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ECJ Case Law Related to Concessions and PPPs

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Agenda



1. Service Concessions
2. Right to exploit the services
3. Transfer of the operating risks
4. Classifying contracts as works vs. services concession
5. Procedure of granting a concession
6. Change of contract

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Service Concessions



- Art. 1 para. 3 b) Directive 2004/17/EC
- Art. 1 para. 4 Directive 2004/18/EC

"Service concession" is a contract of the same type as a public service contract except for the fact that the **consideration** for the provision of services consists either solely in the **right to exploit the service** or in this right together with payment.

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Prerequisites



- Assignment of a public task in public interest to a private supplier,
- assignment of the right to exploit the service and
- transfer to the supplier of the existing risks connected with operating the services.

ECJ, Judgment of 10.9.2009, C-206/08
ECJ, Judgment of 13.10.2005, C-458/03

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Right to exploit the service



**ECJ, Judgment of 11.6.2009, C-300/07
“Orthopädie Schuhtechnik”**

- A statutory health insurance fund invited producers to submit tenders for the **manufacture and supply** of footwear.
- The statutory health insurance fund is the **obligor of the remuneration** by law.
- An EU-wide tendering procedure was not conducted.
- Statutory health insurance funds conclude with different suppliers provision schemes.

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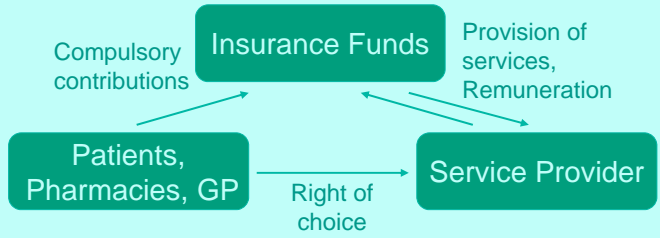


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Right to exploit the service

- The provider bears the risk that patients will (not) avail themselves of its services:



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graph TD
    A[Insurance Funds]
    B[Patients, Pharmacies, GP]
    C[Service Provider]
    B -- "Compulsory contributions" --> A
    A -- "Provision of services, Remuneration" --> C
    B -- "Right of choice" --> C
          
```

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Right to exploit the service



Not a service concession:

- **Supply of products** include also products manufactured in accordance with the consumers' requirements.
- Concessionaire must enjoy a certain economic **freedom to determine the conditions** under which the right to exploit the services is exercised.
- This condition was not met, as the **prices** were **fixed**.

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Operating Risk



The operating risk was not allocated to the supplier, as it did not bear:

- the risks of recovery of payment and **insolvency** of the other party;
- considerable **advance expenditure** before an individual contract and
- a **reasonable forecast** could be made as to the number of customers.

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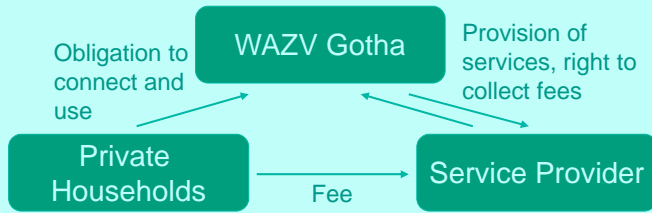
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Transfer of the operating risks

ECJ, Judgment of 10.9.2009, C-206/08 “WAZV”

- Informal bidding procedure to grant a service concession for water supply and sewage disposal.
- Contract notice for a service concession.




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graph TD
    PH[Private Households] -- "Obligation to connect and use" --> WAZV[WAZV Gotha]
    WAZV -- "Provision of services, right to collect fees" --> SP[Service Provider]
    PH -- "Fee" --> SP

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Transfer of the operating risks

- It is not relevant whether the fees are regulated by private or public law.
- No concession in the **complete absence** of a transfer of the risks.
- A significant share of the **existing risks** must be allocated to the supplier.
- The same applies if rules of public law **limit** the operating risk.

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Limited operating risks



Arguments:

- Limitation of the financial risks by rules of public law are **not unusual**.
- Those **enhance transparency**.
- Contracting authorities acting in **good faith** must have the **discretion** to grant a concession.
- Contracting authority is under no obligation to **create** risk factors which are **excluded** by rules of public law.

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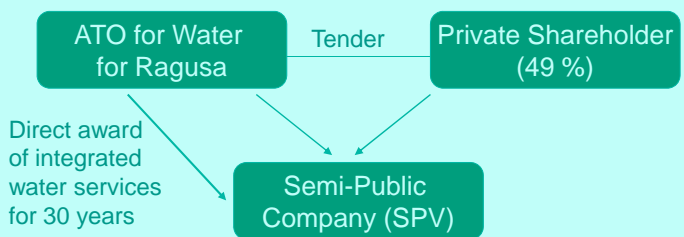
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Concessions to Institutionalised PPPs

ECJ 15.10.2009, C-196/08 “Acoset SpA”


- Operation of the integrated water services through an SPV.
- SPV receives the water tariff from the users.





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graph TD
    ATO[ATO for Water for Ragusa] -- Tender --> PS[Private Shareholder (49%)]
    ATO -- Direct award of integrated water services for 30 years --> SPV[Semi-Public Company (SPV)]
    PS --> SPV
  
```

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Concessions to Institutionalised PPPs

Conducting two award procedures for the selection of the private entity and the award of the concession is **not** necessary, **if**:

- the **selecting criteria** involves the technical capacity and the characteristics of the particular services and
- the SPV retains the **same corporate purpose** throughout the duration of the concession.


If there is any **material amendment** to the contract a new award procedure is necessary.

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Service concession vs. works contract

ECJ 29.10.2009, C-536/07 “Köln Messe”


Tenancy agreement with respect to a building to be constructed in accordance with the requirements specified by the contracting authority.

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graph TD
    City[City of Cologne] -- Sub-tenancy --> Köln[Kölnmesse GmbH]
    Köln -- Sale of the land --> Fund[Private Investment Fund (GKM-GbR)]
    Fund -- Tenancy contract for 30 years --> City
          
```

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Service concession vs. works contract

City of Cologne is the contracting authority:



- City of Cologne is the formal tenant and party to the tenancy contract.
- The contract does not refer to Kölnmesse.
- The tenant and contracting authority cannot be determined functionally.
- The prior sale contract between Kölnmesse and GKM-GbR is not relevant.

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Service concession vs. works contract

Classification of the contract as a works contract:

- Its **main purpose** was the construction of the buildings.
- The construction was executed in accordance with the **specifications** set out by the City of Cologne.
- The main purpose and not the amount paid for the works and the services (rent) is decisive.
- An option or obligation to **repurchase** the building is irrelevant.

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Applicable principles when awarding a service concession

ECJ, Judgment of 15.10.2009, C-196/08 “Acoset SpA”



- Fundamental rules of the **EC Treaty**.
- Principle of **non-discrimination** on the ground of nationality.
- Principle of **equal treatment**.
- **Duty of transparency** to ensure a degree of advertising sufficient to enable competition and a review of impartiality.

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Transparency Obligations

Opinion, 27.10.2009, C-91/08 “WALL”



- Installation, operation and maintenance of public toilettes.
- Concessionaire was granted the concession after a competitive tendering.
- Concessionaire relied on the expertise and reputation of a named subcontractor in the bidding process
- Subsequent to the award of the contract the subcontractor was substituted with prior consent of the public authority, as foreseen in the concession contract.

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Transparency Obligations



- Transparency obligations are affected, if the contract is **materially changed**.
- The concessionaire has a **right of choice of its subcontractors** as it bears the risks of the operation.
- Change of a subcontractor with **prior consent** of the public authority and according to a **provided procedure** is in principle not a material change of the contract.
- but...

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Transparency Obligations

Exceptions:



- If consent of the contracting authority is granted to **circumvent** the transparency obligations.
- If expertise and reputation of the subcontractor is a **decisive criterion** for awarding the concession.

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Conclusions

- The right to exploit the services includes the freedom to determine its conditions.
- Allocation of the existing operating risk is decisive for a service concession.
- Fundamental principles of public procurement apply
- Change of subcontractors can trigger transparency obligations.

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