the definition in the proposal Directive seems to follow *Orthopädie Schuhtechnik*and *Eurawasser* in requiring the transfer of a "*substantial operating risk*" [18]. The analysis of the Member States' legal framework shows that almost all definitions include a notion of risk, even if quite vague [19].

A different allocation of the economic risk means that the concessionaire is compensated by the right to exploit the service granted, thus he sustains the economic risk of this exploitation, while the contractor in a public procurement can rely on a fixed price. Thus the concessionaire is directly liable towards users that can claim his failure to fulfill the service [20].

The specialty of concessions as opposed to public procurement is that while the contracting authority awards the contract and grants the right to the concessionaire, the concessionaire is remunerated by the exploitation of the work, service or good towards third users who have to pay a price [21]. Along with this way of remuneration the concessionaire bears at least part of the risk connected to the return on his investments. Nonetheless it is well known that often the concessionaire renegotiates concession terms and conditions to restore the financial and economic balance of his activities.

The procedure for the awarding of service concessions, which expressly allows for negotiated procedure without prior publication of a contract notice by means of inviting at least five competitors [22] is only subject to EU principles on competition: the principles of transparency, equal treatment and non-discrimination are directly applicable regardless of any specific legal provisions, whether at the national or European level, since they are fundamental principles of EU law [23].

According to the Italian case-law [24], those principles often have been considered as implying the issuing of an open or restricted procedure, while the negotiated procedure is allowed only in the exceptional cases of extreme urgency or disproportionate costs in choosing alternative solutions due to their different technical characteristics [25].

Nonetheless, the Italian administrative Courts have often considered the negotiated procedure without prior publication of a contract notice can be in certain cases compliant with those principles [26].

IV. Transparency and publicity in concession awarding

procedure

The awarding procedure carried on by the University perfectly fulfilled the criteria requested by the IPCC [27]. The University run a negotiated procedure with a prior informal comparative tender among the eight enterprises invited: it also provided the publication of a contract notice.

Such procedure, although informal, is a competitive tender, making it consistent with the EU principles [28]. However, as it disregards full competition can be considered an exceptional procedure to select tenders [29].

The Italian judges well recognised the ECJ's indications regarding the subjection of this procedure to minimum [30] criteria of competition and to the general principles of public awards [31]. Among the rules implied by these principles three particularly stand out: the prescriptions set in the procedure are mandatory for the Administration itself [32], the principles of impartiality and fairness apply to all the competitors [33], the awarding criteria have to be previously stated [34].

The Administration is also compelled by the ECJ's case-law [35] to provide an adequate level of publicity in the selection phase. The principles of publicity and transparency apply to the Administration's choice to perform an informal competition tender as well; the determination itself is bound to the principles of impartiality and non-discrimination [36].

Moreover, despite the non-application of the IPCC's previsions to the concessions (even if this point is still under discussion [37]) the principle of publicity is always binding. It requests an adequate and effective disclosure and communication of all the information needed (*e.g.* time, place of the selection phase) by the Administration.

The connection between the principle of publicity and full competition implies that any omissions regarding the publicity can turn into a violation of the selection of tenderers [38].

In the end, the Communication of the European Commission [39] highlighted the duty of the procuring entity to provide any useful information (*e.g.* the selection criteria, the object of the contract and the requested performances) so that the potential tenderers can evaluate their interest in the procedure.

V. Issues of harmonization

With the publication of Directive Proposal the Commission opened the debate on the European regulation of the award of concession contracts. The Commission has found that in the area of concession contracts there are "*different interpretations of the principles of the Treaty by national legislators and […] wide disparities among the legislation of different Member States*".

By setting up "rules of the game" for the awarding of concession contracts, the Directive Proposal aims at increasing competition and, last, the efficiency of the services organized through concession contracts.

Because of their complexity and their duration, concession contracts are clearly more prone to uncertainty and contractual incompleteness. This contractual incompleteness generates transaction

costs as difficulties in implementing these contracts, especially in the execution phase.

Firstly, once the operator is selected and the concession contract is signed, the relationship between the public authority and the incumbent can a bilateral dependence that can determine subsequent renegotiations in damage of the public interest and unjustified from a social perspective.

Secondly, the introduction of competition through competitive tendering leads to retaining the most optimistic candidate, not the most effective one. This is the so-called "winner's curse effect" because the selected operator is the one that will probably go bankrupt *ex post*, placing the public authority in difficulty [40].

Theory and facts suggest is that there is no point establishing rigid rules for award procedures [41]: this would not solve strategic behaviors put in place by firms in order to avoid competition (*e.g.* low-balling strategies; collusive agreements) as well as errors made in offers by optimistic bidders (winner's curse effect).

Instead, establishing light rules for awarding procedures would permit, to a certain extent, the use of the public authority's discretionary power. It must be kept in mind that concession contracts are long-term agreements that need a stable partnership between the public entity and the private partner in order to be successful. It would thus be reasonable to allow a more broad set of criteria at the award stage (*e.g.* reputation criteria [42]) and to allow the public authority to disqualify offers that are clearly not suitable for establishing a long-term partnership.

However, such a flexible framework should be coupled with greater transparency [43] in order to avoid either incompetence and corruption [44]. When a large set of criteria as well as a part of the discretionary power for the public authority should be accepted at the award stage and renegotiations should be avoided as much as possible but also accepted when necessary at the execution stage [45], this should be made as transparent as possible. The main road should be to implement a transparent and fair renegotiation process *within*the contractual agreement, involving all stakeholders. More transparency can be obtained with mandatory annual reports for every public service, regardless of how they are provided to citizen [46].

Such transparency would generate pressure on the public authority as well as on private operators to increase their accountability.

[1] The notion of service concession in the EU legal framework is provided by the Directive 2004/17/CE (utilities directive), Art. 1, co. 3°, *b* and by the Directive 2004/18/CE (classic directive), Art. 1, co. 4°: nevertheless this notion does not cover all the elements useful to pinpoint a service concession, just referring to whom bears the economic risk. For an overview of the legal regime on concession contracts European Parliament – Directorate General for Internal Policies,*Analytical overview of the legal framework of EU member states regarding the awarding of concession contracts*, PE 475.123, 2012.

[2] Proposal for a Directive of the European Parliament and of the Council on the award of concession contracts, 20 December 2011, COM(2011) 897 final, 2011/0437 (COD).

[3] For an overview of Italian implementation of EU Directives: G. M. Racca, *Public Contracts*, in *Ius Publicum Network Review*, 2012, in http://www.ius-publicum.com/reposit... A. Massera, *Italie/Italy*,

in R. Noguellou and U. Stelkens (diretto da) *Comparative Law on Public Contracts*, Bruxelles, 2010, 737.

[4] According to Art. 30, Italian PCC (d.lgs. 12 April 2006, No. 163. For the EU perspective: Contract Below Threshold: D. Dragos and R. Caranta (eds.), *Outside the Procurement Directives - inside the Treaty?*, Djøf Publishing: Copenhagen, 2012).

[5] As requested by Art. 56, 57, IPCC.

[6] The public works concession is as a contract having as its object either the execution, or both the design and execution of works where the consideration for the works consists either solely in the right to exploit the work or in this right together with payment (Art. 3 IPCC). They are entirely covered by EU directives on public contracts and by its national implementation (Art. 142 IPCC).

[7] The public goods concession is a contract whereby the concessionaire is entrusted with the task of exploiting the public good in return for a fee paid to the grantor authority, sometimes providing a service to third users who sometimes pay the relevant fees. Sometimes the concession is also used to delegate the exercise of public powers. There is no general discipline but sectorial legislation, e.g. art. 2, 7 r.d. 11 December 1933, n.775 as for water abstraction; Art. 36 Cod. Navigation.

[8] R. Cavallo Perin, La struttura della concessione di servizio pubblico locale, Torino, Giappichelli, 1998; B. Raganelli, Le concessioni di lavori e di servizi, in C. Franchini (eds.) I contratti della Pubblica Amministrazione, Torino, 2007, 985; F. Goisis, Public Works Concessions and Service Concessions, in Ius Publicum Network Review, 2011, available at http://www.ius-publicum.com/reposi...

[9] Art. 3, co. 12°, IPCC. G. Corso and F. Satta, Le procedure di affidamento, in M. A. Sandulli, R. De Nictolis and R. Garofoli (eds.), Trattato sui contratti pubblici, IV, Milano, 2008, 2851.

[10] Which exactly replies the the, Art. 1, co 3°, b, Directive 2004/17/CE and the Directive 2004/18/CE, Art. 1, co. 4°.

[11] Lately: ECJ, 6 May 2010, Cases C-145/08 and C-149/08, **Club Hotel Loutraki AE, v. Ethniko Symvoulio Radiotileorasis** ; ECJ, 10 March 2011, Case C-274/09, **Privater Rettungsdienst und Krankentransport Stadler v Zweckverband für Rettungsdienst und Feuerwehralarmierung Passau**; ECJ, 10 November 2011, Case C-348/10, **Norma-A SIA v. Latgales planošanas regions**. On "similar control" notion: ECJ, 29 November 2012, Cases C-182/11 and C- 183/11,**Econord S.p.A. v. Comune di Cagno**. For: R. Cavallo Perin and D. Casalini, Control over In-house Providing Organisations, in Public Procurement Law Review, 2009, 227-241; R. Cavallo Perin, Comuni e province nella gestione dei servizi pubblici, Napoli, 1993, Id., Comment to art. 113, in R. Cavallo Perin and A. Romano (eds), Commentario al testo unico delle leggi sull'ordinamento degli enti locali, Padova, 2006, 651; S. R. Masera, Appalto pubblico di servizi e concessione di servizi nella giurisprudenza comunitaria, in Urb. e app., 2008, 581 - 585; F. Leggiadro, Concessione e appalto: il nocciolo duro della distinzione, in Urb. e app., 2007, 1426 - 1432; A. Massera, Lo Stato che contratta e che si accorda, Pisa, 2011, 154 e ss. For the EU perspective: U. Neergard, Public service concessions and related concepts - the increased pressure from Community law on Member states' use of concessions, in Public Procurement Law Review, 2007, 387 e ss.; M. Robles, Distinzione tra "appalto pubblico di servizi" e "concessione di servizi", in Giur. It., 2011, 762-763.

[12] ECJ, 13 October 2005, Case C-458/03, **Parking Brixen GmbH v. Gemeinde Brixen and Stadtwerke Brixen AG**. F. Goisis, I giudici comunitari negano la "neutralità" delle società di capitali (anche se) in mano pubblica totalitaria e mettono in crisi l'affidamento in house di servizi pubblici locali, in Rivista italiana di diritto pubblico comunitario, 2005, 1915-1932; A. Brown, The Application of the EC Treaty to a Services Concession Awarded by a Public Authority to a Wholly Owned Subsidiary: Case C-458/03, Parking Brixen, in Public Procurement Law Review, 2006, NA40-NA47; G. Piperata, L'affidamento in house nella giurisprudenza del giudice comunitario, in Giornale di diritto amministrativo, 2006, 137-145; R. Cavallo Perin, Il modulo "derogatorio": in autoproduzione o in house providing, in H. Bonura and M. Cassano (eds.) L'affidamento e la gestione dei servizi pubblici locali a rilevanza economica, Torino, Giappichelli Editore, 2011, 119 - 135.

[13] ECJ, 11 June 2009, Case C-300/07, **Orthopädie Schuhtechnik v. AOK Rheinland/Hamburg**. A. Brown, Whether German Sickness Insurance Funds are Contracting Authorities and the Categorisation of a Fund's Contract for the Supply of Orthopaedic Footwear: Hans and Christophorus Oymanns GbR v AOK Rheinland/Hamburg (C-300/07), in Public Procurement Law Review, 2009, NA217-NA221.

[14] ECJ, 10 September 2009, Case C-206/08, **WAZV Gotha v. Eurawasser**. J.-M., Pastor, La CJCE précise la distinction entre marché de services et concession de services, in Revue française de droit administratif, 2009, 1637.

[15] ECJ, 10 March 2011, Case C-274/09, **Privater Rettungsdienst und Krankentransport Stadler v. Zweckverband für Rettungsdienst und Feuerwehralarmierung Passau**. M. Aubert, E. Broussy, F. Donnat, Chronique de jurisprudence de la CJUE. Marchés publics - Concessions de services, in Droit administratif 2011, 1013-1014 ; D. McGowan, Concessions - Rescue, Risk and Remuneration: A Note on Privater Rettungsdienst v Zweckverband für Rettungsdienst und Feuerwehralarmierung Passau (C-274/09), in Public Procurement Law Review, 2011, NA128-NA131.

[16] The reason of the different arguments might be that two different chambers of the ECJ were responsible for the judgments, the Third Chamber for Eurawasser, the Fourth Chamber for Orthopädie Schuhtechnik.

[17] Italian Supreme Administrative Court (*Consiglio di Stato*), 9 September 2011, n. 5068; Italian Supreme Administrative Court (*Consiglio di Stato*), 6 June 2011, n. 3377.

[18] Art. 2, co. 2°, Proposal for a Directive of the European Parliament and of the Council on the award of concession contracts, Brussels, 20.12.2011, com(2011) 897 final, 2011/0437 (cod).

[19] In some Member States, as France, where the notion of risk is not mentioned in the law, the jurisprudence confirmed that the concessionaire has to bear a risk. Among the Member States, at the stake only Portugal legal framework refers exactly to the substantial risk.

[20] Italian Supreme Administrative Court (*Consiglio di Stato*), 9 September 2011, n. 5068; Italian Supreme Administrative Court (*Consiglio di Stato*), 6 June 2011, n. 3377.

[21] Italian Supreme Administrative Court (*Consiglio di Stato*), 19 March 2009, n. 1623; Cons. St., Sect. V, 14 April 2008, n. 1600; Italian Supreme Administrative Court (*Consiglio di Stato*), 30 April 2002, n. 2294. A. Massera, Lo Stato che contratta e che si accorda, cit. 156 and 157.

[22] Art. 27,30, IPCC.

[23] ECJ, 7 December 2000, Case C-324/98, **Telaustria Verlags GmbH v. Telekom Austria AG**; ECJ, 13 October 2005, Case C-458/03, **Parking Brixen GmbH v. Gemeinde Brixen and Stadtwerke Brixen AG**; ECJ, 9 September 2010, Case C-64/08, **Ernst Engelmann**; ECJ, 3 June 2010, Case C-203/08, **Sporting Exchange Ltd. v. Minister Van Justitie**. M. Dischendorfer, Service Concessions under the E.C. Procurement Directives: A Note on the Telaustria Case, in Public Procurement Law Review, 2001, NA57-NA63; L. Bonechi, Concessioni e appalti di pubblici servizi: la Corte elimina i dubbi sulla disciplina applicabile, in Diritto pubblico comparato ed europeo, 2001, 324-328; A. Brown, Application of the EU Treaty Obligation of Transparency to an Exclusive National Licence for Internet Games of Chance: Sporting Exchange Ltd, trading as Betfair v Minister van Justitie (C-203/08), in Public Procurement Law Review, 2010, NA221-NA224.

[24] Tar Lazio, Latina, Sect. I, 12 November 2010 n. 1881; Tar Campania, Napoli, Sect. VII, 5 December 2008 n. 21241;Tar Piemonte, Torino, Sect. I, 26 March 2010, n. 1602.

[25] Italian Supreme Administrative Court (*Consiglio di Stato*), 21 September 2010, n. 7024.

[26] Italian Supreme Administrative Court (*Consiglio di Stato*), 19 September 2008, n. 4520; Tar Lombardia, Brescia, Sect. I, 2 April 2009, n. 781.

[27] Art. 30, co. 3°, PCC.

[28] ECJ, 21 July 2005, Case C-231/03, **Consorzio Aziende Metano (Coname) v. Comune di Cingia de' Botti**; ECJ, 13 October 2005, Case C-458/03, **Parking Brixen GmbH v. Gemeinde Brixen and Stadtwerke Brixen AG**; Italian Supreme Administrative Court (*Consiglio di Stato*), 30 June 2003, n. 3856; Italian Supreme Administrative Court (*Consiglio di Stato*), 4 May 2002, n. 1269. A. Brown, Transparency Obligations Under the EC Treaty in Relation to Public Contracts that Fall Outside the Procurement Directives: A Note on C-231/03, Consorzio Aziende Metano (Coname) v Comune di Cingia de' Botti, in Public Procurement Law Review, 2005, NA153-NA159; R. Caranta, Il principio di diritto comunitario della trasparenza/concorrenza e l'affidamento o rinnovo di concessioni di servizi pubblici (ancora in margine al caso Enalotto), in Giur. it., 2008, 474 – 478. S. S. Scoca, I principi dell'evidenza pubblica, in C. Franchini (eds.) I contratti di appalto pubblico, Torino, 2010, 322 e ss.; A. Massera, Lo Stato che contratta e che si accorda, cit. 156.

[29] Italian Supreme Administrative Court (*Consiglio di Stato*), Ad. Plen., 3 March 2008, n. 1; Cons. St., Sect. V, 11 May 2009, n. 2864; Italian Supreme Administrative Court (*Consiglio di Stato*), 14 April 2008, n. 1600; Italian Supreme Administrative Court (*Consiglio di Stato*), 7 April 2006, n. 1893; T.A.R. Piemonte, Torino, Sect. I, 26 March 2010, n. 1602.

[30] In the statement of the awarding rules the Administration can set, beyond this minimum standard of guarantee the competition, procedures, as a public tender competition, which offer better guarantees of fulfilling the awarding principles. Italian Supreme Administrative Court (*Consiglio di Stato*), 21 September 2010, n. 7024; T.A.R. Puglia, Lecce, Sect. III, 27 November 2009, n. 2868.

[31] Italian Supreme Administrative Court (*Consiglio di Stato*), 4 August 2009, n. 4890; Italian Supreme Administrative Court (*Consiglio di Stato*), 24 April 2009, n. 2559.

[32] Italian Supreme Administrative Court (*Consiglio di Stato*), 30 June 2003, n. 3856; T.A.R. Toscana, Firenze, Sect. I, 30 May 2006, n. 2572; T.A.R. Abruzzo, L'Aquila, 1 September 2004, n. 951.

[33] T.A.R. Sicilia, Palermo, Sect. II, 30 June 2004, n. 1358.

[34] T.A.R. Lombardia, Brescia, Sect. I, 18 October 2007, n. 908.

[35] ECJ, 24 November 2005, Case C-331/04, ***ATI EAC S.r.l. e Viaggi di Maio Snc e altri c. ACTV Venezia SpA e altri***.

[36] T.A.R. Calabria, Catanzaro, Sect. I, 1 July 2010, n. 1419.

[37] Italian Supreme Administrative Court (*Consiglio di Stato*), 13 July 2010, n. 4510 ; Italian Supreme Administrative Court (*Consiglio di Stato*), 20 August 2008, n. 3982; T.A.R. Toscana, Firenze, Sect. II, 20 December 2010, n. 6781.

[38] Italian Supreme Administrative Court (*Consiglio di Stato*), 16 June 2009, n. 3844.

[39] Commission Interpretative Communication On Concessions Under Community Law, Brussels, 12 April 2000, (2000/C 121/02).

[40] Since competitors are usually smart enough to anticipate this problem, their interest is to internalize this winner's curse effect by bidding less aggressively when the number of competitors is increased. Internalization of the winner's curse thus causes that a limited number of suppliers or a bilateral negotiation permits to the public authority to obtain more interesting bids. Of course, for a project with no common value problems, the higher the number of competitors, the better it is. European Parliament - Directorate General for Internal Policies, An Economic Analysis of the Closure of Markets and other Dysfunctions in the Awarding of Concession Contracts, PE 475.126, 2012, 13.

[41] European Parliament - Directorate General for Internal Policies, An Economic Analysis of the Closure of Markets and other Dysfunctions in the Awarding of Concession Contracts, PE 475.126, 2012, 9.

[42] One solution is to explicitly take into account quantitative and qualitative aspects in the evaluation of tenders, with the objective to define all criteria that are relevant as much as possible. Nevertheless, this could lead to abuses: firstly, the use of the lots of criteria significantly increase the risk of renegotiation of contracts and, secondly, this type of auction is often chosen for non-economic reasons, and is thus diverted from its original purpose. Moreover this increases highly the adjudicator's discretion. It would then be natural to select bidders that would more likely behave as a fair partner when it is time to renegotiate. This would suggest that the reputation of the candidates must be considered in the procedure - this can be viewed as a particular type of multi-criteria auction - where the past performance of a company is used to evaluate its current offer.

[43] As transparency increases, economic actors have access to information, enabling them to achieve better control of the probity of the process. Moreover the disclosure of the estimated project cost would reduce the prediction error and would provide better-calibrated offers. New entrants benefit primarily from the effects of diffusion of the estimated price, as it reduces information

asymmetries between experienced and inexperienced candidates. However, more transparency is not always a good issue: in highly concentrated markets, concerning few potential competitors as concessions, collusion can be easier when more information is provided to competitors. As noted by the French Competition Authority (2000) "the publication of a priori selection criteria and prioritization [...] may have anti-competitive effects. [...]Having to inform bidders about the selection criteria is particularly likely to facilitate agreements [because] precise "rules of the game" known in advance by bidders makes the conditions under which the contract will be award readable for them".

[44] European Parliament - Directorate General for Internal Policies, Risks of Corruption and Collusion in the Awarding of Concession Contracts, PE 475.127, 2012.

[45] In the concession procedure, renegotiations are the rule, not the exception, and this should be taken into account in the Directive. The complexity and long-term horizon typical of these contracts make them subject to requests for changes linked to unanticipated events. Moreover, the contractual provisions for anticipated changes may easily become obsolete over time, and their adaptation may become necessary in the light of unexpected major technological changes. Anyway instances of renegotiation should not always be considered bad news (i.e. the result of opportunistic behaviors) and can also be good news (e.g. the partnership nature of the contract leading parties to adapt their cooperation as soon as uncertainties are resolved). All modifications necessary for reaching the original goals of the concession should be admissible without new award procedure. The control over the execution of the contract is an attribution of the grantor entity and of the users, as a contractual control, in few sectors there are independent administrative authorities' interventions too (e.g. water, energy). The incumbent is always allowed to take part in the procedure for choosing the new concessionaire. The automatic renewal is now forbidden in almost every sector, apart from some seashore concession (Tar Toscana, Firenze, Sect. III, 4 October 2010, n. 6431).The Directive Proposal allows for modifications if they are below a certain value without any other prerequisites and provides for modifications under circumstances that could not be foreseen. The latter rule is known to a number of Member States, while no Member State has generally allowed modification below the value of 5 % as foreseen in the Directive Proposal.

[46] As recently proposed by the Communication from the Commission to the European Parliament, the Council and the European economic and social committee Fighting Corruption in the EU, Brussels, 6 June 2011, COM(2011) 308 final.

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