

PUBLIC WORKS CONCESSIONS AND SERVICE CONCESSIONS

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1. THE CONCEPT OF CONCESSION AND HOW TO DISTINGUISH IT FROM THE CONCEPT OF PUBLIC CONTRACT : DECLINE OF FORMAL APPROACHES AND SIGNIFICANCE OF THE MANAGEMENT RISK

It is a common observation that to distinguish among concessions and public contracts it is not any longer of use to make reference to the unilateral nature of the concession, as opposed to the consensual nature of the public contract.

By now, Italian law seems to be fully in line with the European law view, according to which concession is a contract. And this is true in relation to public works concessions, as well as to service concessions.

In particular, Italian legal definitions exactly reflect the European law ones: «"Public works concession" is a onerous contract, to be executed in written, related to the realization , or executive design, or final design and realization of public works or of works of public utility, and of works to the former structurally and directly connected, together with their functional and economic management, of the same type as a public works contract except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the work or in this right together with payment, in conformity with this code» (art. 3, par. 11, code of public contracts), while service concession «is a contract of the same type as a public service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with payment, in conformity with art. 30».

In the case-law, then, it seems to prevail the idea that the contractual relationship established by the public works concession fully belongs to the domain of private law, and, as a result, is, in this respect, equivalent to the relationship established by the public work contract. This with all the consequences as to the performance phase and as to the which court is competent to decide the relative controversies.

In this connection, particular attention is given to art. 142, par. 3, of public contracts code, according to which «Provisions of this Code apply to public works concessions, except to the extent provided for by the chapter». This would implicate a full equivalence among concessions and contracts also in relation to remedies and nature of the relative acts.

As lastly noted, «in accordance to art. 3, par. 11, of public contracts code, the public works concession– that by definitions always comprehends the management of the public work – is a relationship assimilated to a public work contract, from which it differs for the only circumstance that the consideration consists exclusively in the right of

managing the work, or this right with in addition a consideration». Thus, as to the acts related to the performance of the agreement (for example, the termination), «art. 142 of the code extends to the concessions also the provisions on remedies, with particular regard to the rules on judicial competence laid down by art. 244 of the public contracts code, which, in turn, refer to Legislative Decree no. 104 of 2010 (code of administrative justice)»¹. This with the result that the Ordinary Courts are have jurisdiction to decide the relative controversies. Also in relation to public works concessions it should be distinguished among a public law phase, that is intended to select the contractor and a private law one, in which the contract is due to be performed. In principle, these two phases would be autonomous. Or, to put it better, the public law phase could not be annulled for legal errors in the private law phases (whilst, vice versa, the contract would be affected by the annulment of the concession).²

In relation to service concession, wherever it comprehends activities definable as public services, also as a consequence of a specific case of exclusive jurisdiction of the administrative courts existent in that field³, it appears well clear the idea that significant profiles of public power may survive, notwithstanding a mainly contractual nature of the legal relationship.

In reality, if the distinction between concessions and public contracts does not descend primarily from the formal structure of the legal relationship, this distinction must be grounded on the substantial characteristics of the relationship. In particular, we must make reference to the economic substance of the operation to be realized, in terms of risks assumed by the private contractor.

¹ Council of State, sect. V, 26 January 2011, no. 591.

² Council of State, sect. V, 6 December 2010 no. 8554.

³ Art. 133, par. 1, let. c), code of administrative justice.

The concessionaire must assume a risk different and higher than that of the contractor: not only a service or a good shall be guaranteed in the quality or quantity promised, but also the concessionaire is due to bear a specific entrepreneurial risk, resulting from the concrete degree of profitability of the management of the service (to which, in case of a public works concession, the work is instrumental). This as a consequence of the inexact predictability of the related demand.

In this perspective, we could say that the concession relationship is, at least in principle and in substance, of a trilateral nature: in other terms, it is intended to offer services to subjects different from the conceding Authority, i.e. the users. As the choices of the users are only partially predictable and the concession relationship (to which users are not contractual parties) cannot impose them any level of demand of the service offered by the concessionaire, this fact generates a specific market risk.

This substantial trilateral nature remains also when the consideration of the service is paid integrally by the conceding authority, but it is, still, proportional to the demand of the service from third users (for example, management of public ways, compensated by means of shadow tolls). However, this trilateral nature ceases whenever (as expressly allowed by art. 143, par. 9 of public contracts code), the concession concerns works to be directly and exclusively used by the Administration⁴.

These distinctive criteria are applied by the case-law. For example, the Council of State has, coherently, noted, in relation to a public works concession, that «It is well known that, in concessions, the concessionaire provides its service to the public, and, as a result, it assumes the risk of managing the work or service, since it is compensated, at least for a significant part, by the users through a price; in public contracts, by contrast, services

⁴ «Public administrations may award by means of concessions works intended to a direct use by the public administration, to the extent they are instrumental to the management of a public service and upon condition that the economic-financial risk of the management of the work remains to the concessionaire».

are provided to the Administration, which is obliged to compensate the activities that the contractor conducts in favor of the latter»⁵.

The same Council of State, with regard to a service concession, has held that «While in the event that services are supplied to the Administration a public contract is at stake, the concession establishes a relationship of trilateral nature involving Administration as well as users; more in details, in services concession the costs of the services are borne by the users, while in the public service contract it is up to the Administration to compensate the activity of the private party. As a result, the relationship among the corporation managing a swimming facility, including the ordinary maintenance and custody, in which the compensation is directly received from users and rent fees are paid to the Municipality, is to be considered as a concession»⁶.

The most recent, well grounded, analysis of the substantial distinction among public contracts and concessions was however offered in 2010 by the Public Contracts Authority⁷. In particular, with specific regard to public works concessions, an extensive analysis of the concept of management risk was offered.

The Authority observed that, in the light of the legal provisions, «Peculiarity of the concessions is the assumption by the concessionaire of the risk connected to the management of the services to which the work is instrumental, in relation to the tendential capability of the work to self-fund itself, i.e. to generate a cash flow deriving from the management such to compensate the investment made». Wherever such a risk does not exist, a normal public contract is at stake: «In the absence of the risk connected to the management, a public contract, as opposed to a concession, is at stake. In the public contract,

⁵ Council of State, sect. V, 24 September 2010, no. 7108.

⁶ Council of State, sect. V, 15 November 2010, no. 8040.

⁷Resolution 11 March 2010, no. 2, *Problematiche relative alla disciplina applicabile all'esecuzione del contratto di concessione di lavori pubblici*.

the only entrepreneurial risk may originate from an erroneous estimation of the construction costs, in respect to the compensation to be received for the realization of the work. In the concession, in addition to the risks typical of the public contracts, also the risk of the market of the services to which the work is instrumental and/or the so called risk of availability are at stake». If it so, according to the Authority, the work must be capable of creating cash flows: «Essential element of the public works concessions is, thus, the capability of the work object of the concession to generate cash flow such to compensate totally or partially the investment».

The most relevant aspect of the analysis offered by the Authority is represented by the attempt to describe the significance of art. 3, par. 15 of the code of public contracts, as introduced by the third Decree amending the code (Legislative Decree no. 152 of 2008). This rule, in exemplifying the relationship that fall within the definition of private-public partnerships (this one defined as contracts characterized by the total or partial funding by private parties in compliance with prescriptions and guidelines of the European Community), has mentioned public works concessions and services concessions. According to the Authority, Eurostat decision of 2004 on public-private partnerships, as referred to by art. 3, par. 15 *ter*, would confirm that «a concession or a private-public partnership may be substantially distinguished from a public contract, based on the allocation of the risk on the private party». In fact, art. 3, par. 15 *ter*, definitely clarified that concessions (of public works as well as of services) fall «within the definition of private-public partnerships..., in which a total or partial funding is ensured by the private party».

Now, we should analyze whether, as it may seems to be the opinion of the Authority, the compliance to Eurostat decision 11 February 2004 on statistical treatment of works and projects realized in public-private partnerships ⁸ may be deemed to be a

⁸ In *www.epp.eurostat.ec.europa.eu*

precondition, at the same time sufficient and necessary, to classify a relationship as a concession.

In other terms, we should understand whether this decision of Eurostat has acquired, for internal legislative choice, the role of criteria to select not only interventions of public-private partnership that may be classified as off balance, but also of the concessions, as opposed to public contracts.

Two different interpretations of art. 3, par. 15 ter seem possible: one could think that this article refers to concession just for example. In other terms, concessions would be public-private partnership, only insofar as the risk is really transferred to the private party, in compliance to Eurostat decision. By contrast, one could argue that such provision was intended to integrate the definition of concession offered by the previous pars. 11 and 12 of the same art. 3, providing that concession must be characterized by a transfer of risk, at the conditions analytically established by Eurostat, in order to qualify a relationship as off balance.

To reach a conclusion in this respect, it is of crucial importance the circumstance that Eurostat criteria do not reflect a particularly rigorous view, and, as a consequence, do not seem fully consistent with the binding European guidelines: the risks assumed by the concessionaire must be significant, but risk of availability and, respectively, of demand (i.e., of market) are not required necessarily together. This may be explained based on the fact that in cold works directly used by the Administration (as, among others, covered by the Eurostat decision), it is difficult to find a real risk of demand: the Administration is not a third subject, whose choices are only partially predictable, but a part to the contract, from which guarantees on the level of use of the service may well be required. A risk of market, so, tends to be, by definition, absent. . However, the Court of justice, in a last judgment on service concession, has held that «risks such as those linked to bad management or errors of judgment by the economic operator are not decisive for the purposes of classification as a public service contract or a service concession, since those risks are inherent in every

contract, whether it be a public service contract or a service concession.»⁹. In other terms, European judges seem to think that the only risk decisive in the qualification of a contract as concession is the risk of demand, not the risk of availability (i.e., that relative to the quality of the service): « In that regard, it must be stated that the risk of the economic operation of the service must be understood as the risk of exposure to the vagaries of the market (see, to that effect, *Eurawasser*, paragraphs 66 and 67), which may consist in the risk of competition from other operators, the risk that supply of the services will not match demand, the risk that those liable will be unable to pay for the services provided, the risk that the costs of operating the services will not fully be met by revenue or for example also the risk of liability for harm or damage resulting from an inadequacy of the service...»¹⁰.

In sum, the analytic contribution offered by Eurostat and recalled by the Public Contracts Authority puts us in condition of making it much more concrete a concept, that of management risk of the private concessionaire, that, if viewed only in abstract terms and without a real attention to the substance of the cases, risks to only apparently impact on the reality of the concession relationships. In particular, we appreciate the careful analysis of clauses which could turn out (regardless the legal instrument formally used) to impact on the allocation of the risk. However, the conclusions of Eurostat do not seem fully consistent with the current status of the European case-law.

In sum, it does not seem possible to conclude that art. 3, par. 15 *ter*, of the public contracts code has been directed to impose the conformity to criteria laid down by Eurostat decision, as a condition (necessary and sufficient) for a relationship to be qualified as a true concession (as opposed to a off balance partnership). However, the criteria offered by Eurostat seem such to represent a more evolved and precise model, for the purpose of a distinction, often, in concrete, highly disputable.

⁹ Eur. Court of Justice, 10 March 2011, in causa C-274/09, *Privater Rettungsdienst und Krankentransport Stadler*, par. 38.

¹⁰ Par. 37.

2. HOW TO DISTINGUISH AMONG PUBLIC WORKS CONCESSIONS AND SERVICE CONCESSIONS

It is not always a easy task to distinguish, in concrete cases, among public works concessions and, respectively, services concessions.

In both o f them, the consideration is mainly represented by the right to manage a service (to which, when a public work is at stake, the work is instrumental).

Art. 14 of the public contracts code, in governing, pursuant to the European law principles, on the basis of the criteria of the main object of the contract, mixed contracts, establishes that «main object of the contract is represented by works if the amount of works has a value higher than fifty per cent, except if, based on the specific characteristics of the contract, works have a mere secondary relevance in respect to services and supplies, which are the main object of the contract ».

This article is applied also to concessions.

And so, case-law underlines that the rule of prevalence of the works on services should be applied in a functional, as opposed to quantitative, perspective. It is necessary to take in count the comprehensive purposes of the relationship to be set up, as well as to the circumstance that the services are of a secondary significance, in respect to works .

In particular, in relation to services of lightening of a cemetery, it has been repeatedly noted, that «the difference between public works concessions and service concessions is to be identified in the instrumentality link connecting the management of the service and the realization of the works». Therefore, «there is a public works concession if the management of the service is instrumental to the realization of the work, as directed to make available the funds necessary to realize the work, while a service concession is at stake where the realization of the works is instrumental, in relation to the maintenance, refurbishing and

implementation, to the management of the public service, whose provision is already possible thanks to preexisting works.»¹¹.

In other terms, where the management of the service is, in reality, instrumental to compensate the realization of the work, a public work concession is at stake. Where, on the contrary, works are instrumental to make it possible, to create the conditions for, the provision (or a more effective provision) of the public service, a service concession is at stake¹².

Consistently with such an approach, the Council of State explains that, in concrete terms, where it turns out that the fees paid by the users to obtain the service are disconnected from the costs of realization of the works, this represents a significant element that a service concession is at stake. On the contrary, if the fees are intended to compensate the works, a public works concession is at stake. In other terms, it must be considered the circumstance whether «the fees paid by the users» are connected «in a synallagmatic and exclusive way...to the investment necessary to realize the works», or, on the contrary, they are «in reality intended to compensate a unitary and more complex service», i.e. the entire public service.

¹¹ Council of State, sect. V, 14 April 2008, no. 1600.

In favor of a qualification as service concession for a contract of cemeteries lightening, lastly, Council of State, sect. V, 24 March 2011 no. 1784 and Regional Administrative Court, Lombardia, sect. I, 11 February 2011, no. 450.

¹² In this sense, Council of State, sect. IV, 30 May 2005, no. 2805.

3. THE ISSUE OF THE LEGAL REGIME OF SERVICE CONCESSIONS

In line with the European law requirements, the legal regime of the public works concessions is mostly equivalent to that of public works contracts.

On the contrary, as allowed by European law, the service concessions remains mostly extraneous to public contracts code (i.e., the Italian implementation of public procurements directives)

In particular, art. 30 of public contracts code establishes that «provisions of this code do not apply to service concessions ». Pursuant to the European case-law, it is just provided that «the concessionaire must be selected in compliance of the principles deriving from the Treaty and of the general principles of public contracts, and, in particular, of the principles of transparency, adequate publicity, non discrimination, equality of treatment, mutual recognition, proportionality, by means of an informal tender, to which at least five candidates are invited, if a sufficient number of firms operating in the sector exists, and in which selective criteria are predetermined». However, «Specific legislations providing for more competitive regimes remain in force» (it is, for example, the case of the award of service contracts in the field of local public utilities, in which «competitive selective procedures» are always required for selecting the service providers¹³). Under art. 30, par. 7, just the provisions laid down by part IV on remedies and by art. 143, par. 7, on the financial plan to be annexed to the offer, apply directly to service concessions.

The clear wording of art. 30 has actually proved to represent, in the majority of the cases, an effective barrier against the extension of the provisions of the public contracts code to service concessions, up to the refusal of an analogical application of the code (that does not seem per se not prohibited, since exclusively a direct application is barred).

¹³ Art. 23 bis, co. 2, let. a), Law Decree no. 112 del 2008.

And so the Council of State has noted, in relation to deadlines for bidding, that «it is erroneous...the analogical application of the provisions of art. 70 of public contracts on public contracts to the different field of service concessions, as in clear violation of art. 30, par. 1, of the same code»¹⁴. Equally, based on the same, assumed, illegality of an analogical extension of the provisions of the public contracts code, it has been excluded the necessity of the requirement of supplying a bond as a condition to bid in tenders for selecting service concessionaires¹⁵. A precondition to extend specific provisions of the code, is, according to the Council of State, the fact that such provisions represent direct means of implementation of European law principles, as identified by the case-law and (synthetically) recalled by art. 30, par. 3, of the public contracts code.

On the other side, in two different cases, the Council of State, although not stating a tendential, direct, relevance of the public contracts code, has allowed the application not only of European law principles, but also of general, internal, principles on public tenders, as reflected in the same code. It is the case of the duty of information of the candidates in relation to the place and timing of the tender operations¹⁶ and of the prohibition of bidding for operators belonging to the same decisional centre¹⁷.

Yet, clearly, the prevailing case-law trend, in its rigorous approach, is due to perpetuate a rigid distinction between the legal regimes, respectively, of service concessions and public service contracts.

¹⁴ Council of State, sect. V, 11 May 2009, no. 2864.

¹⁵ Council of State, sect. V, 13 July 2010, no. 4510.

Lastly, Council of State, sect. V, 20 April 2011 no. 2447 confirms that «regulations governing public works contracts do not apply analogically to services concessions».

¹⁶ Council of State, sect. V, 16 June 2009. no. 3844.

¹⁷ Council of State, sect. V, 20 August 2008, no. 3982.

To what extent this may be consistent with the different treatment of public works concessions (as already noted, subject to the public contracts code and, yet, not easily distinguishable from service concessions, in which works are to be realized by the concessionaire as well) and most of all, with the uncertainties still existent as to the level of risk required to have a concession, instead of a public contract, it is an issue about which it seems easy to agree on the opportunity of further reflections.

4. BIBLIOGRAPHY

For an annotated bibliography see the Documents area.