Draft Commission interpretative communication on concessions under Community law on public contracts

(1999/C 94/04)

This draft interpretative communication sets out the Commission's first thoughts on the subject after discussing the problems named within the two advisory committees on public contracts and taking note of contributions from the sectors concerned. It intends to consult as widely as possible. The Commission will take account, when drafting the final version of the communication, of any contribution which may be addressed to it. Any such contribution should be forwarded to it within two months of the publication of this draft in the Official Journal of the European Communities. It can also be sent by e-mail to the following address: concessions@dg15.cec.be

INTRODUCTION

1. Participation by the private sector in the financing of public investment has varied widely over time and from one country to another. Some Member States have not hesitated to entrust their major infrastructure projects to private investors (e.g. the railways in the 19th century, the urban transport networks at the beginning of the 20th century and, in some countries, large parts of the road network, redevelopment of city centres etc.).

Involvement of the private sector has declined since the first quarter of the 20th century as governments began to prefer to be directly involved in the provision and management of infrastructure and public services. Nowadays, however, it is experiencing a considerable upswing for technical and financial reasons.

2. This can be explained partly by the need for private financing for large-scale infrastructure projects such as underground railways, motorways and airports. The private sector can also, in some cases, have particular know-how or experience that is not available in the public sector (water, waste or urban transport management, for instance). In its Communication on public-private partnerships in trans-European Transport Network projects (1), the Commission said that it wanted to promote this type of partnership, particularly for certain priority projects.

The Commission regards recourse to private investment for the public infrastructure projects as a positive factor, which must be promoted while ensuring that it complies with Community law.

3. The forms taken by these partnerships between the public and private sectors vary widely from one period or Member State to another. Some countries have legislation on relationships of this kind, sometimes dating back centuries. The most common arrangement is the concession contract.

4. Public-private partnerships — particularly the concession system, which is in full spate — are of great interest for the Single Market as the economic significance of projects is often far greater than that of the biggest traditional public contracts.

5. The usefulness of additional legislation setting out the terms for opening up concessions to Community competition became apparent at the end of the 1980s with the introduction of specific arrangements for works concessions. The Court of Justice has also clarified various aspects of Community law with implications for concessions and other similar forms of public-private partnership.

6. In its Communication on public procurement (2), the Commission said that it also intended to examine other forms of public-private partnership to determine the extent to which the rules on public contracts might provide an appropriate legal framework for ensuring compliance with the rules of the Treaty while allowing these forms of cooperation to develop.

In view of the Court's case law in this field and the experience gained in examining cases in the sector of which it has taken cognisance, the Commission proposes in this interpretative communication to give its opinion on the legal arrangements applicable to concessions and other similar forms of public-private partnership given the current state of Community law. However, this text does not seek to interpret the more specific systems of the Directives adopted in different sectors.


(1) COM(97) 453 final of 10 September 1997.

(2) Public procurement in the European Union, Communication adopted on 11 March 1998, COM(98) 143. Cf. in particular point 2.1.2.4.
This is obviously a basic framework which will be developed. It is set out to enable the various parties (public authorities, awarding authorities, contractors, economic operators, etc.) to get a better picture of the existing rules of the game and to contribute, by applying them correctly, towards improving the operation of the European Single Market.

I. DEFINITION AND GENERAL PROBLEM OF CONCESSIONS AND SIMILAR FORMS OF PUBLIC/PRIVATE PARTNERSHIP

Public authorities in Member States are increasingly calling on the private sector to provide public services on their behalf using various procedures and on a variety of scales. In some cases cooperation of this kind is governed by the directives on public contracts, but it can also take forms, which are not covered. For example, only works concessions are covered by Directive 93/37/EEC, while other similar forms of public/private partnership do not explicitly fall within the scope of the directives on public contracts. All these forms of cooperation nevertheless have common features, and should therefore be dealt with in this communication.

The fact that service concessions and other similar forms of public/private partnership are not expressly covered by the directives on public contracts does not mean that they are exempt from the rules and principles of the Treaty, since in so far as concessions and other forms of public/private partnership are acts of State (\(^{(4)}\)) involving economic activities, they are subject to Articles 52 to 66 of the Treaty and the principles set out in the Treaty or deriving from the Court's case law, particularly the principles of non-discrimination, equality of treatment, transparency, mutual recognition and proportionality.

Concessions and other similar forms of public/private partnership are not defined in the Treaty. We therefore need to outline their distinctive features in order to delimit the field of application of this interpretative communication.

1.1. Definition of ‘works concessions’

(a) Directive 93/37 definition

Article 1(d) of Directive 93/37/EEC defines a ‘public works concession’ as

\(\text{‘a contract of the same type as a public works contract except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the construction or in this right together with payment’}\)

According to this definition, the main distinctive feature of a concession is the fact that the consideration for the works consists in the right to exploit and the exploitation risks are borne for a significant part by the concessionaire.

‘Exploitation’ means that the contractor carrying out the work, instead of being paid directly by the awarding authority initiating the procedure, earns revenue from the fees charged to users of the construction when it is completed. In addition to the construction risk therefore, he also assumes a significant part of the risks involved in the management and use of the facilities. If recovery of expenditure were guaranteed by the awarding authority without the risk involved in the management of the construction, there would be no element of risk and the contract should be regarded as a works contract rather than a concession contract (\(^{(4)}\)).

The directive also states that there may be payment in addition to the right to exploit the construction. We shall deal with this aspect in greater detail in point (b) below, since it is an important element for distinguishing a concession from a public works contract in practice.

(b) Delimitation of the concepts of ‘public works contract’ and ‘works concession’

As the legislation developed, the concept of public works contracts was extended to situations not covered by the previous directives (\(^{(4)}\)). The text as it stands at present stipulates that ‘public works contracts’ are contracts for pecuniary interest concluded in writing between a contractor and a contracting authority (\(\ldots\) ) which have as their object either the execution, or both the execution and design, of works related to one of the activities referred to in Annex II or a work (\(\ldots\) ), or the execution by whatever means of a work corresponding to the requirements specified by the contracting authority (Article 1(a)).

\(\text{\textsuperscript{4}}\) The best-known example of a public works concession is a contract whereby a State grants a company the right to build and exploit a motorway and authorises it to earn revenue by charging tolls.

\(\text{\textsuperscript{5}}\) See, in particular, the eighth recital of Directive 89/440/EEC (Whereas it is to define more precisely what is meant by public works contracts in order to take account, in particular, of new forms of such contracts).
In view of this extension of the Community concept of public works contracts, there is a risk of confusion between public works concessions and public works contracts forming the subject of complex legal arrangements (4).

Even if awarding authorities use complex contractual formulas, these are still public works contracts within the meaning of Community law in so far as the cost is borne entirely by the awarding authority and there are no exploitation risks for the contractor (7).

The fact that the directive allows for a payment in addition to the right of exploitation does not change this analysis.

The definition of a concession always includes the possibility that a payment may be made provided that it doesn't eliminate a significant part of the risk borne by the concessionaire, since Directive 93/37/EEC states that the right to exploit the construction may be accompanied by a payment.

It can be seen in practice that, in certain cases, the grantor shares some of the economic risk borne by the concessionaire. The State therefore bears part of the costs of exploiting the concession in order to keep prices down for the user. A variety of procedures are possible (guaranteed flat rate, fixed sum but paid on the basis of the number of users etc.). This sharing of risks and costs does not necessarily change the nature of the contract.

If the payment covers only part of the cost of the construction, the concessionaire will still have to bear a significant part of the exploitation risks. Similarly, if the concessionaire must, for reasons of public interest, apply ‘social prices’ (8) and receives compensation from the State in a lump sum or instalments, this sharing by the State of operating costs does not relieve the concessionaire of a significant part of the exploitation risks. The situation is different if the awarding authority assumes responsibility for the exploitation risks. In that case it is a public works contract.

1.2. Service concessions and coverage of this communication

Directive 92/50/EEC does not define ‘service concessions’ (9). However, the distinctive features of works concessions as defined by the Community legislator in Directive 93/37/EEC are shared by service concessions, since a concession has the same features regardless of what it relates to. Thus, for example, as with works concessions, the exploitation criterion is vital for determining the existence or otherwise of a service concession (10). By virtue of this criterion, the contractor bears the risk involved in operating the service in question, obtaining a significant part of his revenue from the user, particularly by charging fees in one form or another.

The Commission’s discussions in the Advisory Committees on public contracts and with the main economic operators concerned have also revealed that there are other forms of public/private partnership in the Member States that are very similar to concessions, in the field of both works and services.

For example, it has been observed that the State is sometimes involved in the financing and exploitation of a construction or services at the same time as the private

(4) For example, the Commission has already taken cognisance of cases in which a consortium composed of contractors and banks undertook to carry out a project to meet the needs of the awarding authority, in exchange for reimbursement by the awarding authority of the loan taken out by the contractors with the banks, together with a profit for the private partners. The Commission interpreted this as a public works contract since the consortium did not undertake any exploitation, and therefore bore no attendant risk. The Commission came to the same conclusion in another case where, although the private partner carrying out the work was ostensibly exploiting the construction, the public authority had in fact guaranteed that he would receive compensation. The terms of this guarantee were such that the public authority in effect bore the exploitation risks.

(7) In its Judgment of 10 November 1998 of the Arnhem case, (Case C-360/96), the Court implicitly concluded that it could not be a public concession on the grounds that the remuneration paid comprises only a price and not the right to operate the service, without interpreting the term public service concession (Grounds, paragraph 25).

(8) For example, if the toll for a motorway is fixed by the State at a level which does not cover exploitation costs.

(9) The absence of a reference to the concept of service concession in Directive 92/50/EEC calls for some comment. Although, when preparing this directive, the Commission had proposed including a special arrangement for this type of concession equivalent to the existing arrangement for works concessions, the Council did not accept this proposal. The question remains, however, as to whether or not the granting of service concessions comes entirely under the arrangements introduced by Directive 92/50/EEC, since this applies to all ‘contracts for pecuniary interest concluded in writing between a service provider and a contracting authority’, to the exception of certain types of contract specified in the directive which do not include concession contracts. A literal interpretation of this definition, followed by certain authors, could lead to inclusion of concession contracts, since these are for pecuniary interest and concluded in writing. This approach would mean that the granting of a service concession would have to comply with the entire detailed provisions of Directive 92/50/EEC, and would hence be subject to a more complex procedure than works concessions. However, in the absence of Court case law on this point, the Commission does not follow this interpretation.

(10) See also the Judgment of the Court in Case C-360/96, Arnhem, (Grounds, paragraph 25).
sector, setting up by means of a regulatory act — not necessarily a contract — a public-private equity joint venture. The fact that these forms of concession cannot be defined as works concessions or public contracts within the meaning of Directive 93/37/EEC or that they are not covered by Directive 92/50/EEC does not prevent the rules of Articles 52 and 59 of the Treaty from applying, since any act of State laying down the terms governing economic activities, be it contractual or unilateral, must be viewed in the light of the Treaty and in particular Article 52 to 66. Concessions and similar forms of public/private partnership are governed by acts of this kind and as such are covered by the abovementioned rules and principles of the Treaty.

This interpretative communication therefore concerns acts of State whereby a public authority entrusts to a third party — by means of a contractual act or a unilateral act with the prior consent of the third party — the total or partial management of services for which that authority would normally be responsible and for which the third party takes on the main exploitation risk. Such services are covered by this communication only if they constitute economic activities within the meaning of Articles 52 to 66 of the Treaty. These acts of States will henceforth be referred to as ‘concessions and similar forms of public/private partnership’.

This interpretative communication does not therefore concern acts whereby a public authority entrusts to a third party the management of services connected with the exercise of official authority (13) or authorises the third party the management of services connected with the exercise of official authority (15) or authorises the third party to the extent that these are attributable to the State within the meaning of the Treaty and the principles enshrined in the Treaty or any act of State laying down the terms governing economic activities, be it contractual or unilateral, must be viewed in the light of the Treaty and the principles enshrined in the Treaty or notably the principles of non-discrimination, equality of treatment, transparency, mutual recognition and proportionality (15).

II. REGIME APPLICABLE TO CONCESSIONS AND SIMILAR FORMS OF PUBLIC/PRIVATE PARTNERSHIP

As mentioned above, only works concessions for an amount equal to or greater than the threshold specified in Directive 93/37/EEC (ECU 5 000 000) are subject to a specific regime. Other forms of public/private partnership for works or services or in the water, energy, transport or telecommunications sectors are not subject to the directives on public contracts.

This does not, however, mean that these phenomena are not covered by any Community rules.

Like any act of State laying down the terms governing economic activities, concessions and similar forms of public/private partnership are subject to Articles 52 to 66 of the Treaty and the principles of the Treaty and the principles emerging from the Courts’ case law — notably the principles of non-discrimination, equality of treatment, transparency, mutual recognition and proportionality (13).

In the transport sector the relevant rules on freedom to provide services are set, by the means of Article 61, by Articles 74 to 84 of the Treaty (16). This is without prejudice to the fact that as the Court has consistently held, the general principles of Community law are applicable to the sector (17).

The Treaty does not restrict the freedom of a Member State to have recourse to concessions and analogous forms of public/private partnership, provided the methods of granting these are compatible with Community law. Thus, for instance, if a Member State seeks to impose conditions of an environmental kind when choosing the concessionaire it can include, among the selection criteria, requirements of environmental qualification on a non-discriminatory basis, provided that they are compatible with the rules and the principles of the Treaty.

(1) Obviously, acts and behaviour of the concessionaire to the extent that these are attributable to the State within the meaning of the case law of the Court of Justice are governed by the above rules and principles.

(2) Transport services by rail, road and inland waterway are covered by Regulation (EEC) No 1191/69 as amended by Regulation (EEC) No 1893/91, which set out the mechanisms and procedures that public authorities can employ in ensuring that their objectives for public transport are met.


(11) For example, ‘sovereign’ services (notably, in certain Member States, the profession of notary).

(12) For example, taxi concessions or authorisations to use the public highway (newspapers kiosks, café terraces), acts relating to pharmacies, gas stations.

(13) In his opinion regarding the case Arnhem (abovementioned), Advocate General La Pergola outlined that these are forms of inter-organic delegation that are not outside the administrative sphere of contracting authorities.

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As the Court has stated in connection with the directives on public contracts, even if the Member States remain free to lay down the substantive and procedural rules, they must respect all the relevant provisions of Community law and particularly the prohibitions deriving from the principles enshrined in the Treaty concerning right of establishment and freedom to provide services (18). The Court stated in particular that the public procurement directives were intended to ‘facilitate the attainment within the Community of freedom of establishment and freedom to provide services’ and ‘to ensure the effectiveness of the rights conferred by the Treaty in the field of public works and supply contracts’ (19).

Certain Member States have sometimes thought that concessions were not governed by the rules of the Treaty in that they involved delegation of a service to the public, which would be possible only on the basis of mutual trust (intuitu personae). According to the consistent case law of the Court, the only reasons which would enable State acts which violate Articles 52 and 59 of the Treaty (and therefore concessions and similar forms of public/private partnership which violate Articles 52 and 59 of the Treaty) to circumvent prohibition under these Articles are those referred to in Articles 55 and 66. The very restrictive conditions specified by the Court for the application of these Articles are described below (20).

In what follows, the Commission will refer to the rules of the Treaty and the principles deriving from Court case law that are applicable to concessions and similar forms of public/private partnership covered by this communication; it will explain what, at the current state of thinking, are the applicable criteria.

2.1. The rules and principles of Community law applicable to concessions and similar forms of public/private partnership

The Treaty makes no specific mention of public contracts, concessions or other similar forms of public-private partnership. A number of its provisions are, however, relevant, i.e. the rules instituting and guaranteeing the proper operation of the Single Market, namely:

— the rules prohibiting any discrimination on grounds of nationality (Article 6(1)),

— the rules on freedom of establishment (Articles 52 and following) and on freedom to provide services (Article 59 and following) and the exceptions to these rules provided for in Articles 55 and 56 (21),

— Article 90 of the Treaty might help to determine if the grant of these rights is legitimate.

The rules and principles arrived at by the Court are clarified below.

1. Equality of treatment

The Court has consistently held that the general principle of equality of treatment, which includes specifically a prohibition of discrimination based on nationality, is a fundamental principle of Community law. This principle requires that similar situations are not to be treated differently unless this is justified by objective reasons (22).

In a judgment on the application of the rules and principles of the Treaty to public contracts the Court asserted that the principle of equality of treatment, of which Articles 52 and 59 are a particular expression prohibits not only the obvious discrimination based on nationality but also all covert forms of discrimination which, by applying other criteria of differentiation, lead in fact to the same result (23).

The principle of equality of treatment implies in particular that all tenderers know the rules in advance and that they apply to everybody in the same way. The case law of the Court, in particular the Judgment ‘Raulin’ (24) and the Judgment ‘Parliament/Council’ (25) lays down that the principle of equality of treatment requires not only that conditions of access to an economic activity be non-discriminatory, but also that public authorities take all the measures required to ensure the exercise of this activity.

The Commission points out that restrictive but non-discriminatory measures are contrary to Articles 52 and 59 if they are not motivated by overriding reasons of public interest worth protecting. This is the case when the measures are neither appropriate nor necessary for achieving the objective in question.

In that judgment, the Court of Justice ruled that in view of the facts, the tasks of the concessionaire were limited to activities of a technical nature and as such were subject to the provisions of the Treaty. (26)


(20) Judgment of 26 April 1994, Affair C-272/91, Lottomatica. In this Judgment, the Court of Justice ruled that in view of the facts, the tasks of the concessionaire were limited to activities of a technical nature and as such were subject to the provisions of the Treaty.

(21) The Commission points out that restrictive but non-discriminatory measures are contrary to Articles 52 and 59 if they are not motivated by overriding reasons of public interest worth protecting. This is the case when the measures are neither appropriate nor necessary for achieving the objective in question.


(24) Judgment of the Court of 7 July 1992, Case C-295/90.
In the Judgments Storebælt and Bus Wallons the Court had the occasion to set out the scope of the principle of equality of treatment in the area of public contracts, by asserting on the one hand that this principle requires that all offers conform to the tender specifications to guarantee an objective comparison between offers (26) and, on the other hand, this principle is violated, and transparency of the procedure impaired, when an awarding entity takes account of changes to the initial offers of one tenderer who thereby obtains an advantage over his competitors. Moreover, the Court notes ‘that the procedure to compare offers (must) observe at all stages both the principle of equality of treatment of tenderers and that of transparency, so that all tenderers have the same chances in formulating the terms of their offers’ (27).

The Court has therefore developed in these two judgments a principle of equality of treatment between tenderers quite apart from possible discrimination on the basis of nationality or other criteria to distinguish between them.

The application of this principle to concessions and other similar forms of public/private partnerships (which from all the evidence is only possible when the awarding authority negotiates with several candidates) implies that the grantor is free to choose the award procedures and lay down the requirements which candidates must meet throughout the various phases of a tendering procedure. However, the procedure must be conducted objectively and transparently and comply with the procedural rules and basic requirements originally set (28). Where these rules have not yet been fixed, the application of the principle of equality of treatment requires in any event that the candidates be chosen objectively.

Furthermore, in certain cases, awarding authorities are unable to specify their requirements in sufficiently precise technical terms, so they seek alternative offers likely to provide various solutions to a problem expressed in general terms. In such cases, however, in order to ensure fair and effective competition, the specifications must always state in a non-discriminatory and objective manner what is asked of the candidates and above all the way in which they must draw up their bids. In this way, each tenderer knows in advance that he has the possibility of proposing various technical solutions. More generally, the specifications must not contain elements that infringe the abovementioned rules and principles of the Treaty.

The requirements of the grantor may also be determined in collaboration with companies in the sector provided that this does not restrict competition.

2. Transparency

The Commission notes that in virtually all the Member States the administrative rules or practices adopted with regard to concessions and similar forms of public/private partnership provide that bodies wishing to entrust the management of an economic activity to a third party must, in order to ensure a minimum of transparency, make their intention public according to appropriate rules.

It is up to the awarding authorities to choose these methods. This is done, for example, by publishing a tender notice or a pre-information notice in the daily press or specialist journals, or by posting appropriate notices. These notices generally contain the information necessary to enable potential tenderers to decide whether they are interested in participating (e.g. selection and award criteria, etc.). This includes the subject of the concession or partnership and the nature and scope of the services expected from the concessionaire or partner.

The Commission considers that, under these circumstances, the requirement of transparency is met.

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(28) Thus, for example, even if the specifications provide for the possibility for candidates to make technical improvements to the solutions proposed by the awarding authority (and this will often be the case for complex infrastructure projects), such improvements may not relate to the basic requirements of a project and must be delimited.
The Commission would call moreover that the Court has in its case law concerning subsequent stages of the procedure affirmed that the principle of transparency is the corollary of the principle of the equality of treatment whose useful effect it seeks to ensure in undistorted competitive conditions (36).

3. Proportionality

The principle of proportionality is recognised by the established case law of the Court as being part of the general principles of Community law (37); it also binds national authorities in the application of Community law (33), even when these have a large area of discretion (33).

The principle of proportionality requires that any measures chosen should be both necessary and appropriate in the light of the objectives sought (34). In choosing the measures to be taken, a Member State must adopt those which cause the least possible disruption to the pursuit of an economic activity (39).

Applied to concessions and other similar forms of public/private partnership this principle, which allows contracting authorities to define, especially in terms of performance and technical specifications, the objective to be reached, requires, however, that any measure chosen is both necessary and appropriate in relation to the objective laid down.

Thus, for example, a Member State may not impose, when selecting candidates, technical, professional or financial conditions which are excessive and disproportionate to the subject of the concession or similar form of public/private partnership.

4. Mutual recognition

The principle of mutual recognition has been laid down by the Court and gradually defined in greater detail in a large number of judgments on the free circulation of goods, persons and services. According to this principle, a Member State must accept the products and services supplied by economic operators in other Community countries if the products and services meet in like manner the legitimate objectives of the recipient Member State (36).

The application of this principle to concessions and similar forms of public-private partnership implies, in particular, that the Member State in which the service is provided must accept the technical specifications, checks, diplomas, certificates and qualifications required in another Member State if they are recognised as equivalent to those required by the Member State in which the service is provided.

Thus, for example, the Member State in which the service is provided must accept the equivalent qualifications already acquired by the service provider in another Member State which attest to his professional, technical and financial capacities (39).

5. Exceptions provided for by the Treaty

Restrictions on the freedom of establishment and the freedom to provide services are allowed only if they are justified by one of the reasons stated in Articles 55 and 56 of the Treaty.

With particular reference to Article 55 (which allows restrictions on the freedom of establishment and the freedom to provide services in the case of activities connected, even occasionally, with the exercise of official authority), the Court has stressed on numerous occasions (39) that ‘since it derogates from the fundamental rule of freedom of establishment, Article 55 of the Treaty must be interpreted in a manner which limits its scope to what is strictly necessary and appropriate in the light of the objectives sought’ (35).

(36) This principle derives from case law relating to freedom of establishment and freedom to provide services (in particular in the Vlassopoulous Judgment (2 May 1991, Case C-340/89) and Dennemeyer Judgment (25 July 1991, Case C-76/90). In the first Judgment, the Court of Justice found that ‘even if applied without any discrimination on the basis of nationality, national requirements concerning qualifications may have the effect of hindering nationals of the other Member States in exercising their right of establishment guaranteed to them by Article 52 of the EEC Treaty. That could be the case if the national rules in question took no account of the knowledge and qualifications already acquired by the person concerned in another Member State.’ In the Dennemeyer Judgment the Court stated in particular that ‘a Member State may not make the provisions of services in its territory subject to compliance with all the conditions required for establishment and thereby deprive of all practical effectiveness the provisions of the Treaty whose object is, precisely, to guarantee the freedom to provide services.’ Lastly, in the Webb case (of 17 December 1981, Case 279/80), the Court added that the freedom to provide services requires that ‘( . . .) the Member State in which the service is provided takes into account the evidence and guarantees already produced by the provider of the services for the pursuit of his activities in the Member State in which he is established.’

(35) Apart from applying the technical harmonisation directives, agreements on mutual recognition of voluntary certification systems can constitute proof that the qualifications of enterprises are equivalent; these agreements can be based on accreditation, which shows the competence or the conformity assessment body.

(34) As the Court has stated, a non-distorted system of competition can be guaranteed only if the various economic players have equal chances.


(38) Judgment of 27 October 1993, Case 127/92, recital 27.


(41) See, for example, Judgment of 17 May 1984, Case 15/83, Denkavit Nederland.
necessary in order to safeguard the interests which it allows the Member States to protect. Such exceptions must be restricted to those activities referred to in Articles 52 and 59, which in themselves involve a direct and specific connection with the exercise of official authority (40).

Consequently, the exception included in Article 55 must apply only to cases in which the concessionaire or partner directly and specifically exercises official authority.

Thus, this exception does not automatically apply to activities carried out by virtue of an obligation or exclusivity established by law or qualified by the national authorities as being in the public interest (40). It is true that any activity delegated by the public authorities normally has a connotation of public interest, but this still does not mean that such activity necessarily involves exercising official authority.

As an example, the Court of Justice dismissed application of the exception under Article 55 on the basis of findings such as:

— the activities transferred remained subject to supervision by the official authorities, which had at their disposal appropriate means for ensuring the protection of the interests entrusted to them (41),

— the activities transferred were of a technical nature and therefore not connected with the exercise of official authority (42).

The principle of proportionality requires that any measures restricting the exercise of the freedoms provided for in Articles 52 and 59 should be both necessary and appropriate in the light of the objectives pursued (43). This implies, in particular, that in the choice of the measures for achieving the objective pursued, the Member State must give preference to those which least restrict the exercise of these freedoms (44).

Furthermore, with regard to the freedom to provide services, the host Member State must check that the interest to be safeguarded is not safeguarded by the rules to which the applicant is subject in the Member State where he normally pursues his activities.

6. Protection of the rights of individuals

In consistent case law on the fundamental freedoms guaranteed by the Treaty, the Court has stated that decisions to refuse or reject must state the reasons and must be open to judicial appeal by the affected parties (45).

These requirements are generally applicable since, as the Court has stated, they derive from the constitutional traditions common to the Member States and enshrined in the European Convention on Human Rights (46).

They are therefore also applicable to individuals who consider that they have been harmed by the award of a concession or by the choice of a partner within the meaning of this communication.

2.2. The provisions of Directive 93/37/EEC on works concessions

The Commission considers it worthwhile to point out that the rules and principles, which it has explained regarding concessions for services and similar forms of public/private partnership, are applicable mutatis mutandis to concessions for works.

The fact that Directive 93/37/EEC lays down only advertising rules for works concessions does not mean that these rules are the only ones applicable to them, and for the following reason: since works concessions are State acts the purpose of which is the provision of economic activities, they also fall within the field of application of Articles 52 to 66 of the Treaty and the abovementioned principles.

It goes without saying that, for concessions whose value is below the threshold laid down by Directive 93/37/EEC, the same rules and principles of the Treaty are applicable.

(a) The upstream phase: choice of concessionaire

1. Rules on advertising and transparency

Awarding authorities must publish a concession notice in the Official Journal of the European Communities according to the model laid down in Directive 93/37/EEC to put the contract up for competition at the European level (47).

(40) Judgment of 21 June 1974, Case 2/74, Reyners.
(41) Conclusions of Mr Advocate-General Mischo in Case C-3/88, Data Processing, referred to above.
(42) Judgment of 15 March 1988, Case 147/86, referred to above.
(43) Cases C-3/88 and 272/91, Data Processing and Lottomatica, referred to above.
(44) Case T-260/94, Air Inter SA, referred to above. For example, the Court rejected the application of the exception relating to public policy when it was supported by insufficient reasons and the objective could be achieved by other means which did not restrict freedom of establishment or freedom to provide services (cf. Recital 15 of the Judgment C-3/88, Data Processing, referred to above).
(48) ‘In order to meet the directive’s aim of ensuring development of effective competition. In the award of public works contracts, the criteria and conditions which govern each contract must be given sufficient publicity by the authorities awarding contracts’ (Judgment of 20 September 1988, Case 31/87, Beentjes, recital 21).
A problem encountered by the Commission involves the award of concessions between public entities. Some Member States seem to consider that the provisions of Directive 93/37/EEC applicable to works concessions do not apply to contracts concluded between a public authority and a legal person governed by public law.

Nevertheless, Directive 93/37/EEC requires a preliminary advertisement for all contracts for public works concessions, irrespective of whether the potential concessionaire is private or public. Furthermore, Article 3(3) of Directive 93/37/EEC expressly states that the concessionaire can be one of the awarding authorities covered by the Directive, which implies that this type of relation is subject to publication in accordance with Article 3(1) of the same Directive.

2. The choice of the type of the procedure

The grantor of works concessions is free to adopt one of the three procedures mentioned in the Directive, whilst complying with the abovementioned rules and principles laid down in the Treaty.

(b) The downstream phase: contracts awarded by the contract holder (48)

Directive 93/37/EEC lays down certain rules on contracts awarded by public works concessionaires for works for a value of ECU 5,000,000 or more. They vary, however, depending on the type of concessionaire.

If the concessionaire is an awarding authority within the meaning of the Directive, the contracts for such works must be awarded in full compliance with all the Directive's provisions on public works contracts.

If the concessionaire is not an awarding authority, the Directive stipulates that he must comply only with certain advertising rules. These rules are not applicable when the concessionaire awards works contracts to affiliated undertakings within the meaning of the Directive. The Directive also stipulates that a comprehensive list of such firms must be enclosed with the application for the concession and must be updated following any subsequent changes in the relationship between firms. Since this list is comprehensive, the concessionaire may not cite the non-applicability of the advertising rules as grounds for awarding a works contract to a firm which does not figure on the abovementioned list.

Consequently the concessionaire is always obliged to make known his intention to award a works contract to a third party whether or not he is an awarding authority.

The Commission considers that a Member State is in breach either of the provisions of Directive 93/37/EEC on works carried out by third parties if, to award works contracts to third-party firms, without any invitation to tender, it uses as an intermediary a firm with which it is linked.

(c) The rules applicable to review

In the case of public works concessions, the provisions of Directive 89/665/EEC concerning review are applicable (49).

The Commission also draws attention to the requirements of Article 2(7) of Directive 89/665/EEC, which stipulates 'the Member States shall ensure that decisions taken by bodies responsible for review procedures can be effectively enforced.'

This implies that the Member States must not take any material or procedural measures, which might render ineffective the mechanisms introduced by this Directive.

(48) It should be recalled that under Article 3(2) of the Directive the contracting authority may require the concessionaire to award to third parties contracts representing a minimum percentage of the total value of the work. The contracting authority may also request the candidates for concession contracts to specify in their tenders this minimal percentage.

(49) In this context, it should be noted that Mr Advocate-General Elmer, in Case C-433/93, Commission v. Germany, found that according to the case law of the Court (Judgments of 20 September 1988, in Case 31/87, Beenjjes, and 22 June 1989, in Case 103/88, Constanzo) the Directives on public contracts confer on individuals rights which they may exercise, in certain conditions, directly before the national courts, vis-à-vis the State and awarding authorities. The Advocate-General also maintained that Directive 89/665/EEC, adopted after this Judgment, did not seek to restrict the rights which case law individuals vis-à-vis public authorities. On the contrary, the Directive sought to reinforce 'the existing arrangements at both national and Community levels ... particularly at a stage when infringements can be corrected' (second recital of Directive 89/665/EEC).
In addition to the obligations already mentioned above, these public contracts are subject to the obligation to state reasons provided for by Article 8 of Directive 93/37/EEC, which makes it compulsory for the authorising authority to state the reasons for its decision within fifteen days, and to the review procedures provided for by Directive 89/665/EEC.

Lastly, in the case of service concessionaires who are awarding authorities within the meaning of the Directives, the provisions of the Directives apply to the procedures to award concession contracts.

2.3. The delimitation between works concessions and service concessions

Since Directive 93/37/EEC provides for a special system of procedures for granting public works concessions, it is worth determining exactly what this type of concession is, especially if it is a mixed contract, which also includes a service element. This is virtually always the case in practice since a public works concessionaire often provides a service to the user on the basis of the structure he has built.

For the Commission, the decisive criterion is whether the contract involves building a structure on behalf of the grantor.

If the contract involves building a structure or carrying out works and the control of the resulting assets is to remain in the hands of the authorising authority, the Commission considers that the system provided for by Directive 93/37/EEC must apply as long as the threshold for applying this Directive is reached (ECU 5 000 000), even if service aspects are involved. The fact that the works are performed or the structures are built by third parties does not change the nature of the contract. The same applies if the concessionaire cannot build the structure or perform the works himself: the subject of the contract remains the same.

In contrast, a concession contract, which does not involve construction work or only involves operating an existing structure, is regarded as a service concession since, in both cases, no actual construction work takes place.

Furthermore, alongside a public works concession, service contracts or other service concessions may be concluded for complementary activities, which are, however, independent of the exploitation of the concession, and particularly of a structure. Thus, services to repair a motorway may be the subject of a different service concession from that involving its construction or management.

2.4. Concessions in the special sectors

Directive 93/38/EEC on contracts awarded by entities operating in the water, energy, transport and telecommunications sectors does not have any specific rules either on works concessions or on service concessions.

The system of the Treaty which applies to the grant of a concession by an entity operating in one of the sectors covered by Directive 93/38/EEC does not differ in any material respect from the system applicable to the grant of a concession where the grantor is a public entity and falls within the rules and principles described above.

(50) On the basis of Articles 74 to 84 of the Treaty the Community has legislated to ensure the free provision of services in certain transport sectors, but not all especially not in a significant part of the land transport sectors. For these the responsible authorities of the Member States have a discretionary power to select operators, to whom they accord special rights to supply land transport services and/or whom they reimburse for providing land transport services. Certain tasks are only remunerated if they are covered by a public service contract between an operator and a public authority. This applies both to the provision of services in a works concession contract and to combined supplies and services contracts. Although authorities do not have to apply the detailed rules of Directives 92/50/EEC and 93/38/EEC to bestow service concessions the general principles set out under point 2.1 of equality of treatment, transparency, proportionality, mutual recognition and protection of individual rights apply when a public authority chooses a potential operator. Since the adoption of Regulation (EEC) No 1191/69 there is now a considerably greater understanding of the conditions required for an adequate transport service and the best ways of ensuring it. For these reasons the Commission considers that the Regulation must be brought up to date among other things to set out more precisely proportionality of exclusive rights and to extend the use of public service contracts.