THE AFFIRMATION OF PUBLIC PRIVATE PARTNERSHIPS AS MODALITY FOR DELIVERING PUBLIC SERVICES: THE INCORPORATION OF THE CONCESSIONS DIRECTIVE 2014/23 INTO DOMESTIC LEGAL SYSTEMS

Christopher Bovis, University of Hull, United Kingdom

ABSTRACT

Concessions and public private partnerships are contractual agreements that are characterized by their high value, complexity, and long-term nature. The key elements of these agreements include granting the concessionaire the right to utilize and benefit from the works or services, transferring to the concessionaire the economic risk associated with the potential failure to recover operating costs and investments, and incorporating payment mechanisms that involve contributions from end users. The EU Member States have implemented the 2014 Concessions Directive using a framework that incorporates many similar techniques seen in domestic systems of EU Member States.

Key words: Public Procurement, Concessions, Public Private Partnerships, Risk, Public.

INTRODUCTION

The EU 2014 EU legislative framework on public, utilities and concessions procurement has been enacted with expectations to enhance competitiveness and growth[1] and to ensure the indispensable function of public procurement as an essential lever of competitiveness and growth and as an indispensable instrument of delivering public services[2] in the Member States of the European Union. The Single Market Act[3] has been the pedestal of legislative action on the part of European institutions in having identified the reforms brought by the amendments to the Public Sector Directive[4] and the Utilities Directive[5] and the introduction of the Concessions Directive[6] having as their main aims the strategic use of simpler, flexible and sound procedures which can provide better market access and cross-border trade in public contracts and ensure robust governance through the professionalization of public procurement (Cao & Guo, 2024). The Remedies Directive[7] and the Defence Procurement Directive[8] were not part of the reform agenda of the 2014 EU legislative framework. Remedies in public procurement have been the subject of previous reforms in 2007 to improve access to justice and legal redress.

The notion of Public-Private Partnerships and concessions reveals *forms of co-operation* between the state and private actors which exceed the remit of traditional contractual interface, moving into a strategic sphere of public sector management. Public-Private Partnerships and concessions aim at delivering both infrastructure facilities and public services and are regarded as attractive and credible solutions to traditional methods of financing, organising and delivering public services in the EU.

The axiom in public service delivery is partnerships between public and private sectors. The modern state justifies its existence through the provision of *public services,* a concept which encapsulates the pursuit of public interest. The delivery and regulation of

Citation Information: Bovis, C. (2024). The Affirmation Of Public Private Partnerships As Modality For Delivering Public Services: The Incorporation Of The Concessions Directive 2014/23 Into Domestic Legal Systems. *Journal of International Business Research, 23*(4), 1-21.

public services are based on two diametrically different models which reflect on internalisation choices or externalisation choices on the part of the state. Firstly, as far as internalisation choices are concerned, the notion of public services often fuses with state ownership of assets or infrastructure and amalgamates the ensuing provision of services to the public. It also refers to functions which underpin essential facilities of the state (i.e. defence, justice, policing) and as a result these functions are sheltered from market forces in order to ensure the integrity of their delivery. Secondly, in relation to externalisation choices of the state, public services regularly capture interests of general needs which are delivered through market-based mechanisms where the public sector interfaces contractually with private actors da Silva (de Amurim, et al., 2023). However, the externalised organisation and delivery public services reveals that their providers interface with the state in a marketplace which does not correspond to the principles and dynamics of private markets, thus requiring a different type of regulation which could be seen an amalgam of legal, financial and policy attributes reflecting the constant changing of societal needs, expectations and requirements.

Optimal risk management is the prime advantage to the state which emerges from involving private actors through a *partnership* format in the delivery of public services. This axiom underlines the principle of public accountability for the modern state in a number of ways. The private actor partner often commits its own capital resources for the funding and the delivery of public services. It is not therefore a mere contractor; it is a stakeholder which has a vested interest in the effective and efficient delivery of the relevant public services in order to attain its returns and recoup its investment. This attribute results in an increased certainty of outcomes, both in terms of on-time delivery (the private actor is strongly motivated to complete the project as early as possible and to control its costs and so that the payment streams can commence) and in terms of within-budget delivery (the payment scheduled is fixed before construction commences, protecting the state from exposure to cost overruns). As a result, by transferring the risk of the funding required for the delivery of public services to private actors, the latter become an essential component of the state's functions, thus revealing a conceptual and strategic convergence between public and private sectors. Private actors in Public-Private Partnerships are often financially incentivised to offer value-for-money solutions in the delivery of public services through continuous quality improvement, innovation, management efficiency and effectiveness. As such, behavioural elements which traditionally underpin private sector entrepreneurship are harnessed by the state to enhance the quality of public services through a transfer of operational risk to private actors.

Public-Private Partnerships and concessions are *public service instruments*. As such, the state opts for an externalised model in the delivery of public services and heralds a departure from an *asset-based* to an *enabled-based* format in public services. Through risk transfer mechanisms, the public-private partnership is treated as an emanation of the state and reveals a different ethos in public sector management, that of the state as enabling and facilitating agent. However, the strategic role of private actors in financing and delivering infrastructure facilities and public services by providing input into the various phases such as finance, design, construction, operation and maintenance, reflect the need for longevity of the relations between public and private sectors (Gebeyehu Dessie, 2021). The often-lengthy duration of Public-Private Partnerships is justified on the basis of affordability for repayment on the part of the public sector and on the basis of the ability of the private sector to recoup its investment profitably. Nevertheless, this could potentially result in market foreclosure. There is a pertinent need to address the *competitiveness* of Public-Private Partnerships before and after the procurement process of the private actor.

Citation Information: Bovis, C. (2024). The Affirmation Of Public Private Partnerships As Modality For Delivering Public Services: The Incorporation Of The Concessions Directive 2014/23 Into Domestic Legal Systems. *Journal of International Business Research, 23*(4), 1-21.

Public-Private Partnerships and concessions are grounds where innovation as a concept and also as an instrument exists and runs through the raison d'etre of such arrangements. It epitomises the entire spectrum of such relations, as an alternative method of delivering public services. The source of the conceptual character of innovation in Public-Private Partnerships and concessions is *partner motivation.* The relation is conducive to development processes and systems which create new ground and advance delivery and finance methods. The relationship between public and private sectors is not adversarial. It is collaborative, joined-up and constructive. The contractual parties are *partners* in PPPs. This has a significant effect, both physiologically and practically. A party to a contract has *esoteric* motivation; a partner to a Public-Private Partnerships and concessions has *collective* motivation. The way innovation functions as an instrument in Public-Private Partnerships is multiple. First, innovation underpins the value for money (VFM) principle in Public-Private Partnerships and concessions through a variety of features, such as payment mechanisms, risk pricing, cost authentication, service/product quality, performance management through key performance indicators (KPIs) and benchmarking. Secondly, innovation introduces the model of value engineering in Public-Private Partnerships and concessions, especially for the determination of specifications and standards and the development of solutions through R&D functions of the private partner. Thirdly, innovation is also propelled through incentivisation, and in particular where the corporate relation between public and private sectors is encapsulating profit / revenue driven notions such as gain sharing, profit sharing and refinance opportunities. Finally, innovation depicts facets of effective governance in the relation between public and private sectors which focus on contractual management, step in rights, asset treatment, taxation and dispute resolutions mechanisms.

Public-Private Partnerships can be viewed as *investment instruments*. Financing for a Public-Private Partnership can take one of the following forms: first, *a stand-alone project*, where the funding raised is for only one specific project; secondly, public-private partnership financing can be provided via special purpose vehicles (SPVs) which raise debt and equity funding from the private markets, blend private finance with EU Funds and also introduce risk and equity capital from EU Financial Institutions (Josefsen, 2020). Accountancy treatment of the SPV's consolidated accounts is aligned with the party which controls the SPV. If the private sector partner controls the SPV, its debt is recorded off-balance sheet for public sector borrowing considerations. If an SPV is controlled by the public sector, debt should be consolidated with public sector. Thirdly, a public-private partnership can be financed by securitization of claims on future project revenues.

Public private partnerships and concessions usually consist of contracts that are of large value, complex, and long-term. These contracts necessitate flexibility both during the process of awarding the concession and in its later implementation. Service concessions were not included in the public procurement regime under the Public Procurement Directives. Works concessions, on the other hand, were subject to a limited set of particular restrictions under the 2004 Public Sector Directive but were completely excluded from the 2004 Utilities Directive. Concession awards were subject to the EU General Principles where there was a potential cross-border interest.

Domestic legal systems of nations aim to define the notion of a "concession" by referring to the case law of the European Union. The rules state that the primary aspect of a concession, which is the right to utilize the works or services, always includes the transfer of an economic risk to the concessionaire. This risk involves the potential for the concessionaire to not recover all the investments made and the costs incurred in operating the works or services covered by the concession. Nevertheless, the possibility of granting concessions in industries with regulated tariffs is not completely ruled out, as long as there is a potential for

Citation Information: Bovis, C. (2024). The Affirmation Of Public Private Partnerships As Modality For Delivering Public Services: The Incorporation Of The Concessions Directive 2014/23 Into Domestic Legal Systems. *Journal of International Business Research, 23*(4), 1-21.

transferring at least a minimal level of operational risk to the concessionaire. Concessions that include both works and services are categorized based on which element constitutes the majority of the contract.

The Objectives and Characteristics of the Concessions Legislative Framework

Domestic legal frameworks are designed to provide a structured framework to attract private operators and Contracting Authorities and Entities (CAEs), with the goal of promoting investment in infrastructure and services. Consequently, this is anticipated to enhance the caliber and reduce the cost of goods and services, ultimately benefiting customers, while refraining from endorsing privatization. However, it is ultimately the responsibility of Contracting Authorities and Entities (CAE's) to ensure that the laws are implemented in a suitable and uniform manner, to achieve the maximum advantages of competition, streamlined procedures, and efficiencies. The legislator is seeking more advancement, such as improving legal protection for both CAEs and economic operators when they collaborate on concession partnerships (Kim, 2023). The regulations affirm the autonomy of CAEs to implement the most efficient method of providing public infrastructure and services, while ensuring impartiality and clarity. It provides a more precise explanation of when a concession occurs and how to precisely identify its fundamental qualities, with the goal of preventing discrepancies. The concept of operational risk is explained, providing some clarity on the categorization of risks as 'active' and, more critically, how to identify substantial risks in conjunction with risk transfer. In addition to this, domestic legal systems determine the duration of concessions and incorporate the binding responsibilities of treaties together with the precedents set by the courts. In addition, they include a transparent set of particular and well-defined criteria, which are suitable for the different stages of the award process.

The framework is expected to facilitate a "well-functioning internal market in concessions" by requiring the publication of concession awards above the specified threshold in the Official Journal of the EU. If the latter scenario occurs, CAEs will receive competing proposals from various operators, including those operating across borders, of different scales, which would certainly lead to an increase in economic growth and sustainability. The intended objective is to ensure that all contracting authorities and entities (CAEs) possess the ability to engage in negotiations, leading to the establishment of stable contractual relationships with private operators. This will have a beneficial effect on the long-term viability of infrastructure projects co-financed by the European Union, while also reducing instances of direct awarding, bribery, and collusive activities.

The new secondary legislation is projected to achieve several objectives, including providing CAEs with greater value for money, creating more commercial opportunities for operators of all sizes, and promoting innovation and competition through competitive award procedures. The expected legislative framework is also projected to support essential investments in infrastructure, particularly in improving the provision of high-quality services to consumers. The enhancement of the legal safeguards for bidders is utilized, while simultaneously improving the efficiency and efficacy of CAEs during the process of awarding contracts. Whether the expectations are fulfilled in practice is a separate topic altogether (Lata, 2023). Procedural safeguards that have been properly addressed can expressly jeopardize the same objective for which they were developed, such as direct awarding, corruption, and bid rigging. It will be important to observe how MS (Member States) integrate the requirements of the Directive into their national framework and whether CAEs implement the provisions extensively or restrictively. If the application is limited in

Citation Information: Bovis, C. (2024). The Affirmation Of Public Private Partnerships As Modality For Delivering Public Services: The Incorporation Of The Concessions Directive 2014/23 Into Domestic Legal Systems. *Journal of International Business Research, 23*(4), 1-21.

scope, there is a high likelihood that the legislators' goals will be accomplished to a satisfactory degree.

The Key Aspects of the Domestic Implementation of the Concessions Directive

The main elements of the new rules are as follows: (i) A clearer and more precise definition of a concession (ii) Coverage of award of works and services concessions both in the classic sector (all other sectors not covered by utilities – filling the loophole under previous public procurement and utilities rules (Directives 2004/18/EC and 2004/17/EC respectively); (iii) Compulsory publication of concessions in the Official Journal of the European Union; (iv) Pragmatic solutions for dealing with changes to concessions contracts during their term notably when justified by unforeseen circumstances; (v) Establishment of certain obligations with respect to the selection and award standards to be formatted by CAEs when awarding concessions; (vi) No specific award procedures but instead definition of certain general guaranties aimed at ensuring transparency and equal treatment with particular reference to negotiation; (vii) Application of the Remedies Directives to all concessions above the threshold, which will guarantee judicial protection for all EU companies bidding for cross-border projects (Lin Tan, 2020).

CAEs are not obligated to adhere exactly to a specific award procedure, such as the 'open' or 'restricted' procedures used for public contracts. The guidelines stipulate that CAEs must consider established requirements throughout a fair award process and reject applications from tenderers who do not meet the award criteria. In addition, it is imperative to exclude candidates from the award process who have clearly been convicted of corporate offenses such as fraud, money laundering, and tax evasion. Candidates must be given a detailed schedule outlining the award process and must inform the relevant parties of any changes made in advance. CAEs have the ability to independently design a procedure that is clear, proportionate, and fair, based on their own national frameworks, as long as they adhere to the fundamental standards outlined above.

Excluded Areas from Concessions Regulation

Typically, domestic laws that put concessions into effect often do not include concessions that are granted to establish or manage fixed networks meant to offer a public service related to the production, transportation, or distribution of drinking water, including supplying drinking water to these networks. Concessions are permitted for the disposal or treatment of sewage as well as for hydraulic engineering projects, irrigation, or land drainage. The aforementioned services and works must not be associated with the provision of potable water, since doing so would result in the contract being in violation of EU legislation.

Water is a vital public resource that holds significant importance and value for all individuals. There is a debate about whether opening the water industry to the free market could have negative consequences, although it is important to note that privatization and concessions are distinct concepts and the CAE still retains control. The long-term development of the water sector is uncertain. Public funds are constrained, and governments lack the necessary money to enhance critical network infrastructure. Private participation and competitive bidding have the potential to provide investment advantages, rather than relying solely on internal tendering processes, as is the case with other public services.

In addition to this, domestic laws that implement concessions specifically exclude concessions that would enable CAEs to establish or utilize public communications networks, or offer electronic communications services and air transport services to the public, solely on

Citation Information: Bovis, C. (2024). The Affirmation Of Public Private Partnerships As Modality For Delivering Public Services: The Incorporation Of The Concessions Directive 2014/23 Into Domestic Legal Systems. *Journal of International Business Research, 23*(4), 1-21.

the basis of obtaining an operating license. Concretely, the granting of licenses for certain television and radio services should be safeguarded based on the principle of media diversity, so preventing their exclusion from the new regulations. An exemption is given for concessions granted by media service providers for the provision of essential technical equipment for production and general production in carrying out their service. This measure prevents the use of direct contracting suppliers for services when there is competition, and national interests are not compromised.

The new paradigm aims to ignore concessions specifically related to national matters, such as national security and lotteries. Services such as gaming, betting, and national lotteries should be exempted from the Directive since they primarily entail national matters, including social and public concerns that should be handled through limited procedures. Economic operators are awarded particular service concessions by awarding them a 'exclusive right'. This allows the chosen business to exploit the concessions for a specific amount of time according to national law. In these situations, the presence of a sole operator or national restrictions renders the implementation of a competitive process unfeasible, as it prevents the possibility of utilizing a competitive procedure. Exemption from participating in a competitive procedure can also apply to certain emergency services (excluding ambulance services) when they are provided by non-profit organizations[11]. However, incorporating these operational services into the framework would undermine their effectiveness.

Publicity and Market Testing for Concessions

Similar to other public and utilities contract, concession agreements must be advertised in the Official Journal, unless a valid justification can be presented for not doing so. This measure has been authorized to restrict the granting of concessions contracts by direct awards, which would put valued rivals at a disadvantage and limit them access to concession markets. The act of formally publishing information will partially ensure that openness and fair treatment are provided to all operators involved (Mallisetti, et al., 2022). Concessions cannot be tendered without prior publicity, save under exceptional circumstances, due to the detrimental impact on market competition[12]. It is restricted to situations where publishing a notice beforehand will not result in any further competition, meaning there is only one corporate entity capable of providing the service or there are no alternative substitutes available. In order for the exemption to be valid and avoid previous publication, CAE's should not have created a situation where it is impractical to grant the concession contract to other economic operators, as this would eliminate competition and bypass a competitive procedure in the future award process.

Contracts below this threshold are not obligated to be published in the Official Journal, but alternative methods of publication may be utilized. The primary objective of this framework is to enhance accessibility and competitiveness among potential bidders. Additionally, it establishes a system that effectively manages administrative risks and expenses in proportion to the contract's value. This enhances the legal protection for both economic operators and CAEs, fostering an atmosphere conducive to achieving competitiveness, quality, and value for money. The objective to enhance and incentivize contracts with cross-border significance, integrating markets of Member States and providing CAEs/operators with greater opportunities, is seen in the publication of concession contracts that exceed the legal threshold.

In relation to service concessions, the lawmaker determined that a more lenient framework should be implemented for social services, such as those related to social welfare, healthcare, and education. The main reason for this is the recognition that certain services are

Citation Information: Bovis, C. (2024). The Affirmation Of Public Private Partnerships As Modality For Delivering Public Services: The Incorporation Of The Concessions Directive 2014/23 Into Domestic Legal Systems. *Journal of International Business Research, 23*(4), 1-21.

provided in a distinct manner that varies significantly among Member States, and the liberalization of these markets would not result in substantial advantages. While not completely eliminated, it was determined that a specific framework should be established for these services, as they have recently been subject to regulation. In light of this, the Commission has suggested a mandate to publicly announce a 'prior information notice' along with a 'concession award notification' for social services that meet or exceed the legal standards. This approach should assist economic operators in gaining a better grasp of the possible prospects and competitiveness in the industry, without interfering with national interests. It will also give organizations with transparent information to help them evaluate reputable tenderers.

CAEs shall offer unrestricted, digital access to all pertinent concession documents starting from the initial publication of the tender. This strengthens the principles of the Treaty and demonstrates the modernization of the procurement award procedure. Undoubtedly, the utilization of electronic communication between CAEs and operators can not only decrease expenses and streamline the process, but it can also improve economic efficiency, while ideally upholding transparency (Mugurura & Ndevu, 2020). In the future, it is highly probable that it will become the prevailing method of communication and information sharing in concession award procedures. This is because it significantly improves the opportunities for economic operators to take part in concession award procedures throughout the internal market. Therefore, it is crucial for CAEs to have a thorough understanding of the procedural issues and include the requirements into national regulations, incorporating the fundamental components for electronic communication, in order to avoid any future anomalies or violations.

The Dimensionality of Concessions - Thresholds

The monetary threshold for concessions applies to the value of works and service contracts. This refers to the anticipated rate of return during the defined time period, in other words, the monetary value predicted in the contract itself. When estimating the projected legal threshold, CAEs should determine its value using an unbiased method of calculation based on objective criteria. Such ‘objective’ criteria should include; (i) any extension of the concessions duration; (ii) revenue from the payment by the users of the works or service (not collected by the CAE). (iii) payments made (including compensation[13]) by the CAE or any other public entity to the concessionaire or financial advantages (state aids) [14], grants, prizes (by third parties) or payments to candidate tenderers aiding the concessionaires performance and; (v) any revenue or sales made by the concession and the value of all the supplies and services that are made available by the CAEs needed to execute the works or services.

Domestic laws that implement concessions have established a set of criteria that are used to evaluate the value of the concession. These criteria consider all potential financial benefits and cross-payments that contribute to the concession, which are commonly referred to as 'risk-relievers'. This policy ensures a just process and prevents economic entities from circumventing the legal limit by getting extra financial assistance during the concession period. It also promotes the use of a standardized methodology to determine if the concession falls within the established limits.

CAEs may deliberately manipulate the calculation of the estimate to avoid the contract being subject to the Directive's jurisdiction. Attempting to partition a concession in order to reduce it below the legal threshold is only acceptable if there is a valid justification provided. If a proposed concession could lead to the creation of "subdivided" lots, it is necessary to determine the total number of lots involved. This could potentially be a loophole

Citation Information: Bovis, C. (2024). The Affirmation Of Public Private Partnerships As Modality For Delivering Public Services: The Incorporation Of The Concessions Directive 2014/23 Into Domestic Legal Systems. *Journal of International Business Research, 23*(4), 1-21.

if it cannot be conclusively demonstrated that the individual parcels constitute the same agreement. Regardless, the rule offers a possible procedural safeguard against CAEs who deliberately attempt to evade a competitive and transparent process.

Regarding service concessions, the value below the threshold set by domestic laws is determined by assessing the estimated monetary value of all services that will be provided by the concessionaire during the expected contract period. The value of the concession is independent of or unaffected by its duration. However, the rules specify that the concession contract's duration must be restricted. Concessions lasting longer than five years are limited to the time it takes for a concessionaire to recover their investments in operating the works/services, together with a return on their invested capital. The formula must be considered in relation to the calculated investments needed to attain the specific contractual goals. The computation should consider both the initial infusion of funds and investments made during the whole duration of the concession. This will allow CAEs to accurately estimate the threshold.

The original proposal of the Concessions Directive suggested that the duration should be restricted to the expected period required to recover investments with a satisfactory return on invested capital[15]. The Commission revised the clause that acknowledges the potential for concessions to exceed the initial five-year threshold, in order to provide for the recovery of the investment and a fair rate of return on capital. The question still remains over what an acceptable timeframe is to recoup an investment and get a satisfactory return without eliminating the associated risk. The European Court of Justice explicitly emphasizes the necessity of establishing a clear distinction between investment recovery and a fair return on capital. A public contract that was concluded for an indefinite period is held to be in contravention of Community law principles[16]. An indefinite period would impede effective competition between potential competitors and the application of the rules administering the advertisement of the award of public contracts. *Hemlmut Muller* conveyed that 'there are *serious grounds*, including the need to guarantee effective competition, for holding the grant of concessions of [an] unlimited duration to be contrary to the [EU] legal order'[17]. Essentially, allowing a concession contract for duration of up to fifteen years would be impede the freedoms guaranteed under the Treaty and restrict competition among potential competitors[18].

To prevent market foreclosure and promote competition, it is necessary to limit the duration of a concession agreement. Long-term concessions are highly likely to create obstacles in the market, hindering the aggressive development and impeding the guiding principles of the TFEU, namely the free movement of services and establishment. It is possible to justify concessions that last longer than five years when it is necessary for the company to recover its investment and earn a respectable profit under normal operating conditions, which means meeting the standard quality and price objectives stated in the contract. CAEs are required to incorporate essential initial and additional investments, such as expenses on copyrights, patents, and equipment, while determining the appropriate amount of return and investment recovery for the operation of the concession. The maximum duration of a concession contract should be clearly stated in the formal concession documents or included as part of the award criterion. This would provide clarity in determining the length of the contract, the associated risks, and a fair return on investment. CAEs have considered the option of granting concessions for a shorter duration than required for full recovery, as long as the compensation paid to the operator during the decreased term does not completely erase the risk associated with operating.

Even with the lenient guidance from the Court[19] and the narrower position taken by the Commission on calculating the estimated value, it seems quite difficult for CAEs to be

Citation Information: Bovis, C. (2024). The Affirmation Of Public Private Partnerships As Modality For Delivering Public Services: The Incorporation Of The Concessions Directive 2014/23 Into Domestic Legal Systems. *Journal of International Business Research, 23*(4), 1-21.

able to appreciate what a *reasonable* level of return on capital employed is and the time period for this recovery without *eliminating* the operating risk. The Directive allows for a time limit of the concession to an extent, however, this will expectedly vary between differing interpretations of CAEs. By indirectly *guaranteeing* a reasonable rate of return for the economic operators, the element of risk that the operator bears appears to be clouded. With the removal of the operating risk, the difference is essentially removed between public contracts and concessions[20]. CAEs should be careful to consider the consequences of underlying what amounts to a *reasonable* return of capital in relation to the time span of the concession contract; *without* removing the operating risk and at the same time promoting effective competition between competitors.

Domestic legislation implementing concessions is *silent* as to what rules apply to concessions that fall *under* the threshold. Public contracts that have clearly fallen below the scope of the threshold under the general Procurement Directives have been addressed by the Court[21]. The general Procurement Directive's procedures are to be linked and applied to those contracts which have a value that are equal to *or* exceed the threshold laid down within the Directives[22]. This did not mean, however, that such contracts with a lower threshold would *not* be excluded from the remit of EU law principles[23].

With contracts falling below the threshold under the procurement Directives, CAEs are still obliged to conform within the confines of the principles of transparency and non-discrimination[24]. The *Finland*[25] case brought about discussions in relation a contractual agreement that infringed the EU principles of transparency and non-discrimination, due to inadequate advertising of the contract on behalf of the CAE. As it stood, the contract was below the Procurement Directive's threshold. The question posed was whether the obligations of transparency and non-discrimination fell as obligations onto the CAE when awarding contracts below the legal thresholds[26]. Conclusively, the Procurement Directive's threshold is the legal scope of the rules as intended by the legislator. It is of the opinion that even if this is the case, the fundamental principles of Community law require an assured level of transparency; with such matters left to Member States to formulate under national law[27]. The argument was put forward that the invitation to a number of tenderers, not necessarily through public advertising, was enough to fulfil the Community principle of transparency. The case was dismissed for failing to evidence the scope of Finland infringing Community law; thus no supposition was drawn up by the Court concerning the problems in relation to the Procurement Directive's threshold and the transparency principle. The Court has maintained that the legislator had this in mind when drawing up the Directive and had created the threshold for a reason[28]. Contracts below the legal threshold (covered no cross-border-interest) did not have to comply with publicly advertising tenders and thus were not obligated to follow the Treaty principles[29].

According to the Court, contracts falling below the general Directive's threshold are *de facto* not compelled to follow the procedures spelt out under its provisions. Nevertheless, CAEs consistently have to accommodate the fundamental principles of the TFEU unless a contractual agreement has minimal economic significance. The reasoning for harmonising national concessions rules and establishing such a threshold, is founded on the understanding that contracts below the £5,186,000 are *unlikely* to have a cross-border interest; based on their financial insignificance. Contracts below the threshold are to be governed by MSs National legislation. The Directive's threshold is presumptively set at a level where cross-border interests take hold. National thresholds do vary between MS and are reflective of national economic situations. The Commission would presumably not be able to invoke its powers over the principle of subsidiarity with contracts that are *not* likely to have a major Community impact (Navarro Ortega & Burlani Neves, 2021).

Citation Information: Bovis, C. (2024). The Affirmation Of Public Private Partnerships As Modality For Delivering Public Services: The Incorporation Of The Concessions Directive 2014/23 Into Domestic Legal Systems. *Journal of International Business Research, 23*(4), 1-21.

Legal rules ensuring the benefit of all tenderers, regardless of whether they above or below the threshold, should include a degree of advertising that is sufficient to allow the services market to remove entry barriers, enable a competitive procedure and ensure neutrality. The standards should be applied by CAEs through embedding these principles within MS legal frameworks for concessions which have a minimal economic significance. If concessions fall below the threshold, for the TFEU principles to apply, they have to have a *sufficient connection* with the functioning of the internal market. This will undoubtedly lead to confusion and varying clarifications leaving a level of legal uncertainty for economic operators and CAEs engaging in the award of such contracts. Germany confronted the latter, expressing that under such a policy it invaded the principle of subsidiarity, creating rules and obligations for contracts dipping below the threshold[30]. By compelling MS to publicise contracts, (via a competitive award procedure) and even though it was outside the scope of the Procurement Directives, was beyond its powers to instigate how MS/CAEs should approach such contracts. The Court dismissed Germany's claims, (as the document created no binding effects – merely guidance), highlighting that the fundamental Community principles are central to the operation of the internal market; *all* PPP contracts should bear this in mind.

CAEs will face the challenge of determining how to effectively evaluate whether contracts that fall outside the scope of the Directive are sufficiently connected to the functioning of the internal market. Factors such as positioning, and interests may be taken into account. The idea that concession contracts valued below the threshold lack cross-border interest is baseless. It can be stated that when the anticipated rate of return is unknown or limited, the connection between the contracts that has an impact across borders is substantially diminished. However, in certain situations, the placement and location of a contract's operation may result in a cross-border interest, even for contracts that are below the threshold[31]. Although it is accurate to predict that a few contracts below the barrier will not have any impact on the internal market, there will be certain contracts that will have a significant indirect cross-border effect.

The Dissemination of Information to Concessionaires

The Court has recently focused on the disclosure of information to both successful and failed bidders. It is evident that there are provisions within the Directive which outline the boundaries[32] of the information to be given to potential tenderers, pursuing the objectives of transparency and non-discrimination[33]. CAEs are required to notify all applicants and tenderers of the outcomes resulting from the granting of a works or service concession. The information submitted by CAEs includes: (i) the name of the winning bidder; (ii) the reasons for rejecting a candidate bidder; and (iii) the reasons for not awarding a contract after a concession notice has been published or for restarting the award procedure.

Considering the provisions, a CAE has the authority to exercise judgment when disclosing sensitive information to economic operators in the given circumstances. Individuals are provided with the choice to not disclose specific sensitive information if its release would: (i) hinder law enforcement efforts, or (ii) go against the public's best interest, and (iii) harm the lawful business interests of economic operators, thereby impacting fair competition among competitors. Disclosure of such information enables parties to fully understand the reasons for their rejection and prevents entities from rejecting tenders without providing evidence, therefore reducing the likelihood of contracts being awarded without competition.

Citation Information: Bovis, C. (2024). The Affirmation Of Public Private Partnerships As Modality For Delivering Public Services: The Incorporation Of The Concessions Directive 2014/23 Into Domestic Legal Systems. *Journal of International Business Research, 23*(4), 1-21.

When sharing confidential information with competitors, it is important to exercise caution to avoid the values of transparency and non-discrimination being utilized against the original goals of the company. CAEs should be diligent in preserving a robust competitive atmosphere while avoiding the creation of "anticompetitive transparency". Undoubtedly, candidates who are not successful have the right to get explanations for their contract denial in order to consider potential legal claims. However, there should be a limit to the amount of information the applicant needs to be provided. Revealing specific knowledge might potentially result in collusion or give economic organizations an unfair advantage, which can disrupt the market. The Court has adopted a broad and inclusive stance in permitting the Commission to offer adequate justification to rejected bidders. It is anticipated that Contracting Authorities in the European Union will adopt a similar approach to avoid legal disputes. It is argued that CAEs are not required to give specific explanations for their judgment, but they must clearly and unambiguously explain the logic behind their disputed decision, in order to ensure a fair and transparent process (Papaioannou, et al., 2020).

Criteria for Exclusion and Selection of Concessionaires

Other important characteristics of concessions, which have been identified by domestic legislation implementing concessions and also by the Court[34,] include relevant *deadlines*, *selection*, *award* and *exclusion criteria*. Within these provisions, the new Directive has sought to underlie both the views of the Courts and existing legal instruments that previously covered works concessions. With regards to deadlines, domestic legislation implementing concessions unambiguously put forth a cut-off date, with a capped minimum response time of 30 days (unless it is submitted electronically) for parties to put forth tenders showing interest within any concession award procedure**.**

The selection and exclusion criteria provisions under domestic legislation implementing concessions are less intrusive than similar rules under the general Procurement Directives; this offers flexibility to CAEs and provides elements of legal certainty for tenderers. One notable aspect that has been embedded within the selection criteria framework restricts CAEs taking into consideration conditions (i.e. selective benchmarks) *only* connected to the *economic*, *monetary* and *professional* capacities of the tenderers in question[35]. This allows for a level of legal certainty, lucidity during the tendering/award procedure, thwarting the discrimination of tenderers and promotes efficiencies on both sides. The latter seeks to regulate what amounts to adequate exclusion criteria. This reduces the possibility of discrimination and rectifies the previous uncoordinated procedure which allowed CAEs to award concessions based on a variety of selection criteria[36] (depending on the MS concession rules etc.) and permitted the unjustified awarding of contracts based on an economic entities political influence (i.e. direct awarding).

Similar to the changes made under the general Procurement Directives, domestic legislation implementing concessions grant CAEs with the power to *exclude* bidders throughout the whole procurement procedure, expanding beyond the pre-qualification stage and encompassing sub-contractors and consortia members. The legislator has made it clear that CAEs are to be provided with the option to exclude economic operator which have in the past proven to be unreliable (i.e. failure to perform to adequate standards; violations of environmental/social obligations; or previous infringement of competition and intellectual property regulations). On the other hand, there may be circumstances where faults were not due to the economic operator's incompetence[37] and maybe there were prevailing factors outside of its power which led to inadequate standards or infringement actions. Unless, there is evidence of repeated unreliability, CAEs should be cautious when approaching such cases

Citation Information: Bovis, C. (2024). The Affirmation Of Public Private Partnerships As Modality For Delivering Public Services: The Incorporation Of The Concessions Directive 2014/23 Into Domestic Legal Systems. *Journal of International Business Research, 23*(4), 1-21.

and pay close attention to the factual evidence available to them and base their decision for exclusion on a wider historical performance of the economic entity and *not* just base their decision on a single infringement or poor performance; i.e. information giving them a competitive advantage.

G*rave professional misconduct* would underline an economic entities reliability to perform and could be interpreted as a 'red-flag', being unsuitable to be awarded the concession contract; regardless of its practical and cost-effective ability to perform the contract. Included within the new rules are examples of mandatory grounds by which CAEs are obliged to exclude a tenderer from the procurement process if it is evidenced that the economic entity (or entities) has failed to pay taxes or social security contributions under National law; taking advantage of the taxpayer and CAEs will not be tolerated. Domestic legislation implementing concessions confer a wide discretion on CAEs to derogate from the mandatory grounds on an exceptional basis for 'overriding reasons relating to the public interest' or where exclusion would be prima facie '*clearly disproportionate*'.

Domestic legislation implementing concessions set forth the ability of CAEs to reach a weighted decision on whether to make a mandatory *or* discretionary set-up for reaching grounds of exclusion. Safeguards exist, allowing bidders to provide evidence of '*self-cleansing*' for accusations relating to grounds for exclusion. When the bidder has the power to demonstrate its reliability despite evidential existence for exclusion, it can reverse the decision. This flexibility has been provided by the legislator not only because the CAE is responsible for the consequences of possible inaccurate conclusions, (remedies) but also by granting such powers it promotes efficiencies, as CAEs are in a better position to make a fair and evaluative decision of the submitting operators (Pernazza, 2023).

The Criteria for Awarding a Concession

The award criteria within domestic legislation implementing concessions guide CAEs to use *'objective'* standards associated with the central purpose and constructive aim of the concession contract itself. By guaranteeing a rather flexible[38]application of the award criteria, the fundamental principles of transparency, non-discrimination[39] and equal treatment[40], once again follow from the harmonisation and specificity of the obligations demanded under the Concessions Directive. CAEs are under a compulsory obligation to use *'objective'* standards when assessing tenders. This leaves open the question as to whether it will create a more level playing field amongst different sized[41] (and 'foreign') entities *or* if the situation remains somewhat the same prior the enactment of the Directive. It is anticipated that via the methodology taken by pursuing an *'objective'* standard under the award criteria, tenders will be evaluated under conditions effecting competition[42].

The approach taken in assessing tenders in such a manner will expectedly stimulate competition conditions; permitting market-based determinants[43] and bring about the best value for money, allowing the most superlative tender or CAE to be revealed. The *'objective'* benchmarks should in any event preclude unjustified/discriminatory decisions by CAEs[44]. In other words, the award criteria must be published 'in *advance to all* potential tenderers and must be *specifically* related to the core subject matter of the relevant contract'. This executes the principal of impartiality to the process, preventing CAEs with unlimited liberties of discriminatory selection at the award stage. The rules stress the importance of CAEs to include within the criteria elements reflecting environmental[45], social[46] or innovation related specifications. These standards are a produce of the new European outlook on greener technological methods, sustainability and productive development that seek to increase efficiencies and move towards greener technologies, while enhancing contestability.

Citation Information: Bovis, C. (2024). The Affirmation Of Public Private Partnerships As Modality For Delivering Public Services: The Incorporation Of The Concessions Directive 2014/23 Into Domestic Legal Systems. *Journal of International Business Research, 23*(4), 1-21.

The award criteria as like any other public contract, has to have been published and circulated for a reasonable period, and listed in falling order of its significance[47]. Concessions should be awarded to the 'most economically advantageous tender' (MEAT), in order to ensure effective competition, a fair procedure and efficiencies through the award process (eliminating discrimination/corrupt activities). The scope of domestic legislation implementing concessions provide for CAEs with the ability to request, make available or employ MEAT to concessions[48] ; a framework that has been derived from the general Public Procurement Directives. The updated rules of MEAT specify that the award criteria should effectively include requisite standards, fundamentally grounded on *'price or cost'*, using a *'cost-effectiveness'* approach to attain the best value for money and to guarantee efficiencies. The classical *"cost-effectiveness"* methodology is cemented on the constructive and analytical evaluation of estimated costs during the lifespan of the concerned product, service or works contract. In addition, the calculation includes costs relating to the procurement; the usage (i.e. the consumption of energy; maintenance related overheads; the end-of-life produce (e.g. collection/recycling aspects); and finally, consideration is given to both positive and negative environmental externalities (i.e. pollution or greener efficiencies).

CAEs may also award concession contracts on the '*best price-quality ratio'*. This is measured on the foundations of qualitative, environmental and/or social characteristics concomitant to the subject-matter of the contract; exemplifying an '*efficiency-style*' approach to promote the *resourceful* spending of public funds on concession contracts. CAEs are further expected to consider in their evaluation the characteristics of the production process of the works or services to be purchased (which could include working conditions or green methods used). Domestic legislation implementing concessions promote the evaluation of concession tenders to be assessed via the MEAT criterion, associated with underlying substance of the contract, allowing CAEs to have flexibility in the award process, by granting the ability to take into account the legislators wider aims of social, political and environmental goals of the EU when awarding concessions (Sabatino, 2022).

With *wider* efficiencies considered, the award criteria amplifies the creation of effective competition with the EU concessions market by including not only the option of exploiting the '*best value for money*', but also to ability employ a competitive '*equality*' benchmark amongst competitors (elevating cross-border competition and possible SME participation). In exceptional circumstances, the CAE is able to *modify* the award criteria (where it has already been published) if a tender proposes an innovative solution which breaks the bounds of the original expectations of the functional performance laid down by the CAE that was not foreseen. The award criteria framework set out, exemplifies the flexibility offered by the Directive to CAEs so as to allow modifications which enhance objectivity, equal treatment, and operational efficiencies.

Remedies and Access to Justice for Concessions

In combination with domestic legislation implementing concessions, the Remedies Directive offer all concession contracts that are equal to or beyond the threshold, the assurance for all parties involved to file claims against the award choice of a CAE. It is observed that minimum judicial values have to be applied by all Member States[49] to ensure a transparent and non-discriminatory award procedure[50]. Where CAEs have failed to adhere to prevailing procurement rules[51], tenderers have been provided to sue in breach of contract of the rules; with possible shortening of the contract or fines will be imposed[52]. Notably, unsuccessful tenderers or interested parties outside the formal procedure[53] are provided with the option to contest a CAEs award decision in advance of the contract being signed

Citation Information: Bovis, C. (2024). The Affirmation Of Public Private Partnerships As Modality For Delivering Public Services: The Incorporation Of The Concessions Directive 2014/23 Into Domestic Legal Systems. *Journal of International Business Research, 23*(4), 1-21.

('standstill period'); with the open possibility of the original decision being dismissed. The *'standstill period'*, amounts to a reasonable time period of ten calendar days from date the notification of the contract award decision is sent[54] . During this period, economic operators have time to identify whether a transparent and fair award procedure was met by the CAE (Ssenyonjo, 2020). If sufficient evidence points towards a *derogation* of the above, the CAE must review the whole award procedure within a reasonable time frame[55] and refrain from signing the concession contract[56].

Protection is further provided, barring CAEs from finalising a contract with the winning tenderer, where an application has been filed to an independent review body by an unsuccessful bidder to review the decision. Under the circumstances where there is the direct awarding of contract, in area which is *not* subject the exception (i.e. granted by exclusive rights), the rules of transparency and the failure to provide a competitive tendering process will amount an *infringement* that will have to be *compensated*. The direct awarding of concessions contracts are 'the most serious infringement[s] of EU procurement law' and CAEs will be in a position to compensate those who were *not* allowed to compete in a competitive procedure. In addition, a contract can be concluded as being *ineffective* unless a proper transparent and competitive procedure. However, the definition of what amounts to '*ineffective'* has been left to the relevant national courts to define, which is arguably a mistake on behalf of the legislator. Retrospective annulment of the contract could be a possibility, with the standing risk that a contract may be connoted as being ineffective *after* six months of performing the contract. An exception to the rule of 'ineffectiveness' may only prevail where superseding reasons relating to a general interest require that the [standing] effects of the contract should be maintained'. Offering concrete remedies to economic operators, throughout the award procedure, to shield themselves against CAEs acting arbitrarily is wholly welcomed. However, bringing infringement actions against CAEs will be costly and small enterprises will more than likely be deterred from entering litigation procedures. While protection has been granted, tightly funded operators may not be able to take advantage of such options, questioning the Directive's protection of smaller operators (Zancajo, et al., 2021).

CONCLUSION

The implementation of the modernizing package of the procurement legislation aims to fulfill broad objectives and enhance EU integration. The themes of integration, sustainable development, and continuous innovation, which are the goals of the single market, will be analyzed in the future in relation to concessions. The realization of these objectives, as anticipated by the Commission, is entirely contingent upon the approach taken by CAEs and economic operators towards the new framework.

It was argued throughout talks that by ratifying the Concessions Directive, the practice of directly awarding concession contracts would be eliminated. The threshold encompassed contracts that the legislator deemed to involve a cross-border aspect, thereby promoting competition across EU markets and preventing national authorities from granting favors only to existing companies. Undoubtedly, the new regulations improve openness and establish a foundation for a just and safeguarding process. Nevertheless, there is uncertainty regarding whether these "lenient" regulations will effectively deter the practice of granting contracts without competition, as well as the occurrence of bribery and corruption. Although the guidelines aim to provide a more equitable and competitive process, CAEs still have the freedom to determine the award criteria and select the operator they deem appropriate, while simply needing to provide "sufficient justification" to rejected bidders. Most manufacturing

Citation Information: Bovis, C. (2024). The Affirmation Of Public Private Partnerships As Modality For Delivering Public Services: The Incorporation Of The Concessions Directive 2014/23 Into Domestic Legal Systems. *Journal of International Business Research, 23*(4), 1-21.

and service sectors will exhibit reluctance in allowing foreign operators to enter their marketplaces. The use of the "in-house" rule is expected to increase in popularity. This rule allows CAEs to have more flexibility in configuring contractual agreements without being subject to the restrictions of the "light" regime or facing public scrutiny. Considering these considerations, one would maintain a skeptical attitude towards the impact that the new Directive will have in terms of liberalizing national markets and prohibiting the direct granting of concessions.

Undoubtedly, increased transparency in the process of awarding concessions will, to a limited extent, support interstate trade and contribute to achieving the specific market objectives outlined in the chosen 2020 Strategy. These objectives include promoting economic growth, increasing the involvement of small and medium-sized enterprises (SMEs), and enhancing competition within the market structure. The benefits to SMEs that occur one after another are unclear. Despite the presence of openness and equal treatment standards, the expenses associated with legal matters will continue to discourage small and medium-sized enterprises (SMEs) from engaging in tendering processes. It is important to mention that concessions that exceed the threshold are unlikely to benefit small firms, but rather only medium enterprises, so reducing its overall impact. The competitive landscape is expected to stay unchanged, since larger corporate operators will continue to have an advantage in terms of offering a competitive bid and covering legal and operating expenses. An adversarial and unambiguous process does not inherently result in more rivalry or improved availability. Without question, the incumbents will undoubtedly be cognizant of the changing circumstances and ready to utilize their substantial financial resources to uphold the existing situation. It is desirable that Member States and CAEs implement effective procedural protections to ensure that SME participation increases to a satisfactory level.

Significantly, the legislator has not provided a comprehensive explanation about the expectation of contracts that are below the threshold but involve a cross-border component. Concession contracts that do not meet the legal threshold established by the Directive continue to experience significant uncertainty and a lack of specific, standardized, and equitable procedural protections, particularly affecting small and medium-sized enterprises (SMEs), thereby diminishing the overall effectiveness of the Directives. It would have been appreciated if the Commission had included instructions in the recitals specifying how Member States should handle contracts below the threshold that may have an ambiguous cross-border aspect.

Although domestic legislation that enforces concessions provides clarity regarding the presence of operational risk, there is a disagreement about what constitutes a sustainable rate of return on capital employed and the level of operational risk. The primary purpose of these contracts is to shift the risk to the private operator, with the significant chance that it may not recoup its investment. Providing a specific and essential timeframe for recovering investments along with a fair rate of return appears to be in conflict with the idea of opening up concession markets and encouraging competition. When economic operators can earn a satisfactory profit on their investments, it reduces or eliminates the operational risk associated with conflicting time estimates. This may lead to uncertainty for certain CAEs in determining whether a concession contract or public contract has been established.

There may be a discrepancy between the Court's precedent of concessions lasting indefinitely and the Directive's requirement for the concessionaire to return their investment and make a profit within a specific timeframe. Widespread reading of the latter may present challenges for CAEs in reaching conclusions and finding concession agreements, potentially resulting in infringement actions or preliminary references. Transparency and fair treatment are ensured through the publication of concessions in the Official Journal of the European

Citation Information: Bovis, C. (2024). The Affirmation Of Public Private Partnerships As Modality For Delivering Public Services: The Incorporation Of The Concessions Directive 2014/23 Into Domestic Legal Systems. *Journal of International Business Research, 23*(4), 1-21.

Union (OJEU), the guidance on award criteria, and the provision of remedies. This will undoubtedly assist CAEs/economic operators throughout the initial step of awarding and throughout the entire duration of the concession.

The regulatory control of Public-Private Partnerships and concessions reveals an environment of structured Regulation. The development of two distinctive legal structures/models will assist the evolution and delivery of Public-Private Partnerships. Firstly, the contractual model, where the interface between the state and the private actors reflects on a relation which is based solely on contractual links. Under this model and structure, it is unlikely that there would be any element of exclusive asset exploitation or end-user payments levied by the private actor. However, mechanisms of profit sharing, efficiency gain sharing as well as risk allocation between the public and private partners distinguish contractual Public-Private Partnerships from traditional public contracts for works or services. The contractual model of Public-Private Partnerships assumes that the private sector partner will provide the financing for completing the project and the public sector partner will pay back by way of "service or unitary charges" which reflect payments based on usage volumes or demand (i.e. payments in lieu of fees or tolls for public lighting, hospitals, schools, roads with shadow tolls). Secondly, the institutional model of public private partnerships and concessions involves the establishment of a separate legal entity held jointly by the public partner and the private partner. The joint entity has the task of ensuring the raising of finance and the delivery of a public service or an infrastructure project for the benefit of the public. The direct interface between the public partner and the private partner in a forum with a distinctive legal personality allows the public partner, through its presence in the body of shareholders and in the decision-making bodies of the joint entity, to retain a relatively high degree of control over the development and delivery of the project. The joint entity could also allow the public partner to develop its own experience of running and improving the relevant public services, while having recourse to the support of the private partner. An institutional Public-Private Partnership can be established either by creating an entity controlled by the public and private sector partners, or by the private sector taking control of an existing public undertaking or by the participation of a private partner in an existing publicly owned company which has obtained public contracts or concessions.

Procurement regulation will be critical for concessions and public private partnerships. Considerable emphasis has been placed on observing the public sector management principles such as transparency and accountability, competitiveness and value for money. When a transaction creating a mixed-capital entity is accompanied by the award of tasks through an act which can be designated as a public contract, or even a concession, it is important that there be compliance with the principles of transparency and accountability, as well as the principle of non-discrimination. The selection of a private partner called on to undertake such tasks while functioning as part of a mixed entity can therefore not be based exclusively on the quality of its capital contribution or its experience, but should also take account of the characteristics of its offer in terms of the specific services to be provided. The conditions governing the creation of the entity must be clearly laid down when issuing the call for competition for the tasks which one wishes to entrust to the private partner. Also, these conditions must not be discriminatory nor constitute an unjustified barrier to the freedom to provide services and to freedom of establishment.

Risk treatment and its regulation reveal the most important issue of concession and public private partnerships contracts. A significant regulatory trend which has emerged as a result of the strategic role of the private sector and its long-term engagement in delivering infrastructure and public services reflects on the legal treatment of risk distribution between the public and private sectors and in particular, the allocation and pricing of *construction or*

Citation Information: Bovis, C. (2024). The Affirmation Of Public Private Partnerships As Modality For Delivering Public Services: The Incorporation Of The Concessions Directive 2014/23 Into Domestic Legal Systems. *Journal of International Business Research, 23*(4), 1-21.

project risk, which is related to design problems, building cost overruns, and project delays; *financial risk*, which is related to variability in interest rates, exchange rates, and other factors affecting financing costs; *performance risk*, which is related to the availability of an asset and the continuity and quality of the relevant service provision; *demand risk*, which is related to the on-going need for the relevant public services; and *residual value risk*, which is related to the future market price of an asset. Risk transfer from the public sector to the private sector has a significant influence on whether a Public-Private Partnership is a more efficient and cost-effective alternative to public investment and publicly funded provision of services.

The cost of capital needed to finance a concession or a caePublic-Private Partnership should depend on the characteristics of project related risks and not on the source of finance. However, the source of finance can influence project risk depending on the maturity and sophistication of the risk bearing markets. On the one hand, within advanced risk bearing markets, it is irrelevant whether project risk is borne by the public sector or the private sector. On the other hand, when risk bearing markets are less developed, project risk depends on how widely that risk is spread. This outcome might contravene the assumption that private sector borrowing generally costs more than government borrowing. However, this mainly reflects differences in *default risk*. The public sector's power to tax reduces the likelihood that it will default on its debt, and the private sector is therefore prepared to lend to the public sector at close to the risk-free interest rate to finance risky projects. The crucial issue is whether Public-Private Partnerships and concessions result in efficiency gains that offset higher private sector borrowing costs. Risk transfer from the public sector to the private sector has a significant influence on whether a Public-Private Partnership is a more efficient and cost-effective alternative to public investment and publicly funded provision of services. The public sector and the private sector typically adopt different approaches to pricing market risk. The public sector tends to use the social time preference rate (STPR) or some other risk-free rate to discount future cash flows when appraising projects. The private sector will include a risk premium in the discount rate it applies to future project earnings, where under the widely used capital asset pricing model (CAPM), the expected rate of return on an asset is defined as the risk-free rate of return plus a risk premium, the latter being the product of the market risk premium and a coefficient which measures the variance between the returns on that asset and market returns.

A number of criteria have been devised to assess the degree of risk treatment in Public-Private Partnerships and concessions and these criteria involve asset ownership as an essential feature. The extent of risk transfer between the parties and the quantum for such transfer can be assessed by reference to the nature of contractual relations. A distinction is made between *separable contracts*, where asset ownership and delivery of public service elements are different features, and *non-separable contracts*, where asset ownership fuses with public service delivery.

The success of Public-Private Partnerships and concessions rests on the relative efficiency of the private sector. However, this efficiency must demonstrate itself in a dynamic mode, reflecting the need for competition in the provision of the relevant services through and the imperative of democratic accountability and control. The evolution of the control interface will focus on regulatory standardisation which will have recourse to both hard law and soft law. Hard law will utilise normative acts of public law character in order to impose safeguards for accountability, competition and procurement of concessions and Public-Private Partnerships. On the other hand, soft law, in the form of guidelines, will create the appropriate environment in the fields of corporate structures and behaviour of public and private sectors, probity and anti-corruption, innovation, risk management, risk assessment, financing, securitisation, debt treatment and dispute resolution. Regulatory standardisation

Citation Information: Bovis, C. (2024). The Affirmation Of Public Private Partnerships As Modality For Delivering Public Services: The Incorporation Of The Concessions Directive 2014/23 Into Domestic Legal Systems. *Journal of International Business Research, 23*(4), 1-21.

will augment legal certainty and will emit best practice in accountability, transparency and consistency in public service delivery.

For Public-Private Partnerships and concessions to operate in a global competitive environment, safeguard the principles of transparency, and accountability in public sector management, structure regulation is paramount. Where a private sector operator can sell public services to the public, but there is little scope for competition, the public sector must regulate the prices for the relevant public services. However, the challenge is to design well-functioning regulation which increases output towards the social optimum, stabilises prices in a sustainable manner, and limits monopoly profit while preserving the incentive for private sector to be more efficient and reduce costs. This challenge is translated in the legal interface of the EU Member States and pose some considerable questions in relation to the role and scope of private actors in delivering public services, the regulatory compatibility between norms of anti-trust and exclusivity of private actors in delivering public services, the financial, operational and strategic expectations of private actors, the compliance and enforcement process of delivering public services, and finally, the treatment of risk.

Regulatory trends for Public-Private Partnerships and concessions will reflect on the current regulatory deficit in the EU, and in particular, the conceptual limitations of anti-trust to intervene in and regulate such complex relations between public and private sectors. Such limitations have set a new paradigm which has established that public services and the modality of Public-Private Partnerships function in sui generis market-place, where state intervention in the organisation, structure and delivery of public services reveals a type of regulation based on public law. As a result of the importance of Public-Private Partnerships and concessions to close the infrastructure deficit in the EU, a standardised regulation will present national and trans-national features in a way that jurisdictional and enforcement characteristics will emerge not only within national markets but also within regional trading blocs. The national/trans-national regulation will pave the way towards international norms of coherent and standardised dimensions with a view to establishing not only standardisation of law and policy but uniformity of application and implementation of Public-Private Partnerships and an increased and enhanced legal certainty for both the State, private actors and the public as end users of public services.

Accountability is the discipline of regulatory systems which will emerge out of the route of national towards international regulation of Public-Private Partnerships and concessions will reflect on competing models for the delivery of public services. The state will have absolute discretion in engaging with private actors to deliver public services or advance models which include intermediary marketisation of public services through mutual societies, social enterprise, and in-house arrangements. The competitive dynamics from the interface between Concessions and Public-Public partnerships will present a valuable benchmark to the European Union State for the ever-increasingly changing background, expectations, standards and needs for the delivery of public services.

END NOTES

[1]European Commission, Communication, Europe 2020, A strategy for smart, sustainable and inclusive growth, 3.3.2010, COM (2010) 2020 final.

[2]European Commission, Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest, 7.12.2010, SEC(2010) 1545 final. European Commission, Buying Social: A Guide to Taking Account of Social Considerations in Public Procurement, SEC(2010) 1258, final.

[3]European Commission, Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, *Towards a Single Market Act*, COM(2010) 608 final.

[4]Directive 2014/24/EU, OJ L 94, 28.3.2014,p.65–242.

Citation Information: Bovis, C. (2024). The Affirmation Of Public Private Partnerships As Modality For Delivering Public Services: The Incorporation Of The Concessions Directive 2014/23 Into Domestic Legal Systems. *Journal of International Business Research, 23*(4), 1-21.

[5]Directive 2014/25/EU. OJ L 94, 28.3.2014, p. 243–374.
[6]Directive 2014/23/EU, OJ L 94, 28.3.2014, p. 1–64.
[7]Directive 2007/66/EU, O.J. 2007, L335/31.
[8]Directive 2009/81/EU, OJ L 216, 20/08/2009, p. 76–136.
[9]Case C-107/98, Teckal Slr v. Comune di Viano, [1999] ECR-I-8121 paras 30-36.; Case C-71/92 Commission v Spain [1993] ECR I-5923, para10; Case C-573/07, Sea Srl v Comune di Ponte Nossa ECR I–0812 paras 63-67, 90.
[10]Case 234/84 Belgium v Commission [1986] ECR 2263 para.14.
[11]Case C-44/96, Mannesmann Anlangenbau Austria AG et al. v. Strohal Rotationsdurck GesmbH, [1998] ECR 73 paras 37-41.
[12]Case C-323/96, Commission v. Belgium, [1998] ECR I-5063, para 34.
[13]Case C-280/00 (fn.126) paras 135,176.
[14]Case T-106/95, FFSA and Others v. Commission, [1997] ECR II-229; Case C-174/97 P [1998] ECR I-1303 para17; C-241/94 France v Commission [1996] I-4551, para 34;
[15]COM (2011) 897(fn.6) final.
[16]Case C-454/06 Pressetext [2008] ECR I-4401, para 73 .
[17]Case C-451/08(fn.18) para 79.
[18]Case C-64/08 Engelmann [2010] ECR I-8219, para. 46.
[19]Case C-206/08(fn.1) paras72-76.
[20]European Commission interpretative communication of Community law on public procurement concessions, OJ/2000/C-21, p. 2, fn.10.
[21]Cases C-147 & 148/06, SECAP SpA and Santorso Soc. coop. arl, [2008] ECR I-3565 para 35.; C-412/04, Commission v. Italy, [2008] ECR I-619, para 65.
[22]Case C-59/00 Vestergaard [2001] ECR I-9505 paras 19-26.
[23]Case C-324/98(fn.4) para 60.
[24]Case C-6/05 Medipac-Kazantzidis AE v. Venizelio-Pananio (PE.S.Y. KRITIS), [2007] ECR I-4557 para 33, 53.
[25]Case C-195/04 Commission v. Finland [2007] ECR 1-335.
[26]Case C-220/06, Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia v. Administración General del Estado, [2007] ECR I-12175 paras 75-77, 88.
[27]Case C-195/04(fn.173) paras. 32-33.
[28]Case C-507/03, Commission v. Ireland (An Post), [2007] ECR I-9777, para 29.
[29]Case C-203/08 (fn.69).
[30]Case T-258/06 (fn.21).
[31]Case C-231/03(fn.16) para 20.
[32]Case C-27/98, Fracasso and Leitschutz v. Salzburger Landesregierung, [1999] ECR I-5697, paras. 23,25.
[33]Case C-406/08, Uniplex (UK) Ltd v. NHS Business Services Ltd., [2010] ECR I-817 paras 30-35.
[34]Case C-532/06, Emm G. Lianakis AE v. Alexandroupolis, [2008] ECR I-251 paras 22, 32, 42-46.
[35]C-31/87 Beentjes v Netherlands State [1988] ECR 4635 para 37; Case C-28/86, Bellini, [1987] ECR 3347 para 27.
[36]Case C-199/07, Commission v. Greece, [2009] ECR I-10669 paras 52-58.
[37]Case C-213/07, Michaniki AE v. Ethniko Simvoulio Radiotileorasis and Ipourgos Epikratias and others, [2008] ECR I-9999 para 21.; Case C-538/07, Assitur Srl v. Camera di Commercio, Industria, Artigianato e Agricoltura di Milano, [2009] ECR I-4219.
[38]Case C- 31/87 (fn.195).
[39]Case C-379/98, PreussenElektra, [2001] ECR I-2099, para 73.
[40]Case C-324/98 (fn.4) para 61; Case C-92/00, Hospital Ingenieure Krankenhaustechnik Planungs-GmbH (HI) and Stadt Wien, [2002] ECR I- 5553, para 45.
[41]Case C-87/94, Commission v. Belgium, [1996] ECR I-2043, para 54.
[42]Case C-513/99, Concordia Bus Finland v. Helsingin kaupunki, [2002] ECR I-7213, para 81.
[43]Case C-315/01, Gesellschaft für Abfallentsorgungs-Technik GmbH (GAT) v.Österreichische Autobahnen und Schnellstraßen AG (ÖSAG), [2003] ECR I-6351paras 62-64.
[44]Case C-324/98 (fn.4) para 42.
[45]Case C-31/87(fn.194) para 37; Concordia Bus Finland, para 57; C- Case C-513/99 (fn.21).
[46]Case C-31/87(fn.194).
[47]Case C-31/87 (fn.194). para 22.
[48]Case C-380/98, The Queen and HM Treasury, ex parte University of Cambridge, [2000] ECR 8035, para.17; Case C-44/96(fn.128) para. 33; Case C-360/96(fn.1) paras 42, 43; Case C-237/99, Commission v.France [2001] (OPAC), paras 41,42.

Citation Information: Bovis, C. (2024). The Affirmation Of Public Private Partnerships As Modality For Delivering Public Services: The Incorporation Of The Concessions Directive 2014/23 Into Domestic Legal Systems. *Journal of International Business Research, 23*(4), 1-21.

[49]Case C-212/02, Commission v. Austria, judgment of 24 June 2004 (not published).
[50]Case C-470/99 Universale-Bau and others [2002] ECR I-11617, paras 51,89.
[51]Case C-249/01, Hackermüller, [2003] ECR I-6319, para 18.
[52]Case C-315/01, Gesellschaft für Abfallentsorgungs-Technik GmbH (GAT) and Österreichische Autobahnen und Schnellstraßen AG (ÖSAG), ECR [2003] I-6351; C-81/98 Alcatel Austria [1999]ECR I-7671 para 43.
[53]Case C-26/03, Stadt Halle and RPL Lochau (2005), E.C.R. I-00001 para 41.
[54]Case C-61/95, Palmisani, [1997] ECR I-4025, para 28; C-78/98, Preston and Others, [2000] ECR I-3201, para 33.
[55]Case C-390/98, Banks v Coal Authority and Secretary of State for Trade and Industry [2001] ECR I-6117, para 121; C-453/99, Courage v. Crehan [2001] ECR I-6297, para 29.
[56]Case C-81/98(fn.227).

REFERENCE

Cao, F., Li, R., & Guo, S. (2024). Rhetoric and reality of public-private partnerships in China: A sustainable public procurement perspective. *Socio-Economic Planning Sciences*, *92*, 101852.

da Silva de Amurim, E. P., Macagnan, C. B., & Seibert, R. M. (2023). Justification of a public university's choice of procurement modality. *SN Business & Economics*, *3*(7), 122.

Gebeyehu Dessie, A. (2021). *Public-Private Partnerships in Ethiopia: A Legal and Policy Analysis* .

Josefsen, A. X. (2020). EU Public Procurement: Contractual Implementation and Viability of EPC Contracts for Provisions on Marine and Offshore Infrastructures for the Public Sector.

Kim, M. J. (2023). Toward Coherence: A Space Sector Public-Private Partnership Typology. *Space Policy*, *64*, 101549.

Lata, J. (2023). Exploring privatisation as a panacea to the creation of value in South Africa's passenger rail service.

Lin Tan, Y. (2020). Global PPPs and the choice of law challenge. *The Chinese Journal of Comparative Law*, *8*(1), 79-115.

Mallisetti, V., Dolla, T., & Laishram, B. (2022). Unpacking the framework of unsolicited proposal for public private partnership projects–the Indian case. *Journal of Financial Management of Property and Construction*, *27*(2), 179-198.

Mugurura, J., & Ndevu, Z. (2020). The legal public–private partnership framework and policy implementation in Uganda. *Africa's Public Service Delivery and Performance Review*, *8*(1), 1-10.

Navarro Ortega, A., & Burlani Neves, R. (2021). Legal aspects of urban water and sanitation regulatory services: An analysis of how the spanish experience positively would contribute to the brazilian new regulation. *13*(8):1023.

Papaioannou, P., Georgiadis, G., Nikolaidou, A., & Politis, I. (2020). Public Transport tendering and contracting arrangements in countries under regulatory transition: The case of Cyprus. *Research in Transportation Economics*. *83*:100944.

Pernazza, F. (2023). The Role of State-Owned Enterprises in the Economic Transnational Relations. In *State and Enterprise: Legal Issues in the Global Market* (pp. 169-214).

Sabatino, G. (2022). The legal issues of "Going Global" and the trans-nationalization of the Chinese public-private partnership model. In *Regulation of State-Controlled Enterprises: An Interdisciplinary and Comparative Examination*. 125-142.

Ssenyonjo, H. (2020). A critical discourse analysis of public-private partnerships in education in Black Africa: A case of basic education in Liberia.

Citation Information: Bovis, C. (2024). The Affirmation Of Public Private Partnerships As Modality For Delivering Public Services: The Incorporation Of The Concessions Directive 2014/23 Into Domestic Legal Systems. *Journal of International Business Research, 23*(4), 1-21.

Zancajo, A., Fontdevila, C., Verger, A., & Bonal, X. (2021). Regulating public-private partnerships, governing non-state schools: an equity perspective: Background paper for UNESCO Global Education Monitoring Report.

Received: 30-Jul-2024, Manuscript No. jibr-24-15099; **Editor assigned:** 31-Jul-2024, Pre QC No. jibr-24-15099(PQ); **Reviewed:** 14-Aug-2024, QC No. jibr-24-15099; **Revised:** 19-Aug-2024, Manuscript No. jibr-24-15099(R); **Published:** 26-Aug-2024

Citation Information: Bovis, C. (2024). The Affirmation Of Public Private Partnerships As Modality For Delivering Public Services: The Incorporation Of The Concessions Directive 2014/23 Into Domestic Legal Systems. *Journal of International Business Research, 23*(4), 1-21.