

Outsourcing the Public Services of General Economic Interest under EU Public Contract Law

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Abstract

One of the primary means of outsourcing public services of general economic interest in the EU, service concessions have been excluded from EU directives on public procurement since the first public procurement law was adopted in the 1970s. However, the legal framework on service concessions established under CJEU case-law changed following implementation of the 2014 Directive on Concession, which aimed to bring legal certainty and transparency to procedures associated with choosing concessioners and the performance of concession contracts. This new Directive provides for looser procedures than the 2014 Public Procurement Directive when contracting authorities decide to entrust the delivery of public services to the private sector through concession contracts, but several important issues are left to be clarified, particularly the distinction between public services contracts and service concessions. This article attempts to provide a wholistic picture of the legal frameworks for outsourcing public services in the EU, including via public service contracts and service concessions under the public procurement law and the case-law of CJEU. Following establishment of the frameworks, this article tries to clarify the ambiguous conceptions of public services contracts and service concession through discussion of the various types of risk, and how much risk should be transferred in the determination of contract types. Also, if operational risks are limited, or extremely low due to

the supervision of public service under the domestic public law, how is the nature of the contract determined?

Key Words: service concession, concession contract, EU Directive on Concession, EU Public Procurement Directive, public-private partnership