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What Need and Logic for a New Directive on Concessions, Particularly Regarding the Issue of their Economic Balance?

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1. INTRODUCTION

Following its announcement of the intention to adopt a legislative initiative on concessions in the Single market Act of April 2011, the European Commission reviewed the approach to concessions in the public procurement rules and, in December 2011, proposed the adoption of a Directive on the award of concession contracts (the ‘Proposed Concessions Directive’).

As is well known, currently only works concessions are covered by specific rules in the public sector Directive 2004/18, whereas services concessions are only covered by Treaty obligations and all types of concession are excluded from the utilities rules of Directive 2004/17. The position is however slightly complicated under existing CJEU case law, which rules that public bodies are obliged to subject the award, substantial modification, or renewal of concessions to cross-border advertising and competition, provided the concession is of potential cross-border interest. The vagaries of the existing case law and the relative imprecision of the case by case approach adopted so far have generated significant legal uncertainty concerning the specific rules applicable to the award of concession contracts, despite the guidance issued by the European Commission in 2006—which was
strongly criticised on the basis that it exceeded the requirements of the case law that it aimed to codify, and therefore imposed new obligations on Member States without a proper legal basis.

In order to overcome this faulty regulatory situation, the Commission has drafted the Proposed Concessions Directive and submitted it for adoption as a new stand-alone directive (covering both works and services concessions, and applicable also to those in the utilities sector), to fill the gap caused by the lack of specific rules. The Commission considers that concessions are not being awarded transparently in some EU Member States and, hence, that there is need and opportunity for regulatory intervention. In terms of the explanatory memorandum for the Proposed Concessions Directive:

The award of works concessions is presently subject to a limited number of secondary law provisions, while service concessions are covered only by the general principles of the TFEU. This loophole gives rise to serious distortions of the internal market, in particular limiting access by European businesses, especially small and medium-sized enterprises, to the economic opportunities offered by concession contracts. The lack of legal certainty also results in inefficiencies.

This position of the Commission finds support in the Impact Assessment report of the proposal, which in the summing up of the Commission, found that economic operators are faced with an unlevel playing field, which often leads to missed business opportunities. This situation gives rise to costs and is detrimental to competitors located in other Member States, contracting authorities and contracting entities and consumers. Moreover, both the definition of concessions and the precise content of the obligations of transparency and non-discrimination arising from the Treaty remain unclear. The resulting lack of legal certainty increases the risk that illegally awarded contracts will be cancelled or terminated early and it ultimately discourages the authorities from using concessions where this type of contract could be a good solution.

Therefore, the Proposed Concessions Directive tries to remove all those obstacles and sources of economic inefficiency, and aims to further contribute to the development of the internal market, particularly by boosting SME access to the concessions markets.

This article briefly reviews the need for the Proposed Concessions Directive and the opportunity of the proposal; explores the logic and main aspects of the Proposed Concessions Directive, particularly regarding its more ‘concession-specific’ rules on their economic balance; and offers

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5 In that regard, see Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives, [2006] OJ C 179/2, available at http://ec.europa.eu/internal_market/publicprocurement/docs/keydocs/communication_en.pdf (last visited 3 July 2012); and the ensuing Judgment of the General Court (Fifth Chamber) of 20 May 2010 in Case T-258/06 Germany v Commission [2010] ECR II-2027.

6 COM(2011) 897 final, Explanatory Memorandum at para. 1, emphasis added.

7 COM(2011) 897 final, Explanatory Memorandum at para. 2.

8 On a related note, for an assessment of the general contribution of existing EU procurement rules to the achievement of those goals of economic growth and internal market development, see A Sanchez Graells, ‘Are the Procurement Rules a Barrier for Cross-border Trade within the European Market? A view on proposals to lower that barrier and spur growth’ in Ølykke, Risvig & Tvarno (eds) EU Public Procurement – Modernisation, Growth and Innovation (Copenhagen, DJØF Publishing, 2012) 107-133.
some briefly preliminary conclusions that will remain tentative until the current negotiation and redrafting efforts are concluded and a concessions directive is eventually adopted (4).

2. WHY NOT JUST AMEND DIRECTIVE 2004/18?

2.1. No need for a separate Directive ...

Given the characteristics of the tendering of concession contracts (both for works and services) as such (i.e. looking exclusively at contract preparation and tendering and award phases) and from a functional perspective, it is difficult to justify that concessions require tendering procedures that are totally different from those used for the rest of public contracts—and, consequently, that there is an actual need for a stand-alone instrument rather than an extension of coverage of the general procurement rules (with the required adjustments or simplification, as deemed appropriate)9.

Indeed, the explanation provided by the Commission on the preferability of a separate directive seems rather week, since it merely points out that

[t]he optimal solution identified was legislation based on the current provisions on public works concessions, adequately adjusted and supplemented with certain specific provisions. A more restrictive approach would be to extend to concessions the provisions that apply to public contracts. This approach was considered counterproductive in that it could potentially discourage contracting authorities from using concessions10.

The proportionality analysis concerning the Proposed Concessions Directive fares no better:

The most basic set of provisions, currently applicable to public works concessions, was also found to be inadequate because it does not provide sufficient legal certainty and compliance with the Treaty principles. On the other hand, more detailed legislation similar to the existing rules for the award of public contracts was considered to go beyond what is necessary to achieve the objectives11.

The former would imply that the existing Directive 2004/18, or its revised version on the basis of the Proposed New Public Contracts Directive12, may discourage contracting entities from tendering contracts in general, which seems a rather general criticism that may lack sufficient support; particularly if one bears in mind that, regardless of the source of the rules—be it EU or domestic—contracting authorities cannot aspire to conduct ‘completely unregulated’ procurement13. The latter

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9 This was the preferred option, amongst others, of the UK government. See *Procurement Policy Note – Legislative Proposals for the Revised Procurement Directives and new Directive on Concessions*, 21 December 2011, available at [http://www.cabinetoffice.gov.uk/sites/default/files/resources/PPN-11-11-Legislative-Proposals-for-the-Revised-Procurement-Directives_0.pdf](http://www.cabinetoffice.gov.uk/sites/default/files/resources/PPN-11-11-Legislative-Proposals-for-the-Revised-Procurement-Directives_0.pdf) (last visited 3 July 2012).

10 COM(2011) 897 final, Explanatory Memorandum at para. 2 in fine.

11 COM(2011) 897 final, Explanatory Memorandum at para. 3.


is troubling because it plainly acknowledges that (works) concessions have been improperly regulated for a long time\textsuperscript{14}. Also, and as an overall consideration, there seems to be no difficulty in setting specific rules for particular types of contracts within the framework of the existing Directive 2004/18 (as can be seen in the draft new rules for social and other specific services contracts in Title III of the Proposed New Public Contracts Directive); so it is hard to see why or how the exact same (‘concession-specific’) rules could not be inserted in the general directive, or how would such rules have a different effect on contracting authorities merely depending on whether they are included in a regulatory instrument or another.

In furtherance to the above, it must be underlined that the criteria for the classification of a given contract as a concession (captured by the Proposed Concessions Directive) or a ‘regular’ works or service contract (to remain under the Proposed New Public Contracts Directive) are not watertight, nor perfectly objective. It is worth noting that the Proposed Concessions Directive [art 2(2)] introduces a rather open-ended standard in the definition of a concession by requiring that it implies the transfer to the concessionaire of the substantial operating risk. The concessionaire shall be deemed to assume the substantial operating risk where it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services which are the subject-matter of the concession\textsuperscript{15}.

With this in mind, it must be stressed that the adoption of a separate self-standing directive for concessions actually increases regulatory risks for contracting authorities and entities (CAE), since they have to deal with the uncertainty of assessing how substantial the risks transferred to the awardee of the contract are, already when they are choosing under which rules to tender and award the contract. Moreover, it can be a hard call in some instances, since the flexibility of the Proposed Concessions Directive for the contracting authority to basically tailor-make its own tender procedure (see art 35 on procedural guarantees that, however, points ‘subtly’ towards a negotiated procedure) makes this a one way street—because tendering under the Proposed Concessions Directive would in almost all cases fall short from securing compliance with the tighter procedures of the Proposed New Public Contracts Directive (unless the ‘new’ competitive procedure with negotiation of its art 27, or a more ‘traditional’ competitive dialogue of its article 28, were ‘voluntarily’ used for the award of the concession).

Therefore, it seems rather clear that: i) subjecting all types of contracts (including concessions) to a single set of rules regarding procedure choice (basically, the ‘new’ competitive procedure with negotiation), tender rules and award criteria, and ii) having all the rules in a single regulatory instrument, would suppress such legal uncertainty—which, otherwise, may give incentives for CAE to either overshot the mark and systematically adopt general procedures that exceed the lighter touch advanced by the Proposed Concessions Directive (just to remain on the safe side in case they get their risk assessment wrong) or, on the contrary, to stretch risk assessment and create paper walls to have an apparently objective justification to escape the more stringent requirements under regardless have to procure their goods and services and costs would be incurred with or without the directives’. The same argument applies to non-cost related burdens derived from compliance with EU procurement rules.

\textsuperscript{14} A concern that is not alleviated by the fact that “[t]he proposal extends the majority of the obligations which currently apply to the award of public works concessions to all services concessions”; COM(2011) 897 final, Explanatory Memorandum at para. 5. In the end, this just shows a rather ‘blind’ push for a separate directive.

\textsuperscript{15} See Risvig Hansen, ‘Defining a Service Concession Contract’, above n 4, 252-254.
the general procurement rules of the Proposed New Public Contracts Directive. Be it as it may, this separation of instruments is prone to generate legal uncertainty and litigation, and may be regarded as a far from optimal regulatory strategy.

2.2. ... but need for certain concession-specific rules?

Notwithstanding all the above, and as already clearly signalled by the definition in the Proposed Concessions Directive 16, the particularities of concession contracts derive from the key element of the risks assumed by the concessionaire 17; as well as from the ensuing: i) need to regulate the (quality) standards of the services to be ultimately delivered to the public; and, of major importance, ii) the need for clear rules governing the assessment and potential reestablishment of the economic balance of the contract (due to unforeseen deviations from the original business plan, traffic or use estimates, etc), particularly to avoid opportunistic post-award behaviour in long contracts 18.

These are issues related to the design, monitoring, execution and eventual renegotiation of the contract (which make concessions potentially more suitable to ‘pure’ regulation than competitive bidding, strictly speaking), and which are (even if only timidly) included in the Proposed Concessions Directive 19 (see section 3 below for discussion of some of these rules). Therefore, even if it seems hard to accept the regulatory approach preferred by the European Commission as capable of contributing to simplification and further flexibility of the EU procurement system 20; it must be

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16 And stressed in recital (7) of the Proposed Concessions Directive, in the following terms: “[t]he main feature of a concession, the right to exploit the works or services, always implies the transfer to the concessionaire of an economic risk involving the possibility that it will not recoup the investments made and the costs incurred in operating the works or services awarded”.


20 This option has also been criticised by S Arrowsmith, ‘Modernising the EU’s Public Procurement Regime: a Blueprint for Real Simplicity and Flexibility’ (2012) 21 Public Procurement Law Review 74: “it would not be necessary to introduce an entirely new instrument to regulate concessions, but simply to amend the current rules that apply to utilities regarding the extent and manner of their application to concessions”. Along the same lines, criticising the hard selling of the directive by the Commission as a light regime for concessions,
reckoned that **concessions have distinguishing characteristics that may require distinct regulatory treatment** (although not necessarily in a fully separate directive, above section 2.1).

However, it must be stressed that these differences are not at tender or award stages (as a reading of the Proposed Concessions Directive makes clear, given that most of its provisions are identical to those in the Proposed New Public Contracts Directive), but rather concern certain ‘dynamic’ aspects of concession contracts (that is, purely ‘contractual’ dimensions of the concessions policy and practice in Member States). Mainly, the ‘concession-specific’ elements to be regulated are related to: i) the design of the concessions (in terms of scope and duration) and their underlying financial and economic arrangements, as well as ii) the evolution of the economic balance during the life cycle of the concession, as regards its execution and (eventual) renegotiation, and the adjustment of the contract due to unforeseen circumstances or changes in the regulatory scenario.

This is important, since it may generate a non-trivial issue concerning the legal basis for the adoption of certain rules in the Proposed Concessions Directive. EU procurement rules have traditionally been limited to pre-contractual or contract formation phases (and the ensuing remedies for their breach) because it was understood that those are the elements in the procurement policy and practice of Member States that affect the development and consolidation of the internal market—and, consequently, are covered by art 114 TFEU. Contract execution has been left to Member States’ domestic rules. However, in the last ‘wave’ of modernisation of EU procurement rules, the Commission has included draft provisions that go beyond contract formation and affect contract execution and modification (both in the Proposed New Public Contracts Directive and the Proposed Concessions Directive). Even if rules on modifications may be a (justified) complement to rules on contract formation (particularly with a view to avoid direct award of new contracts disguised as contract modifications), the red line of how far into ‘pure contractual rules’ EU procurement rules can go has started being pushed forward. This may be particularly relevant in the context of concessions and, more specifically, regarding rules on the economic balance of the contract or the public guarantees against certain risks (regulatory risks, for instance), which vary significantly across the EU and which seem to have a relatively loose link with the impact of this concessions policy and practice on the development of the internal market.

Be it as it may, these draft rules may end up being adopted regardless of these concerns on the adequate legal basis for some ‘core or pure’ contractual rules, since the Proposed Concessions Directive **considered as a whole** would make it difficult to find that its adoption lacked sufficient legal basis. Therefore, the remainder of this paper will not be concerned with the ultimate justification of their need, or with the other provisions regarding the light touch approach to compliance with the Treaty requirements that the Commission is trying to set up in the Proposed Concessions Directive.

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Risvig Hansen, ‘Defining a Service Concession Contract’, above n 4, 255-257, who concludes that “[a]s many of the provisions in the proposed Directive are identical to the once proposed in Directive for the Public Sector it might have been a better option to include concessions [in] this Directive instead of proposing a new separate Directive”.

21 In my view, this may be an example of a rather questionable exercise of ‘avoidance by escalation’ of the tricky issue of legal basis of art 114 TFEU and its breadth: if some rules individually considered generate concerns, why not wrap them in a fully developed separate Directive that basically reproduces rules already under art 114 TFEU? This brings us back to the issue of necessity of the self-standing Proposed Concessions Directive and may offer a (cynical) explanation for the choice of regulatory instrument, but probably is of marginal legal relevance.
(ie the rules on advertising, procedures, etc). Rather, it will focus on the logic and consistency of the ‘concession-specific’ rules on risk identification and transfer to the concessionaire, on concessions’ duration, and on modifications to concessions contracts to re-establish their economic balance.

3. LOGIC OF SOME OF THE MAIN ASPECTS OF THE PROPOSED CONCESSIONS DIRECTIVE CONNECTED TO THE ECONOMIC BALANCE OF THE CONTRACT

As already mentioned, the Proposed Concessions Directive basically aims to provide specific guidelines to contracting authorities on how to apply the Treaty principles to the tendering of concessions; and to overcome the perceived shortcomings and criticism to the prior use of soft law instruments to do so. This is a relevant development of EU public procurement law, but only an incremental one, since it follows up on the parallel discussions regarding other types of contracts not or not fully covered by the Directives and the need to make the general findings of the case law more specific and to translate them into workable rules.

However, the Proposed Concessions Directive can generate a rather more significant ‘revolution’ in the EU procurement system because it introduces some relevant rules regarding contract design (both in terms of risk transfer and duration) and contract modification, which may anticipate the development of a broader set of EU public ‘contracts’ (rather than strict ‘procurement’) rules (above section 2.2). This section focuses on some of these rules in connection with the economic balance of concessions and its re-establishment, explores their logic and critically appraises them.

3.1. The issue of the economic risks transferred to the concessionaire

As already mentioned (above section 2.1), according to art 2(2) of the Proposed Concessions Directive, there must be a ‘transfer of substantial operating risk’ to the concessionaire. More specifically, the economic risk transferred may consist in either of the following:

(a) the risk related to the use of the works or the demand for the provision of the service; or

(b) the risk related to the availability of the infrastructure provided by the concessionaire or used for the provision of services to users.

Therefore, it seems that the relevant risks to be taken into consideration to determine whether the contract is a concession or not can (only) be related to either demand (a) or offer (b) of the services [implicitly leaving out financial risks and similar considerations, which would fall short from ensuring the ‘transfer of substantial operating risk’ to the concessionaire].

However, this provision of the Proposed Concessions Directive is very open-ended and, at the same time, inconclusive. Particularly in view of the fact that, to meet the requirements under art 2(2) for a ‘transfer of substantial operating risk’ to the concessionaire, it seems that such transfer must imply

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23 For discussion on the main sources of risk, namely the vagaries of the market (ie demand risk), management and use of facilities/equipment necessary for the provision of the service (ie offer risk), funding and security of payment (ie financial risks); see Risvig Hansen, ‘Defining a Service Concession Contract’, above n 4, 241-247.
that ‘there is no guarantee that the concessionaire will recoup the investments made or the costs incurred in operating the works or the services which are the subject-matter of the concession’. This seems to be supported by recital (8) of the Proposed Concessions Directive, which expressly indicates that:

Where sector specific regulation provides for a guarantee to the concessionaire on breaking even on investments and costs incurred for operating the contract, such contract should not qualify as a concession.

Therefore, it seems that the transferred risks must not only be related to either demand or offer of the services, but seem to also need to be ‘full’ or ‘uncovered’ risks—which raises the issue of the sufficiency or legality of risk-sharing arrangements between CAE and concessionaire (for instance, by setting maximum losses or sharing the upshot in case of unexpected positive evolution of demand), or the possibility to offer guarantees where the risks are altered due to facts that are under the control of the CAE (and that the concessionaire is not in a position to control or undertake).

In that regard, it is important to stress that CAE will, in many instances, retain significant powers to make decisions that would affect (either negatively or positively) both demand and offer-related risks. For instance, CAE may adopt schemes that promote the use of the services (by granting tax breaks to users, for instance) or alter the relevance of the infrastructures used in the provision of the services (for instance, by subsequently authorising the provision of new competing services to other concessionaires or to unrelated private undertakings). In these cases, it seems appropriate to offer concessionaires the guarantee that their investments will not be materially prejudiced by CAE’s decisions—since it seems appropriate to force concessionaires to take all risks they can control and (all or part) of non-controllable risks (acts of God, economic environment), but it may be excessive and investment-deterring to also mandate them to assume regulatory risks (ie regal risks).

These issues have traditionally been regulated by provisions that would re-establish the economic balance of the contract in the face of certain types of regulatory risks (and associated ius variandi powers) that may at some point increase (or reduce) the risks transferred to the concessionaire and trigger a compensation (either a pecuniary one, or by an extension of the concession)—and which may or may not qualify for an ‘acceptable’ contract modification in the draft terms of the Proposed Concessions Directive (below section 3.3). In those cases, any compensation granted by the CAE to the concessionaire could be seen as taking risks back by the CAE and, consequently, could jeopardize the legal status of the concession contract under the Proposed Concessions Directive. However, these situations are almost impossible to prevent in long-lasting contracts, particularly if they affect fields of (economic) activity where regulation is prone to change. Therefore, a more detailed specification of risks and their related guarantees (particularly those closely related to prevention of expropriation or abuse by CAE) seems desirable if this issue is to be more comprehensively regulated in the Proposed Concessions Directive.

3.2. The related issue of the duration (and profitability) of concessions

Following up on the issue of risk identification and transfer, it is important to take into account the rules concerning concessions’ duration. According to art 16 of the Proposed Concessions Directive, the duration of the concession shall be limited to the time estimated to be necessary for the concessionaire to recoup the investments made in operating the works or services together with a
reasonable return on invested capital. However, there is no indication as to the methodology that should be used to conduct such an assessment, which is nonetheless (partially) conditioned by the rules on the methods for calculating the estimated value of concessions (art 6 of the Proposed Concessions Directive) and by applicable rules on depreciation, etc.

This already raises the issue whether the very strict position of the Proposed Concessions Directive regarding guarantees on breaking even on investments is too stringent. Indeed, if the concession can be designed (in terms of duration) to allow concessionaires to obtain a reasonable return on invested capital (for, otherwise, who would invest in concessions?); would losing such return on investment not be a sufficient economic risk for concessionaires?

In my personal view, that should be the case and, consequently, the existence of (sector specific or general) guarantees on the recoupment of investment (without any additional return, and always in cases where losses are not due to the concessionaire’s own fault or mismanagement) should not exclude the existence of a concession (above section 3.1). The only guarantee that should be excluded in concession arrangements (to make sure that they are different from ‘pure’ works or services contracts) is that of the contractor obtaining a predetermined (minimum) return or benefit (which is implicit in those ‘pure contracts’, unless the contractor incurs in cost overruns that do not allow it to negotiate a contract modification). However, it seems too harsh to impose on the concessionaire the risk of incurring net losses due to non-controllable factors or in cases where it has done everything a diligent businessman would to maximise revenues [particularly, bearing in mind that the losses are potentially of the entire investment, since a ‘floor guarantee’ that limited losses may not comply with the requirements of art 2(2) of the Proposed Concessions Directive].

It is (or should be) implicit in the regulation of concessions that their contractual design must allow for concessionaires to make a profit in the provision of the relevant services or the exploitation of the relevant works (as long as they properly do so), and that CAE should not obtain any unjust enrichment derived from the transferring of excessive risks to concessionaires—since that would not be in the public interest in the long run, because it would reduce the interest of undertakings to invest in those works or the provision of those services, and would increase the expected returns in view of the increased risks (therefore, making concessions ‘more expensive’ or simply unavailable).

Moreover, being too strict on public compensation for the (unforeseen) improper functioning of concessions (where there is no fault by the concessionaire) or for changes in the regulatory scenario may avoid a problem by creating another, since bankrupt concessionaires can trigger very complicated situations that demand intensive public intervention (by the rescue of the concession and its retendering, or even by requiring the direct public provision of the services, at least temporarily, to avoid discontinuity). Therefore, a more comprehensive assessment of the issue of economic balance and potential contract modifications does deserve the attention paid by the Proposed Concessions Directive—although it may also require some further changes.

3.3. The issue of the economic balance of concessions and their modifications

As has evaporated from the prior discussion, one of the needs for truly ‘concession-specific’ rules concerns their economic balance and the issue of the risks and guarantees that affect the possibilities of breaking even (and/or making a profit) by the concessionaire. This is covered in very strict terms in the Proposed Concessions Directive. Despite the fact that the proposal seems to
reckon the need for flexibility in the modification of concession contracts, such flexibility is axed in the case of the reestablishment of the economic balance of concessions.

Generally, recital (35) of the Proposed Concessions Directive recognises that CAE can be faced with external circumstances that they could not foresee when they awarded the concession and that, in those cases, a certain degree of flexibility is needed to adapt the concessions without a new award procedure. The recital goes on to explore the concept of ‘circumstances that a diligent contracting authority or contracting entity could not foresee’, which would be the standard to meet in order to benefit from lenient treatment for concession modifications. However, any specific concession modifications aimed at re-establishing the economic balance of the concession seem to receive a much less lenient approach under the draft rules.

Indeed, according to art 42 of the Proposed Concessions Directive, any modification that ‘changes the economic balance of the concession in favour of the concessionaire’ shall be considered a ‘substantial modification of the provisions of the concession during its term’ and, consequently, give rise to a new award for the purposes of the directive—which shall require a new concession award procedure [art 42(1), in connection with art 42(2)(b) of the of the Proposed Concessions Directive].

Therefore, it seems that there is no way to maintain economic rebalancing provisions in domestic concessions’ regulations which, at the same time, would not require the retendering of the concessions—and that would render them basically ineffective, unless the incumbent concessionaire was awarded the concession in this second round (where there would seem to be strong incentives to ‘stir’ the design of the tender in the incumbent’s favour to ensure the economic compensation initially sought—hence, further contributing to an undesirable regulatory situation due to the perverse incentives it generates for the proper conduct of this second round of award).

However, the Proposed Concessions Directive also includes a double derogation from the harsh mandatory retendering rule of art 42(1), which applicability to the re-balancing of concession contracts is worth exploring, to try to find some relaxation on this apparent outright ban on changes in the economic balance of the concession (in favour of the concessionaire).

As a first derogation, art 42(5) determines that concession modifications shall not be considered substantial within the meaning of art 42(1), where they have been provided for in the concession documents in clear, precise and unequivocal review clauses or options—as long as such clauses state the scope and nature of possible modifications or options as well as the conditions under which they may be used, and do not provide for modifications or options that would alter the overall nature of the concession. However, as a matter of pure statutory interpretation, it may be doubted that art 42(5) effectively deactivates the mandatory retendering of concession modifications that alter the economic balance of the concession in favour of the concessionaire. Given that art 42(2)(b) seemingly sets a iuris et de iure presumption of substantiality of this type of modification, there is at least some shade of doubt cast on the effectiveness of art 42(5) to transform it into a iuris tantum presumption in light of a general clause in the concession documents that simply reserved the right of the CAE to re-establish the economic balance of the concession (in favour of the concessionaire) under any given set of foreseeable circumstances. My personal reading of art 42(1), 42(2) and 42(5) together is that concession modifications that change the economic balance of the concession (in favour of the concessionaire) would in all instances qualify as substantial modifications and, consequently, initially require a new concession award procedure in accordance with the directive.
However, a second type of derogation is set in the Proposed Concessions Directive that seems available even in cases of change of their economic balance, as its broad wording makes it applicable to all types of substantial modifications. Indeed, according to art 42(6) of the Proposed Concessions Directive, a substantial modification shall not require a new concession award procedure where the following cumulative conditions are fulfilled:

(a) the need for modification has been brought about by circumstances which a diligent contracting authority or entity could not foresee;

(b) the modification does not alter the overall nature of the concession; [and]

(c) in case of concessions awarded by contracting authorities where any increase in price is not higher than 50% of the value of the original concession.

These are rather stringent requirements to deviate from the general retendering obligation for substantial modifications of concessions. And the condition regarding the foreseeability of the circumstances that trigger the modification seems particularly prone to a restrictive interpretation by the Commission. As indicated in recital (35) of the Proposed Concessions Directive:

The notion of circumstances that a diligent contracting authority or contracting entity could not foresee refers to those circumstances which could not be predicted despite reasonably diligent preparation of the initial award by the contracting authority or contracting entity, taking into account its available means, the nature and characteristics of the specific project, good practice in the field in question and the need to ensure an appropriate relationship between the resources spent in preparing the award and its foreseeable value. However, this cannot apply in cases where a modification results in an alteration of the nature of the overall procurement, for instance by replacing the works, supplies or services to be procured by something different or by fundamentally changing the type of procurement since, in such a situation, a hypothetical influence on the outcome may be assumed (emphasis added).

This seems to set a very high standard that would limit the scope of application of the exclusion to very rare occurrences or exceptional circumstances. A general argument that changes in the regulatory environment could be foreseen in all instances by a diligent CAE (at least in abstract terms, or as a matter of general risk) could be easily made; and that seriously threatens to automatically exclude from the derogation in art 42(6) all concession modifications that aimed to rebalance the economic equilibrium of the contract due to changes in the regulatory framework (either by the CAE, or other public powers).

The possibility to resort to that derogation to change the economic balance of the concession (in favour of the concessionaire) seems to be further restricted (or, at least, complicated) by the fact that art 42(7) of the Proposed Concessions Directive prevents CAE from having recourse to modifications of the concession in the following cases:

(a) where the modification would aim at remedying deficiencies in the performance of the concessionaire or the consequences thereof, which can be remedied through the enforcement of contractual obligations; [or]
(b) where the modification would aim at compensating risks of price increases that are the result of price fluctuations that could substantially impact the performance of a contract and that have been hedged by the concessionaire.

In short, a joint reading of art 42(2)(b) and 42(7)(a) of the Proposed Directive seems to set an almost undischARGEABLE burden of justification for CAE willing to reassess and re-establish the economic balance of concessions (in favour of the concessionaire). For the reasons already discussed (above sections 3.1 and 3.2), this seems an excessively harsh and restrictive regulatory approach, and a more flexible concession modification regime that allowed for a re-establishment of the economic balance of the contract in a broader set of circumstances would be desirable in order to prevent cases where (bankrupt) concessionaires would simply abandon their concessions, or lower significantly the (non-measurable) quality of the services provided directly to the public, leaving a bigger (and potentially more expensive to solve) problem on the table of the CAE.

4. CONCLUSION

Even if the European Commission may have rightly identified the need to subject the award of concession contracts to procurement rules at the EU level (despite a weak proportionality analysis in the explanatory memorandum), both the choice of regulatory instrument and the content of the Proposed Concessions Directive are in my view open to criticism, particularly regarding the specific issue of the assessment and re-establishment of the economic balance of concessions.

Regarding the choice of regulatory instrument, the proposal for a new self-standing directive on concessions is criticisable. On the one hand, because it follows very closely (if not literally) the text of the existing EU procurement directives and the Proposed New Public Contracts Directive and, therefore, creates unnecessary repetition and ads to the already complicated and lengthy EU public procurement acquis. Not less because the apparently specific rules designed to make the requirements of the Treaties workable (but with a lighter touch than those of the existing Directives) remain somewhat obscure or imprecise (e.g. art 35 concerning procedural guarantees rather than a choice of set procedures). There seems to be a rather weak justification not to subject concessions to the general Proposed New Public Contracts Directive and to include, in so far as necessary, a limited set of particular rules (as has been done for social and other specific services contracts in Title III of the Proposed New Public Contracts Directive)—which would however be largely unnecessary if one takes into consideration the increased flexibility of the competitive procedure with negotiation (art 27 of the Proposed New Public Contracts Directive).

On the other hand, the creation of the separate regime for concessions rests on a weak foundation due to the fact that the definition of ‘concession’ that delimits its scope of application depends on the appraisal of the escaping requirement of ‘transfer to the concessionaire of the substantial operating risk’—which increases regulatory risks for contracting authorities and entities. Therefore, an alternative regulatory avenue would be preferable, in order to ensure that all the rules were contained in a single regulatory instrument—since, otherwise, CAE may have incentives to either overshoot the mark and systematically adopt general procedures that exceed the lighter touch advanced by the Proposed Concessions Directive (just to remain on the safe side in case they get their risk assessment wrong and, consequently, eroding any potential advantages of such lighter regulatory approach) or, on the contrary, to stretch risk assessment and create paper walls to have an apparently objective justification to escape the more stringent requirements under the general
procurement rules of the Proposed New Public Contracts Directive. Be it as it may, a unification of regulatory instruments could increase legal certainty and reduce future litigation, and may be regarded as a superior regulatory strategy.

On its part, the specific issue of the assessment and re-establishment of the economic balance of the concession serves as a clear example of the fact that concessions have distinguishing characteristics that may require distinct regulatory treatment. However, such particularities are not related to the contract preparation and formation phase, but are rather ‘core or pure’ contractual issues—which may generate a non-trivial issue concerning the sufficiency of art 114 TFEU as the legal basis for the adoption of certain rules in the Proposed Concessions Directive. Be it is at it may, a critical appraisal of the draft rules on changes in the economic balance of the concession (in favour of the concessionaire) shows how these ‘concession-specific’ rules may require some further refinement before a future concessions directive is adopted. In particular, it has been submitted that there are cases of no fault on the part of the concessionaire that may require the economic re-balancing of the contract (particularly in cases of regulatory changes or exercise of *ius variandi* by the CAE) and that, however, under the draft rules, doing so would require a new award procedure in compliance with the Proposed Concessions Directive—which could be tantamount to excluding any effective compensation to the incumbent concessionaire (unless it was re-awarded the concession; which generates perverse incentives in this second round of award of the concession). In the end, such a situation that may as well generate new problems for CAE—such as an increase of the costs of awarding future concessions, or the simple unavailability of potential concessionaires, if concessions are seen as excessively risky enterprises; or the potential need to undertake direct provision of the services if (loss-making) concessions were abandoned or discontinued by bankrupt concessionaires.

Overall, then, my opinion is that the Proposed Concessions Directive should be merged with the Proposed New Public Contracts Directive and the very few ‘concession-specific’ rules it contains should be grouped in a new Chapter on Concessions in its Title III ‘Particular Procurement Regimes’. Moreover, I think that such ‘concession-specific’ rules—and particularly those concerning the transfer of (substantial) risks and re-establishment of the economic balance of concessions—deserve some further refinements in order to avoid the imposition of unnecessary rigidities on either CAE or concessionaires, and to allow for the appropriate management of concessions under circumstances that are not infrequent in practice and that may surface a significant number of years from now.